

# WAIKATO LAW REVIEW

TAUMAURI

VOLUME 24, 2016

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# OUR GOOD FRIEND MATIU DICKSON

NĀ JUDGE CRAIG COXHEAD

*Tātai whetū ki te rangi, mau tonu, mau tonu  
Tātai tangata ki te whenua, ngaro noa, ngaro noa  
E te hoa e Matiu kua ngaro koe ki te pū o mahara  
Tēnei ka haku, tēnei ka mapu  
Kua kore koe i te tirohanga tangata  
Tēnei ka auē, tēnei ka auhi  
He aha māku?  
He tangi, he mihi, he poroporoaki  
Nōreira e te hoa  
E moe, i te moenga roa, ki reira okioki ai*

*While the starry hosts above remain unchanged and unchanging  
The earthly world changes inevitably with the losses of precious, loved ones  
To you Matiu who has been lost to the void of memories  
For you we lament  
To you who is lost from sight  
For you we cry of distress  
What am I left to do?  
But to grieve, acknowledge, and farewell you  
Rest now dear friend in peace*

During his lifetime, Matiu fulfilled many roles and was many things to many people. He was a husband, father, grandfather, kaumatua, teacher, city councillor, lecturer, the Chair of the Law Faculty, Chair of Te Rūnanga o Kirikiriroa, the Acting Dean of Te Piringa Faculty of Law, a composer, an academic, kaikōrero, kapa haka judge, researcher, board member and much more. He was a person who gave so much of his time and himself and expected little in return. Above all else, to many people Matiu was simply and importantly – a good friend.

Matiu was born in May 1952 in Te Puke, the son of Charlotte and Te Rongoihaere Dickson. For the first years of Matiu's life he was raised by his maternal grandparents on Matakana Island. When he was about eight, he shifted to his much-loved place of Matapihi.

Matiu was a proud old boy of Auckland Grammar School (1965–1969). He attended Auckland University, completing a Bachelor of Arts and a Bachelor of Laws (1978). His law degree was followed by a post graduate Diploma in Teaching (1979). Following tertiary studies, teaching was Matiu's focus. He taught firstly at Mount Maunganui Intermediate, then as an Itinerant Teacher of Māori for the Tauranga Moana area and then a position at Tauranga Boys' College. Matiu's attention then turned to law when he was admitted to the Bar in 1985.

Matiu commenced his association with the University of Waikato Law School, now officially known as Te Piringa Faculty of Law, in 1996 when he began as a lecturer; a relationship which

endured for more than 20 years. During this time he positively affected, influenced and guided many students and colleagues. There were few people who upon meeting Matiu did not immediately succumb to his gentle and humble presence. However, this gentle nature often disguised a stern and staunch determination.

Matiu's teaching style was "creative" – somewhat unique. Matiu had a talent for explaining difficult tikanga topics in a clear and sometimes unusual manner. It could be argued that his teaching methods were too creative and left students enlightened, informed, bemused and puzzled all at the same time. He displayed this creative and unique style in teaching Jurisprudence, Legal Systems, Legal Method, Māori Land Law, Intellectual Property, Constitutional Law, Treaty of Waitangi issues, Criminal Law, Corporate Entities, Alternative Dispute Resolution and his own creation, a specialist course on Tikanga Māori. In fact, there were few law courses that Matiu was not involved with at some time.

However, Matiu did not confine himself solely to lecturing – he couldn't – instead he actively took on the role of guiding students through their studies, not only in terms of their academic work but also in terms of their presence, appearance, behaviour and even their dress. Matiu's commitment to his students extended well beyond the classroom. He was at times known to make kind but somewhat critical comments regarding what students wore to class. Following Matiu's cutting comments, students would appear at the next class dressed as though they were going to Court. He would also ask students to see him after class where he would provide words of encouragement – although some may have seen these talks more as a good telling off.

Matiu's students not only benefited from his teaching style but also the Māori perspective he brought. Regardless of the topic, Matiu would bring a profound Māori view, and all of his research and publications incorporated a Māori dimension. That was Matiu. Everything, whether it was politics, law, youth justice, local government, health, the justice system, crime, waiata or land law, had a Māori dimension. As he took a Māori perspective to law, he took a legal perspective to Māori issues. In that way, he always brought value to the discussion.

Matiu was extremely proud of his tribal affiliations – Ngāiaterangi, Ngāti Ranginui, Te Whakatōhea, Ngāti Awa and Ngāti Whakaue. While he was affiliated to a number of iwi, his heart was always directed towards his people of Tauranga Moana, and in particular, Ngāiaterangi. He was "honestly biased" towards his people. This parochial bias shone through clearly in his lectures and conference presentations, where he would proudly state that his view of tikanga was a view of his own iwi. While he would acknowledge that other iwi had different perspectives, he would then proceed to extol Ngāiaterangi tikanga as being the only tikanga – the only correct tikanga – in essence, the one and only tikanga. He was staunch to his iwi – and why wouldn't he be – for his iwi were a crucial part of what defined him.

Matiu had a quiet stubbornness, which was especially evident when it came to matters of tikanga and kaupapa Māori within the law school. Many of the initiatives that Māori students now take for granted (such as Māori tutorials) were hard fought for, and were the result of the collective efforts of Matiu, Ani Mikaere, Judge Stephanie Milroy, Linda Te Aho, Leah Whiu, Judge Caren Fox, Gay Morgan, Ruth Bush, myself and others. Such efforts, of which Matiu was an integral part, were undertaken to ensure Māori students experienced learning within a safe environment that allowed Māori legal thinking, Māori expression and Māori content to be part of many of the University's courses. Māori students now reap the benefit of Matiu's determination, stubbornness and years of hard work.

Matiu not only taught tikanga but he lived it and embodied it. He manifested the concept of whanaungatanga. He would delve into students' whakapapa, looking to make connections with them. He wanted to know them as more than just names. He wanted to know them as whanaunga, as members of an iwi or as members of a community.

Matiu was also a man of service. His enduring ethos of service was embodied in his service to his whānau, hapū and iwi, in his service to a number of Law School committees and in his service to numerous community boards. He was also an avid hui attendee. If there was a hui being held, Matiu would be there. The very purpose of Matiu's service was his persistent desire to help people better themselves – as students, as colleagues of the University, as whānau or as community people.

Matiu had many loves. He loved waiata. He composed the Te Hunga Rōia Māori waiata “Tēnei mātou”. He loved leading mōteatea. He loved kapa haka and judged at both regional and national levels. He loved teaching and learning – he graduated with his Masters in Law in 2000 and proudly completed a Diploma in Māori Art – Raranga (weaving) in 2004. He also liked nothing more than to sit down and have a chat, normally a chat about law, politics or tikanga issues – frequently a combination of these at the same time. But whānau were by far his most important love. His wife Helen and their children and mokopuna positively consumed his life. He was devoted. It was in his whānau setting that he displayed so much manaaki and aroha. This manaakitanga extended to his students and colleagues of the University – his other whānau.

Matiu sought positive change through education, law and community service. He was adept at using his skills, in a quiet but meaningful and stubborn way, to get things done. He was able to process and facilitate change in his gentle, staunch and mainly non-confrontational manner. Te Piringa and academia circles in Aotearoa have been enriched through Matiu's scholarship and teaching. We are all grateful and thankful for the contributions Matiu made to the lives of many, including his whānau, friends, colleagues and students, all for whom he did more than teach – he guided, influenced and inspired. We are grateful for the way he has touched our lives.

Matiu passed away tragically early. However, in passing he was surrounded by his loves – his whānau, his students, University colleagues and his many friends – and he was doing what he loved, imparting knowledge while delivering a whaikōrero. An ironic situation – one only Matiu could create and deliver.

We all miss Matiu with much aroha. We miss his discussions. We miss the little chats and debates. We miss his creative teaching style. We miss his presence at hui. However, most of all, we all miss his friendship.

Matiu was a good friend!

# INTRODUCTION AND DEDICATION TO MATIU DICKSON

Beyond the printed word of course materials and textbooks, Matiu's lectures created vaulted spaces of memory, where we students could access an exquisite repository of law, history and culture. More than lecturer, Matiu was librarian, gatekeeper and master narrator of the law – and I will always be grateful.<sup>1</sup>

This edition of the Waikato Law Review is dedicated to our dear friend and colleague, Matiu Dickson, and we thank Judge Craig Coxhead for his wonderful tribute to Matiu. The morning of the 7th of April 2016 will forever be imprinted in our minds and hearts. Matiu passed away that morning having just delivered the final speech in the opening ceremony for our new Law Building here at Waikato University. It was said at his tangi that this was a high price to be paid for such a building. A price that we would never have chosen to pay. That price brings an obligation to honour and respect the legacy that Matiu has left us, his commitment to the Faculty's founding goals and, in particular, the promotion of a bicultural legal education for Māori and non-Māori alike; that tikanga is recognised as the first law of Aotearoa New Zealand and continues to form a central part of our curriculum. Matiu personified the bicultural mission of Te Piringa Faculty of Law; that, through its curriculum, research activities and its structures, the Faculty would be the forefront of the development of a bicultural legal philosophy. Matiu worked hard to ensure this mission remained a stated goal of the Faculty and to give it meaning over his 20 year tenure. He constantly worked to infuse it into the structures and processes of this Law Faculty. He worked and campaigned for years, and successfully so, to make sure the name gifted to the Faculty by Dame Te Atairangikaahu at its founding, "Te Piringa", became our Faculty's officially recognised name. He was passionate about the use of te reo Māori in assessment. He encouraged and facilitated the use of te reo Māori mooting. It was our colleague, Ani Mikaere, who, during her time here as a legal academic, first publicly articulated tikanga Māori as the first law of Aotearoa. Through the years, Matiu and our academic colleagues, including Stephanie Milroy, Craig Coxhead, Caren Fox (all now Māori Land Court judges), Leah Whiu, Harata Paterson, Nan Seuffert, Ruth Bush, Wayne Rumbles, Robert Joseph, Valmaine Toki and ourselves, reaffirmed tikanga as the first law of Aotearoa in our teaching and research. Years later, the article "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" by Justice Joseph Williams<sup>2</sup> developed the idea further and is currently the leading piece on the weaving of tikanga and Anglo-New Zealand law.<sup>3</sup> Matiu Dickson was an expert in tikanga, the first law of Aotearoa. He lived it every day. He created and taught courses on it and made sure it was integrated throughout the curriculum. In Matiu's honour, it is entirely appropriate that there are a number of contributions in this Review that have a Māori or Indigenous theme, and we hope future issues will likewise assure such a balance.

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1 Dr Keakaokawai Varner Hemi, below, at 14.

2 Taken from his Harkness Henry Lecture and published by the Waikato Law Review: Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 WLR 1.

3 This term, "Anglo-New Zealand law", mirrors that used by Brooke Greenwood ("Anglo Australian law") in her article in this edition. Other terms used to describe laws that are not Indigenous or first laws, include "western law" and "Pākehā law". Lex Aotearoa is a weaving together of tikanga and Anglo-New Zealand law, to create what Williams J refers to as the third law of Aotearoa.



In her article, former student of Te Piringa, and now lecturer in the Faculty, Dr Keakaokawai Varner Hemi (Keaka) recalls the privilege of being one of Matiu Dickson's undergraduate students. As a person of Native Hawaiian and Cherokee ancestry growing up on the Mainland of the United States, Keaka shares:<sup>4</sup>

I had never been taught like *that* in a classroom or lecture hall before. The tone of his voice, the patience, the almost sacred yet humorous way he shared knowledge evoked home and the ways of my parents, grandparents, aunties and uncles. As he discussed familiar principles – things like tapu and whanaungatanga that we Hawaiians live too – his kindness and generosity helped me to close the geographical distance between studying law and my own identity.

Keaka's article examines narratives of equality and the interpretation of the Native Hawaiian schools' preference for Native Hawaiian students as either reverse racial discrimination or an exception to the general rule of homogeneity and anonymity. For comparison, the article then examines similar equality narratives in New Zealand law.

Matiu was a passionate teacher and supported other Indigenous peoples in their quest to incorporate Indigenous law into the standard education and legal curricula of other colonised jurisdictions, and his work and legacy continues, as exemplified in Brooke Greenwood's article, "Teaching Indigenous Law". Brooke Greenwood highlights the absence of Indigenous law from Australian legal education and draws on the example of Te Piringa Faculty of Law to demonstrate the possibilities for embracing Indigenous law as an integral part of legal education.

Dr Andrew Erueti's article discusses current claims to freshwater by Māori in the context of different models for conceptualising Indigenous rights in New Zealand, and government responses to those claims. Andrew argues that unless frameworks for thinking about Indigenous rights to water embrace rights to property and to political authority, as well as to culture, "we risk falling short of our aspirations of creatively redressing historical wrongs and thereby creating a fairer and more just society."<sup>5</sup>

Lara Burkhardt, a practising lawyer putting words into action, analyses the pragmatics of water allocation for iwi. Matiu would have approved, as getting down to pragmatics was important to him, one example of this being his work as an advisor to the Family Court on tikanga issues. Lara explores whether an allocation of water for iwi, or something similar, can be achieved under the current legal framework and some of the implementation issues that might arise.

Associate Professor Linda Te Aho reviews and endorses the *Handbook of Indigenous Peoples' Rights* edited by Corinne Lennox and Damien Short (Routledge, London and New York, 2016), a collection of scholarly works addressing many important contemporary Indigenous rights issues, the sorts of issues that animated Matiu's life's work, as a lawyer and as a teacher. It is work which this Faculty will continue to carry on.

The Review is proud to publish the last of the Harkness Henry Lectures. We thank Harkness Henry for having supported this lecture series since 1992. As is traditional, the lecture is published at page 1 of the Review. The 2016 lecture was delivered by retired High Court Judge, Honourable Sir Ron Young, and it is provocative. Sir Ron was made Chief District Court Judge in 1993. Until 2001 he was responsible for the running of the District Court and oversaw its 112 judges in the criminal, civil, family and youth court sections. He was then made a High Court judge, presiding

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4 Dr Keakaokawai Varner Hemi, below, at 14.

5 Andrew Erueti, below, at 80.

over criminal and civil cases until his retirement. Sir Ron does not mince words in highlighting a number of worrying trends and his concern that the right of a defendant to a fair trial and the public's right to a fair and properly funded criminal justice system has been compromised in recent years and remains vulnerable to further compromise. This vulnerability stems from a variety of sources including: reduced legal aid for defence lawyers; unavailability of expert witnesses for the defence; reduced and changed funding for Crown solicitors and Crown Law; the effect of lobby groups such as the Sensible Sentencing Trust; and some recent legislative changes including the three strikes law and the effect of the media, especially when reporting sentencing and victim involvement in policing initiatives. He urges the legal community to engage with these changes that have the potential to undermine the criminal justice process. Like Matiu, Sir Ron is concerned that justice be fair and be fair to all; his was a lecture which Matiu would have found inspiring and most enjoyed.

We are also pleased to publish a commentary by Sir Grant Hammond, which provides an insight into the impact of the work of the Law Commission, an independent statutory agency that undertakes much of the government's legal research.

Tax lawyer and legal academic, Joel Manyam, writes about the Commissioner of Inland Revenue's statutory duty to collect the highest net revenue and provides some valuable practical insights.

It is always a pleasure to support students by publishing their work. In this edition, Selwyn Fraser addresses the issue of homeless youths and street families in Aotearoa New Zealand's youth justice system. This is an issue that would have been dear to Matiu, as he worked tirelessly for the dispossessed. His determination to make a difference for those who struggled was more than talk and teaching; he lived it. A former student's family told us that Matiu paid for a student's rental accommodation for a period of time so that the student, who was struggling financially, could continue and complete his studies effectively. That student did continue and is now a successful lawyer.

Matiu looked forward as well as back, anticipating what arising issues might impact Aotearoa and its people's ability to maintain their self-determination. In this vein, Andrew Shelley reviews some of the privacy and surveillance concerns created by the rapid proliferation of unmanned aerial systems, commonly known as drones, and considers the effectiveness of existing New Zealand law in addressing those concerns.

We end by thanking the referees in New Zealand and abroad to whom articles were sent, our student editors, led by Carey Church, and Mary-Rose Russell who assisted with editing and proof-reading.

Our final words are for Matiu,

*Taku tau kahurangi, tēnei ka ora mai, e kore rawa koe e warewaretia*

Dearest friend, your legacy lives on, you will never be forgotten.

Linda Te Aho and Gay Morgan  
Editors

# THE HARKNESS HENRY LECTURE

## HAS THE NEW ZEALAND CRIMINAL JUSTICE SYSTEM BEEN COMPROMISED?

BY SIR RON YOUNG\*

### I. INTRODUCTION

About 18 months ago, I retired to Greytown in the Wairarapa after 42 years in the law. I swapped suits for my gardening gear: cut-off jeans, tee shirts, and most importantly, thick socks and red band gumboots. Rather unattractively, those gumboots do give you a band around your calf muscles from the top of your gumboots. It does look rather strange. The good thing is most other people in my town have the same calf muscle mark.

Kate and I had shifted to the Wairarapa to ride horses, develop a large garden and play golf, all in good weather without Wellington's wind. We wanted to fit into the local community without the burden of our past, me as a Judge and Kate as Crown Counsel, and so we avoided mentioning our immediate past jobs. When Sir Ivor Richardson died, I went to his memorial service. On the way to Wellington I stopped at my local petrol station, this time dressed not in my gardening gear but, for once, in my dark judge's suit and tie. The petrol attendant, my mate Lance, looked at me and said, "Off to Court?" Damn, I thought, our desire for anonymity had not worked, I am sprung. Lance saw my irritation. He said, "Sorry, it is just that pretty much all of the people who come in here wearing a suit are off to Court".

What Lance was really emphasising was that my criminal résumé was incomplete. I had been a criminal lawyer, and a judge who presided in criminal trials and criminal appeals in the District Court, the High Court and the Court of Appeal. I had been a witness in a criminal trial (indeed my evidence had been filmed for television). But, and this is a big but, I had never appeared in a criminal court as a defendant. Lance had identified this inadequacy.

This is not an academic paper. It is based on my practical knowledge and experience. So, in listening to what I say today, I hope you will consider this gap in my résumé.

My proposition today is that in a variety of ways the right to a fair trial is being undermined. The public's right to a fairly and properly funded criminal justice system in which they can be confident, is also being compromised.

This vulnerability arises through a variety of sources: reduced legal aid for defence lawyers; reduced availability of money for expert witnesses for the defence; reduced funding for Crown Solicitors and Crown Law; the effect of the Sensible Sentencing Trust's lobbying and some recent legislative changes (including victim involvement in sentencing and the Three Strikes Law); the contribution of the media to public understanding or misunderstanding of judicial decisions

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\* Judge of the District Court 1988–1993, Chief Judge of the District Court 1993–2001, Judge of the High Court 2001–2015.

including sentencing; and the police diversion/warning system and the police/community justice system in Christchurch.

I want to talk about each of these topics and explain how each has, in its own way, influenced the standard of trial or appellate hearing in New Zealand.

## II. LEGAL AID

I first want to discuss the changes to payments made to lawyers for criminal legal aid work by the Legal Services Act 2011 and my view of the effect these changes have on the availability of legal services provided for those charged with crimes.

The cost of legal aid for those charged with criminal offending has long been the subject of government concern. Obviously, a system that simply funds lawyers for whatever work they do without limit is soon going to result in a cost explosion. So some restraint on what can be charged is only reasonable. The balance in this equation really arises in two ways. First, the equality of arms argument – our system of criminal law only provides true justice if both prosecution and defence have similar relevant resources. This involves similar funding resources whether for case preparation or for expert witnesses. Of course, equality of arms must consider the prosecution's burden of proof. Secondly, the legal aid system must pay enough so that appropriately experienced and competent lawyers are prepared to do the work at the right level.

We can only say that a defendant has had a fair trial if there are, in the context of economic need, reasonable resources available to a defendant to instruct a lawyer, assess what evidence may be required and call such evidence. Further, there must be a lawyer available and prepared to act and who has the competence and skill required to meet the charge or charges a defendant faces.

I believe that the cost cutting inherent in the 2011 legal aid reforms, in some cases, may have put a fair trial in jeopardy. It is difficult objectively to assess this jeopardy. I rely upon my own knowledge and experience and anecdotal information from the concerns of others in the criminal justice system, including lawyers, in making this assessment.

First, let us consider the 2011 legal aid reforms. As many of you know, the basis for legal aid payments has varied over the years. Immediately before 2011, the payment system was on an hourly basis intended to reflect experience, together with guideline hours for different types of work. The number of hours charged could not exceed the guidelines unless an amendment to the grant was sought and approved. My experience was that the guideline hours were reasonable, although many applications to exceed the hours were made and granted.

In the early 2000s, the eligibility for legal aid both financially and for types of offending was liberalised. It was hardly surprising that the cost of legal aid exploded.

Dame Margaret Bazley undertook a review of legal aid. In summary, she concluded that the then existing fee structure for legal aid (a fee for a particular service) was not efficient, and that it was open to, and in fact subjected to, abuse by some lawyers. She considered a bulk or fixed fee was the efficient system, linked together with the development of the Public Defender Service.<sup>1</sup> As I have mentioned, legal aid expenditure had exploded. In 2004/2005 it was approximately \$80 million, by 2006/2007 it was \$101 million and by 2009/2010 it was \$152 million.<sup>2</sup>

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1 Dame Margaret Bazley *Transforming the Legal Aid System* (Ministry of Justice, November 2009).

2 Ministry of Justice *Managing the cost of legal assistance in the justice sector: Regulatory Impact Statement* (2010) at [12]–[13].

The government acted. It decided that it would cap the legal aid budget, rather than continue with what had been an open budget with the government funding whatever it cost in legal aid payments. No more open budget. They decided the baseline for legal aid would be set at the 2007/2008 expenditure of \$101 million. Importantly, under the existing system the \$101 million was forecast to increase from \$152 million in 2009/2010 through to \$207 million in 2014/2015.<sup>3</sup> Doubling in seven years.

Why these massive increases? Well, we know it was not the lawyers' hourly rates. They have been kept static or in most cases reduced. My impression is that the following factors played a major role; there were more serious cases; the government had increased eligibility for legal aid; and criminal cases took much longer with jury trials, on average, taking 50 per cent or more longer than they were a decade before. Why was this? There are two reasons; first, a huge increase in forensic evidence, such as DNA, blood testing and video evidence of the scene of the crime; secondly, defence lawyers heeding the constant attacks by appellate defendants in the Court of Appeal alleging trial counsel failure. Counsel understandably reacted by running every possible defence, challenging every point and calling every possible witness.

The government, therefore, proposed to reduce legal aid payments from the actual \$152 million in 2009/2010 back to a baseline of \$101 million over the following five years to 2014/2015. A projection of \$138 million was to be saved in legal aid payments over the next five years to 2014/2015.<sup>4</sup> How did the government propose to do this? Mostly, it was to be achieved by reducing legal aid payments to lawyers through a fixed fee regime and by the widening of the public defender service to cover up to 50 per cent of cases in areas where they operated. Thus, the new regime came into being with the 2011 Act.<sup>5</sup>

There were challenges to the scheme in courts; some, in part, successful. But, in the end, the government had its way. Legal aid paid a fixed fee for all criminal work with two exceptions, high cost cases and complex cases. These cases were estimated to be no more than five per cent of the cases heard although, as it has turned out, they have constituted much less. For example, the original fixed fee for a defended judge-alone trial (including sentencing) varied between \$480 and \$580. This fee included: taking instructions from a client and a brief of evidence, interviewing any witness, reviewing disclosure, all court appearances, before-trial research, identifying the legal issues, preparation for hearing, conducting the hearing, appearing at sentencing and the like. If the defended hearing was more than 1.5 hours, then there would be an additional payment of \$48 per half hour or \$96 per hour.<sup>6</sup>

Even in the simplest of criminal judge-alone cases, this estimate will often be hopelessly inadequate. At the \$96 per hour rate this set fee gives the lawyer 3.5 hours for all possible attendances, including two or three court appearances before the hearing. At \$96 per hour, no lawyer is going to get rich. Assuming 1,500 chargeable hours per annum and a 50 per cent overhead, the legal aid lawyer might be lucky at these rates to earn \$70,000 per annum.

The issue then becomes – which lawyers will act for these defendants at these rates? Will the lawyers be prepared to do all that is necessary properly to conduct a trial; particularly if that means,

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3 At [12].

4 Simon Power “Proposals to tackle unaffordable growth in legal aid” (press release, 13 April 2011).

5 Legal Services Act 2011.

6 Legal Services Commissioner *Criminal Legal Aid: Changes to Fees Schedules – Review Responses and Final Decisions* (Ministry of Justice, 2015) at 75–97.

over a year, hundreds of hours of unpaid work? The answer of course is, the least experienced and, let us be brutally honest, the least competent lawyers will take on this lower end work. This problem is exacerbated through the more complex and serious criminal cases, with sometimes inexperienced and inadequate lawyers undertaking criminal cases well above their competence level. Typically, judges will do what they can to level the trial playing field, but it is not their job. Too much judicial intervention carries all sorts of hidden dangers both for judges and for a fair trial. But, I also want to acknowledge the many competent and talented criminal lawyers who take on this work at a fraction of the hourly rates of their brothers and sisters doing commercial work. Recent analysis has confirmed what was known anecdotally, that significant numbers of lawyers are pulling out of legal aid work.<sup>7</sup> These will often be the very experienced lawyers that the system badly needs. Complaints of trial counsel inadequacy are common in the Court of Appeal. But, a poor effort by trial counsel is seldom enough to justify appellate intervention. The right to a fair trial is being compromised.

Parallel with this problem is defence access to forensic evidence. In my experience, two problems have arisen here, primarily driven by reduced funding. There have been regular problems for defence lawyers in getting approval from legal aid for forensic testing. This was a constant refrain from defence lawyers when I ran the High Court Criminal List in Wellington. Approval, if given, was slow and limited. I was reduced, personally, to ringing the legal aid approval officer and telling them I would have to announce in court that this serious murder trial was going to be delayed because legal aid had not done its job. It got results, but it was hardly ideal.

The second problem is reduced availability of experts. New Zealand has a very small pool of expert witnesses. Often, overseas experts are the only available defence witnesses able to comment on the prosecution expert. Finding and funding such experts can become a major problem and an impediment to a fair trial.

I acknowledge that in the most recent budget, legal aid payments were due to increase by \$96 million over a four-year period, an average of \$24 million per year.<sup>8</sup> Will this make any difference? I doubt it will address the problems I have identified.

In summary, legal aid payments are now at rock bottom. Too often this means inexperienced lawyers with insufficient time are trying cases. While this is typically at the lower level of criminal cases, it affects all levels. Why does it matter? It matters because a fair trial matters. Justice systems rely upon confidence in the system. Each time we let a defendant down, one who leaves court with a justified sense of grievance because he/she has not had a fair go at trial, confidence in the system is eroded just a little bit more.

### III. CROWN SOLICITORS

About the time the 2011 legal aid changes came into being, the basis for funding Crown Solicitors also changed. In many ways, the existing payment systems for defence and prosecution were similar; hourly rates were limited, but could be exceeded, although the Crown hourly rates were generally higher.

The new funding model was to bulk fund Crown Solicitors. They would be paid a lump sum to conduct the Crown work in their area. Again, exceptional trials could justify variations to the

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<sup>7</sup> Liz Bolger “Legal Aid Lawyers Declining Significantly” *NZ Lawyer* (online ed, Auckland, 29 August 2016).

<sup>8</sup> Simon Bridges “\$96m for legal aid and community law centres” (press release, 26 May 2016).

scheme. For some Crown Solicitors, this was a significant funding cut. If you think about bulk funding, what are the economic incentives? The complaint about open-ended hourly rates was a lack of incentive to limit the time taken. The economic incentive was to take as long as possible. The economic incentive of bulk funding is both to reduce trial time and, if possible, avoid a trial altogether. The fewer fully contested trials, the more profitable the business for the Crown Solicitor. This inevitably raises plea discussions as a way of avoiding a trial. Indeed, the 2013 Solicitor-General Prosecution Guidelines<sup>9</sup> specifically acknowledge that “fiscal restraints” have meant fewer resources for Crown Solicitors. They also specifically authorise plea discussions, with the guidelines noting such arrangements can save considerable costs for the Crown, the courts and legal aid.<sup>10</sup>

There is no doubt, from my experience, that since the introduction of bulk funding and the new Solicitor-General guidelines, the Crown has been far more willing to discuss and agree to lesser charges with a guilty plea. This is not necessarily a bad thing but these factors are relevant:

1. Plea discussion should not be driven by cost.
2. The charge pleaded to should reflect the true criminality of the act.
3. The reasons for the acceptance of a plea to a lesser charge should always be made public.

Failing to take these factors into account undermines confidence in the prosecution of crime and in the judiciary. For some, it looks like all those on the inside have got together to avoid the inconvenience of a trial. All too often, no reasons are given. This problem (a failure to give reasons for an acceptance of a plea to a lesser charge) is well illustrated in child death/murder cases. These are very difficult cases to try. Often it is difficult to establish when the fatal blow occurred and by whom. It is also difficult in such cases to establish the necessary mental ingredients of murder: an intent to kill; or recklessness; or an appreciation that what is being done may kill, but proceeding anyway.<sup>11</sup> In many cases, there are terrible injuries to a young child. When the Crown agrees to accept a guilty plea to manslaughter and the murder count is discharged, typically no explanation is given. The public are left confused. They do not understand what has been done nor why, resulting in another drop in confidence in the administration of justice.

I accept that an explanation by the Crown might not satisfy the public. All too often when an explanation is given, subsequent media reports do not seem to reflect what has been said or to report the important points. But, at least, there is an explanation in the public domain.

The other point I want to make is this. Some of these difficult serious cases of child abuse and death may be better left to a jury to decide. Often the prosecution decision, whether there is enough evidence to establish who did what and whether the intent to murder is established, is on a fine line. I suggest it may be better to have 12 ordinary people bring their collective experience and sense to these decisions as their verdict is much more likely to be accepted by the wider public. We all hope, however, that the economic incentives or disincentives inherent in bulk funding play no part, even unconsciously, in these plea decisions.

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9 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013) at 2.

10 Crown Law *Solicitor-General's Prosecution Guidelines* (1 July 2013).

11 Crimes Act 1961, s 167.

#### IV. CROWN LAW

My experience is that there are direct parallels with what is happening at some Crown Solicitors' offices that I have mentioned and at the Criminal Section at Crown Law in Wellington.<sup>12</sup> I have already discussed the problems arising from bulk funding of Crown Solicitors. Obviously, the best use of bulk funds, if there is to be a hearing, is to have the most junior lawyer possible at the hearing. This is especially noticeable in appeals from the District Court to the High Court, which are dealt with by local Crown Solicitors. When neither appellant counsel nor counsel for the respondent have much court experience, the result may be rather superficial submissions. Some of these cases can be of considerable precedential importance in the District Court. I often required counsel to go away and properly research important points. This illustrates again how important work is being pushed down to a lawyer, too junior in experience for the work. In my experience, this is also what happens with Crown Law in appeals to the Court of Appeal.<sup>13</sup>

These comments arise from my experience in two ways: first, when Crown Law was restructured in about 2012, significant numbers of experienced lawyers left.<sup>14</sup> Crown Law was one of the best places to practice law, despite the fact the pay was anecdotally said to be only so-so. It attracted the very best lawyers on a par with the top two or three law firms. The result of the changes was that many new inexperienced lawyers appeared for the Crown in criminal appeals in the Court of Appeal. There are some top class experienced lawyers at Crown Law but with hundreds of criminal appeals each year to the Court of Appeal, the loss of experience was significant and noticeable.

Why does this drop in experience really matter? Well, to understand this you need to understand, practically, how the Criminal Appeal Division of the Court of Appeal works. I was a judge of this Court for about 10 or 11 years, and sat on hundreds of criminal appeals. The majority were defence appeals. A few days, sometimes up to a week or more, before a hearing, the judges get the appeal book. This has the relevant documents for the trial generally including the transcript, the final address and the summing up. There is a heck of a lot of reading required of a judge, and the standard of counsel's submissions inevitably play a big part in helping the judges focus on the issues. Here, Crown Law were the Kings or Queens of the Court of Appeal: the standard of their submissions identifying relevant parts of the evidence, and other parts of the case, and the relevant authorities were of the highest standard. I am afraid to say, mostly but not always, it was vastly better than defence counsels' efforts. While Crown Law employed some very bright young lawyers after the revamp in 2012, their lack of experience sometimes showed. The Crown Law standard dropped at times with the Court left in the position that counsel's submissions had not really comprehensively dealt with the issues the case raised. This could affect the quality of some appellate decisions, as a fair appellate hearing, comprehensively assessing the trial process, could be compromised. While any deficit may be made up by the judges, this is not how the system works best. Sure, some money was saved from Crown Law's budget but what is the true cost to a criminal justice system where some cases might not get the full consideration and analysis that was their due?

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12 This is my personal experience and general observation and is not intended to reflect on any individual or person at Crown Law in Wellington.

13 Crown Law appear for the Crown on most appeals in the Court of Appeal.

14 LawFuel "Crown Law Shake-up Underway" *Scoop* (online ed, New Zealand, 20 December 2012).



## V. POLICE DIVERSION/WARNING SCHEMES

Police constables have a discretion whether or not they charge someone suspected of a crime. Those of us old enough remember the local constable, who caught a youngster committing a minor crime; he, and it mostly was a he, would take them home and talk to their parents. An informal punishment followed, perhaps tidying up the local Scout Hall for a month. With more centralised policing, the use of this discretion seemed to have disappeared. Then, the focus changed to cost. What was the cost of prosecuting those who had been charged with low-level crime?

The police developed a diversion scheme. The defendant was still charged, came to court, and, if guilt was admitted to the police, they would be “diverted” from the criminal justice system. They avoided a conviction if they paid a fine or did some charity work. This system had great advantages. It avoided a criminal conviction for minor crime, which could easily taint the life of a defendant. But, there were serious hooks. Crimes that were eligible for diversion were at the idiosyncratic discretion of the local diversion sergeant. Eligibility varied wildly from place to place. Donations were to be made to favoured charities. Those who believed they were not guilty were under pressure to accept guilt and avoid a conviction. Today, diversion is out of favour, in part because of these problems, but primarily, I believe, because of the cost of the diversion scheme. It costs real money to run what is really a form of alternative justice with a structure of diversion officers and the supervision of community work and other punishment. “Diverted” defendants, in fact, often appear many times in court, sorting out whether they are to be diverted and what if any “punishment” they are to undertake before being released.

As a result, the diversion system has mostly been replaced by the police warning system. Police at a constable level exclusively run the warning system with centrally developed guidelines. When the defendant is arrested and a decision made not to charge, the defendant is warned about his or her behaviour and potential future consequences. This typically occurs at the police station and a record of the warning is kept. The person does not appear in court. This has resulted in significantly fewer defendants appearing in the District Court on minor criminal matters. About 2,000 warnings are issued each month. It has resulted in significantly reduced police costs compared with diversion cases.<sup>15</sup>

But, there are similar concerns with the police warning system. It can be highly idiosyncratic. One constable’s warning is another’s arrest and prosecution. Like offending may not be treated alike. What if the crime warned against caused damage to another’s goods? Does the victim have a remedy? The potential for corruption arises in all these processes, which ultimately are designed to avoid the courts performing a public adjudicative function. A police constable who arrests someone will decide if that person avoids a conviction. It may be for a minor crime but a conviction can be the tipping point in, for example, a job application or a visa for entry into a country. Consequently, the stakes for a defendant may be high and the future prospects of an arrested person might rely on the discretion of an individual constable. Because this discretion is effectively exercised in private, the seeds of corruption are always present. I do not intend to suggest there has been corruption, but this is not an open public system like the courts and, in that, it invites speculation.

I do, however, want to acknowledge the real advantages of these schemes. Thousands of New Zealanders have avoided convictions for minor crime to their considerable advantage. But

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15 New Zealand Police “Pre-Charge Warnings” (July 2013) <[www.police.govt.nz](http://www.police.govt.nz)>.

the real concerns remain: pressure on the not-guilty to accept guilt; uneven and unfair differences in decision-making; a hidden process; and the potential for corruption.

## VI. COMMUNITY JUSTICE PANEL – CHRISTCHURCH

I now want to talk about community justice panels in Christchurch. I take the description of the community justice panel in Christchurch from various New Zealand Police internet sites and from personal knowledge.<sup>16</sup> While presently only operating in Christchurch, the police hope to expand to other centres. The community justice panel is described as “one of three Alternative Resolutions, Policing Excellence initiatives which allow NZ Police more graduated responses to low-level offending without the need to rely on the courts.”<sup>17</sup> It is described as a “grassroots partnership” between Community Law and the New Zealand Police.<sup>18</sup> The Department of Justice provided start-up funding for the community justice panel. The community justice panel takes adults who are charged with a crime who admit guilt and agree to participate. After admitting guilt, the offenders appear before the panel, rather than the court. Around 40 per cent of those who appeared before the panel had no previous convictions, and, therefore, 60 per cent had previous convictions.<sup>19</sup> Members of the panel who make the decisions are described as “vetted and trained community representatives” who “hold [offenders] to account for their offending and set restitution conditions to redress and repair the harm and/or damage caused by their offending”.<sup>20</sup> The community justice panel process is said to save half an hour in police time for each prosecution, compared with a court hearing, and two hours compared to diversion.<sup>21</sup>

Each community justice panel hearing lasts 30–45 minutes.<sup>22</sup> The result may be reparation payments, community service or donations to charity. Some of the more serious offences referred have been: burglary; unlawfully taking a motor vehicle; assaulting a child; common and domestic assault; cultivating/supplying/selling cannabis; and possession of an offensive weapon.<sup>23</sup> For some offenders in the courts, this offending could result in imprisonment.

The focus of the community justice panel is said to address the reasons for offending including, economic need, abuse of alcohol and drugs and mental health issues.<sup>24</sup>

So, what is wrong with all of this? Surely this is a commendable community/police initiative. The first point I want to make is that I am all for those charged with minor crimes avoiding a conviction where it may affect their future. But, I have two concerns about this Christchurch process. The first is less serious than the second. A lot of resources are going into this process for those who commit minor crime, but there seems to be only a modest effect on recidivism. Some of the resources used are voluntary, but some, for example rehabilitation programmes, are not. The criminal justice system would be very glad of this effort by volunteers and these rehabilitation resources for those

16 See for example <[www.police.govt.nz/about-us/publication/community-justice-panel-christchurch-evaluation](http://www.police.govt.nz/about-us/publication/community-justice-panel-christchurch-evaluation)>.

17 New Zealand Police *Community Justice Panel in Christchurch: An Evaluation* (November 2012) at Overview.

18 At i.

19 At Overview.

20 At i.

21 At vii.

22 At ii.

23 At 11.

24 At Overview.

charged with much more serious crime. So, the first concern is use of significant resources for minor criminal offending, which does not really seem to significantly reduce re-offending.

The second concern is more fundamental. The community justice panels are really an alternative justice system without the protections and the trained participants of the criminal justice system. It is akin to a hospital without medical professionals but with very well-meaning citizens trying to do their best. The crimes dealt with include some where imprisonment is common. Thus, equality of treatment of offenders suffers. None of the fundamental protections for those charged with a crime apply in the community justice panel, which sets its own process. Who vets and trains these community representatives, the police? If you do not want to participate as a defendant because something looks unfair, then you are forced back to the criminal justice system and the possibility of a conviction. So, the pressure is on to accept whatever the community justice panel says because the alternative may not be attractive. What of the close involvement of the police in this process? Where is the proper separation of the investigative/prosecutorial/defence and judicial functions so essential to a fair criminal justice system? In the community justice panel the lines are dangerously blurred. In summary, the panel is well-meaning but a dangerous undermining of the formal criminal justice system and the protections and balance in such a system.

## VII. VICTIMS' RIGHTS

Today in most common law jurisdictions there is a strong victims' rights movement. This is understandable. When I first began in criminal law 40 years ago, victims were hardly mentioned; it was as if the system did not want to hear how crime had affected those caught up in it. This changed significantly with the enacting of the Victims of Offences Act in 1987, now superseded by the Victims' Rights Act 2002. At sentencing, victims could file reports that detailed for the judge the effect the crime had had on them, their families and friends. Impact reports could be read out in court, often in dramatic and emotional ways which graphically told the defendant and the judge the effect of the offending.

Some controversy arose, however, over some victim impact reports. The original Act made it clear the report was intended to describe the impact the crime had on the victim/victims. It was not intended to be an attack on the defendant, his or her personality or a critique of the defendant's family. It was the responsibility of the police and the Crown Prosecutor to edit these reports so that they complied with the Act. Sometimes this was not done and we had the very difficult problem of a judge being forced to tell victims they could not read out parts of what they wanted to say, resulting in cries of "unfair censorship". As a result, the Act was changed in 2015. The changes widened what could be included in victim impact reports. Now, judges are obliged to allow victims to read out victim impact statements. If the statements deal with the victims' views about the offending, they are acceptable. This is a very wide right and in many victims' minds entitles them to give their view of the defendant and often his or her family. While the Act allows a judge to control abuse in a practical sense, this is very difficult to do.

In my view, these changes were unwise and, to a degree, they undermine the essence of a civilised criminal justice system.

When victims resort directly to telling defendants what they think of them and their family, violence can easily erupt in the courtroom. What a victim thinks of the defendant or their family surely cannot be part of a sentencing decision. The impact of the crime on the victim is an important part of a sentence; the fact the victim thinks the defendant is a scumbag is not.

Finally, and perhaps most importantly, this tacit acceptance of such abuse wrongly encourages the personalisation of the criminal process. We gave up personal response to crime by the intervention of the state through a structured criminal justice system. The state's role is to put a barrier between victim and defendant so that personal revenge does not disrupt society. The danger of the new liberal victims' rights laws is that they allow just a little of that personal revenge. Abuse is difficult to prevent. At times the defendant's family in court has responded aggressively to that abuse. This is the very situation a civilised criminal justice system is designed to avoid in the interests of social harmony.

Knowledge of the impact of the crime on the victim is essential to a fair criminal justice system; victim abuse of defendants undermines its foundation.

### VIII. SENSIBLE SENTENCING TRUST

I want to briefly discuss the Sensible Sentencing Trust. It is a catchy name and to give the Trust their due they have consistently developed that theme over the years. They claim they have a sensible, common sense view of what judges should do and how those before the courts should be dealt with. The Trust has had a significant effect on the position of victims within the justice system.

The persistent theme in the Sensible Sentencing Trust's publicity is that they wish to make victims the centre of the justice system.<sup>25</sup> Well, victims are not at its centre. Understanding and considering the effect of crime on victims is a very important part of any criminal justice system, but it is not the centre. At the centre are fair and just processes to determine whether those charged with criminal offences are guilty and if so, what their punishment should be. Victims other than those who have relevant evidence about a charge are not involved in the determination of guilt or otherwise. They are involved in one aspect of the process; it is an important one and it occurs at sentencing.

The Sensible Sentencing Trust's newsletters over the last few years relentlessly and often inaccurately criticised the justice system and defence lawyers. Appeals are often said to be an appalling waste of time. When an appeal by a defendant is dismissed it is "lucky" the Court of Appeal saw sense. When an appeal is dismissed, the newsletter suggests, the lawyer should be charged with wasting the court's time. Lawyers are only in it for the money. New Zealand has been described as a "paedophile haven" and the justice system endorses paedophilia.<sup>26</sup>

The newsletter claims that, before the Sensible Sentencing Trust came into existence, most New Zealanders "were scared to question the politically correct pervasive liberal lunatics knowing full well they would turn their wrath on you to discredit and eliminate all opposition". Apparently without any irony, the newsletter said of these "pervasive liberal lunatics", "Their hatred – their venom and vengeance knew no bounds their mission was simply to seek and destroy at all costs!"<sup>27</sup>

Several letters to the newsletter are highly critical of defence lawyers. Those who are trying to get acquittals of defendants whom a correspondent declares are guilty, are especially vilified

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25 Sensible Sentencing Trust <[www.sst.org.nz/victims/](http://www.sst.org.nz/victims/)>.

26 "NZ Paedophile Haven" *Sensible Sentencing Trust Newsletter* (online ed, New Zealand, January 2015).

27 Garth McVicar "What does SST mean to YOU" *Sensible Sentencing Trust Newsletter* (online ed, New Zealand, May 2015).

(Teina Pora comes to mind). Judges are said to sanction child abuse if they suppress an offender's name and have "abdicated their 'Duty of Care' to [New Zealand children]"<sup>28</sup>

There is trenchant criticism of discounts for guilty pleas, for those who offer restorative justice and for those who get parole.

In one section, the fact of a reduction in crime by 30 per cent is recorded (due mostly to the Sensible Sentencing Trust's work) and next a claim that there is a crime epidemic, which pervades New Zealand.<sup>29</sup>

I have spent some time describing some of the Sensible Sentencing Trust's and their supporters' views because many are in serious conflict with the right to a fair trial, a balanced sentencing and, at least, one appeal as of right. This constant refrain about how useless lawyers and the justice system are is dangerous, particularly because it is rarely, if ever, challenged.

The principles on which the justice system is based are fundamental to a democracy. Principles of the rule of law have been developed over centuries. They maintain a well-established balance between the defendant and the state. For a system designed by humans, it works damn well. If there is no counter to the Sensible Sentencing Trust's approach on these issues, they will undermine the rule of law piece by piece. Often, the only voice in the media on criminal justice issues is that of the Sensible Sentencing Trust. What about senior lawyers and academics responding to the Trust's view of the criminal justice system and putting some balance into the debate?

## IX. THE THREE STRIKES LAW

I do not want to discuss the Three Strikes Law in detail. Most of you will be familiar with it. Essentially, it provides that the more crimes you commit of a particular type, the longer you will serve in prison. At the second level, you may have to serve the sentence you receive without parole, and at the third level you may have to serve the maximum sentence for the offence.<sup>30</sup>

This law significantly reduces judicial discretion at sentencing. The individual facts do not define a strike offence, it is the offence itself, no matter how minor. Where a murder qualifies then there is no parole. The defendant will rot in prison until they die, with narrow exception. This approach to sentencing is contrary to New Zealand history and good practice. Punishment should fit the facts of the crime. The temptation for judges will be to stretch the narrow exceptions to the law to the greatest degree to do justice to an individual case.

Where it applies, this law does its best to prevent the courts doing justice in each case. It sadly illustrates a deep distrust in the wisdom of judges, given it all but eliminates their function in these cases.

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28 Garth McVicar "Do we have a 'Duty of Care' to our kids?" *Sensible Sentencing Trust Newsletter* (online ed, New Zealand, December 2015).

29 "Sensible Sentencing Supports Police Initiative to Target Burglars" *Sensible Sentencing Trust Newsletter* (online ed, New Zealand, May 2016).

30 Sentencing and Parole Reform Act 2010.

## X. THE MEDIA

Having a well-informed media which puts the courts under a microscope is a good thing in a democracy. No judge can complain about criticism if it is informed and based on what the judge said.

Some in the metropolitan print media, and a few in the electronic media, are top class journalists. They accurately report what goes on in the courts. But all too often, opinion pieces in the media are simply not based on the facts. Criticism is not based on reading what the judge has said or understanding the legal constraints. What an interest group says about a judicial decision is simply reported with no effort made to assess whether it is based on fact. A minor example, when I was Chief Judge; there was a driving case involving a tourist, resulting in death. The driver was imprisoned. The media reported that the lenient sentence outraged the public. A journalist rang me and asked me to comment on what she described as the lenient sentence. I told her that perhaps she should read the Judge's sentencing remarks. The Judge had in fact, imposed the maximum sentence available. That fact did not appear in the media report.

There is continuing frustration in the High Court with the reporting of murder sentencing where the sentence is described as the minimum non-parole period; the fact that life imprisonment has been imposed is not reported. I am afraid the media, especially the electronic media, very rarely try to explain the reasons for the decision. Decisions of public interest are put up on the court's internet site within hours, sometimes within minutes of being delivered. Some media will provide links to the full decision, but all too often the main point of the judge's reasoning is ignored and all the public are left with is another distraught family complaining that 12 or 15 years is not enough for the life that is taken.

One other aspect is criticism of judges' decisions. As I have said this is healthy in a democracy, but where it is based on misapprehended facts or is wrong in law, who speaks for the judges when the judges cannot? It used to be the Attorney-General, but that is now rare. So, I suggest it again falls to the lawyers and the legal academics. I challenge senior lawyers and academics to speak out when criticism of the courts and judges is factually or legally wrong. In my experience, the media will be interested in putting the other side. Too often, the interest groups have free rein in the Press. You can provide balance.

## XI. SUMMARY

Why do these problems in the criminal justice system really matter? After all, most people who are guilty are found guilty; most of those who are not guilty are found not guilty. Who really cares that lawyers are now being paid less by the state? I do not recall seeing any protests in the streets of New Zealand over any of these issues that I have raised this evening.

Each of these issues are, at their essence, about a fair trial, whether from the perspective of the lawyers involved (prosecution or defence); the trial process itself; or the public policy issues arising from poorly thought-through legislation.

A fair trial is a fragile thing. It ultimately relies upon the faith that ordinary citizens have in the trial process. Are the laws a citizen is tried under, fair? Is there approximate equality of arms between the prosecution and defence? Is the judge fair? Are the jury open-minded? Are there any financial incentives that might skew the obligations of the prosecution or defence? Do narrow

interest groups dominate the discourse on what is justice? Is the information the public receives about the courts accurate and balanced?

In each of these areas I have identified worrying trends. Many seem to be driven by the political law and order debate, too often marked by competing political party policies which try and outdo each other on the “get tough on crime” mantra. What many of these policies fail to recognise is that they chip away at the whole criminal justice system. Laws which protect an ordinary citizen’s rights are condemned as being soft on crime. If you are innocent, then why should you need these protections? The result: the rights of citizens to fair representation and a fair trial, developed over centuries, are eroded. Of course, for most citizens, day-to-day, this does not matter. It does not matter until someone in their family is charged with a crime, or is the victim or a witness to a crime. Then it matters. Then, whether you are dealt with fairly or not really matters. If you are not? Well, you might be interviewed on television if the case is very serious and you will be asked something like “What did you think of the sentence of 12 years for the life of your son/daughter?” No one cares to say “actually, the sentence was life imprisonment, and sentencing is not trying and cannot put a value on a life”. Certainly, no one says to a convicted defendant “do you think you got a fair trial given you had an inexperienced counsel, could not get the necessary forensic evidence and you now face life without parole under the Three Strikes Law?”

My plea is for the legal community to raise a stink about changes that have the potential to undermine the criminal process and the right to a fair trial. No one else will.

# CLOSING GEOGRAPHICAL DISTANCES: THE VALUE OF A NEW ZEALAND PERSPECTIVE ON THE ADMISSION POLICY OF A NATIVE HAWAIIAN SCHOOL

BY DR KEAKAOKAWAI VARNER HEMI\*

## I. INTRODUCTION

Many years ago, I had the privilege of being one of Matiu Dickson's undergraduate students. He was my first teacher of tikanga Māori and jurisprudence, a subject I now teach. As a person of Native Hawaiian and Cherokee ancestry growing up on the Mainland of the United States, I had never been taught like *that* in a classroom or lecture hall before. The tone of his voice, the patience, the almost sacred yet humorous way he shared knowledge, evoked home and the ways of my parents, grandparents, aunts and uncles. As he discussed familiar principles – things like tapu and whanaungatanga that we Hawaiians live too – his kindness and generosity helped me to close the geographical distance between studying law and my own identity. Years later, as a doctoral student, that distance would close again whenever he pulled me into his office for a kōrero about how it was all going.

Matiu's lectures were often dramatic, a weaving of law and stories into something like a living thing through word and waiata. Accounts of atua, of whakapapa and tīpuna flowed timelessly into his experience in courtrooms and cases. Centuries of history, legal principles and facts settled into one's mind with a characteristic raising of his eyebrows and patient "nē?" Beyond the printed word of course materials and textbooks, Matiu's lectures created vaulted spaces of memory, where we students could access an exquisite repository of law, history and culture. More than lecturer, Matiu was librarian, gatekeeper and master narrator of the law – and I will always be grateful.

In honour of Matiu as narrator and in the interest of closing geographical distances, this article examines the legal narratives evident in the American federal court decision in *Doe v Kamehameha Schools (Kamehameha)*.<sup>1</sup> The article first describes the historical development of *everyone/no-one, someone* and Indigenous equality narratives and their particular impact on the narration of Indigenous peoples in the law. It then examines how the opinions of the United States Ninth Circuit Court of Appeals in this case exhibit significant narrative confusion and distrust about the relationship between Indigenous identity and equality, with the Ninth Circuit interpreting the Native

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\* LLB (first class honours), Waikato; PhD, Waikato. Lecturer, Te Piringa – Faculty of Law, University of Waikato. I am grateful to the anonymous reviewers for their very constructive feedback on the article and to Mary-Rose Russell for proofreading it. I am also thankful to our editors, Linda Te Aho and Gay Morgan, for their encouragement and patience and also for Kathy Iorns Magallanes who first planted the seeds for this particular article in my mind. These ideas were first developed in my doctoral thesis under the supervision of Claire Breen. I am extremely grateful for all the years she has patiently listened to me ramble on about equality narratives.

1 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003); aff'd in part, rev'd in part 416 F 3d 1025 (9th Cir 2005); reh'g en banc granted 441 F 3d 1029, 470 F 3d 827 (9th Cir 2006) (en banc) [*Kamehameha*].



Hawaiian schools' preference for Native Hawaiian students as either reverse racial discrimination or an exception to the general rule of homogeneity and anonymity. For comparison, the article then examines similar equality narratives in New Zealand law, which reveal few legal challenges to admission policies which, either explicitly or implicitly, prefer Māori and demonstrate a narrative complementarity between equality and Indigenous identity. The article recognises that, while complementarity could clarify the narrative issues in *Kamehameha* for future American federal courts, it also provides the opportunity for New Zealand to pause and reflect. Ultimately, the article advocates a weaving of equality narratives across geographical distances.

## II. THE POWER OF THE NARRATIVE

The idea that law is narrative in character, that it tells and retells stories and that sometimes these stories conflict, is not novel. The language of law itself can affect individual and group outcomes, due to its “centrality in the production, exercise, and subversion of legal power”.<sup>2</sup> Beyond “rules and policies”, the law also inherently relates “stories, explanations, performances, [and] linguistic exchanges – as narratives and rhetoric”.<sup>3</sup> Such narratives “do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results”.<sup>4</sup> From a law and literature perspective, legal narratives may also “invent rather than reflect our lives, ourselves, and our worlds”.<sup>5</sup>

Via outcomes, precedents, catchphrases and doctrine, the law is laced with stories which gain power and momentum with each telling – whether or not the narrative is accurate or fair. Narratives of both discrimination and equality have been historically utilised to discriminate against Indigenous peoples and violate our rights. In recent decades, highly formalised equality guarantees and reverse discrimination prohibitions have similarly demonstrated tremendous discursive power and momentum.

### A. *Everyone, No-one and Someone*

Overtly discriminatory legal narratives have invented and manipulated Indigenous identity for a long time. Post-conquest, the doctrine of discovery identified the Indigenous nations of the Americas and other places as non-Christians whose land was *terra nullius* and free for the taking.<sup>6</sup> Later, the 19th century Marshall Trilogy<sup>7</sup> established the fundamental doctrines of American federal Indian

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2 John Conley and William M O’Barr *Just Words: Law, Language, and Power* (2nd ed, University of Chicago Press, Chicago, 2005) at xi.

3 Paul Gewirtz “Narrative and Rhetoric in the Law” in Peter Brooks and Paul Gewirtz (eds) *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press, Cambridge, Massachusetts, 1996) 2 at 2.

4 Peter Brooks “Narrative in and of the Law” in James Phelan and Peter J Rabinowitz (eds) *A Companion to Narrative Theory* (Blackwell, Malden, Massachusetts, 2005) 415 at 419.

5 Maria Aristodemou quoted in Kathleen Birrell *Indigeneity: Before and Beyond the Law* (Routledge, London, 2016) at 1.

6 See discussion in Robert J Miller, Lisa LeSage and Sebastian Lopez Escarcena “The International Law of Discovery, Indigenous Peoples, and Chile” (2011) 89 *Nebraska L Rev* 819.

7 Three Supreme Court cases, namely: *Johnson v M’Intosh* 21 US 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); and *Worcester v Georgia* 31 US 515 (1832). Each majority opinion was delivered and significantly influenced by Chief Justice John Marshall. These decisions established the three governing principles of federal Indian law: retention of occupation and land usage rights, inherent tribal sovereignty and the federal trust responsibility.

law and depicted its Indigenous peoples as dependent nations, somewhere between foreign nations and states. Within the Trilogy, Native Americans are described as fierce, warlike and incapable of civilisation, but also as child-like – the “ward”, “pupil” or “dependent”.<sup>8</sup> The “irrationality” of such children justified “exercise of a guardianship ‘to protect them and their property and personal rights’”.<sup>10</sup> In New Zealand, Prendergast CJ similarly dismissed the Treaty-based claims of Ngāti Toa in the infamous *Wi Parata v Bishop of Wellington*<sup>11</sup> decision on the grounds that Māori were “primitive barbarians” incapable of making a Treaty with the Crown. According to Native American scholar Robert Williams, such narratives reflect a “legal consciousness that at its core regards tribal peoples as normatively deficient and culturally, politically and morally inferior to Europeans”.<sup>12</sup>

Notions of equality have also rationalised discrimination against Indigenous people in the United States. Carole Goldberg has described how:<sup>13</sup>

... in its earliest incantations, the talk of equal rights focused on restrictions that allegedly disadvantaged the Indians. For example, allotment of Indian lands in the late nineteenth century was justified as a means of affording Indians equality with other property holders. In the middle of the twentieth century, proponents of the disastrous policy of [treaty] termination employed the rhetoric of the budding civil rights movement, characterizing property owned by the United States in trust for tribes and exempted from taxation as demeaning for Indian men who had returned from fighting in World War II.

These discourses owe much of their power to a larger historically specific and identity-blind narrative. Since 1868, the 14th Amendment to the Constitution of the United States’ Equal Protection Clause (EPC) has formally prohibited “any State” from “denying to any person within its jurisdiction the equal protection of the laws”.<sup>14</sup> The 13th and 15th Amendments to the Constitution likewise prohibit slavery and the denial of the right to vote “on account of race, color, or previous condition of servitude”,<sup>15</sup> respectively. A string of post-Civil War Supreme Court

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8 These and similar terms are used frequently throughout the Trilogy (the three Marshall cases – see above n 7). According to Native American scholar Ward Churchill, such terms originated in conquest, colonialism and the “duality” of international law at the time – the reality of “one code applying to colonizers, another to the colonized”: Ward Churchill *Perversions of Justice: Indigenous Peoples and Anglo-American Law* (City Lights, San Francisco, 2003) at 39.

9 Robert Williams “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man’s Indian Jurisprudence” (1986) *Wis L Rev* 219 at 260–265.

10 At 260–265.

11 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC).

12 Williams, above n 9.

13 Carole Goldberg “American Indians and ‘Preferential Treatment’” (2002) 49 *UCLA L Rev* 943 at 944–945. For instance, “[e]qual rights and antipaternalism rhetoric also permeated ... the 1971 Alaska Native Claims Settlement Act, which substituted Native corporations for the Bureau of Indian Affairs as the recipients of lands obtained in settlement” and the 1978 Native American Equal Opportunity Act Bill, which “sought to nullify all treaties entered into by the United States with Indian nations, to terminate all separate or special legal protections of Indians, and to end federal supervision over the property and members of Indian tribes.”: See Goldberg, at 945.

14 Constitution of the United States, amendment XIV, § 1.

15 Amendment XV § 1.

decisions including *The Slaughterhouse Cases* (1872),<sup>16</sup> *The Civil Rights Cases* (1883)<sup>17</sup> and *Plessy v Ferguson* (1896)<sup>18</sup> interpreted equality in a highly formalised form, which condoned de facto and de jure discrimination, including separate-but-equal facilities.<sup>19</sup>

Decades and generations later, the Supreme Court held that separate-but-equal schools for African-American children violated the EPC in the landmark *Brown v Board of Education of Topeka, Kansas* (1954).<sup>20</sup> Equality required homogeneity. African-American children were entitled to go to the *same* schools, access the *same* facilities and resources and have the *same* teachers as Anglo-American children. Its sequel, *Brown v Board of Education II* (1955)<sup>21</sup> mandated race-aware positive measures to ensure equality. Into the 1970s, federal courts judged that the 14th Amendment imposed an “affirmative duty” and ordered local authorities to take concrete steps, including “compulsory integration”,<sup>22</sup> redrawing school zones and bussing,<sup>23</sup> in order to integrate African-American learners into Anglo-American schools. Through its bussing decisions, “[t]he Supreme Court established strong precedent for race-based remedial measures”.<sup>24</sup> Affirmative action was bolstered by President Lyndon Johnson’s signing of Executive Order 11246,<sup>25</sup> which required the Labor Department to ensure that all federal government contractors were non-discriminatory in their employment practices. Goals of diversity led to the targeted recruitment of minority workers. Eventually, private and public educational institutions and businesses nationwide adopted similar policies to be consistent with the government, as failure to do so could result in loss of federal contracts or funds.<sup>26</sup>

Equality had been interpreted in substantive *everyone* and *no-one* terms – that is, everyone was guaranteed the right to equal protection while denial of that right to anyone or the negatively identified *no-one* was prohibited. Equality had, however, also been interpreted in *someone* terms. Specific identities – the former slave and segregated African-American learner – were recognised in law as members of a particular group within society, which had historically been, and continued

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16 *Slaughterhouse Cases* 83 US 36 (1872).

17 *Civil Rights Cases* 109 US 3 (1883).

18 *Plessy v Ferguson* 163 US 537 (1896).

19 At 538, per majority.

20 *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) [*Brown I*].

21 *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955) [*Brown II*].

22 *Green v County School Board of New Kent County* 391 US 430 (1968) at 437–438 and 441–442.

23 *Swann v Charlotte-Mecklenburg Board of Education* 402 US 1 (1971) at 27–31. This was based on the fact that a white student, for instance, was likely to meet only other white students when she attended the school closest to her, regardless of the admissions policy.

24 Carl Livingston “Affirmative Action on Trial: The Retraction of Affirmative Action and the Case for Its Retention” (1996) 40 *How LJ* 145.

25 Also see President John F Kennedy’s Executive Order 10925, signed in 1961, which created the President’s Committee on Equal Employment Opportunity.

26 Lee Epstein and Thomas G Walker *Constitutional Law: Rights, Liberties, and Justice (Constitutional Law for a Changing America)* (8th ed, SAGE, Thousand Oaks, California, 2013) at 690.

to be, discriminated against. Positive measures demonstrated an awareness that group identity attracts de facto disparities in real-time.<sup>27</sup>

### B. Reverse Discrimination and Indigenous Narratives

Reverse discrimination cases in the 1970s invoked the Equal Protection Clause or legislation descending from it and dramatically altered the tone of *everyone/no-one* and *someone* narratives. In *McDonald v Santa Fe Trail Transportation Co* (1976),<sup>28</sup> Anglo-American employees, dismissed for misbehaviour, successfully sued their employer when an African-American employee guilty of the same misbehaviour was not similarly dismissed. The Supreme Court held that § 1981 of Title 42 of the United States Code – a descendant of both the 13th and 14th Amendments – “prohibits racial discrimination ... against white persons as well as non-white persons”.<sup>29</sup> In *Regents of University of California v Bakke* (1978),<sup>30</sup> where the 14th Amendment was invoked directly, the Supreme Court outlawed the use of both racial quotas and separate tracks for such admissions. While public educational institutions could continue to use race as a factor in admissions, such policies would trigger the highest level of judicial review – strict scrutiny – and had to be “tailored” to a “compelling governmental interest” and be “necessary”.<sup>31</sup> Later decisions would require that the policy be “narrowly tailored”,<sup>32</sup> a standard usually “fatal” to any policy.<sup>33</sup>

The success of reverse discrimination arguments in federal courts demonstrated the persuasive power of a more *adamant everyone/no-one* narrative, which presumed that identity-awareness in admissions or employment amounted to racial discrimination. *Brown*’s historico-legal context<sup>34</sup> appeared forgotten and, paradoxically, the measure of equality and non-discrimination had shifted from parity with the privileged majority to parity with the historically disadvantaged minority. Judicial concern had similarly shifted from actual and intentional discrimination targeting certain racial groups to inadvertent, potential disadvantage to non-minority individuals.

27 The equality narratives introduced throughout this article are discussed in greater detail in my doctoral thesis: Keakaokawai Varner Hemi “Everyone, no-one, someone and the Native Hawaiian learner: How expanded equality narratives might account for guarantee/reality gaps, historico-legal context and an admission policy which is actually levelling the playing field” (Doctor of Philosophy (PhD) Dissertation, University of Waikato, 2016).

28 *McDonald v Santa Fe Trail Transportation Co* 427 US 273 (1976).

29 At 278–279.

30 *Regents of the University of California v Bakke* 438 US 265 (1978).

31 Ironically, the *Bakke* majority relied on the Japanese-American internment cases of *Hirabayashi v United States* 320 US 81 (1943) and *Korematsu v United States* 323 US 214 (1944), which established that “[r]acial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny”. Strict scrutiny required any policy to meet two criteria: compelling government interest in the policy and that the policy be tailored to further that interest. “Compelling” required that the court weigh the value of policies on a case-by-case basis against the “burden” which the individual who is disadvantaged by the policy is being asked to bear or “suffer”. The policy also had to be “necessary” to achieve the compelling government interest.

32 See *City of Richmond v JA Croson Co* 488 US 469 (1989).

33 Or “strict in theory but fatal in fact”: Eric Yamamoto quoted in Avis Poai and Susan Serrano “Alii Trusts” in Melody MacKenzie, Susan Serrano and Kapua’ala Sproat (eds) *Native Hawaiian Law: A Treatise* (Native Hawaiian Legal Corporation, Ka Huli Ao Center for Excellence in Native Hawaiian Law at the William S Richardson School of Law and University of Hawai’i at Mānoa, Honolulu, 2015) 1168 at 1229. Yamamoto explained, “Over time, the U.S. Supreme Court transformed the strict scrutiny analysis from one that protects minorities to one that invalidates all racial classifications”.

34 See Part IIA above: *Brown v Board of Education of Topeka, Kansas* 347 US 483 (1954) and *Brown v Board of Education of Topeka, Kansas* 349 US 294 (1955).

In this narrative climate, Indigenous rights were once more assailed in the name of equality. In *Morton v Mancari* (1974),<sup>35</sup> the Bureau of Indian Affairs's hiring preference for Native Americans was upheld by the Supreme Court against a reverse discrimination challenge via the 14th Amendment from a non-Indigenous and unsuccessful applicant. A tribe's right to determine membership internally was also protected in *Santa Clara Pueblo v Martinez*<sup>36</sup> against a former tribe member's EPC challenge. In both cases, tribal sovereignty and narratives of self-determination won out. *Mancari* delineated a clear exception to *adamant everyone/no-one* narratives for government bodies which serve Native Americans, based in the political relationship between tribes and the federal government rather than any racial identity. The Court also applied a rational basis of judicial review "with a wide latitude",<sup>37</sup> a standard only requiring that the policy be rationally related to a legitimate government interest.<sup>38</sup> *Mancari*, however, has continued to be challenged. In recent cases such as *Williams v Babbitt*<sup>39</sup> – where legislation limiting traditional reindeer herding rights to Alaskan Natives was challenged under the EPC – federal courts have shown that they are eager to apply strict scrutiny tests to Indigenous rights, despite *Mancari*, in the name of identity-blind equality.<sup>40</sup> *Morton v Mancari* continues to be "unrelent[ing] assault[ed]" via *everyone/no-one* narratives.<sup>41</sup>

A similar narrative featured in *Rice v Cayetano*<sup>42</sup> where the voting scheme of the Office of Hawaiian Affairs (OHA) – a state government agency specifically established to oversee the use of funds and land set aside for Native Hawaiians in trust – was successfully challenged under the 15th Amendment by a wealthy non-Hawaiian rancher on the Big Island. This state body resembles both the federal Bureau of Indian Affairs and a tribal entity, given its mission and fiduciary role and as a vehicle of self-determination for Native Hawaiians – or something that looks a lot like a *Mancari* body. As such, only Native Hawaiians have been allowed to vote in elections which determine the make-up of the OHA's Board of Trustees. In *Rice*, however, the Supreme Court ruled that Native Hawaiian "[a]ncestry can be a proxy for race."<sup>43</sup> Despite its consistency with *Mancari* policies and

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35 *Morton v Mancari* 417 US 535 (1974).

36 *Santa Clara Pueblo v Martinez* 436 US 49 (1978). In *Martinez*, the plaintiff challenged the constitutionality of a Pueblo ordinance, which denied membership to children of female members who married outside the tribe on the basis of non-discrimination on the grounds of § 1302(8) of Title I of the Indian Civil Rights Act of 1968 25 USC §§ 1301–1304, which states that: "No Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws". The drafting history revealed that the section's central purpose was to "secur[e] for the American Indian the broad constitutional rights afford[ed] to other Americans," and thereby to "protect individual Indians from arbitrary and unjust actions of tribal governments".

37 *City of Cleburne v Cleburne Living Center* 473 US 432 (1985) at 440.

38 See *United States v Carolene Products Co* 304 US 144 (1938) at 152, n 4, traditionally known as Famous Footnote Four.

39 *Williams v Babbitt* 115 F 3d 657 (9th Cir 1997).

40 At 665. Kozinski J of the US Ninth Court of Appeals – who was also in the dissent in *Kamehameha Schools* (see below at Part III) – delivered the majority judgment. His Honour took the time to go through the seemingly not so hypothetical steps of applying strict scrutiny tests for equal protection to the reindeer herding legislation.

41 Gregory Smith and Caroline Mayhew "Apocalypse now: The unrelenting assault on *Morton v. Mancari*" (2013) 60 *The Federal Lawyer* 47.

42 *Rice v Cayetano* 528 US 495 (2000).

43 At 514.

voting schemes limited to persons with special interests,<sup>44</sup> the Court applied strict scrutiny to the scheme and equated it with deliberately discriminatory measures against African-Americans in the wake of slavery, including poll taxes and grandfather clauses.<sup>45</sup> The decision gave non-Native Hawaiians the right to vote in OHA elections and opened a flood of reverse discrimination cases against similar policies.<sup>46</sup>

The narratives and outcome in *Rice* are consistent with the near demise of race-based affirmative action measures in recent federal cases including *Hopwood v Texas*,<sup>47</sup> *Gratz v Bollinger*,<sup>48</sup> *Grutter v Bollinger*,<sup>49</sup> *Schuetz v Coalition to Defend Affirmative Action*<sup>50</sup> and *Fisher v University of Texas at Austin*.<sup>51</sup> Both the assaults on Indigenous rights and race-based special measures reveal an extremely homogenous and anonymous version of equality – an *adamant everyone/no-one* narrative – which is historically abstract and highly formalised. Conversely, group identity has been reduced to a minimum diversity factor amidst the matrix of admissions,<sup>52</sup> indicating an extremely *weak* or *slim someone* narrative, something even less than a token gesture towards substantive equality. Both the *adamant* and *weak* narratives would be evident in *Kamehameha*.

### III. THE SCHOOLS AND THE CASE

While Indigenous peoples are frequently depicted as mere victims of colonisation, our counter-response to such narratives has often been one of agency and action,<sup>53</sup> particularly in terms of education. The Kamehameha Schools (the Schools), a private, Indigenous education system, was first established in 1883 by the *ali'i* Princess Bernice Pauahi Bishop (Pauahi), specifically to help “indigent”<sup>54</sup> Native Hawaiian children overcome socio-economic disparities which were, even then, alarming. In her lifetime, Pauahi had witnessed disease, population decimation, landlessness,

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44 See, for instance, *Salyer Land Co v Tulare Lake Basin Water Storage Dist* 410 US 719 (1973) and *Hill v Stone* 421 US 289 (1975).

45 *Rice*, above n 42, at 506, per majority.

46 See Lahela Hiapola'ela'e Farrington Hite “Maka'ala Ke Kanaka Kahea Manu: Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy” (2009) 32 U Haw L Rev 237 at 244. Cases include *Arakaki v Cayetano* 324 F 3d 1078 (9th Cir 2003); *Carroll v Nakatani* 342 F 3d 934 (9th Cir 2003); and *Arakaki v Lingle* 477 F 3d 1048 (9th Cir 2007).

47 *Hopwood v State of Texas* 78 F 3d 932 (5th Cir 1996).

48 *Gratz v Bollinger* 539 US 244 (2003).

49 *Grutter v Bollinger* 539 US 306 (2003).

50 *Schuetz v Coalition to Defend Affirmative Action* 572 US \_\_\_\_ (2014), 134 S Ct 1623 (2014).

51 *Fisher v University of Texas at Austin* 570 US \_\_\_\_ (2013), 133 S Ct 2411 (2013) (*Fisher I*). Following *Fisher I*, the Supreme Court upheld the University of Texas' admission scheme after a second challenge by the plaintiff, Abigail Fisher: see *Fisher v University of Texas* 579 US \_\_\_\_ (2016) (*Fisher II*). The Court considered wider social implications in their decision but did submerge race in a matrix of admissions factors and relied on the scrutiny tests applied in *Grutter v Bollinger*, above n 49.

52 *Grutter*, above n 49.

53 See B Kamanamaikalani Beamer “Na Wai Ka Mana? 'Ōiwi Agency and European Imperialism in the Hawaiian Kingdom” (PhD Dissertation, University of Hawai'i, 2008); Noelani Goodyear Ka'ōpua “Rebuilding the 'Auwai: Connecting Ecology, Economy and Education in Hawaiian Schools” (2009) 5AlterNative 46 at 57–59; and Donovan C Preza “The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848” (PhD Dissertation, University of Hawai'i, 2010).

54 Thirteenth point, Last Will and Testament of Princess Bernice Pauahi Bishop, dated 31 October 1883.

poverty and other ills arising from Westernisation impact her people. She would have witnessed how the management of education in Hawai‘i was assumed by Westerners who considered Native Hawaiians to be “ignorant”, “filthy” and “lazy”, educated them for subservience, benignly neglected Hawaiian-medium schools and advocated English-only education.<sup>55</sup> In response, Pauahi established a school that would allow Native Hawaiian learners to “compete” with other groups on an equal footing.<sup>56</sup> That school has grown into an Indigenous educational system which serves “more than 47,400 learners” from preschool to high school “on its campus[es] and community-based education programs and services statewide”.<sup>57</sup>

Unsurprisingly given its purpose, the private school system has prioritised Native Hawaiians in admission for generations. There are approximately 70,000 Native Hawaiian children in Hawai‘i of relevant age but only 5,400 spots in its K-12 programmes.<sup>58</sup> Consequently, non-Native Hawaiians are rarely admitted, though lack of a blood-quantum requirement means that the student body is actually quite diverse.<sup>59</sup> In practice, this preference has produced measurable, substantive equality. Without government funding, the Schools produce students who defy the negative numbers frequently associated with Native Hawaiians in virtually every area of human well-being.<sup>60</sup> Too often, we are identified in various studies and reports by disparities vis-à-vis all other groups in the State of Hawai‘i, our own country. We often appear to be the extreme: the *most* likely to be absent, in special education and below average in all subjects; the *least* likely to attend school, graduate and continue to higher education.<sup>61</sup> At the Kamehameha Schools, however, 99 per cent graduate and 92.6 per cent go on to higher education.<sup>62</sup>

Despite this apparent levelling of the proverbial playing field, a non-Native Hawaiian teenager sued the Schools in 2002 under name suppression when he was not admitted under the policy. He was not the first Doe<sup>63</sup> nor the last<sup>64</sup> but represented by the same lawyers whose avowed mission was to eradicate affirmative action. In *adamant everyone/no-one* language, they alleged the admissions

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55 Gary Y Okihiro *Island World: A History of Hawai‘i and the United States* (University of California Press, Oakland, 2008) at 98–133.

56 Charles Bishop “Founder’s Day Speech” (19 August 2015) Kamehameha Schools/Bernice Pauahi Bishop Estate <<http://kapalama.ksbe.edu>>.

57 Poai and Serrano, above n 33, at 1194.

58 See Kamehameha Schools/Bernice Pauahi Bishop Estate “Financial Aid and Scholarships Services” <<http://apps.ksbe.edu/financialaid/>>.

59 To qualify as “Native Hawaiian”, applicants are only required to show that they had at least one Native Hawaiian ancestor prior to 31 December 1959: see Kamehameha Schools/Bernice Pauahi Bishop Estate “Hawaiian Ancestry Verification Documentation Information” <[www.ksbe.edu](http://www.ksbe.edu)>. Since Kamehameha students may qualify with *any* amount of Native Hawaiian blood under the policy, the Schools’ student population is actually quite diverse, representing some 60 ethnic groups: *Kamehameha*, above n 1, at 832, per majority.

60 See discussion in Hemi, above n 27, at 93–96.

61 See Kamehameha Schools/Bernice Pauahi Bishop Estate *Native Hawaiian Educational Assessment Update 2009: A Supplement to Ka Huaka‘i 2005* (Kamehameha Schools Research & Evaluation Division, Honolulu, 2009).

62 Linda Serra Hagedorn and others “The Academic and Occupational Outcomes of Private Residential High School Student Instruction” (2005) 13 Pac Ed Res J 21 at 33–34.

63 See *Rice v Cayetano* 528 US 495 (2000); *Mohica-Cummings v Kamehameha Schools* No CV0300441 (D Haw dismissed December 8, 2003) and *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003). See Poai and Serrano, above n 33, for an in-depth discussion on these cases.

64 See *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 625 F 3d 1182 (9th Cir 2010) brought by a similar group of plaintiffs who were also represented by Eric Grant.

policy violated § 1981 of Title 42 (Equal Rights Under the Law 42 USC). Three panels of judges struggled to decide if the admissions policy *was* discriminatory or a measure of equality.

### A. *Equality and the Native Hawaiian Learner*

In 2003, Judge Kay, in the United States District Court for the District of Hawai‘i,<sup>65</sup> applied an adapted or “flexible”<sup>66</sup> version of the test established in *Johnson v Transportation Agency*,<sup>67</sup> where the Supreme Court applied a Title VII standard to an affirmative action policy in private employment,<sup>68</sup> though such tests were “not entirely analogous” to the circumstances of Kamehameha Schools.<sup>69</sup> Prior to *Johnson*, *United Steelworkers of America v Weber*<sup>70</sup> had protected a private employment affirmative action plan and held that intermediary Title VII standards, rather than strict scrutiny, were appropriate for § 1981 claims.<sup>71</sup> Together, the *Weber-Johnson* criteria were three-fold: the admission policy must respond to a “manifest imbalance” between Native Hawaiian children and others in education, must not unnecessarily trammel the rights of members of non-preferred groups and must do no more than necessary to achieve “parity” between groups.<sup>72</sup> Judge Kay held that a “manifest imbalance” in education between Native Hawaiians and other children justified the policy as a legitimate remedial measure. Judge Kay opined that “context matters” and emphasised the “exceptionally unique historical circumstances” of the policy, including the overthrow of the Kingdom of Hawai‘i by American agents, later annexation of the Islands by the United States and resulting disparities in various areas of well-being including education which resulted from those acts.<sup>73</sup>

Addressing the same facts on appeal in 2005, a three-judge panel of the Ninth Circuit recognised that the admission policy was purposefully<sup>74</sup> conscious of Native Hawaiian ancestry and that, as *Rice*<sup>75</sup> established, ancestry could be a proxy for race. This admission of “racial” preference triggered a rebuttable but inferred presumption of unlawful racial discrimination. Following *Patterson v McLean Credit Union* (1989), the Schools now bore the burden of proving that it had

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65 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 295 F Supp 2d 1141 (D Haw 2003).

66 At 1166.

67 *Johnson v Transportation Agency* 480 US 616 (1987).

68 Title VII “Equal Employment Opportunity” of the Civil Rights Act of 1964; see 42 USC § 2000e-2(a) – Unlawful employment practices: “It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin”.

69 *Doe v Kamehameha Schools*, above n 64, at 1164.

70 *United Steelworkers of America v Weber* 443 US 193 (1979).

71 Discussed *Doe v Kamehameha Schools*, above n 64, at 1164.

72 At 1172.

73 At 1145 and 1148.

74 Following *General Building Contractors Assoc v Pennsylvania* 458 US 375 (1982) a violation of § 1981 must be purposeful (Equal Rights Under the Law 42 USC § 1981).

75 *Rice*, above n 42.



“legitimate non-discriminatory reasons for its conduct”.<sup>76</sup> Had the Schools received any federal funding, strict scrutiny would have applied.<sup>77</sup> As it was, the majority equated the identity-awareness of the policy with racial discrimination and “rigidly applied a formerly flexible contextual analysis, which had been developed to assess private employment affirmative action programs”.<sup>78</sup> In a 2–1 decision, the majority applied the *Weber-Johnson* criteria rigorously. In their opinion, the majority de-emphasised the manifest imbalance or purpose of the policy, finding that “[e]ven if we assumed that some, limited racial preferences might be appropriate in order for the Schools to advance its mission” the policy operated as “an absolute bar on the basis of race” to the admission of non-Native Hawaiian students, since such students are rarely admitted.<sup>79</sup> The policy which had helped so many was somehow unconstitutional.

In 2006, a slim 8–7 majority of a full sitting of the Ninth Circuit overturned that decision holding that the policy constituted a legitimate affirmative action policy aimed at racial parity – but only after modifying the *Weber-Johnson* test to judge the manifest imbalance in the external setting of the state of Hawai‘i and not merely the Schools. Five members of the majority were also persuaded that the policy was justified by the exception recognised in *Mancari*.<sup>80</sup> Under imminent threat of appeal<sup>81</sup> to the same Supreme Court bench which had decided *Rice*, the Schools settled with Doe for a sizeable sum in 2007.<sup>82</sup>

When the Schools petitioned for a rehearing en banc, they had been joined by 45 amici curiae representing state and local government, civil rights organisations, Indigenous nations and minority groups farther afield,<sup>83</sup> who argued that the policy was a measure of Indigenous self-determination by, and restorative justice for, a historically unique Indigenous people to whom § 1981 tests were misapplied.<sup>84</sup> The Ninth Circuit’s reasoning, however, entertained only three possible versions of the admissions policy. It was either an affront to *everyone/no-one* equality guarantees, consistent with affirmative action via an ever slimmer *someone* narrative or another Indigenous exception to the general rule of identity-blindness under *Mancari*. Failing to recognise the policy as a measure of equality itself, however, contradicted the actual success of the Schools in overcoming real disparities in education for the very vulnerable Native Hawaiian learner. Narrated as an exception to *everyone/no-one* narratives, even *Mancari* fails to account fully for Indigenous

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76 *Patterson v McLean Credit Union* 491 US 164 (1989).

77 Per *Grutter*, above n 49, and *Gratz*, above n 48.

78 Poai and Serrano, above n 33, at 1189.

79 *Doe v Kamehameha Schools/Bernice Pauahi Bishop Estate* 416 F 3d 1025 (9th Cir 2005) at 1042.

80 *Morton v Mancari* 417 US 535 (1974).

81 Eric Grant, lead counsel for Doe, describes how settlement occurred the Friday before the Supreme Court was set to hear the petition on Monday: Eric Grant “*Doe v. Kamehameha Schools: The Undiscovered Opinion*” 30 U Haw L Rev 355 at 355.

82 See Jim Dooley “Kamehameha Schools settled lawsuit for \$7M” *Honolulu Advertiser* (online ed, Honolulu, 2 August 2008).

83 The Schools were joined by amici curiae representing the highest levels of state and local government, including the Attorney-General of the State of Hawai‘i, the City and County of Honolulu, and the Hawai‘i Civil Rights Commission. They were also joined by other Indigenous and minority bodies farther afield, including the Native American Rights Fund, Alaskan Federation of Natives, Japanese American Citizens League and Centro Legal de la Raza, a Latino-American organisation.

84 See Susan Serrano and others “Restorative Justice for Hawai‘i’s First People: Selected Amicus Curiae Briefs in *Doe v. Kamehameha Schools*” (2007) 14 Asian Am LJ 205.

self-determination rights which precede liberal notions of equality. Such inconsistencies suggest that none of these narratives actually fit the policy.

#### IV. EVERYONE, NO ONE AND SOMEONE IN A SISTER SETTLER JURISDICTION

Aotearoa New Zealand is another former settler jurisdiction which continues to struggle with a history of colonisation, assimilation, discrimination and present disparities between its Indigenous peoples and other groups resulting from that history. For much of its post-Treaty of Waitangi history, education law and policy in New Zealand was characterised by inherently prejudicial civilisation, assimilation, forced integration and outright discrimination which targeted Indigenous identity.<sup>85</sup> This de jure and de facto discrimination had “long-term and intergenerational” effects.<sup>86</sup> Māori are also often depicted in education statistics in terms of dramatic disparities and discrimination.<sup>87</sup> Here, too, Indigenous peoples have responded to denigrating narratives in education and law by acting to re-establish their own educational systems where education is provided by Māori for Māori in a way that is Māori. As real-time expressions of self-determination, *kōhanga reo*, *kura kaupapa* Māori and other grassroots initiatives<sup>88</sup> have resulted in measurable de facto equality and are now recognised in legislation and are publicly funded. Other public educational institutions have also implemented special measures aimed at creating parity between Māori learners and other groups. As in Hawaii, Indigenous schools which prefer Māori in admissions produce students who defy the terrible numbers often associated with Māori learners and evidence a real-time equality.<sup>89</sup>

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85 Linda Tuhiwai Smith has written that “the major agency for imposing ... positional superiority over knowledge, language and culture was colonial education ... . Numerous accounts across nations now attest to the critical role played by schools in assimilating colonized peoples, and in the systematic, frequently brutal, forms of denial of indigenous languages, knowledges and cultures.”: Linda Tuhiwai Smith *Decolonizing Methodologies: Research and Indigenous Peoples* (2nd ed, Zed Books, London, 2012) at 126–127. Also see Huia Tomlins-Jahnke and Te Rina Warren “Full, exclusive and undisturbed possession: Māori education and the Treaty” in Veronica MH Tawhai and Katarina Gray-Sharp (eds) *‘Always Speaking’: The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011) 21 at 22; Judith A Simon and Linda Tuhiwai Smith *The Native Schools System 1867-1969: Ngā Kura Māori* (Auckland University Press, Auckland, 1998) at 259; JM Barrington *Separate but Equal? Māori Schools and the Crown 1867-1969* (Victoria University Press, Wellington, 2008) at 15 and 20–21; and Peter Caccioppoli and Rhys Cullen *Māori Education* (Kotahi Media Ltd, Auckland, 2006) at 60.

86 Tomlins-Jahnke and Warren, above n 85, at 23. Human Rights Commission *A fair go for all? Rite tahi tātou katoa? Addressing structural discrimination in public services* (July 2012) at 2.

87 Human Rights Commission, above n 86, at 50, 53 and 54. Māori learners aged 15–19 illustrate this. In terms of participation in education, Māori youth have a 96.3 per cent rate at age 15, 73.7 per cent rate at age 16, a 50.6 per cent rate at age 17 and a 10.6 per cent rate at age 19 compared with non-Māori figures of 98.5 per cent, 91.8 per cent, 75.4 per cent and 17.9 per cent for the same ages. In regards to qualifications, Māori learners “lag behind” in Level 3 NCEA achievement, only 20 per cent of Māori School leavers achieve University Entrance compared with more than two-fifths of non-Māori, and Māori have a higher rate of learners leaving with no qualification at all (13 per cent) compared with non-Māori (5 per cent): Te Puni Kōkiri “Ko Ngā Rangatahi Māori i te Rāngai Mātauranga me te Whiwhi Mahi: Māori Youth in Education and Employment” (2012) Te Puni Kōkiri/Ministry of Māori Development <[www.tpk.govt.nz](http://www.tpk.govt.nz)> at 6–8. In other words, Māori tend to stay in mainstream education for a shorter time than their non-Māori counterparts and achieve fewer qualifications.

88 Graham Hingangaroa Smith “Indigenous Struggle for the Transformation of Education and Schooling” (keynote address to the Alaskan Federation of Natives (AFN) Convention, Anchorage, Alaska, October 2003) at first paragraph.

89 See forthcoming article, Keakaokawai Varner Hemi “Māori Education as Justice and Reckoning” in the Yearbook of New Zealand Jurisprudence.

In contrast to the current persuasiveness of *adamant everyone/no-one* narratives in the United States, however, there are few legal challenges to admission policies which either explicitly or implicitly prefer Māori. New Zealand's unwritten constitution prioritises a homogenous and anonymous rightsholder identity in terms of equality, but there is almost no jurisprudence on reverse discrimination. Instead, three alternative equality narratives are readily apparent: the *substantive everyone/no-one*, *strong* or *complex someone* and *multi-narrative Indigenous learner*.

### A. A Substantive Everyone/No one

New Zealand law initially appears to display an almost American *everyone/no-one* narrative. While not guaranteeing equal protection per se, the New Zealand Bill of Rights Act 1990 (BoRA) usually references the anonymous "no one" and the homogenous "everyone", "every person", or "every New Zealand citizen".<sup>90</sup> As Paul Rishworth and others describe, such language conveys the idea that "individuals have rights because each individual matters, and matters equally".<sup>91</sup> Section 19(1) of the BoRA also affirms "[f]reedom from discrimination".<sup>92</sup> The Human Rights Act 1993 (HRA), as in antebellum American constitutional amendments, speaks in *no-one* terms, recognising various group identities as prohibited grounds for unlawful discrimination including: "colour", "race" and "ethnic or national origins".<sup>93</sup>

New Zealand courts and tribunals have, like American federal courts, interpreted equality in terms of identical treatment. In the Court of Appeal, plaintiffs in *Quilter v Attorney-General*<sup>94</sup> argued that a failure to treat same-sex couples the same as heterosexual couples in terms of marriage constituted discrimination on the grounds of sexual orientation. The plaintiffs were unsuccessful but later courts approved Thomas J's dissenting interpretation of equality as same treatment.<sup>95</sup> In *Jian v Residence Review Board*, the High Court of New Zealand recognised "unjustifiably different treatment ... assessed by reference to an appropriate comparator group" as discrimination.<sup>96</sup>

Education is also initially expressed in *everyone/no-one* terms in legislation. Section 3 of the Education Act 1989 affirms the "Right to free primary and secondary education":<sup>97</sup>

... every person who is not an international student is entitled to free enrolment and free education at any State school or partnership school kura hourua during the period beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday.

As in *Brown*, these learners have the right to be treated the same. Sections 8 and 9 of that Act, for instance, recognise that learners with disabilities have the "same right" to education at public

90 The exception is s 20 which recognises the "[r]ights of minorities" and the individual – that is "[a] person who belongs to an ethnic, religious, or linguistic minority in New Zealand".

91 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 368.

92 New Zealand Bill of Rights Act 1990, s 19.

93 See Human Rights Act 1993, s 21 "Prohibited grounds of discrimination".

94 *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA).

95 Thomas J's reasoning was also persuasive with parliamentarians in 2013 when the Marriage (Definition of Marriage) Amendment Act 2013 (making same-sex marriage legal in New Zealand) passed on 19 August 2013, based largely on arguments which interpreted equality as same treatment.

96 *Jian v Residence Review Board* HC Wellington CIV-2005-485-1600, 3 August 2006.

97 Education Act 1989, s 3.

schools “as people who do not”.<sup>98</sup> As in American *no-one* narratives, education is expressed elsewhere in terms of non-discrimination. Under the HRA, the right to non-discrimination applies to “[v]ocational training bodies”,<sup>99</sup> “educational establishments”,<sup>100</sup> and, like the American § 1981, contractual relationships and the “[p]rovision of goods and services”.<sup>101</sup>

New Zealand’s *everyone/no-one* narratives, however, are much more substantively aware than their American version. Section 65 of the HRA recognises:<sup>102</sup>

Where any conduct, practice, requirement, or condition that is not apparently in contravention of any provision of this Part *has the effect* of treating a person or group of persons differently on 1 of the prohibited grounds of discrimination in a situation where such treatment would be unlawful under any provision of this Part other than this section, that conduct, practice, condition, or requirement shall be unlawful under that provision unless the person whose conduct or practice is in issue, or who imposes the condition or requirement, establishes good reason for it.

Similarly, the High Court has recognised<sup>103</sup> that discrimination can be indirect or “neutral on its face but ha[s] ... a disproportionate effect on” an identifiable group because of a particular characteristic of that group.<sup>104</sup> The Court has suggested that the effect of differential treatment on an appropriate comparator person or group will reveal the discrimination.<sup>105</sup> The Human Rights Commission (HRC), established to receive complaints of discrimination, has similarly stated:<sup>106</sup>

Formal equality is equal treatment before the law. It reflects the Aristotelian notion that, to ensure consistent treatment, like should be treated alike. However, equal treatment does not always ensure equal outcomes, because past or ongoing discrimination can mean that equal treatment simply reinforces existing inequalities. To achieve substantive equality—that is, equality of outcomes—some groups will need to be treated differently. It follows that not all different treatment will be considered discriminatory...

Schools whose admissions policies are designed to effect substantive equality are consistent with an *everyone/no-one* narrative. Where the purpose of the policy has been gravely minimised in American federal jurisprudence, New Zealand law has long recognised that educational institutions

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98 Education Act 1989, ss 8 and 9.

99 Human Rights Act 1993, s 40.

100 Human Rights Act 1993, s 57.

101 Human Rights Act 1993, s 44.

102 Human Rights Act 1993, s 65 (emphasis added). The Human Rights Commission Act 1977 had previously made “discrimination by subterfuge” unlawful: Human Rights Commission Act, s 27. Also see *Proceedings Commissioner v Air New Zealand* (1988) 7 NZAR 462 (EOT).

103 *Jian*, above n 96, and *Talley’s Fisheries Ltd v Lewis* HC Wellington CIV-2005-485-1750, 14 June 2007.

104 See commentary in Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 73–74. Also compare *Jian*, above n 96, at [24].

105 *Claymore Management Ltd v Anderson* [2003] 2 NZLR 537 (HC). In *Quilter*, Tipping J in the majority had asked – not unlike the intermediate scrutiny test in *Kamehameha* – whether the “distinction or differentiation has the effect of imposing burdens, obligations or disadvantages on some individual or group not imposed on others”: *Quilter*, above n 94, at 575. Justice Thomas, in dissent, considered the Marriage Act 1955 discriminatory at the outset because it treated homosexual couples differently: *Quilter*, above n 94, at 540.

106 Human Rights Commission *Human Rights in New Zealand 2010: Ngā Tika Tangata O Aotearoa* (December 2010) at 27.

which prefer a certain “sex, race, colour, or religious belief”<sup>107</sup> in admissions do not necessarily breach the legislation where there is inequality between groups and where it is done to remedy those disparities.<sup>108</sup> This more substantive version of equality anticipates a privately or publicly funded school which prefers certain minority identities in admission, when such preference would certainly constitute trammelling under United States federal law and be fatal to the policy.

### B. *A More Complex Someone*

New Zealand equality narratives are comfortable with group identity where recognising such is necessary to achieve substantive equality. Section 58 of the HRA recognises in unambiguous terms certain “[e]xceptions in relation to establishments for particular groups”:<sup>109</sup>

An educational establishment maintained *wholly* or *principally* for students of one sex, *race*, or religious belief, or for students with a particular disability, or for students in a particular age group, or the authority responsible for the control of any such establishment, does not commit a breach of section 57 by refusing to admit students of a different sex, race, or religious belief, or students not having that disability or not being in that age group.

The BoRA also recognises a more complex version of what constitutes a minority. Where American federal law often appears preoccupied with a racialised, black–white dichotomy, the BoRA recognises the *human* rights of individual members of “ethnic, religious and linguistic minorities” who have the right “in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority”.<sup>110</sup> The Ministry of Justice has previously approved a definition of “minority”,<sup>111</sup> which distinguishes Pacific Island communities<sup>112</sup> from Māori as *tangata whenua*, a distinction which further distances Indigenous identity from a racial categorisation.

The HRA provides an unambiguous list of groups to which such exceptions apply. While at least 20 sections of the HRA identify prohibited grounds, 31 recognise exceptions. Other provisions justify different treatment in terms of identity relative to religion, privacy, age, politics, family status or where certain employment<sup>113</sup> is concerned. Rather than a weakened standard, these exceptions were drafted to be explicit.<sup>114</sup>

107 Human Rights Commission Act 1977, s 26(2).

108 Human Rights Commission Act 1977, s 28. Ironically, during an era when the substantial equality reasoning of *Brown* (*Brown I* and *Brown II*, above nn 20 and 21) was already beginning to be forgotten, New Zealand drew a clear line between outright discrimination and special measures meant to overcome discrimination.

109 Human Rights Act 1993, s 58(1) (emphasis added).

110 Bill of Rights Act 1990, s 20. Section 19’s non-discrimination clause in that Act is immediately followed by a recognition of minority rights in s 20.

111 The Ministry of Justice recognizes international definitions of minorities: see “International and domestic law on minorities” (Ministry of Justice, 23 October 2016) at [5.2].

112 “There appears to be little doubt that Pacific people in New Zealand have the status of ‘minority’ groups at international law, to whom rights flow under Article 27 of the [International Covenant on Civil and Political Rights 1966], as members of their national groups. In light of their sense of shared identity, it is also probable that Pacific people collectively constitute a minority group at international law”: see Ministry of Justice, above n 111, at [5.2].

113 See respectively, Human Rights Act 1993, ss 27, 28, 30, 32 and 31.

114 Such sections are intended “[f]or the avoidance of doubt”: see Human Rights Act 1993, s 74.

The HRA also provides a straightforward three-step test which prioritises the purpose of the policy and a more substantive version of equality. Section 73 of the HRA recognises:<sup>115</sup>

Measures to ensure equality

- (1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part shall not constitute such a breach if—
  - (a) it is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part; and
  - (b) those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

Section 19(2) of the BoRA reiterates:<sup>116</sup>

Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

When examining a complaint, the Human Rights Review Tribunal (HRRT)<sup>117</sup> can similarly approve a prima facie discriminatory practice – in effect, a practice where some identification takes place – if there is a “genuine occupational qualification” or “genuine justification”.<sup>118</sup> Such emphasis on purpose allows previously conflicting *someone* and *everyone/no-one* narratives to sit comfortably together given their consistency with a more substantive version of equality and non-discrimination.

## V. NEW ZEALAND COURTS, *BAKKE*-LIKE QUOTAS AND TOTAL RESERVATION

The complementarity of *substantive everyone/no-one* and *strong someone* narratives is illustrated in *Amaltal Fishing Co v Nelson Polytechnic*.<sup>119</sup> The facts resemble *Bakke*'s quotas,<sup>120</sup> while the Complaints Review Tribunal's reasoning recalls the dissent in *Kamehameha*. Crucial differences, however, are worth noting.

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115 Human Rights Act 1993, s 73(1).

116 New Zealand Bill of Rights Act 1990, s 19(2).

117 As well as the Privacy Commissioner (Privacy Act 1993) and the Health and Disability Commissioner (Health and Disability Commissioner Act 1994); see “Human Rights Review Tribunal”, Ministry of Justice website, found at <[www.justice.govt.nz/tribunals/human-rights-review-tribunal](http://www.justice.govt.nz/tribunals/human-rights-review-tribunal)>, dated 14 March 2017.

118 See the Human Rights Act 1993, s 97 and *Avis Rent-A-Car Ltd v Proceedings Commissioner* (1998) 5 HRNZ 501 (CRT).

119 *Amaltal Fishing Co Ltd v Nelson Polytechnic (No 2)* (1996) 2 HRNZ 225 (CRT) [*Amaltal II*]. Historically, the case spans a period of transition during which the first generation of New Zealand human rights legislation, namely the Race Relations Act 1971 and the Human Rights Commission Act 1977, which had been frequently amended over the years, was repealed by the enactment of the Human Rights Act 1993. The case was pre-Human Rights Review Tribunal. The human rights complaint in question was brought before its forerunner, the Complaints Review Tribunal.

120 *Bakke*, above n 30.

### A. New Zealand's Kamehameha?

A fishing training course was offered at Nelson Polytechnic only twice a year with numbers limited to 14 places in each intake. The Polytechnic reserved a certain number of places in the course for Māori and Pacific Islanders. Fees for “target group” members were government subsidised while fees for others were not. Consistent with the agreement, three spaces in the first round of 1994 were reserved for target group members while all fourteen spots in the second round were reserved for the target group. The plaintiff, a fishing company which frequently sponsored individuals for the course,<sup>121</sup> alleged discrimination under the Race Relations Act 1971 (RRA), the Human Rights Commission Act 1977<sup>122</sup> and HRA<sup>123</sup> when one of its intended sponsored employees failed to secure a spot in either intake. When its complaint was not upheld by the Race Relations Conciliator, Amaltal appealed to the Complaints Review Tribunal (CRT).

Giving judgment on substantive issues in 1996,<sup>124</sup> the Tribunal recognised a *prima facie*<sup>125</sup> but rebuttable presumption of unlawful racial discrimination once the Polytechnic's status as a provider of services to the public,<sup>126</sup> vocational training institution<sup>127</sup> or educational establishment<sup>128</sup> had been established and the use of race was shown to be the factor which determined rejection or admission.<sup>129</sup> Thus, the Polytechnic had discriminated against Amaltal's employee by failing to consider him for the eight spots in the first round and for any spots in the second round because he was not a member of the target group.<sup>130</sup> Regarding the first round, the Tribunal, found that:<sup>131</sup>

In relation to each one of those nine unsuccessful applicants [outside the target group] the reason for refusing or failing to admit the applicant to one of these three reserve places was race: race was the criterion on which some were admitted and others were rejected ...

The object of the Act[s] is to secure equality of treatment by rendering [race] irrelevant, and when that characteristic has in fact governed the decision it seems to us to be beside the point that the same decision might or might not have been arrived at had other, relevant, factors been considered.

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121 As a procedural issue, the Tribunal found that the company fulfilled the criteria for an “aggrieved person” under the Race Relations Act 1971, s 17; Human Rights Commission Act 1977, s 38; and the Human Rights Act 1993, s 83: *Amaltal II*, above n 119, at 236.

122 See discussion in Gordon Anderson and others *Mazengarb's Employment Law (NZ)* (online looseleaf ed, LexisNexis) at [4000.1].

123 Specifically, s 4 of the Race Relations Act 1971, s 22 of the Human Rights Commission Act 1977 and s 26 of the Human Rights Act 1993, which were all active during the period of January to February 1994 when the advertising for the courses in question and decisions of acceptance were made.

124 Prior to substantive issues, the Complaints Review Tribunal determined it had jurisdiction to review the Polytechnic in terms of human rights legislation: *Amaltal Fishing Co Ltd v Nelson Polytechnic* (1994) 1 HRNZ 369 (CRT) [*Amaltal I*] at 373.

125 *Amaltal II*, above n 119, at 241 and 244.

126 Human Rights Act 1993, ss 44 and 67; Human Rights Commission Act 1977, s 24; and Race Relations Act 1971, s 4.

127 Human Rights Act 1993, s 40 and Human Rights Commission Act 1977, s 22.

128 Human Rights Act 1993, s 57 and Human Rights Commission Act 1977, s 26.

129 Depending on a United Kingdom case, *James v Eastleigh Borough Council* [1990] 2 All ER 607 (HL) at 618.

130 It had also breached the almost identical provisions of s 7 of the Race Relations Act 1971, s 32(1) of the Human Rights Commission Act 1977 and s 67(1) of the Human Rights Act 1993 when it advertised the same course knowing that it intended to discriminate on the basis of race.

131 *Amaltal II*, above n 119, at 237–238.

However, the Tribunal eagerly referred to the very similar provisions in s 9 of the RRA, s 29 of the HRCA and s 73(1) of the HRA, which contained three elements that would justify the policy if proven by the defendant on the balance of probabilities: the discrimination was done “in good faith”; for the purpose of assisting or advancing persons or groups; and the persons or groups in question actually did need or might “reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community”.<sup>132</sup>

Ultimately, the agreement with the government and the unlawful discrimination itself, aimed at a specific target group, proved the first two elements. The Tribunal, however, decided in favour of the plaintiff based on the curious refusal of the defendant to produce any evidence to prove the third element because they insisted that the Polytechnic was not subject to the human rights legislation. While ordering that the defendant be “[r]estrain[ed] from repeating the conduct which” constituted breaches of the Acts in question – namely, the reservation of places for members of the target group and the advertisement of such – the Tribunal:<sup>133</sup>

...[left] it open for the defendant to reserve places for members of the target group in any courses which it runs in the future providing that it complies with the requirements of s 73 of the Human Rights Act 1993.

That is, the Polytechnic would need to prove all three elements of the s 73 defence.

The case was precedent-setting, given that it was “the only decision on the interpretation of the affirmative provisions in the Human Rights Act 1993”.<sup>134</sup> In its wake, respected legal scholars suggested applying an American strict scrutiny to future policies.<sup>135</sup> Despite its human rights focus, the CRT’s reasoning seems dichotomous, even American. As in *Kamehameha* and *Rice*,<sup>136</sup> the CRT equated Indigenous identity with *race*.<sup>137</sup> A preference in admissions for the Indigenous learner automatically triggered a presumption of unlawful racial discrimination where both rounds involved *Bakke*-like quotas.<sup>138</sup> The need query recalled the “manifest imbalance” step of *Kamehameha*’s intermediate scrutiny test and ignored any *Mancari*-like<sup>139</sup> exception or prior sovereignty.

The CRT also equated educational and employment contexts<sup>140</sup> as the Ninth Circuit had in *Kamehameha*. The third element itself raised *Kamehameha*-like issues in terms of identifying the

132 Human Rights Act 1993, s 73(1)(b). See current Human Rights Act 1993, s 73(1) containing all three elements.

133 *Amaltal II*, above n 119, at 248.

134 Mai Chen and Geoffrey Palmer *Affirmative Action: A Discussion Paper* (Ministry of Justice, Discussion Paper 12, 1998) at [12.1]. Following the case, Chen and Palmer noted: “To date *Amaltal* is the only decision on the interpretation of the affirmative action provisions of the HRA. This has led to the decision being given disproportionate weight and a corresponding lack of confidence in ss 73 and 74 as a means of justifying affirmative action programmes”.

135 At [12.8.3].

136 *Kamehameha*, above n 1, and *Rice*, above n 42.

137 The actual application for the fishing courses identified the target group of the scheme as persons “of Māori or Pacific Island descent”, but throughout the decision, the Tribunal refers only to race.

138 The second round is analogous to the practical effect of the *Kamehameha* Schools policy, which rarely results in the admissions of non-Native Hawaiian students owing to the large numbers of Native Hawaiians who apply.

139 *Mancari*, above n 35.

140 The three main institutional categories which the Polytechnic fall into are provider of services to the public, vocational training establishment and, lastly, educational institution. The description of the first in s 4 of the Race Relations Act 1971 is comparable to the contractual relationship described in the American § 1981 (Equal Rights Under the Law 42 USC § 1981), while the second is directed towards preparation for employment.



appropriate comparator group. It also raised questions of *which* purposes would qualify, a query which would trigger at least intermediate scrutiny in American federal courts.<sup>141</sup> Finally, under s 73 of the HRA, the policy could only be temporary.<sup>142</sup> Thus, the only case we have in New Zealand on reverse discrimination, may not approve the *Kamehameha* admission policy.

### B. *The Loneliness of Reverse Discrimination*

The current persuasiveness of reverse discrimination reasoning in American federal courts contrasts with the scarcity of similar cases in New Zealand. Actually, *Amaltal*<sup>143</sup> is most famous for its loneliness and looks less American upon closer examination.

In retrospect, the purpose of the policy mattered to the CRT. Contrary to *Bakke*,<sup>144</sup> the CRT differentiated between policies which actually discriminate against groups and individuals and those designed to help disadvantaged groups overcome discrimination. In contrast to the wholesale denunciation of any identity-specific policy as reverse discrimination, the possibility that purpose-designed policies may promote equality is left open. In contrast to the precedent in *Bakke*, the decision appears to allow quotas, and even total reservation may be defensible under New Zealand law. While *any* reservation of places at a public school would be a *Bakke*-like quota and certainly constitute discrimination in American federal courts, the CRT allows the possibility that quotas might be justified where the policy in question meets all elements of s 73. Even the sympathetic and flexible majority in *Kamehameha* would have been unable to justify an outright total reservation of places in the second round at a public institution. The CRT did note that “[t]he legislation provides for special treatment for disadvantaged groups” and that “evidence could have been called to establish that one or both of the racial groups within the target group were in need of such special treatment.”<sup>145</sup>

Both s 19(2) of the BoRA and s 73 of the HRA legislate relatively straightforward tests for *Kamehameha*-like policies – that is, for public and private bodies – which contextualise the prima facie presumption of discrimination. In New Zealand, impact on others will be taken into account<sup>146</sup> but is not determinative per se of the policy’s lawfulness. Paul Rishworth and others have concluded that special measures under s 19(2) of the BoRA will likely be lawful where the “good faith” requirement is met and the policy benefits “persons disadvantaged because of discrimination”. Under s 73(1), however, “[i]t is enough that they be persons or groups against whom discrimination is unlawful, who need or may reasonably be supposed to need assistance of

141 See Chen and Palmer, above n 134, at [12.11]. In American federal courts, narrow tailoring and strict scrutiny have become virtually insurmountable hurdles for admissions policies, especially as both remedial and diversity-based policies have fallen out of favour with the United States Supreme Court and are only acceptable as submerg factors in the larger global matrix of admissions.

142 Chen and Palmer noted that, as in the modified *Weber-Johnson* factors (see Part III, A above), the third element of the s 73 defence only protects the measure in question until equal placement with other groups is achieved; that is, it is temporary. Again, looking for possible overseas guidance on how achievement might be measured, Chen and Palmer found the most helpful authority to be the Rehnquist Court’s *Adarand Constructors Inc v Peña* 515 US 200 (1995), where strict scrutiny was applied and the policy in question was ultimately found to be unlawful: see Chen and Palmer, above n 134, at [12.12].

143 *Amaltal II*, above n 119.

144 *Bakke*, above n 30.

145 *Amaltal II*, above n 119, at 247.

146 Human Rights Commission *Guidelines on Measures to Ensure Equality* (February 2010) at [5].

advancement.”<sup>147</sup> Meeting all three elements is much more likely given that the level of scrutiny to be applied in s 73 cases is the balance of probabilities, a standard akin to *Mancari*’s rational basis rather than *Bakke*’s strict or *Kamehameha*’s intermediate scrutiny. This relaxed scrutiny itself suggests greater narrative allowance for both quotas and total reservation.

Grant Huscroft has also stated that, while s 19(2) “contemplates the use of affirmative action as a remedial measure”, s 73(1) “contemplates the use of affirmative action as a tool of distributive justice rather than simply a remedial measure”.<sup>148</sup> Similarly, the Human Rights Commission’s *Guidelines on Measures to Ensure Equality* recognised *Kamehameha*-type measures as “part of a tool kit to address inequality” when it stated: “Measures to ensure equality are not only permitted but at times required, to ensure equality for disadvantaged groups.”<sup>149</sup> Quotas and total reservation are consistent with the proportional approach to special measures taken by the Human Rights Commission:<sup>150</sup>

The more entrenched the disadvantage the greater the need for measures to ensure equality. Where a group, for example, has been denied access to education because of their race then that group may need preferential admission to redress the resulting disadvantage.

In the wake of *Amaltal*, reverse discrimination cases are almost non-existent though discrimination cases are plentiful. Tim McBride has discussed 42 cases of note on discrimination decided by the HRRT and the courts between June 1996 and January 2010.<sup>151</sup> Only two involved policies or practices relevant to HRA ss 65, 73 or 74.<sup>152</sup> In *Kerr v Victoria University of Wellington*,<sup>153</sup> the CRT held that a university policy providing women-only space for activities including breastfeeding was justified under s 74 and possibly under s 73 as well. In *Church v Hawkes Bay Regional Council*,<sup>154</sup> the complainant’s claim that having to listen to a Māori karakia (prayer) at the end of a public meeting constituted discrimination was not upheld given s 65 of the HRA. His appeal to the High Court was similarly struck out. In contrast, more than half of the remaining cases address gendered discrimination, especially sexual harassment in the context of private employment, with the majority decided in favour of the traditionally disadvantaged group.<sup>155</sup> Only three allege racial or national origin discrimination.<sup>156</sup> In fact, racial quotas are widely used in New Zealand,

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147 Grant Huscroft “Freedom from Discrimination” in Rishworth and others, above n 91, at 390–391.

148 At 390.

149 “Where the disadvantage is not widely entrenched or applicable to the group as a whole, then the measure should be less intrusive. It also follows that if there is a less intrusive way of providing a benefit then that is preferable.” Human Rights Commission, above n 146, at [1] and [2].

150 At [7].

151 See Tim McBride *New Zealand Civil Rights Handbook* (Craig Potton Publishing, Nelson, 2010) at 336–344.

152 Section 74 approves special measures related to pregnancy and motherhood.

153 *Kerr v Victoria University of Wellington* CRT28/96, 18 March 1997.

154 *Church v Hawkes Bay Regional Council* CRT04/01, 26 March 2001.

155 The Human Rights Act 1993 appears to have the capacity to protect women in *no-one* terms, while retaining the flexibility to recognise special measures which espouse a more *complex someone* narrative.

156 In terms of ss 44, 61, 62 or 65 of the Human Rights Act 1993, see: *Proceedings Commissioner v Archer* CRT16/96, 25 June 1996; *Proceedings Commissioner v Vallant Hooker & Partners* CRT5/98, 18 December 1998; and *B v Commissioner of Inland Revenue* CRT22/93, 6/99, 10 March 1999.

particularly in university admissions. Although sometimes debated in the media or for political grandstanding,<sup>157</sup> there are few legal challenges to such policies.

Thus, the emphasis of the CRT on human rights in *Amaltal* could unwittingly signal what the result may not have outright. In contrast to American trends of adamance, New Zealand narratives recall human rights obligations and *Brown*-like<sup>158</sup> goals of substantive rather than merely formal equality. The only case on affirmative action in New Zealand generously suggests that special measures are defensible where all elements of s 73 were met. Where diversity submerged in the matrix of admissions may be the only viable ground for affirmative action in public schools left in federal courts, diversity-based policies and programmes might not even be considered special measures in New Zealand.<sup>159</sup>

## VI. A COMPLEX INDIGENOUS LEARNER MULTI-NARRATIVE

The *Amaltal* decision raises other questions relative to Māori identity. It was argued purely on the basis of *race* and without reference to the Treaty of Waitangi or its principles (that is, without reference to a specifically Indigenous, *Mancari*-type equality narrative based on self-determination and political rather than racial status, as was the case in *Kamehameha*). New Zealand law, however, further evidences a *complex*, specifically *Indigenous* equality narrative, which seemingly exceeds *Mancari*. Rather than conflict with equality, Māori identity creates a narrative nexus between *substantive everyone/no-one*, *complex someone* and *Indigenous learner* narratives. This equality multi-narrative is apparent in legal responses to the Foreshore and Seabed legislation and Treaty of Waitangi interpretation by the Waitangi Tribunal.

### A. Treaty as Indigenous Multi-narrative

The text of the Treaty of Waitangi brings two equality narratives together. Article II of the Treaty reserves specifically *Indigenous* rights to Māori which have nothing to do with a racial identity and everything to do with the political relationship between the Crown and Māori as “constituent” parties to the Treaty.<sup>160</sup> Given Article III’s guarantee to Māori of “all the Rights and Privileges of British Subjects”, the Treaty is also New Zealand’s most straightforward legal statement of equality and an *everyone* narrative. Thus, the “foundation”<sup>161</sup> document of New Zealand recognises

157 See, for instance, Martin Johnson “Students Stung by Quota Backlash” *New Zealand Herald* (online edition, Auckland, 1 March 2004).

158 *Brown*, above nn 20 and 21.

159 See discussion in Paul Callister and Belinda Hill *Special Measures to Reduce Ethnic Disadvantage in New Zealand: And Examination of Their Role* (Institute of Policy Studies, Wellington, 2007) at 7–8.

160 The Treaty appears to be an example of Indigenous agency not unlike that in Hawai‘i. It was negotiated and debated. The debate focused on the retention of self-government. Rather than a completely one-sided affair, “Māori were autonomous” in that process. The Māori version was “strategically” crafted to meet Māori expectations and concerns: Jessica Orsman “The Treaty of Waitangi as an exercise of Māori constituent power” (2012) 43 VULWR 345 at 356–357. The Treaty can be viewed as a “fundamental political decision by Māori exercising constituent power”, that is, acting as one of two legitimate constitutional actors and giving their duly recognised “assent” as the Indigenous people of the country to a new constitution which defined a power-sharing arrangement: Orsman, at 357–358. Of course, only five years earlier, Māori chiefs had tried to protect their “independence” via He Whakaputanga – Declaration of Independence 1835.

161 Orsman, above n 160, at 352–353.

a collective, specifically *Indigenous* right to self-determination and taonga and a right to equal protection.

The same document is increasingly recognised as a *constitutional* document which outlines the ongoing relationship between constituent parties.<sup>162</sup> The late Sir Hugh Kāwharu wrote that this “covenant (‘kawenata’) for relations between all Māori and the British Crown ... has ever since meant relations between Māori and all non-Māori in New Zealand”.<sup>163</sup> The nature of the relationship resembles that between Native American tribes and the federal government but also seems to display an expanded self-determination. It entails fiduciary duties but also active protection and partnership – as opposed to dependent nation status – and preserves Māori rights to self-determination. Importantly, the Crown is viewed as having a duty to remedy past breaches of the Treaty.<sup>164</sup>

Although its decisions are not binding, “the Treaty of Waitangi Act 1975 (ToWA) has also afforded the Waitangi Tribunal the opportunity to play a crucial role in debating our constitutional past and present”.<sup>165</sup> The Treaty of Waitangi Act 1975 appears to narrate liberal principles including non-discrimination. First, it interprets Māori identity as both race and ancestry, and recognises the reality and possibility of historical, ongoing and potential prejudice.<sup>166</sup> It binds the Crown outright<sup>167</sup> and is, essentially, meant to address discrimination. Māori, individually or collectively,<sup>168</sup> can bring claims to the Waitangi Tribunal where “he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected.”<sup>169</sup> Importantly, its “Treaty principles jurisdiction” cannot be “water[ed] down”.<sup>170</sup>

### B. *The Treaty versus an Adamant Everyone/No one*

The Treaty’s multi-narrative would face-off with an *adamant everyone/no-one* counter-narrative in courts of law, courts of public opinion and the Waitangi Tribunal as the result of the issues raised by the Foreshore and Seabed Bill in 2004.

The narrative drama began in 1997 when a group of South Island iwi sought to have “certain land comprised of the foreshore and seabed” declared Māori customary land by the Māori Land Court.<sup>171</sup> By June 2003, the case of *Ngati Apa v Attorney-General* came before the Court of Appeal

162 Orsman, above n 160.

163 IH Kāwharu “Foreword” in Michael Belgrave, Merata Kawharu and David V Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at v.

164 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

165 Jacinta Ruru “The Waitangi Tribunal” in Malcolm Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 127 at 127.

166 Treaty of Waitangi Act 1975, s 2.

167 Section 3.

168 Section 6(1)(a–d).

169 Section 6(1).

170 Ruru, above n 165, at 128.

171 This area was defined under s 5 of the Foreshore and Seabed Act 2004 as “(a) ... the marine area that is bounded,— (i) on the landward side by the line of mean high water springs; and (ii) on the seaward side, by the outer limits of the territorial sea; and (b) includes the beds of rivers that are part of the coastal marine area (within the meaning of the Resource Management Act 1991); and (c) includes the bed of Te Whaanga Lagoon in the Chatham Islands; and (d) includes the air space and the water space above the areas described in paragraphs (a) to (c); and (e) includes the subsoil, bedrock, and other matters below the areas described in paragraphs (a) to (c)”.

which unanimously held that common law and customary rights to aboriginal title “continued until lawfully extinguished” by specific legislation.<sup>172</sup> In January 2004, Dr Don Brash, National party leader, famously alleged in a race-neutral fashion that “[t]here can be no basis for special privileges for any race, no basis for government funding based on race”.<sup>173</sup> In response to such allegations, the usually pro-Māori Labour Government drafted legislation vesting ownership of the foreshore and seabed in the Crown.

The *Report on the Crown’s Foreshore and Seabed Policy*,<sup>174</sup> issued in March 2004 by the Waitangi Tribunal, found that the proposed legislation breached both Articles II and III of the Treaty of Waitangi, as well as principles of the Treaty, namely reciprocity, partnership, good faith, rule of law, active protection and equity and options.<sup>175</sup> Parliament, however, disregarded the Waitangi Tribunal – and Treaty and common law rights – when it passed the Foreshore and Seabed Act 2004 (FSA) under urgency in November 2004. Section 3 set the narrative tone:<sup>176</sup>

The object of this Act is to preserve the public foreshore and seabed in perpetuity as the common heritage of *all* New Zealanders in a way that enables the protection by the Crown of the public foreshore and seabed on behalf of *all* the people of New Zealand, including the protection of the association of whānau, hapū, and iwi with areas of the public foreshore and seabed.

The legislation immediately signalled a Māori/non-Māori dichotomy and an *adamant everyone/no-one* standard inherently incompatible with the multi-narrative rights guaranteed by the Treaty. Sections 7(2) and 8(1) of the FSA reiterated that “*Every* natural person has access rights” to the foreshore and seabed and that “*Every* person has rights of navigation within the foreshore and seabed.”<sup>177</sup> Māori enjoyed a homogenous “association”, not the rangatiratanga of Article II of the Treaty as s 13 of the FSA declared Crown ownership in “absolute” terms.<sup>178</sup> Other sections made any customary title claims contingent on demanding criteria.<sup>179</sup> Section 13 of the FSA also denied “any fiduciary obligation, or any obligation of a similar nature, to any *person* in respect of the public foreshore and seabed.”<sup>180</sup>

United Nations Special Rapporteur on Indigenous Peoples, Rodolfo Stavenhagen, concluded that “the Crown, while arguing in favour of the interests of the general public in New Zealand, ha[d] breached the Treaty of Waitangi once again”<sup>181</sup> and heightened “racial tensions”.<sup>182</sup> The

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172 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at 643.

173 Don Brash “Nationhood” (speech to the Orewa Rotary Club, Orewa, 27 January 2004).

174 Waitangi Tribunal *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004).

175 At 127–134.

176 Foreshore and Seabed Act 2004, s 3: repealed, on 1 April 2011, by Marine and Coastal Area (Takutai Moana) Act 2011, s 5 (emphasis added).

177 Sections 7–8 (emphasis added).

178 Section 13(1).

179 Including “exclusive” and “uninterrupted” “use and occupation” since 1840.

180 Section 13(4) (emphasis added).

181 Rodolfo Stavenhagen *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Addendum: Mission to New Zealand* E/CN.4/2006/78/Add.3 (2006) at 14.

182 At 14.

debacle undoubtedly raised questions about the strength and “constitutional security”<sup>183</sup> of Indigenous rights,<sup>184</sup> while allegations of privilege and advantage once again seemed to be a case of mistaken identity whereby a dichotomous racial label was applied to Māori. In its wake, Māori again responded with action to have their Treaty rights recognised.<sup>185</sup> When they did, a curious nexus of equality narratives emerged.

The Waitangi Tribunal’s *Report on the Crown’s Foreshore and Seabed Policy*<sup>186</sup> had found that the legislation:<sup>187</sup>

... clearly breaches the principles of the Treaty of Waitangi. But beyond the Treaty, the policy fails in terms of wider norms of domestic and international law that underpin good government in a modern, democratic state. These include the rule of law, and the principles of fairness and *non-discrimination*.

The Tribunal reasoned that Article III of the Treaty and the rule of law would be violated because only Māori would be disadvantaged by “cutting off their access to the courts and effectively expropriating their property rights” thus “put[ting] them in a class different from and inferior to all other citizens”.<sup>188</sup> Essentially, the legislation would only disadvantage Māori *in effect* and was, therefore, discriminatory. This conclusion was consistent with human rights narratives about equality. Bodies monitoring New Zealand’s international treaty obligations similarly condemned the legislation. In March 2005, the United Nations Committee on the Elimination of All Forms of

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183 The Treaty remains more exposed to the dangers of political discretion than human rights inspired legislation such as the Bill of Rights Act 1990 [BoRA] and the Human Rights Act 1993 [HRA], which though not entrenched, have some safeguards built-in (such as ss 5 and 6 of the BoRA). Former United Nations Special Rapporteur on Indigenous Peoples, James Anaya, has criticised the “[l]ack of constitutional security for Māori rights” in New Zealand, even noting a Bill in 2006 that proposed to delete or remove all legislative references to either “the principles of the Treaty” or the Treaty itself. Anaya recommended that the Treaty be given at least similar safeguards as those in the BoRA and HRA, but that discussion should begin on the subjects of entrenchment and making New Zealand law more consistent with international human rights standards, especially the *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61-295 (2007). Also see the Principles of the Treaty of Waitangi Deletion Bill 2006 (66-1). A similar Bill was also put forward in 2005.

184 Janine Hayward came to “the sobering conclusion ... that the wishes of the majority might be the greatest obstacle to achieving greater constitutional protection for Māori rights as a minority ... Parliament is representative of Māori and is able to negotiate compromises and solutions to situations that arise concerning the Treaty and Māori rights. But, as the Foreshore and Seabed Act illustrated, Māori cannot rely on Parliament to protect Māori rights (even as defined by the courts), if these are not seen to be in the interests of the majority”: Janine Hayward “The Treaty and the Constitution” in Raymond Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, Melbourne, 2010) 105 at 111.

185 Valmaine Toki has written: “In May 2004 a hiko (march) culminated in over 20,000 people gathering at Parliament to protest against the Foreshore and Seabed Bill. This was the largest form of protest by Maori since the Land March of 1975. Tariana Turia, a Labour Member of Parliament who could not support the Foreshore and Seabed Bill, resigned. A Waitangi Tribunal Report was strongly critical of the government policy on the foreshore and seabed. An overwhelming majority of those who made submissions to the Select Committee opposed the Foreshore and Seabed Bill. On 18 November 2004, the Bill passed [its] third reading. Symbolically, on the same day Tim Selwyn, mirroring Hone Heke’s action, put an axe through the window of the electorate office of the Prime Minister, Helen [Clark]. Nevertheless, on 24 November 2004, the Foreshore and Seabed Act was enacted, vesting title of the foreshore and seabed in the Crown. In October 2006, Tariana Turia, now co-leader of the Māori Party, introduced a Private Member’s Bill designed to repeal the Foreshore and Seabed Act.”: Valmaine Toki “Can the Developing Doctrine of Aboriginal Native Title Assist a Claim under the Foreshore and Seabed Act 2004?” (2008) 34 Commonwealth Law Bulletin 21 (footnotes omitted).

186 Waitangi Tribunal *Foreshore and Seabed*, above n 174.

187 At xiv (emphasis added).

188 At xiv–xv.

Racial Discrimination (CERD) issued their own decision on the FSA, which concluded that the Act was discriminatory because it removed legal recourse and means of redress where Treaty rights were violated.<sup>189</sup>

Although the *adamant everyone/no-one* legislation initially appeared to trump Māori rights, the divisive legislation was repealed seven years later by s 5 of the Marine and Coastal Areas (Takutai Moana) Act 2011. As the result of Māori and international pressure, the *multi-narrative* Treaty was reaffirmed but also emerged as a narrative symbol of human rights and non-discrimination. Historical Indigenous rights had been recognised by the courts as common law rights; by the expert Waitangi Tribunal as Treaty rights; and, eventually, by Parliament as both.

### C. Narratives of the Māori Learner

Not unlike the Kamehameha Schools, the student bodies of many kura are overwhelmingly or completely Māori, the curriculum Māori- and even iwi-centric. A preference for Māori identity in admissions is obvious though not exclusive.<sup>190</sup> As of 1 July 2016, there were some 107 “Māori medium schools” in New Zealand<sup>191</sup> covering a similar age group to Kamehameha. While the foreshore and seabed generated narrative conflict, there is no similar furor over admission policies which prefer Māori learners. Besides uninterrupted everyday practice, there is a growing body of Waitangi Tribunal interpretation interpreting the Crown’s Treaty obligations in education in terms of positive obligations which recall *someone* measures and *Indigenous* self-determination. Where such obligations are neglected, Māori are likely to be discriminated against in terms of Articles II and III of the Treaty – that is, in terms of *everyone/no-one* equality and specifically Māori rights to self-determination and taonga.

In the *Mokai School Report*,<sup>192</sup> parents of Māori learners brought a Treaty claim when their bilingual primary school was closed by the Ministry of Education. Parents claimed that their Article II rangatiratanga right over taonga including te reo Māori (Māori language) and mātauranga Māori (Māori knowledge) and other Treaty principles had been breached when the school was closed without adequate resource allocation and consultation with parents. Closing the school, they claimed, prevented their children from learning Māori language and knowledge at Mokai, forced

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189 United Nations Committee on the Elimination of Racial Discrimination *Concluding Observations on the Committee’s 65th Session* (20 August 2004). See discussion in Claire Charters and Andrew Erueti “Report from the Inside: The CERD Committee’s Review of the Foreshore and Seabed Act 2004” (2005) 36 VULWR 257.

190 At some schools, a majority of the student body actually identifies with a common iwi or hapū. At Te Rakaumangamanga in Huntly, for instance, 95 per cent of students have whakapapa linking them back to Waikato-Tainui. A preference for prior knowledge of and even fluency in te reo Māori often considered in the admissions process for some kura and even kōhanga would seem to create a de facto preference for the Māori learner, not unlike the preference at issue in the *Kamehameha* case (above n 1). In *Kamehameha* it was the de facto effects of the policy that were the source of contention, rather than the official policy which, like many Indigenous institutions in New Zealand, does not officially exclude non-Indigenous students. Like the Kamehameha Schools, these schools do not require a blood-quantum in terms of who is Māori, and student bodies can be quite diverse. The curriculum and kaupapa itself is Māori-centric and may be iwi-centric as in the case of Waikato-Tainui schools such as Te Rakaumangamanga and Bernard Fergusson (which is located in Ngaruawahia adjacent to Turangawaewae Marae).

191 Ministry of Education “Number of Schools by Highest Level of Immersion and Māori Language Descriptor & Highest Level of Immersion – July 2016” <[www.educationcounts.govt.nz](http://www.educationcounts.govt.nz)>.

192 Waitangi Tribunal *The Mokai School Report* (Wai 789, 2000).

them to travel outside the community and meant losing their “Mokai identity”.<sup>193</sup> The Tribunal concluded that the Ministry had prejudicially affected Māori in failing to “actively promote and protect” Indigenous language and knowledge, failing to consult with parents prior to the decision and in not allocating enough resources – human and otherwise – to the school when a quality review raised questions.<sup>194</sup> These actions resulted in a diminishment of the community’s Article II rangatiratanga and prejudice.<sup>195</sup>

In its *Report on the Aotearoa Institute Claim Concerning Te Wānanga O Aotearoa*,<sup>196</sup> the Tribunal described an Indigenous tertiary institution as “fulfilling both an educative and a social justice function for all Māori, and indeed for all New Zealanders”.<sup>197</sup> The institution taught Māori language and tikanga in addition to “literacy, numeracy, and other life and employment skills” and was especially aimed at “second chance” learners “whom the primary and secondary education system has failed”.<sup>198</sup> The claim was brought on the basis of a breach of rangatiratanga in regards to Crown policy on who might attend the wānanga – namely whether the wānanga should be allowed to admit non-Māori – that is, who had the right to determine admissions. Again, the Tribunal found that the Crown had “fail[ed] to protect the rangatiratanga of [the institution]” with resulting prejudice to the claimants in not allowing them to make that decision.<sup>199</sup>

The Tribunal’s *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* in 2011<sup>200</sup> described Indigenous-specific policies currently in place as praiseworthy, representing a certain amount of partnership and “considerable progress”.<sup>201</sup> Regarding Crown control of curriculum, however, the Tribunal noted a failure to consult with Māori on key policy decisions and underfunding as breaches of the Treaty.<sup>202</sup> It recommended greater self-determination and responsibility, increased resource allocation, the development of specific indicators to measure Māori progress and the successful transmission of Indigenous knowledge, as well as actual Māori achievement in mainstream education.<sup>203</sup>

Most recently, *Matua Rautia: The Report on the Kōhanga Reo Claim*<sup>204</sup> provided an expansive analysis of an Indigenous right to education at the preschool level. Central to the claim was the Tribunal’s finding that kōhanga reo, or language nests, are vital to the survival and revitalisation of Māori language which is a taonga and Treaty right.<sup>205</sup> While the principle of partnership makes both the Crown and Māori responsible for language survival, the Crown has a duty of active promotion

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193 At 137. They also claimed that the Education Act 1989 should include a provision requiring consistency with the Treaty and its principles.

194 At 123.

195 At 125.

196 Waitangi Tribunal *The Report on the Aotearoa Institute Claim Concerning Te Wānanga o Aotearoa* (Wai 1298, 2005).

197 At 2.

198 At 2.

199 At 51.

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

201 At 559 and 560.

202 At 542 and 543.

203 At 559 and 561.

204 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo Claim* (Wai 2336, 2013).

205 Repeatedly mentioned throughout the Report.



and protection, which requires it to “engag[e] in ‘especially vigorous action’ to protect te reo” via funding, policy, increased resource allocation and other positive, identity-specific measures.<sup>206</sup> Regarding options and equity, the Tribunal recognised that the right to attend a preschool was “a citizenship right” afforded to every child in New Zealand, but Māori children were also entitled to know their options, and to a “policy framework” tailored to protecting te reo. Failing to provide such policy or promote participation, or by imposing a funding regime which did not provide incentives for kōhanga reo teachers specifically, was interpreted as prejudice by the Tribunal.<sup>207</sup>

While *everyone/no-one* and *someone* narratives are woven into the narrative of the *Indigenous learner*, the rights in question accord with Treaty principles and remain self-determination based. In these reports, the Tribunal has recognised: Article II rangatiratanga over taonga including te reo Māori and mātauranga;<sup>208</sup> active promotion and protection of such taonga, consultation and participation;<sup>209</sup> partnership, kāwanatanga, rangatiratanga, kaitiakitanga, options and equity.<sup>210</sup> In terms of admissions, the *Aotearoa Institute* decision<sup>211</sup> reveals a *Santa Clara Pueblo*-like control over membership, even where those being admitted are not Indigenous. In the *Mokai*, *Aotearoa Institute* and *Kōhanga Reo* decisions, the schools in question, rather than a greater Indigenous political entity, were themselves recognised as holders, even trustees,<sup>212</sup> of a collective right to self-determination. Diminishing this internal self-determination constituted breaches of the Treaty resulting in prejudice, which seem to violate Article III of the Treaty as much as Article II. Substantive non-discrimination thus linked homegrown Treaty rights with more *substantive everyone/no-one* and *complex someone* rights.

## VII. STORIES TOLD, LESSONS LEARNED

In contrast to the conflict of narratives evident in *Doe v Kamehameha Schools*,<sup>213</sup> New Zealand legislation, jurisprudence and Treaty interpretation recognise a complex and complementary multi-narrative of equality. Its main features include scarcity of reverse discrimination, re-affirmation of a *complex someone* right, Indigenous rights as non-discrimination or non-prejudice, remediation and positive government obligations. Education is narrated according to multiple, complex and complementary rightsholder identities rather than a homogenous and anonymous *everyone/no-one*. Substantive non-discrimination rather than a formalised equality is prioritised implying a *Brown*-like,<sup>214</sup> real-time sense of equality. These features have blurred the narrative lines between the international and domestic, the constitutional, the human and Indigenous. Despite the Waitangi Tribunal’s interpretive and recommendatory jurisdiction in terms of Indigenous rights, this nexus has also blurred the narrative lines between the courts and the Waitangi Tribunal. Subsequently,

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206 *Kōhanga Reo Claim*, above n 204, at 235.

207 At 236–240.

208 Indigenous knowledge.

209 See Waitangi Tribunal *Mokai School Report*, above n 192, at 137.

210 See extensive Tribunal’s discussion on Treaty principles in terms of education in *Kōhanga Reo Claim*, above n 204, at 55–71.

211 Waitangi Tribunal *The Report on the Aotearoa Institute Claim*, above n 196.

212 See kaitiakitanga principle discussed in *Kōhanga Reo Claim*, above n 204, at 66.

213 *Kamehameha*, above n 1.

214 *Brown*, above nn 20 and 21.

New Zealand narratives are also imbued with a supra-domestic moral force which is consonant with domestic intuitions about equality and the unique historico-legal context of Māori rights to education.

Colleagues in the trenches of Indigenous education wisely caution and various reports demonstrate that there is certainly room in New Zealand for greater municipal importation and implementation of human rights, as well as greater recognition of Treaty rights to education. Disparities continue to negatively identify Māori and Native Hawaiian learners in educational data. Key international human rights instruments, which have adopted similar *multi-narratives* about the Indigenous learner, have not been directly incorporated into New Zealand law. These include the Convention on the Rights of the Child 1989,<sup>215</sup> the Convention on the Rights of Persons with Disabilities 2006<sup>216</sup> and the United Nations Declaration on the Rights of Indigenous People 2007;<sup>217</sup> instruments which also come loaded with international interpretation and supra-domestic moral force. The intentional incorporation of human rights instruments, including the International Covenant on Civil and Political Rights 1966<sup>218</sup> into New Zealand law, at least partially explains the complementarity between *everyone/no-one* guarantees and *someone* measures in New Zealand law. Further incorporation seems a logical next step in moving beyond narrative debates to more earthy discussions on real-time realisation of equality, as does a possible re-evaluation of the jurisdiction of the Waitangi Tribunal, given its interpretive expertise and constitutional role.

The obvious danger remains that future New Zealand governments may once again choose to impose *adamant everyone/no-one* narratives on schools which prefer Māori learners, but, for now, a complex *multi-narrative* of equality is evident. The real question then is not whether a *Kamehameha*-like admission policy is consistent with equality nor whether it might coincide with an Indigenous peoples' rights to self-determination in education. Clearly, it is and it can. Rather, current criticisms revolve around implementation. In the United States, meaningful discussions on implementation, and substantive equality generally, will remain moot points until federal law expands the narratives of equality wrestled with in *Kamehameha*.

### VIII. WEAVING ACROSS DISTANCES

Since Matiu's passing, his virtues and accolades, his victories and achievements, his offices and involvement in the lives of so many have been much recounted – and rightly so. As Māori legal luminary, scholar, activist, public servant, cultural expert, composer, husband, father and grandfather, he was truly a Renaissance man. Of all Matiu's identities, however, the one which has stayed in my mind is that of the weaver.

Matiu not only wove words, history and law through his *kōrero* and *waiata*, and wove people through *aroha* and true *rangtiratanga*, but told stories physically with deft fingers in fibre, colour and texture. In honour of this skill, a beautiful example of Māori weaving now hangs in the building in

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215 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

216 Convention on the Rights of Persons with Disabilities A/Res/61/106, Annex I (opened for signature 30 March 2007, entered into force 3 May 2008).

217 *United Nations Declaration on the Rights of Indigenous Peoples*, above n 183.

218 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 13 March 1976).

which I write, against the reverence of a black wall in a quiet room adjacent to the courtyard where Matiu graced us with his final *kōrero* in this life. Worked with obvious *aroha* by Christine Hurihia Wirihana, the unexpectedly thin mat *Whaariki Takapau* is full of stories. Each time I see it, yellow strands look like Matiu's laughter, the light in his eyes, his love of Matakana and Matapihi. Dark fibres against the fair are true to the *tikanga* he taught us and lived, to the history he shared and his excellence. The multi-tonal hues in the golden background give the weaving a three-dimensional quality, a life and breath, as if mimicking a field of ripe wheat in a breeze or shifting sand. In this weaving for a weaver there is character, movement and even a soul, somehow perhaps even something of his. More than this, there are stories woven into the *harakeke*, *kiekie* and *pingao*, including those of *tamariki* running across the piece.

Narrative issues have become only more pressing in Hawai'i since Kamehameha. Already *adamant everyone/no-one* rhetoric has morphed into the vicious in the Donald Trump era where intolerance and ignorance is "shared" and "liked" in posts, tweets and soundbites. After decades of failed legislative attempts to settle which narrative applies to the Native Hawaiian people and our rights to self-determination,<sup>219</sup> former President Barack Obama's Department of the Interior created the so-called Final Rule or Part 50,<sup>220</sup> which provides for federal recognition and would clarify the application of a *Mancari*<sup>221</sup> or, perhaps, another ground-breaking narrative to Kamehameha's admission policy. James Anaya and Robert Williams, two of the nation's foremost Indigenous law scholars, recommended in 2015 that the exact shape of Native Hawaiian sovereignty – and, thus, the exact narrative – was not settled and could borrow from decolonisation and human rights narratives from international law.<sup>222</sup> Even as the Office of Hawaiian Affairs drafts a constitution for a Native Hawaiian nation, however, threats of a potential rescinding of Part 50 by President Trump loom large in the popular media. The 2016 election of Keli'i Akina to the OHA Board punctuates an alarming division between Native Hawaiian groups on federal recognition. Akina controversially heads a non-profit think-tank which is funded by major business interests and is urging the President to rescind the rule. The think-tank has also taken an *adamant everyone/no-one* stance on *Rice v Cayetano*.<sup>223</sup> Ultimately, the equality narratives we tell about ourselves may be the most important of all.

In education, we Native Hawaiians have looked to Aotearoa before, have modelled language revitalisation and Indigenous-medium education on what we learned from Māori struggles and battles hard-won. As if borrowing flax from our cousins across geographical distances, we have woven those lessons into our own struggles and battles hard-won with significant success. These lessons have created distinctive yet familiar patterns of a particular hue and texture and stories

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219 See various incarnations of the Native Hawaiian Reorganization Akaka Bill including The Native Hawaiian Government Reorganization Act of 2011, s 675 – 112th Congress (2011-2012), "A bill to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity". See also: Native Hawaiian Government Reorganization Act of 2009 S1011/HR2314, 111th Congress, nicknamed after Senator Daniel Akaka who introduced its first version in 2000.

220 "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community" 43 CFR Part 50 ([4310-93] Department of the Interior).

221 *Mancari*, above n 35.

222 S James Anaya and Robert A Williams Jr *Study on the International Law and Policy relating to the Situation of the Native Hawaiian People* (University of Arizona, June 2015).

223 *Rice v Cayetano*, above n 42. See Vicki Viotti "Developments in Native Hawaiian affairs could spur ripples of change" *Honolulu Star-Advertiser* (Hawai'i, 11 December 2016).

within stories in our weavings of law. As American federal courts, the executive branch and we ourselves wrestle with which narrative should be applied to the admission policy next, we may do well to remember the lessons we have already learned from Aotearoa. Now may be as good a time as any to close the distance between American equality narratives and those of a sister settler jurisdiction, to tell a more substantive story in the harakeke, one based on outcomes and not merely formal guarantees. The beauty of such a weaving will derive from its three-dimensional quality, a specifically Indigenous multi-narrative consistent with the everyday complexities of equality and a historico-legal account which pays heed to the substantive good of schools such as Kamehameha. Only then will it bear the imprint of our tamariki's feet and tell the right story of equality.

# FIRST LAWS: THE CHALLENGE AND PROMISE OF TEACHING INDIGENOUS LAWS IN AUSTRALIAN LAW SCHOOLS

BY BROOKE GREENWOOD\*

## I. INTRODUCTION

The past decade in Australian higher education has been referred to as an “historic moment” for the integration of Indigenous perspectives across the curriculum.<sup>1</sup> Spurred by recommendations from the 2008 *Review of Australian Higher Education*<sup>2</sup> and the 2012 *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People* reports,<sup>3</sup> as well as innovative programmes overseas, universities throughout Australia have made commitments to increase levels of Indigenous “knowledge and perspectives” across disciplines.<sup>4</sup> Australian law schools have been part of this movement, with a significant number implementing strategies to increase levels of Indigenous “content” in LLB and JD programmes. Such efforts have been matched by a growing body of Australian literature, assessing the effectiveness or absence of efforts to incorporate Indigenous content in specific law schools and across a variety of law courses, as well as examining the curricular experiences of Indigenous law students and academics.<sup>5</sup>

Until recently, however, there has been little direct consideration of the place of Indigenous laws in Australian legal education as distinct from other forms of Indigenous legal “content”.<sup>6</sup> Māori legal academic Dr Carwyn Jones identifies three distinct types of Indigenous legal content which can be incorporated into the legal curriculum: Indigenous legal issues (meaning the way in which laws impact the rights and interests of Indigenous peoples and communities); Indigenous

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1 Lester Irabinna Rigney *Indigenous Higher Education Reform and Indigenous Knowledges* (Department of Industry, Innovation, Science, Research and Tertiary Education, 10 May 2011).

2 Denise Bradley and others *Review of Australia Higher Education: Final Report* (Department of Education, Employment and Workplace Relations, 12 December 2008) at xxvi.

3 Larissa Behrendt and others *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People: Final Report* (Department of Industry, Innovation, Science, Research and Tertiary Education, 12 July 2012) recommendation 18 at xxii.

4 See, for example, Australian National University “Reconciliation Action Plan” (2009) <info.anu.edu.au>.

5 See, for example, Alexander Reilly “Finding an Indigenous Perspective in Administrative Law” (2009) 19 *Legal Education Review* 271; Asmi Wood “Law Studies and Indigenous Students’ Wellbeing: Closing the (Many) Gap(s)” (2011) 21 *Legal Education Review* 251; Nicole Watson “Indigenous People in Legal Education: Staring into a Mirror Without Reflection” (2005) 6 *Indigenous Law Bulletin* 4.

6 Growing Australian scholarship in this area includes: Thalia Anthony “Embedding Specific Graduate Attributes: Cultural Awareness and Indigenous Perspectives” in Sally Kift, Michelle Sanson, Jill Cowley and Penelope Watson (eds) *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, Chatswood (NSW), 2011) 137 and Irene Watson and Marcelle Burns “Indigenous Knowledges: A Strategy for First Nations Peoples Engagement in Higher Education” in Sally Varnham, Patty Kamvounias and Joan Squelch (eds) *Higher Education and the Law* (Federation Press, Annandale (NSW), 2015) 41.

perspectives (meaning Indigenous peoples' opinions and critiques of the law); and finally Indigenous laws (defined as the content of Indigenous legal systems and the law and institutions which comprise them).<sup>7</sup> While Australian law schools have engaged to differing degrees with the first two of these categories, they have failed to engage with Indigenous laws, perpetuating the subordination of Indigenous laws within the Anglo-Australian legal system.

This paper highlights the absence of Indigenous laws from Australian legal education and presents a reasoned rationale for their inclusion. It examines the challenges posed by teaching Indigenous laws in Anglo-Australian institutions, and draws on the example of Canadian and New Zealand universities to demonstrate the possibilities for embracing Indigenous laws as an integral part of legal education. The interaction of Indigenous land laws and Anglo-Australian property law is used as an example throughout, however this is not intended to limit consideration of other important areas for the teaching of Indigenous laws.<sup>8</sup>

## II. THE ABSENCE OF INDIGENOUS LAWS

The teaching of Indigenous knowledges in universities has historically been negligible, especially in "professional" disciplines such as law.<sup>9</sup> A review of course offerings at Australian law schools demonstrates the persistence of this norm.<sup>10</sup> There is currently no systematic attempt to teach Indigenous laws in any of the 35 Australian law schools. No Australian law school offers a course exclusively on the topic of Indigenous laws as defined above.<sup>11</sup> Similarly, while most law schools do offer, at least periodically, elective courses focused on Indigenous Australians,<sup>12</sup> these courses are primarily directed at Indigenous interactions with the Anglo-Australian legal system and may not include content on Indigenous laws as distinct legal systems.<sup>13</sup> Where Indigenous

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7 Carwyn Jones "Indigenous Legal Issues, Indigenous Perspectives and Indigenous Law in the New Zealand LLB Curriculum" (2009) 19 *Legal Education Review* 257 at 259. Indigenous law exists independently of the Anglo-Australian legal system and its legitimation is internal to Indigenous communities. While the singular "law" is used for simplicity, it is recognised that there is no single Indigenous law, but rather distinct laws governing particular groups, with commonalities uniting Indigenous laws across Australia.

8 Anthony, above n 6, at 149–161. See also Thalia Anthony "Introduction: Putting the 'Black' in Black Letter Law Subjects" (2012) 4 *Ngiya: Talk the Law* 1.

9 Behrendt and others, above n 3, at 97.

10 The author conducted a web-survey of course offerings and descriptions at the 35 law schools in Australia, as identified by membership of the Australian Council of Law Deans. The author sought to identify courses directly concerning Indigenous laws or legal systems. The author also examined coverage, if any, of Indigenous laws in courses with an identified focus on Indigenous Australians. This information is current as at 7 November 2016.

11 The University of Notre Dame Australia lists a course titled 'Indigenous Law' in its list of LLB units. However, rather than teaching Indigenous laws in their own terms, the brief description clarifies that the examination of the interaction of Indigenous and European laws is introductory to other legal issues "of relevance to indigenous people", including the criminal justice system, Aboriginal heritage, stolen generations, international law and reconciliation: University of Notre Dame "Units: Law" <[www.nd.edu.au](http://www.nd.edu.au)>.

12 Twenty-five of the 35 law schools surveyed offered at least one Indigenous-specific elective.

13 See, for instance, the course "Indigenous Australians and the Law" offered at Flinders University, which deals exclusively with "interactions between Indigenous Australians and the mainstream Australian legal system": Flinders University "LLAW3246 Indigenous Australians and the Law" <[www.flinders.edu.au](http://www.flinders.edu.au)>.

laws do appear in the course descriptions of these electives, coverage often appears to be limited or merely introductory.<sup>14</sup>

Specified courses are not the only, or even necessarily the preferable, way of integrating Indigenous laws into the legal curriculum. Indeed, some have argued that the isolation of Indigenous content in separate courses taken only by interested students represents the ghettoising of Indigenous content, and instead they advocate the “embedding” of Indigenous knowledges into generalist courses.<sup>15</sup> For law, this would mean embedding Indigenous laws into the compulsory “Priestley Eleven” courses which are necessary for admission as a solicitor and which comprise around two-thirds of the legal curriculum. There is little evidence that “embedding” Indigenous laws in this way is currently taking place in Australian law schools.

Property law, one of the Priestley Eleven,<sup>16</sup> is illustrative in this respect. Given the judicial and legislative recognition of Indigenous land laws in the form of native title law, property law might appear to be the ideal place to integrate Indigenous law into the curriculum. However, native title law, let alone the Indigenous laws that inform it, does not feature on the list of Prescribed Areas of Knowledge for property law as specified by the Law Council of Australia for admission.<sup>17</sup> Consequently, as property law lecturer Nicole Graham describes, the majority of property law courses adopt a conventional model of legal education that coincides with an exclusion of Indigenous land laws. Even where lecturers opt to include native title law in their courses, there is a tendency to conflate these concepts with Indigenous law, obscuring the increasing inconsistency between native title law and the core features of Indigenous land laws.<sup>18</sup>

The absence of Indigenous law from law school curricula is not an inevitable state. Rather, its historical absence mirrors the way in which the broader Anglo-Australian legal system originally denied the existence of Indigenous laws, and more recently has offered only limited recognition. The denial of Indigenous laws was exemplified in the colonial characterisation of Australia as a settled colony, which had been “practically unoccupied”, rather than a conquered or ceded colony where native inhabitants had a law of their own.<sup>19</sup> Australia’s Indigenous inhabitants

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14 For instance, a number of course descriptions include a topic on Indigenous law or “customary law” in the introductory week of the course. See, for example, the University of Sydney course “Indigenous Peoples and Public Law” which is described as “beginning” with an exploration of Indigenous legal systems: Sydney University “LAWS3435 Indigenous Peoples and Public Law” <<https://cusp.sydney.edu.au>>. This is not to detract from the very significant work of many individual lecturers in incorporating Indigenous laws into elective courses.

15 Prue Vines *Putting Indigenous Issues into the Curriculum: Succession and Equity* (Working Paper No 49, University of New South Wales Faculty Research Series, 2012) at 1; Bradley and others, above n 2, at 32; Behrendt and others, above n 3, at 96.

16 The Priestly Eleven are the 11 law subjects that the Law Admissions Consultative Committee in Australia requires students to pass in order to be able to practice as a legal practitioner in Australia.

17 Law Admissions Consultative Committee “Model Admission Rules 2015” Law Council of Australia <[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)>.

18 Nicole Graham “Indigenous Property Matters in Real Property Courses at Australian Universities” (2009) 19 *Legal Education Review* 289 at 295.

19 *Cooper v Stuart* (1889) 14 AC 286 (PC) at 291; see also *Attorney-General (NSW) v Brown* (1847) 1 Legge 312 (SC) at 318; *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439 per Isaacs J; and *Randwick Corp v Rutledge* (1959) 102 CLR 54 at 71. These categorisations were set out by William Blackstone in his *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765) vol 1 at 104–105. The colonial justification for the settlement of Australia is commonly referred to as the doctrine of terra nullius, although the explicit use of the term appeared in the twentieth century, see Ann Curthoys, Ann Genovese and Alex Reilly *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, Sydney, 2008) at 56–57.

were considered “so low in the scale of social organisation that their usages and conceptions of rights and duties [could not] be reconciled with ... the legal ideas of civilized society.”<sup>20</sup> Even in exceptional instances where Indigenous laws were acknowledged, Indigenous rights and interests were nevertheless considered incapable of recognition because they bore “so little resemblance” to Anglo-Australian laws.<sup>21</sup> Early law schools correspondingly excluded both Indigenous students and Indigenous knowledges.<sup>22</sup> Until the 1950s, Indigenous students were barred from universities, and Indigenous participation in all levels of education remained low, even in the late 1960s.<sup>23</sup> Similarly, Indigenous issues, knowledges and perspectives were invisible within curricula. The assumption that European law was “superior to all others” meant that Indigenous laws and culture were “seen not only as worthless but inimical to education.”<sup>24</sup>

The 1970s and 1980s witnessed a period of dramatic change in Aboriginal affairs, leading firstly to increased attention on the recognition of Indigenous laws, and later to concrete judicial and legislative action.<sup>25</sup> Growing interest in Indigenous laws crystallised in the landmark 1986 report by the Australian Law Reform Commission, which recommended that “Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system”.<sup>26</sup> Although this recommendation remains largely unimplemented, significant recognition was afforded with the momentous decision of the High Court in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and the subsequent passing of the Native Title Act 1993 (Cth). Since then, aspects of Indigenous law have been recognised in amendments to the Family Law Act 1975 (Cth),<sup>27</sup> the creation of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)<sup>28</sup> and the adoption in some jurisdictions of circle sentencing,<sup>29</sup> among other examples.

While at face value this burst of activity appears to signify a victory, contemporary recognition of Indigenous laws have been limited and simultaneous with their subordination to Anglo-Australian law.<sup>30</sup> This subordination is embodied in the characterisation of Indigenous laws as “customs”

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20 *Re Southern Rhodesia* [1919] AC 211 (PC) at 233–234 per Lord Sumner; see also *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 39 per Brennan J.

21 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 (NTSC) at 273.

22 Phil Falk “Law School and the Indigenous Student Experience” (2005) 6(8) Indigenous Law Bulletin 8 at 8.

23 A total of nine Indigenous students were enrolled in Australian universities in 1967: Sydney Dunn and Colin Tatz (eds) *Aboriginies & Education* (Sun Books, Melbourne, 1969) at 60.

24 Falk, above n 22, at 8.

25 See, for example, Aboriginal Land Rights Act (Northern Territory) 1976 (Cth).

26 Australian Law Reform Commission *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) at [194].

27 The 1995 addition of s 68F(2)(f) (now s 60CC(6)), requiring the court to consider the culture and traditions of Aboriginal and Torres Strait Islander peoples in child custody arrangements.

28 Section 9 allows the Minister to make declarations regarding areas and objects of significance under Indigenous traditions.

29 Indigenous Sentencing Courts were established in South Australia, New South Wales, the Northern Territory, Queensland, Victoria, Western Australia and the Australian Capital Territory: Elena Marchetti and Kathleen Daly “Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model” (2007) 29 Sydney Law Review 415. The Darwin Community Court has since been disbanded.

30 As contrasted with Canada and New Zealand, where colonial treaties lend constitutional significance to Indigenous law; see, for example, John Borrows “Ground-Rules: Indigenous Treaties in Canada and New Zealand” (2006) 22(2) New Zealand Universities Law Review 188 at 192. See also Watson and Burns, above n 6, at 48–51.



rather than “laws”.<sup>31</sup> As Professor Lisa Strelein has written, the common law “does not approach Indigenous law as an equal partner in negotiating recognition and producing a space in which both laws can operate”.<sup>32</sup> Rather, Indigenous laws have been recognised by selective “incorporation” into the Anglo-Australian legal system at its discretion.<sup>33</sup> As recognised by Kirby J in *Wik Peoples v Queensland*, the native title of Indigenous Australians is not enforceable of its own power but rather because of its translation and reinterpretation into common law doctrine.<sup>34</sup> Importantly, since *Mabo*, courts and legislatures have sought to confine recognition to native title<sup>35</sup> and limit the doctrine of native title itself, including through jurisprudence on extinguishment.<sup>36</sup>

This failure to fully recognise Indigenous laws as authoritative legal systems in their own right has translated into the absence of Indigenous laws in legal education. While law schools have become increasingly cognisant of Indigenous “issues” and the need to accommodate Indigenous students,<sup>37</sup> there remains scepticism regarding the inclusion of Indigenous laws in the curriculum. As Kirsten Anker asserts, “the state has such an imaginative monopoly on the idea of law that we [legal academics] mostly don’t think about it as referring to anything else.”<sup>38</sup> Thus, in the context of property law, as described above, priority is given to teaching classical Anglo-Australian law. Native title may be included, but the Indigenous laws upon which it derives meaning are absent. In this way, the hierarchy of law over custom established by the Anglo-Australian legal system is uncritically reproduced in the syllabus.<sup>39</sup>

### III. RATIONALE FOR INCLUSION

Challenging the absence of Indigenous laws within Australian law schools requires the articulation of a strong rationale for change. The history of marginalisation of Indigenous laws outlined above makes plain that the value of Indigenous laws and the social imperative for their inclusion in the curriculum are not well understood by the legal academy. Attempts to increase the teaching of Indigenous laws have and will continue to face resistance and require lively debate.<sup>40</sup> In response, a three-fold rationale is offered.

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31 Shaunnagh Dorsett “‘Since Time Immemorial’: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry” (2002) 26 Melbourne University Law Review 32 at 58; Iain Stewart “‘Customs in Common’: The Emperor’s Old Clothes” (2006) 6 Macquarie Law Journal 139 at 150.

32 Lisa Strelein “Conceptualising Native Title” (2001) 23 Sydney Law Review 95 at 115.

33 Greg McIntyre *Aboriginal Customary Law: Can it be Recognised?* (Background Paper No 9, Law Reform Commission of Western Australia, September 2004) at 344–346.

34 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 238.

35 *Walker v New South Wales* (1994) 182 CLR 45 at 50.

36 Dorsett, above n 31, at 53; Strelein, above n 32, at 115.

37 Indigenous enrolments have increased since the 1970s: Heather Douglas “The Participation of Indigenous Australians in Legal Education 1991-2000” (2001) 24(2) UNSW Law Journal 485 at 488. However, “parity” with non-Indigenous enrolment remains elusive: Asmi Wood *Challenging (the) Humanities: Indigenous Studies and the University* (paper presented at Challenging (the) Humanities Symposium, University of Western Sydney, 16 November 2012) at 5.

38 Kirsten Anker “Teaching ‘Indigenous Peoples and the Law’: Whose Law?” (2008) 33(3) Alternative Law Journal 132 at 132.

39 At 132.

40 John Borrows “Heroes, Tricksters, Monsters & Caretakers: Indigenous Law and Legal Education” (2016) 61(4) McGill Law Review 795.

First, knowledge of Indigenous laws is of practical value in preparing students to engage with the Anglo-Australian legal system in areas where it “relies (directly or indirectly) on Indigenous terms and concepts”.<sup>41</sup> Although Anglo-Australian law only extends limited recognition to Indigenous “customs” as set out above, it nevertheless intersects with Indigenous laws in many obvious and less obvious ways that would be valuable for Australian law students to understand. Some examples of this interaction include the burgeoning area of intellectual property rights based on Indigenous knowledge, art and symbolism;<sup>42</sup> s 61F of the Family Law Act 1975 (Cth), which enables the family court to have regard to “any kinship obligations, or childbearing practices, of the child’s Aboriginal or Torres Strait Islander culture” in making child custody arrangements; the protections given to “Indigenous heritage” under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth);<sup>43</sup> and clashes between Indigenous and Anglo-Australian legal norms in questions of inheritance, intestacy and the drafting of wills.<sup>44</sup>

Perhaps the most prominent example in the Australian context, however, is native title law. Since *Mabo*<sup>45</sup> and the passage of the Native Title Act 1993 (Cth), native title law has become a significant factor in the practice of Anglo-Australian property law, both because of the sheer scale of its geographic coverage<sup>46</sup> and the complexity of the legal relationships it creates between Indigenous communities, governments and corporate interests.<sup>47</sup> While a creation of Anglo-Australian law, native title law relies on Indigenous land laws to give it meaning. In *Western Australia v Ward*, the High Court confirmed that in accordance with *Mabo* and s 223(1) of the Native Title Act 1993 (Cth), native title rights derive from Indigenous laws and customs, “not the common law”.<sup>48</sup> Therefore, an approach to teaching that focuses only on substantive common law and statutory rules, undermines the ability of students to fully engage with native title law. As Graham has argued, “without information on relevant Indigenous laws, there is a risk that students will be limited in their capacity to practice in the area”.<sup>49</sup> Thus, while not all students will choose careers which expose them to Indigenous law, there is nevertheless a practical benefit to students learning about the various ways it intersects with the Anglo-Australian legal system.

The second part of the rationale lies in the social importance of teaching Indigenous laws, both as a means of challenging their subordination in the Anglo-Australian legal system and fostering the inclusion of Indigenous students and academics in law schools. Addressing inequity is at the heart of the Bradley and the Behrendt *Reviews*’ recommendations that Indigenous knowledge and perspectives be embedded in university curricula<sup>50</sup> and in the attempts of universities themselves to

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41 Jones, above n 7, at 262.

42 Terri Janke and Robynne Quiggin *Indigenous Cultural and Intellectual Property and Customary Law* (Background Paper No 12, Law Reform Commission of Western Australia, September 2004).

43 Sections 15C(7), 15B(4), 341JG and 528.

44 Prue Vines “Wills as Shields and Spears: the failure of intestacy law and the need for wills for customary law purposes in Australia” (2001) 5 *Indigenous Law Bulletin* 16.

45 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

46 According to the 2012 *National Native Title Report* of the National Native Title Tribunal, the 134 successful determinations cover 15.2 per cent of Australia’s land mass and the area under claim is far greater.

47 Both determinations and claims of native title produce ongoing legal relationships given the interim right to negotiate; see Native Title Act 1993 (Cth), s 190B and pt 2, div 3, subdv P “Right to Negotiate”.

48 *Western Australia v Ward* (2002) 213 CLR 1 at 66.

49 Graham, above n 18, at 296.

50 Bradley and others, above n 2, at 32; Behrendt and others, above n 3, at 94.

promote Indigenous inclusion through reconciliation strategies and action plans.<sup>51</sup> It also accords with the broader notion that law schools have a social and public responsibility arising from the historic genesis of law as a “profession” founded on public service and ideals of justice.<sup>52</sup> Law schools generate not only future lawyers and judges but also policy makers and legislators. As Watson has argued, their “virtual monopoly over legal education” means that law schools have a “profound obligation to ensure that the future profession can accommodate the legal needs of our entire society, including Indigenous communities.”<sup>53</sup>

Legal practitioners’ ignorance of Indigenous laws and belief in their inferiority perpetuates the denial and subordination of Indigenous laws described earlier in this paper and more broadly contributes to the persistent disadvantage faced by Indigenous peoples in the Anglo-Australian legal system. The controversial *Yorta Yorta* litigation is illustrative in this respect. The majority of the High Court in *Yorta Yorta v Victoria*<sup>54</sup> held that proof of native title under s 223(1) of the Native Title Act 1993 (Cth) required Indigenous claimants to prove a “substantially uninterrupted” system of normative laws and customs originating prior to British assertion of sovereignty.<sup>55</sup> In finding that the claimants had not satisfied this test, they deferred to the judgment of Olney J at trial,<sup>56</sup> who held that the *Yorta Yorta* connection to land was interrupted when they presented the Crown with a petition acknowledging that their lands were inhabited by European settlers.<sup>57</sup> As Aileen Moreton-Robinson has argued, this finding is inconsistent with Indigenous understandings of the legal relationship with land, which holds that “Indigenous people are the human manifestations of the land and creator beings, they carry title to the land through and on their bodies” and therefore “the connection to land is never broken”.<sup>58</sup> Similarly, Behrendt and Kelly assert that Olney J’s determination that the *Yorta Yorta* had ceased to acknowledge traditional laws reflects a “narrow-minded and romanticised view about what constitutes Aboriginality”, particularly the notion that only remote Aboriginal peoples can be said to observe authentic “attachment to land”.<sup>59</sup> As Lisa Strelein has argued, the precedent set by *Yorta Yorta* means that “[n]ative title claimants must rely on the ability of non-Indigenous judiciary to conceptualise the contemporary expressions of Indigenous identity, culture and law as consistent with the idea of a pre-sovereign normative system”.<sup>60</sup>

While not a panacea for the substantive and procedural disadvantage experienced by Indigenous peoples in the Anglo-Australian legal system, teaching Indigenous laws in law schools has the

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51 For example, the Australian National University Reconciliation Action Plan acknowledges the “economic and social disadvantage” of Indigenous peoples in comparison with other Australians and affirms the university’s “conviction that it must contribute to the righting of the[se] wrongs”, above n 4, at 3.

52 Tamara Walsh “Putting Justice Back into Legal Education” (2007) 17 *Legal Education Review* 119 at 121.

53 Nicole Watson, above n 5, at 6.

54 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

55 At 456 per Gleeson CJ, Gummow and Hayne JJ.

56 At 458 per Gleeson CJ, Gummow and Hayne JJ.

57 At 450.

58 Aileen Moreton-Robinson “The possessive logic of patriarchal white sovereignty: The High Court and the *Yorta Yorta* decision” (2004) 3(2) *Borderlands E-journal* at [12].

59 Larissa Behrendt and Loretta Kelly *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, Leichhardt (NSW), 2008) at 24.

60 Lisa Strelein *Compromised Jurisprudence: Native title cases since Mabo* (Aboriginal Studies Press, Canberra, 2006) at 90.

capacity to challenge misinterpretations about the nature of Indigenous laws and misconceptions about their inferiority, which continue to exist among legal practitioners. Taken at its highest outcome, teaching Indigenous laws in law schools has the capacity to trigger a broader cultural shift within the legal profession. At the very least, it would end the complicity of law schools with the inequities of the past and present.

The learning and teaching of Indigenous laws can similarly contribute to addressing the educational disparities between Indigenous and non-Indigenous law students. As the Bradley and the Behrendt *Reviews* have identified, there is a “significant gap” between the enrolment and retention of Indigenous and non-Indigenous Australians in higher education.<sup>61</sup> Earlier studies have shown similar, if not greater, disparities for Indigenous law students.<sup>62</sup> There is a considerable body of literature expressing the view that at least part of the explanation for this “gap” in law schools is the cultural isolation that students experience as a result of tensions between Indigenous and Anglo-Australian legal systems and the absence of teaching of Indigenous content, including Indigenous laws.<sup>63</sup> Nicole Watson, for example, has described her experience as an Indigenous law student at the University of Queensland as “staring into a mirror without reflection”.<sup>64</sup> On her life as a legal academic she stated: “being a teacher of the legal system that facilitated the invasion of one’s people, and remaining sane, is no easy feat.”<sup>65</sup> These sentiments were echoed by Irene Watson who, in reflecting on the challenges of attempting to teach Indigenous law at Flinders University law school, wrote “the issue of not quite ‘fitting in’ remains standard as the vacant spaces delegated to Aboriginal ways and knowledges remain mostly empty across University disciplines, and particularly within law”.<sup>66</sup> Integrating Indigenous laws into the curriculum is, therefore, an important part of the inclusion of Indigenous students and academics in Australia’s predominantly white law schools.

A third part of the rationale recognises Indigenous laws as a rich and complex source of legal knowledge in their own right, with unique relevance to the Australian context. The value of studying alternative legal systems has long been recognised, including its ability to stimulate critical reflection and identify alternative solutions to legal problems.<sup>67</sup> This is reflected in growing trends

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61 Bradley and others, above n 2, at 32; Behrendt and others, above n 3, at 3.

62 Douglas, above n 37, at 485.

63 See, for example, Wood “Law Studies and Indigenous Student’s Wellbeing”, above n 5, at 256–258; Heather Douglas and Cate Banks “From a Different Place Altogether: Indigenous Students and Cultural Exclusion at Law School” (2001) 15 *Australian Journal of Law and Society* 42 at 45–49; *Royal Commission into Aboriginal Deaths in Custody: National Report* (Australian Government Publishing Service, Canberra, 1991) vol 4 at [33.2.5].

64 Nicole Watson “Indigenous People in Legal Education: Staring into a Mirror Without Reflection” (2005) 6 *Indigenous Law Bulletin* 4.

65 At 4.

66 Irene Watson “Some Reflections on Teaching Law: Whose Law, Yours or Mine?” (2005) 6 *Indigenous Law Bulletin* 23 at 23. See also Loretta Kelly “A Personal Reflection on Being an Indigenous Law Academic” (2005) 6(8) *Indigenous Law Bulletin* 19; Hannah McGlade “The Day of the Minstrel Show” (2005) 6(8) *Indigenous Law Bulletin* 23.

67 See, for example, John Hazard “Comparative Law in Legal Education” (1951) 18(2) *The University of Chicago Law Review* 264; Hugh Ault and Mary Ann Glendon “The Importance of Comparative Law in Legal Education: United States Goals and Methods of Legal Comparison” (1976) 27 *Journal of Legal Education* 599; Jaakko Husa “Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing Pluralistic Legal Mind” (2009) 10 *German Law Journal* 913.

towards comparative, “global” and “transsystemic” legal education worldwide.<sup>68</sup> Indigenous laws, like Anglo-Australian law and other comparative sources of law, provide a particular response to universal human issues such as governance, the resolution of disputes, the allocation of resources and environmental degradation. They represent an immense resource in reasoning through the most complex and pressing issues of our time. As Christine Morris has argued:<sup>69</sup>

Western law would benefit greatly if it were to stop and listen to Indigenous perspectives, *on their own terms*, ... not least because our law has something to say concerning a very wide range of constitutional and legal issues.

Morris gives the examples of intellectual property, international trade law and federal-state relations as areas of law in which “mainstream Australia might learn things *that would benefit itself* ... by studying Aboriginal law”.<sup>70</sup>

Another example is the distinctive way in which Indigenous laws attempt to deal with environmental concerns. As Graham points out, this is not simply an indicator of cultural difference, but of social priorities. She links the “pre-enclosure” system of common property in early England, Scotland and Wales with Indigenous property interests, highlighting that each “marry the laws of ownership and resource management” and then contrasting this to the fact that “modern private property regimes belong to a legal system that divorces the two laws”, necessitating a separate body of environmental law in the Anglo-Australian legal system.<sup>71</sup> For students, the divergent approaches to the relationship between “property” and “environment” are not only relevant to understanding the logic and structure of Anglo-Australian law but to questioning its usefulness in addressing the pressing environmental concerns of today’s world and to scoping alternative answers.<sup>72</sup>

Although the benefits of comparative legal study may be equally gained by studying international legal systems, Indigenous laws have additional relevance for Australian law students by virtue of their innate connection to Australia’s geographic landscape and national identity. Indigenous legal systems were created in “response to the land” over thousands of years of inhabitation.<sup>73</sup> They reveal how the first inhabitants adapted social structures and rules in reaction to the distinctive natural phenomenon of the Australian continent. Increasingly, the richness of this Indigenous heritage is acknowledged as an inseparable part of our national identity, as reflected in the recent proposals to recognise Indigenous Australians in the constitution.<sup>74</sup> Suggestions that Indigenous laws have

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68 See, for example, Catherine Valcke “Global Law Teaching” (2004) 54 *Journal of Legal Education* 160; Peter Strauss “Transsystemia – Are We Approaching a New Langdellian Moment? Is McGill Leading the Way?” (2006) 56 *Journal of Legal Education* 161.

69 Christine Morris “Constitutional Dreaming” in Charles Sampford and Tom Round (eds) *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (Federation Press, Leichhardt (NSW), 2001) 290 at 293 (emphasis in original).

70 At 293 (emphasis in original).

71 Graham, above n 18, at 293.

72 For instance, customary regulation of biological resources has been promoted in the Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), art 10(c).

73 Vines “Putting Indigenous Issues into the Curriculum”, above n 15, at 3.

74 Patrick Dodson and others *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Commonwealth Government, 16 January 2012) at 10.

been washed away by “the tides of history”<sup>75</sup> are inconsistent with the potent force it has in the lives of Indigenous Australians. In its inquiry into the recognition of Aboriginal law and culture, the Law Reform Commission of Western Australia recognised that for many Indigenous peoples, “it is Aboriginal law, not Australian law, which provides the primary framework for people’s lives, relationships and obligations.”<sup>76</sup> As Timmy Djawa Burarrwanga has written, “[w]e hold *ngarra rom* [law] in our identity ... [i]t is like layers and layers of information about our country.”<sup>77</sup> When carried out thoughtfully, and in close collaboration with Indigenous people and communities, the study of Indigenous law has the potential to support the evolution and revitalisation of these laws within communities themselves, bringing to light alternative answers to complex and important legal questions.<sup>78</sup>

#### IV. CHALLENGES AND POSSIBILITIES FOR TEACHING INDIGENOUS LAW

Despite the strength of these rationales, there are significant practical and ethical challenges in attempting to teach Indigenous laws in mainstream educational institutions. As currently taught, Australian legal education reflects the Enlightenment underpinnings of Anglo-Australian law, including an emphasis on secularism, rationality, hierarchical structures of precedent and written knowledge.<sup>79</sup> In contrast, Indigenous laws are described as originating from the land itself and from ancestral teachings dating back to the beginning of the world, as conceptualised within Indigenous cultures.<sup>80</sup> Indigenous laws are firmly grounded in oral tradition and the particular syntax and grammar of Indigenous legal language.<sup>81</sup> Importantly, Indigenous laws are epistemologically tied to individuals and place, such that their instruction and documentation in an unexamined European educational environment may “disembody it from the people who are its agents ... dislocate it from its locale, and separate it from the social institutions that uphold and reinforce its efficacy.”<sup>82</sup> Finally, Indigenous methods of transmitting legal knowledge are radically different from the standard pedagogy of large-group lectures and mass examination in Western legal education, instead consisting of life-long learning “under the guidance of an elder lawperson”.<sup>83</sup>

These complex distinctions in the source, content and transmission of Indigenous laws pose two principle challenges to translating this knowledge into Anglo-Australian institutions: first, the

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75 *Yorta Yorta*, above n 54, at 461 per Gaudron and Kirby JJ, quoting Olney J at trial.

76 Law Reform Commission of Western Australia *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture: Final Report* (Project No 94, September 2006) at 64.

77 Quoted in Dodson and others, above n 74, at xx.

78 Programmes being developed at Victoria University in Canada’s British Columbia, for instance, expressly aim to be a resource and aid to the teaching and development of law within Indigenous communities, and are discussed below. See Borrows “Heroes, Tricksters, Monsters & Caretakers”, above n 40.

79 Anker “Teaching ‘Indigenous People and the Law’”, above n 38, at 134.

80 See, for example, Ambelin Kwaymullina “Seeing the Light: Aboriginal Law, Learning and Sustainable Living in Country” (2005) 6 *Indigenous Law Bulletin* 12; George Pascoe Gaymarani “An Introduction to the Ngarra law of Arnhem Land” (2011) 1 *Northern Territory Law Journal* 283; James Gurrwanngu Gaykamangu “Ngarra Law: Aboriginal customary law from Arnhem land” (2012) 2 *Northern Territory Law Journal* 236.

81 Wood “Law Studies and Indigenous Students’ Wellbeing”, above n 5, at 256.

82 Martin Nakata “The Cultural Interface” (2007) 36 *The Australian Journal of Indigenous Education* (Supplement) 7 at 9.

83 Wood “Law Studies and Indigenous Students’ Wellbeing”, above n 5, at 256.

risk of the assimilation and appropriation of Indigenous laws and their distortion in a law school setting; and secondly, the cost and resources required to teach Indigenous laws if one is to avoid an assimilationist outcome. As Anker has asserted, law schools seeking to teach Indigenous laws “will always have to confront the issue of translation” including actively questioning “who is doing it, how, and for what purposes”.<sup>84</sup> Similarly, Indigenous education scholar Martin Nakata has described this contested space between the Indigenous and non-Indigenous knowledge systems as the “cultural interface”.<sup>85</sup> He argues that unless universities address the difficulties of translation, they risk simplifying Indigenous knowledges and entrenching their subordination as an inferior tradition, the antithesis of the rationales identified above. These are weighty challenges, not least because of the persistence of institutionalised racism and the rise of managerialism in higher education, with its attendant cost-cutting measures.<sup>86</sup> Practically, the need for additional resources and faculty appointments to support adequate teaching of Indigenous law conflicts with the pressures to provide legal education on the cheap.

Nevertheless, the development of programmes to teach Indigenous laws in Canada and New Zealand demonstrates that respectful and meaningful translation is possible, even within this context. McGill University in Canada, for instance, has integrated Canadian Indigenous law into a number of core compulsory and other courses as part of their “transsystemic” legal education programme, which already combines teaching of civil and common law traditions.<sup>87</sup> An even more ambitious project is the proposed Juris Indigenarum Doctor (JID) programme at the University of Victoria, British Columbia, which teaches Indigenous legal orders and the common law in parallel so that, at the end of four years, students attain professional degrees in both.<sup>88</sup> In New Zealand, the Māori<sup>89</sup> law staff collective at the University of Waikato’s “bicultural” Te Piringa Faculty of Law has pioneered teaching of Māori law, language and oral traditions in mainstream courses such as “Legal Method”, as well as providing stand-alone courses on Indigenous law.<sup>90</sup>

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84 Anker “Teaching ‘Indigenous People and the Law’”, above n 38, at 134.

85 Nakata, above n 82, at 9; see also Soenke Biermann and Marcelle Townsend-Cross “Indigenous Pedagogy as a Force for Change” (2008) 37 *The Australian Journal of Indigenous Education* (Supplement) 146 at 149.

86 Richard Hill *Whackademia: An Insider’s Account of the Troubled University* (NewSouth Publishing, Sydney, 2012) at 10; Margaret Thornton *Privatizing the Public University: The Case of Law* (Routledge, New York, 2012) at 27.

87 According to responses to the author’s enquiries, this includes the compulsory first year course “Criminal Justice”, a course in succession, wills and estates titled “Death and Property” as well as a new transsystemic property course to be offered in 2017–2018. See also, Anker “Teaching ‘Indigenous People and the Law’”, above n 38, at 133.

88 “Joint Program in Canadian Common Law and Indigenous Legal Orders JD/JID” University of Victoria: Law <[www.uvic.ca/law/about/indigenous/jid/index.php](http://www.uvic.ca/law/about/indigenous/jid/index.php)>. See also Borrows “Heroes, Tricksters, Monsters & Caretakers”, above n 40.

89 Māori is the name for the Indigenous peoples of Aotearoa, New Zealand.

90 Jacquelin MacKinnon and Linda Te Aho “Delivering a Bicultural Legal Education: Reflections on Classroom Experiences” (2004) 12 *Waikato Law Review* 62 at 80; despite facing significant challenges, see Leah Whiu “Waikato Law School’s Bicultural Vision – Anei Te Huarahi Hei Wero I A Tatou Katoa: This is the Challenge Confronting Us All” (2001) 9 *Waikato Law Review* 265; Stephanie Milroy and Leah Whiu “Waikato Law School: An Experiment in Bicultural Legal Education” (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 173.

While many of these initiatives are still evolving,<sup>91</sup> and may reflect the distinctive realities of Canadian and New Zealand jurisdictions,<sup>92</sup> they have developed a remarkably united set of pedagogical methodologies that can be adapted to serve Australian law schools. In particular, these programmes revolve around four key components: engagement with Indigenous people and communities, the adoption of critical methods of legal education, a commitment to experiential and in-situ learning and the use of non-traditional modes of delivery and assessment.

### A. *Engagement with Indigenous Communities*

A primary requirement is that Indigenous laws are taught by or in close collaboration with Indigenous peoples and communities, particularly those persons with authority to speak about Indigenous law. For instance, the ability of Te Piringa, the Faculty of Law at Waikato University, to provide bicultural legal education in both English and Māori legal traditions is founded on the existence of “Te Piringa Tangata”, a Māori staff collective within the Faculty of Law.<sup>93</sup> Te Piringa Tangata, consisting of Māori legal academics, tutors and mentors, provide the necessary “critical mass” of Indigenous scholars for the incorporation of Indigenous issues into the curriculum. In addition, Te Piringa appoints an Elder or expert on Indigenous law from the local Indigenous tribe of Waikato-Tainui in the Waikato region to “consult on issues of local custom”.<sup>94</sup>

Similarly, the teaching of Indigenous laws at the University of Victoria, British Columbia is supported by a dedicated Indigenous Law Research Unit, which partners with Indigenous peoples and communities to ascertain and articulate their own legal principles and processes. In this way, the teaching of Indigenous laws is viewed as part of a broader effort to revitalise Indigenous laws in which law schools are viewed as a “resource and aid” to communities. The law faculty, therefore, only works with legal traditions in communities of which they are a part or through invitation to assist a specific community in their own efforts to revitalise law.<sup>95</sup>

In Australian law schools, the continued under-representation of Aboriginal legal academics compounds the difficulties in communicating Indigenous laws. Equally, however, the inclusion

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91 Although in each case they reflect a long-term commitment to Indigenous legal perspectives, which has been consciously theorised and debated. See, for example, the active discussion surrounding the University of Waikato’s bicultural legal education: Milroy and Whiu, above n 90, at 173; Makere Papanui-Ball “Caught in the Cross-Fire: The Realities of Being Māori at a Bicultural law School” (Masters Dissertation, University of Waikato, 1996). See also John Borrows “Creating an Indigenous Legal Community” (2005) 50 McGill Law Journal 153.

92 For instance, recommendation 28 of the Canadian Truth and Reconciliation Commission that directly calls on law schools to teach a compulsory course in Aboriginal People and the law, including Indigenous law (Truth and Reconciliation Commission of Canada *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Manitoba, 2015)).

93 Mackinnon and Te Aho, above n 90, at 66. To mark its 20th anniversary, the name of the Law Faculty was officially changed in 2010 to “Te Piringa Faculty of Law”. “Te Piringa” means “the coming together of people.” The name was given to the Law Faculty by the late Te Arikini Dame Te Atairangikaahu, the Māori Queen, and links the faculty with the mana whenua of Waikato and Tainui, the people of the land where the university sits. It was previously known as The School of Law, Te Wāhanga Ture. See Matiu Dickson “Te Piringa” (2010) 18 Wai L Rev 66 at 70.

94 Associate Dean (Māori), Linda Te Aho has advised that the numbers of staff have fluctuated from between four and seven Māori legal academics. As at 2017, there are four Māori legal academics, two tutors, four senior student mentors and a Māori liaison officer. For more, see Huia Woods “Indigenous Space in Institutions: Frameworks around Māori Legal Academics at Waikato” (2008) 2 MAI Review Article 5 at 2–4.

95 Borrows “Heroes, Tricksters, Monsters & Caretakers”, above n 40.



and promotion of Indigenous laws within legal education will help overcome some of the institutionalised barriers to recruitment and retention of Indigenous staff.

### *B. Critical Educational Methodologies*

Critical educational methodologies are arguably essential to teaching Indigenous laws because they allow students to deconstruct the paradigm created by Anglo-Australian law and examine Indigenous laws without simplifying or subordinating their content. Originating from 1930s American legal realism and developing alongside feminism and post-colonialism in the 1970s, critical legal studies seek to expose the normative and socially constructed nature of law,<sup>96</sup> including the role that race and colonisation have played in privileging some forms of legal knowledge over others.<sup>97</sup> This approach to legal education is embodied in McGill University's transsystemic method of teaching Indigenous laws, which overcomes the "issue of translation" because rather than attempting to "fit" Indigenous laws into the confines of European legal traditions, it engages directly with the "lack of fit" between Indigenous and Anglo-legal systems.<sup>98</sup> For example, while lecturer Kirsten Anker teaches standard Canadian Aboriginal land rights cases, she frames this discussion under the broader heading of "Land" and requires students to examine the underlying philosophies behind Gitksan land laws and conceptions of property in feudal Europe. In this way, Anker's critical approach "destabilise[s] foundational assumptions on which legal reasoning depends and emphasise[s] that the translation is a translation and not an objective fact or reality."<sup>99</sup>

### *C. Experiential and In-situ Learning*

Ensuring that teaching does not dislocate Indigenous laws from their environment is similarly important, given that Indigenous laws are fundamentally entwined with the physicality of the land.<sup>100</sup> Indigenous law programmes within mainstream legal institutions have addressed this dilemma by placing emphasis on experiential learning, including components that take place on traditional lands or within Indigenous communities.<sup>101</sup> For instance, the proposed JID programme at Victoria University, British Columbia, would require students to undertake two mandatory "field schools" in Indigenous communities. The proposal for the programme notes that Indigenous legal orders are often person and place specific and considers as crucial "that students experience their operation

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96 Lucy Maxwell "How to Develop Law Students' Critical Awareness? Change the Language of Legal Education" (2012) 22 *Legal Education Review* 99 at 113; Mark Tushnet "Critical Legal Studies: An Introduction to its Origins and Underpinnings" (1986) 36 *Journal of Legal Education* 505 at 505; Nickolas James "A Brief History of Critique in Australian Legal Education" (2000) 24 *Melbourne University Law Review* 965.

97 Derrick Bell "*Brown v Board of Education* and the Interest-Convergence Dilemma" (1980) 93 *Harvard Law Review* 518; Richard Delgado and Jean Stefancic (eds) *Critical Race Theory: The Cutting Edge* (2nd ed, Temple University Press, Philadelphia, 2000).

98 Anker "Teaching 'Indigenous People and the Law'", above n 38, at 134.

99 At 134 (emphasis in original).

100 Kwaymullina, above n 80; John Borrows "Outsider Education: Indigenous Law and Land-Based Learning" (2016) 33 *Windsor Yearbook of Access to Justice* 1.

101 See, generally, Julie Cassidy "The Classroom 'In Country': Experiential Learning of Indigenous Legal Studies" (2012) 4 *Ngilya: Talk the Law* 79; Anthony "Embedding Specific Graduate Attributes", above n 6, at 165–166.

in practice, observe the territories to which they relate, learn from indigenous knowledge-holders, [and] practice the law in context in communities”.<sup>102</sup>

Such a proposal, although ambitious, has much in common with the numerous exchanges, clinical courses and internship programmes currently available to Australian law students. A relevant example is the *Aurora Internship* in native title law, which may involve students working closely with traditional owners of land (both urban and remote) and learning about Indigenous land law for the purpose of a native title claim.<sup>103</sup> Extending and formalising such programmes and other opportunities for in-situ learning could go some way to addressing the pedagogical dislocation of teaching Indigenous laws in mainstream Australian law schools. More importantly, the challenge of dislocation highlights the need for universities to prioritise engagement with local Indigenous communities regarding the teaching of Indigenous laws.

#### D. *Non-traditional Delivery and Assessment*

A final pedagogical strategy is the application of non-traditional methods of delivering and assessing Indigenous law content. Broader literature on Indigenous knowledge in education advocates the use of teaching practices embedded in Indigenous philosophy, including storytelling, art, circle-discussions, self-analysis and reflection.<sup>104</sup> Such pedagogies are reflected in existing courses on Indigenous laws. Anker’s McGill course utilises storytelling and assesses students through a “creative project”, requiring them to respond to the course other than through academic text.<sup>105</sup> The University of Victoria’s JID proposal, on the other hand, includes key learning outcomes for students such as the “preparation and presentation of an Indigenous legal ‘text’ ... (pole, blanket, canoe, etc)” and the “recitation and application of a song, story, genealogy, and legal brief in relation to a field-school community’s legal tradition”.<sup>106</sup>

Importantly, these modes of delivery are not fanciful diversions, they reflect and validate the diverse sources of Indigenous laws. Art, for instance, arguably the antithesis of European-derived law, is embedded in Indigenous law and serves not only to represent law, but may also be considered a form of law in and of itself.<sup>107</sup> The Indigenous use of artwork, storytelling and other radically different forms of legal transmission have, for instance, been recognised and utilised in order to prove native title claims in Anglo-Australian courts.<sup>108</sup> If applied in a way that is sensitive to the risk of appropriation, non-traditional modes of delivery and assessment can assist in training and testing students’ ability to traverse the “interface” between radically different forms of law.

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102 Jeremy Webber and others *Studying Law for a Postcolonial World: A Proposal for a Unique, Trans-systemic, Professional Degree Program in Indigenous Legal Orders and the Common Law* (Draft Proposal, Approved by Faculty Council of the Faculty of Law, University of Victoria, British Columbia, 19 January 2011) at 24.

103 The Aurora Project “The Aurora Project and Programs” (2016) <[www.auroraproject.com.au](http://www.auroraproject.com.au)>.

104 Anthony “Embedding Specific Graduate Attributes”, above n 6, at 167–168.

105 Anker “Teaching ‘Indigenous People and the Law’”, above n 38, at 135.

106 Webber and others, above n 102, at 24.

107 Kirsten Anker “The Truth in Painting: Cultural Artefacts as Proof of Native Title” (2005) 9 *Law, Text, Culture* 91 at 92; Gaykamangu, above n 80.

108 Native Title Act 1993 (Cth), s 82 and Federal Court Rules 2011 (Cth), r 34.123, which allow evidence of customary law in the form of “singing, dancing and storytelling”; see Anker “The Truth in Painting: Cultural Artefacts as Proof of Native Title”, above n 107, at 96–97.

Overall, international examples demonstrate that it is possible for law schools to navigate the “cultural interface” using methodologies that depart significantly from the standard mode of legal education. Many of these pedagogies reflect what is increasingly being considered good-practice teaching in order to facilitate student learning and wellbeing.<sup>109</sup> Ultimately, such pedagogies are not only a means of addressing the challenge of “translation”, but a non-negotiable requirement if Indigenous laws are to be brought into legal education in a way that is respectful, meaningful and enduring.

## V. CONCLUSION

In the midst of growing recognition of the dynamic, socially transformative role Indigenous knowledge can play in education,<sup>110</sup> Australian law schools continue to exclude Indigenous laws. This absence perpetuates the invisibility of Indigenous legal systems and, consequently, of Indigenous peoples. The alternative, bolder project of engaging with Indigenous laws presents formidable challenges. However, as programmes in Canada and New Zealand indicate, teaching Indigenous laws is not beyond the reach of law schools. While it requires commitment to alternative pedagogies, teaching Indigenous laws also brings with it the promise of a richer, more just education for Australian law students and the revitalisation of legal structures that have guided communities and nations of people for thousands of years.

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109 See, for example, Melanie Poole and others *Breaking the Frozen Sea: The Case for Reforming Legal Education at the Australian National University* (ANU Law School Reform Committee, November 2010) at xi–xiii, especially recommendations 1, 2.1, 3, 5, 8, 10, 11 and 18; Molly Townes O’Brien, Stephen Tang and Kath Hall “Challenging Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Law Curriculum” (2011) 21 *Legal Education Review* 149.

110 Behrendt and others, above n 3, at 94.

# MĀORI RIGHTS TO FRESHWATER: THE THREE CONCEPTUAL MODELS OF INDIGENOUS RIGHTS

BY ANDREW ERUETI\*

## I. INTRODUCTION – CULTURE, PROPERTY AND POLITICAL AUTHORITY MODELS

Responding to recent government proposals to privatise interests in water, Māori have asserted their right to own water in the Waitangi Tribunal. As the institution charged with considering claims that the Crown has breached the Treaty of Waitangi, the Tribunal has found that Māori do possess rights in water bodies akin to ownership.<sup>1</sup> The government, however, will not recognise Māori proprietary rights in water. This article discusses these claims to freshwater by Māori in the context of different models for conceptualising Indigenous rights in New Zealand. I suggest that there are three principal models at work: a right to culture, property and political authority models.<sup>2</sup>

By a right-to-culture model, I mean the protection of a traditional way of life, procedural rights to participate in decision-making and tribal self-management of property. The right-to-culture model has proven controversial in recent years in the context of formulating international Indigenous rights. Karen Engle, writing about the 25 year negotiations on the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UN Declaration), argues that Indigenous advocates wrongly pursued a strategy of emphasising the cultural elements of their claims and downplaying claims to “strong forms of self-determination”, for example, “right of secession or independence as a nation state.”<sup>3</sup> The latter strategy was dropped as a matter of realpolitik as Indigenous advocates accepted the realities of working within the United Nations (UN) human rights system.<sup>4</sup> Instead of self-determination, Indigenous advocates pursued a “human right to culture” strategy.<sup>5</sup> But the effect has been to reify identity and Indigenous rights and displace “the very issues that initially motivated much of the advocacy: issues of economic dependency, structural discrimination, and lack of indigenous autonomy”.<sup>6</sup>

I suggest that the right to culture is a prominent means of both Māori and government thinking about Indigenous rights in New Zealand. In large part, this follows from the emphasis on making

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\* Thanks are due to the co-authors of *Ngā Wai o te Māori: Ngā Tikanga me Ngā Ture Roia* (23 January 2017), particularly Tā Edward Taihākurei Durie for comments on my section of that paper, which I draw upon for this article. Special thanks to the editorial team at the Waikato Law Review.

1 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [Freshwater Report].

2 For elaboration of the argument and its application to other areas of law, including political representation, treaty settlements and constitutional reform, see Andrew Erueti “Conceptualising Indigenous Rights in Aotearoa New Zealand” (2017) 27 NZULR 715.

3 Karen Engle *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* (Duke University Press, Durham, 2010).

4 At 2.

5 At 3.

6 At 3.

historical reparations to the tribe, or iwi, in the context of Treaty settlements, the process whereby individual tribes and government negotiate redress for the historical loss of natural resources and tino rangatiratanga. The tribe negotiating redress has to be the same tribe that suffered the original loss. Therefore, despite a history of discrimination and marginalisation, iwi – like other Indigenous peoples in the Americas and Australasia – have had to establish that they are still a culturally distinctive and coherent community of peoples, connected to their lands and one another in a unique way. Culture will always be a significant aspect of the claims of iwi, but their claims cannot be reduced to culture alone. To do so, or to place too much emphasis on culture, leads to a reductive approach to rights recognition and the stereotyping of Māori social and political life.<sup>7</sup> Thus, it is important to supplement culture claims with other conceptual models.

In New Zealand, Indigenous rights reforms are also based on a property model. This seeks to restore to Māori a “resource base” of property rights and monetary compensation. A significant component of Treaty settlements, for example, is the provision of “commercial redress”.<sup>8</sup> Iwi have acquired property rights to natural resources, including fisheries, forests and aquaculture, on the basis that Māori possess de facto property rights in the resource.<sup>9</sup> These property and right-to-culture models can lead to significant reforms, as witnessed by the economic fruits of Treaty settlements. The economic redress has had a profound impact on the Māori economy, estimated in 2016 to be worth \$42 billion and growing by 1 billion each year.<sup>10</sup> For example, Ngāi Tahu is the largest private land owner in the South Island.<sup>11</sup> Ngāi Tahu and Waikato-Tainui received \$170 million in their respective reparations in 1993, but the value of their assets is now over \$1 billion each.<sup>12</sup> Māori are major stakeholders in the commercial fishing,<sup>13</sup> forestry<sup>14</sup> and aquaculture industries.<sup>15</sup>

However, the Crown’s focus on property and the right to culture has resulted in a lacuna in terms of Indigenous political authority. By this, I mean the right to self-government, self-determination or tino rangatiratanga. These are the terms commonly used to describe the right of Indigenous peoples to make decisions relating to matters of significance to them independently of the state. In New Zealand, it is often said by political leaders that self-government would be impracticable either because sovereignty was ceded, or we do not have the landmass to accommodate North-American style “reservations”.<sup>16</sup> But in the New Zealand context, the self-government concept tends to be more nuanced and relates to constitutional reform, and political authority and control over natural resources and other matters of significance to iwi.

7 See Manuhua Barcham “(De)Constructing the Politics of Indigeneity” in Duncan Ivison, Paul Patton and Will Sanders *Political Theory and the Rights of Indigenous Peoples* (Cambridge University Press, Cambridge, 2000) 137.

8 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past and Building a Future* (March 2015).

9 See discussion below at Part IIIB.

10 Liz Te Amo “The Māori economy is big business” (29 July 2015) *New Zealand Trade & Enterprise* <[www.nzte.govt.nz/](http://www.nzte.govt.nz/)>.

11 Ngāi Tahu Claims Settlement Act 1998.

12 See Waikato-Tainui “Annual Report 2015” (2015) <[www.tgh.co.nz/](http://www.tgh.co.nz/)>; Te Rūnanga o Ngāi Tahu “Annual Report 2016” (2016) <<http://ngaitahu.iwi.nz/>>.

13 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Fisheries (Kaimoana Customary Fishing) Regulations 1998.

14 Central North Island Forests Land Collective Settlement Act 2008.

15 Maori Commercial Aquaculture Claims Settlement Act 2004.

16 See, for example, Sir Douglas Graham, Minister of Treaty Negotiations in the early 1990s, equating tino rangatiratanga with iwi self-management in D Graham *Trick or Treaty?* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1997) at 20–21.

What are the implications of this framework of thinking for Māori claims to water? In the context of the freshwater claim before the Waitangi Tribunal, the claimants have principally advanced a property model, that is, iwi seek ownership of freshwater.<sup>17</sup> The government, I argue, has responded with a right-to-culture model by facilitating Māori engagement in the regulation of water. So why does the government not accept the right to property claim to water by Māori? The problem, as I set out below, is that the ownership model only applies in certain cases, and in many other cases, the property model is rejected by government. The reason for this seems to be political and fiscal expedience. Government is concerned about the implications, politically, of recognising exclusive rights in natural resources, both in terms of the negative response by the public (who value recreational use and access to natural resources) and the interests of business. But what about political authority? In the context of all claims to natural resources, including water, Māori turn to the tino rangatiratanga guarantees in the Treaty as a basis of rights recognition. However, the Crown is consistent in its rejection of tribal political authority and that includes authority over natural resources.

In Part II, I consider the political authority model in more detail and explain why it is avoided by government. In Part III, I consider the property model, focusing on aboriginal rights jurisprudence in the common law countries, and its potential application to water. I refer to the statutory schemes in New Zealand that recognise Māori proprietary rights in natural resources. I also discuss the claims to property rejected by government. In Part IV, I argue that in relation to freshwater, the reforms in Treaty settlements and amendments to the Resource Management Act 1991 (RMA), while innovative and important, are based in a right-to-culture model. I conclude by arguing that if Indigenous rights reforms are directed in the main at advancing the right to culture, we should consider more deeply why this is the case and how to address the concerns. Simply filtering out property and political models because it is politically expedient further undermines Treaty rights and undermines the quest for a fairer and more just society.

## II. THE POLITICAL AUTHORITY MODEL

Political authority in this context, as noted above, refers to the right to tino rangatiratanga, self-government or self-determination. Tino rangatiratanga is grounded in many ideas but is closely related to concepts of prior sovereignty or historical sovereignty and the international legal right to self-determination.<sup>18</sup> According to these concepts, Indigenous peoples were independent peoples and possessed full authority over their lands and peoples and are therefore entitled to recognition

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17 *Freshwater* Report, above n 1.

18 For a formulation of this type of argument, see Benedict Kingsbury's discussion about "self-determination" and "historical sovereignty" conceptual structures in Benedict Kingsbury "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 NYU J Int'l & Pol 189; Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand Law" (2002) 52 U Toronto LJ 101; Allen E Buchanan *Justice, Legitimacy, and Self-determination: Moral Foundations for International Law* (Oxford University Press, Oxford, 2007) at 179. See also Patrick Macklem who offers a historical-based argument for recognition of Indigenous Peoples in international law in Patrick Macklem *The Sovereignty of Human Rights* (Oxford University Press, New York, 2015).

of their right to self-determination.<sup>19</sup> Indigenous peoples' calls for reform are thus grounded in rectificatory or corrective justice.<sup>20</sup> This form of justice has also underpinned the calls for tino rangatiratanga in New Zealand by Māori. The Crown, too, has broadly based its agenda of rights recognition on the desire to right historical wrongs.<sup>21</sup> The quest is for a more legitimate and fairer society; only the contemporary remedy does not extend to political authority.

In relation to Treaty settlements, for example, there is no recognition of any form of political authority. Instead, iwi have the right to "self-management" of their tribal property.<sup>22</sup> This gap is also evident in relation to Māori interests in natural resources, including water, as iwi seek a greater say in their regulation. Government has responded through Treaty settlements relating to water, such as the Whanganui and Waikato-Tainui river agreements<sup>23</sup> (which allow the rivers to be co-managed by iwi and the Crown) and reforms to the RMA to facilitate shared decision-making.<sup>24</sup> However, these grant procedural rights (effective participation in decision-making) and not stronger rights such as free, prior and informed consent, as guaranteed by the UN Declaration.<sup>25</sup>

To illustrate the distinction in human rights terms, the right to participate in public life is guaranteed to all citizens of the state.<sup>26</sup> The UN Declaration on the Rights of Minorities provides that minorities have the right to participate in decisions that affect them as minorities.<sup>27</sup> The UN Declaration, on the other hand, is even more extensive. It provides for the Indigenous right to free, prior and informed consent in relation to projects on their lands, including the extractive

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- 19 As the Waitangi Tribunal notes in its *Whaia Te Mana Motuhake* report, "tino rangatiratanga has been interpreted as absolute authority and can include freedom to be distinct peoples; the right to territorial integrity of their land base; the right to freely determine their destinies; and the right to exercise autonomy and self-government." Waitangi Tribunal *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake* (Wai 2417, 2015) at 36. In the *Ko Aotearoa Tēnei* report, the Waitangi Tribunal noted that tino rangatiratanga conveys concepts of authority and control, but added that there is more to the concept, including "expectations about right behaviour, appropriate priorities and ethical decision-making that are deeply embedded in Māori culture." Waitangi Tribunal *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011), vol 1 at 80 [*Ko Aotearoa Tēnei* Report].
- 20 Macklem, for example, when reviewing the development of international Indigenous rights argues that they serve the purpose of remedying international law's denial of their right as peoples to sovereignty. See Macklem *The Sovereignty of Human Rights*, above n 18. See also Douglas Sanderson "Redressing the Right Wrong: The Argument from Corrective Justice" (2012) 62 U Toronto LJ 93 (arguing for a corrective justice model for addressing the historical and on-going suppression of institutions in Indigenous communities that positively affirm Indigenous values, cultures and identities).
- 21 Department of Justice *Principles for Crown Action on the Treaty of Waitangi* (Wellington, 1989). See also, Geoffrey Palmer "The Treaty of Waitangi – principles for Crown action (New Zealand)" (1989) 19 VUWLR 335.
- 22 *Principles for Crown Action*, above n 21; and Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past and Building a Future* (March 2015) at 147. Tino rangatiratanga is defined as "highest chieftainship, authority. In this context the Crown interprets this to mean Māori self-management or autonomous authority of Māori groups over their development and resources."
- 23 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.
- 24 See Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) at 29.
- 25 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007) [The UN Declaration].
- 26 *Universal Declaration of Human Rights* GA Res 217A, A/810 (1948), art 21. International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) [ICCPR], art 25.
- 27 *United Nations Declaration on the Rights of Minorities* GA Res 47/135, A/Res/47/135 (1992), art 2(2) and (3). See also art 27 of the ICCPR.

industry, and law and policies that will impact on Indigenous peoples.<sup>28</sup> The UN Declaration also guarantees the right to self-government and self-determination.<sup>29</sup> These rights extend beyond those participatory rights granted to minorities and citizens generally. The justification for these Indigenous rights is the denial of tino rangatiratanga – or more generally for Indigenous peoples’ self-determination – and dispossession of natural resources. These rights to political authority in the UN Declaration are thus directed at rectificatory justice.<sup>30</sup> As argued below, Treaty settlements and the RMA provide Māori with more than the general right to participate in decisions relating to natural resources and extend to co-management and shared decision-making. However, they do not guarantee to Māori sufficient autonomy or the right to say no to proposals that may be counter to their values and aims.<sup>31</sup> The reforms, therefore, sit within the right-to-culture model.

The rejection by successive governments of the notion of any form of political authority residing in iwi, is partly due to the controversial nature of such claims. There are many politicians and commentators who object to Māori acquiring such political rights or even distinctive procedural rights on the basis that this would be discriminatory to non-Māori. Constitutional lawyer, Stephen Franks, for example, has called reforms in the RMA that seek to enhance Māori participation in decision-making “racist” and based on “inherited status”.<sup>32</sup> Don Brash, a former leader of the New Zealand’s National Party – currently the governing party at the time of writing this article – has called Treaty settlements an “entrenched Treaty grievance industry” and said there is “no homogenous, distinct Māori population”.<sup>33</sup> These are not fringe views but held by a large segment of society in New Zealand.<sup>34</sup> Brash’s comments followed the controversy in New Zealand about the possibility of Māori obtaining ownership of sections of the foreshore and seabed due to the *Attorney-General v Ngati Apa* decision. The Court of Appeal ruled that the Māori Land Court could investigate tribal claims to customary title to the foreshore and seabed and then potentially grant freehold titles to the areas claimed.<sup>35</sup> This meant that Māori could potentially exclude others from their freehold titles (this being a right associated with Māori freehold land under Te Ture Whenua Māori Act 1993) and even the sale of the land to others. The prospect of exclusive interests

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28 The UN Declaration, above n 25, arts 19 and 32.

29 Articles 4 and 3.

30 See Macklem *The Sovereignty of Human Rights*, above n 18.

31 There are exceptions, for example the Fisheries (Kaimoana Customary Fishing) Regulations 1998, which provide tangata whenua with power to make bylaws about customary fishing, including imposing rahui (prohibitions) on customary gathering. See also the permission and conservation rights in the Marine and Coastal Area (Takutai Moana) Act 2011 granted to holders of a marine customary title, although iwi will struggle to obtain these rights given the high evidential standards that iwi need to prove to obtain a title.

32 Pam McMillan and Stephen Franks *Resource Legislation Amendment Bill – increased power for iwi* (Legal Opinion to Lee Short, Democracy Action, Franks Ogilvie Commercial and Public Law, Wellington, 7 March 2016) at 4 and 5.

33 Don Brash “Nationhood” (speech to the Orewa Rotary Club, Orewa, 27 January 2004).

34 See also the publications of Democracy Action, which argue that reforms to the Resource Management Act 1991 relating to iwi participation threaten non-Māori property rights <[www.democracyaction.org.nz](http://www.democracyaction.org.nz)>.

35 See *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA). This was the Māori Land Court’s original mandate; that is, to convert lands “owned by Natives under their customs or usages” into a Crown granted fee simple title. In other words, the Native land legislation saw Māori customary title as translating readily into a right of ownership.



possessed by Māori in the foreshore and seabed, while not clear,<sup>36</sup> was too controversial for the government of the day. The then government promised to protect the public interests and especially access to the coast while the opposition party argued that the government was not doing enough. The result was legislation which effectively overrode the decision and replaced it with a statutory scheme for recognition of non-exclusive rights and that remains in place today.<sup>37</sup>

But rejection of political authority or *tino rangatiratanga* also stems from an originalist understanding of the bargain between the Crown and Māori in the Treaty of Waitangi that seeks to “read up” the Crown’s Article 1 (right to sovereignty) and “read down” the Article 2 guarantee to Māori of *tino rangatiratanga*.<sup>38</sup> Signed in 1840 and written in both the Māori and English languages, the Treaty of Waitangi provides, in Article 1 of the English version, for the cession of sovereignty to the British Crown while guaranteeing to Māori in Article 2 of the Māori version their “*tino rangatiratanga*” (absolute chieftainship) over their lands, resources and people.<sup>39</sup> The relationship between these two measures has vexed Indigenous-Crown relations ever since.<sup>40</sup> The Māori version appears to anticipate a form of political power-sharing, whereas the English version assumes absolute sovereign power is ceded to the British Crown. Regardless, successive governments – and commentators like Franks and Brash – have always read sovereignty as meaning the Crown governs absolutely and exclusively, while *tino rangatiratanga* guarantees the right of Māori to the property in their possession.<sup>41</sup> The implication is that tribes may have possessed historical sovereignty but this was willingly given up and so there is no right now to seek self-determination or political authority. Instead, they possess the right to culture and property. But this interpretation

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36 Elias CJ in *Ngati Apa*, above n 35, at [45] noted that freehold was not necessarily the outcome of an inquiry because the Māori Land Court may now make a declaration of status of customary land without making a vesting order, changing the status of customary land to Māori freehold land. Justice Gault noted at [121] that few customary interests in the foreshore and seabed would be capable of supporting a vesting order and an estate in fee simple. However, contrast with Boast noting this “may well have been overstating the position”: Richard Boast *Foreshore and Seabed* (LexisNexis, Wellington, 2005) at 97.

37 Marine and Coastal Area (Takutai Moana) Act 2011, which repealed the Foreshore and Seabed Act 2004. Note that under the Marine and Coastal Area (Takutai Moana) Act 2011, while it declares that “neither the Crown nor any other person owns, or is capable of owning, the common marine and coastal area” (s 11(2)), it is possible to acquire ownership of sub-surface minerals, excepting “Crown Minerals”, under the Crown Minerals Act 1991.

38 Here I use the “originalist” versus “living constitutionalism” models of interpretation where in the latter case, instead of focusing on the intentions of those who create a constitution, a constitution is seen as an evolving, living entity that is capable of adapting to changing social circumstances and contemporary moral and political beliefs. See Ran Hirschl *Constitutional Theocracy* (Harvard University Press, Cambridge (Mass), 2011). For a copy of the Te Tiriti, see Treaty of Waitangi Act 1975, sch1, Tiriti o Waitangi, art 2.

39 Ian Hugh Kawharu “A reconstruction of Māori text” in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) at 390.

40 Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008).

41 See also Stephen Franks and Don Brash, who both read the right to *tino rangatiratanga* as relating to property only. See Brash, above n 33 (“The Treaty contains three short clauses, and deals with the government of New Zealand [art 1], property rights [art 2], and citizenship [art 3] ... [t]he Treaty did not create a partnership: fundamentally, it was the launching pad for the creation of one sovereign nation”). See McMillan and Franks, above n 32, at 22: “Despite the assertion [by the New Zealand Human Rights Commission] that Article 2 was about self-determination, a more straightforward interpretation is that it reflects classical property rights”. See also, Wayne Mapp “Time for Constitutional Clarity” [2003] NZLJ 148 at 151: “[I]t does not seem that the Treaty really conferred the right of some residuary sovereignty as opposed to the protection of particular property rights. The sweeping forms of consultation superior to everyone else can only be justified by the mistaken belief that Maori have a residuary sovereignty.” See also Bill English “The Treaty of Waitangi and New Zealand Citizenship” [2003] NZLJ 148.

is contested by Māori and many historians who argue that the Treaty of Waitangi envisaged a form of power-sharing between Māori and the Crown.<sup>42</sup> The Waitangi Tribunal has recently found that Māori in the far North did not intend to cede sovereignty to the Crown.<sup>43</sup>

Legal philosopher, Jeremy Waldron, on the other hand, highlights the importance of events that followed the Treaty of Waitangi.<sup>44</sup> In his view, circumstantial changes such as immigration or the availability of resources can operate to supersede historic Māori entitlements. Waldron's approach is to prioritise forward-looking redistributive justice, that is, to divide the public purse up according to present need instead of historic claims. This view echoes that of Brash who refers to Māori "socio-economic disparity" as "not Treaty issues: ... [but] ... social welfare issues."<sup>45</sup> However, Māori, like many other Indigenous peoples, are not seeking only public assets to address their social and economic needs but resources that are related to their political identity as Indigenous peoples. This requires a more historic-centred approach that recognises and accepts that Māori possessed and continue to assert tino rangatiratanga. Māori political authority is not a privilege, then, but a right based on prior sovereignty that was wrongly taken away and continues to be denied to Māori.

### III. THE PROPERTY MODEL

One can understand why the property category might be so prominent in New Zealand's Indigenous rights jurisprudence given the dominant role property has historically played in Indigenous-tate relations in New Zealand. The Treaty itself in the English version of Article 2 speaks of Māori rights to "Lands and Estates Forests Fisheries." Most of the law relating to Crown-Indigenous relations is about property – from the land sales transactions to legislation confiscating land from Māori resisting land sales to the Māori Land Court, which converted customary title into an alienable freehold title.<sup>46</sup> Property, thus, is an ancient means of thinking about Indigenous rights in New Zealand.

In recent decades, the common law doctrine of aboriginal rights has revitalised such property-based claims by Indigenous peoples. The property model has appeal to governments because it does not threaten or call into question current configurations of political power. It has appeal to Indigenous advocates as well because it avoids the controversy surrounding political authority yet provides substantive rights.<sup>47</sup> Yet the property model can be difficult for governments because it grants exclusive rights.

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42 See Claudia Orange *The Treaty of Waitangi* (Bridget Williams Books, Auckland, 2010) at 36: "As presented, the Treaty seemed to be confirming the chiefs' authority and directing its effects mainly at Pākehā, aiming specifically at better control of British subjects. Such control might be to the advantage of the Māori people, even though it would mean accepting an increased British authority and sharing the ruling power of the land."

43 Waitangi Tribunal *He Whakaputanga me te Tiriti: the Declaration and the Treaty Report* (Wai 1040, 2014) at 524: "Our view is that, on the basis of what they were told, the signatories were led to believe that Hobson would be a rangatira for the Pākehā and they would retain authority within their own autonomous hapū."

44 Jeremy Waldron "Redressing Historic Injustice" (2002) 52 UTLJ 135; Jeremy Waldron "Superseding Historic Injustice" (1992) 103 Ethics 4.

45 Brash "Nationhood", above n 33.

46 David Williams *Te Kooti Tango Whenua: the Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

47 Hence the focus by the claimants on the property model in the *Freshwater* claim, See *Freshwater* Report, above n 1.

Ownership is not the typical means by which Māori describe their right to water bodies but such a description of their rights in this manner is largely prompted by government privatisation of water rights.<sup>48</sup> However, it is the right to use, exclude and exploit the water body that is the heart of the matter.<sup>49</sup> Property is commonly referred to as a bundle of rights. As Paul McHugh notes, “the essence of property was not the physical thing itself but the rights in relation to the thing; rights which other members of the particular society were bound to observe.”<sup>50</sup> In *Yanner v Eaton*, the High Court of Australia noted:<sup>51</sup>

The word “property” is often used to refer to something that belongs to another. But ... “property” does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of “property” may be elusive. Usually it is treated as a “bundle of rights”.

Ownership in a natural resource gives a right to exclude and use the natural resource as you wish, including allowing others to exploit it and to gain some benefit from its use (for example, its use for electricity generation). Even owners are subject to the rights of the state, which may, for example, take property for public works subject to compensation; and the use of natural resources in New Zealand is regulated by the RMA. As a result, in thinking about proprietary rights it is often useful to think of a set of relevant rights that relate to the natural resource in question and to consider how those rights are to be allocated to various interested parties. Presently, the Crown reserves the right to regulate the use of water. The Crown receives benefits (indirectly by taxing profits made from use of water) from the use of the resource through the RMA consent system. Those who take water under the RMA acquire rights to the water captured and can benefit from its use.<sup>52</sup> This idea of different types of rights held by different parties obviously has many parallels with Māori customary tenure.<sup>53</sup>

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48 As Richard Boast observes, “It is no accident that those natural resources which have been privatised by statute (fisheries, the radio spectrum) have attracted the greatest amount of litigation from Māori groups. If a resource is unowned, or is nationalised, there is at least some hope of securing interests in it; but it is quite otherwise once privatised.” See Richard Boast “Maori Fisheries 1986-1998: A Reflection” (1999) 30 VUWLR 111 at 134. Boast was speaking in the context of fisheries and efforts to privatise that industry, but the parallels to water are very close.

49 Generally, property includes the following rights: the right to use or enjoy the property, the right to exclude others, and the right to sell or give away. See *Milirrpum v Nabalco* (1971) 17 FLR 141 (NTSC) at 171 per Blackburn J. See also: Kevin Gray “Property in Thin Air” (1991) 50 CLJ 252.

50 Paul McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 73. This notion of a bundle of rights is the conception applied in thinking about the content of “native title” in Australia as opposed to a “right in land” approach, which presupposes an underlying title to which are attached pendant rights; see *Western Australia v Ward* (2002) 191 ALR 1 (HCA). For the development of the “bundle of rights” approach, see Pamela O’Connor “The Changing Paradigm of Property and the Framing of Regulation as a ‘Taking’” (2010) 36 Monash University Law Review 50 at 54–56.

51 *Yanner v Eaton* (1999) 201 CLR 351 at [17].

52 B Barton “Different kinds of argument for applying property law to resource consents” (April 2016) RMJ 1.

53 For discussion of the notion of Māori overlapping rights and interests, see Angela Ballara *Iwi* (Victoria University Press, Wellington, 1998). With respect to tikanga Māori and water, see, Ta Edward Durie and others *Ngā Wai o te Māori: Ngā Tikanga me Ngā Ture Roia; The Waters of the Māori: Māori Law and State Law* (paper prepared for the New Zealand Māori Council, 23 January 2017).

Before the Waitangi Tribunal, the freshwater claimants sought “proprietary rights” in particular water resources.<sup>54</sup> This argument is clearly directed to the right to use and occupy water exclusively and to benefit financially from its use. As noted above, similar rights to exclusive occupation of property arose in the *Attorney-General v Ngati Apa* decision but were rejected by government.

So far, the Waitangi Tribunal has not had any difficulty in finding that the customary interests held by Māori in rivers are akin to proprietary rights.<sup>55</sup> In the *Freshwater* Report, the Waitangi Tribunal accepted the claimants’ contention that western-style legal ownership – while not a comfortable fit with Māori customary authority (mana or the Treaty equivalent, tino rangatiratanga) over particular resources – is the closest English cultural equivalent.<sup>56</sup> But it also recognised that tribes have political authority over their resources or tino rangatiratanga.<sup>57</sup> According to the Waitangi Tribunal, the claimants were entitled to enhanced authority and control in how their taonga would be used.<sup>58</sup> The *Freshwater* Tribunal found that claimants may be entitled to commercial redress for the use of rivers for electricity generation and that this might be in the form of both compensation for past losses<sup>59</sup> and royalties for future use.<sup>60</sup>

The Crown’s general negotiating stance is against the recognition of ownership interests or the provision of commercial redress for a river’s past and future use.<sup>61</sup> But it is “open to discussing the possibility of Māori proprietary rights in water, short of full ownership”.<sup>62</sup> By this, the Crown seems to be saying that it will not entertain the right of Māori to use and occupy and exploit the natural resource. Instead, for the Crown, tino rangatiratanga equates with protection and preservation, so that the natural resource may be cared for, used and enjoyed by present and future generations of tangata whenua, and shared with tauwi (non-Māori) as appropriate. In other words, the Crown is rejecting the right-to-property model in favour of the right-to-culture model.

#### A. Common Law Aboriginal Rights to Water

The doctrine of aboriginal rights is a means to assert property to natural resources through the common law courts and it is quite possible that iwi have aboriginal rights to specific bodies of

<sup>54</sup> See *Freshwater* Report, above n 1, at [1.1.1].

<sup>55</sup> See *Freshwater* Report, above n 1. Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998); Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999); Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993); Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008). The Waitangi Tribunal has also, in other reports, found a treaty breach in relation to Māori rights to water, see Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984); Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985).

<sup>56</sup> See *Freshwater* Report, above n 1, at [2.8.3(3)].

<sup>57</sup> *Freshwater* Report, above n 1, at [2.8.3(1)], agreeing with the Whanganui River Waitangi Tribunal that “tino rangatiratanga was more than ownership: it encompassed the autonomy of hapū to arrange and manage their own affairs in partnership with the Crown.”

<sup>58</sup> *Freshwater* Report, above n 1, at [3.9.1].

<sup>59</sup> At [3.9.1].

<sup>60</sup> At [3.8.3(1)] and [3.9.4]. See also, the Waitangi Tribunal reports relating to geothermal resources; Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 1590; Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993); and Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at [10.4].

<sup>61</sup> Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past and Building a Future* (March 2015) at 103.

<sup>62</sup> *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [113].

freshwater. Aboriginal rights litigation emerged from the 1970s in response to the rise of Indigenous movements and rights advocacy in the common law states.<sup>63</sup> McHugh argues that the judiciary were prodded into action due to the ambivalent political action on land claims.<sup>64</sup> Scholars, legal academics and Indigenous advocates took advantage of the rise of public interest litigation and judicial review to bring claims to lands and resources before the courts resulting in a series of “breakthrough” decisions including *Calder v Attorney-General of British Columbia* in Canada in 1973,<sup>65</sup> and in Australia, the decision of *Mabo v Queensland (No 2)* in 1992,<sup>66</sup> which overturned as discriminatory the common law rule that Australia was terra nullius when sovereignty was asserted over the country. Many of these early decisions were quite non-committal on the specific nature of the right.<sup>67</sup> But it was clear that the rights themselves were justiciable, after many decades of being characterised as only political in nature (hence the epithet, breakthrough), and sui generis in that the rights had their origins in a pre-colonial aboriginal life and not the property system created by the state.

The courts seemed to see their decisions as a basis for political negotiations between Indigenous peoples and the state. There were government responses in the form of contemporary treaty settlements in Canada, for example.<sup>68</sup> Yet little progress was made and disappointment about the content of rights meant that aboriginal rights continued to be litigated. The result, according to McHugh, is a “disfigured jurisprudence” – the move from the new dawn to the cold light of day – as the courts developed complex evidential standards of proof relating to continuity of connection and the legal extinguishment of aboriginal rights.<sup>69</sup> McHugh attributes this result to the focus on property rights by the courts (which were simply unable to accommodate the many dimensions

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63 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

64 PG McHugh “A Common Law Biography of Section 35” in Patrick Macklem and Douglas Sanderson (eds) *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (University of Toronto Press, Toronto, 2016).

65 *Calder v Attorney-General of British Columbia* [1973] SCR 313.

66 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

67 McHugh “A Common Law Biography of Section 35”, above n 64.

68 Nisga’a Final Agreement, Nisga’a Nation–Canada–British Columbia (opened for signature 27 April 1989).

69 See Paul McHugh “New Dawn to Cold Light: Courts and Common Law Aboriginal Rights” [2005] 4 NZ L Rev 485. For critique of this jurisprudence, see, for example, Maureen Tehan “A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act” (2003) 27 *University of Melbourne Law Review* 523 at 556; Sean Brennan “Native Title in the High Court a Decade after *Mabo*” (2003) 14 *Public Law Review* 209 at 212–214; Noel Pearson “The High Court’s Abandonment of ‘The Time-Honoured Methodology of the Common Law’ in its Interpretation of Native Title in *Mirriuwung Gajerrong and Yorta Yorta*” (2003) 7 *Newcastle Law Review* 1; Kirsten Anker “Law in the Present Tense: Tradition and Cultural Continuity in *Members of the Yorta Yorta Aboriginal Community v Victoria*” (2004) 28 *Melbourne University Law Review* 1; Richard Bartlett “An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*” (2003) 31 *University of Western Australia Law Review* 35; Greg McIntyre “Native Title Rights after *Yorta Yorta*” (2003) 9 *James Cook University Law Review* 268; Lisa Strelein “*Members of the Yorta Yorta Aboriginal Community v Victoria*—Comment” (2003) 2(21) *Land, Rights, Laws: Issues of Native Title* 1; Simon Young “The Trouble with ‘Tradition’: Native Title and the *Yorta Yorta* Decision” (2001) 30 *University of Western Australia Law Review* 28.

of aboriginal rights claims-making) but especially, political authority over territory.<sup>70</sup> It was a mistaken attempt to use private property to address a public end.<sup>71</sup>

The greatest criticism has been of the evidential test for proof of *existing* aboriginal rights. Aboriginal rights law is not restorative or reparative but based on a right that has survived and endured. The difficulties, of course, are the many intervening years in which the Crown has displaced Indigenous peoples and allocated rights in land and formalised those rights in the form of land grants.

There is not much cause to bring an aboriginal rights claim to land in New Zealand. Most of the rights are considered extinguished at law due to Crown confiscation, and direct purchase and conversion into westernised freehold titles by the Māori Land Court. That has resulted in exceptional cases of riverbeds being litigated in *Paki v Attorney-General (No 2)*<sup>72</sup> (*Paki No 2*) and the foreshore and seabed in *Ngati Apa*.<sup>73</sup> *Ngati Apa* arose because successive governments had assumed that any aboriginal rights in that area had long been extinguished. Recently, in *Paki No 2*, the Supreme Court recognised the potential for aboriginal rights in riverbeds.

Freshwater seems to be another exceptional and overlooked interest. This is unusual because with water, there seems to be much potential for such an aboriginal rights claim, due in large part to the repeated insistence by the Crown that no one owns water in New Zealand. This is the government's standard response to claims to water by Māori. The Crown policy is that this is not possible at common law due to the common law doctrine of capture.<sup>74</sup> Water is only capable of ownership once captured or contained (for example, put in a tank or bottled). For this reason, the government says it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a Treaty settlement.<sup>75</sup> The government notes specifically in relation to “the benefits of hydroelectricity generation” that this “belongs to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes.”<sup>76</sup>

However, according to New Zealand common law and statute, common law presumptions such as the doctrine of capture cannot displace an Indigenous interest in a natural resource. The English common law applied in New Zealand from 1840 only “so far as applicable to the circumstances of the ... Colony of New Zealand”.<sup>77</sup> In *Baldick v Jackson*, for example, the Court

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70 McHugh “A Common Law Biography of Section 35”, above n 64.

71 McHugh “A Common Law Biography of Section 35” above n 64. See also, Richard Boast “Treaty Rights or Aboriginal Rights” [1990] NZLJ 32 at 36, noting “Another criticism [of aboriginal rights] is that the rule forces indigenous claims and indigenous rights into the rather Procrustean bed of an obscure feudal rule of the common law”.

72 *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67 [*Paki No 2*]. Lack of experience with aboriginal rights law may explain why the claimants did not raise this in *Paki*, assuming instead that any aboriginal right was displaced by the common law presumption of *ad medium filum aquae*.

73 *Ngati Apa*, above n 35.

74 Office of Treaty Settlements *Ka Tika ā Muri, Ka Tika ā Mua: Healing the Past and Building a Future* (March 2015) at 103.

75 At 103 and 111.

76 At 103.

77 As was later confirmed by the English Laws Act 1858 (UK) 21 & 22 Vict, for the avoidance of doubt. This provision was continued, in relation to New Zealand, by the English Laws Act 1908 and is confirmed today by the Imperial Laws Application Act 1988, s 5. See also *Amodu Tijani v Southern Nigeria* [1921] 2 AC 399 (PC) at 403.

rejected the argument that there was a common law royal prerogative in stranded whales.<sup>78</sup> In *Ngati Apa*, Elias CJ rejected the English common law presumption that the Crown has property to the foreshore and seabed noting “if any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.”<sup>79</sup> The Supreme Court decision of *Paki (No 2)* found that the presumption that the Crown had obtained title to the bed of the river in accordance with the *ad medium filum aquae* or mid-point presumption could not apply unless it was consistent with Māori custom.<sup>80</sup> The issue, the Court said, had to be determined on a case-by-case basis depending on the customary law of the tribe in question.

By saying that no one owns water under the common law, the Crown is, of course, also saying *it* does not own water. But what about legislation? There is, in fact, no legislation that expressly states that the Crown has “property” in water. This can be compared with legislation such as the Crown Minerals Act 1991, which expressly provides that “all petroleum, gold, silver, and uranium ... shall be the property of the Crown.”<sup>81</sup> In the case of rivers and lake bodies, the Crown could assert extinguishment of any aboriginal right by implication (the exclusion of Māori without their consent from their development, governance and management by legislation and Crown actions) such as under the Water-power Act 1903, the Water and Soil Conservation Act 1967 and the Resource Management Act 1991.

However, there is much authority in Australian and Canadian aboriginal rights law saying that “to regulate” is not “to extinguish”. In *R v Agawa*, the Ontario Court of Appeal ruled that a provincial licensing requirement did not extinguish an aboriginal right to fish. The right had been regulated and not extinguished by the fishing legislation.<sup>82</sup> In *Sparrow*, the Supreme Court of Canada said that to extinguish an aboriginal right, the intention must be “clear and plain.”<sup>83</sup> The Court found that the subjection of Indians to a licensing system under federal law for the exercise of any fishing rights was “simply a matter of controlling the fisheries not defining underlying rights.”<sup>84</sup> The Australian High Court in *Yanner v Eaton* found that legislation vesting “property” in “all fauna” in the Crown did not extinguish a native title right to catch juvenile estuarine crocodiles

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78 *Baldick v Jackson* (1910) 30 NZLR 343 (SC). At common law, whales taken in the territorial waters of the United Kingdom or stranded ashore were regarded as royal fish and belonged to the sovereign, but in *Baldick v Jackson*, Stout CJ said this rule could have no applicability in New Zealand for two reasons: it had never been asserted in New Zealand waters by the Crown and would, in any case, be contrary to the Treaty of Waitangi “for they [Māori] were accustomed to engage in whaling.”

79 *Ngati Apa*, above n 35, at [86].

80 *Paki No 2*, above n 72, thus recognises the possibility that there may be unextinguished Māori customary title in the beds of non-navigable rivers; a possibility that some had assumed was precluded by the *Re the Bed of the Wanganui River* precedent (*Re the Bed of the Wanganui River* [1962] NZLR 600 (CA)). The practical consequence of the Court’s decision in *Paki No 2* is that it is now possible for the plaintiffs and others to apply to the Māori Land Court for investigation of title to the non-navigable segments of the bed of the Waikato River.

81 Crown Minerals Act 1991, s 10. Even if a statute does vest property in the Crown, that does not mean any aboriginal right is extinguished. The *Ngati Apa* decisions found that s 7 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 (which deems the seabed and subsoil “to be and always to have been vested in the Crown”) was not sufficient to extinguish native title in the seabed. See, for example, Elias CJ in *Ngati Apa*, above n 35, at [63]. See also *Yanner v Eaton* (1999) 201 CLR 351.

82 *R v Agawa* (1988) 65 OR (2d) 505 (CA).

83 *R v Sparrow* [1990] 1 SCR 1075.

84 At 1085.

for food without a permit.<sup>85</sup> The use of the word “property” in the Act did not give the Crown absolute, beneficial ownership in the fauna.<sup>86</sup> Instead, the Act was intended to regulate, not abolish, the practice of hunting native fauna.<sup>87</sup> But, of course, in the case of water in New Zealand there is, as noted, no vesting of property in the Crown, only its regulation by the RMA.

In *Ngati Apa*, the New Zealand Marine Farming Association argued that Māori claims to ownership of property in foreshore and seabed are inconsistent with the controls of the coastal marine area under the RMA.<sup>88</sup> It was suggested that any Māori customary property interests amounting to rights less than ownership can be recognised now only under the RMA.<sup>89</sup> Elias CJ rejected this argument observing that while the management of the coastal marine area under the RMA “may substantially restrict the activities able to be undertaken” by Māori with customary property in the area, “[t]he statutory system of management of natural resources is not inconsistent with existing property rights as a matter of custom. The legislation does not effect any extinguishment of such property.”<sup>90</sup>

As a result, one of the greatest potential challenges to an aboriginal rights claim to water in New Zealand – that the right has been supplanted by statute – does not seem to be an issue in the context of a Māori claim to water. The question then becomes whether there was an interest to begin with and whether that interest had been maintained. The common law jurisprudence generally requires continuity of use and connection as noted above and this has proved to be a major issue for many Indigenous peoples.<sup>91</sup> In New Zealand, each resource claimed would have to be decided on a case-by-case basis. In the case of the use of geothermal resources, for example, there would be little difficulty meeting continuity tests. For example, there could be little doubt

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85 *Yanner v Eaton* (1999) 201 CLR 351.

86 At [115]. The majority in *Yanner* did not consider that property had to be construed as meaning something like all rights attached to a thing. Contrast with the decision of McHugh J who held at [49] that the use of the word “property” gave the Crown “every right, power, privilege and benefit that does or will exist in respect of fauna ... to exclude every other person from enjoying those rights, powers, privileges and benefits”. This reasoning led to the conclusion that the Crown’s rights were so broad that the appellant’s native title rights must have necessarily been extinguished. But see *Hayes v Northern Territory* (1999) 97 FCR 32 where Olney J found that particular vestings did not operate to extinguish native title, because they did not imply exclusive possession (at 114–116), and in another case because land was merely vested in “an emanation of the Crown” (at 130).

87 In that case, the majority also took account of the fact that the common law had only ever recognised a qualified or limited property right in wild animals. At common law, like the doctrine of capture, wild animals are not capable of ownership unless captured.

88 *Ngati Apa*, above n 35, at [75] per Elias CJ.

89 At [75].

90 At [76] per Elias CJ; at [123] per Gault P (“[the Resource Management Act 1991] provisions are not wholly inconsistent with some private ownership”); and at [192] per Tipping J (“[T]he prescribed restrictions on activities within the coastal marine area, stringent as they are, do not inevitably lead to the view that the potential for an underlying status of Māori customary land has thereby been extinguished.”) Compare *McRitchie v Taranaki Fish and Game Council* [1999] 2 NZLR 139 (CA), where the majority of the Court of Appeal found that the taking of trout by McRitchie without a licence was unlawful, despite a statutory reference to the protection of a “Māori fishing right”, because the taking of trout has always been controlled by law. The majority concluded that the legislative history “demonstrates beyond doubt that the appellant and his hapū did not have a Māori fishing right to take trout in the Mangawhero River” (at 153). However, the Court of Appeal majority did not fully consider the nature of the right (the appeal was only on the question of law of effect of legislation) and especially the law of aboriginal rights, and did not consider jurisprudence in Australia and Canada and New Zealand about regulation of aboriginal rights.

91 See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 (HCA).



that iwi have consistently used geothermal water in their rohe consistently since 1840.<sup>92</sup> In the case of the Waikato River, raupatu undermined the ability of Waikato-Tainui iwi to exercise control over their use of the Waikato River. However, there is no doubt about a continuing connection with the river.<sup>93</sup> The Waitangi Tribunal has issued five reports on iwi claims to rivers and they all attest to the continued close association between tribes and rivers as taonga.<sup>94</sup> Proof of ownership, as accepted in the Native Land Court and later in the Waitangi Tribunal, and as demonstrated by the claimants in the *Freshwater* Report, rests on the following customary proofs or “indicia of ownership”, which have been accepted by the Crown:<sup>95</sup>

... the water resource has been relied upon as a source of food; the water resource has been relied upon as a source of textiles or other materials; the water resource has been relied upon for travel or trade; the water resource has been used in the rituals central to the spiritual life of the hapū; the water resource has a mauri (life force); the water resource is celebrated or referred to in waiata; the water resource is celebrated or referred to in whakataukī; the people have identified taniwha as residing in the water resource; the people have exercised kaitiakitanga over the water resource; the people have exercised mana or rangatiratanga over the water resource; whakapapa identifies a cosmological connection with the water resource; and there is a continuing recognised claim to land or territory in which the resource is situated, and title has been maintained to “some, if not all, of the land on (or below) which the water resource sits”.

The Marine and Coastal Area (Takutai Moana) Act 2011 imposes rigid evidential standards focused on ideas of “occupation”, “exclusivity” and “continuity” as has been the case in relation to aboriginal title litigation in Canada.<sup>96</sup> In brief, to obtain customary title, claimants need to show they have occupied land without interruption and to the general exclusion of others since 1840. The requirement to establish aboriginal exclusive occupation has been a vexed issue in Canadian litigation. However, the 2014 Canadian Supreme Court decision of *Tsilhqot’in Nation v British Columbia* has confirmed that both “occupation” and “exclusion” are considered with reference to the aboriginal perspective as well as that of the common law.<sup>97</sup>

It should be noted too that the common law is capable of recognising Indigenous proprietary rights. In the Australian High Court case of *Mabo (No 2)* Brennan J, noted “a community which asserts and asserts effectively that none but its members has any right to occupy or use the land

92 Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008) at 1590 and Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at [10.4].

93 Linda Te Aho “Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – the Waikato River Settlement” (2010) 20 *The Journal of Water Law* 285.

94 See, for example, *Freshwater* Report, above n 1. Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998); Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999); Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993); Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008).

95 *Freshwater* Report, above n 1, at [2.2.1].

96 See Kent McNeil’s argument concerning aboriginal prior occupation granting a right to exclusive occupation at common law that cannot be displaced by adverse possession in Kent McNeil *Common Law Aboriginal Title* (Oxford University Press, Oxford, 1989). Similarly, aboriginal title in Canada is based on exclusive occupation at sovereignty. See *Tsilhqot’in Nation v British Columbia* 2014 SCC 44, in which aboriginal title to land was recognised. At the same time, aboriginal title is not based on aboriginal law and sovereignty but on “prior occupation” of land. Aboriginal law is adopted as a tool to ensure that the common law tests of occupation are modified to accommodate different perspectives.

97 *Tsilhqot’in Nation v British Columbia* 2014 SCC 44.

has an interest in the land that must be proprietary in nature: there is no other proprietor ... The ownership of land within a territory in the exclusive occupation of a people must be vested in that people.”<sup>98</sup> Accordingly, Brennan J accepted that the customary land claims of Aboriginals comprise a “proprietary community title”. In Canada also, aboriginal rights include the right exclusively to occupy land and ownership of subsurface minerals.<sup>99</sup> Canadian aboriginal title law also recognises the potential for joint-aboriginal title ownership in those cases where two or more aboriginal communities shared the use of particular territories.<sup>100</sup>

There is a long-standing practice in New Zealand law – recognised recently in the *Ngati Apa* decision<sup>101</sup> – of readily translating a Māori customary property into a right of ownership and that is the conversion process recognised in Māori land legislation since its originating statutes of 1862. This allowed for the conversion of lands “owned by Natives under their customs or usages” into a Crown-granted fee simple title.<sup>102</sup> The Māori Land Court retains that power, (though, of course, not in relation to the coastal marine area) due to the Marine and Coastal Area (Takutai Moana) Act 2011.

Any judicial recognition of aboriginal rights to water in New Zealand would likely lead to negotiations between aboriginal rights-holders and government. However, there is no guarantee that a judicial decision would result in a robust set of rights as is evidenced with the experience following *Ngati Apa*. An important difference between *Ngati Apa* and any future judicial declaration of rights to water is that in the latter case there would be actual justiciable rights and so it would be much harder for the government to expropriate the rights without the consent of the claimants. In the case of *Ngati Apa* the central issue was about *jurisdiction* to investigate whether such rights existed and so there was no recognition of any legal rights as such and disagreement about the potential scope and nature of any rights.<sup>103</sup>

What is clear is that the courts would likely add significant impetus for negotiation of reforms. The Waitangi Tribunal reports on water bodies have no doubt provided momentum for the Treaty settlements relating to the Whanganui and Waikato rivers, for example. However, it is not clear how much leverage this will provide Māori seeking rights of significance in water bodies in the absence of a judicial determination of an aboriginal right to water. For example, the *Freshwater* Report was not sufficient to leverage a settlement when government decided to sell 49 per cent of the shares in Mighty River Power and other State-owned Enterprises. The Crown has undertaken that it will not rely on the privatisation of the hydro-electric generating companies so as to diminish any claimed rights. Yet, the partial privatisation of Mighty River Power (now Mercury) has been achieved.<sup>104</sup> The Supreme Court found that the government could proceed with partial privatisation

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98 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 51.

99 *Delgamuukw v British Columbia* [1997] 3 SCR 1010; *Tsilhqot'in Nation v British Columbia* 2014 SCC 44.

100 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at [158].

101 *Nga Apa*, above n 35.

102 Native Lands Act 1862; see also Native Lands Act 1865.

103 McHugh speculated that the common law would not be able to recognise exclusive interests in the foreshore and seabed, drawing on Australian jurisprudence especially *Yarmirr v Northern Territory* [2001] HCA 56; see Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 50–56.

104 Mercury remains 51 per cent government-owned after partial privatisation in 2013.

because this would not materially impair the Crown's ability to take the reasonable action needed to comply with the principles of the Treaty of Waitangi.<sup>105</sup>

It does not appear that the Supreme Court fully appreciated the potential rights available to Māori as yet not de jure but de facto and so substantial, on their face, that there is a compelling case for Māori ultimately obtaining de jure rights through the common law doctrine of aboriginal rights. Also, the Supreme Court seems to have over-estimated the potential gains to be made through the political process of negotiation with the Crown. The Supreme Court was very much convinced by the Crown's argument that this was the appropriate process. But while this is the typical means of addressing Māori claims, the position of Māori in such negotiations is relatively weak unless tribes have some type of legal right with which to confront the Crown.

### *B. Negotiated Property in Natural Resources*

An interesting dimension to claims to natural resources is the many Treaty settlements made that give effect to Māori proprietary rights. Treaty settlements are directed at providing compensation for dispossession of rights to lands and natural resources (most of which are now in private ownership or Crown ownership, for example, the conservation estate). This is in contrast to the modern treaty settlements in Canada which are directed at extinguishing *existing* aboriginal property rights in land in exchange for treaties that allow for forms of self-government and legal rights to natural resources.

However, iwi have been successful in negotiating a right of "ownership" over specific natural resources as a means of re-claiming control over them. This includes Treaty settlements relating to the right to commercial and customary fisheries,<sup>106</sup> lakebeds,<sup>107</sup> forests,<sup>108</sup> Crown lands,<sup>109</sup> and aquaculture<sup>110</sup> and minerals in the coastal marine area.<sup>111</sup> This has taken place in the highly political realm of Treaty settlement negotiations.<sup>112</sup>

The claims have been assisted by the development of the common law doctrine of aboriginal title. While these agreements are framed as Treaty settlements, all of them are based on a similar notion to that underpinning modern treaties in Canada, that is, the notion of tribes possessing existing de facto property rights in natural resources. In other words, there are no established *legal* rights in the resource in question. There is an arguable case for legal rights on the basis that Māori once possessed these resources, that the resource or rights to the natural resources

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105 *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

106 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Fisheries (Kaimoana Customary Fishing) Regulations 1998.

107 Te Arawa Lakes Settlement Act 2006, s 23(1): "The fee simple estate in each Te Arawa lakebed is vested in trust in the Trustees of the Te Arawa Lakes Trust."

108 Central North Island Forests Land Collective Settlement Act 2008. The proposed sale of forests land, resulted in objection by Māori who claimed an interest in the forests, and a Treaty settlement that led to the Crown keeping ownership and creation of the Crown Forestry Rental Trust (to manage rental gained from selling of cutting rights and leasing of forest lands).

109 State-Owned Enterprises Act 1986.

110 Maori Commercial Aquaculture Claims Settlement Act 2004.

111 See *Ngati Apa*, above n 35; and Marine and Coastal Area (Takutai Moana) Act 2011.

112 C Charters "Māori Rights: Legal or Political?" (2015) 26 PLR 231.

are now in the possession of the Crown, and that the Crown's interest is challenged by the prior Indigenous rights.<sup>113</sup> Indeed, these Treaty agreements acknowledge potential property rights in the natural resource in question by expressly providing that all claims in relation to the natural resource are “fully and finally settled, satisfied, and discharged.”<sup>114</sup> This includes claims “founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise.” These clauses thus anticipate and foreclose any potential rights based on the Treaty and common law aboriginal rights.<sup>115</sup>

The validity of the de facto property right is typically established through a Waitangi Tribunal inquiry into the historical claims of iwi. Indeed, the Waitangi Tribunal has become something of a de facto common law aboriginal rights court. Claimants seem to prefer the Waitangi Tribunal (a commission of inquiry) given it is not as adversarial as the general courts and is less costly than an aboriginal rights judicial inquiry, and the Waitangi Tribunal is likely to be more open to such a claim than the courts, which have been generally conservative in hearing aboriginal rights claims. There is also the fact that most aboriginal rights cases are a prelude to political negotiations so claimants may hope that a successful Waitangi Tribunal inquiry would lead to negotiation of a fair settlement. This has proven to be the case in relation to claims to fisheries and aquaculture.

However, government has resisted many Māori legal claims to “ownership” of resources. In relation to New Zealand's conservation estate, the general Crown principle is that this land is not able to be returned to iwi. Conservation groups have resisted the return of conservation lands to iwi in Treaty settlements given concerns over protection of endangered species and access to walkways. Successive governments have refused to engage with Māori on petroleum ownership and other precious minerals despite the fact that the Waitangi Tribunal ruled that the hapū had a “Treaty interest” in petroleum, which entitled Māori to a remedy for its wrongful loss.<sup>116</sup> The government, as noted, has also refused to grant property in the foreshore and seabed due to public opposition to exclusive interests in the coast. And of course in relation to water and water bodies of lakes and rivers, government will not recognise property rights. What can be gleaned from this approach to natural resources?

First, it is clear that government prefers to negotiate agreements to address Māori claims to natural resources. For water, the government asserts that the “process of rights” definition is best left to collaboration between iwi and the Crown. The trouble with this for Māori, as noted, is that the process is controlled by the executive branch of government with little means of legal review. This can still result in rights of substance but it seems that Māori must seek leverage in negotiations by obtaining some prima facie legal right to the natural resource.

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113 To this extent, at least, there are more similarities between the agreements and the modern agreements made in Australia and Canada in relation to aboriginal title than many commentators assume.

114 See, for example, Maori Commercial Aquaculture Claims Settlement Act 2004, s 6(2)(i): settlement of Māori claims to commercial aquaculture activities are “fully and finally settled, satisfied, and discharged” in relation to “rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise.”

115 See Boast, above n 36, who thinks the fishing treaty settlements have their origins in the Treaty, noting that the 1989 and 1992 settlements and their implementing enactments explicitly invoke the Treaty of Waitangi. The Maori Fisheries Act 1989 is described in its long title as an Act “to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi” (long title at (a)). See Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, preamble, especially recitals (a), (c), (d), (f), (j), (k) and s 10(a) and (b). The common law doctrine of native or aboriginal title is the other obvious candidate.

116 Waitangi Tribunal *The Petroleum Report* (Wai 796, 2003).

Secondly, the proprietary rights recognised do not impact significantly on non-Indigenous people's rights or the Crown – the rights granted to Māori do not overtly deprive others of rights. In contrast, lakes and rivers and the coastal marine area, and the conservation estate, are politically challenging because of issues of public access, navigation and public fishing rights. This is especially difficult given New Zealand is a small island state with a large coastline and many large rivers and lakes. As a result, the public access to, and use of, water bodies is a quintessential part of New Zealand social and cultural life. New Zealanders are also anxious about the prominent role of Treaty settlements and their perceived potential to entrench ethnic divisions, undermine civil unity and create special rights.

Thirdly, the proprietary rights are based on the idea of prior Indigenous ownership or traditional use and some type of enduring interest. The fisheries and aquaculture agreements were supported by ample evidence of an extensive Māori fishery in New Zealand at 1840, gathered by the Waitangi Tribunal in two major claims involving fisheries; pounamu was based on its well-recorded significance to Ngāi Tahu; the return of Crown land is clearly based on tribal occupation of the land – if not physical then a close connection and the significance of land to culture and identity. Fisheries and land are expressly referred to in Article 2 of the Treaty of Waitangi. Many see the rationale behind such claims compared, say, to claims to petroleum and other minerals where there is little evidence of historical and contemporary use. With water, of course, as we have seen, there is a rich repository of evidence of use and connection with water resources.

Fourthly, proprietary rights recognition to date are based on natural resources that may be of high value but will not break the fiscal envelope bank. The high economic value of proprietary rights in water, petroleum and similar natural resources raises the question of the relativity of Treaty settlements.

To bring it all together, there seems no basis in principle for denying an Indigenous right to water in New Zealand (given substantial evidence of its continuous use by Māori), other than the political risks of recognition and the value of the natural resources to the state. Government, as was the case with *Ngati Apa* and the foreshore and seabed, are concerned about public opposition to Indigenous rights recognition.

One means for the government to avoid the ownership question over natural resources of national interest is to establish co-management agreements with iwi. Government has negotiated co-management deals in Treaty settlements with iwi that demonstrate a connection with a river. These agreements do not address the proprietary dimension on an Indigenous people's right to property – in fact they expressly defer consideration of proprietary interests.<sup>117</sup> However, the co-management agreements are largely directed at promoting the right to culture and not proprietary rights or political authority.

#### IV. THE RIGHT TO CULTURE MODEL

So far, we have discussed the notion of political authority in New Zealand and the property model. As argued above, the Māori right to natural resources cannot be reduced to ownership only. Rather, tino rangatiratanga subsumes the ideas underlying proprietary rights in that the Māori concept envelops both a political conception of authority as well as rights attached to resources, including

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117 See also the Tūhoe deal where the Crown rejected ownership of conservation land and offered, instead, to vest the park with legal personality, to be co-chaired by Māori and the Crown; See, Te Urewera Act 2014.

rights to exclusive possession and use. In short, tino rangatiratanga encompasses both political authority and proprietary rights. As we saw in Part III, in turning to the recognition of natural resources in the last four decades of Indigenous rights recognition, it is evident that the Crown has accepted that Māori can be accorded rights of ownership in natural resources and that this is based on the notion of an enduring interest to the resource in question. In other cases, however, politics prevents the recognition of rights of ownership – for example in the case of petroleum and foreshore and seabed. This seems to be the rationale behind the refusal of the Crown to recognise Māori proprietary rights in water. In such cases, government applies, instead, a right-to-culture model.

### A. *The RMA and Māori Interests – Right-to-Culture Model*

Compared with many other countries, New Zealand has a robust regulatory process for environmental regulation of natural resources – including water bodies – and this includes important protections for Māori interests. The principal legislation for regulating the use of the physical environment is the RMA, which refers to a set of Māori interests. These Māori interests reflect the right-to-culture model in that they are not aimed at granting political authority to Māori but, rather, focus on stewardship, the “relationship” of Māori with their environment and effective participation in decision-making that may impact on them.<sup>118</sup> There is no reference in the RMA to tino rangatiratanga over natural resources in their rohe or mana whenua and mana moana. Instead, all decision-makers under the RMA must “take into account the principles of the Treaty of Waitangi,”<sup>119</sup> and have “particular regard” to “kaitiakitanga” (guardianship by the tangata whenua),<sup>120</sup> and “recognise and provide for ... the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred sites], and other taonga [treasures].”<sup>121</sup> As a result of these provisions, when a local council draws up development plans or grants resource consents to carry out some activity, it must first consider the implications of the plan and consent on the tangata whenua’s customary law as it relates to kaitiakitanga, for example.

However, these interests do not appear to be advancing the interests of Māori. As the Waitangi Tribunal has said many times, iwi and hapū feel sidelined by the RMA consent process.<sup>122</sup> Part of the challenge lies with the weak statutory directions to “take into account” the principles of the Treaty and the fact that the Māori interests are one of several other competing interests, including the overall commitment to sustainable development. Additionally, s 36A of the RMA explicitly states that neither an applicant nor a local authority has a duty to consult any person (including Māori).

The RMA was amended in 2005 to strengthen the role for Māori by creating an obligation to consult with tangata whenua in the preparation of a proposed policy statement or plan if they may

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118 Resource Management Act 1991, ss 6, 7 and 8.

119 Resource Management Act 1991, s 8.

120 Section 7.

121 Section 6.

122 See Waitangi Tribunal *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011). See also, Jacinta Ruru *Indigenous restitution in settling water claims: the developing cultural and commercial redress opportunities in Aotearoa* (2013) 22 *New Zealand Pacific Rim Law & Policy Journal* 311 at 325, noting that “Since the enactment of the RMA in 1991, there have been about twenty instances where Māori, as objectors, have appealed council decisions that approved resource consents to take water, discharge wastewater into water, or dam water.”

be affected by the policy or plan.<sup>123</sup> A further amendment provided for public authorities and iwi to enter into “joint management agreements”, under which decisions taken have the legal effect of a decision of the local authority.<sup>124</sup> These have only been used on a few occasions. In addition, local authorities now must have regard to iwi management plans in the preparation of their own plans and policy statements.<sup>125</sup> Regional policy statements must set out the resource management issues of significance to the region’s iwi authorities.<sup>126</sup> There is also provision under the Act for local authorities to transfer functions to iwi authorities.<sup>127</sup> However, it has rarely been used.

Despite the introduction of enhanced consultation requirements and provision for the consideration of iwi management plans, the current RMA regime has not empowered iwi. A major issue has been the weak impact of iwi management plans. Regional or district plans are not required to be consistent with iwi management plans. There is no requirement to consider iwi management plans when determining whether or not to grant resource consents. The RMA is also silent as to the purpose and content of iwi management plans. Consequently, iwi management plans tend to be uneven in style and content. Their quality depends on the extent to which iwi have the resources “to get legal and technical advice, consult on and develop the plan, and engage in RMA processes.”<sup>128</sup> The Waitangi Tribunal has called upon the Ministry for the Environment to “step up with funding and expertise, to ensure that [Māori] are not prevented from exercising their proper role by a lack of resources or technical skills.”<sup>129</sup> Māori communities struggle to keep up with the paperwork associated with resource consent applications and planning.<sup>130</sup>

As a result of these shortcomings, in November 2015, the government introduced a proposal to amend the RMA and included in the suite of changes was the notion of “iwi participation arrangements” (IPAs).<sup>131</sup> The IPAs were intended to strengthen the current iwi management plans by placing a statutory obligation on local authorities to invite iwi to establish iwi participation

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123 Resource Management Act 1991, sch 1, cl 3(1)(d).

124 See Resource Management Act 1991, s 2(1), definition of “joint management agreement”, and ss 36B–36E. See, for example, the agreement between Taupo District Council and Ngāti Tūwharetoa: Taupo District Council “Joint Management Agreement” (2008) <[www.taupodc.govt.nz](http://www.taupodc.govt.nz)>. Some iwi have entered into joint management agreements. Ngāti Porou recently entered into such an agreement with the Gisborne District Council in relation to the Waiapu River (see Gisborne District Council “Joint Management Agreement between Gisborne District Council and Te Runanganui o Ngāti Porou Trustee Limited” (8 October 2015) <[www.gdc.govt.nz](http://www.gdc.govt.nz)>). In that Agreement, the purpose of the joint management agreement is “to provide a mechanism for Ngā Hapū o Ngāti Porou to share in RMA decision-making ... within the Waiapu Catchment” (at [11]). The “broader aspiration of Ngāti Porou hapū [is] to move to a transfer of powers under the Resource Management Act 1991 (RMA), within five (5) years” (at [8(b)]).

125 Resource Management Act 1991, ss 61(2A) and 74(2A).

126 Section 61(1)(b).

127 Section 33.

128 *Ko Aotearoa Tēnei* Report, above n 19, at 254.

129 At 283.

130 See Waitangi Tribunal *The Report on the Management of the Petroleum Resource* (Wai 796, 2011) at 94, noting “how time consuming – and protracted – the processes can be. Indeed, they show that for some claimant groups, and for those members who shoulder the responsibility, the task of staying abreast of petroleum companies’ activities so that taonga can be protected is relentless. ... All the claimants we heard from were volunteers for their hapū. The sheer size of the files that they had assembled about particular projects to which they had objected provided some indication of the extent of the work required of them, which was done in their own time”.

131 Resource Legislation Amendment Bill 2015 (101-1).

arrangements<sup>132</sup> as well as a mechanism for review and monitoring of that relationship.<sup>133</sup> It was hoped that iwi engagement would improve through formalising the negotiation and engagement process.<sup>134</sup>

The provisions relating to IPAs underwent significant changes from the Bill's first reading in December 2015 through to its assent in April 2017.<sup>135</sup> IPAs were renamed Mana Whakahono a Rohe (MWAR), and their purpose and content were broadened significantly. The new concept was introduced following engagement between the Iwi Chairs Forum leader group on water and cabinet ministers.<sup>136</sup> Unlike the IPA process, the MWaR process is iwi-initiated.<sup>137</sup> On receiving an invitation, the local authority must meet with iwi to discuss how they will negotiate an MWaR.<sup>138</sup> The purpose of MWaR is:<sup>139</sup>

... to provide a mechanism for iwi authorities and local authorities to discuss, agree, and record ways in which tangata whenua may, through their iwi authorities, participate in resource management and decision-making processes under this Act;

There are now minimum requirements that must be contained in an MWaR, for example, it must state how iwi may participate in the plan-making process as well as how iwi are to be consulted in resource management decision-making.<sup>140</sup> It is therefore possible under the MWaR programme for iwi to negotiate agreements that are akin to those negotiated by iwi in Treaty settlements, such as the co-management agreements contained in the Waikato-Tainui and Whanganui River treaty settlements. Yet these, as I argue below, apply the right-to-culture model.

### *B. Co-Governance Agreements over Water in Lieu of Ownership Interests – Right-to-Culture Model*

Despite the government's rejection of Māori ownership of freshwater bodies, it has negotiated alternatives to ownership in the form of co-governance agreements. Most of the agreements have been negotiated as tribal-specific Treaty settlements, but also as tribal-specific joint committee agreements under the RMA. In relation to the largest river in the North Island, the Waikato River, for example, Waikato-Tainui tribes negotiated an agreement given effect in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. This establishes the Waikato River Authority, which is made up of roughly equal numbers of tribal and government representatives.<sup>141</sup> The Waikato River Authority is responsible for establishing the "vision and strategy to achieve the restoration and protection of the health and wellbeing of the Waikato River for future

132 Resource Legislation Amendment Bill 2015 (101-1) (explanatory note) at 3.

133 Resource Legislation Amendment Bill 2015 (101-3), cl 38 inserting new s 58L into the Resource Management Act 1991 (now s 58M in the Resource Management Act 1991).

134 Ministry for the Environment "Department Disclosure Statement" (25 November 2015) <<http://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2015-101.pdf>> at 4.

135 Resource Legislation Amendment Act 2017.

136 See Ministry for the Environment *Next steps for fresh water: Consultation document* (February 2016) at 29.

137 Resource Management Act 1991, s 58O.

138 Resource Management Act 1991, s 58O(2)(a).

139 Resource Management Act 1991, s 58M(a).

140 Resource Management Act 1991, s 58R.

141 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22 and sch 6.



generations.”<sup>142</sup> Following the confiscation of Waikato-Tainui tribal lands in the late 1800s, the Crown assumed control of the river and the river suffered from pollution due to farm run-off, coal mining and sewage.<sup>143</sup> This “clean up” is to be assisted by a series of agreements with the local council that seek better integration of Waikato-Tainui tribes into the RMA planning processes, including the preparation of an “integrated river management plan” and an “environmental plan” that local councils must consider when preparing planning documents.

More recently, the government has reached a novel co-management agreement with affected tribes which vests the Whanganui River, Te Awa Tupua, with legal personality and establishes a trust, Te Pou Tupua, constituted equally of tribal and government members to co-manage the river.<sup>144</sup> Recognition of the independent autonomy of the river roughly accords with the customary view that rivers possess their own mauri (life force). Like the Waikato agreement, the focus is on the future health and wellbeing of the river and its people. Measures are provided to facilitate tribal engagement in the RMA planning and consent-making processes associated with the river.<sup>145</sup> By vesting the river with legal personality, the government has effectively side-stepped the issue of ownership.<sup>146</sup> The tribes, thus, cannot gain any benefit from use of the resource.

These agreements promote tribal engagement in RMA regulatory processes, yet they remain directed at the right to culture in so far as they are limited to effective participation and the overall objective of restoring and protecting the health and wellbeing of the [river] for future generations.<sup>147</sup> Tribes are not granted the right to give their free, prior and informed consent in relation to the use of the river for hydro-electric projects, for example.<sup>148</sup> The Whanganui River and Waikato River tribes cannot, for example, stop the issuing of natural resources consents over the river to extract or divert water or build dams on them. Nor do they gain any benefit from use of the resource. The issue of water ownership over the river remains unresolved.

This outcome is a far cry from the recommendation made by the Waitangi Tribunal that the river, in its entirety, be vested in the tribes, which would mean that any resource consent application would require the tribe’s approval.<sup>149</sup>

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142 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22.

143 Linda Te Aho “Indigenous Challenges to Enhance Freshwater Governance and Management in Aotearoa New Zealand – the Waikato River Settlement” (2010) 20 *The Journal of Water Law* 285.

144 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, s 14 (Te Awa Tupua declared to be a legal person). The Act gives effect to the Whanganui River Deed of Settlement signed on 5 August 2014, which settles the historical claims of Whanganui Iwi as they relate to the Whanganui River.

145 Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, ss 8 and 63.

146 See also the Tūhoe deal where the Crown rejected ownership of conservation land and offered, instead, to vest the park with legal personality, to be co-chaired by Māori and the Crown: Te Urewera Act 2014. See also s 11(2) of the Marine and Coastal Area (Takutai Moana) Act 2011, which simply declares that no one owns the foreshore and seabed.

147 Linda Te Aho “The ‘False Generosity’ of Treaty Settlements: Innovation and Contortion” in A Erueti (ed) *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, Wellington, 2017) (forthcoming, September 2017). Te Aho also notes that the issue of ownership is expressly deferred by the Treaty settlement, see Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, ss 64 and 90.

148 The requirement in the UN Declaration, above n 25, that states obtain the free, prior and informed consent of Indigenous peoples before engaging in any activity that could significantly affect them, is pertinent here.

149 Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999).

## V. CONCLUSION

There have been many important reforms in Aotearoa New Zealand in the past three to four decades, including Treaty settlements and the incorporation of Māori concepts in legislation such as the RMA. The co-management and shared decision-making provided for in Treaty settlements and the RMA is also innovative and important in securing Māori participation in decision-making. However, as I have argued, there remains a gap in the reforms. In many cases, government does not recognise Māori property rights and it has rejected calls for political authority over natural resources. Instead, as is the case with claims to freshwater, government applies a right-to-culture model. Māori will likely have a much greater say in decisions relating to water due to innovations like the MWaRs in the RMA and Treaty settlements. However, there is little prospect of iwi owning a water body or being granted a right to stop a development that may be detrimental to iwi. And the reason for this appears to be political concern about granting greater rights to Māori. Government, then, is responding to public concerns about recreational use of natural resources and their commercial exploitation. Government has to contend with the repeated criticism that Māori rights create race-based privilege. If that is the case then we should be more open about it and consider how to address the concerns. By simply filtering out property and political models in Indigenous rights reforms for reasons of political expediency, we risk falling short of our aspirations of creatively redressing historical wrongs comprehensively and thereby creating a fairer and more just society.

# A FRESHWATER ALLOCATION TO IWI: IS IT POSSIBLE UNDER THE RESOURCE MANAGEMENT ACT 1991?

BY LARA BURKHARDT\*

## I. INTRODUCTION

Most members of the New Zealand public possibly only became aware of the issue of Māori rights and interests in freshwater as part of the Mighty River Power and Meridian Energy asset sales in 2013 and the court action and Waitangi Tribunal claims that responded in an attempt to protect Māori rights in water. However, as reported in 2012 by the Waitangi Tribunal in the National Freshwater and Geothermal Resources Inquiry (the Inquiry), the issue is not new, novel or opportunistic.<sup>1</sup> Central government attention and, in some respects, local government attention on the extent to which these rights and interests can and should be provided for, is certainly a more recent feature in planning policy development, perhaps highlighting a general shift in thinking toward better recognising the rights of tangata whenua.

There are options to provide for tangata whenua interests that involve fundamental shifts in the principles that underlie our present resource management system, particularly where the discussion extends to talk of “ownership” of water.

The current position is that water is not capable of ownership, but this position is hotly debated. Māori rights in 1840 included rights of authority and control over taonga (treasures), and are rights that are akin to the English concept of ownership.<sup>2</sup> The Waitangi Tribunal has clearly and repeatedly said that a right to development of property or taonga is guaranteed under Te Tiriti o Waitangi and is indeed a Treaty right.<sup>3</sup> For some iwi/hapū, they have since time immemorial had the use of freshwater and have exercised kaitiakitanga, or guardianship, over it. To date, the Crown, has not specifically extinguished those rights (unlike its extinguishment of other things, like minerals and

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1 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 14.

2 See Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at 126. See, generally, Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1999), and more recently, Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim*, above n 1, at 80. It is noted that the Stage 2 hearings for the Freshwater and Geothermal Resources Claim commenced in November 2016 and continued in June 2017. These hearings will consider whether Māori have proprietary rights to water in their rohe.

3 Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998) at 120. See The Treaty of Waitangi/Te Tiriti o Waitangi (1840), arts 2 and 3.

the foreshore and seabed).<sup>4</sup> As Jacinta Ruru identifies, the courts have stayed clear of this issue, and even where the Tribunal has made recommendations, the government can and does ignore those recommendations.<sup>5</sup> While the issue of “ownership” is beyond the scope of this article, it provides important context for any discussion about an allocation of water to iwi.<sup>6</sup>

The focus of this article is narrow, and specifically addresses whether an allocation of water for iwi, or something similar, can be achieved under the current regime of the Resource Management Act 1991 (RMA *or* the Act), rather than under a new system altogether.<sup>7</sup> The author does not attempt to discuss the merits of whether an allocation to iwi should be made (and what its purpose is), only whether it is possible. In doing so this article looks at how far the boundaries have been pushed and what could be changed in the current legal framework to provide for an allocation to iwi without overhauling the system in a more fundamental way. It also discusses what some of the implementation issues are with making such changes.

## II. WHAT IS AN IWI ALLOCATION?

Under the RMA, there is a presumption that a person may not take water unless allowed<sup>8</sup> and, generally, a resource consent is required. Local authorities may have a rule in a regional plan that, for example, allocates water to certain types of activities or that prioritises types of activities over others.

An allocation of freshwater to iwi, therefore, could be implemented in a number of ways, including by a rule that says X amount of water (or more likely X percentage of a flow) is to be reserved or set aside for iwi use or development. This would allow iwi to abstract a certain volume of water and use it for their benefit and for whatever purpose they chose, whether the use was by iwi themselves to support their own developments, or to support developments undertaken by iwi in partnership with someone else, or through the leasing or transfer of those water rights to others for their use. Another possibility would be to have a preferential rule (or policy) that gives a priority to iwi use of water over other uses (such as through the use of different classes of activity categorisation).<sup>9</sup>

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4 The Crown Minerals Act 1991, s 10 claims all petroleum, gold, silver and uranium existing in its natural condition in the land (whether or not the land has been alienated from the Crown) as the property of the Crown. The Marine and Coastal Area (Takutai Moana) Act 2011 creates a special status for the common marine and coastal area and says that it is incapable of ownership, although the Act recognises customary interests in the area and customary marine title in ss 11 and 58.

5 Jacinta Ruru “Māori legal rights to water: Ownership, management, or just consultation?” (2011) 7 *RM Theory and Practice* 119 at 120–123.

6 See Ruru, above n 5, for an excellent discussion on the basis for a claim to ownership.

7 A new system could be based on a rights-based regime, which is considered by Kieran Murray, Marcus Sin and Sally Wyatt to offer strong economic advantages over a consents-based regime. One example is the quota management system which, according to Murray et al, was used to recognise iwi proprietary rights in fisheries. An iwi allocation would be a proportion of the commercially available “allocable quantum”. See Kieran Murray, Marcus Sin and Sally Wyatt *The costs and benefits of an allocation of freshwater to iwi: A Report prepared for the Iwi Advisors Group* (Sapere Research Group, 2014).

8 Section 14(3)(a)–(b).

9 Section 87A.

To be clear, an allocation to iwi is distinct and additional to the amount of water that should be retained in water bodies<sup>10</sup> to protect cultural values, which is certainly something that the current system does provide for.

It is not suggested that the allocation would confer a right that was somehow different to what is provided for under the current regime, that is a right to take and use water for a defined period of time – presently no more than 35 years. A perpetual right to take and use water is not provided for under the current framework, and in my view this kind of outcome would present a much greater shift in the underlying principles which govern water allocation.

Despite the limited life of a consent, the reality is that water permits have many of the characteristics of a property right as it creates valuable rights to water and gives the consent holder control and exclusive use of the water for the term of the consent.<sup>11</sup> In effect, water permits do confer valuable rights that are proprietary in nature, and this characteristic is relevant, in particular, to the implications of any changes to the current framework (such as considering how the rights of existing users will be affected).

Indigenous water allocation is not widely recognised; however, in British Columbia the Water Sustainability Act 2014 makes provision for first nations to have water reserved for the purposes identified in a final agreement of a first nation treaty.<sup>12</sup> A percentage of water in a water body is reserved for that first nation’s domestic, industrial and agricultural purposes. Clearly, the circumstances between our two countries are quite different, but this shows that there are movements in thinking towards providing Indigenous people with rights to natural resources, at least on paper.

### III. IS AN IWI ALLOCATION POSSIBLE UNDER THE RESOURCE MANAGEMENT ACT 1991?

An allocation of water to a certain group of people does not appear to be possible under the current legal framework,<sup>13</sup> however, it seems that there is the ability to allocate for cultural uses and potentially even to link an allocation to a type of land tenure, such as Māori land. In comparison, an allocation to iwi for economic or commercial use does not seem to be possible as it is difficult to define such a general category of use as an “activity” for RMA purposes. To explain why the author thinks it is possible to provide for an allocation for some uses or activities and not others, reference is made to the key sections of the RMA that say how water is to be managed; the National Policy Statement for Freshwater Management 2014 (NPS-FM 2014); as well as some of the cases that have considered the issue of allocation to iwi.

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10 A “**water body** means fresh water or geothermal water in a river, lake, stream, pond, wetland, or aquifer, or any part thereof, that is not located within the coastal marine area” – s 2(1) of the RMA.

11 See Vanessa Hamm and Bridget Bailey “Resource Consent: Property in all but name” (April 2014) RMJ 17 and Barry Barton “Different kinds of argument for applying property law to resource consents” (April 2016) RMJ 1.

12 Water Sustainability Act SBC 2014 c 15, s 40.

13 See also Philip Milne “Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*” (Salmon Lectures 2005, 1 July 2005).

### A. *The Current Statutory Framework*

The starting point is s 14 of the RMA, which sets out the restrictions relating to water. Under s 14, a person cannot take water unless that take is allowed by a national environmental standard,<sup>14</sup> a rule in a regional plan, or a resource consent. There are limited exceptions to this, and these include where the take or use is for an individual's reasonable domestic needs, animal drinking water or for fire-fighting purposes.<sup>15</sup> As mentioned above, inherent in s 14 is the prohibition that you cannot do anything with water unless you are expressly allowed to. This restriction applies to all water-related activities (including discharges to water) and is in contrast to the approach to activities using land (like subdivision or building) whereby you are allowed to do those activities unless you are otherwise restricted by a rule or provision which says you cannot. So any allocation to iwi will need to be provided for by either a rule in a regional plan or by central government through a national environmental standard.

Section 30 of the Act includes regional council functions with respect to water allocation, in particular the requirement to control the take and use of water and the quantity, level and flow of water in a water body.<sup>16</sup> This includes setting the minimum level of water that must remain in a water body to protect in-stream values. That water must remain in the water body and cannot be abstracted. These are known as "minimum flows" or "ecological flows".

Regional councils can also establish rules which allocate the take or use of water and may do so in any way subject to express limitations.<sup>17</sup> The main limitations relate to existing users of water. For instance, a regional council cannot have a rule in a plan that allocates water that is already allocated to someone else,<sup>18</sup> although it can allocate water in anticipation of existing consents expiring.<sup>19</sup> That is, when a consent expires, that water could be earmarked, via a rule, for a different use. A rule may allocate water amongst competing types of activities,<sup>20</sup> and must not affect domestic needs, animal drinking water or water used for fire-fighting purposes. There is a clear focus on activities, and allocating to types of activities, which has played an important role in the cases that have considered the issue of allocations to iwi. One example of an allocation regime

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14 Environmental standards are regulations made under the Resource Management Act 1991, which prescribe technical standards, methods or other requirements and that apply nationally. The Ministry for the Environment released a Discussion Document in 2008 proposing an environmental standard on ecological flows (*Proposed National Environmental Standard on Ecological Flows and Water Level: Discussion Document* (Ministry for the Environment, 2008), however it has not progressed. This article does not contemplate the use of this mechanism in light of the recognised unlikely prospect of a single, nationwide mechanism for water allocation being developed, discussed later.

15 Section 14(3)(a)–(b).

16 Section 30(1)(e).

17 Section 30(1)(fa).

18 Section 30(4)(a).

19 Section 30(4)(c). The only way a rule can affect an existing consent during its term is when a rule becomes operative that sets ecological flows or minimum standards of quality and it is necessary to review the conditions of the consent so the flows or standards set by the rule can be met: s 128(1)(b) of the RMA. A resource consent may also be reviewed to meet new national environmental standards: s 128(1)(ba) of that Act.

20 Section 30(4)(e).

based on different types of activities can be found in the Waitaki Catchment Water Allocation Regional Plan, which gives an annual volume to various activities.<sup>21</sup>

In circumstances where a regional council wants to establish some form of differentiation or preference in its water allocation regime, the RMA explicitly says the allocation is to be based on the type of activity that the water is to be used for.<sup>22</sup> Relatively common “types” of activities that can be found in water allocation frameworks include municipal water supply, renewable electricity generation, irrigation and frost protection.

An example of how a regional council has given priority to different activities is the Canterbury Land and Water Regional Plan, where one of the strategic policies is:<sup>23</sup>

Water is managed through the setting of limits to safeguard the life-supporting capacity of ecosystems, support customary uses, and provide for group or community drinking-water supplies and stock water, as a first priority and to meet the needs of people and communities for water for irrigation, hydro-electricity generation and other economic activities and to maintain river flows and lake levels needed for recreational activities, as a second priority.

Milne succinctly explains the position regarding allocation – the consent process allocates the resource to a person and the plans guide allocation, or prioritise by classifying activities as either permitted or controlled. For discretionary or non-complying activities, the allocation mechanism is the consent process that is guided by policies which prioritise those activities.<sup>24</sup>

Allocation based entirely on the consent holder’s status as iwi does not comfortably sit within the context of “activity” under s 30 of the RMA. Case law confirms this, and has established that while a regional council can give preference to a class of activity or by reference to the effects of activities, it cannot give preference to a particular section of the community.<sup>25</sup> However, allocation of water for customary or cultural use, as distinct from commercial use, may well be able to be considered as a separate category and is discussed further below. The commonly termed “Māori provisions” in pt 2 of the Act certainly provide a statutory basis to argue for such an allocation.<sup>26</sup>

### *B. National Policy Statement for Freshwater Management 2014*

Sitting directly below the RMA and above local planning documents is the NPS-FM 2014. This hierarchical structure means that all regional plans are to give effect to the objectives and policies set out in the NPS-FM 2014. Objective D1 of the NPS-FM 2014 requires councils to ensure that tangata whenua values and interests are identified and reflected in the management of, and

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21 See *Waitaki Catchment Water Allocation Regional Plan (Incorporating Changes 1, 2, and 3)* (Waitaki Catchment Water Allocation Board, September 2005) (incorporating amendments as directed by the High Court on 3 July 2006), r 6 and table 5. These activities include town and community water supplies, industrial and commercial activities, tourism and recreational activities, agriculture and horticultural activities, any other activities and hydro-electricity generation.

22 Section 30(4)(e).

23 Environment Canterbury Regional Council *Canterbury Land and Water Regional Plan* (December 2015) (operative in part on 1 December 2015) <www.ecan.govt.nz> at 4.5.

24 Milne, above n 13, at 95.

25 *Hauraki Māori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004.

26 These are s 6(e), “the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga”; s 7(a), kaitiakitanga; and s 8, the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

decision-making on, freshwater.<sup>27</sup> There are now some cultural values identified as additional national values in the National Objectives Framework (in the NPS-FM 2014) that can guide decision-making. For example:<sup>28</sup>

- he ara haere/navigation, recognising the value to Māori of having navigable waterways and the importance of traditional trails and rites of passage for waka (which includes launching and landing of waka);
- wai tapu, recognising the sacredness of places where rituals and ceremonies are performed;
- mahinga kai/food gathering, places of food; this recognises the importance of having safe kai to harvest and eat.

Although direction was given by central government on the cultural values to be considered by the decision-maker, the term “interests” has been left undefined. The process of defining these interests is presumably left to local processes, although one would expect some guidance should come out of the central government-led processes currently underway.

In addition to councils ensuring tangata whenua values and interests are reflected in decision-making, Objective D1 requires the involvement of tangata whenua in freshwater management to ensure that tangata whenua values and interests are identified and reflected in the management of freshwater. This objective is implemented in Policy D1 of the NPS-FM 2014,<sup>29</sup> which requires councils to take reasonable steps to achieve this objective.

While the NPS-FM 2014 may be considered to give further support to the notion of an iwi allocation, it does not change the underlying RMA framework, and the constraints within that framework remain.

### C. *A New Start for Freshwater*

Since 2009, the government has been reforming the way water is managed.<sup>30</sup> A number of entities have been engaged in the discussion, including the Iwi Leaders Group and its Iwi Advisors Group,<sup>31</sup> and the Land and Water Forum (LAWF).

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27 Objective D1 is implemented through Policy D1, which states that local authorities shall take reasonable steps to involve iwi and hapū in the management of freshwater and work with them to identify tangata whenua values and interests, and to reflect tangata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

28 *National Policy Statement for Freshwater Management 2014* (Ministry for the Environment, 4 July 2014) at Appendix 1: National values and uses for fresh water [NPS-FM 2014].

29 Policy D1 of the NPS-FM 2014 states:

Local authorities shall take reasonable steps to:

- a) involve iwi and hapū in the management of fresh water and freshwater ecosystems in the region;
- b) work with iwi and hapū to identify tāngata whenua values and interests in fresh water and freshwater ecosystems in the region; and
- c) reflect tāngata whenua values and interests in the management of, and decision-making regarding, fresh water and freshwater ecosystems in the region.

30 See Robert Makgill “A New Start for Fresh Water: Allocation and Property Rights” (2010) 2(1) *Lincoln Planning Review* 5 for a good discussion on the reform and allocation.

31 The Freshwater Iwi Leaders Group comprises the leaders of Ngāi Tahu, Whanganui, Waikato-Tainui, Te Arawa and Tūwharetoa, and was formed in 2007 to engage with the Crown and to advance the interests of all iwi. The Freshwater Iwi Leaders Group also constituted the Iwi Advisors Group to work with Crown officials and the Law and Water Forum.



LAWF is made up of a range of industry groups, iwi, scientists and environmental, recreational and other organisations all with an interest in freshwater management. Four reports have been produced, and each identify areas for reform. The first report recommended that “[t]he transition to any new system of water allocation should proceed hand in hand with Crown-iwi discussions on iwi rights and interests in water management”.<sup>32</sup> The focus of the second report was on the setting of limits (and decision-making structures for this) and the implementation and management of limits.<sup>33</sup> The third report addressed allocation and included a statement in which LAWF acknowledges that iwi have rights and interests in freshwater, but the responsibility for resolving those issues and the options for providing for them rests with iwi and the Crown.<sup>34</sup> More detail on how the Crown could provide for iwi interests is contained in the fourth report, concluding that there are a number of mechanisms to recognise iwi interests in freshwater, including:<sup>35</sup>

- a. giving iwi priority access to:
  - i. unallocated water and discharge allowances in catchments that have not yet reached full allocation
  - ii. allocable quantum that is created through application of the “reasonable technical efficiency test” on transition to the new freshwater management regime
  - iii. discharge allowances or load for unallocated contaminants that are created through the application of good management practice requirements on transition to the new freshwater management regime
  - iv. water, discharge allowances or additional contaminant load created through government investment in infrastructure to generate “new water” or “headroom” in quality limits
  - v. water or discharge allowances that are voluntarily surrendered
- b. facilitating commercial partnerships and joint ventures between iwi and incumbent holders of authorisations to take water and discharge contaminants
- c. acquiring a portion of the allocable quantum, total available discharge allowance or total contaminant load through:
  - i. commercial agreements between the Crown and other users to transfer authorisations to iwi
  - ii. running a voluntary reverse auction as a means to find the most efficient way for the Crown to access authorisations to transfer to iwi.

In light of LAWF’s recommendations, steps have been taken by the government to improve iwi involvement in managing freshwater (and this is recognised), however government has not yet gone so far as to implement any change to the current water allocation system to provide for iwi

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32 “Report of the Land and Water Forum: A Fresh Start for Fresh Water” (September 2010) Land and Water Forum <[www.landandwater.org.nz](http://www.landandwater.org.nz)> at 39.

33 “Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration” (April 2012) Land and Water Forum <[www.landandwater.org.nz](http://www.landandwater.org.nz)>.

34 “Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water” (October 2012) Land and Water Forum <[www.landandwater.org.nz](http://www.landandwater.org.nz)> at 8.

35 “Fourth Report of the Land and Water Forum” (November 2015) Land and Water Forum <[www.landandwater.org.nz](http://www.landandwater.org.nz)>, recommendation 4 at 80.

proprietary rights and interests in freshwater. In fact, the opposite could be said. A 2016 Cabinet Paper sought cabinet approval for a freshwater allocation programme that:<sup>36</sup>

... took account of the following bottom lines:

- Nobody owns freshwater
- No national settlement favouring iwi/hapū over other users
- Allocation determined catchment by catchment based on resource availability, efficiency of use, good industry practice, and a positive contribution to regional economic development.

This statement signals that there still remains a significant change needed in government thinking before an allocation will be made for iwi use, whether under the RMA or otherwise.

A cabinet paper discussing the reform says that previous Cabinet considerations have identified that the way that iwi aspirations relating to water allocation could be represented is likely to vary from iwi to iwi, and there is no reasonable prospect of a single, nationwide mechanism for water allocation being developed. Further, “Treaty settlement and other ongoing engagement processes are appropriate mechanisms to address iwi claims to preferential rights and interests in water.”<sup>37</sup> However, the paper goes on to say that the government is committed to appropriately providing for iwi/hapū rights and interests in the context of freshwater allocation and use. The most effective way will be to develop tools at a national level, which can then be developed regionally. These tools may include criteria for establishing the need to provide preferential access for iwi.<sup>38</sup>

#### IV. HOW FAR HAVE THE BOUNDARIES BEEN PUSHED?

The three main cases where tangata whenua have sought an allocation of a resource under the RMA are discussed below. The cases show how far the boundaries have been pushed to date and help identify what is possible under the current Act. In all the cases, the courts have upheld the notion that the RMA can allocate a resource by activity or by category of effect, but that it does not contemplate an allocation by user. The Tasman Regional Plan will also be discussed as it includes an approach that links take and use of water to Māori land.

##### A. *Hauraki Māori Trust Board v Waikato Regional Council*

*Hauraki Māori Trust Board v Waikato Regional Council*<sup>39</sup> was an appeal against a decision of the Environment Court striking out the applicant’s claim for, among other things, an allocation of coastal space for iwi. The case was against the backdrop of a claim by the applicant to the Waitangi Tribunal regarding ownership of the foreshore and seabed and legislative amendments for aquaculture activities. The case began when the Waikato Regional Council sought to vary its Proposed Regional Coastal Plan to establish a marine farming zone, south of Coromandel. The Trust Board was acknowledged to be tangata whenua in the area and had, at that stage, made a claim to the foreshore and seabed. A Waitangi Tribunal Report on aquaculture claims had also

<sup>36</sup> Cabinet Paper Office of the Minister for the Environment “Freshwater: Allocation Work Programme” (June 2016).

<sup>37</sup> Cabinet Paper Office of the Minister for the Environment “Freshwater reform: Next steps and discussions at Waitangi 2015” (January 2015) at 2–3.

<sup>38</sup> At 5.

<sup>39</sup> *Hauraki Māori Trust Board v Waikato Regional Council*, above n 25.

found that Māori have an interest in aquaculture and marine farming.<sup>40</sup> The Trust Board sought an allocation of a percentage of coastal space within the marine farming zone, but did not specify the amount it considered appropriate. The Trust Board's case relied heavily on the Māori provisions of pt 2 of the RMA.<sup>41</sup>

The Environment Court held that, in the absence of authorising legislation, the preparation of regional plans was not an appropriate vehicle for either resolving or addressing Treaty claims or other iwi grievances. Any claims to ownership or redress for grievances based on the Treaty were for the Crown in its executive capacity and not for the Environment Court.<sup>42</sup> The case was struck out and the Trust Board appealed to the High Court.

The High Court discussed the provisions regarding the preparation of regional plans and said that despite Parliament turning its mind to Māori interests, the legislation did not include express provisions to allocate space in the coastal marine area to Māori.<sup>43</sup> The Court went on to say that arguably the rule-making provisions are wide enough on their face to include a rule allocating space to Māori, but the provision is to be construed in light of the statutory scheme as a whole.<sup>44</sup>

The High Court was not persuaded that the RMA authorises a regional coastal plan to differentiate between individuals or groups in the way suggested for three reasons. First, the overall purpose of the Act is to promote sustainable management of natural and physical resources. Secondly, the RMA does not provide for allocating coastal space to Māori or any other sector of the community. Thirdly, there is no provision authorising regional councils to give preference or priority to tangata whenua. The Court said:<sup>45</sup>

The Act focuses on the authorisation of activities and may do so by reference to a particular class of activity or by reference to the effects of activities. That is consistent with the statutory purpose as defined in section 5(2). Section 68 does not contemplate the making of rules which would give preference to a particular section or sections of the community in the allocation of space in the coastal marine area.

One point the Court did make was that while the RMA does not permit preferential allocation of space in the coastal marine area, there is nothing to prevent provisions in a proposed plan from protecting and preserving Māori interests.<sup>46</sup> The Court seems to suggest an allocation for cultural use could be made.

Although the Hauraki Māori Trust Board were unsuccessful with their claim, they were not unsuccessful altogether. Almost 10 months after the decision, the Māori Commercial Aquaculture Claims Settlement Act 2004 came into force which gave 20 per cent of aquaculture space to Māori through regional agreements between iwi aquaculture organisations, the Crown and Te Ohu Kaimoana Trustee Limited.<sup>47</sup> This legislation is the type of authorising legislation that appears to be

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40 Waitangi Tribunal *Ahu Moana: The Aquaculture and Marine Farming Report* (Wai 953, 2002) at 76.

41 Resource Management Act 1991, ss 6(e), 7(a) and 8.

42 *Hauraki Māori Trust Board v Waikato Regional Council* EnvC Auckland A078/2003, 2 May 2003 at [36]–[37].

43 *Hauraki Māori Trust Board v Waikato Regional Council*, above n 25, at [41].

44 At [43].

45 At [57].

46 At [70].

47 Maori Commercial Aquaculture Claims Settlement Act 2004, s 9.

needed to allow for an allocation to iwi. Although there is no provision under the RMA still, Māori rights to an allocation for aquaculture have been recognised.

Of course this case concerned the allocation of space for a specific activity (aquaculture), whereas in the case of freshwater the issue is one of allocation between activities.

### B. *Carter Holt Harvey v Waikato Regional Council*

*Carter Holt Harvey v Waikato Regional Council*<sup>48</sup> concerned Variation 6 to the Proposed Waikato Regional Plan (Variation 6), which was a significant water allocation plan change. When notified, the provisions explicitly sought to move away from a first-in-first-served approach to water allocation by introducing common expiry dates on water permits to enable all applications to be dealt with at the same time and by giving preference to particular types of water use ahead of others. While that approach was not ultimately pursued by the Waikato Regional Council on appeal, it did set the scene for a framework of rules that gives preference to certain types of water use by making some easier to get consent for than others. Because of this approach, all of the major user groups of water were represented at the hearing, all jostling for the best spot in the queue under this new regime.

The Waikato River Iwi Trusts looked to secure a favorable controlled activity rule (that is one that must be granted) for the taking of surface water for iwi development, essentially affording preferential treatment to the five Waikato River Iwi. The proposed definition for “iwi development” was:<sup>49</sup>

[D]evelopment undertaken by the Waikato River Iwi within their rohe in respect of:

- a) Maori land held under Te Ture Whenua Maori Act 1993 and/or
- b) Land owned or leased by an iwi authority representing any of the Waikato River Iwi, and undertaken by the relevant authority for the benefit of its members.

Any application for the purpose of iwi development must be made by an entity entirely controlled by the relevant iwi authority or the Te Ture Whenua Maori Act recognised representative body affiliated to the River Iwi.

The Waikato Regional Council’s position was that there was no ability to have such a rule and, relying on the *Hauraki* case, argued that a preferential rule was beyond their powers.<sup>50</sup>

The Waikato River Iwi Trusts sought to distinguish *Hauraki*, on the basis that s 30 of the RMA had been amended and the “Vision and strategy for Waikato River” (sch 2 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Settlement Act)) had since come into force.<sup>51</sup> The Environment Court was not persuaded that the Settlement Act and Vision and Strategy extended to the functions and powers of the Waikato Regional Council under the RMA. This, they said, would require clear and unambiguous words to override the principal Act which creates the functions and powers of decision-makers.<sup>52</sup>

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48 *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380.

49 At [432].

50 At [434].

51 At [434].

52 At [440].

The Environment Court considered itself bound by *Hauraki* and held that, while the rules in Variation 6 can provide a favorable status to an activity and apply to anyone who partakes in the activity, they cannot be based on a person's ethnicity.<sup>53</sup>

The Court also considered that limiting the definition of Waikato River Iwi to the five named iwi was not fair or equitable, and if such a provision was to be included then it should apply throughout the region and to all iwi.<sup>54</sup> It is presumed that this statement is referring to the need for there also to be a preferential rule for the benefit of other iwi across the region in respect of water bodies other than the Waikato River, given that not all iwi have a relationship or affiliation to the Waikato River.

Further, the Court considered that there was no practical reason for granting the relief sought as Māori already had the largest and second largest takes for irrigation in the region, and that there was no evidence to suggest that Māori were not able to undertake cultural activities. The Court was clearly interested in the question of exactly what iwi may want the allocation for, that they are unable to gain under existing plan provisions.

### *C. Ngāti Mākinō Heritage Trust v Bay of Plenty Regional Council*

In *Ngāti Mākinō Heritage Trust v Bay of Plenty Regional Council*,<sup>55</sup> Ngāti Mākinō appealed the decisions on the Proposed Bay of Plenty Regional Policy Statement (RPS), seeking provision for a "cultural use" allocation. A regional policy statement cannot contain rules per se, but it can contain directions that must be given effect to by regional plans, which do include rules. Ngāti Mākinō sought a cultural use allocation for a percentage of water based on kaitiakitanga and/or mana whenua links to a water body. This water would be set aside for iwi and hapū and they would be able to activate this through a consent process at the point they wanted to use it.

The Environment Court looked at the two cases just discussed and found that they do not say that plans cannot, in an appropriate case, recognise and provide for tangata whenua based upon the proper application of cultural and other principles under the Act.<sup>56</sup> As it turned out, the hearing itself focused largely on whether or not the RPS should require water to be allocated for "cultural uses", which it said *is* an activity. Importantly, the Court considered that cultural use could include both in-stream and out-of-stream uses.<sup>57</sup> That is the water to be left in the water body for the maintenance and restoration of mauri and other in-stream values, and water that is extracted from the water body for out-of-stream cultural uses.

The Court said that it was unable to see any reason why an allocation could not be made for cultural use, provided the relevant Regional Water Plan had appropriate mechanisms and criteria.<sup>58</sup> As far as the RPS was concerned, it could not see any reason why that higher order document could not recognise tangata whenua values and the need for a Regional Water Plan to provide some flexibility for future tangata whenua developments, either by cultural allocation or including it as part of the in-stream values, until required in the future. The Court did, however, qualify this by

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53 At [439].

54 At [441].

55 *Ngāti Mākinō Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25.

56 At [34].

57 At [35].

58 At [35].

saying that it could not be done arbitrarily or generically, but would need to be specific to the local circumstances and agreed with the premise of the other cases that the rule could not amount to a priority allocation to particular applicants or individuals.<sup>59</sup>

Exactly what “cultural uses” would entail was left to be worked out through the Regional Water Plan review process, because further work and consultation would be required. As a result of the case, the RPS was amended to specifically require this to be done.<sup>60</sup>

While this case acknowledges that an allocation to iwi for specific cultural uses is possible, it also confirms the current position that a “rule could not amount to a priority allocation to particular applicants or individuals”.<sup>61</sup>

#### D. *Tasman Resource Management Plan*

The Tasman Resource Management Plan<sup>62</sup> (Tasman Plan) is a close example of an iwi allocation. The Tasman District Council has identified, within its plan, two uses for which water is to be reserved or preferentially allocated. The first is for future community needs, the second is for the irrigation of Māori perpetual lease land.<sup>63</sup>

Water is reserved within the sustainable allocation limits of the water body for the irrigation needs of Māori perpetual lease lands until those lands are returned to the Māori landowners.<sup>64</sup> In addition to making a reservation of water, the transfer of existing consents away from these lands is a non-complying activity to ensure Māori landowners will retain access to water for irrigation in the future when they regain control of their lands.<sup>65</sup> Where allocation has already reached maximum levels, priority is given to the reserved irrigation needs of Māori perpetual lease lands when water becomes available, ahead of other potential users who are put on a waiting list.<sup>66</sup>

These provisions are not inconsistent with the reasoning in the cases discussed in this article because the reservation is not to a particular class of persons, rather it is for a specified use or activity (being irrigation) of a particular class of land tenure (being Māori perpetual lease land). Even if the provisions are not inconsistent with the current law as it stands, the Tasman Plan certainly pushes the boundaries.

While the approach in the Tasman Plan is a way of achieving a type of allocation which protects iwi interests, it is constrained in terms of offering Māori absolute flexibility in how they choose to benefit from that allocation.

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59 At [35].

60 The Bay of Plenty Regional Council is progressing an initial change (Plan Change 9) to its Bay of Plenty Regional Water and Land Plan to start giving effect to the NPS-FM 2014. The author understands that while the plan change seeks to set a framework for dealing with cultural values and uses, the detail is being left to the catchment-specific processes that are intended to follow. The catchment-specific process would arguably be more in keeping with the Court’s view that defining a cultural use needs to be specific to local circumstances.

61 *Ngāti Māhino Heritage Trust v Bay of Plenty Regional Council*, above n 55, at [35].

62 Tasman District Council “Tasman Resource Management Plan” (Part V: Water Operative 26 February 2011) <[www.tasman.govt.nz](http://www.tasman.govt.nz)>.

63 Section 30.0.4.

64 Policy 30.2.3.6(a).

65 Section 30.1.20.

66 Policy 30.2.3.7.

## V. WHAT CAN IWI ACHIEVE UNDER THE CURRENT LEGAL FRAMEWORK?

The law is clear on whether iwi can achieve an allocation under the existing provisions in the RMA. An allocation for cultural use is possible, so too is giving cultural use a priority over other uses. However, an allocation for iwi development, or giving iwi preference over any other sectors of the community, is presently beyond the bounds of what is possible. The reason for this is that an allocation based on the iwi status of the user is not considered an “activity” under s 30 of the RMA. Allocation for certain customary or cultural uses (including out-of-stream uses) would need to be clearly defined. Because there is no guidance from central government, what iwi can achieve will vary between regions.

Any attempt to provide for “iwi development” or similar, will face a hurdle when it comes to defining what that development covers. This is where the issue of focusing on the person undertaking the activity rather than the activity itself comes into conflict with the current Act. If a use could only be “cultural”, this would limit the ability to lease or transfer the water to other users for value, which lessens the economic value that iwi could derive from it. For example, the ability to take water for purposes associated with marae or papakāinga will be of limited use to non-Māori who may otherwise be willing to lease that water from iwi for another purpose (such as irrigation on farms).

Setting in-stream minimum flow requirements that recognise and provide for cultural values are of course provided for – in recent years a number of different models, indices and approaches have emerged that try to identify the amount or level of water flow necessary to sustain and enhance mauri, the life force of the water. These tools will no doubt play a role in the next round of regional water plans promulgated under the NPS-FM 14.

Tangata whenua can also be involved in governance, decision-making and planning under various mechanisms in the RMA and the Local Government Act 2002. Ultimately though, this does not change the legal position; that is, iwi could not allocate water to themselves simply because they are in a decision-making role – iwi would still be bound by the limits of the current regime and the law.

## VI. WHAT NEEDS TO HAPPEN TO TAKE IT A STEP FURTHER AND ALLOW FOR AN ALLOCATION TO IWI?

So far this article has explained that under the current framework there are ways of allowing for out-of-stream use for cultural purposes, and potentially for use on land of a certain status. But that framework does not allow for an allocation to certain people or for use by certain people.

In order to derive an economic benefit (that is, to allow iwi to develop their use of water either themselves, with others or through receiving income from leasing their interest in water), changes would need to be made to the existing framework. To put the issue beyond doubt, there would need to be some amendments to the RMA and possibly also the NPS-FM 2014 as the key documents governing freshwater, or there would need to be other authorising legislation such as through Treaty settlements. However, before this happens there will need to be a fundamental shift in the position of central government.

### A. *Resource Management Act Reform*

There are a number of ways that the RMA could be amended, but the most obvious way is to expressly provide that iwi use and development is an activity. This would enable a regional council to make rules around allocating water to iwi. There may also need to be amendments to the transfer of water rights provisions to ensure that iwi can maximise any benefits in the short term, in the event that they are not yet ready to use the water for their own developments. This also ensures an efficient use of water in the meantime.

The NPS-FM 2014 currently provides high level direction on tangata whenua interests and values. It could be amended to more explicitly provide for additional values, like the right of iwi to develop, to ensure that these values sit alongside all others that guide the process of setting objectives and limits for water bodies under the NPS-FM 2014.

In a cogent article by Gerald Lanning, the issue is raised whether regional councils can continue to grant rights to use water that Māori may have property rights in, without Māori consent or compensation.<sup>67</sup> One option that Lanning identifies is the possibility of introducing a new “form of title”<sup>68</sup> (such as the special status for certain land under the Marine and Coastal Area (Takutai Moana) Act 2011), which could then create specific rights and obligations under the RMA. But perhaps, another option is to provide an allocation to iwi that effectively recognises those same property rights in lieu of compensation. That perspective is worth considering and may be a persuasive reason to grant iwi an allocation.

### B. *Treaty Settlement Agreements*

The findings of the Stage 2 hearings in the Waitangi Tribunal’s Freshwater and Geothermal Resources Claim Inquiry may be the impetus needed to make headway with gaining an allocation to iwi, but we will have to wait and see whether an allocation to iwi will occur under the RMA or under a different legislative framework. As stated in the *Hauraki Māori Trust Board* case, regional plans are not the appropriate vehicle for resolving iwi claims, in the absence of authorising legislation. This authorising legislation could involve legislation similar to the Maori Commercial Aquaculture Claims Settlement Act 2004, but targetted at freshwater and granting iwi a share of the available allocable flow in a water body. Without such authorising legislation, it seems Māori face a potentially insurmountable hurdle.

Even though the changes to the legal framework to enable an allocation to iwi may be relatively straightforward, again, the policy and principle shift that would need to sit behind any changes are not quite so simple. The work of the Land and Water Forum and the Freshwater Iwi Leaders Group<sup>69</sup> and their advisors in this regard is acknowledged.

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67 Gerald Lanning “Ownership of Freshwater: is the issue back ‘on the table’ and what might it mean for the RMA?” (2012) 9 BRMB 181 at 182.

68 At 182.

69 The Freshwater Iwi Leaders Group has been prominent in representing iwi rights and interests. The group includes leaders of various iwi of Aotearoa who have participated in the Land and Water Forum and have been engaging with the Crown to seek to improve the recognition of Māori rights and interests in freshwater.



## VII. IMPLEMENTATION ISSUES

There are challenging issues that would need to be worked through in terms of implementing this kind of change. One of the most obvious, perhaps, is defining exactly what an iwi allocation is as an activity or category of use and then determining the level of preference or priority to be given to that allocation (or parts thereof) in the water management framework. Some of the questions being raised are:

- Should the specific uses to which an allocation may be put be identified and, if so, should these be treated the same (or differently) in the water management framework?
- Would the take or use have to benefit the entire iwi, or could individuals, whanau or hapū from the iwi apply for all or part of the allocation?
- How much water should be allocated, and how is this determined and by whom?
- If the type of activity iwi wished to undertake already received an allocation, would an application by iwi reduce the activity-based allocation or the iwi allocation, or should there be an order of priority depending on the available allocable flow within each class or category?
- If iwi receive an allocation, can that allocation be leased to a person outside of the iwi?
- In catchments where there is more than one iwi, how is the allocation to be shared or should there be different allocations for different iwi and/or water bodies?
- Is it desirable that iwi receive similar allocations across all regions, or should it be left up to each regional council to determine whether, and if so, how much, water is to be allocated to iwi?
- Should iwi need to meet criteria to establish a relationship with the water body before they receive an allocation?
- Should all water permits be re-set, which would involve cancelling all existing consents and re-allocating the available water under a new set of rules?<sup>70</sup>

Further issues that have been identified by Hamm and Bailey are:<sup>71</sup>

- How would a regional council address allocation to iwi or hapū with overlapping rohe?
- In fully or over allocated catchments, must a regional council re-allocate water to iwi in anticipation of consents expiring? If so, how do we determine what sector the water should be allocated away from?
- Would an iwi allocation extend to the other types of water, such as groundwater and geothermal water?

Even if central government does amend the RMA to accommodate an iwi allocation, whether those provisions will be utilised, or to what extent, will then be up to regional councils, unless there is a mandatory obligation to provide an allocation for iwi. Such has been the case with the RMA mechanisms for Treaty partnership with iwi/hapū in regards to freshwater management,

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70 This option was raised by participants at regional hui facilitated by the Iwi Advisors Group during October and November 2014. See “Report to the Iwi Advisory Group from the Freshwater Iwi Leadership Regional Hui” (November 2014) Iwi Advisory Group <<http://iwichairs.maori.nz/>> at 12. See also M Durette and others *Māori Perspectives on Water Allocation* (Ministry for the Environment, June 2009) at 61.

71 Vanessa Hamm and Bridget Bailey “Enabling an iwi allocation of freshwater: Is it a radical change?” (November 2015) RMJ 22 at 26.

which have not been well or widely used.<sup>72</sup> The same case could occur with provisions for an iwi allocation.

### VIII. CONCLUSION

Theoretically, the tools to enable an iwi allocation of freshwater are broadly in place, although some changes are necessary, both to recognise that an iwi allocation is an activity under the RMA, and to provide the necessary direction to regional councils through the NPS-FM 2014. When looked at practically, providing for an iwi allocation is simply a matter of accommodating an additional category of use. Just as regional councils must (and do) tailor water management to accommodate the specific interests of competing users, the same would need to be done for iwi if the matter was left to the regions.

Under the current RMA regime for water allocation, providing an allocation to iwi depends on the type of activity iwi wish to undertake. A broad allocation giving rights to take water for an unspecified purpose but based on the status of iwi is not possible, for example an allocation to iwi for economic development or commercial gain. To gain this type of allocation, authorising legislation will be required. On the other hand, allocations for cultural use are a possibility, so too is granting iwi a priority over other uses either for cultural use or when the allocation is to an activity tied to Māori land.

Overall, providing for an iwi allocation will no doubt add complexities to an already complex water allocation framework, though this is not fatal to it being achieved. Regional councils could address the matter within their freshwater management functions, but national direction and clear implementation guidance would be critical to providing some certainty for all parties involved in this process. However, without law change of the kind discussed in this article, the ability of regional councils to be able to meet any request by iwi for an allocation to support iwi development is somewhat constrained. Central government direction and guidance in this area is needed – as soon as possible.

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72 Cabinet paper Office of the Minister for the Environment “National Policy Statement: Freshwater Management 2011” (4 May 2011) at 5.

# THE UTILISATION OF LAW COMMISSION REPORTS

BY SIR GRANT HAMMOND KNZM LLD\*

## I. INTRODUCTION

Some years ago, I observed that the New Zealand Court of Appeal appeared to make only limited use of law reform reports. The then President of the Court, Sir Robin Cooke, wrote to me privately in Canada saying that he thought that not to be entirely correct.<sup>1</sup>

We were not able to resolve the point empirically. To manually search through all the New Zealand Court of Appeal judgments in the 1970s was a monumental task.

Times change. The advent of electronic technology has made the monitoring of usage relatively straightforward. To establish modes of usage and influence has become more straightforward. It is also necessary, not least because modern audit practice requires a demonstration of the benefits achieved by an independent Crown entity such as the New Zealand Law Commission.

The object of this paper is to establish how these Commission reports are being utilised in practice today and evaluate the significance of that usage to government, courts, the legal profession and others. I hope to demonstrate that the reports are an important and influential element of our legal system.

I will first, as a matter of context, summarise how these reports come into being. I will then deal with the usage over the last five years in government; in the senior courts; and by the profession and public at large.

## II. CONTEXT

Law reform reports come into existence for particular purposes and in particular ways. I next summarise that system in New Zealand.

The New Zealand Law Commission (the Commission) was established by the Law Commission Act 1985. The Commission is today an independent Crown entity under the Crown Entities Act 2004. It has reporting obligations and must table an Annual Report and an Annual Statement of Intent. It is audited under the Public Audit Act 2001.<sup>2</sup>

The Act provides that the main functions of the Commission are to:<sup>3</sup>

- keep under review the law of New Zealand in a systematic way;
- make recommendations for reform and development of the law; and
- advise on making the law as understandable and accessible as possible.

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\* Professor of Law and Judicial Studies, Waikato University; President of the New Zealand Law Commission, 2010–2016.

1 I was then Director of the Institute of Law Research and Reform, Edmonton, Canada.

2 Public Audit Act 2001, pt 3.

3 See Law Commission Act 1985, s 5.

The Commission must take into account Te Ao Māori (the Māori dimension) and consider the multi-racial character of New Zealand society. It is also required to consider the desirability of simplifying the expression and content of the law.

The Commission has an annual work programme, which is approved by the Minister Responsible for the Law Commission, who is normally also the Minister of Justice. The process involves the Minister writing to all ministers inviting proposals from departments.

Projects must meet the following criteria:

- involve issues that span the interests of a number of government agencies and professional groups;
- require substantial long-term commitment and fundamental review;
- involve extensive public and professional consultation;
- need to be done independently of government because of vested interests or significantly different views;
- require independent consideration to promote informed public debate; and
- involve technical law reform of what is often called “lawyers law” that would otherwise be likely to escape attention.

Ministers are required to comment on how a proposal will align with government priorities. They must also commit resources to work with the Commission during the project and in responding to a final report.

The Commission forwards its reports to the Minister Responsible for the Law Commission, who then presents them to the House.

If the government agrees with the Commission’s final report, the portfolio minister must arrange for a Cabinet Paper that incorporates the views of the Minister, other relevant agencies and the Commission. It may include split recommendations. The Minister is enabled to decide who prepares the Cabinet Paper. It may be the department, or the Commission, or both.

If Cabinet accepts the Commission’s recommendations and a Bill is required, the Bill will be added to the annual legislation programme with an appropriate priority. There may already be a Bill accompanying the Commission’s report. If so, it may be introduced with whatever amendments may be necessary. The Parliamentary Counsel Office is responsible for drafting a final Bill, although it may itself have been involved in producing a Commission Bill.

It is only if Cabinet rejects the Commission’s recommendations that the government must respond formally by presenting a paper to the House within 120 days of the Commission’s report being first presented to the House.

The Commission can self-refer, but rarely does.

The Commission’s work process typically involves producing one or more issues papers. These identify the issues involved and call for submissions. Once received and analysed, the Commission produces a final report containing specific changes for recommendations to the law.

Very occasionally, a report is “advisory” only, in that it is thought to provide a useful outline, or history, or background on the law for some particular purpose, but not a new legislative scheme.

Since its inception, the Commission has produced 139 reports. Many, indeed most, have been adopted wholly or in part and resulted in legislative changes to the law. Some of New Zealand’s most significant, and frequently resorted to, statutes are based on the Commission’s work. Examples include the:

- Companies Act 1993;
- Arbitration Act 1996;
- Interpretation Act 1999;
- Coroners Act 2006;
- Evidence Act 2006;
- Wills Act 2007;
- Criminal Procedure Act 2011;
- Inquiries Act 2013;
- Search and Surveillance Act 2012; and
- Legislation Act 2012.

Law Commissioners and research staff sometimes appear before select committees considering Bills that have resulted from Law Commission reports. This may be as a joint adviser with the relevant department or it may be on a less formal basis. In this kind of situation, the Commission functions like a departmental adviser, assists with evaluating submissions, writes reports to select committees and gives advice on proposed changes. It may also be as a submitter, where an issue arises from a Commission report.

Sometimes the Commission may be invited by a select committee to make a submission on a Bill that has not resulted from a Commission report. For instance, it made two submissions on the Regulatory Responsibility Bill, introduced in 2008 by a member. It also made submissions on a Member's Bill on a possible Register of Judges' Pecuniary Interests. It made submissions on investigations conducted by the Regulations Review Committee into issues concerned with delegated legislation. It has made submissions to the Standing Orders Committee on changes to parliamentary procedure.

It is sometimes wrongly suggested that the take-up rate of Commission reports is poor. In New Zealand, since the adoption of mandatory Cabinet responses post-2004 by the Cabinet Manual provisions, the legislative response rate in New Zealand over 29 proposed measures has risen to 79 per cent.<sup>4</sup> That rate refers to measures which have been adopted in whole or in part. This strongly suggests that the phenomenon of reports simply being "left on the shelf" as opposed to distinctly rejected is largely a matter of the past. The real difficulty, as I have suggested elsewhere, is the slowness of the implementation rate on too many measures.<sup>5</sup>

Based on my London paper surveying 12 representative Commissions around the Commonwealth, a take-up rate in the 70 per cent range is a sound empirical benchmark. New Zealand, since the amendments to the Standing Orders in 2006, has had a rate just under 80 per cent, which is as good as it gets in the Commonwealth.<sup>6</sup> If the take-up rate was substantially higher, one would have to be concerned with whether Parliament itself is sufficiently rigorous in its review of the work.

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4 See Sir Grant Hammond "The Legislative Implementation of Law Reform Proposals" (paper delivered at the 50th Anniversary of the England and Wales Law Commission, United Kingdom Supreme Court, London, 10 July 2015), reproduced in M Dyson, J Lee and SW Stark (eds) *Fifty Years of the Law Commissions: The Dynamics of Law Reform* (Hart Publishing, London, 2016) 175 at 180. See also Sir Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Chartering the Future" (2015) 131 LQR 402.

5 Hammond, above n 4, at 5. See also Sir Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Chartering the Future" (2015) 131 LQR 402.

6 The Standing Orders of the House of Representatives (as amended from time to time) are published on the parliamentary website (<[www.parliament.govt.nz](http://www.parliament.govt.nz)>), as well as being available in hardcopy. See also Dyson, Lee and Stark, above n 4, at 179.

The Commission does not decide the law of New Zealand; Parliament does. There should be no suggestion, let alone the actuality, of “rubber stamping”.

### III. GOVERNMENT USE

In the following table, I set out the outcomes with respect to reports, over the last five years.

**Table 1 – Law Commission Reports 2011–2016**

<b>Report Name</b>	<b>Report Reference</b>	<b>Government Response</b>	<b>Current Status</b>
Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4	NZLC R123 (2011) (see also NZLC SP19 (2008), R101 (2008) and R113 (2010))	Substantially accepted.	Cabinet has approved a consultation process on a review of the Privacy Act 1993 in advance of introducing a Bill to Parliament.
Consumers and Repossession: A Review of the Credit (Repossession) Act 1997	NZLC R124 (2012)	Substantially accepted.	A raft of consumer credit reforms passed into law in June 2014, previously contained in the Credit Contracts and Financial Services Reform Bill. This included substantial changes to consumer credit repossession laws, reflecting recommendations made by the Law Commission (Credit Contracts and Consumer Finance Amendment Act 2014, Credit Contracts and Consumer Finance Amendment Regulations 2015).
The Public’s Right to Know: Review of the Official Information Legislation	NZLC R125 (2012)	Partially accepted.	Several recommendations have been accepted and are awaiting legislative vehicles. Some recommendations in the Final Report, re extending the Official Information Act 1982 (OIA) to the parliamentary service and redrafting OIA, not accepted.

Review of the Judicature Act 1908: Towards a New Courts Act	NZLC R126 (2012)	Substantially accepted and enacted.	The Judicature Modernisation Bill, implementing the Commission's recommendations, was more than 1,000 pages long. It was enacted in the form of several statutes on 12 October 2016.
Towards a New Courts Act: A Register of Judges' Pecuniary Interests? – Review of the Judicature Act 1908 First Issues Paper	NZLC IP21 (2011)	Accepted by government. No legislation needed.	Views in IP21 Judges' Pecuniary Interest made into final recommendations in R126 (at 63), that no legislation be enacted. A Select Committee rejected Dr Kennedy Graham's contrary Private Member's Bill on Judges Pecuniary Interest in 2015.
The 2013 Review of the Evidence Act 2006	NZLC R127 (2013)	Substantially accepted and now enacted.	The Evidence Amendment Bill was introduced into Parliament in May 2015. The Bill follows the Law Commission's 2013 Report. The Select Committee reported favourably on 25 November 2015. Second reading 9 June 2016. Third reading and Royal Assent September 2016.
The News Media meets "New Media": Rights, Responsibilities and Regulation in the Digital Age	NZLC R128 (2013)	Part 1: Ministerial briefing substantially accepted and acted upon. Part 2: Final Report not accepted.	Ministerial Briefing <i>Harmful Digital Communications: The Adequacy of the Current Sanctions and Remedies</i> (August 2012) resulted in the introduction of the Harmful Digital Communications Bill 2013, which received Royal assent in July 2015 as the Harmful Digital Communications Act 2015.
A New Act for Incorporated Societies	NZLC R129 (2013)	Accepted.	Government has drafted a Bill, but it has not yet been introduced.

Review of the Law of Trusts: A Trusts Act for New Zealand	NZLC R130 (2013)	Core recommendations substantially accepted.	The government is currently analysing the potential scope of the new Act based on the Commission's core recommendations, as well as considering the Commission's further recommendations, in anticipation of legislation being drafted. The Minister has set up a trusts' working group to look over the proposed reforms.
Suicide Reporting	NZLC R131 (2014)	Substantially accepted and enacted.	The Coroners Amendment Bill was introduced in July 2014. It reflects the Commission's recommendations, and was enacted on 21 June 2016.
Liability of Multiple Defendants	NZLC R132 (2014)	Substantially accepted.	The government accepted the Law Commission's principal recommendation, that the rule of joint and several liability remains the applicable rule where two or more defendants are liable to a plaintiff for the same, indivisible damage. The government has requested that the Minister of Justice and the Minister of Business, Innovation and Employment consider and carry out further work on the Law Commission's other recommendations.
Pecuniary Penalties: Guidance for Legislative Design	NZLC R133 (2014)	Substantially accepted; no legislation needed.	Government response substantially accepted the recommendations.
Death, Burial and Cremation	NZLC R134 (2015)	Awaiting government response.	Report tabled 28 October 2015.



The Crown in Court: Review of the Crown Proceedings Act 1950 and National Security Information Proceedings	NZLC R135 (2015)	There is a response to Part A of the report. <sup>7</sup>	Report tabled 14 December 2015.
The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes	NZLC R136 (2015)	Substantially accepted.	Report tabled 15 December 2015. Pilot project being set up.
Modernising New Zealand's Extradition and Mutual Assistance Laws	NZLC R137 (2016)	Awaiting government response.	Report tabled 10 February 2016. Government agrees that new legislation should be considered for enactment and accepts the position in the Commission's draft Bill, subject to further consideration on some matters of detail.
Strangulation: The Case for a New Offence	NZLC R138 (2016)	Accepted.	Report tabled 8 March 2016. Government response has indicated the new offence will be legislated.
Understanding Family Violence: Reforming the Criminal Law Relating to Homicide	NZLC R139 (2016)	Awaiting government response.	Report tabled 12 May 2016.

It should be noted that some of the reports in the table were never intended to produce legislation. For instance, Report 133 on Pecuniary Penalties was deliberately undertaken in such a way as to produce guidance for the construction of statutes, but not for the enactment of those individuated statutes.

Once tabled, Law Commission reports are considered by a substantial number of people in the public sector: by the department which promoted the reform through its own officials and structure up to its minister; cognate ministries; parliamentary select committees; parliamentary counsel; the Law Society; Bar Association; and routinely the press. It is not fanciful to suggest that in some cases literally hundreds of people will have looked at a report in the public sector.

Sometimes a "cluster" of reports will engage even more widespread consideration. For instance, reports 136, 138 and 139 are all inter-related in various ways. They have a common theme of endeavouring to address the dreadful incidence of child abuse in New Zealand.

A question which can be usefully asked is, "what would the position be if these reports had not come into existence?" As a country, would we seriously wish to return to the pre-Commission

<sup>7</sup> See <http://www.lawcom.govt.nz/our-projects/crown-proceedings-act-1950?id=1268>

situation of ad hoc committees? Of that situation Michael Kirby has written: “Wonderful people participated in the committees [in New Zealand] – lawyers of great ability. But the institutions were not well serviced. They deserve the criticism that they were ‘ramshackle, unsystematic, part-time and unsatisfactory’.”<sup>8</sup>

In the end, law commissions are a bit like the old saw relating to the Harvard Law School: if they did not exist they would have to be invented.

#### IV. COURT USAGE

In the five years from July 2012 to June 2016 in the senior courts in New Zealand (the High Court, the Court of Appeal and the Supreme Court) there have been 371 judgments referring to Law Commission reports. These references range from footnotes to discussion of all or part of a report. This is an average (rounded off) of 75 judgments per year, or well over one per week from our senior courts.

These figures do not include the District Court. The reason for that is not to ignore the status and achievements of that court. Those judgments are not online in the same way as those of the senior courts. That is being attended to, and the usage of reports is likely to go up quite sharply, particularly in the areas of evidence and criminal law.

It is not possible in an article of this kind to review all 371 cases. But as an indicative exercise it may be useful to survey the Supreme Court decisions to indicate the range of influence.<sup>9</sup>

In *Ririnui v Landcorp Farming Ltd*<sup>10</sup> there is a discussion of Report 9 on Company Law Reform and Restatement.<sup>11</sup> In *Gilbert v Body Corporate 162791*<sup>12</sup> there is reference to IP24 on Reform of the Incorporated Societies Act 1908.

In *Morton v R*<sup>13</sup> there is reference to the Commission’s reports on reform of the Law of Evidence. It should be remarked at this point that the Commission’s various reports on Evidence are easily the most heavily subscribed to in court judgments.

In *Hotchin v New Zealand Guardian Trust Co Ltd*<sup>14</sup> there is reference to the Commission’s work on the apportionment of civil liability. In *Helu v Immigration and Protection Tribunal*<sup>15</sup> there is reference to the guide which the Commission prepared on international law and its sources.<sup>16</sup> *Allied Concrete Ltd v Meltzer*<sup>17</sup> took the Court into the area of the difficult transitional provisions relating

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8 Michael Kirby “What is Distinctive about New Zealand Law and the New Zealand Way of Doing Law?” (paper “Law Reform and the Trans-Tasman Log Jam”, Law Commission of New Zealand Twentieth Anniversary Conference, Wellington, August 2006) at 19–20.

9 Figures obtained from judgments listed on the Courts of New Zealand website <www.courtsofnz.govt.nz>, under: Supreme Court, Court of Appeal and High Court decisions.

10 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056.

11 Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at 41.

12 *Gilbert v Body Corporate 162791* [2016] NZSC 61, (2016) 11 NZCLC 98-042.

13 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1.

14 *Hotchin v New Zealand Guardian Trust Co Ltd* [2016] NZSC 24, [2016] 1 NZLR 906.

15 *Helu v Immigration and Protection Tribunal* [2015] NZSC 28, [2016] 1 NZLR 298.

16 Law Commission *A New Zealand Guide to International Law and its Sources* (NZLC R34, 1996).

17 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141.

to company law reform, and *Dotcom v Attorney-General*<sup>18</sup> into the area of search and surveillance powers.<sup>19</sup> Arbitration did not escape attention in *Carr v Gallaway Cook Allen*.<sup>20</sup>

Some of the Commission's work outside formal reports was noted – for instance *Jennings Roadfreight Ltd*<sup>21</sup> – in an area where the Commission had given an advisory report to the Ministry of Commerce on the priority of debts in the distribution of insolvent estates.

Perhaps, the most significant usage of Law Commission reports in the Supreme Court is in cases where that court is faced with challenges to the existing law and suggestions it should be altered in some way. In such a situation, the Court itself has a law reform role, albeit one which is not completely open-ended.

One example is *Takamore v Clarke*.<sup>22</sup> Mr Takamore had died suddenly on 17 August 2007 in Christchurch. He had lived there with Ms Clarke and their children for the previous 20 years. On his death, his mother, sister and other family members travelled to Christchurch to claim his body for return to Kutarere for burial. Ms Clarke and his son resisted the request. There was strong family dissension. In the result the Kutarere family took Mr Takamore to Kutarere where he was buried on 21 August in an urupa alongside his father and other family members. The Kutarere family believed their actions to be justified in accordance with tikanga (Māori custom). Ms Clarke thereafter obtained a licence from the Minister of Health under the Burial and Cremation Act 1964 authorising disinterment of Mr Takamore's body. She also obtained probate and unsuccessfully sought the return of Mr Takamore's body. She then brought proceedings in the High Court which ultimately proceeded as far as the Supreme Court. Ms Clarke succeeded in the High Court and the Court of Appeal.

By a 3:2 majority, the Supreme Court upheld the common law rule that the executor has the duty and the right to determine where and how the body of the deceased would be disposed of. That principle was not displaced in this case. It recognised the common law rule under which personal representatives have both the right and duty to attend to disposal of the body of the deceased. The rule becomes operative where there is no agreement or acquiescence among the family on what is to be done, where arrangements have broken down or when nothing is happening. In exercising that power, the personal representative(s) should take account of the views of those close to the deceased which are known or conveyed to them. Any views expressed by the testator on what should be done are an important consideration.

The Chief Justice and William Young J agreed that the appeal should be dismissed. But they would not have recognised the role of personal representatives. In their view, any disputes about what should be done with the body of the deceased can only be resolved by the court.

As it happened, whilst this dispute was proceeding through the courts, the Commission had itself on foot a reference on burial law in New Zealand. *Takamore* in the courts illustrates the difficulty of undertaking law reform where, for one reason or another, it is not possible to follow the usual sort of law reform processes. One possibility, which was not considered in any of the New Zealand courts, including the Supreme Court, was to do away with the old common law rule, which had existed for hundreds of years, and to make the testators wishes paramount. This would

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18 *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

19 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).

20 *Carr v Gallaway Cook Allen* [2014] NZSC 75, [2014] 1 NZLR 792; Law Commission *Arbitration* (NZLC R20, 1991).

21 *Jennings Roadfreight Ltd (in liq)* [2014] NZSC 160, [2015] 1 NZLR 573.

22 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

bring New Zealand law much more into line with the preponderance of the law on this subject in the Northern Hemisphere. A testator could express his or her own wishes (including to have his or her body dealt with by tikanga) subject to an overriding court discretion if the testator wished to do something manifestly unreasonable or improper.

The Commission's report is still under government consideration and has been so since 28 October 2015. The position is somewhat unsatisfactory given that the extent of burial disputes of this kind is rather greater, on the Commission's evidence, than what the Supreme Court seemed to have thought the position to be.

Reference has already been made to the large number of times courts have referred to the Commission's work on issues papers and the Evidence report itself. In many ways, for better or for worse, evidence law has become the Commission's "baby". This is likely to continue for at least the foreseeable future because the Evidence Act itself provides that the Commission is to review the law in this area at five yearly intervals.<sup>23</sup> This was in large measure a concession to the strong views expressed in some quarters in the legal profession, when reform was being considered, that the law in this area should not be reduced to a statute (although it was never expressed to be a code).

One example of this area, as being merely illustrative, is the extensive use which was made in *R v Wichman*<sup>24</sup> of the Commission's work. The central issue in that case was the very important topic of so-called "Mr Big" operations by the police. A supposed criminal organisation, based on the (questionable?) principle that its members are completely honest and open amongst themselves, recruits a suspect as an associate of the organisation who becomes involved in what appear to be criminal activities. The organisation has an apparent ability to resolve problems associated with possible prosecution. The involvement ends with an interview between Mr Big and the suspect. This interview is the final step before full membership of the organisation. The suspect is expected to be entirely frank about any prior offending. Essentially the "Mr Big" scenario is used to obtain confessional evidence.

Three members of the Supreme Court were not moved to "bar" this technique. The Chief Justice took another view: that it culminates "in an interrogation without procedural safeguards against the background of a reality constructed by state deception that I consider to be unacceptable".<sup>25</sup> Glazebrook J also had concerns.

The short point for present purposes is that the work of the Law Commission was again referred to in some considerable detail.

In conclusion, under this head, the work of the Commission is frequently referred to in our courts; most frequently in understanding why the law has assumed its present shape. The Commission always outlines the trail which has been followed and this "clearing of the undergrowth" is of great assistance to practitioners and busy judges. Whether the ultimate merit position taken up by the Commission on a given point is accepted is, as it should be, a matter for debate in our appellate courts and the legislature. But the Commission's viewpoint has been looked to with respect.

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23 Evidence Act 2006, s 202.

24 *R v Wichman* [2015] NZSC 198, [2016] 1 NZLR 753.

25 *R v Wichman*, above n 24, at [348].

## V. OTHER USAGE

Reference to Law Commission reports is extensive elsewhere. The Commission maintains a professional website.<sup>26</sup> Much of its output is now electronic, although it is required by statute to lodge hard copies when tabling Reports in the House.

Perhaps the most interesting question on general usage is how much the legal profession is resorting to electronic access. My successor in Alberta, Professor Peter Lown, produced a particularly interesting paper on thoughts and questions on law reform in an electronic age at the last Commonwealth Law Conference. It relied to some extent on a paper by Steven Lastres.<sup>27</sup>

Prior to contemporary electronic research, if a lawyer was researching an unfamiliar area, the first resource they would consult would be a leading text book or another secondary source located by searching at their local law library. Now the first step for young associates researching in an unfamiliar area is to conduct a plain language Google search. Prior to the “electronic age”, lawyers would have to consult abridgments, case citators or other classifications of legal systems to conduct case law research. Such resources are now almost never used. If they are, it is at a later step in the research process and it is accessed by following a digest link on the online cases’ headnotes.

Even electronic research is changing. Electronic case law databases used to employ Boolean searches. Now many databases are following Google’s lead and utilising natural language searches. The bottom line is that easy access to online resources has led to an almost exclusive reliance on electronic research with little or no library usage and little or no understanding of search logic. This has been a challenge for law librarians – while electronic research is usually quicker, it leads to higher expectations in that it is assumed that researchers should be able to find a particular resource and they should be able to do so themselves.

This has other implications. Some research suggests that new associates at law firms spent 73 per cent of their work week online, 31 per cent of it spent doing legal research. This research is mostly done using online, paid resources (first) and online, free resources (second). Less than two hours per week was spent consulting print resources and 10 per cent of those surveyed did not use print resources at all.<sup>28</sup> This is significant for professional law reformers because they spend most of their time conducting legal research and, unlike firm associates, do not have as many competing demands on their time.

Law Commissions are well placed in such an environment. Their work is now online. It is thereby professionally and publicly accessible. Given that courts are prepared to receive law reform material, of course where relevant, they will be assisted by law reform papers and reports which routinely deal with the points in issue in greater depth than text books. Such reports are generally considered to be authoritative. They are endorsed by Law Commissioners who have senior professional standing.

The advent of the electronic age for legal materials and searching is beneficial to practitioners and members of the public and the usage seems likely to continue to escalate, with real implications for the Law Commission.

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26 See <[www.lawcom.govt.nz](http://www.lawcom.govt.nz)>.

27 Steven A Lastres “Rebooting Legal Research in a Digital Age” (Insights Paper, 6 July 2013) <[www.lexisnexis.com/documents/pdf/20130806061418\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20130806061418_large.pdf)>.

28 Lastres, above n 27, at 2–3.

# THE COMMISSIONER OF INLAND REVENUE'S STATUTORY DUTY TO COLLECT THE HIGHEST NET REVENUE

BY JOEL MANYAM\*

## I. INTRODUCTION

The payment and collection of taxation revenue marks the largest annual transfer of wealth from the private citizenry to the Government of New Zealand. For the most part, this transfer occurs without incident. Tax owed by taxpayers is paid without the need for enforcement action. In practice, this means that taxpayers accept their legal obligation pursuant to s 15B of the Tax Administration Act 1994 (TAA 1994), which obliges them to assess their tax liability,<sup>1</sup> determine the amount of tax payable<sup>2</sup> and pay their respective tax debts on time.<sup>3</sup> This process by which the taxpayers accept their liability for tax and proceed to pay their tax debts without the need for enforcement is referred to as the principle of voluntary compliance, and is the cornerstone of New Zealand's taxation system.<sup>4</sup> The arm of government that is responsible for collecting this vast amount of money is Inland Revenue and it is the Commissioner of Inland Revenue (CIR) who serves as its Chief Executive.<sup>5</sup>

Where taxpayers cannot or will not voluntarily pay their respective tax debts, the CIR will take enforcement action. Enforcement action can include the use of a freezing order in respect of taxpayers' assets,<sup>6</sup> the use of statutory garnishee notices on third party debtors to taxpayers<sup>7</sup> and entry into third party guarantees by the CIR.<sup>8</sup> More common enforcement action is the serving of

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1 Section 15B(aa).

2 Section 15B(a).

3 Section 15B(c).

4 *Re Marra, ex parte Commissioner of Inland Revenue* (2004) 21 NZTC 18,494 (HC) at [17].

5 The Court of Appeal, in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2014] NZCA 349, (2014) 26 NZTC 21-085 at [50], opined that the better view was that the Commissioner of Inland Revenue [CIR] was an officer of the Crown who could exercise certain functions on the Crown's behalf.

6 Such orders were used in *Commissioner of Inland Revenue v Dymock* [2013] NZHC 3346, (2013) 26 NZTC 21-060 and *Chesterfield Preschools Ltd v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,500 (HC).

7 Examples of the effective use of the notice procedure as a means of enforcement include *Enterprises Lakeview Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,139 (HC) and *King v Leary* (1988) 10 NZTC 5,067 (HC).

8 Recent examples of the successful use of third party guarantees include *Commissioner of Inland Revenue v Mikkelsen* (2011) 25 NZTC 20-053 (HC); *Commissioner of Inland Revenue v Wright* [2016] NZHC 2125, (2016) 27 NZTC 22-070; *Federal Commissioner of Taxation v Croft* [2016] QSC 190, (2016) ATC 20-580 in Australia.

a statutory demand,<sup>9</sup> pursuant to the Companies Act 1993 (CA 1993) in respect of companies.<sup>10</sup> Should the statutory demand not be met, the CIR, as creditor, will usually apply for a court order pursuant to s 241(4) of the CA 1993, to have the company placed in liquidation.<sup>11</sup> The CIR has successfully pursued enforcement action seeking the bankruptcy of individual tax debtors,<sup>12</sup> pursuant to the Insolvency Act 2006 (IA 2006). When such enforcement action places taxpayers at imminent risk of being wound up or adjudicated bankrupt, they have sought to avoid the serious consequences of insolvency by seeking to enter into arrangements, including instalment payment arrangements, with the CIR for the payment of their tax debts.<sup>13</sup> The CIR has wide statutory powers to enter into such compromises with taxpayers, which are consistent with the statutory duty to collect the highest net revenue over time.

However, taxpayer proposals to enter such compromises have also been rejected. Taxpayers have largely been unsuccessful in seeking judicial review of the CIR's decisions to reject. The purpose of this article is twofold: first, to analyse the reasons the courts have upheld the CIR's decisions; and secondly, to highlight the types of payment proposals taxpayers will need to make in order for those proposals to have a better chance of being accepted by the CIR. It is in the taxpayers' best interests not only to enter into such agreements but to also honour them, when accepted by the CIR. The CIR, in deciding whether to accept or reject payment proposals, has not only to consider their content but also to weigh them against the backdrop of the wider tax system and the collection duty imposed on the greater tax-paying public. Accordingly, taxpayer payment offers need to be made very carefully. They must achieve two goals: a significant inroad into a taxpayer's existing debts and an acceptance by the CIR that the proposal is compatible with its legislated taxation responsibilities.

## II. THE STATUTORY FRAMEWORK FOR TAX COLLECTION

Sections 6 and 6A of the TAA 1994 outline the obligations of government ministers, officers and the CIR "at all times to use their best endeavours to protect the integrity of the tax system."<sup>14</sup> Section 6A(3) stipulates that "in collecting the taxes ... and notwithstanding anything in the

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9 As noted in *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2014] NZCA 349, (2014) 26 NZTC 21-085 at [50], a statutory demand is issued in accordance with s 289 of the Companies Act 1993 [CA 1993] and is not filed in court. It does not involve the commencement of legal proceedings.

10 In *Accent Management Ltd v Commissioner of Inland Revenue* [2013] NZHC 3197, (2013) 26 NZTC 21-050, statutory demands dated 18 April 2013, were made by the CIR for payment of \$NZD 3,250,265.74 from Accent Management Ltd and for \$2,115,039.48 from Lexington Resources Ltd, respectively.

11 A recent example being *Commissioner of Inland Revenue v Shearing Services Kamupene Ltd* [2016] NZHC 1379, (2016) NZTC 22-057.

12 A recent example is provided in *Re Commissioner of Inland Revenue, ex parte Musuku* [2016] NZHC 2773, (2016) 27 NZTC 22-078, where, on 17 November 2016, the CIR successfully obtained an order for the adjudication in bankruptcy of the judgment debtor.

13 In *Re Commissioner of Inland Revenue, ex parte Musuku* [2016] NZHC 2773, (2016) 27 NZTC 22-078, the judgment debtor owed \$92,843.10 and it was on the basis of this debt that the CIR as judgment creditor was seeking the debtor's adjudication in bankruptcy. The judgment debtor had offered to pay \$65,000 on the basis that it would be an end to all litigation between the parties.

14 Section 6(1). Sections 6 and 6A were amended by the Tax Administration Amendment Act 1995 and came into force on 10 April 1995. Section 6(2) of the Tax Administration Act 1994 [TAA 1994] provides an inclusive meaning of "the integrity of the tax system", which includes taxpayers' perceptions of that integrity.

Inland Revenue Acts,<sup>15</sup> it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law<sup>16</sup>. Tax debts arise by operation of law as the charge for tax is imposed<sup>16</sup> by the Income Tax Act. As observed by Richardson J in the Court of Appeal decision in *Brierley Investments Ltd v Commissioner of Inland Revenue*,<sup>17</sup> one of the relevant features of the legislative scheme for income tax was the role of the CIR in quantifying the liability for tax by making an assessment of what that liability should be. It was the CIR's assessment of the tax which determined the quantum of indebtedness of the taxpayer to the Crown.<sup>18</sup> The assessed tax must then be collected. Lord Templeman in *New Zealand Stock Exchange v Commissioner of Inland Revenue*<sup>19</sup> confirmed that it is the duty of the CIR to see that such income is assessed for tax and that the tax is paid. The collection function is subject to a further statutory duty: "to collect over time the highest net revenue that is practicable within the law."<sup>20</sup> This latter duty is to be exercised having regard to: the resources available to the CIR, the importance of promoting compliance, especially voluntary compliance<sup>21</sup> by all taxpayers with the Inland Revenue Acts, and the compliance costs incurred by taxpayers. In reference to the statutory context in which the duty to collect is to be exercised, Richardson P in *Auckland Gas Co Ltd v Commissioner of Inland Revenue* commented that the CIR, "is required to operate within limited resources"<sup>22</sup> in respect of functions committed to the Commissioner's charge.

The duty to collect the highest net revenue is a paramount duty.<sup>23</sup> Randerson J in *Raynel v Commissioner of Inland Revenue*<sup>24</sup> asserted that it is clear from the wording of s 6A(3) of the TAA 1994 that the duty prevails over other provisions in the Inland Revenue Acts. It follows that the CIR will pursue enforcement action against both individual and corporate taxpayers who do not comply with the obligation in s 15B(c) of the TAA 1994 to pay their taxes on time. Such enforcement action would include bankruptcy proceedings or applications for the winding up of companies.

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15 These are defined by s 3(1) and sch 1 of the TAA 1994 to include not only the principal Acts which impose either taxes or duties but also the TAA 1994 itself.

16 In *Commissioner of Inland Revenue v Michael Hill Finance (NZ) Ltd* [2016] NZCA 276, [2016] 3 NZLR 303 at [80], the Court of Appeal opined that liability under the revenue legislation is imposed by statute, not by the Commissioner.

17 *Brierley Investments Ltd v Commissioner of Inland Revenue* [1993] 3 NZLR 655 (CA).

18 In *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530 (CA) at 532, Cooke J observed that the Commissioner was an officer of the Crown charged by statute with the function of collecting revenue on behalf of the Crown.

19 *New Zealand Stock Exchange v Commissioner of Inland Revenue* [1992] 3 NZLR 1 (PC) at 3.

20 Pursuant to s 6A(3) of the TAA 1994. In *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 (HC) at [45], Randerson J noted that "[a]t least since 1995, the TAA has required the Commissioner to maximise the recovery of outstanding tax."

21 In *Wilson v Commissioner of Inland Revenue* [2016] NZHC 87, (2016) 27 NZTC 22-047 at [26], counsel for the CIR submitted that the voluntary compliance scheme was central to the proper functioning of the Inland Revenue Acts.

22 *Auckland Gas Co Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,027 (CA) at 15,034.

23 In *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003 at [20], Asher J opined "[i]t is significant that s 6A(3) imposes an overarching duty ... to collect the highest net revenue that is practicable over time."

24 *Raynel*, above n 20, at [49].



### III. BANKRUPTCY AND LIQUIDATION ACTION IN PURSUIT OF COLLECTING THE HIGHEST NET REVENUE

If taxpayers, individual or corporate, either cannot or refuse to pay their assessed tax by the due date, they can expect the CIR to proceed against them. Section 156(1) of the TAA 1994 confers the power and specifies the method by which the CIR may recover unpaid tax in the following words: “[a]ll unpaid tax shall be recoverable by the Commissioner on behalf of the Crown by suit in the Commissioner’s official name.”

The question arises whether taking bankruptcy action or liquidation proceedings amounts to a form of recovery. In *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd*,<sup>25</sup> Randerson J expressed his clear view that he considered both the issuing of a statutory demand and the commencement of winding up proceedings to be a form of debt recovery.<sup>26</sup> Two years later, in *Silverpoint International Ltd v Wedding Earthmovers Ltd*, Associate Judge Doogue expressed an opposing view that:<sup>27</sup>

... while liquidation proceedings are *de facto* used to exert pressure on [companies] to pay their debts, the end in view and the objective of, such a proceeding is not a “proceeding for the recovery of a debt”.

In 2007, the Privy Council in *Cambridge Gas Transportation Corp v Unsecured Creditors of Navigator Holdings plc*, settled the matter by stating that both liquidation and bankruptcy proceedings were measures which amounted to a form of debt recovery. Lord Hoffman noted that:<sup>28</sup>

The purpose of bankruptcy proceedings ... is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details ... The important point is that bankruptcy, whether personal or corporate, is a collective proceeding to enforce rights and not to establish them.

The High Court in *Commissioner of Inland Revenue v Ben Nevis Forestry Ventures Ltd*<sup>29</sup> followed the Privy Council and stated that it was satisfied that liquidation proceedings brought under Part 16 of the CA 1993, was a form of debt recovery.

Enforcement action, such as bankruptcy, can have serious consequences for a person as noted by Toogood J in *P v Commissioner of Inland Revenue*:<sup>30</sup>

The consequences of bankruptcy can be severe: it makes it difficult to obtain credit in the future; bank accounts can be terminated; job security and a person’s ability to be a business owner can be threatened; a person can lose assets including the family home; it can affect Kiwisaver funds and superannuation. Bankruptcy can also have a lasting impact on a person’s family life.

25 *Volcanic Investments Ltd v Dempsey & Wood Civil Contractors Ltd* (2005) 18 PRNZ 97 (HC).

26 At [20].

27 *Silverpoint International Ltd v Wedding Earthmovers Ltd* HC Auckland CIV-2007-404-104, 30 May 2007 at [83].

28 *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors (of Navigator Holdings plc)* [2006] UKPC 26, [2007] 1 AC 508 at [14]–[15].

29 *Commissioner of Inland Revenue v Ben Nevis Forestry Ventures Ltd* [2014] NZHC 1746, (2014) 26 NZTC 21-082.

30 *P v Commissioner of Inland Revenue* [2015] NZHC 2293, (2015) 27 NZTC 22-081 at [71(b)].

When the CIR commences such proceedings against a defaulter, the potential for serious consequences may act as a catalyst for a taxpayer to make payment proposals, such as instalment arrangements with the CIR or submitting a payment proposal to the court in a bid to have a bankruptcy notice set aside. A recent illustration of this is the taxpayer's response in the High Court decision in *Wilson v Commissioner of Inland Revenue*.<sup>31</sup> Here, the taxpayer, Mr Wilson, had been a trustee of a trust which had been unable to meet a core goods and services tax (GST) debt of \$17,693.65. Mr Wilson did not dispute the assessments for which judgment had been entered on 17 June 2015.<sup>32</sup> The trust had no assets and was unable to pay the judgment debt. The CIR issued a bankruptcy notice on 8 October 2015, which was served on the taxpayer on 5 November 2015. Mr Wilson responded by applying to the Court to set aside the bankruptcy notice. He also applied for an order approving his proposed terms for payment of the full amount of the debt.<sup>33</sup> The parties agreed that the Court had inherent jurisdiction to consider a payment proposal when considering an application to set aside a bankruptcy notice.<sup>34</sup> However, Associate Judge Christiansen was of the opinion that special circumstances needed to be demonstrated if such an application were to be granted.<sup>35</sup>

Mr Wilson's counsel submitted that it was in the interests of justice to stay the bankruptcy proceedings and approve the offer to repay the judgment debt in full, over a relatively short period of time.<sup>36</sup> Of interest is that the Court noted that Mr Wilson had only proposed to pay the whole of his debt "because of the inevitability of his bankruptcy had he not done so."<sup>37</sup> The Court also recorded that Mr Wilson's offer in fact amounted to a payment of 66 per cent of the debt.<sup>38</sup> Mr Wilson's terms of payment were approved by the Court.

In *Wilson* the instalment payment proposal was made to the Court, but where the same proposal is made directly to the CIR the issue is more problematic given the CIR's duty to collect the highest amount of net revenue. The following examination of court decisions will illustrate how realistic such proposals need to be in order to be acceptable. These decisions also illustrate the kinds of proposals which the CIR is entitled to reject without being in breach of its statutory duty.

#### IV. INSTALMENT ARRANGEMENTS AND THE DUTY TO COLLECT THE HIGHEST NET REVENUE

It is appropriate to begin with the High Court decision of Randerson J in *Raynel v Commissioner of Inland Revenue*<sup>39</sup> for a number of reasons. First, *Raynel* is treated as precedent by later courts.

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31 *Wilson v Commissioner of Inland Revenue* [2016] NZHC 87, (2016) 27 NZTC 22-047.

32 At [5].

33 At [57], where Associate Judge Christiansen noted the unusual nature of the proposal to pay the full amount as follows: "[u]nusually, but to Mr Wilson's credit, his proposal contained a promise to pay the whole of his debt (as it was perceived to be)".

34 At [6].

35 At [6].

36 At [15].

37 At [56].

38 At [57]. This offer of repayment was considered to be generous in comparison with offers in similar applications to the High Court (at [59]).

39 *Raynel*, above n 20.

Secondly, Asher J in *Russell v Commissioner of Inland Revenue* referred to *Raynel*<sup>40</sup> as “the leading High Court decision”.<sup>41</sup> Thirdly, in the appeal against Asher J’s decision, the Court of Appeal in *Russell v Commissioner of Inland Revenue (No 2)* endorsed the principles articulated in *Raynel* and considered that Asher J had correctly referred to them in his interpretation of the relevant legislative provisions.<sup>42</sup> Additionally, *Raynel* is significant in that the CIR was pursuing enforcement action against both the individual, Mr Raynel, and his company. Randerson J’s articulation of the principles are therefore relevant to both corporate and individual taxpayers.

In *Raynel*, the CIR commenced proceedings to bankrupt Mr Raynel and wind up his company, In Forest Training Ltd (IFTL), for pay as you earn (PAYE), GST and income tax arrears. The indebted parties did not dispute their respective liabilities for the unpaid tax. They put forward various proposals for repayment of some or all of their tax debts; these proposals were rejected by the CIR. The taxpayers applied for judicial review of the decision to reject. The grounds for their application were that in rejecting their offers of payment the CIR had breached his duty under s 176 of the TAA 1994, which was to maximise the recovery of outstanding tax. Their argument was that the CIR would have recovered more tax by accepting their proposals than by pursuing bankruptcy and winding up action. Randerson J reached a number of factual conclusions and found first, that the taxpayers had a “very poor record of compliance.”<sup>43</sup> The history of the taxpayers’ dealings with the CIR indicated a clear pattern of their entering into repayment arrangements but consistently failing to comply with them. Secondly, the evidence indicated a failure by the taxpayers to provide the CIR with a full and realistic disclosure of their respective financial positions,<sup>44</sup> despite numerous efforts by the CIR’s staff to acquire this information. There was also evidence that while IFTL had made a proposal for repayment, it remained in default in respect of its obligations to file PAYE and GST returns and to make payment of PAYE deductions. Mr Raynel had also demonstrated an ongoing failure to meet his current tax obligations: the timely filing of returns and payment of outstanding taxes. The repeated pattern of defaulting provided sufficient justification for the CIR to express a lack of confidence in Mr Raynel’s ability to comply with any future arrangements. The proposals themselves varied markedly. The lump sum payments offered were well short of the sum owed and no information had been provided to the CIR regarding Mr Raynel’s financial status despite repeated requests. Such information was vital to enable the CIR properly to assess the proposals and whether they would maximise recovery. The Court came to the inevitable conclusion that neither Mr Raynel, nor any other entities he was associated with, had sufficient resources to pay the debts or a significant amount towards them. The CIR was entitled to reach a commercial decision that there was no basis on which to conclude that accepting the proposals would result in a greater return to the CIR than if enforcement action was taken.

This conclusion was reached, however, without any account being taken of the requirements in ss 6 and 6A of the TAA 1994. Randerson J proceeded to consider the interpretation and impact of these statutory provisions. He concluded that the obligation to collect the highest net revenue was

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40 *Raynel*, above n 20.

41 *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003 at [22].

42 *Russell v Commissioner of Inland Revenue (No 2)* [2015] NZCA 351, (2015) 27 NZTC 22-018 at [30].

43 *Raynel*, above n 20, at [7].

44 A comprehensive form known as the “IR 590 (Statement of Financial Position)” (*Raynel*, above n 20, at [16]), which required a full statement of income and outgoings, as well as assets and liabilities, had been sent to the taxpayer on numerous occasions.

not absolute in nature as the CIR was only required to take action in recovering revenue which was practicable and lawful. In discharging the statutory duty to collect the highest net revenue, the CIR was required to take into account available resources, the importance of promoting compliance, especially voluntary compliance, and compliance costs incurred by taxpayers. The overall position meant that there was no requirement for the CIR to collect revenue without taking into account the practicalities of any collection measure, available resources and costs. Instead, the CIR's duty regarding collection was to be discharged using a practical approach which took account of the likely costs and benefits of any collection measure being pursued. It followed that the CIR had a wide discretion to use the best means of determining recovery. This extended to the CIR being able to enter into compromise agreements with taxpayers for the collection of tax, instead of pursuing enforcement action, if this would prove the better option for collection.<sup>45</sup> In addition to the statutory criteria in s 6A of the TAA 1994, the CIR was also required to take account of the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts.

There was also a clear link between promoting voluntary compliance and upholding the integrity of the tax system. Those who voluntarily complied with their tax obligations were entitled to expect the CIR to take firm enforcement action against defaulters. This was the situation in *Raynel*. It was accordingly proper for the CIR to take firm enforcement action against the taxpayers "which would have the maximum coercive effect",<sup>46</sup> including pursuing Mr Raynel in bankruptcy and the winding up of IFTL. Randerson J acknowledged that the CIR had been granted wide powers in discharging collection duties and stated that the courts would be hesitant to interfere in the proper exercise of power. In judicial review proceedings, it was not the court's role to substitute its decision for one properly made by the CIR, taking into account the various statutory requirements.

In *Clarke v Commissioner of Inland Revenue*<sup>47</sup> the plaintiffs had been assessed for income tax and penalties. The plaintiff, Mr Clarke, had a total debt owing of \$581,461.49. Mr Money, the other plaintiff, owed a total debt of \$865,118.23. The quantum of their respective taxation liabilities was unchallenged. As their liabilities exceeded their assets by a significant margin, both plaintiffs sought a compromise with the CIR to avoid bankruptcy. Mr Clarke initially offered to pay a lump sum of \$12,000 plus \$100–\$200 a week for three years. This was later replaced by an offer of \$10,000 in full and final settlement of all tax arrears and was accompanied by an application for formal relief in terms of s 177 of the TAA 1994. Mr Money offered to pay a total of \$19,800 by monthly instalments of \$550 over a three-year period. This offer was later replaced by an application for relief under s 177 of the TAA 1994 and included a lump sum payment of \$25,000 in full and final settlement.<sup>48</sup> The CIR rejected both offers as they did not maximise recovery of revenue and the plaintiffs had not made full and frank disclosure of their financial affairs. In addition, the interest and penalties had been imposed by their adoption of an abusive tax position, which the CIR had no statutory discretion to remit.<sup>49</sup>

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45 *Raynel*, above n 20, at [55].

46 *Raynel*, above n 20, at [72].

47 *Clarke v Commissioner of Inland Revenue* (2005) 22 NZTC 19,165 (HC).

48 At [19], Priestley J observed that, "the request made by each plaintiff to the defendant [was] to accept a relatively paltry figure when measured against the plaintiffs' total tax debt" (at [25]).

49 Section 177C(3) of the TAA 1994 prevented the CIR from remitting core tax or shortfall penalty tax arising from an abusive tax position.

Counsel for the CIR had argued that Mr Clarke did not provide complete disclosure and this had caused the CIR to doubt whether his settlement offer was the best that could be achieved. Priestley J cited with approval and applied Randerson J's statement of principles in *Raynel* on the CIR's discretion in relation to the statutory duty of collection. He held that there was no evidence that the CIR had failed to consider relevant statutory obligations. There was also no evidence that by declining to accept sums offered and writing off balances of the plaintiffs' respective debts, that the CIR had acted irrationally or unreasonably.<sup>50</sup> The Court declined the applications for judicial review. Having cited *Raynel* in respect of the principles expressed in ss 6 and 6A of the TAA 1994, Priestley J commented on how they applied to the facts: in exercising his discretion the CIR was entitled to consider a broad range of factors; there had been no breach of the CIR's obligation to uphold the integrity of the tax system under s 6 of the TAA 1994; and there had also been compliance with the duty in s 6A(3) to promote voluntary compliance as although the outcomes for the two plaintiffs were unpalatable, such consequences could be important in promoting voluntary compliance in accordance with s 6A(3)(b).<sup>51</sup>

The dicta of Randerson J in *Raynel* was also adopted by the High Court in *McLean v Commissioner of Inland Revenue*,<sup>52</sup> where the plaintiff had been assessed by the CIR for tax and penalties. The plaintiff sought relief on the grounds of hardship and made numerous offers to pay his tax debts, which were rejected by the CIR. The principal reason for declining the application and offers was due to the taxpayer's dealings with his trusts, in particular the transferring of his assets to the trusts. The CIR obtained judgment for the tax debt of \$234,066.65. The plaintiff commenced judicial review proceedings to set aside or strike down the CIR's decisions. He sought further court orders directing the CIR to reconsider his offers, extending to, if necessary, directing the CIR to engage in negotiations to achieve a satisfactory outcome. The CIR agreed to suspend enforcement of the judgment pending the outcome of the judicial review application.

Venning J declined the application and held that the CIR had acted correctly and dismissed the proceedings. He held that the CIR had acted lawfully for two reasons. First, on the facts there was no basis for the claim that the CIR's decision was unreasonable. Secondly, in light of the collection obligations on the CIR, his decision to decline the offers was proper. In relation to the second reason, Venning J endorsed *Raynel* and held that the CIR, particularly in light of the facts "was quite entitled and indeed obliged"<sup>53</sup> to uphold the integrity of the tax system and have regard to the importance of promoting compliance with the Inland Revenue Acts. On the facts it was clear that despite the plaintiff having knowledge of his tax obligations, he actively sought to structure his affairs through the trusts that had been set up. This was done with the clear objective of reducing his personal assets and to hinder the CIR's efforts to recover payment from him personally. In Venning J's opinion, "[i]t would do nothing for the integrity of the tax system if the plaintiff were permitted to act in that way to force the Commissioner to accept a settlement."<sup>54</sup>

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50 *Clarke*, above n 47, at [37].

51 At [56]. Counsel for the CIR had submitted that an objective observer would be "dismayed" if either plaintiff could avoid their tax liabilities and walk away by paying small sums without any demonstrable detriment (at [44]).

52 *McLean v Commissioner of Inland Revenue* (2005) 22 NZTC 19,231 (HC).

53 At [73].

54 At [73].

In *Rogerson v Commissioner of Inland Revenue*<sup>55</sup> the taxpayer had a long history of non-compliance with tax reporting requirements and non-payment of assessed tax. The CIR obtained judgment against him for \$18,658.55 in respect of outstanding tax, shortfall penalties and interest. The taxpayer made a number of offers to the CIR in settlement of the judgment debt. All the offers were declined by the CIR. The taxpayer sought judicial review of the CIR's decision to decline his payment proposals. He claimed that the CIR had breached the statutory duty to collect the highest net revenue over time and/or maximise revenue for the Crown by its rejection. Potter J dismissed the taxpayer's application and endorsed the approach of the High Court in both *Raynel* and *Clarke* accepting that the CIR had acted properly within his statutory collection responsibilities in declining the offers for payment by the taxpayer and said:<sup>56</sup>

The Commissioner was quite entitled, indeed obliged, to take into account that acceptance of the amounts variously offered, which did not nearly equate with the plaintiff's tax debt, would not protect the integrity of the tax system, nor ultimately collect the highest net revenue, given the plaintiff's compliance history.

## V. RECENT DEVELOPMENTS IN THE CIR'S RESPONSE TO TAXPAYER INSTALMENT PAYMENT OFFERS

The above four cases where taxpayers have sought to settle their tax debts by entering into payment arrangements are over 10 years old. It is worth examining more recent cases involving payment proposals for tax arrears accepted, which have also been challenged in judicial review proceedings. The respective courts' judgments provide valuable insight into how realistic such proposals need to be and also highlight other factors that the CIR is entitled to take into account when considering whether to accept or reject such payment proposals.

The relatively recent High Court decision in *Kea v Commissioner of Inland Revenue*<sup>57</sup> vividly illustrates that even high income-earning taxpayers<sup>58</sup> may find themselves seeking instalment payment arrangements with the CIR for large debts.<sup>59</sup> A distinguishing feature in *Kea* was that the taxpayer's debt, unlike those in previously discussed cases, did not arise as a consequence of the unravelling of tax avoidance schemes. Rather, the large tax debts arose due to the taxpayer's failure to pay her tax debts as they fell due in each of the relevant tax years. Additionally, in *Kea*, there was a material misrepresentation of a key ingredient in the instalment payment proposal made to the CIR. Had the CIR known of the material omission, he would have been quite entitled, on this basis alone, to reject the proposal.

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55 *Rogerson v Commissioner of Inland Revenue* (2005) 22 NZTC 19,260 (HC).

56 At [33].

57 *Kea v Commissioner of Inland Revenue* (2011) 25 NZTC 20-084 (HC). Further commentary on this High Court decision can be found in "Commissioner's decision to decline instalment arrangement upheld" (2011) 23(10) Tax Information Bulletin at 20–21.

58 See *Kea*, above n 57, at [92], where the High Court noted that the taxpayer's income for over half of the eight income years for which tax debts were outstanding "had been over \$100,000 for the tax years ended March 2006, 2007, 2008, 2009 and 2010".

59 At [4], [17] and [111]. The taxpayer personally owed over half a million dollars in tax, interest and penalties and the company, Ampak Associates Ltd, which the taxpayer primarily owned, owed \$44,000.

The facts concerned the taxpayer, Mrs Kea, who had received a total income of \$791,932 over eight financial years ended 31 March 2003 until 31 March 2010. She had filed tax returns for each of the tax years, through her tax agent, but had paid a total of only \$2,303 in tax for the entire period. She owed a total of \$532,653.28 in outstanding tax together with interest and penalties when she applied for judicial review. The history of Mrs Kea's dealings with the CIR about her outstanding tax arrears starts in 2007. The CIR wrote to Mrs Kea about her tax arrears and reminded her of her payment obligations. Mrs Kea responded by assuring the CIR that she would comply, but she failed to honour her assurances. In September 2008, the taxpayer's solicitor wrote to the CIR advising that a payment proposal would be submitted for the outstanding tax, but none was submitted. From 2009, the taxpayer made numerous instalment payment offers to the CIR. All were rejected. The final proposal, made on 17 December 2010, included an offer to make monthly payments of \$7,000 from 1 March 2011 for at least two years. Significantly, at the date of the offer, Mrs Kea was able to pay this sum for only two months.<sup>60</sup> This fact was not disclosed, neither in her 17 December 2010 proposal nor in response to inquiries made by the CIR's staff who sought further clarification on the proposal in their efforts to properly consider it.

The Court agreed with the CIR that this failure to disclose that the offer would only endure for two months was a material misrepresentation. The consequence was that even if the taxpayer had succeeded in establishing some error in the CIR's decision-making process, the Court would not have been prepared to grant a remedy. The Court considered whether the CIR had committed any procedural error in deciding to reject the instalment payment proposals. It held that the decision to reject was one the CIR was quite entitled to reach. The taxpayer had a history of being unreliable, and there was little or no effort on her part voluntarily to pay her long-standing tax debts. In light of this it was not credible for the taxpayer to argue that accepting an instalment arrangement would maximise the recovery of tax. While she had been making numerous instalment payment proposals to the CIR, she had failed to pay any of her outstanding tax and had not paid her current tax that had become due.<sup>61</sup>

The CIR also had to consider, as part of the decision-making process, the obligation to promote voluntary compliance. On the facts, the taxpayer had flouted her tax obligations and remained non-compliant. The Court concluded that the CIR had properly exercised his discretion in rejecting the taxpayer's payment proposal and there were no grounds on which the taxpayer could challenge the CIR's decision.

The most recent development is the compendium of decisions relating to the payment of tax arrears by Mr Russell.<sup>62</sup> The CIR applied for summary judgment against Mr Russell for the amount of \$367,204,207.41<sup>63</sup> plus costs and disbursements on the basis that the defendant had no defence to the claim. In determining the CIR's application in *Commissioner of Inland Revenue v*

60 At [109]. This minimal period only became evident in the taxpayer's affidavit dated 29 July 2011, which was filed in support of the judicial review proceedings.

61 At [32]. The Court noted that the taxpayers' tax payments that were due in 2011, had not been paid.

62 *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003 at [1].

63 *Commissioner of Inland Revenue v Russell* [2014] NZHC 1296, (2014) 26 NZTC 21-074. This amount comprised a core debt amount which totalled \$15,757,556.18, in respect of which additional tax, penalties and interest had accumulated. This liability was finally fixed by the Court of Appeal in its judgment in *Russell v Commissioner of Inland Revenue* [2012] NZCA 128, (2012) 25 NZTC 20-120. The taxpayer's application for leave to appeal to the Supreme Court was dismissed in *Russell v Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20-140.

*Russell*, Associate Judge Doogue was satisfied that the defendant had no defence and there was no suggestion that granting the order for summary judgment might lead to an injustice. As these legal tests were satisfied, there were no impediments to the CIR's application being granted.

However, the defendant argued that the Court should exercise its discretion and decline the application for summary judgment on the basis that an application for judicial review of the CIR's decision to reject the taxpayer's instalment payment proposal was yet to be determined, and that this determination could affect the quantum of tax indebtedness in respect of which summary judgment was being sought. Associate Judge Doogue rejected the argument and concluded that granting a summary judgment order would not create complications for the Court in hearing the judicial review application.<sup>64</sup> However, in what were clearly obiter comments, the Associate Judge assessed the prospects of success for the taxpayer, in the yet-to-be-determined judicial review application, in case it could affect the granting of the CIR's application for summary judgment. The Court was clear in its view that the defendant did not have "any realistic expectation of success in the judicial review proceedings",<sup>65</sup> relying on the High Court decision in *Raynel*.<sup>66</sup>

The taxpayer argued that rejection of his payment proposals would result in bankruptcy action being pursued against him. This needed to be contrasted with his ability to pay \$1,000 per week in instalments. This perception of the breadth of the statutory duty was an oversimplification. The decision by the CIR to reject his offers could quite legitimately be explained by the CIR's obligation to take into account the need for visible and vigorous enforcement of taxation liabilities in order to protect the integrity of the tax system.<sup>67</sup> The Court also assessed the extent to which the instalment payment proposals were realistic. The taxpayer had proposed to pay \$1,000 per week amounting to about \$50,000 per year for the rest of his life. He was then 79 years old and, on the optimistic assumption of his being able to work for an additional 10 years in order to continue paying \$1,000 per week, this offer would result in a minuscule<sup>68</sup> fraction of the total debt of about \$360 million being paid. This indicated a reduced prospect of the Court concluding that the CIR had erred in rejecting the taxpayer's payment proposal. It followed that it was unlikely that the judicial review proceedings would result in either interim or permanent relief being granted to the defendant. In any case, in light of the CIR's summary judgment application, the CIR had discharged the onus of establishing that the defendant had no defence to the application. The Court accordingly granted an order for summary judgment against the defendant taxpayer.

It followed that the CIR could commence proceedings for its enforcement. However, before enforcement action could be pursued, the CIR applied for an order striking out the taxpayer's application for judicial review. The application for strike out was determined by the High Court in *Russell v Commissioner of Inland Revenue*<sup>69</sup> in the CIR's favour. This was appealed by the taxpayer, with the Court of Appeal unanimously rejecting the appeal.<sup>70</sup>

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64 *Commissioner of Inland Revenue v Russell* [2014] NZHC 1296, (2014) 26 NZTC 21-074 at [23].

65 At [32].

66 *Raynel*, above n 20.

67 *Russell*, above n 64, at [46].

68 At [48], Associate Judge Doogue observed that the amount offered would not even provide sufficient compensation to the CIR for the loss of use of the unpaid amount of the debt.

69 *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003.

70 *Russell v Commissioner of Inland Revenue (No 2)* [2015] NZCA 351, (2015) 27 NZTC 22-018.



An examination of the High Court judgment is particularly relevant for the insights on the CIR's duty to collect the highest net revenue. Both the High Court and Court of Appeal were clear that bankruptcy is an action for recovery of debt particularly in a case where there was the potential for more being gained, compared with a small amount which might be obtained in an instalment payment arrangement. In order to fully appreciate the Court's determination of the strike out application, it is worth ascertaining exactly what the three proposals for payment actually entailed and the sequence in which they were made. The first offer made to the CIR on 27 September 2006,<sup>71</sup> was to make instalment payments towards his tax debt totalling \$360 million, at the rate of \$1,000 per week, for the rest of his life. This was rejected by the CIR. The second proposal made on 9 December 2012, was to pay the debt by instalments of \$1,000 per week for the rest of his life or until his bankruptcy<sup>72</sup> or mental incapacity. This proposal was declined. An alternative proposal, made on 2 September 2013, offered a lump sum payment of \$150,000 on condition that the balance of the debt would be remitted. The CIR declined this offer by letter dated 13 September 2013.

The taxpayer argued that the CIR's rejection of both the instalment and lump sum payment proposals would not maximise the recovery of tax revenue and would be inconsistent with the CIR's duty to collect the highest net revenue. Before commenting on the validity of the taxpayer's argument, the Court examined the net effect that the respective payment proposals would have in reducing the taxpayer's tax debt. First, in respect of the proposals to make payment by weekly instalments, the Court stated "The fact is the proposal was to pay a very small amount of money, and a tiny proportion of the debt."<sup>73</sup> The Court further observed that the interest on the debt would accrue at a rate faster than the instalments reduced it.<sup>74</sup> Secondly, in respect of the lump sum payment proposal, the Court concluded that the taxpayer's offer was "to pay a tiny proportion of the overall debt".<sup>75</sup> Asher J observed that accepting such a small offer from an insolvent taxpayer could send the wrong message to defaulting taxpayers generally.<sup>76</sup> Further, it would not be in the interests of collecting the highest revenue from taxpayers over time, even if such taxpayers had no other assets against which enforcement action could be taken. In addition, to accept such a small offer could also be inconsistent with promoting compliance by all taxpayers. His Honour also opined that even where an offer of payment could be higher than if enforcement action were taken, the CIR may be justified in refusing the offer if such refusal would have the effect of preserving the integrity of the tax system and promoting compliance by taxpayers generally. Such refusal by the CIR would be particularly justified.<sup>77</sup>

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71 The offer was made in the course of a judicial settlement conference before the Taxation Review Authority, which had been convened by Judge Barber and was accordingly privileged.

72 As noted by Associate Judge Doogue in *Commissioner of Inland Revenue v Russell* [2014] NZHC 1296, (2014) 26 NZTC 21-074 at [47], the defendant taxpayer had himself made reference to the possibility that the CIR might seek his bankruptcy.

73 *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003 at [39].

74 At [27].

75 At [28]. Asher J noted that the offer to pay the lump sum of \$150,000 amounted to 0.04 per cent of the entire debt and a mere 2.63 per cent of the original debt of \$5,692,665.90 (at [28]).

76 At [21].

77 At [23].

... when what is offered is only a very small portion of the tax owed, and when there has been a flagrant and ongoing failure to comply. The relationship of the amount of the offer to the amount of the overall debt of the taxpayer to the Commissioner, is relevant. The paramount obligation to collect the highest net revenue in the long term can be defeated if taxpayers who owe vast amounts can insist that an offer that is very small, and bears little relation to the real indebtedness, be accepted.

The Court held that the taxpayer had failed on this “first and important”<sup>78</sup> ground. It was appropriate for the CIR to conclude that it was consistent with collecting the highest net revenue that such a small offer be rejected, even if it was also the best commercial return.<sup>79</sup> In reaching the decision to reject the offer, the CIR was entitled to take into account the fact that the taxpayer was in his late seventies; that instalment “payments of \$1,000 per week offered little certainty of finality”;<sup>80</sup> the complexity and unknown nature of the taxpayer’s affairs; and the taxpayer’s poor compliance record.

The taxpayer also argued that the CIR was in breach of s 6A(3)(a) of the TAA 1994 in proceeding with bankruptcy action as it would be an inefficient use of resources. The Court dismissed the argument and held that it was an entirely proper course of action for the CIR to adopt as it may well recover more than what the taxpayer had offered. Asher J was clear that the CIR was quite entitled to exercise the discretion to pursue enforcement, having formed the view that the proposals for payment would not maximise the recovery of tax from the taxpayer. Pursuing bankruptcy was not a wasteful use of resources as the taxpayer had alleged.<sup>81</sup> It was completely consistent with the wider interests of promoting compliance in order to protect the integrity of the tax system.<sup>82</sup> The High Court concluded that the CIR’s discretion had quite properly been exercised. It was unacceptable for the taxpayer to have pursued an application for judicial review to further scrutinise an otherwise properly exercised statutory discretion.

The High Court’s conclusion that Mr Russell’s judicial review application was an abuse of the judicial process is of particular significance. Once the CIR began bankruptcy action, the date on which the CIR as creditor served a creditor’s application could be critical for determining the time frame in which the Official Assignee, as trustee of the bankrupt estate, could claw back and cancel insolvent transactions pursuant to the Insolvency Act 2006.<sup>83</sup> This critical date had been compromised by the taxpayer’s successful application for an interim stay,<sup>84</sup> to prevent the CIR pursuing enforcement action. Preventing the CIR from issuing bankruptcy proceedings, meant the Official Assignee had been potentially barred from acting in respect of particular transactions. This could have compromised the effectiveness of the bankruptcy process and undermined the “fair administration of justice and commerce generally”.<sup>85</sup> The fact that the taxpayer had taken seven and a half years before commencing judicial review of the CIR’s decision to decline the first instalment

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78 At [28].

79 At [28].

80 At [27].

81 At [32].

82 At [25].

83 Sections 193 and 194.

84 *Russell v Commissioner of Inland Revenue* [2014] NZHC 2034, (2014) 26 NZTC 21-095, in which Andrews J had granted Mr Russell’s application for an interim order preventing the CIR from taking bankruptcy action only until the CIR’s application to strike out the taxpayer’s judicial review proceedings had been determined.

85 *Russell v Commissioner of Inland Revenue* [2015] NZHC 754, (2015) 27 NZTC 22-003 at [52].

proposal made on 27 September 2006 was also an abuse of process.<sup>86</sup> Asher J concluded, therefore, that the application for judicial review appeared to be aimed at preventing bankruptcy proceedings from taking their usual course and was an abuse of process.<sup>87</sup> The CIR's strike out application was granted.

Shortly after Asher J's judgment,<sup>88</sup> the CIR served Mr Russell with a bankruptcy notice on 24 April 2015. Mr Russell applied to the Court of Appeal<sup>89</sup> for a stay pending the hearing of his appeal against the High Court decision striking out his application for judicial review. This was rejected on the grounds that the High Court had jurisdiction to manage the bankruptcy process and invoke any safeguards to protect Mr Russell if this was necessary. The Court of Appeal, in a short judgment, also commented on the CIR's rejection of all the taxpayer's payment proposals as follows:<sup>90</sup>

Her [the CIR's] stance is that she does not accept that Mr Russell can pay no more than he has offered. She wants to pursue bankruptcy proceedings with a view to having the Official Assignee ascertain what assets are available to Mr Russell.

The CIR's use of bankruptcy proceedings, then, is not merely to uphold the integrity of the tax system and promote voluntary compliance, but provides a realistic option for greater tax recovery. The CIR had clearly been attempting to obtain a clearer perspective of Mr Russell's asset position but had not succeeded. Pursuing bankruptcy action would enable the CIR to obtain a more comprehensive assessment of the true asset position.

The taxpayer appealed against Asher J's decision; the Court of Appeal, in *Russell v Commissioner of Inland Revenue (No 2)*, unanimously dismissed the appeal. The Court held that Asher J was correct in granting the CIR's strike out application on the grounds that the CIR was entitled to reject the instalment and lump sum offers, and that the taxpayer's application for judicial review was an abuse of court process. In dealing with the first ground, the Court noted that the taxpayer had continued to argue that the only consideration for the CIR in deciding whether to accept the payment proposals was whether accepting the offers represented maximum recovery of the tax owed. The Court was emphatic in its rejection of such a narrow proposition asserting "We reiterate: that is absolutely not the position."<sup>91</sup> The CIR was entitled, as indeed Asher J had earlier held, to take into account a range of relevant factors including the taxpayer's poor compliance history. The taxpayer's poor compliance history was a relevant factor when considering both the integrity of the tax system as well as the importance of voluntary compliance.

The Court of Appeal, however, indicated that it was prepared to go beyond the factors that the High Court had considered the CIR could quite properly have taken into account in the decision. This broader approach was adopted because of the unusual or special features in the taxpayer's conduct. The Court emphasised that in the CIR's decision-making "the Commissioner was entitled

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86 At [53]. Asher J observed this was in itself indicative of an abuse of procedure.

87 At [55].

88 Asher J's judgment was delivered in the High Court at Auckland on 17 April 2015.

89 *Russell v Commissioner of Inland Revenue* [2015] NZCA 155, (2015) 27 NZTC 22-006.

90 At [4].

91 *Russell v Commissioner of Inland Revenue (No 2)* [2015] NZCA 351, (2015) 27 NZTC 22-018 at [43]. The CIR was entitled, as indeed Asher J had earlier held, to take into account a range of relevant factors, including the taxpayer's poor compliance history.

to place considerable weight on taxpayer perceptions of the integrity of the tax system.”<sup>92</sup> This was because the taxpayer, as a chartered accountant, would have been fully aware of the consequences of avoiding tax on the approximately \$15 million that had been attributed to him as income. In addition, there were factors such as the taxpayer’s determined efforts over more than a decade to challenge his liability to tax. These special features entitled the CIR to place particular weight on the integrity of the tax system and the effect on voluntary compliance in making the decision.<sup>93</sup>

The Court of Appeal also considered that in the unusual circumstances of the particular taxpayer, it was relevant for the CIR to also take into account Mr Russell’s actions as an agent for other taxpayers.<sup>94</sup> He had devised the tax avoidance schemes that were used by a number of taxpayers for whom he acted as agent, as well as in related schemes used by his own entities. There were instances where the boundary between agent and taxpayer had been blurred as Mr Russell, in fact, controlled the entities that participated in schemes that he had devised and implemented. The decision-making by the CIR in regard to her rejection of the proposals had “obvious relevance to taxpayer perceptions of the integrity of the tax system.”<sup>95</sup>

The Court also addressed other issues raised in the High Court. The bankruptcy action was not an end in itself but could lead to greater tax recovery because of the Official Assignee’s powers to unravel the taxpayer’s complex finances. The Court of Appeal agreed with the High Court that the judicial review application was an abuse of process. In the Court’s view the application was “patently a tactic to delay the Commissioner commencing a proceeding to have Mr [Russell] adjudicated bankrupt”.<sup>96</sup> The CIR had argued that the appeal had no merit<sup>97</sup> and had accordingly unjustifiably delayed the CIR’s proceedings. She sought indemnity costs and the Court of Appeal acquiesced with her request.

## VI. CONCLUSION

Outstanding tax debts may become the subject of enforcement action by the CIR in the normal discharge of statutory collection obligations. Such recovery action may have drastic consequences for taxpayers, particularly if bankruptcy or liquidation proceedings are pursued. The severe and enduring effect of these enforcement actions may be avoided by taxpayers’ agreeing to instalment payment arrangements with the CIR for payment of outstanding tax debts. Payment via instalments may be attractive for taxpayers who owe large amounts but whose financial circumstances render it impossible to pay in one or more lump sums. Instalment payment arrangements can be advantageous for both taxpayer and the CIR. The taxpayer is able to comply with payment obligations as their means permit, while the CIR is able to obtain payment with ease, certainty and reduced costs without the need to pursue difficult, time-consuming and expensive enforcement action. While instalment payment arrangements have their attractions, if they are to be viable they must be realistic both in terms of quantum of payments and time frames. The proposals for payment need to be made against a backdrop of a taxpayer’s historical record of compliance. The CIR is entitled

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92 At [44].

93 At [44].

94 At [48].

95 At [48].

96 At [66].

97 The CIR had in fact submitted that the appeal was hopeless.

to consider the history of a taxpayer's conduct in respect of their tax obligations when considering whether to accept a proposal. Material misrepresentations or serious omissions will be sufficient in themselves to enable the CIR to reject what may otherwise be a realistic payment proposal. In addition to having a realistic proposal for paying outstanding tax, the taxpayer must also be able to demonstrate that current tax obligations will be met as they fall due.

The common failure evident from court decisions that have upheld the CIR's decisions to reject payment proposals has been offers based on a taxpayer's self-interest. It is critically important for taxpayers to appreciate that proposals need to be made in the context of the CIR's triple statutory obligations – to uphold the integrity of the tax system, to promote compliance especially voluntary compliance and to ensure the collection of the highest revenue, if they are to stand any chance of being accepted by the CIR.

The above analysis of relevant court decisions clearly demonstrates that it is of little, if any, assistance for a taxpayer to resort to judicial review just because the CIR's decision is unfavourable. If the decision to refuse a payment proposal is made within the statutory parameters, the courts will not second guess the CIR's decision. The onus on taxpayers, therefore, is to make proposals that clearly attain the high threshold of demonstrating that they genuinely seek to pay what has been legally assessed to be their correct tax liability.

# HOMELESS YOUTHS’ “STREET FAMILIES” IN AOTEAROA NEW ZEALAND’S YOUTH JUSTICE SYSTEM

BY SELWYN FRASER\*

“Famili, whānau, aiga, gia dinh, mum and dad, gramps, nana, the clan, uncle Bert and auntie Sue, the cuzzies, great-aunt Whina, my partner, my lover, the guys in the gang,” are some of the responses people in our society may make if asked “who is family?”<sup>1</sup>

When it comes to Youth Justice, family matters. Or at least such is the case with Aotearoa New Zealand’s globally-acclaimed Youth Justice System. The Oranga Tamariki Act 1989 (the Act)<sup>2</sup> contains almost 2000 references to “family”.<sup>3</sup> The trend does not change in pt 4 of the Act, which deals specifically with youth justice. In outlining the governing principles of pt 4, s 208 alone mentions “family” eight times. Now, counting references can take one only so far. Still, it points to a statutory emphasis on the participation and empowerment of the young offender’s community and especially their family. But one of the most penetrating questions that can be asked of our Youth Justice System is: who, precisely, is a young person’s family or community?

This article probes this question in the context of one especially “unconventional” family arrangement that pushes against the outer limits of our statutory categories. The arrangement is the “street family”, the communal association entered into by (many) homeless youth.<sup>4</sup> This issue merits attention for two reasons. Generally, the interrelationships between youth homelessness and youth justice are a neglected but important area of academic concern.<sup>5</sup> This article makes a start in that direction. More importantly, street families provide an interesting test case through which our Youth Justice System’s approach to notions of family and community can be assessed. This is especially crucial with respect to the Family Group Conference, which lies at the heart of our

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1 Mark Henaghan “Legally Defining Family” in M Henaghan and B Atkins (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 1 at 1.

2 Or alternatively, the Children’s and Young People’s Well-being Act 1989. This Act was formerly called the Children, Young Persons, and Their Families Act 1989, until the enactment of the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 on 14 July 2017. This Amendment Act introduces a number of changes, especially to the statutory objects and principles in ss 4, 5 and 208. Pursuant to s 2 of the Amendment Act, however, the substantive changes relevant to this article do not come into force until 1 July 2019 or else on an earlier date to be appointed by Order in Council. These changes may well have implications for the thesis of this article, although the tensions and questions driving the analysis will remain.

3 Or “families”. The exact number is 1,860.

4 The term “street family” is used because it is the most common (though not exclusive) self-description offered by members of these associations: John Hagan and Bill McCarthy *Mean Streets: Youth Crime and Homelessness* (Cambridge University Press, New York, 1997) at 158.

5 This is not just true for New Zealand. Internationally, young people are one of the fastest growing groups of homeless: Chez Leggatt-Cook *Homelessness in New Zealand: A Discussion and Synthesis of Research Findings* (report prepared for Methodist Mission Northern, November 2007) at 52.

Youth Justice System. If, as one writer suggests, these family conferences are all about enabling and strengthening families and communities to resolve issues themselves, what could this possibly look like for young people who are alienated from their family of origin and embedded into street families?<sup>6</sup>

The argument proceeds in five stages. Part I describes the phenomenon of street families, and then enumerates four reasons why these associations provide a useful test case on the concept of family. Part II explores the statutory importance, status and role of a young person's family or community, asking both *who* the Youth Justice System recognises as the young person's family or community and *how* they will be involved. This section builds on the foundations laid by former Principal Youth Court Judge, Andrew Becroft, in his paper entitled *It's All Relative: the Absolute Importance of the Family in Youth Justice*.<sup>7</sup> Significant statutory ambiguities remain following this analysis, and this article explores how the influential theories of restorative justice (RJ) and therapeutic jurisprudence (TJ) might influence practitioners' approach to street families in Part III. Finally, Part IV considers whether Māori youth raise any unique concerns and Part V offers some concluding remarks.

## I. STREET FAMILIES

### A. *Defining Homeless Youth*

Youth homelessness is a pressing issue for New Zealand.<sup>8</sup> A nation-wide University of Otago study in 2013 found that of the 30,000 severely housing-deprived New Zealanders,<sup>9</sup> half were younger than 25 years, and half again children under 15 years.<sup>10</sup> This phenomenon clearly deserves sustained attention from youth justice academics and practitioners. The focus in this paper is on homeless youth aged over 14 but under 17.<sup>11</sup> This age bracket mirrors the current definition of "young person" in the Act as a boy or girl over age 14 but not over age 17.<sup>12</sup> Regrettably, there is insufficient data on my focus group – not least because some studies employ unhelpfully broad "youth" categories, spanning a 10- or 15-year age-gap. It thus remains unclear how many homeless youth will encounter the Youth Justice System while homeless, but the large and growing numbers

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6 See generally Murray Levine "The family group conference in the New Zealand children, young persons, and their families act of 1989 (CYP&F): review and evaluation" (2000) 18(4) *Behavioral Sciences & the Law* 517.

7 His Honour Judge Andrew Becroft "It's All Relative: the Absolute Importance of the Family in Youth Justice (a New Zealand Perspective)" (paper presented to the World Congress on Juvenile Justice, Geneva, Switzerland, 26–30 January 2015).

8 As is homelessness more generally, evidenced by the recent cross-party report on homelessness by the Green Party, Labour Party and Māori Party: *Ending Homelessness in New Zealand: Final Report of the Cross-Party Inquiry on Homelessness* (10 October 2016).

9 The authors of the study preferred the term "severely housing deprived" over "the homeless" because the latter is "burdened by stereotype": Kate Amore and others *Severe Housing Deprivation: The problem and its measurement* (Official Statistics Research Series, Statistics New Zealand, September 2013) at 7–8.

10 At 41.

11 The terms "youth" and "young person" are used interchangeably in this paper.

12 Children's and Young People's Well-being Act 1989, s 2(1).

of homeless youth,<sup>13</sup> together with the prevalence of criminal behavior amongst this group,<sup>14</sup> indicate that the total sum would not be insubstantial.

The definition of “homelessness” is matter of considerable debate. Statistics New Zealand defines a person as homeless if they have no options to acquire safe and secure housing.<sup>15</sup> This may be because they are without shelter, in temporary accommodation, sharing accommodation with a household or living in uninhabitable housing.<sup>16</sup> This definition intentionally resisted the historical preoccupation of homelessness research on rough sleepers (people living and sleeping on the streets).<sup>17</sup> While rough sleepers clearly represent the most extreme form of homelessness, this more extensive category of “homelessness” sheds new light on “concealed homeless” living situations that are less visible to the public eye.<sup>18</sup> The definition also recognises that “homelessness falls along a continuum, the closer you are to the acceptable standard [of housing] the less homeless you are”.<sup>19</sup> Importantly, for our purposes, it would seem that the further a person is from acceptable standards of housing the more likely they are to be members of street families. It is amongst the rough sleeper population group that street families are most commonly found. In reality, many homeless youth will tend to drift between “rough sleeping” and other categories of homelessness. The more these youth sleep rough, the more they are likely to identify with the communal associations of the street.<sup>20</sup> And whilst most homeless youth are not “rough sleepers”, youth form a significant *proportion* of New Zealand’s rough sleeping population.<sup>21</sup>

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13 Youthline writes that “[h]omelessness is a growing problem in New Zealand, with youth homelessness contributing a substantial part of this growth”: “Youth homelessness ‘needs a closer look’” (10 April 2015) Youthline <[www.youthline.co.nz](http://www.youthline.co.nz)>.

14 Leggatt-Cook, above n 5, at 63.

15 An alternative definition was provided by Statistics New Zealand in 2009 and quoted by Amore and others, above n 9, at [2.1]. They define homelessness as “living situations where people with no other options to acquire safe and secure housing: are without shelter, in temporary accommodation, sharing accommodation with a household, or living in uninhabitable housing”. This definition has benefits in steering attention away from the connotations of the word “homelessness” and incorporating a strengthened human rights basis: see the discussion in Reina Tuai Harris *Invisible in the SuperCity: Hidden Homelessness in Auckland* (Salvation Army Social Policy and Parliamentary Unit, November 2015) at 12. However, the Statistics New Zealand definition remains the more familiar and widely-used definition of homelessness in New Zealand.

16 Paul Bellamy “Homelessness in New Zealand” (17 July 2014) Parliamentary Library Research Paper <[www.parliament.nz](http://www.parliament.nz)> at 1. For a complete description of the definition of homelessness, refer to the website <[www.statistics.govt.nz](http://www.statistics.govt.nz)>.

17 *New Zealand Definition of Homelessness: Update* (Statistics New Zealand, October 2015) at 5–6.

18 At 4.

19 Reina Tuai Harris *Invisible in the SuperCity: Hidden Homelessness in Auckland* (Salvation Army Social Policy and Parliamentary Unit, November 2015) at 12.

20 See generally the description of how young people come to increasingly identify with the street in Jeff Karabanow *Being Young and Homeless: understanding how youth enter and exit street life* (Peter Lang, New York, 2004) at 50–58.

21 Bellamy, above n 16, at 5.



### B. *The Phenomenon of Street Families: An Interesting Test Case*

A street family is a social unit formed between homeless persons. They often involve the “adoption of familial names and identities” to recognise a special relational arrangement differentiated even from close friends.<sup>22</sup> Research conducted in the United Kingdom suggests that over half of the homeless youth will identify as members of a street family at some point after leaving home.<sup>23</sup> International literature also suggests that homeless youth are more social and more likely to join such associations than older homeless.<sup>24</sup>

Street families provide an interesting test case “family” or “community” for four reasons. First and most obviously, street families are not biological, nor are they recognised as traditional or socially acceptable associations for rearing and nurturing young persons. Secondly, this new familial identity is indeed established over and against biological or traditional identities.<sup>25</sup> Of course, members of street families can still participate in their original family, yet there is a way in which street families attempt to replicate and even replace their family of origin. For instance, their members typically role-play the tasks of family members, complete with parent-child and sibling relationships.<sup>26</sup> Brothers offer physical protection, fathers make decisions, mothers offer emotional support, and so on.<sup>27</sup> Thirdly, street families form an important locus of protection, belonging and identity for homeless youth. Smith writes that street families fulfil homeless youths’ “need for companionship, replacing the intimacy and support commonly provided by traditional families”.<sup>28</sup> They also provide protection, and are therefore particularly valuable for more vulnerable parties, such as younger youth and females.<sup>29</sup> These families have a shared culture based on their experiences of street life.<sup>30</sup> But, fourthly, street families are far from ideal. Certainly, the families that these youth left may well be “dysfunctional by almost any definition”,<sup>31</sup> but their street families are typically little better and likely worse.<sup>32</sup> They are clearly no ultimate solution.<sup>33</sup>

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22 Hilary Smith “Searching for Kinship: The Creation of Street Families Among Homeless Youth” (2008) 51(6) *Am Behav Sci* 756 at 763; Hagan and McCarthy, above n 4, at 159.

23 Hagan and McCarthy, above n 4, at 158.

24 At 158.

25 Smith, above n 22, at 759.

26 At 759 and 764.

27 At 766.

28 At 756.

29 Hagan and McCarthy, above n 4, at 166.

30 At 158.

31 At 25.

32 At 110.

33 Nowhere is this complex dynamic more powerfully explained than in Sophia Beaton and others “An insight into the experience of rough sleeping in central Auckland” (January 2015) at 5, 23–13 and 15–16. As the authors describe at 16, street families are both a source of “rough practical, financial and emotional support”, a “very viable and real alternative” to their families of origin from whom they are dislocated; but these street relationships can also quickly sour into abuse and manipulation.

## II. FAMILY AND COMMUNITY IN THE ACT

### A. *The Importance and Ambiguity of Family and Community in the Act*

The significance of family and community in the Act cannot be overstated,<sup>34</sup> but the statutory categories are as ambiguous as they are important. Family matters to our Youth Justice System, we are all agreed; but deciding *who* constitutes family and *how* family matters are vexing questions facing youth justice practitioners and academics. The status and role of street families in the Youth Justice System depends on the answers given to these two questions.

### B. *Who Constitutes Family and Community: Narrow versus Broad Interpretations*

New Zealand law does not provide a comprehensive or tidy definition of family, and the Act is no exception.<sup>35</sup> Nor would an attempt at a definition yield much success in our pluralistic society, for in modern New Zealand culture “[t]here are almost as many ways to conceptualise families as there are families”.<sup>36</sup> Some writers go so far as to describe the task of defining family as a legal mine-field.<sup>37</sup> Because of this, in his paper *It’s All Relative*, Becroft explicitly refuses “to make a value statement as to how families ought to be constructed”.<sup>38</sup> But in mapping the statutory boundaries of family and community, we have no such luxury: value-judgments must be made. Mark Henaghan provides a helpful framework for making this value-judgment in his comprehensive study on the evolving understanding of family in New Zealand law generally. Henaghan distinguishes between “status-based” and “function-based” approaches to defining family. The former grants moral status, and thus legal status, to only certain types of relationships. This approach lends itself to a narrow statutory interpretation of family, whereby the Act aims to “keep children with their family of origin where possible and place[s] emphasis on supporting rather than replacing existing families”.<sup>39</sup> A common sense understanding of this phrase “family of origin” would not be restricted to only biological families, but would extend to what we might call “traditional families” – families that are socially or culturally trusted, if not legally entrusted, with the task of rearing a child.<sup>40</sup> It hardly needs saying that street families would fall well outside the scope of the status-based family.<sup>41</sup>

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34 Becroft “It’s All Relative”, above n 7, at 3 and 33.

35 At 4.

36 At 4. Becroft lists a number of these different ways of conceptualising family: “domestic composition, genealogy, participation, shared values and community, interpersonal and emotional bond, and legal right or entitlement”.

37 Carol Lupton and Paul Nixon *Empowering Practice? A Critical Appraisal of the Family Group Conference Approach* (Policy Press, Bristol, 1999) at 66.

38 Becroft “It’s All Relative”, above n 7, at 4.

39 Lupton and Nixon, above n 37, at 53.

40 Henaghan, above n 1, at 4 and 13. Henaghan writes that status-based families have tended to be biological relationships and/or relationships acceptable to traditional (Christian) mores.

41 Granted, traditional families are just as much shaped by social and cultural forces as are street families, but the distinction drawn here is between “traditional families” that are accepted by mainstream culture, and street families whose legitimacy is for the most part acknowledged only by members of these street families or others who inhabit the same narrow sub-culture.

The contrasting perspective views family functionally, looking past the type of relationships to see “what is actually happening”.<sup>42</sup> It recognises that exploitation and harm can occur in the most traditional arrangement, and love and care in the most unconventional. This view would strip the statutory references to family and community of any *necessary* biological or traditional clothing, thus potentially opening the doors to street families (as well as other unconventional familial arrangements). In interrogating the boundaries of these statutory references, we can consider both textual and contextual evidence.

### 1. Textual evidence

The textual evidence leans strongly towards a function-based approach. The Act leaves the specific term “family” undefined, preferring instead to employ a range of terms to “identify different components of the familial matrix”.<sup>43</sup> There is a standard list of five terms: family, whānau, hapū, iwi and family group (which we can collectively refer to as “groupings”). Much less frequent is the term “community”, which would naturally favour a very inclusive reading. But of the standard list, only the last is afforded a definition. The term “family group” is defined broadly to mean a family group, including an extended family:<sup>44</sup>

- (a) in which there is at least 1 adult member—
  - (i) with whom the child or young person has a biological or legal relationship; or
  - (ii) to whom the child or young person has a significant psychological attachment; or
- (b) that is the child’s or young person’s whanau or other culturally recognised family group

This solitary definition is significant in its expansiveness and in encompassing both of Henaghan’s categories. The reference-points of biology, law and cultural norms are clearly status-based, while psychological attachment is a functional notion. For Becroft, subs (a)(ii) of the “family group” definition means that the emphasis of this definition is “on connection with the child or young person and the means of connection are wide and varied”.<sup>45</sup> Significantly, for our purposes, there is no obvious *linguistic* reason for excluding street families from this definition, provided their members enjoy significant psychological attachments.

While the “family group” term suggests a function-based approach, the remaining terms seem to weigh against it. For many, at least for many Pākehā, the term “family” calls to mind the Eurocentric nuclear unit of parents and kids (and possibly even mum, dad, and kids).<sup>46</sup> More compellingly, the three Māori terms carry specific, cultural meanings. Ruru observes, for instance, that when native speakers of Māori hear the word “whānau” they think of “a group of relatives defined by reference to a recent ancestor, comprising several generations, several nuclear families and several households, and having a degree of ongoing corporate life”.<sup>47</sup> But crucially, the inclusion of the defined term “family group” ensures that these narrower and status-based readings do not exhaust what Becroft calls the “family matrix”. Unconventional familial arrangements that

42 Henaghan, above n 1, at 4.

43 Becroft “It’s All Relative”, above n 7, at 4.

44 Children’s and Young People’s Well-being Act 1989, s 2(1).

45 Becroft “It’s All Relative”, above n 7, at 4.

46 At 4.

47 Jacinta Ruru “Kua tutu te puehu, kia mau: Māori aspirations and family law policy” in Mark Henaghan and Bill Atkin (eds) *Family Law Policy in New Zealand* (4th ed, LexisNexis, Wellington, 2012) 57 at 59.

are turned away and denied statutory recognition at the doors of the more status-based terms might yet find a home in the broad, function-based “family group” category.

Before unequivocally asserting that the text supports a function-based approach, a qualification must be made. It does not follow from the fact that a street family (with strong psychological attachments amongst its members) is not statutorily excluded, that the street family will *actually* be recognised by the Youth Justice System. One suspects that many practitioners operate from an unacknowledged assumption that the statutory category of “family” is necessarily tied to biological, legal or cultural traditions. With this observation we arrive at perhaps the most critical question that can be asked of the function-based family: who gets the final say on who constitutes family? For Becroft, the answer is that “what constitutes family or whānau is left to be defined by those who are involved with the child or young person”.<sup>48</sup> But this will not do. Rather than providing an answer, Becroft merely pushes the question back one notch. The question now becomes, who is relevantly “involved with the child or young person” so that they are entitled to such great decision-making power? Under the status-based approach, the problem has considerably less relevance, since family is more easily defined according to blood, law or cultural norms. But if the family is defined functionally, the issue becomes who is authorised to identify proper functionality. Who, in other words, is entitled to point to a young person’s relationship with another and declare that a strong psychological attachment is present? And even more fundamentally, what say does the young person have in this decision? In these crucial matters the Act provides little guidance.

## 2. Contextual evidence

A partial explanation for the scant attention paid to the function-based family is arguably found in the contextual evidence, for if the text pushes us towards a function-based approach, the context largely pulls in the other direction.<sup>49</sup> Support for a narrow, status-based rendering is arguably found in the influences that shaped the formation of the Act. In particular, the 1988 Ministerial Advisory Committee report into Social Welfare, *Puao-te-ata-tu (Daybreak)*,<sup>50</sup> argued that welfare interventions undermined the traditional role of whānau, hapū and iwi. Taking governance powers away from these groups, the report suggested, “effectively destabilised the foundations of Māori society”.<sup>51</sup> The report also complained that interventions with Māori youth were based on Pākehā values. It thus called for “substantial ideological change”, in recognising that:<sup>52</sup>

... the Maori child is not to be viewed in isolation, or even as part of [a] nuclear family, but as a member of a wider kin group or hapu community that has *traditionally exercised responsibility* for the child’s care and placement.

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48 Becroft “It’s All Relative”, above n 7, at 4; and see 11 and 16 (extending this principle to decisions on who can attend the Family Group Conference).

49 This is not to deny that the meaning of the Act is properly ascertained from its text and in the light of its purpose, and not directly from the context under which it was enacted: Interpretation Act 1999, s 5(1). However, my interest here is less on the proper statutory interpretation as it is on identifying the pressures and influences acting on youth justice academics and practitioners.

50 *Puao-te-ata-tu (day break): The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (Wellington, New Zealand, September 1988).

51 Teresa Olsen, Gabrielle M Maxwell and Allison Morris “Maori and Youth Justice in New Zealand” in Kayleen M Hazlehurst (ed) *Popular Justice and Community Regeneration: Pathways of Indigenous Reform* (Praeger, Connecticut, 1995) 45 at 47.

52 *Puao-te-ata-tu (day break)*, above n 50, at [103], quoted in Lupton and Nixon, above n 37, at 57 (emphasis added).

Importantly, such calls for a less bureaucratic and more empowering approach were not limited to Māoridom. In its historical context, the Act represented a sharp departure from the welfarism prevalent at the time. The paternalist model of rescuing youth *out of* their family into the state bureaucracy fell out of favour, and was replaced by a (re-)emphasis on the role of the whānau or family as a young person's carer and protector.<sup>53</sup> Granted, more recent legal trends would likely incline judges and other interpreters towards a broader, more function-based perspective,<sup>54</sup> but it seems clear that at the time of enactment, Parliament had a more status-based approach in mind.

### *C. How Family and Community Matters: Including versus Promoting*

Once we have determined *who* the Youth Justice System should recognise in a young person's family or community, there is the further question of *how* that family or community is to be involved. Roughly speaking, the Act contains two kinds of imperatives regarding the groupings (and again, by "groupings" I mean the five terms listed previously: family, whānau, hapū, iwi and family group). There are imperatives *including* the groupings in the Youth Justice process, and others *promoting* the groupings' welfare and capacity to nurture the young person. It must be stressed that the "including" and "promoting" categories are not explicit in the Act,<sup>55</sup> and as such the Act makes no attempt to distinguish between the meanings of various terms discussed above in these two contexts.

#### *1. Including provisions*

As an example of an including provision, one of the principles in s 5 (governing the entire Act) states that these groupings should participate in making decisions affecting the young person and that their views should be taken into account.<sup>56</sup> Adding more legal bite to these principles are a couple of more specific provisions. There is a legal entitlement for the groupings to attend Family Group Conferences.<sup>57</sup> The youth justice co-ordinator must also make all reasonable endeavours to consult with them about the details of the family conference.<sup>58</sup>

#### *2. Promoting provisions*

Examples of promoting provisions abound. The s 5 principles enjoin that the relationship between the young person and his or her grouping should be maintained and strengthened,<sup>59</sup> and that decision-makers should consider a decision's effect on the grouping's stability.<sup>60</sup> The principles in s 208 of the Act express similar sentiments. Measures dealing with offending should aim to strengthen these groupings and foster their ability to develop their own means of dealing with the

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53 At 62.

54 As described by Henaghan, above n 1, at 5: "current legal policy on the concept of the family is moving from a primarily moral view to a much greater recognition of a wide range of family relationships".

55 While these categories are my own, Becroft makes similar distinctions between "involving" and "strengthening", or between "participation" and "empowerment": Becroft "It's All Relative", above n 7, at 25 and 33.

56 Children's and Young People's Well-being Act 1989, s 5(a).

57 Section 251(1)(b).

58 Section 250(1).

59 Section 5(b).

60 Section 5(c)(ii).

young person's offending.<sup>61</sup> Further, any sanctions imposed should not only aim at maintaining and promoting the young person's development, but do so within the context of these groupings.<sup>62</sup>

### 3. A "keeping" provision

One s 208 principle is in a category of its own. It instructs that young offenders should be kept in their community so far as that is practicable and consonant with the need to ensure the safety of the public.<sup>63</sup> Not only does it refer to "community" rather than the groupings, but it also straddles the two camps – not including the community nor promoting it, but simply *keeping youth there*. While the implications of this provision are intriguing, it is hard to identify the logic (if any) behind the presence or placement of this single reference to community.

## III. THE PHILOSOPHIES OF RJ AND TJ

This exercise in statutory interpretation has left much unresolved regarding both the "who" and the "how" questions explored above. Practitioners and academics, therefore, retain significant wiggle-room in their approach to street families – and it stands to reason that they will "wiggle" to the tune of their deeper philosophical commitments concerning a "best practice" Youth Justice System. While many philosophical traditions have shaped our Youth Justice System, contemporary practitioners and academics are arguably most heavily influenced by the philosophies of RJ and TJ.<sup>64</sup> This article does not seek to defend the claim that one (or both) of these philosophies accurately captures the philosophical heart of the Act.<sup>65</sup> It merely interrogates how these philosophies are likely to influence the Youth Justice System's approach to the inclusion or promotion of street families.

### A. Restorative Justice

RJ has almost as many definitions as it does proponents. A helpful framework for understanding this complex, philosophical tradition is provided by Daniel W Van Ness and Karen Heetderks, who summarise the diversity of RJ accounts into three broad conceptions.<sup>66</sup> First are the "encounter conceptions", which lay the emphasis on the procedural peculiarity of RJ: the mediated encounter

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61 Section 208(c).

62 Section 208(f)(i).

63 Section 208(d).

64 Andrew Becroft "Signed, Sealed – (but not yet fully) Delivered" (paper presented to the Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence Conference, University of British Columbia, Canada, 9 October 2014) at 22–24 and 30–34.

65 For cogent defences of both perspectives, see generally Judge FWM McElrea "The Intent of the Children, Young Persons, and Their Families Act 1989 – Restorative Justice?" (paper presented to the Youth Justice Conference of the New Zealand Youth Court Association, Auckland, 25 February 1994); and AJ Fitzgerald "Ko te rongoa, ko te aro, ko te whai kia tika ai mo nga rangatahi: Solution focused justice for young people" (paper presented to the Young People and the Law Conference, Prato, 21 September 2015) at 2–3. I have also written on the philosophical underpinnings of New Zealand's Youth Justice System in Selwyn Fraser "A Cloak of Many Philosophies: Restorative Justice, Therapeutic Jurisprudence, and Family Empowerment in Aotearoa New Zealand's Youth Justice System" (2017) *Arizona Summit Law Review* (forthcoming).

66 For the following section, see Daniel W Van Ness and Karen Heetderks Strong *Restoring Justice: An Introduction to Restorative Justice* (4th ed, Matthew Bender & Company, NJ, 2010) at 42–43.

between the key parties implicated in a crime. Tony Marshall famously describes this encounter as when:<sup>67</sup>

... all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

By contrast, "reparative conceptions" emphasise that RJ's fundamental ambition is to repair the harm caused by the crime. "Transformative conceptions" go further than the first two. Not content to merely repair individual harm through some mediated encounter, transformative conceptions also address broader systemic injustices created or revealed by a specific instance of crime.<sup>68</sup> Another framework for classifying RJ accounts is the purist-maximalist spectrum. The purist RJ account focuses on the localised RJ encounter, while the maximalists take a much broader perspective. For them, RJ has political, or even metaphysical, implications for the processes and values of society more broadly.<sup>69</sup> How the RJ-influenced practitioner or academic will respond to street families depends heavily on how RJ is to be understood.

### 1. Ensuring accountability: a reason to include

One place where nearly all RJ accounts converge is on the importance of promoting offender accountability through an "eyeball-to-eyeball" encounter of victim and offender.<sup>70</sup> There is a resonance here with the Act's distinctive focus on ensuring the young offender is "held accountable, and encouraged to accept responsibility, for their behavior".<sup>71</sup> RJ advocates often describe what they consider to be the ideal conditions for evoking offender accountability. There are conditions common to these descriptions, and an argument can be made that the inclusion of street families facilitates both conditions. The first condition is that in the restorative justice forum the offender is surrounded by a morally upstanding community with whom the offender is familiar. The Braithwaite model of reintegrative shaming, popular with many RJ theorists, certainly locates the source of positive shame (rather than a destructive shame) in the moral disappointment conveyed by this community.<sup>72</sup> One naturally hesitates to equate street communities with this idealised community. Yet street families may still generate positive shaming with respect to at least some offences. Secondly, Judge McElrea makes a persuasive case that accountability can only be achieved through the personalisation of the court process. He suggests the traditional court system is too ritualised,

67 Tony F Marshall "The evolution of restorative justice in Britain" (1996) 4(4) *European Journal on Criminal Policy and Research* 21 at 37 [emphasis in original] as cited in Daniel Van Ness, Allison Morris and Gabrielle Maxwell "Introducing Restorative Justice" in Allison Morris and Gabrielle Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, Oxford, 2001) 3 at 5.

68 Van Ness and Heetderks Strong, above n 66, at 42–43.

69 Chris Marshall "Restoring What? The Practice, Promise and Perils of Restorative Justice in New Zealand" in Warren J Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 147 at 153.

70 A Family Group Conference facilitator, quoted in T Stewart *The Youth Court in New Zealand; a New Model of Justice* (Legal Research Foundation, Auckland, 1993) at 43 and 49.

71 Children's and Young People's Well-being Act 1989, s 4(f)(i). The emphasis here is subjective accountability in contradistinction to retributive justice's much stricter requirement of objective commensurability.

72 See generally John Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge 1989).

too much like a game, to effectively ensure accountability.<sup>73</sup> Even if it did not facilitate subjective accountability, including street families would indubitably personalise the court room process.

## 2. *Community reconciliation: a second reason to include*

RJ accounts tend to be fleshed out in highly relational terms.<sup>74</sup> For the RJ proponent, crime is first and foremost an offence against people and relationships, and not (as with retributive justice) against the state.<sup>75</sup> In that sense, community matters to the RJ vision because crime has effects beyond those felt by the immediate victim; as many RJ accounts will insist, crime involves a disruption in the community life which must be restored. It is easy to see the importance of including street families when the crime is committed against other homeless persons (or even within the street family). In such cases the street family will likely be an integral part of the affected community; in the language of Marshall's definition of RJ, they will therefore have a "stake" in the offence. It is more complicated when the crime is committed against domiciled or non-homeless persons. There is often no non-artificial community shared by the homeless offender (and his or her street family) and the domiciled victim. The only connection is by virtue of the offence itself; there is little to no sharing in a communal life. However, for some RJ accounts – for instance, transformative conceptions that look to the structural injustices that lie behind a specific instance of crime – this may present something of an opportunity. A purist RJ vision might restrict RJ's commitment to "promot[ing] repair, reconciliation, and reassurance"<sup>76</sup> to just the victim and offender. But a maximalist perspective is also alive to the need for reconciliation between homeless and domiciled communities more generally. Research suggests that feelings of alienation between homeless and domiciled communities reinforces conditions of homelessness. Homeless youth tend to distrust domiciled society, perceiving it as a threat to their freedom and way of life.<sup>77</sup> For the domiciled, homelessness often evokes strong and conflicting emotions of "distrust, fear, pity, anger, blame, guilt and compassion".<sup>78</sup> Such community reconciliation has value not only in and of itself, but also in healing harmful perceptions and realities that keep the young offender in their condition of homelessness. Admittedly, it is not the purpose of youth justice to promote community reconciliation generally, but only for parties affected by the offending. Yet nor should the Youth Justice System spurn such an opportunity, insofar as it is not to the detriment of more important legal outcomes and values.

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73 FWM McElrea "Accountability in the Community: Taking Responsibility for Offending" (a paper prepared for the Legal Research Foundation's Conference *Rethinking Criminal Justice: a Conference on New Initiatives in Criminal Justice*, Auckland, May 1995) at 4–5.

74 Indeed, restorative justice is often closely associated with a movement called "relational justice": see generally Michael Schluter "What is Relational Justice" in Jonathan Burnside and Nicola Baker (eds) *Relational Justice: Repairing the Breach* (Waterside Press, Cambridge, 1994) 17.

75 Van Ness, Morris and Maxwell, above n 67, at 3.

76 Van Ness, Morris and Maxwell, above n 67, at 3.

77 Leggatt-Cook, above n 5, at 63.

78 Darrin James Hodgetts and others "'Near and Far': Social Distancing in Domiciled Characterisations of Homeless People" (2011) 48(8) *Urban Studies* 1739 at 1746.



### 3. RJ's prioritisation of the victim: a reason not to include

The victim nearly always receives pride of place in the RJ vision.<sup>79</sup> Offenders are not unimportant, of course, yet their importance principally resides in that they "hold the key to the [victims'] healing" through mediated victim-offender encounters.<sup>80</sup> In a Family Group Conference inspired by RJ, the offender's street family would likely be excluded if the victim's reparation and reassurance is compromised by their inclusion – or indeed, if the victim downright objects to their presence.<sup>81</sup> Given the widespread fears and distrust of homeless communities, it is not unlikely that a domiciled victim would object to the intimidating presence of street families at such a vulnerable time.

### B. Therapeutic Jurisprudence

One of the most common challenges to RJ accounts – excepting transformative conceptions – is that they do not adequately challenge the already unjust status quo. Cleland and Quince opine "[t]he theory of restorative justice ... implies that offending has disrupted an otherwise functional life".<sup>82</sup> But for homeless youth this is palpably not the case. *Mere* restoration, therapeutic jurisprudence insists, does not go nearly far enough.

As with RJ, TJ has been given a variety of interpretations.<sup>83</sup> At its most basic, however, TJ is simply a research agenda for examining the law as a therapeutic agent.<sup>84</sup> Its central conviction is that as an agent, the law results in both legal *and* non-legal (psychological, emotional, relational) effects for those who engage with it.<sup>85</sup> Its driving ambition is to optimise legal rules, processes and practices such that the law is maximally therapeutic.<sup>86</sup> TJ accounts often emphasise the importance of therapeutic intervention into the life of the high-needs offender.<sup>87</sup> As one New Zealand writer puts it, TJ requires "addressing the physical, emotional, mental and social well-being" of young

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79 Nessa Lynch "Restorative Justice through a Children's Rights Lens" (2010) 18(2) *Int'l J Child Rts* 161 at 163; Malcolm Hill and Kay Tisdall *Children and Society* (Longman, London, 1997) at 188.

80 Christopher D Marshall *Compassionate Justice: An Interdisciplinary Dialogue with Two Gospel Parables on Law, Crime, and Restorative Justice* (Cascade Books, Eugene, Oregon, 2012) at 231.

81 On the tensions between offender- and victim-centred approaches, see Nessa Lynch, above n 79, at 173. It is not at all clear that the legislation envisioned this victim prioritisation in the Family Group Conference. See the insightful comments in MP Doolan "Restorative Practices and Family Empowerment: both/and or either/or?" (paper presented to Building a Global Alliance for Restorative Practices and Family Empowerment, Part 3 Conference, Penrith, New South Wales, March 2005) at 16.

82 Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington, 2014) at 251.

83 See generally Ian Freckelton "Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence" (2008) 30 *T Jefferson L Rev* 575 at 575.

84 Arie Freiberg "Psychiatry, Psychology and Non-Adversarial Justice: From Integration to Transformation" (2011) 18 *Psychiatry, Psychol & L* 197 at 300; Robert F Schopp "Integrating Restorative Justice and Therapeutic Jurisprudence" (1998) 67 *Jur UPR* 665 at 666.

85 Freckelton, above n 83, at 576.

86 Susan Daicoff "The Comprehensive Law Movement: An Emerging Approach to Legal Problems" (2006) 49 *Scandinavian Stud L* 109 at 120.

87 Michael S King "Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice" (2008) 32(3) *MULR* 1096 at 1116. For a discussion of the importance of welfare to New Zealand's Youth Justice System, see generally Alison Cleland "Focus on Welfare: The Importance of Personal Information to Youth Justice Decisions in Aotearoa/New Zealand" (2012) *NZ L Rev* 573.

offenders.<sup>88</sup> A focus on the offender's needs is evident in the Act.<sup>89</sup> Measures dealing with young offenders must acknowledge their needs and give them opportunities to develop in responsible, beneficial and socially acceptable ways.<sup>90</sup> Since a 2010 amendment to the Act, these measures must also address the causes underlying their offending so far as is practicable.<sup>91</sup> In light of TJ's comprehensive focus on addressing the offender's needs, one can discern reasons both against promoting and for including street families.

*1. Rehabilitation and reintegration: a reason not to promote*

Street families clearly raise care and protection concerns. In the language of international instruments, street families ultimately work against "the desirability of [the youth's] rehabilitation" and the likelihood of them "assuming a constructive role in society".<sup>92</sup> Street families cultivate an identity among their members that is predicated on shared experiences of street life and self-consciously distanced from domiciled experiences. Such an identity is deleterious to efforts made to integrate homeless youth into mainstream society. There are a trio of reasons why street families undermine rehabilitation. First, street families are unhealthy, for one, and sometimes extremely so.<sup>93</sup> They are transient – often lasting only a few months or even weeks – and thus an unstable source of protection.<sup>94</sup> They are not only unstable, but often characterised by abuse and neglect.<sup>95</sup> What their members describe as "sibling rivalry" may involve significant violence.<sup>96</sup> Because of their greater reliance on street families for emotional support, safety and protection, females are particularly vulnerable and more commonly experience intra-family physical and sexual victimisation.<sup>97</sup> Secondly, street families entrench homeless youth in a condition of life that is itself dangerous and unhealthy. Thirdly, they also encourage recidivism. New Zealand research is clear that criminal activity is commonplace amongst homeless youth, especially petty theft, car conversions and trespassing.<sup>98</sup> One must be careful here: distinguishing cause and effect is problematic because many of the factors that force youth out of their homes are shared by other youth offenders generally.<sup>99</sup> Still, there is some research indicating that while homeless youth are no more likely to commit crimes when with their street family than when alone, street families are nonetheless a causative influence on crime.<sup>100</sup> This is largely because they form a source of tutelage

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88 Barrie Evans "The Intensive Monitoring Group [IMG] and Youth Justice" (M Phil in Public Policy Thesis, Auckland University of Technology, 2012) at 75.

89 Fitzgerald, above n 65, at 3.

90 Children's and Young People's Well-being Act 1989, s 4(f)(ii).

91 Section 208(fa).

92 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 14(4); United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 40(1).

93 For a discussion of homeless youths' conflicted relationships with their street families, see Karabanow, above n 20, at 53–58.

94 Smith, above n 22, at 758.

95 At 758.

96 At 767–768.

97 At 766 and 769.

98 Leggatt-Cook, above n 5, at 63.

99 Hagan and McCarthy, above n 4, at 78.

100 At 135.

in criminal skills and motivations.<sup>101</sup> To reiterate the point made earlier, they embed youth in a homeless state that is a “foreground cause of crime”, combining subsistence needs with criminal opportunities.<sup>102</sup> As The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) note, recidivism and non-reintegration often go hand-in-hand.<sup>103</sup> Youth foster non-criminogenic dispositions by “engaging in lawful, socially useful activities and adopting a humanistic orientation toward society and outlook on life”.<sup>104</sup>

## 2. *Over-idealising family realities: challenging the welfare-therapeutic lenses*

There is a tension between the Act’s presumption of minimum intervention into family life and the often less-than-ideal families of young persons involved with youth justice. It is well-recognised that “parents and parenting significantly are a risk factor (or as a filter for other risk factors) for adolescent anti-social behaviour”.<sup>105</sup> Becroft, therefore, ironically advises that if you want child offenders to continue into adult offending, the first thing to do is to “leave [their] families alone to sort themselves out”.<sup>106</sup> The problem is especially acute for abuse cases, where the legislation may “tip the scales dangerously” by granting decision-making power to a young person’s abuser.<sup>107</sup> To this accusation, some have responded that the extended family, hapū or iwi affords the best source of protection from, and social control of, the nuclear family.<sup>108</sup> But that response similarly risks idealising realities. It assumes the young person is sufficiently connected with their wider family, an assumption that homeless youth challenge. Indeed, the extended family is arguably less important in Pākehā culture, but even for Māori the statutory language “eulogise[s] certain stereotypes of Māori social ordering, in assuming that Modern Māori maintain core tikanga values of collectivity and live with a whānau, hapū or iwi context.”<sup>109</sup> Even when the extended family attends a Family Group Conference, for instance, they may have scarce contextual knowledge about the young person or even their immediate family.<sup>110</sup> Though it is hardly what the legislation envisioned,<sup>111</sup> the sobering reality is that “archetypal [Family Group Conference] ... involves a young Māori boy and his mum”.<sup>112</sup>

As argued previously, the families of homeless youth are paradigmatic examples of non-ideal families. Abuse and neglect is a common reason why a young person first takes to the streets.<sup>113</sup> But more basically, the very fact that a young person is homeless indicates that his or her family is not

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101 At 135.

102 At 78 and 104.

103 *The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)* A/RES/45/112 (1990); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* A/RES/40/33 (1985).

104 Article 1.

105 Andrew Becroft “Youth Offending: Introductory Notes” (paper presented to New Zealand Community Boards’ Conference, Auckland, 7 July 2007) at 6.

106 At 6.

107 Lupton and Nixon, above n 37, at 66.

108 At 66.

109 Cleland and Quince, above n 82, at 180.

110 At 164. For further discussion of the complexities of extended families, see Becroft “It’s All Relative”, above n 7, at 23–24.

111 Cleland and Quince, above n 82, at 164.

112 At 163.

113 Smith, above n 22, at 758.

(at least, not seen by the young person as) the supportive “moral net” that the legislation seems to envision.<sup>114</sup> While “leaving home often *exacerbates* their risk of victimization”,<sup>115</sup> it is likely that in some cases a homeless young person’s street family may offer them the best source of care and protection – at least while the young person is homeless.

### C. *Providing Insight into Unmet Needs and Affirming Identity: Two Reasons to Include*

With this context in mind, one can discern two reasons to include – though not promote – street families in youth justice processes. First, it is possible in at least some cases that a homeless young person’s street family could provide a unique and valuable perspective on the young person’s needs and their emotional and psychological states. Their insights could be heard at a Family Group Conference or in therapeutic-styled court processes, as part of a “therapeutic alliance” of legal professionals and service-providers.<sup>116</sup> Secondly, and perhaps more controversially, street families should be included to affirm youth offenders as autonomous persons capable of making decisions about who they choose to identify and belong with. TJ is sometimes accused of a covert paternalism, legitimising interventions into young people’s lives that replace the young person’s definition of “well-being” with its own.<sup>117</sup> It would be all too easy for a TJ ethic to exclude street families, or even actively discourage any ongoing relationship with them, in the interests of the medico-legal establishment’s well-meaning ambition to further a young offender’s “therapeutic interests”.<sup>118</sup> And yet a robust TJ vision is well aware of the significance of personal relationships in any concept of well-being, cognisant of the fact that law is part and parcel of a wider network of human interactions.<sup>119</sup> The Youth Justice System impoverishes its therapeutic potential, and possibly even acts anti-therapeutically, by undervaluing youth offenders’ chosen community of belonging and thus stigmatising important elements of their identity.

### D. *Summary*

Combining the insights from the RJ and TJ perspectives, there are four positive outcomes attendant on a decision to include street families in the Youth Justice System. It could more effectively hold youth offenders accountable; provide a unique perspective into their underlying needs; affirm their value and identity; and help bring about restoration between the homeless youth and various domiciled parties. On the other hand, street families ultimately undercut efforts to rehabilitate and reintegrate homeless youth and should not be promoted as a permanent site for their protection and nurture. Including street families would raise similar concerns to the extent that inclusion denotes endorsement. Homeless youth, thus, tug at a perennial tension in any youth justice system. The tension can be expressed in various ways: youth are “both capable and incapable of looking

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114 At 758.

115 At 758.

116 This is the approach of the problem-solving courts, modelled closely on TJ insights: Alex Woodley “A Report on the Progress of Te Kooti o Timatanga Hou – The Court of New Beginnings” (Lifewise, Auckland, 2012) at 6.

117 Freckelton, above n 83, at 585.

118 King, above n 87, at 1116.

119 Freckelton, above n 83, at 577.

after their own interests";<sup>120</sup> they are not merely "human becomings",<sup>121</sup> but neither are they fully cognitively developed.<sup>122</sup> In short, young people are independent actors, but still vulnerable and in need of protection.

#### IV. MĀORI YOUTH

At first glance, it would seem that there are unique justifications for a narrow rendering of the terms "whānau" and "community" in the case of Māori youth. One justification relates to the Crown's obligations to Māori, principally under the Treaty of Waitangi (Treaty),<sup>123</sup> to uphold the traditional right of iwi and hapū in exercising authority over their people. Such obligations could be grounded in the right to tino rangatiratanga (the highest chieftainship) preserved in Article 2 of the Treaty. More controversially, one could accept Moana Jackson's argument that the kawatanga ceded to the Crown in Article 1 of the Treaty was never intended to extend to Māori. Thus "the authority to control and exercise power over Māori stayed where it always had been, with the iwi".<sup>124</sup> Moreover, the identity of many Māori "is predicated on belonging – to whānau, to hapū, to iwi".<sup>125</sup> Indeed, the assumption driving the successful *Ngā Kooti Rangatahi* is that:<sup>126</sup>

... for young Māori who appear before the court to have any sense of purpose in the future, they need to start by knowing where they come from and who they are.

The two ideas may be linked: some writers have identified associations between homelessness and both Māori landlessness (the loss of physical connection) and also the loss of spiritual connections with whānau, hapū and iwi.<sup>127</sup>

In many cases, "strengthen[ing] rangatahi self-identify and cultural identity" will be the most fruitful means of promoting the rehabilitation and reintegration of Māori homeless youth,<sup>128</sup> but it is not the only way for a young person to find a sense of belonging and personal integrity. Intriguingly, Cleland and Quince stress that the principles underlying the Rangatahi Court "hold the key" for effective responses to *all* young offenders.<sup>129</sup> These principles include "community

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120 David Archard "Children's Rights and Juvenile Justice" in Malcolm Hill, Andrew Lockyer and Fred Stone (eds) *Youth Justice and Child Protection* (Jessica Kingsley Publishers, London, 2007) 250 at 254.

121 Hill and Tisdall, above n 79, at 20.

122 Charlotte Walsh "Youth Justice and Neuroscience: A Dual-Use Dilemma" (2011) 51(1) *Brit J Criminol* 21 at 25.

123 The Treaty of Waitangi is the main but not necessarily the only source of normative obligations owed by the Crown to Māori: see RP Boast "Recognising Multi-Textualism: rethinking New Zealand's legal history" (2006) 37 *VUWLR* 547.

124 Moana Jackson "Maori Law, Pakeha Law and Treaty of Waitangi" (1999) 14 *Mana Tiriti: The Art of Protest and Partnership* at 19.

125 Cleland and Quince, above n 82, at 164; Alex Woodley, above n 116, at 7.

126 Cited in Lisa Davies and others *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Ministry of Justice, 17 December 2012) at 27, from H Taumaunu "Rangatahi Courts of New Zealand: Kua Takoto te Mānuka, Auē Tū Ake Rā!" in MH Tawhai and K Gray-Sharp (eds) *'Always Speaking': The Treaty of Waitangi and Public Policy* (Huia Publishers, Wellington, 2011). The Rangatahi Courts are youth courts, which sit on marae and in Pasifika churches and community halls, encouraging cultural links and designed to help Māori and Pasifika families engage with the youth court process.

127 Woodley, above n 116, at 43.

128 Lisa Davies, above n 126, at 27.

129 Cleland and Quince, above n 82, at 266.

support, appreciation of who you are and where you come from, developing a sense of place and of identity.”<sup>130</sup> It follows that the goal is to foster for the young offender a positive identity and community of belonging and support *wherever that is best found*. The same point can be made with reference to Māori models for well-being, all of which place a premium on community. Mason Durie’s models, for instance, have emphasised *te taha whānua*, the “ability to connect and belong” and *te oranga* or “participation in society”.<sup>131</sup> In short, Māori youth do not escape the same tensions present for youth from other ethnic or non-Indigenous backgrounds. The centrality of the traditional family in society, and the inadequacy of street families, mean that for *all* homeless youth the family and community of origin is the ideal. But for the present moment, the street family may be the best alternative community available.

## V. THE WAY FORWARD

This article finishes with some concluding remarks on the two lines of inquiry laid out in the introduction: the Act’s approach to family and community, and our Youth Justice System’s treatment of homeless youth offenders.

### A. *The Act’s Approach to Family and Community*

There is a pressing need for judicial or legislative disambiguation of the Act’s intended meanings for the constellation of terms used to describe the young person’s familial matrix. I have argued that the Act must be read broadly to include function-based familial arrangements where the members enjoy strong psychological attachments. If this interpretation is correct, it should be made more explicit – moreover, the ramifications must be explored more fully by commentators and implemented more consistently by practitioners. It is also imperative that the Act resolves questions around who decides whether and when the young person enjoys a strong psychological attachment with another person. This article inferred from the statutory language the categories of “including” and “promoting”, as well as one curious reference in s 208(d) of the Act to “keeping” youth in their community. Equally in need of clarification, then, is whether such categories are relevant to the interpretation of the statutory terms or the implementation of certain provisions.

When presenting the Act’s Bill, the Minister of Social Welfare, emphasised that a young person’s well-being “is bound in with the welfare of their families”.<sup>132</sup> But as one female homeless youth opines: “You don’t have to be related to someone to be a family. Family to me means ... you love each other no matter what.”<sup>133</sup> The Act has not thought hard enough about the different implications arising from the many and varied families and communities to which young people choose to belong. Of course, Henaghan highlights that discrepancies have always existed between the “official story” of the law’s understanding of “family”, and the “unofficial story” played out in social reality.<sup>134</sup> It would be easy for our Youth Justice System to allow street families to fall through the gaps between these stories. Perhaps this is for the better; but then again, perhaps not.

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130 At 266.

131 At 12 and 16. Of course, “Oranga Tamariki” is the new title of the 1989 Act.

132 Cited in Lupton and Nixon, above n 37, at 62.

133 Smith, above n 22, at 763.

134 Henaghan, above n 1, at 2.

For the sake of honouring the identity and community of homeless youth, any exclusion of street families should be by parliamentary design and not the accidental confluence of social norms and vague statutory wording.

### *B. The Treatment of Homeless Youth*

The theoretical lens exposed an important, underlying tension: there are good reasons to include but not to promote street families, yet it is not unlikely that inclusion carries at least a note of endorsement. A starting point for resolving this tension is adopting a non-static or transformative posture. Smith writes that interventions with homeless youth should focus on:<sup>135</sup>

... understanding the values and beliefs that are embodied among youth already living on the street, recognizing the importance of youth's continuing identification with the street and with street peers.

Her confidence that "involving members of one's street family might result in more positive outcomes than individual interventions" must be taken seriously.<sup>136</sup> Smith does not write about youth justice specifically, but by applying her general advice, two practical suggestions can be made. The author is not a youth justice practitioner. I am not competent to iron out all of the kinks that these two suggestions might throw up in the day-to-day realities of youth justice processes. However, I would suggest that there is good reason, statutory and otherwise, to at least explore fresh ways of honouring homeless youths' communities of belonging. My first suggestion is this: representatives from a young person's street family should be encouraged to participate in the Family Group Conference. The encouragement must be insistent: anything less will not suffice to empower people accustomed to passivity in the justice process.<sup>137</sup> Secondly, judicial power should not be wielded in a heavy-handed manner to enforce a young person's separation from their street family or homeless lifestyle. As per s 208 of the Act, the young person should be kept in their community of choice. Quoting another writer, Smith urges professionals "to socialize and initiate dialogue right in the street, hoping that at some point the young person will become aware of other possibilities".<sup>138</sup> These "other possibilities" are what prevent the inclusion of street families from ultimately conflicting with the interest of our Youth Justice System in a homeless young person's rehabilitation and reintegration. Te Kooti o Timatanga Hou, the Auckland-based therapeutic court targeted at homeless offenders, encourages offenders' relationships with their families of origin, and links them with appropriate service-providers.<sup>139</sup> Our Youth Justice System should do the same. Every effort should be made to provide the holistic support youth need to *gradually* leave the street and embed themselves into a more positive family and community context.

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135 Smith, above n 22, at 769.

136 At 770.

137 Cleland and Quince, above n 82, at 163.

138 Elena Volpi *Street children: Promising practices and approaches* (The World Bank, Washington, 1 January 2002), cited in Smith, above n 22, at 769.

139 Woodley, above n 116, at 27.

# PROPOSALS TO ADDRESS PRIVACY VIOLATIONS AND SURVEILLANCE BY UNMANNED AERIAL SYSTEMS

BY ANDREW V SHELLEY\*

The rapid proliferation of unmanned aerial systems (UAS), commonly known as “drones”, has given rise to considerable public concern about privacy and unwelcome surveillance and observation. This paper reviews some of the privacy and surveillance concerns created by UAS, and considers the effectiveness of existing New Zealand law in addressing those concerns. Current law does not effectively address the new technology, and a package of legal and regulatory changes is required. UAS raise unique challenges, not least the anonymity of the operator, and the merits of alternative solutions are discussed. I propose the adoption of a package of measures including: tort law reform, the promulgation of a “Code of Practice for UAS Operations” under the Privacy Act 1993, an encoded radio frequency beacon to identify approved operators, provision for aerial trespass by unmanned aircraft, provision for the destruction of unmanned aircraft committing trespass, and the clarification of what constitutes a privacy violation by broadcast or closed-circuit television and video systems.

## I. INTRODUCTION

Within just a few years, small drones have gone from being of only military interest and an obscure hobby to now being popular consumer items with a growing range of commercial applications. Commonly available UAS have the capability to stream live video back to the pilot, who may be located some considerable distance away from the subject being observed. While there are potentially material benefits accruing from the use of UAS, the ability to observe a subject from afar gives rise to significant legal issues that must be addressed.

Many people are concerned at the prospect of being observed by an unknown surveillant using a drone. In New Zealand, there have been news articles about drones being used to film into another person’s property,<sup>1</sup> taking photographs of children at a public swimming pool,<sup>2</sup> and frightening animals in people’s backyards.<sup>3</sup> In Australia, a woman discovered that real estate advertisements, including a large billboard, carried an image of her sunbathing in her backyard.<sup>4</sup> These media reports are illustrative of, and contribute to, a general disquiet among the public, raising issues of

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- 1 Caleb Harris “Drones invading our privacy say critics” *Stuff* (online ed, New Zealand, 25 January 2015).
- 2 Andrew Bonnallack and Alisa Young “Mystery drone hovers over pool” *Wairarapa Times-Age* (online ed, Masterton, 2 March 2015).
- 3 Hunter Wells “Drone unsettles Bay’s backyard dwellers” *Sunlive* (online ed, Tauranga, 27 February 2015).
- 4 Rita Panahi “Mt Martha woman snapped sunbaking in g-string by real estate drone” *Herald Sun* (online ed, Melbourne, 17 November 2014).



trespass and privacy. UAS have also been used for privacy-breaching criminal activity, such as reconnaissance for potential burglaries.<sup>5</sup>

While in New Zealand a drone has been stomped on and damaged by an upset member of the public;<sup>6</sup> in the United States unmanned aircraft have been shot at or shot down in New Jersey,<sup>7</sup> Kentucky,<sup>8</sup> California,<sup>9</sup> Virginia,<sup>10</sup> and in two separate incidents in Tennessee.<sup>11</sup> In the New Jersey, Kentucky, and California cases the shooter claimed a right to privacy, while in the Virginia case the shooter claimed to be defending another person's right to privacy. The legal outcome for each of these cases is discussed in part V of this paper. The diversity of outcomes highlights the conflict between privacy and trespass on the one hand, and various issues of endangering the public, damage to property and damage to aircraft on the other.

UAS technology provides an avenue for surveillance by both private parties and State agencies. Private entities utilising drones for legitimate productive activities, such as pizza delivery or responding to burglar alarm activations, could collect significant surveillance imagery. The police in Baltimore have already engaged a private contractor to undertake citywide surveillance using manned aircraft,<sup>12</sup> and the low cost of UAS make this more likely to occur in the future.

In Helsinki, researchers demonstrated in a six-month study that even individuals who consent to surveillance will actively alter their behaviour in order to regulate what the surveillants see, and that the surveillance system was "a cause of annoyance, concern, anxiety, and even rage."<sup>13</sup> While the Helsinki researchers found that the overt negative emotions reduced over time, there was also evidence that there is a longer-term insidious effect from surveillance. A study conducted in former East Germany found that those counties that had higher levels of Stasi informers during the communist era had lower rates of economic growth and higher unemployment during the 1990s and 2000s.<sup>14</sup> The research suggests that surveillance results in individuals having lower levels of trust in institutions and other people, making it more difficult to make agreements and engage in wealth-enhancing activity.

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- 5 David Barrett "Burglars use drone helicopters to target homes" *The Telegraph* (online ed, United Kingdom, 18 May 2015).
  - 6 Jimmy Ellingham "Drone rage puts stomper in court" *The New Zealand Herald* (online ed, Auckland, 18 July 2015).
  - 7 "Man Indicted for Shotgun Blasts at Hovering Drone" (25 August 2015) *The Smoking Gun* <[www.thesmokinggun.com](http://www.thesmokinggun.com)>.
  - 8 "Hillview man arrested for shooting down drone; cites right to privacy" (1 August 2015) *WDRB News* <[www.wdrb.com](http://www.wdrb.com)>.
  - 9 Cyrus Farivar "Man shoots down neighbor's hexacopter in rural drone shotgun battle" (28 June 2015) *ARS Technica* <[www.arstechnica.com](http://www.arstechnica.com)>.
  - 10 Cyrus Farivar "Woman shoots drone: 'It hovered for a second and I blasted it to smithereens'" (30 August 2016) *ARS Technica* <[www.arstechnica.com](http://www.arstechnica.com)>.
  - 11 See Larry Flowers "Father, son caught by surprise as drone shot out of sky" (26 May 2016) *WKRN-TV* <[www.wkrn.com](http://www.wkrn.com)>; and Cyrus Farivar "Man takes drone out for a sunset flight, drone gets shot down" (25 April 2017) *ARS Technica* <[www.arstechnica.com](http://www.arstechnica.com)>.
  - 12 Conor Friedersdorf "The Sneaky Program to Spy on Baltimore From Above" *The Atlantic* (online ed, Washington DC, 26 August 2016).
  - 13 Antti Oulasvirta and others "Long-term Effects of Ubiquitous Surveillance in the Home" (paper presented to Proceedings of The 14th International Conference on Ubiquitous Computing, Pittsburgh, September 2012) at 41–50.
  - 14 A Lichter, M Loeffler and S Sieglach *The Economic Costs of Mass Surveillance: Insights from Stasi Spying in East Germany* (Institute of Labor Economics, Discussion Paper No. 9245, July 2015).

There are, thus, potentially significant costs offsetting the many benefits of using UAS, both as regards short-term emotional responses and long-term trust and economic functioning. If operators of UAS do not face the costs induced by this activity, they are unlikely to take sufficient precautions and are likely to have a higher than socially optimal activity level.<sup>15</sup> An efficient level of UAS activity can only be achieved if these costs are taken into account by UAS operators. The role of the legal and regulatory system is to balance the costs and benefits, and, where possible and practicable, to facilitate the transfer of cost to the operator so that efficient decisions may be made.

This paper, structured in seven parts, considers from a law and economics perspective, the ability of existing law to address the potential costs imposed by UAS, and those characteristics of UAS that require new legal rules.

Part II summarises relevant aspects of the New Zealand Civil Aviation Rules, including a default prohibition from flying above persons without their permission (and a prohibition from flying above property without permission of the occupier), unless the operator has submitted a risk management plan to the Civil Aviation Authority and has been granted authorisation to conduct such flights.

As reported by the Law Commission in its consideration of police surveillance, surveillance, which gives rise to privacy violations, may be trespassory or non-trespassory.<sup>16</sup> Trespassory surveillance necessarily involves a trespass, so law relating to trespass may be able to prevent the surveillance activity, just as it can be used to prevent some other privacy violations.<sup>17</sup> Part III discusses the tort of trespass together with the Trespass Act 1980, which enables prosecution for trespass, and the Civil Aviation Act 1990 which prohibits actions in trespass in certain circumstances.

Non-trespassory surveillance does not involve a trespass, so reliance must be placed on privacy regulation. Part IV discusses the main elements of privacy regulation in New Zealand: the privacy torts, the Privacy Act 1993, and other relevant legislation. The tort of intrusion on seclusion is particularly relevant, although the threshold of “highly offensive” may prove to be too high to effectively address the challenges of UAS. The Privacy Act 1993 creates a wrong of “interference with privacy” that is applicable to UAS, although the effectiveness of the existing legislation is uncertain.

Part V discusses relevant international experience, including the United States’ cases discussed above and the application of the Data Protection Directive in the European Union.

Part VI presents six proposals for addressing privacy concerns arising from UAS use: tort reform; a Code of Practice for UAS under the Privacy Act 1993; encoded radio frequency identification, particularly for those operators with procedures by the Privacy Commissioner; amendments to the Privacy Act 1993; strengthening other relevant legislation to effect the legalisation of self-help measures; and application of criminal sanctions in appropriate circumstances.

Part VII provides concluding comments.

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15 Steven Shavell “Strict Liability versus Negligence” (1980) 9 JLS 1.

16 Law Commission *Search and Surveillance Powers* (NZLC R97, 2007).

17 Ursula Cheer “Invasion of Privacy” in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 975 at 978.

## II. CIVIL AVIATION REGULATION

Civil aviation regulation is concerned with the regulation of aviation safety,<sup>18</sup> and does not directly address other issues that may require regulation, such as trespass and privacy. While most areas of civil aviation regulation are based on rules and guidelines promulgated by the International Civil Aviation Organization, the regulation of UAS is currently subject to considerable discretion by each country. New Zealand has two Civil Aviation Rules (CARs) governing UAS: CAR, pt 101, governs UAS generally,<sup>19</sup> and CAR, pt 102, provides for the “certification” of operators who may be exempted from some of the requirements of pt 101.<sup>20</sup> A brief overview of these two rules provides context for the legal environment in which UAS operate.

### A. Part 101 Rules

The pt 101 rules require UAS to be operated no higher than 400 feet above ground level (AGL),<sup>21</sup> and within visual line-of-sight of the pilot.<sup>22</sup> The operator “must take all practicable steps to minimise hazards to persons, property and other aircraft”,<sup>23</sup> and must give way to manned aviation.<sup>24</sup> There are also specific requirements for operating at or in the vicinity of an aerodrome.<sup>25</sup>

Of particular relevance to this paper, CAR, r 101.207(a)(1), provides the specific restriction that unless operating in a designated “danger area”:

A person operating a remotely piloted aircraft must ... avoid operating:

- (i) in airspace above persons who have not given consent for the aircraft to operate in that airspace; and
- (ii) above property unless prior consent has been obtained from any persons occupying that property or the property owner.

This rule was introduced to address issues related to safety, yet it is popularly perceived within the UAS community as addressing concerns related to privacy.<sup>26</sup> However, permission from one person to operate above them or above their property does not address privacy concerns of others.

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18 Aviation safety includes the safety of persons and property on the ground.

19 Civil Aviation Rules 2017, pt 101.

20 Civil Aviation Rules 2015, pt 102.

21 At r 101.207(a)(3).

22 At r 101.209.

23 At r 101.13.

24 At r 101.213.

25 At r 101.205.

26 See, for example, John Brooks “New regulations for drone operation in New Zealand cause consternation” (18 August 2015) UAV News NZ <[www.uavataut.blogspot.co.nz](http://www.uavataut.blogspot.co.nz)>.

### B. *Certificated Operators*<sup>27</sup>

CAR, pt 102, enables a person to become a certificated operator of a UAS. This rule provides the means for an operator to be authorised to operate a UAS “other than in accordance with Part 101”,<sup>28</sup> provided that the Civil Aviation Authority (CAA) is satisfied that such an exemption from pt 101 will not be detrimental to aviation safety. Persons intending to operate under CAR, pt 102, must make an application on the prescribed form and provide written details of operating, maintenance and safety procedures, organisational systems, and the like. If CAA is satisfied that the procedures will adequately manage the risks of the proposed operation, then the applicant is granted a Part 102 Certificate and becomes a certificated operator.

The Advisory Circular that accompanies CAR, pt 102, provides guidance on how CAA intends to apply the rule.<sup>29</sup> It is clear that exemptions from CAR, r 101.207(a)(1), are anticipated, enabling operators to fly over persons and property without obtaining prior permission provided that the safety risks of doing so are adequately managed.<sup>30</sup> This is not surprising: the introduction of CAR, pt 102, was intended to assist the development of new UAS,<sup>31</sup> such as a “drone delivery service” where UAS are used to deliver packages directly to an individual or premises. Accordingly, it would be relatively straightforward to obtain approval under CAR, pt 102, for persistent surveillance over an urban area. A fixed-wing UAS with back-up power supplies and radios could be operated at a height of 400–500 feet AGL, well below the minimum height of 1,000 feet for manned aircraft, for many hours at a time. Being a fixed-wing aircraft it could be piloted to glide to a safe landing area if it experienced an in-flight failure.

## III. TRESPASS

Trespass generally is an act that interferes with a person’s right to exclusive use and possession of something, and usually requires intent on the part of the tortfeasor. The aspect of trespass most relevant to this paper is that of trespass against land, being an intentional encroachment on to land without the consent of the owner. The tortfeasor need not themselves intrude upon the land, but may be the direct cause of an intrusion by a person or thing.

### A. *Intent*

Intent requires a conscious and voluntary act to be at that location, rather than an intention to trespass. Conversely, the absence of a conscious and voluntary act means there is no trespass. The operator of a UAS that is intentionally flown on to a particular area of land will therefore be trespassing whether or not they intend to commit a trespass. However, a UAS that has a parachute as a safety feature and drifts on to a particular parcel of land when that parachute is activated may

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27 At the date of writing the author has co-authored the operating manuals for seven operators either certified or intending to become certified under CAR, pt 102, and provided related advice to two other operators.

28 At r 102.9(a).

29 Civil Aviation Authority *Advisory Circular AC102-1: Unmanned Aircraft – Operator Certification* (27 July 2015).

30 At 10.

31 Simon Bridges and Craig Foss “New world-class framework for UAVs” (23 July 2015) New Zealand Government <[www.beehive.govt.nz](http://www.beehive.govt.nz)>.

not be committing a trespass. The key consideration in the latter case is the extent to which drifting on to the land is a direct consequence of the need to use the parachute.<sup>32</sup>

Recent advances in UAS technology enable an agency to fly a surveillance device to “perch” in a tree or against a building.<sup>33</sup> This would clearly be an intentional act and likely to amount to trespassory surveillance.

### B. Rights to Airspace

UAS are aerial vehicles, so a relevant question is to what extent rights to land extend into airspace. Common Law holds that the owner of property also has rights to the airspace above the property.<sup>34</sup> The maximum height to which this principle applies is uncertain.

In *Bernstein of Leigh v Skyviews & General Ltd (Skyviews)*, Griffiths J held that there is an upper limit to the airspace included in the tort:<sup>35</sup>

The rights of an owner of land in the air space above the land extended only to such height above the land as was necessary for the ordinary use and enjoyment of the land and the structures on it, and above that height the owner had no greater rights in the air space than any other member of the public.

However, contrary to *Skyviews*, the New Zealand High Court more recently held that property rights “are absolute ... [and] can only be diminished by creation of competing interests in the land, by contract, or most importantly by statute”.<sup>36</sup> The qualified prohibition against actions in trespass provided by s 97(2) of the Civil Aviation Act 1990 provides such a diminution:

No action shall lie in respect of trespass, or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather, and all the circumstances of the case is reasonable, so long as the provisions of this Act and of any rules made under this Act are duly complied with.

This provision, and the rest of s 97, was first contained in s 7 of the Air Navigation Act 1931, which was in turn modelled on s 9 of the Air Navigation Act 1920 (UK),<sup>37</sup> enacted when aviation was a very new phenomenon.

The s 97(2) prohibition of actions in trespass has been tested infrequently in New Zealand courts. In broad terms, the minimum height for an aircraft is 1,000 feet AGL in an urban area and

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32 For a discussion of the necessity of the trespass following directly from the act of the tortfeasor see Bill Aitken “Trespassing on Land” in Stephen Todd (ed) *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 481 at 494.

33 See Morgan Pope “Stanford’s Flying, Perching SCAMP Robot Can Climb Straight Up Walls” (16 March 2016) IEEE Spectrum <[www.spectrum.ieee.org](http://www.spectrum.ieee.org)>; Morgan Pope “Microspines Make It Easy for Drones to Perch on Walls and Ceilings” (12 May 2016) IEEE Spectrum <[www.spectrum.ieee.org](http://www.spectrum.ieee.org)>.

34 For a history of the earliest development of this doctrine see Yehuda Abramovitch (1962) “The Maxim ‘Cujus Est Solum Ejus Usque Ad Coelum’ as Applied in Aviation” (1962) 8 McGill LJ 247.

35 *Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479 at 902.

36 *De Richaumont Investment Co Ltd v OTW Advertising Ltd* [2001] 2 NZLR 831 (HC) at [39].

37 Air Navigation Act 1920 (UK) 10 & 11 Geo V c 80, s 9. The Air Navigation Act 1936 (UK) 26 Geo V & 1 Edw VIII c 44, s 9 contains almost identical wording to the Air Navigation Act 1931. For a contemporaneous discussion of this specific clause in the 1920 and 1936 United Kingdom Acts, see George R Thomson “The British Air Navigation Acts, 1920 & 1936” (1936) 7(4) Air Law Review 335 at 341.

500 feet AGL in a rural area,<sup>38</sup> except when conducting a take-off or landing. In both *R v Peita* and *R v Hertnon*, a flight at or above the minimum height was found to be reasonable in terms of s 97(2).<sup>39</sup> These decisions have limited applicability to UAS because the CARs do not specify a minimum height for flight. Rather, CAR, pt 101, specifies a maximum height of 400 feet AGL unless certain specified procedures are followed.

Collectively, s 97(2) of the Civil Aviation Act 1990 and *Skyviews* create a two-pronged test for trespass by a UAS:

- (1) the aircraft is flown below a height that is reasonable given the applicable CARs; and
- (2) the height at which the aircraft is flown infringes the ordinary use and enjoyment of the land.

Accordingly, an operator flying a UAS at a such a low level that it has some probability of colliding with a person is likely to be committing trespass because:

- (1) the operator would not be taking all practicable steps to minimise hazards to persons and the operation would then not comply with all applicable CARs; and
- (2) the UAS is being flown at a height that infringes the ordinary use and enjoyment of the land. Some height above that (perhaps 10 feet AGL) might also still constitute trespass and be actionable because “all the circumstances of the case” are not reasonable.

However, there will be some height AGL at which the UAS will no longer be considered to be infringing the ordinary use and enjoyment of the land, and thus be considered reasonable. In a practical sense, it is difficult for both plaintiffs and the operator of the UAS accurately to assess what height that might be.

### C. Remedies

There are five remedies available for trespass against land: two self-help remedies, two judicial remedies, and invoking the Trespass Act 1980.<sup>40</sup>

The two self-help remedies are expulsion and distress damage feasant. Expulsion normally requires the ability physically to apprehend and forcibly remove the trespasser or trespassing object. Distress damage feasant requires the ability physically to apprehend and contain the offending object until the owner makes suitable reparation for any damage. Physical apprehension may be possible only if the UAS lands. While a UAS is flying, it may be possible to force it to return to its take-off location (that is expel the aircraft) or to land by a variety of radio and GPS jamming

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38 Minimum heights are specified in CAR 91.311. The minimum height over a “congested area” of a city, town, or settlement, or over an open-air assembly of persons is 1,000 feet above the surface or any obstacle within a 600m radius. In any other area, the minimum height is 500 feet above the surface or any obstacle that is within a 150m radius.

39 *R v Peita* (1999) 5 HRNZ 250 (CA); *R v Hertnon* HC Palmerston North CRI-2007-031-536, 7 August 2009.

40 Aitken, above n 32, at 507.

devices and techniques.<sup>41</sup> However, it is an offence against the Radiocommunications Regulations 2001 to operate any radio jamming equipment in New Zealand without a licence,<sup>42</sup> effectively eliminating the use of these devices as a legal self-help remedy for most people.

The two judicial remedies are injunction and damages. If there is a continuing or repeated trespass by an identifiable UAS, such as one operated by a delivery company, then an injunction may be appropriate. As discussed above, flights by UAS do not constitute a trespass so long as the flight is at a height that is reasonable given the applicable CARs. Explicit legal definition of the height extent of private property rights would enhance the possibility of successful injunctive relief. McNeal suggests a height of 350 feet AGL based on the idiosyncrasies of a particular United States legal decision,<sup>43</sup> while Rule suggests setting the upper limit of private airspace at the minimum navigable airspace height of 500 feet AGL.<sup>44</sup> While both recommendations were formulated for the United States, where at least one state has enacted such a statute,<sup>45</sup> there is no reason why Rule's recommendation could not also apply in New Zealand.<sup>46</sup> Rule argues that such an approach could significantly reduce the economic loss associated with excessive UAS flights, relative to the efficient level of flights where the costs to property owners are taken into account.

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41 A review of the relevant literature reveals that many small unmanned aircraft may be vulnerable to "hijacking" so that the aircraft is under the control of a party other than the pilot. In 2013, a hacker developed software dubbed "Skyjack" that enabled the hijacking of an unencrypted Parrot AR Drone: Dan Goodin "Flying hacker contraption hunts other drones, turns them into zombies" (4 December 2013) ARS Technica <[www.arstechnica.com](http://www.arstechnica.com)>. Rodday identifies two security vulnerabilities, including weak encryption, that render many relatively high-end unmanned aircraft vulnerable to hijacking: Nils Rodday "Exploring Security Vulnerabilities of Unmanned Aerial Vehicles" (Master's Thesis, University of Twente, Amsterdam 2015). In 2015 a group of computer security researchers discovered a design flaw in the Mavlink radio protocol, used by many UAS manufacturers, which enabled them to develop a low-cost system to hijack an unmanned aircraft using this protocol: Brian Benchoff "Hijacking Quadcopters with a MAVLink Exploit" (15 October 2015) Hackaday <[www.hackaday.com](http://www.hackaday.com)>.

A further technique to gain control of unmanned aircraft is that of "GPS spoofing" where a GPS transmitter is used to override satellite GPS signals. A report in 2001 warned of the vulnerabilities of GPS to signal loss and disruption, including malicious disruption: John A. Volpe National Transportation Systems Center "Vulnerability Assessment of the Transportation Infrastructure Relying on the Global Positioning System" (29 August 2001) United States Department of Transportation <[www.navcen.uscg.gov](http://www.navcen.uscg.gov)>. Despite this warning, UAS technology remains vulnerable to attack. GPS spoofing was used by Iran to commandeer and land a United States RQ-170 Sentinel surveillance aircraft: Scott Peterson "Exclusive: Iran hijacked US drone, says Iranian engineer" (15 December 2011) Christian Science Monitor <[www.csmonitor.com](http://www.csmonitor.com)>. The technique has also been demonstrated as being able to be used to commandeer and potentially crash a small unmanned aircraft: Lisa Vaas "Drone hijacked by hackers from Texas college with \$1,000 spoofer" (2 July 2012) Naked Security <[www.nakedsecurity.sophos.com](http://www.nakedsecurity.sophos.com)>.

Another example is the Battelle Systems "Drone Defender", which uses radio jamming to overpower the radio systems on the unmanned aircraft, forcing it to activate either "auto land" or "return to home", depending on which option has been programmed into the aircraft: Chris Matyszczyk "Say welcome to the special anti-drone shoulder 'rifle'" (15 October 2015) CNET <[www.cnet.com](http://www.cnet.com)>.

42 "Radiocommunications Regulations (Prohibited Equipment – Radio Jammer Equipment)" (16 June 2011) 83 *New Zealand Gazette* 2039.

43 Gregory McNeal *Drones and Aerial Surveillance: Considerations for Legislators* (Brookings Institution, 2014).

44 Troy A Rule "Airspace in an Age of Drones" (2015) 95 *Boston University Law Review* 155 at 187.

45 "[A] person who owns or lawfully occupies real property" in Oregon may "bring an action against any person or public body that operates a drone that is flown at a height of less than 400 feet over the property if (a) The operator of the drone has flown the drone over the property at a height of less than 400 feet on at least one previous occasion; and (b) The person notified the owner or operator of the drone that the person did not want the drone flown over the property at a height of less than 400 feet." See Or Laws Ch 686 s 15(1) (2013).

46 Section 97(2) of the Civil Aviation Act 1990 would require amendment to take account of this defined column of private airspace.

A one-off incident is not amenable to an injunction, so damages may be more appropriate. However, if trespass has been committed, but no tangible harm is done, then damages must necessarily be of only a nominal amount and may amount to as little as one dollar.<sup>47</sup> This means that the economic cost of bringing a suit may outweigh any benefit gained,<sup>48</sup> and many trespasses by UAS would not be actioned, even if there would be a net benefit to society from bringing suit. Additionally, the identification of the operator is likely to be problematic.

The Trespass Act 1980 creates a number of offences related to trespass, the most relevant of which are the offences of “trespass after warning to leave” and “trespass after warning to stay off”.<sup>49</sup> Having been warned and then committing a trespass, a trespasser can then be prosecuted in the criminal justice system rather than by civil suit, transferring the cost of litigation to the Crown. The Trespass Act 1980 complements rather than replaces the tort of trespass, with actions in tort still available.

Action under the Trespass Act 1980 would require issuance of a warning, but it is not clear what form this could take to be effective, when a landowner does not know who might fly a UAS over that land. Given modern technology, it might be appropriate to post a warning on an electronic bulletin board or website,<sup>50</sup> but there is no compulsion for the pilot of a UAS to check such a website. Another option might be to follow the example of a Justice of the Peace in New Jersey, who is described in a 1910 publication on aviation, as erecting a sign on the roof of his house warning aviators against trespass,<sup>51</sup> but this would not resolve the dual problems of privacy violations from a neighbouring or public property and the difficulty of identifying the operator of the UAS.

#### D. Summary

Because a UAS is an aircraft and therefore covered by the Civil Aviation Act 1990, actions in trespass may only arise if it is flown below a height which is reasonable having regard to all the circumstances of the case. The provisions of CAR, pt 101, mean that many UAS will require permission to fly over people or property, and if this does not occur then it is hard to see how any height could be considered reasonable. Nevertheless, a UAS may be flown under a pt 102 certification that permits flight over property without obtaining permission.

A clearly defined property right over airspace above a property could facilitate trespass actions. However, even if this action was available, it does not solve the identified problem: unwelcome

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47 *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) at 583; affirmed in *Dehn v Attorney-General* [1989] 1 NZLR 320 (CA) at 323.

48 While courts may make an order for costs, such orders often cover only a portion of the actual costs and there is no compensation for the time involved in bringing suit.

49 Trespass after warning to leave occurs when a person has been warned to leave by the occupier of a place and “neglects or refuses to do so”. Trespass after warning to stay off occurs when a person has been warned by the occupier of a place to “stay off” that place, and then wilfully trespasses on the place within two years of the warning.

50 A suitable website is provided by the “Airshare” site <[www.airshare.co.nz](http://www.airshare.co.nz)> run by Airways Corporation of New Zealand. Airways Corporation provides services such as air traffic control, aviation mapping, and communication services utilised by aircraft. The Airshare website has been developed to provide UAS operators with a central source of information on UAS, as well as providing a way for UAS operators to obtain permission to fly in controlled airspace.

51 WJ Jackman and Thomas H Russell *Flying Machines: Construction and Operation* (Charles C Thompson Co, Chicago, 1910) at 170–171.



surveillance by a UAS able to hover over a public right of way and conduct surveillance, or to fly over property at a height “private” airspace. It also does not solve the difficulty of trying to establish the identity of the operator of the UAS.

#### IV. PRIVACY

New Zealand has two privacy torts: wrongful publication of private facts and intrusion on seclusion. The privacy torts are heavily complemented by both civil and criminal statutes, and remain an area where further relevant development is possible. This section reviews the two privacy torts and then gives particular consideration to how the Privacy Act 1993 might apply to UAS. Other potentially pertinent statutes are briefly reviewed.

##### A. Privacy Torts

Wrongful publication of private facts was confirmed as a tort by the Court of Appeal in *Hosking v Runting*.<sup>52</sup> Gault and Blanchard JJ held that the elements of this tort are:<sup>53</sup>

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

The tort of intrusion on seclusion was subsequently found to be part of New Zealand law by Whata J in the High Court in *C v Holland*.<sup>54</sup> Whata J held that the following four elements must be satisfied:<sup>55</sup>

- (a) An intentional and unauthorised intrusion;
- (b) Into seclusion (namely intimate personal activity, space or affairs);
- (c) Involving infringement of a reasonable expectation of privacy;
- (d) That is highly offensive to a reasonable person.

It is an open question whether wrongful publication and intrusion on seclusion are separate torts or elements of a single privacy tort,<sup>56</sup> but for the analysis of UAS that question is not critical. The key distinguishing factor between wrongful publication and intrusion on seclusion is that publication is not required for the latter. This may be relevant to UAS when imagery is collected for the private use of the operator without necessarily an intent to publish the imagery.

Some commentators have questioned whether these torts are too tightly formulated and exclude privacy violations that should be captured by the respective torts. One such question concerns the “highly offensive” threshold required by both torts. A second question concerns Whata J’s acceptance of there being “no right to limit views”, which potentially allows surveillance and

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52 *Hosking v Runting* [2005] 1 NZLR 1 (CA).

53 At [117].

54 *C v Holland* [2012] NZHC 2155; [2012] 3 NZLR 672.

55 At [94].

56 *Faesenkloet v Jenkin* [2014] NZHC 1637 at [38].

photography from afar.<sup>57</sup> The relevance of both of these areas to UAS operations are discussed below.

### 1. The “highly offensive” threshold

Both privacy torts require the violation of privacy to be “highly offensive to an objective reasonable person”. In *C v Holland*, the intrusion involved covert filming of a woman in the shower, so easily met the “highly offensive” threshold. In *Hosking v Runting*, the action in contention was the publication of a photograph of young children taken in a public place and this did not meet the threshold. However, quite where a UAS filming a person sunbathing naked in their backyard falls on this continuum is an open question with no obvious answer.<sup>58</sup>

In *Hosking v Runting*, Gault and Blanchard JJ were concerned that only “publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned” should give rise to legal liability.<sup>59</sup> Tipping J concurred, considering that “relatively trivial invasions of privacy should not be actionable,”<sup>60</sup> while at the same time expressing the preference that the threshold should be one of a “substantial level of offence rather than a high level of offence ... [the former being] a little more flexible”.<sup>61</sup>

Moreham argues that the “highly offensive” test is unnecessary, noting that English law avoids the use of that test by relying on the reasonable expectation of privacy test.<sup>62</sup> The close linkage between offensiveness and reasonable expectation of privacy has been recognised in New Zealand.<sup>63</sup> In the context of wrongful publication of private facts, Elias CJ has also urged the Supreme Court to “reserve its position” on the test, noting that members of the House of Lords have “doubted” the test in a decision since *Hosking v Runting*.<sup>64</sup>

It could be argued that in the years since *Hosking v Runting* there has been a sufficient body of precedent in New Zealand law that the original purpose for the threshold, to deter litigation over relatively trivial matters, is now redundant. In *Hamed v R* it was held that there is no reasonable expectation of privacy on a public road,<sup>65</sup> but there is a much greater expectation of privacy “in a building or an enclosed space like a hedged garden or the curtilage of a home”.<sup>66</sup> It is also recognised that there may be an expectation of privacy in some public places where the plaintiff does not expect his/her actions to be viewed beyond those people in immediate view,<sup>67</sup> or words

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57 At [92].

58 See, for example, Panahi, above n 4.

59 *Hosking v Runting*, above n 52, at [126].

60 At [255].

61 At [256].

62 Nicole A Moreham “Why is Privacy Important? Privacy, Dignity and Development of the New Zealand Breach of Privacy Tort” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation: Essays in Honour of John Burrows QC* (LexisNexis, Wellington, 2008) 231 at 246.

63 *Faesenkloet v Jenkin*, above n 56, at [50].

64 *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [25].

65 *Hamed v R* [2011] NZSC 101 at [205] per Blanchard J and [224] per Tipping J.

66 At [191] per Blanchard J.

67 *Peck v United Kingdom* (2003) 13 BHRC 669 (ECHR).

heard beyond those in immediate earshot,<sup>68</sup> and that disclosure of some actions in public places can amount to disclosure of personal information that is private.<sup>69</sup>

In *Hosking v Runtig* and *C v Holland* the level of offensiveness was congruent with the expectations of privacy, but that will not always be the case. In *Andrews v Television NZ Ltd*, it was held that publication of an exchange of which the plaintiffs held a reasonable expectation of privacy was not offensive, not least because the plaintiffs themselves were unable to identify any aspect of the broadcast that they considered offensive.<sup>70</sup>

However, the “highly offensive” test has also been criticised as being unpredictable and creating uncertainty.<sup>71</sup> Decisions involving the news media highlight circumstances in which disclosure of private information is not considered by the courts to be highly offensive, although the individuals concerned clearly held a different view. In *Hosking v Runtig*, Gault P stated that “[t]he harm to be protected against is in the nature of humiliation and distress,”<sup>72</sup> yet in *Clague v APN News Media*, Toogood J opined that embarrassment and distress might be insufficient to be classified as offensive or objectionable.<sup>73</sup>

None of the above provides clear guidance to the operator of a UAS or to a person who is observed by a UAS. The law appears to recognise that a person has an increasing expectation of privacy as they move from their front yard (exposed to the street) to their backyard (potentially surrounded by high fences), but it remains entirely unclear whether or not a single overflight by a UAS might be highly offensive. If it is not, then the issue rests on the duration required for a UAS to hover or loiter in the general vicinity before the highly offensive test is met. It is also unclear whether the filming of ordinary activities, such as gardening or children playing games in a backyard, where there is a reasonable expectation of privacy, would be considered highly offensive, even if the individuals involved experienced considerable anxiety at potentially being observed, or whether there are only certain activities for which the intrusion would be considered highly offensive.

Further uncertainty is injected by Toogood J’s acceptance in *Faesenkloet v Jenkin* that “deliberate intrusion designed to offend might be more offensive than one which is obviously accidental and incidental to another purpose”.<sup>74</sup> Given such views, UAS operators might well consider that so long as they have a legitimate purpose, such as real-estate photography or roof inspection, they do not need to be concerned with what other imagery they might incidentally capture. This increases the likelihood of conduct that could violate privacy, and, if potential plaintiffs are aware of the same uncertainties, could also simultaneously decrease the likelihood of an action being brought that would clarify the question and increase the extent to which individuals change their behaviour in an effort to maintain privacy.

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68 *Andrews v Television NZ Ltd* [2009] 1 NZLR 220 (HC) at [66].

69 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457.

70 *Andrews v Television NZ Ltd*, above n 68, at [67]–[69].

71 Moreham, above n 62, at 246.

72 *Hosking v Runtig*, above n 52, at [128].

73 *Clague v APN News and Media Ltd* [2012] NZHC 2898, [2013] NZAR 99 at [38].

74 *Faesenkloet v Jenkin*, above n 56, at [47].

## 2. *No right to limit views*

Whata J stated in *C v Holland* that the torts provide “no right to limit views from public places or from other private property”,<sup>75</sup> which would appear to legitimise non-trespassory surveillance however it is conducted. With UAS, such surveillance could be conducted from a public right of way, above the property of a consenting neighbour, or at a sufficient height above the subject property.

Whata J cited the 1937 case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* in support of the proposition that there is no right to limit views.<sup>76</sup> In that case, Latham CJ stated that “[a]ny person is entitled to look over the plaintiff’s fences and to see what goes on in the plaintiff’s land”.<sup>77</sup> Dixon J likewise stated that “the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises”.<sup>78</sup>

However, it is unclear whether the “no right to limit views” principle applies entirely without qualification. In his judgment, Latham CJ stated that no general right of privacy exists and that “neither this court nor a court of law will interfere on the mere ground of invasion of privacy”.<sup>79</sup> The law in New Zealand has since developed, with both Parliament and the courts recognising a variety of aspects of privacy. Given that the case was decided by a narrow majority of 3:2, and that at least some aspects of privacy are now recognised, the dissenting judgments require further consideration.

Rich J, in his dissenting judgment, stated that:<sup>80</sup>

... the right of view or observation from adjacent land has never been held to be an absolute and complete right of property incident to the occupation of that land and exercisable at all hazards.

and went on to hold that:<sup>81</sup>

... there is a limit to this right of overlooking and that the limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another.

Evatt J stated:<sup>82</sup>

The defendants also say that the law of England does not forbid one person to overlook the property of another. That also is true in the sense that the fact that one individual possesses the means of watching, and sometimes watches what goes on on his neighbour’s land, does not make the former’s action unlawful. But it is equally erroneous to assume that under no circumstances can systematic watching amount to a civil wrong ... under some circumstances, the common law regards ‘watching and besetting’ as a private nuisance, although no trespass to land has been committed.

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75 *C v Holland*, above n 54, at [92].

76 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 (HCA).

77 At 494.

78 At 507.

79 At 496.

80 At 504.

81 At 504.

82 At 517.

And, “it is an extreme application of the English cases to say that because *some* overlooking is permissible, all overlooking is necessarily lawful.”<sup>83</sup>

It may be, therefore, that “no right to limit views” is an inessential element of the tort of intrusion on seclusion. An alternative formulation could place the “reasonable expectation of privacy” at the core of the tort: where the plaintiff has no reasonable expectation of privacy then there would be no right to limit views, but where the plaintiff has a reasonable expectation of privacy then there would be a right to limit views. This formulation would appear to respect the earlier authorities, such as *Victoria Park Racing*, while allowing this area of law to develop.

Until such time as there is a judgment to that effect, the privacy torts appear to allow filming and observation of individuals to be undertaken so long as it is not highly offensive. The privacy torts as currently formulated might therefore allow UAS flights that violate a reasonable expectation of privacy, such as for individuals in their private backyards, and thereby impose uncompensated costs on an aggrieved party.

### B. *Privacy Act 1993*

The privacy torts are supplemented by the Privacy Act 1993, which governs the collection, use, and disclosure of personal information. The Act requires an “agency” to comply with a set of 12 broad information privacy principles (IPPs).<sup>84</sup> A UAS operator, whether an individual flying recreationally or a company utilising a UAS for commercial operations, falls within the definition of an agency.<sup>85</sup>

While the IPPs do not directly create a legal right enforceable in a court of law,<sup>86</sup> s 66 creates a civil wrong of “interference with privacy” of an individual. This requires that the action in question breaches an IPP (or one of four other specified breaches)<sup>87</sup> and, in the opinion of the Privacy Commissioner or the Human Rights Review Tribunal (HRRT), the action has caused or may cause some harm to the individual. An action in the HRRT may be at the suit of either the Director of Human Rights Proceedings,<sup>88</sup> or the aggrieved party,<sup>89</sup> and may be appealed to the High Court.<sup>90</sup> The aggrieved party may only bring suit after the Office of the Privacy Commissioner has investigated the complaint, and the scope of the HRRT’s hearing is restricted to the issues investigated by the Privacy Commissioner.

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83 At 518 (emphasis in original).

84 The information privacy principles are specified in s 6 of the Privacy Act 1993.

85 The definition of agency in the Privacy Act 1993 also includes a number of exceptions, none of which rule out a private individual collecting information about others.

86 Section 11 of the Privacy Act 1993 expressly provides that “the information privacy principles do not confer on any person any legal right that is enforceable in a court of law”, with the exception to obtain confirmation from a public sector agency of whether information is held and to have access to that information.

87 The other breaches specified in s 66 of the Privacy Act 1993 are a breach of: (a) a code of practice relating to public registers, (b) an IPP or code of practice related to information sharing agreements, (c) an information sharing agreement, and (d) provisions relating to information matching.

88 Privacy Act 1993, s 82.

89 Section 83.

90 Appeals to the High Court are made under s 123 of the Human Rights Act 1993.

The Privacy Commissioner may issue guidelines to any industry sector and has done so for CCTV cameras.<sup>91</sup> The CCTV Guidelines apply to UAS, even though this is not explicitly stated in the Guidelines themselves.<sup>92</sup> This is consistent with practice in the United Kingdom, where the equivalent guidelines issued by the Information Commissioner's Office explicitly include consideration of UAS.<sup>93</sup>

In *Armfield v Naughton*, the HRRT considered issues related to a CCTV system that in part surveilled the front yard of a neighbouring property.<sup>94</sup> Naughton had set up a number of CCTV security cameras around his house, one of which had an unobstructed view of Armfield's lawn and of the swing used by Armfield's children. The Tribunal held that Naughton had failed to comply with the privacy principles specified in the Privacy Act 1993, and specifically that the camera recording part of the front yard collected personal information in a way that intruded to an unreasonable extent on the personal affairs of Armfield and the other persons living at that property.<sup>95</sup> Whether the surveillance was "highly offensive" was not considered by the HRRT as its jurisdiction is limited to the Privacy Act 1993 and the issues investigated by the Privacy Commissioner.<sup>96</sup>

The decision in *Armfield v Naughton* affirmed previous decisions that "injury to the feelings" includes negative feelings such as anxiety, stress, fear and anger (feelings associated with unwelcome surveillance).<sup>97</sup> It was held that the facts of this case established "both significant loss of dignity and significant injury to the feelings" of the plaintiffs,<sup>98</sup> and that an interference with privacy was established.<sup>99</sup> A benchmark of \$15,000 in damages was noted by the HRRT,<sup>100</sup> although a lesser amount was awarded effectively at the request of the plaintiff.

Butler cautions that the requirement in s 66(1)(b)(iii) for the humiliation, loss of dignity, or injury to feelings to be "significant" sets a high threshold: "mere misuse or dissemination of personal information is insufficient for a complaint to be upheld."<sup>101</sup> On the other hand, s 66(1)(b)(i) only requires that the action "has caused, or may cause, loss, detriment, damage, or injury to that individual." This clause seems broader and sets a far lower threshold than that required by s 66(1)(b)(iii).

Personal information is defined in s 2 as "information about an identifiable individual". Whether an individual can be clearly identified from UAS imagery depends on the quality of the camera on board the UAS, and the distance between the UAS and the person. The person on the ground is not always able to determine whether the UAS is carrying a camera, or whether they can be identified

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91 Privacy Commissioner "Privacy and CCTV: A guide to the Privacy Act for businesses, agencies and organisations" (19 October 2009) <[www.privacy.org.nz](http://www.privacy.org.nz)>.

92 Charles Mabbett "Game of Drones" (21 January 2015) Privacy Commissioner <[www.privacy.org.nz](http://www.privacy.org.nz)>.

93 "In the picture: A data protection code of practice for surveillance cameras and personal information" (21 May 2015) Information Commissioner's Office <[www.ico.org.uk](http://www.ico.org.uk)>.

94 *Armfield v Naughton* [2014] NZHRRT 48.

95 At [65].

96 At [29].

97 At [82].

98 At [83].

99 At [87].

100 At [105].

101 Petra Butler "The Case for a Right to Privacy in the New Zealand Bill of Rights Act" (2013) 11 *New Zealand Journal of Public and International Law* 213 at 222.

from any imagery that might be collected. Drone advocates argue that a conventional camera with a telephoto lens is capable of providing much clearer imagery from a distance and thereby provide a greater threat to privacy.<sup>102</sup> However, technology continues to improve, and some UAS cameras now rival the performance of a telephoto camera.<sup>103</sup> Even with lower-resolution images it can be possible to identify the individual from characteristics such as build and hair colour, particularly when the address at which imagery is taken is known. This would seemingly satisfy the requirement in *Andrews v Television NZ Ltd* that the plaintiff is identified “either directly or by implication”.<sup>104</sup> Thus, even when the imagery is at a relatively low resolution, it may be reasonable to assume that personal information is being gathered.

We can therefore conclude that: first, a UAS that flies in the vicinity of a property and takes photos of that property is potentially collecting personal information; and secondly, that a person who is in some way upset, anxious or angry about such an action has suffered an “injury to feelings”. Having satisfied the second limb of s 66, the only remaining requirement to prove an interference to privacy is whether the personal information collected breaches an IPP.

IPP 1 requires that “the information is collected for a lawful purpose connected with a function or activity of the agency, and the collection of information is necessary for that purpose.” Flying a UAS is not an unlawful purpose. However, personal information may be unintentionally but unavoidably collected when a UAS is collecting imagery of an intended “target”, such as when a real-estate photographer using a drone unintentionally captures imagery of people in neighbouring properties. It is unclear whether personal information collected in such a manner is contrary to this principle.

IPP 4 requires, among others, that personal information shall not be collected by an agency “by means that, in the circumstances of the case ... intrude to an unreasonable extent upon the personal affairs of the individual concerned.” Whereas intrusion on seclusion requires the intrusion to be “highly offensive”, the Privacy Act 1993 merely requires the collection of information (that is, capturing of video or still photographs) to intrude to “an unreasonable extent”. The CCTV Guidelines note that it is almost certainly unreasonably intrusive to capture imagery of “a person’s private front or backyard or any other places where people are likely to expect privacy”,<sup>105</sup> and this was confirmed in *Armfield v Naughton*.<sup>106</sup> It is unclear whether footage captured incidentally while the UAS is capturing imagery of a neighbouring property is unreasonably intrusive. However, there may be an arguable case for an unreasonable intrusion when imagery is deliberately collected about an individual but consent has not been obtained.

IPP 6 requires that where an agency holds personal information in a form that can be readily retrieved, the individual concerned has a right to obtain confirmation of whether information is held and to access that information (that is, view the footage that pertains to the individual). However, short of involving the Privacy Commissioner, enforcing that right may be difficult, and the holder concerned has the incentive to deny that personal information is held.

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102 See Adam Derewecki “Are Drones Better Than Telephoto Lenses for Spying? The Answer May Creep You Out” (21 August 2015) PetaPixel <[www.petapixel.com](http://www.petapixel.com)>.

103 See, for example, Alex Cooke “Check Out This Footage From the Zenmuse Z30 30x Zoom Drone Camera” (12 April 2017) Fstoppers <[www.fstoppers.com](http://www.fstoppers.com)>.

104 *Andrews v Television NZ Ltd*, above n 68, at [52].

105 Privacy Commissioner, above n 91, at 13.

106 *Armfield v Naughton*, above n 94, at [65].

In sum, footage deliberately collected without permission of someone's front or back yard is likely to breach at least one IPP, but the status of information collected incidentally to a lawful purpose is unclear. Information collected by a UAS thus might be an "interference with privacy".

### C. *Uncertainty over Privacy Violation*

Two problems arise that reduce the expected damages cost to the UAS operator. The first problem is one of asymmetric information: only the UAS operator knows with a high degree of certainty whether their actions are interfering with the privacy of person(s) on the ground, but the person(s) on the ground lack this information. This asymmetry creates uncertainty whether it is worth the opportunity cost of initiating an action or making a complaint to the Privacy Commissioner.

The second problem is that there is no guaranteed cause of action: an intrusion into seclusion must be highly offensive for an action in tort and yet that standard is undefined in respect of UAS imagery; an intrusion into seclusion must also be intentional, and the UAS operator always has the opportunity to argue it was unintentional or even negligent.

An interference with privacy requires one or more of the IPPs to have been violated, which likely requires the gathering of imagery to have intruded to an unreasonable extent.<sup>107</sup> The Privacy Commissioner has previously held that if a UAS is not recording then there is no information collected, so no IPP can be violated.<sup>108</sup> A UAS is typically configured so that the video is broadcast back to the ground station, and this is certainly the case for any UAS utilised for filming as the operator needs to ensure that the UAS is filming the desired target. Given this factual background, the Privacy Commissioner's decision is questionable, as it would allow the continuous visual monitoring of private locations so long as none of the imagery was recorded. The Privacy Commissioner's decision also incentivises a UAS operator to claim that no imagery was recorded if any complaint is made.

Faced with such uncertainties, a smaller proportion of cases will be pursued than would be the case if there was certainty about the filming, and some of the cases that are pursued will fail. Just what proportion of cases will be pursued and what proportion will be successful is unknown. These uncertainties will have the effect of reducing the expected cost of a penalty, and therefore reducing the incentive for a UAS operator to avoid privacy violations.

### D. *Crimes Act 1961 and Summary Offences Act 1981*

Part 9A of the Crimes Act 1961 creates a number of "crimes against personal privacy", including interception of private communications, disclosure of private communications unlawfully intercepted, and making, possessing, and distributing intimate visual recordings. The tort of intrusion on seclusion was developed in a case where the defendant had been convicted of making and possessing an intimate visual recording.<sup>109</sup> Distribution of an intimate visual recording would seem to cover the same grounds as wrongful publication of private information, and interception of private communications addresses any instances where electronic communications are intercepted by a UAS.

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107 Note that this does not require the physical device, whether CCTV camera or UAS, to have intruded.

108 Privacy Commissioner "Case Note 267458 [2015] NZ PrivCmr 6: Man objects to drone filming near his apartment" (12 August 2015) Office of the Privacy Commissioner <[www.privacy.org.nz](http://www.privacy.org.nz)>.

109 *C v Holland*, above n 56.



Section 30 of the Summary Offences Act 1981 creates an offence punishable by a fine of not more than \$500 for “peeping or peering into a dwelling house” at night. This offence would be of little help to those concerned about a UAS hovering over their house or property because most surveillance is likely to occur during the day rather than at night.<sup>110</sup> In addition, the fine is of a level that is unlikely to pose a significant deterrent to those with a criminal purpose.

### *E. Law Commission Privacy Project*

From October 2006 to August 2010, the Law Commission conducted a thorough review of New Zealand privacy law. The review was conducted in four stages: Stage 1 provided an overview of privacy values, technology trends and international developments; Stage 2 considered public registers; Stage 3 considered the adequacy of New Zealand’s law to deal with invasions of privacy; and Stage 4 reviewed the Privacy Act 1993.

Although UAS were not widespread at the time of the Law Commission’s Stage 1 study, the concerns the Commission considered about CCTV and camera phones are relevant to them.<sup>111</sup>

In the Stage 3 report, the Law Commission recommended the introduction of a Surveillance Devices Act which “would provide for both criminal offences and a right of civil action in relation to use of visual surveillance, interception and tracking devices.”<sup>112</sup> The proposed Act was seen as a complement to the Search and Surveillance Act 2012,<sup>113</sup> which applies solely to law enforcement officers. The Law Commission was particularly concerned about surveillance of the interior of a dwelling, and considered that:<sup>114</sup>

... the offence [of visual surveillance of a private dwelling] should not apply to visual surveillance of the curtilage of a dwelling, such as a yard, garden or deck. The expectation of privacy outside the walls of a dwelling is lower than within it, and not so high as to justify criminal charges for infringing it.

The Law Commission considered surveillance outside of the dwelling to be adequately regulated by the Privacy Act 1993, with some minor modifications proposed. In particular, the Law Commission considered that the Privacy Commissioner should be able to undertake self-initiated audits of agencies using CCTV or other surveillance systems.<sup>115</sup> Such audits are likely to be appropriate for UAS operators and may be essential for ensuring that the IPPs are being complied with.

The Stage 3 report also recommended that the tort of invasion of privacy be left to develop at Common Law.<sup>116</sup> Whata J’s subsequent finding that the tort of intrusion on seclusion forms part of the law of New Zealand is in accord with the Law Commission’s recommendation.<sup>117</sup>

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110 The Law Commission suggests that the “the restriction to night time is irrational”: Law Commission *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy: Stage 3* (NZLC R113, 2010) at [5.39].

111 Law Commission *Privacy: Concepts and Issues: Review of the Law of Privacy: Stage 1* (NZLC SP19, 2008) at 140–142.

112 Law Commission, above n 110, at [1.7].

113 When the Stage 3 report was released, the Search and Surveillance Act 2012 was still a Bill before Parliament.

114 Law Commission, above n 110, at [3.37].

115 At [4.8].

116 Law Commission, above n 110 at [7.9]–[7.13].

117 *C v Holland*, above n 54.

The Stage 4 report provided a focused review of the Privacy Act 1993.<sup>118</sup> A large number of recommendations were proffered, including the introduction of a new Privacy Act, but in large part the underlying principles would remain as discussed above.

### F. Summary

The privacy torts require the publication or recording of information to be “highly offensive”, a threshold that is unclear for observation of people undertaking normal activities in their backyards. The Privacy Act 1993 provides an alternative cause of action for an “interference with privacy”. Imagery collected from CCTV of private front and back yards has been held to intrude to an unreasonable extent on privacy, and thus constitute an interference with privacy. It is unclear whether a single flight collecting the same imagery would necessarily constitute an unreasonable intrusion. In addition, the Privacy Commissioner has held that if a UAS is not recording then collection of personal information does not occur and there is no interference with privacy. In sum, there are sufficient uncertainties in the current body of tort and statute law that a person upset by unwelcome surveillance cannot be sure of an acceptable resolution, even when that surveillance takes place in a location where they have a reasonable expectation of privacy. From an economic perspective, this imposes uncompensated costs on the aggrieved party.<sup>119</sup> If these costs remain uncompensated, the outcome can only be efficient if those costs would be exceeded by the cost of enforcement.

## V. INTERNATIONAL EXPERIENCE

The introduction noted six cases from the United States where UAS had either been shot at or shot down, with privacy concerns claimed in four of those cases. In the New Jersey case, the shooter, Russell Percenti, was indicted on charges of criminal mischief and possession of a firearm for an unlawful purpose.<sup>120</sup> Percenti pleaded guilty to the lesser charge of criminal mischief, avoiding a potential prison sentence for the firearms charge.<sup>121</sup> In the California case, a small claims court found that the shooter “acted unreasonably in ... shoot[ing] the drone down, regardless of whether it was over his property or not” and was ordered by a small claims court to pay \$850 for damage to the UAS.<sup>122</sup> There were no criminal charges. In the Virginia case, the operators of the unmanned aircraft fled when the shooter threatened to call the police, but no one has filed a criminal complaint,<sup>123</sup> and no charges have been laid. In the 2016 Tennessee case, it appears that police were called, but no charges were laid because “the responding deputy could not identify a law that had been broken”.<sup>124</sup> No charges have been laid in the 2017 Tennessee case.

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118 Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy: Stage 4* (NZLC R123, 2011).

119 The nature of those costs was discussed in the introduction to this paper.

120 The Smoking Gun, above n 7.

121 “Man who shot down drone pleads guilty to criminal mischief” (13 February 2016) Fox News US <[www.foxnews.com](http://www.foxnews.com)>.

122 Farivar, above n 9. The cited article provides links to scanned copies of the small claims filing and the court decision.

123 Farivar, above n 10.

124 Flowers, above n 11.

In the Kentucky case, the shooter (William Meredith) was charged with first degree wanton endangerment and first degree criminal mischief.<sup>125</sup> Those charges were dismissed, with the Judge hearing the case finding that the overflight of the UAS was an invasion of privacy and that Meredith “had the right to shoot at this drone”.<sup>126</sup> The owner of the UAS (John Boggs) subsequently filed proceedings in the United States District Court for declaratory rulings on a number of matters, including that the operating the UAS “did not violate [Meredith’s] reasonable expectation of privacy”, that it is not legal to shoot at an UAS operating in navigable airspace, and a claim for \$1,500 for damage to the UAS under trespass to chattels.<sup>127</sup>

Part of Boggs’ argument rests on the proposition that he was operating his UAS in “Class G” airspace, which is defined as the airspace between the surface and the lower level of controlled airspace, and therefore the operation was legal and falls entirely under the jurisdiction of the Federal Aviation Administration.<sup>128</sup> This proposition appears to ignore the leading United States authority on aviation trespass (*Causby*), in which the United States Supreme Court held that although the *cujus est solum* doctrine had been substantially and necessarily modified by the advent of aviation, low-level flight could amount to trespass.<sup>129</sup>

The superadjacent airspace at ... low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.

Another argument proffered by Boggs is that Meredith does not have a reasonable expectation of privacy, relying on the majority opinion in *California v Ciraolo* that an expectation that a garden is protected from observation from publicly navigable airspace “is unreasonable and is not an expectation that society is prepared to honor”.<sup>130</sup>

The United States District Court dismissed the case for lack of subject matter jurisdiction and found that the claim for trespass to chattels was properly one for a state court to decide rather than a federal court.<sup>131</sup> This leaves unresolved the question of the height at which the flight of an unmanned aircraft becomes a trespass: above that height *Ciraolo* would seem to be the controlling case, and below that height *Causby* would be the controlling case.<sup>132</sup>

European Union (EU) member states are subject to the Charter of Fundamental Rights of the European Union, which includes a “right to respect for ... private and family life, home, and communications” (art 7) and a “right to the protection of personal data” which “must be processed fairly for specified purposes and on the basis of the consent of person concerned or some other legitimate basis laid down by law” (art 8).<sup>133</sup> Article 8 is expanded by the “Data Protection

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125 WDRB News, above n 8.

126 “Judge dismisses charges for man who shot down drone” (27 October 2015) WDRB News <www.wdrb.com>.

127 *Boggs v Meredith* 3:16-cv-00006 (Ky 2016) Document 1.

128 The Federal Aviation Administration is the United States’ equivalent of the New Zealand Civil Aviation Authority.

129 *United States v Causby* 328 US 256 (1946) at 265.

130 *California v Ciraolo* 476 US 207 (1986) at 213.

131 *Boggs v Meredith*, above n 127, Document 20.

132 For further analysis of the unresolved United States legal position see McNeal, above n 43.

133 Charter of Fundamental Rights of the European Union [2000] OJ C364 1–22.

Directive”, which provides additional detail on how personal data is to be protected.<sup>134</sup> EU member states are required to implement their own national legislation to comply with the Data Protection Directive. National legislation will be similar in effect to our Privacy Act 1993, which has been recognised by the EU as complying with the principles of the Data Protection Directive.<sup>135</sup> As such, EU member states will generally face the same issues as New Zealand with respect to UAS and privacy.

Under Swedish law, a camera that is operated remotely and can surveil public areas is considered a surveillance device and a surveillance licence is required. In October 2016, the Supreme Administrative Court of Sweden ruled in *AA v Data Protection Authority* that UAS with cameras meet both requirements (remote operation and the ability to surveil public areas) and are therefore surveillance devices.<sup>136</sup> It is notable that the Swedish treatment of surveillance devices provides specific protection of privacy in public places, in contrast to the law in New Zealand which holds there is only a limited expectation of privacy in public places.

In December 2016, the United Kingdom’s Department for Transport issued a consultation on the regulation of UAS.<sup>137</sup> That consultation acknowledges the range of safety, privacy, and security issues associated with UAS, but does not offer any proposals directed specifically at privacy. However, the consultation paper includes proposals for registration and electronic identification of UAS to “aid enforcement”.

## VI. REFORM PROPOSALS

Although the Law Commission’s recommendations represent a comprehensive package of reforms that would strengthen New Zealand’s privacy laws, there is gap that allows for privacy violations by UAS, and for which a civil remedy is appropriate. Drawing on UAS characteristics and the foregoing analysis of the status quo, the following options for statutory reform are worth consideration: (i) amending the privacy torts by statute; (ii) the issuance of a Code of Practice under the Privacy Act 1993; (iii) an encoded radio frequency beacon for those UAS piloted by an operator approved by the Privacy Commissioner; and (iv) strengthening the application of the Privacy Act 1993 to UAS.

Even with these changes in place, a significant problem with UAS remains: identification of the operator.<sup>138</sup> In such circumstances judicial remedies will be ineffective. Consequently, it may

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134 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31–50.

135 Commission Implementing Decision of 19 December 2012 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequate protection of personal data by New Zealand (notified under document C(2012) 9557) [2013] OJ L28/12–14.

136 A copy of the judgment is available (in Swedish) from the UAS Sweden website at <[www.http://uassweden.org/wp-content/uploads/2016/10/78-16.pdf](http://uassweden.org/wp-content/uploads/2016/10/78-16.pdf)>.

137 “Unlocking the UK’s High Tech Economy: Consultation on the Safe Use of drones in the UK” (21 December 2016) Department for Transport <[www.dft.gov.uk](http://www.dft.gov.uk)>.

138 See the testimony of Chief Inspector Nick Aldworth of the Metropolitan Police before the House of Lords in “Revised transcript of evidence taken before The Select Committee on the European Union Internal Market, Infrastructure and Employment (Sub-Committee B) Inquiry on Civil Use of Remotely Piloted Aircraft Systems (RPAS)” (17 November 2014). This testimony can be found at: <[www.parliament.uk/documents/lords-committees/eu-sub-com-b/CiviluseofRPAS/EU-Sub-Committee-B-Civil-use-of-Remotely-Piloted-Aircraft-Systems.pdf](http://www.parliament.uk/documents/lords-committees/eu-sub-com-b/CiviluseofRPAS/EU-Sub-Committee-B-Civil-use-of-Remotely-Piloted-Aircraft-Systems.pdf)>.

be more appropriate to enable forms of self-help. This would enable a potential victim to take immediate action against a UAS in order to prevent an actual or potential privacy violation.

Finally, some privacy-violating conduct is sufficiently egregious that criminal sanction is warranted, hence the final option proposed is the extension of criminal law.

### *A. Tort Reform*

The first option I propose for addressing the privacy concerns generated by modern imaging technologies, including UAS, is that of tort reform. In particular, the privacy torts could be amended by statute to rely primarily on the reasonable expectation of privacy. This could include Moreham's proposal to dispense with the "highly offensive" threshold,<sup>139</sup> or alternatively, to clarify the range of circumstances which should be considered highly offensive. I also propose that the reasonable expectation of privacy should be given explicit precedence over the existing principle of no right to limit views, effectively rendering the latter redundant.

### *A. Code of Practice for UAS Operation*

One option that could be implemented relatively quickly is the creation of a privacy code of practice associated with UAS operator certification.<sup>140</sup> Under pt 6 of the Privacy Act 1993, the Privacy Commissioner may issue codes of practice for an industry or activity which may modify one or more of the IPPs or specifies the means of compliance with an IPP. This provides clear means by which the activities of UAS could be regulated in regards to privacy, making use of existing dispute resolution and enforcement mechanisms within a coherent privacy framework.

The creation of a separate code of practice is more appropriate than revising the CCTV Guidelines or issuing new guidelines because violating a code of practice amounts to a breach of the IPPs, but a violation of guidelines does not. Such a code of practice could reduce the uncertainty around what activities intrude to an unreasonable extent, and thus reduce the uncertainty over whether a particular use of UAS constitutes an interference with privacy.

I propose that the "Code of Practice for UAS Operations" should contain the following provisions:

- Unless expressly exempted by the Privacy Commissioner or permission has been obtained from the occupiers of the affected properties, a UAS must not be operated over residences, residential areas or other locations where people have a reasonable expectation of privacy. Operation in contravention of this provision would be deemed to intrude to an unreasonable extent into the personal information of the affected individuals.
- Affected properties are all properties that might reasonably be expected to be included in photographs or imagery captured by the UAS.

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139 Moreham, above n 62.

140 Note also that the Law Commission considered the possibility of a CCTV code of practice as "the logical next step" if "guidance alone does not prove effective in controlling CCTV surveillance and ensuring that privacy is protected". See, Law Commission, above n 110, at [4.14].

- The Privacy Commissioner may grant an exemption to a UAS operator that has undertaken appropriate training,<sup>141</sup> and has adopted procedures approved by the Office of the Privacy Commissioner for protection of personal information.
- An exemption carries with it the requirement to be subject to audit.

The first of the proposed provisions is the analogue of CAR, pt 101.207(a)(1),<sup>142</sup> but in relation to privacy rather than safety. The third and fourth of the proposed provisions are the analogue of CAR, pt 102.<sup>143</sup>

The Law Commission rejected the blanket licensing of CCTV systems as “impractical and overly bureaucratic”.<sup>144</sup> My proposals for exemptions granted by the Privacy Commissioner are, in effect, a form of licensing. However, the exemptions would only be sought by those UAS operators that have a genuine need to conduct operations that might be viewed as interfering with privacy, and thus would not amount to blanket licensing. Those operators who do not seek an exemption would instead need to ensure that they communicated with all affected persons regarding the purpose of their flight.

### *B. Encoded Radio Frequency Identification*

A privacy exemption to operate over residential areas should be associated with a means of identifying both the UAS and the operator. To that end, certification under CAR, pt 102, already requires the operator to provide CAA with a list of the UAS that the operator intends to fly, including a serial number or other unique identifier. CAA’s standard practice with manned aircraft is to publish a register of aircraft listing the registration, make, model, serial number and registered operator.<sup>145</sup> There may be considerable benefit in requiring registration of UAS and that register being available to the public.

One potential problem is the small size of UAS and the consequential difficulty of having a visible identifier. Similar to the proposal advanced by the United Kingdom Department for Transport, it might be possible to have an encoded radio frequency beacon on all properly authorised UAS, with transmissions occurring on a frequency that can be received by smartphones (possibly on the 2.4 GHz “WiFi” frequency band already utilised by most UAS); an app would be required to determine the aircraft’s registration and whether the UAS has been authorised by the Privacy Commissioner.<sup>146</sup> UAS without such a beacon, or with a malfunctioning beacon, would be presumed to lack a privacy exemption. People could then have confidence that an authorised UAS

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141 The “appropriate training” could be as simple and low-cost as the online training already provided by the Privacy Commissioner.

142 Civil Aviation Rules, pt 101, above n 19.

143 Civil Aviation Rules, pt 102, above n 20.

144 Law Commission, above n 110 at [4.15].

145 The aircraft register is available at <[www.caa.govt.nz/script/air-reg-query/](http://www.caa.govt.nz/script/air-reg-query/)>. Selecting an aircraft classification (for example: aeroplane, glider, helicopter) provides a list of all aircraft of that classification.

146 Department for Transport, above n 137. In the consultation paper, at [6.16], the Department for Transport comments: “We envisage a digital identification system embedded in all drones over a certain weight, which will identify the drone in the air to drone traffic management systems, other drones flying around it and other airspace users, as well as anyone ‘scanning’ the drone from within a certain distance equipped with appropriate ‘scanning’ technology. Scanning a drone would release its unique identifying number. If the drone operator was perceived to be breaking the law, this number could then be used by the Police to track the owner of the drone down via the drones registry.”

is not violating their privacy, and the police and other enforcement officials would have greater confidence in intervening when an UAS is potentially photographing without approval.

This option directly reduces both sources of uncertainty: at least some UAS will be registered and carry an identification beacon, and people on the ground may be able to ascertain that such aircraft are operating with procedures approved by the Privacy Commissioner, and are therefore unlikely to be breaching privacy. The UAS operating under this scheme would also be traceable back to a specific operator. UAS operating outside this scheme (not carrying an identification beacon), would be presumed to be operating outside of the Privacy Commissioner's regime, and therefore potentially committing a privacy breach. Operator identification then remains problematic. The UAS operators most likely to breach privacy might also be the operators most likely to remain outside the scheme, and this option does not provide an adequate approach for controlling those operators.

### *C. Strengthening the Privacy Act 1993*

The Privacy Act 1993 could be strengthened to better address privacy issues raised by UAS. In particular, improvements are required that reduce or eliminate existing uncertainties. This could be achieved by specifying that the gathering of still or video imagery by any broadcast or closed-circuit television system of a location where a person has a reasonable expectation of privacy constitutes an unreasonable intrusion. Using the phrase "reasonable expectation of privacy" in the formulation of the civil offence would also have the effect of harmonising the civil offence with the privacy torts. The current definition of an "interference with privacy" is quite different from the definition of the two privacy torts.

This option would reduce uncertainties about the conduct legally considered to be an interference with privacy. This option would not address the first source of asymmetric information, as it would not include a provision for the Privacy Commissioner to approve or audit the practices of UAS operators, nor a means of determining whether a UAS is likely to be operating in a manner that does not violate privacy. However, it would apply to all operators, so any uncertified operators that breach privacy and can be identified could be sued.

### *D. Self-Help*

A further option proposed for addressing UAS-related privacy violations is the doctrine of self-help, allowing the victim to take immediate steps to halt a potential privacy violation. This may be particularly important when it is difficult to identify the UAS operator and/or an optimal fine is unlikely to be levied. Froomkin and Colangelo observe that the law allows self-help remedies against both crime and torts.<sup>147</sup> While originally derived from Common Law, many of these self-help remedies have been codified in statute. The Crimes Act 1961 allows the use of reasonable force to protect both oneself and others from assault (s 48). The Impounding Act 1955 provides that trespassing stock may be seized and restrained or impounded (pt 5), although trespass damages can only be recovered if the occupier of the land has taken reasonable precautions, such as fencing the land (s 26). The Dog Control Act 1996 provides that any person may seize or destroy a dog attacking any person or animals (s 57), and even a dog simply "at large" among stock or poultry may be seized or destroyed (s 60). Froomkin and Colangelo argue that the practical problems

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147 A Michael Froomkin and Zak Colangelo "Self-Defense Against Robots and Drones" (2015) 48 Conn L Rev 1.

associated with UAS mean that self-help remedies may be appropriate too: if the operator of the UAS cannot be identified then the law is not going to be able to ensure a just outcome, and self-help may be the only practical means of protecting oneself from a wrong.

An argument in favour of allowing self-help in relation to privacy violation by UAS can be drawn by analogy with self-help remedies allowed in relation to dogs. Davis argues in the context of physical harm that, just as a strict liability is placed on dog owners for any damage caused, there should also be strict liability placed on the operators of UAS for any damage caused.<sup>148</sup> This analogy can be readily extended from physical harm to a broader notion of mental and emotional harm. Stock worrying – which occurs when a dog is roaming at large among stock without actually attacking them – is a result of the fear response of prey animals to a predator (the dog).<sup>149</sup> UAS have been shown to induce physiological stress responses in large mammalian predators,<sup>150</sup> and the adverse human responses to UAS described in the introduction to this paper are clear examples of stress. If the law allows that a dog may be seized or destroyed for stock worrying, logically applying this same principle to UAS suggests that an aircraft worrying stock or people should also be liable to be seized or destroyed, even if the person concerned is not certain that the UAS is engaged in a privacy breach.

The law is silent on the destruction of illegal surveillance devices. But, it is not surprising that the courts have not seen claims for compensation for the destruction of such devices, as their very existence is the result of a criminal or tortious act. Destruction of the devices is the use of reasonable force to prevent a greater harm from occurring. The Crimes Act 1961 provides for forfeiture of interception devices if a person is convicted of intentionally using such a device to intercept communications (s 216E), and equipment used for making intimate visual recordings may also be subject to forfeit (s 216L(2)).

There are some obvious limitations to the proposition that an individual should be able to seize or destroy an UAS without evidence that it is actually breaching privacy. In the first instance, a person in a location with no reasonable expectation of privacy should not be able to exercise such a self-help remedy. Secondly, various offences under the Arms Act 1983 limit the ability to shoot down a UAS if doing so would present risks to persons or property.<sup>151</sup> Thirdly, as noted earlier, while a UAS could be disabled by radio or GPS jamming radios,<sup>152</sup> it is an offence against the Radiocommunications Regulations 2001 to operate any radio jamming equipment in New Zealand without a licence.<sup>153</sup> Fourthly, if UAS is disabled in flight, it may crash on a another's property causing either harm to people or damage to property, particularly if non-trespassory surveillance is

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148 Jim Davis “The (Common) Laws of Man Over Vehicles Unmanned: Comment by Emeritus Professor Jim Davis” (2011) 21 *JLIS Special Edition: The Law of Unmanned Vehicles* 166 at 170.

149 Even domestic farmed sheep that are relatively familiar with the presence of dogs show behavioural and physiological responses to dogs that are characteristic of fear. See, for example, Ngaio Jessica Beausoleil “Behavioural and physiological responses of domestic sheep (*Ovis aries*) to the presence of humans and dogs” (PhD thesis, Massey University, 2006).

150 Mark Ditmer and others “Bears Show a Physiological but Limited Behavioral Response to Unmanned Aerial Vehicles” (2015) 25 *Current Biology* 2278.

151 It is offence against s 53 of the Arms Act 1983 to carelessly use a firearm or to discharge a firearm with reckless disregard for the safety of others, and against s 48 to discharge a firearm near a dwellinghouse or public place “so as to endanger property or to endanger, annoy, or frighten any person”.

152 See above n 41.

153 *New Zealand Gazette*, above n 42.



involved. These limitations collectively suggest that the self-help option is feasible and desirable only when trespass occurs, with the proviso that the person disabling the UAS may be liable for damage caused to any other property.

It is also relevant to note the relationship between the size of UAS and its purpose. Most, if not all, UAS carrying out a legitimate commercial purpose will be designated as “small” or larger.<sup>154</sup> High-quality photography requires a stable platform and larger machines will have greater stability in a breeze. Applications such as parcel delivery, when that eventuates, will require UAS of a significant size capable of lifting a package of moderate size and weight. The size and design of the UAS will be an indication that the aircraft has a legitimate purpose. Very small UAS, on the other hand, are unlikely to have a legitimate purpose other than recreational use. The smallest UAS are typically intended specifically for surveillance,<sup>155</sup> and may also be the easiest to seize and destroy if they are found to be trespassing.

Problems may arise from the prohibitions in the Aviation Crimes Act 1972 against destroying an aircraft in service or causing damage to an aircraft in service which renders the aircraft incapable of flight; these offences carry a term of imprisonment of up to 14 years.<sup>156</sup> These prohibitions were framed in an era when aircraft were always manned, so destroying or damaging an aircraft would necessarily put human life at risk. There is no direct risk to human life with a small UAS which by virtue of their size are incapable of carrying passengers, and on that basis, it can be argued that the provisions in the Aviation Crimes Act 1972 should be revised to reflect the new technology.

Legalising self-help would require amendments to both the Aviation Crimes Act 1972, providing a defence in the event that an UAS was committing aerial trespass and the Civil Aviation Act 1990, providing a broader range of circumstances in which a UAS could be held to be committing aerial trespass.

If adopted, this potential option would ensure that UAS operators obtained permission from every property over which they were going to fly, or otherwise risk having their UAS somehow disabled or destroyed. This requirement to obtain permission would be separate from, and take precedence over, the requirement in CAR, pt 101.207(a)(1), and thus could not be circumvented by obtaining operator certification under CAR, pt 102. This would significantly reduce the costs associated with privacy violations, substituting for them the costs of either damaged or destroyed UAS, or the effort of obtaining permission from all parties potentially affected by a UAS operation. This would provide the UAS operator with the incentive to ensure that the benefits of each UAS flight were at least equal to the costs incurred, and ultimately to optimise the number and characteristics of flights.

There may be some situations where this option by itself could result in the destruction of some UAS that were carrying out legitimate activities and were not engaged in a privacy breach. For that

154 Within the literature, UAS may be described in terms of the adjectives “nano”, “micro”, “small”, and so forth. There is general agreement that those with a maximum take-off weight of 25kg or less are “small”, although it is unclear how 25kg became the relevant break point. Small UAS can be further classified into “micro” with a maximum weight less than 2kg, and nano with a maximum weight less than 500g. See Volpe *Unmanned Aircraft Systems (UAS) Service Demand 2015-2035: Literature Review & Projections of Future Usage* (United States Airforce, Technical Report DOT-VNTSC-DoD-13-01, 2013) at 104.

155 For example, the manufacturer AeroVironment has developed a “Hummingbird Nano Air Vehicle” that looks like a hummingbird, flies with flapping wings like a hummingbird, and is designed specifically for surveillance purposes. Evan Ackerman “AeroVironment’s Nano Hummingbird Surveillance Bot Would Probably Fool You” (4 March 2011) IEEE Spectrum <spectrum.ieee.org>.

156 Aviation Crimes Act 1972, s 5.

reason, a better outcome is likely to be achieved by a combining this option with a privacy code of practice, certification, and radio frequency identification: UAS engaged in legitimate activity would be registered and identifiable and therefore less likely to be seized and/or destroyed if trespassing. It may also be appropriate to define aerial trespass as occurring up to a certain height (such as 500 feet AGL) so that a corridor of airspace can be preserved for UAS that must traverse airspace as part of legitimate activity.<sup>157</sup> A gap will potentially remain for non-trespassory surveillance by unregistered UAS, but this gap also exists with the “no right to limit views from public places or from other private property” under tort.<sup>158</sup>

### E. Criminal Sanction

The low probability of detection means that damages in either tort or under statute would need to be very high in order to provide optimal deterrence.<sup>159</sup> Posner views criminal law as deterring people from bypassing “the market” when the optimal damages required for deterrence in tort are so high that they would exceed the offender’s ability to pay, and therefore suggests that criminal law may be more appropriate.<sup>160</sup> There is also a class of offence where civil privacy law is not the best option, such as when a UAS is used for reconnaissance purposes in the commission of a crime.

In the first instance, the offence of peeping into a dwelling house at night should be amended to remove the restriction to night time,<sup>161</sup> and to increase the fine from \$500 to a maximum of at least the benchmark of \$15,000 adopted by the HRRT. These measures would provide a more effective deterrent against what might be the most egregious use of UAS, the deliberate observation inside a house.

The second suggestion is the introduction of a new crime of using surveillance technologies in the commission of another crime. This would create a new offence covering the use of UAS for reconnaissance in the commission of a burglary. This should attract at least the same sentence as the amended “peeping” crime or the Law Commission’s proposed crime of “visual surveillance of a private dwelling”.

While fines and monetary reparations under criminal law may be relatively low, transferring a wrong from tort to criminal law creates additional costs to the wrongdoer. If a suit is successful, a tortfeasor must pay damages and costs, but has no equivalent of a criminal “record” that can act to exclude the individual from future opportunities.

Counterbalancing the costs imposed by a criminal conviction, conviction of a crime requires both mens rea and a higher evidentiary standard than required for any of the other proposed options. The lowest evidentiary standard is associated with the proposed self-help remedy, where a concern that privacy is being breached may be sufficient for action. A breach of the Privacy Act 1993 or an associated code of practice may be unintentional, but is nonetheless still an actionable breach,

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157 Note that the minimum height for manned aircraft over urban areas is 1,000 feet AGL or any obstacle, so allowing aerial trespass up to 500 feet AGL provides a “slice” of airspace 500 feet high that can be used for applications such as delivery services.

158 *C v Holland*, above n 54 at [92].

159 A Mitchell Polinsky and Steven Shavell “Enforcement Costs and the Optimal Magnitude and Probability of Fines” (1992) 35 *Journal of Law and Economics* 133.

160 Richard A Posner “An Economic Theory of the Criminal Law” (1985) 85 *Colum L Rev* 1193.

161 This could also be achieved by adopting the Law Commission’s proposed crime of “visual surveillance of a private dwelling”. See Law Commission, above n 110, at [3.33].

and being a civil statute only requires a breach to be proved on balance of probabilities. A crime, however, must be proven beyond reasonable doubt. When a UAS operator can simply delete any recording, and deny that footage was being taken, it may be very difficult to prove a crime unless an operator is caught “in the act” by law enforcement officials. Publication of material that involved a privacy breach will also not always be conclusive evidence, as it will still be necessary to prove intent.

## VII. CONCLUSION

The general public is concerned about UAS violating their privacy and being subjected to surveillance in spaces where they might have a reasonable expectation of privacy. Experimental evidence clearly demonstrates that even individuals who consent to surveillance experience a range of negative emotions including fear, anxiety and anger, and change their behaviours in response to the surveillance. Over the longer term, these negative emotions and the behaviour changes can result in reduced trust and lower economic growth. In this paper, I have proposed six reforms that would enhance the effectiveness of existing privacy law in addressing privacy breaches by UAS.

The mind of the public frequently equates privacy and trespass, yet the two are manifestly different. However, trespass could be used to prevent some forms of privacy violation. Amending the Civil Aviation Act 1990 to provide for aerial trespass by unmanned aircraft would enable the law of trespass to be invoked when such an aircraft is operating at low level over a property without authorisation. Given the difficulty of identifying or apprehending a UAS or its operator, this paper also proposes that the law is amended to allow destruction of aircraft committing aerial trespass. These proposals are consistent with those advanced for the United States by Froomkin and Colangelo.<sup>162</sup>

Clarifying what conduct constitutes aerial trespass does nothing to solve the problem of non-trespassory surveillance, which can be conducted using a UAS located over a neighbouring property or public way, such as a road, footpath, or walkway.

The general problem of UAS non-trespassory surveillance can only be addressed through the development of privacy law. New Zealand’s privacy torts may set too high a standard (“highly offensive”), and should arguably be reformed to rely solely on the reasonable expectation of privacy as suggested by Moreham.<sup>163</sup> Tort law reform may be too slow given the pace of technological change unless implemented by statute. An alternative approach is for the Privacy Commissioner to promulgate a “Code of Practice for UAS Operations”, issued under the Privacy Act 1993. The Code would be able to clarify exactly when a UAS would constitute an unreasonable intrusion and likely to result in an “interference with privacy”, a civil wrong that can be pursued in the HRRT. I propose that the Code of Practice would prohibit flights over residences, residential areas and other areas where persons would have a reasonable expectation of privacy unless either permission is obtained from all affected properties (including those not directly under the flight path) or an exemption has been obtained from the Privacy Commissioner on the basis that the applicant has demonstrated good privacy systems. A privacy exemption to operate over residential areas should be associated with a means of identifying both the UAS and the operator, which might be

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162 Froomkin and Colangelo, above n 147.

163 Moreham, above n 62.

best achieved by use of an encoded radio frequency beacon as proposed by the United Kingdom Department of Transport.<sup>164</sup>

The proposed Code of Practice would sit alongside the CARs in being an instrument to regulate the use of UAS, and may be most effectively implemented by requiring the UAS operator to hold a CAR, pt 102 certificate. There may, however, need to be a minor amendment to the Civil Aviation Act 1990 to allow this.

I also propose amending the Privacy Act 1993 to clarify what constitutes an unreasonable intrusion into privacy for still or video imagery by any broadcast or closed-circuit television systems. The reduction in uncertainty would improve efficiency in the application of the law.

Finally, I support the extension of the existing crime of peeping into a dwelling house to include peeping during daytime; and propose a new crime to capture the use of unmanned aircraft in the commission of any other crime.

Collectively, these proposals would enable New Zealand's privacy law to better address the challenges posed by UAS.

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<sup>164</sup> Department for Transport, above n 137.

## BOOK REVIEW

HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS edited by Corinne Lennox and Damien Short, Routledge, London and New York, 2016, 442 pp, recommended retail price NZ\$195.00.

The *Handbook of Indigenous Peoples' Rights* is a collection of scholarly works which highlights many important contemporary Indigenous rights issues. The collection focuses principally upon the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration),<sup>1</sup> which has been hailed as a comprehensive, ground-breaking document. However, critical analysis in a number of chapters demonstrates that there are limitations to the Declaration.<sup>2</sup>

The collection is divided into eight parts. Chapter titles are detailed and informative with the content of the 28 chapters providing short, intensive discussions of the topics one would expect to see in such a handbook: Indigenous identity, land rights, development and the environment, the rights of Indigenous women, mobilisation for rights, justice and reparations, and international protection mechanisms. The four regional surveys which form the final part of the collection provide valuable case studies from Africa, Asia, Latin America and the Nordic countries.

This review highlights the key ideas from each part, and offers some observations on the relevance and value of this handbook for New Zealand readers.

Part I comprises three chapters on “indigeneity”. The philosophical justifications for attributing distinctive rights to Indigenous peoples within liberal democratic communities is a topic of ongoing debate in New Zealand<sup>3</sup> and is the subject of chapter 2. The following chapters canvas arguments for more nuanced approaches to affirmative action and a discussion of how tribal groups decide their membership. The latter refers to membership issues arising in Treaty of Waitangi settlements and the “pan-tribal” settlement of commercial fishing claims. Comparisons are drawn with other jurisdictions where potential members are excluded on the basis of blood quantum, and claims of gender discrimination that arise where legislation allows for loss of membership “status”.

Part II is entitled “Right and Governance”. In chapter 5, Marco Odello sets out the background to the drafting of the Declaration to explain some of the Declaration’s “shortcomings” (such as the lack of a definition of “Indigenous peoples”, the incompatibility of individual and collective rights and the clash between claims for self-determination and the sovereign independence and territorial integrity of states). Despite the shortcomings, the author points to recent developments in law and policy that demonstrate an “evolution of the international consensus” towards the new legal standards embodied in the Declaration.

The impact of development projects on Indigenous peoples’ land is identified in chapter 6 as one of the “foremost concerns of Indigenous peoples worldwide”. The author discerns the emergence of a more flexible approach in determining the scope of free, prior and informed consent. This theme is continued in the following two chapters through a review of seven case studies<sup>4</sup> and an exploration of Indigenous self-government and forms of autonomy.

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1 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295 (2007).

2 For example, chs 5, 10 and 27.

3 Particularly following the speech by politician Don Brash at Orewa in 2004, and opposition to the Local Electoral (Equitable Process for Establishing Māori Wards and Māori Constituencies) Amendment Bill 2017 (261–1), that proposed reserved seats for Māori at local government level.

4 Bangladesh, Indonesia, Bolivia, Ecuador, Mexico, Venezuela and Colombia.

In a chapter discussing reparations for Indigenous peoples in Canada, New Zealand and Australia, Andrew Erueti argues that the better pathway for Indigenous peoples is not to seek recognition of existing rights (such as via the judge-made doctrine of native title) but rather to seek reparations for enduring injustices. Concluding that measures such as New Zealand's Treaty of Waitangi settlement processes are incomplete and incoherent, the author promotes the Declaration as a means for setting out a path for political and legal reform.

Chapter 9 delves into the "dizzily complex bureaucratic maze" that is the Canadian land claims process,<sup>5</sup> concluding with the recommendation that Canada develops a system of land conflict resolution that recognises Indigenous ideas about sovereignty in order to accord with Canada's obligations under the Declaration.

Part III deals with Indigenous women's rights. Despite existing international human rights instruments, Indigenous women's rights remain an overlooked issue both at international and local levels. The Zapatista Women's Revolutionary Law in Mexico is proffered as a positive example of Indigenous women's rights developed at grassroots level and in chapter 10, Rauna Kuokkanen laments the absence of such an affirmation of these rights in the Declaration. In chapter 11, citing gender discrimination through tribal disenrolment in the United States, violence against Indigenous women and the lack of access to justice, and the "gendered injustice of Indian land claims",<sup>6</sup> Cheryl Suzack calls for human rights organisations and nation-state actors to develop political strategies that endorse the remedies that Indigenous women have developed.

Part IV deals with development and the environment. In arguing that the existing sustainable development agenda has not delivered on its promise of improved environmental sustainability, Deborah McGregor postulates, in chapter 12, that many international undertakings, often led by the United Nations (UN), continue to marginalise the involvement and voice of Indigenous peoples. An alternative vision of "living well with the Earth"<sup>7</sup> is proposed based on Indigenous concepts of relationships, responsibilities and obligations to Mother Earth. Examples referred to include constitutional provisions in Bolivia and Ecuador and the recent New Zealand example of the Whanganui River Iwi settlement, which resulted in the river being recognised as a living and legal entity.

The remaining chapters in this Part deal with diverse topics: development and climate governance, citing the Peoples' Agreement of Cochabamba 2010 as an example of a new paradigm for challenging neo-liberal capitalism's so-called "green economy"; corporate responsibility to respect human rights; the impacts on the Indigenous peoples of the Atacama Desert as a result of privatisation of copper in Chile and the impact upon water supply; and the evolution of Indigenous peoples' rights and the Indigenous knowledge debate.

The two chapters in Part V cover the important issue of mobilisation for Indigenous peoples' rights. Chapter 17 discusses strategies for mobilisation at the UN that achieved significant international change. Chapter 18 shares the strategies and achievements of the San (Bushmen) of Botswana and the African Indigenous movement.

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5 Elizabeth Cassell and Colin Samson "The long reach of frontier justice: Canadian land claims as a human rights violation" in Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge, London and New York, 2016) 111 at 123.

6 Cheryl Suzack "Human rights and Indigenous feminisms" in Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge, London and New York, 2016) 146 at 155.

7 Deborah McGregor "Living well with the Earth: Indigenous rights and the environment" in Corinne Lennox and Damien Short (eds) *Handbook of Indigenous Peoples' Rights* (Routledge, London and New York, 2016) 167.

Part VI chapters discuss reparations, compensation and self-determination in respect of the mandate and work of the Indian Specific Claims Commission in the United States and the stolen generations in Australia respectively.

The focus of Part VII is the story behind the establishment of the three mechanisms for monitoring and implementing the rights of Indigenous peoples: the Special Rapporteur, the Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples. Historical events that led to the inclusion of Indigenous peoples' issues into the work of the UN are recounted, such as the visits to the League of Nations by Iroquois Chief Deskaheh and Māori leader TW Rātana in the 1920s.

In chapter 22, Rodolfo Stavenhagen, a former UN Special Rapporteur on the Rights of Indigenous Peoples, draws upon personal experience to explain the mandate and work of the Special Rapporteur. The author shares his view that while the Special Rapporteur's reports are instruments in the struggle for human rights, due to the lack of enforcement mechanisms there is an "implementation gap". States seem to disregard the reports and are becoming increasingly immune to "blame and shame".

In chapter 23, Lee Swepston reminds us of the importance of the International Labour Organisation (ILO) Convention – Indigenous and Tribal Peoples 1989 (No 169),<sup>8</sup> which can be ratified and thereby become binding in national and international law, and subject to supervision by the ILO's supervisory bodies. This Convention offers an alternative monitoring pathway as the Declaration sets out aspirations and creates standards, but is not subject to direct reporting and supervision. Exemplars of certain rights which may be more effectively addressed outside the specific "Indigenous rights" framework are provided.

In chapter 24, Cynthia Morel recounts a handful of well-known cases (*Awás Tingni*; *Lovelace*; and *Endorois*)<sup>9</sup> to illustrate the role that litigation plays as a means to achieve strategic leverage for highlighting indigneous rights issues.

The final Part contains four regional case studies: an overview of international human rights standards and Indigenous peoples' land and human rights in Asia; the struggle by Indigenous peoples in Africa for recognition and protection of their human and peoples' rights; the major achievements that have come about as a result of decades of Indigenous struggle in Latin America; and the struggles of the Sami and the Inuit in the Nordic countries.

### Observations and recommendation

New Zealand was one of the few states that participated from the outset in the drafting of the Declaration. Māori made a significant contribution to both the text and the process for drafting the Declaration. Despite descriptions of the Declaration by our government representatives as being purely aspirational, Māori leaders and communities have strongly endorsed the Declaration.

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8 Convention concerning Indigenous and Tribal Peoples in Independent Countries ILO No 169 (adopted on 27 June 1989, entered into force 5 September 1991).

9 See *The Mayagna (Sumo) Awás Tingni Community v Nicaragua* Inter-Am Ct HR No 79 (Ser C, 2001); *Lovelace v Ontario* [2000] 1 SCR 950, 2000 SCC 37; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 276/2003 African Commission on Human and Peoples' Rights, 4 February 2010.

Sir Edward Taihākurei Durie,<sup>10</sup> for example, cites the Declaration as the most significant international development for Māori since the Treaty of Waitangi.

Important contemporary issues are discussed in this collection and its relevance to New Zealand readers is enhanced by the use of New Zealand examples in a number of key themes. Academics and students alike will find the *Handbook of Indigenous Peoples' Rights* a useful and valuable resource.

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