Kia whanake ngā ture o Aotearoa mā te arotake motuhake
Better law for Aotearoa New Zealand through independent review

Keynote Speech to the Legal Research Foundation AGM, Auckland, 6 August 2020

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1. My thanks to the Legal Research Foundation for inviting me to speak this evening. I am honoured to be here and pleased to be able to continue a longstanding relationship with the LRF that I have enjoyed very much over the years, beginning with a stint on the LRF Council between 2005 and 2011. I am also pleased to have this opportunity to talk about the Law Commission and share some of my initial reflections about the Commission's role and our ambitions for the future.

2. Our current work includes projects covering class actions and litigation funding, succession and the use of DNA in criminal investigations; we will soon begin reviews of surrogacy and of laws concerning adults with impaired decision making capacity. It is interesting and challenging work. But rather than talk about our projects, I thought that I would discuss some of our objectives for the next few years, and in particular, our intention to focus on te ao Māori dimensions to our work, within the framework of our vision and values. We have recently undertaken a planning exercise, as required by the Crown Entities Act, which obliges the Commission to deliver a 'statement of intent' to the Minister of Justice every three years (covering the upcoming four year period).[1] The transition between commissioners has also created an opportunity for us to think about how we want to position ourselves within broader currents across the legal system and about what we as a law commission might uniquely have to offer.

The Law Commission Act 1985

3. I hope that most of you are familiar with the Commission and I do not intend to traverse the detail of its functions. For context I'll say a few things about our governing statute. The Law Commission is an independent Crown entity operating under the Law Commission Act 1985. The Commission was established to deliver the purpose set out in the Act, which is to 'promote the systematic review, reform and development of the law of New Zealand'.[2]

4. There are two important duties I wish to highlight.

Our vision

5. The Commission has recently interpreted its mandate through its vision of "Better law for Aotearoa New Zealand through independent review" – this is the title of my talk this evening.

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[1] Crown Entities Act 2004, s 139(2)-(3).

[2] Law Commission Act 1985, s 3.

6. Deciding on what amounts to "better" will inevitably implicate ideological choices to the extent that deciding on what amounts to "better" involves making choices among competing values.[3] The Commission has endeavoured to be transparent about its values, and we formally adopted four, along with the vision, in May. The values concern whanaungatanga (the importance of relationships), hiranga (how we define excellence), the importance of te ao Māori to our work, and upholding the mana of all people in Aotearoa New Zealand. Vision and values statements can sometimes be regarded sceptically, as an effort in PR but without much substance or purpose. In our case it was a genuine effort to think about what we are trying to achieve as an organisation and what kind of place we need to be to achieve it.

7. We are now working on how to infuse the values across our workplace contexts, for example, to help inform decisions about updating our editorial style guide – on issues such as how should we address bilingualism and gender silence, and so on. One of our advisers has written an excellent paper on communications strategies for the Commission, including the use of social media. The paper argues that the interpretation of our mandate as encapsulated in our vision means that fulfilling our role depends not only on providing expert advice to Government, but also on nurturing an environment characterised by meaningful public discourse and a lively civil society.[4] The paper, I think, is intended as an invitation to tweet.

8. The vision and values have also provided the framework for developing our statement of intent, or four-year plan, which broadly comprises four inter-related objectives:

    - excellent law reform advice and recommendations remain at the heart of what we do
    - we also need to build and maintain a strong workplace culture
    - and to develop relationships with key stakeholders to inform our work
    - where that work includes contributing to a wider and more enduring understanding of te Tiriti o Waitangi | the Treaty of Waitangi and te ao Māori

Te ao Māori

9. Workplace culture and stakeholder relationships are self-explanatory and the point is simply that these are things we wish to focus on. The last objective, concerning te ao Māori, invites some elaboration.

10. In a speech to Te Hunga Rōia Māori o Aotearoa last year, the Chief Justice delivered a keynote entitled "Renovating the House of Law".[5] Her Honour mapped out what she described as the beginning of the development of an indigenous law of New Zealand, and an indigenous way of doing justice to meet the needs of our society. At the Commission, we have been asking ourselves, what is our contribution to the renovation? Are we architects, builders or painters? And what kind of renovation is it?

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[3] Geoffrey Palmer "The Law Reform Enterprise: Evaluating the Past and Charting the Future" (2015) 131 LQR 402 at 410.

[4] Samuel Mellor "Communications at the Law Commission: Toward a Strategy" (Law Commission internal paper, July 2020) at 3.

[5] Helen Winkelmann, Chief Justice of New Zealand "Renovating the House of Law" (Keynote Speech to Te Hūnga Rōia Māori o Aotearoa (Māori Law Society), Wellington, 29 August 2019).

11. Although we have identified te ao Māori as an area of strategic focus for the Commission, reflecting upon Māori law and its relationship with state law was in fact envisaged for the Commission right at the outset. I found it very interesting to read through the debates on the Law Commission Bill. One issue that emerges clearly from those debates is the desire to create a permanent and structured method of law reform. The other is the desire for that structured approach to law reform to suit the circumstances of this country.

12. The then Minister of Broadcasting, Jonathan Hunt, on behalf of the Minister of Justice, moved that the Bill be read for a second time. In his speech, he said:[6]

> I pause to emphasise that New Zealand society is not a carbon copy of societies in other countries. It has never been. Until recently, however, we have sometimes been slow to appreciate the implications of that. We are now shaking off the derivative tendency that has so dominated our legal thinking in the past. Our law and our law reform procedures should be tailored to our own special conditions and needs. One very important aspect of that … is that New Zealand is a bicultural society. It is a nation of two principal peoples. Our laws must reflect that fact if they are to be seen as just – and, indeed, legitimate. One of the most significant provisions of the Bill is therefore clause 5(2)(a), which enjoins the commission in making the recommendations to take into account te ao Māori, or the Māori dimension.

13. From the Opposition side, Katherine O'Regan proposed the amendment that resulted in the deletion of the word "shall" as it related to the Commission having regard to New Zealand's multicultural character. She suggested there were concerns that things were "going a bit far", but also that the proposed change would not detract from the commitment to Māori.[7]

14. Another Opposition member, Paul East had earlier noted his "considerable reservations" about the obligation to take into account te ao Māori.[8] He thought it might be possible for a person who is aggrieved with laws recommended by the Commission to be able to seek review of those laws for not properly taking into account the Māori aspect. As a legal argument this seems highly doubtful, given that the Commission has only recommendatory powers, but as a way to lay the foundation for his solution to the problem it works fine. His solution, posed as a question, was to ask the Minister of Māori Affairs why "there is not a Maori on the Law Commission to represent Maori views".[9] He continued: "He [the Minister] is silent… about why a Maori should not be appointed to the commission. Surely it is better to get in at the ground floor".[10]

15. These comments from the legislative history address two important themes. One is that our law should be a law of and for Aotearoa New Zealand. We have a rich and bicultural legal heritage. The second is that justice for Māori includes Māori points of view. Both themes are encompassed by the duty in section 5(2)(a) of the Law Commission Act. In meeting that duty, to begin with, the Commission needs to seek the views of Māori on what legal issues are important to Māori that the Commission should be reviewing in its work programme.

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[6] (3 December 1985) 468 NZPD 8643.
[7] (3 December 1985) 468 NZPD 8644.
[8] (12 November 1985) 467 NZPD 7966.
[9] (12 November 1985) 467 NZPD 7967.
[10] (12 November 1985) 467 NZPD 7967.

This may include the relevance of tikanga Māori, how Māori experience the relevant law, and / or Māori perspectives on how legal and social problems should be understood and addressed.

16. Barriers, risks and strategies to consider when planning effective engagement with Māori include consultation fatigue – or the idea that a relatively small pool of Māori (including Māori lawyers) is continuously asked for input, on a voluntary basis, often on complex projects, and sometimes at a point in a process that is too late to be meaningful. They also include in our case, the Commission's small size and limited budget, which impacts our reach, and the need to continuously enhance our cultural capabilities.

17. The Commission is fortunate in that we are supported and challenged in our work by a standing Māori Liaison Committee which, since 2013, has been chaired by Justice Joe Williams. The Committee may advise the Commission on how we engage and consult with Māori, on tikanga, and on how we frame our recommendations.[11] We also wish to build healthy and collaborative partnerships within te ao Māori and across the public and private sectors. For example, Te Hunga Rōia and the Commission signed a Memorandum of Understanding on 21 July 2020 which sets out a framework for cooperation.

18. So that is the first task, to seek to understand what the Māori world is telling us. The Commission must then consider the implications of what we learn in terms of law reform advice and recommendations. There are several possible options. They include:

    - We make recommendations that are not inconsistent with Māori perspectives or interests, and, potentially, seek to demonstrate respect for the independent authority of tikanga Māori.

    - Recommend measures for actively protecting Māori interests within state law which may include consideration of tikanga Māori.

    - Recommend other measures for protecting Māori interests without mainstreaming those protections in state law.

    - We find state law equivalents to tikanga Māori and make recommendations that draw on parallels with Māori perspectives. We try to find common ground but risk simplifying Māori concepts in the process.

    - We make recommendations that seek to adopt and incorporate Māori legal concepts in their own right and for general application.

19. This last approach is a version of the *Lex Aotearoa* discussed by Justice Joe Williams in a 2013 article, in which he argued that tikanga forms part of the general common law and should influence its development.[12] In the context of legislation, it is an ambitious approach although also the least complicated in an institutional sense,[13] and it can be combined with

[11] Law Commission "Māori Liaison Committee Terms of Reference" <www.lawcom.govt.nz> at [3].
[12] Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 15–16. Recent case law to consider the place of tikanga in state law include *Ngati Apa v Attorney-General* [2003] NZCA 117, [2003] 3 NZLR 643 at [17] and following; and *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [94] per Elias CJ.
[13] I note art 28 of sch 1 to the Arbitration Act 1996, which contemplates the parties choosing 'rules of law' to govern their dispute. In practice, in international commercial arbitration, parties sometimes use the choice of law flexibility of arbitration to apply more than one separate legal system to establish the

any of the others. In terms of renovations, we are talking about taking out walls and building extensions.

20. Some of the questions raised, again in the context of legislation, include how do we gain consent from Māori to use tikanga in this way, and then how can we, at the Commission, promote legitimacy in the implementation of laws that incorporate tikanga? The careful and gradual approach of case by case incorporation through the common law is possibly less risky and more flexible than statutory incorporation (although tikanga may become less flexible through its application under the common law too).[14] On the other hand, the law reform process may be more collaborative and less adversarial than adjudication and have a stronger social foundation as a result.[15]

21. We are also aware of concerns from within te ao Māori regarding the passing on of tikanga to state law (or its appropriation by state law), which makes the preliminary steps of consultation and engagement so fundamental to our work. I would add that tikanga will still maintain its own identity and mana separately from what happens in state law. But we need to make sure that state law properly fulfils its function of reflecting the values and aspirations of the society that it serves.

22. I go back to what Minister Hunt said in 1985 about the conditions for just laws, and by extension, just society. People are unlikely to accept or trust laws that they do not perceive to be just. In 1996 the Law Commission issued a paper on the privilege against self-incrimination, and devoted an entire chapter to te ao Māori. The chapter observed that: "Tikanga requires the alleged offender to face his or her accusers and admit wrongdoing and harm to the victim. There is an expectation that the offender and his or her whanau will restore the balance ….".[16] This prompted concern about a possible tension between tikanga and the presumption of innocence, and the risk of Māori not fully relying on their rights within the criminal justice system. The Commission suggested wider education about rights.[17] But the issue was that the rights made no sense to the people who were intended to benefit from them. Much has been written about Māori and the criminal justice system and I will leave the topic there,[18] except to note that in the 1996 report, the Commission recognised a potential problem under art III of the Treaty of Waitangi in terms of inequality under the law.[19]

Te Tiriti o Waitangi | Treaty of Waitangi

23. This leads then to te Tiriti o Waitangi and the Treaty of Waitangi, and the many questions we are asking ourselves regarding our relationship to them. Where do we fit within the state, and do we wear the Crown? On the one hand, the Commission has no decision-making

applicable rules of law. Combined laws using this method can be complicated to apply unless there is a rule for determining priority or resolution of conflicts.

[14] For examples of statutory incorporation, see Resource Management Act 1991, ss 6(e), 7(a) and 34A(1A); and Oranga Tamariki Act 1989, ss 4(a)(i), 4(g) and 5(1)(b)(iv).

[15] Although it should be noted that both parties appear to have agreed on a 'Statement of Tikanga' in the lead up to the recent case *Ellis v R*, as discussed in *Ellis v R* [2020] NZSC Trans 19 at 17.

[16] Law Commission *The Privilege Against Self-incrimination* (Preliminary Paper 25, September 1996) at [135].

[17] At 40.

[18] Moana Jackson *The Maori and the Criminal Justice System* (Department of Justice, Study Series 18, February 1987); and, more recently, Len Cook *A Statistical Window for the Justice System* (31 July 2020).

[19] Law Commission, above n 19, at [124] and following.

power, but on the other, it is part of the state infrastructure established by the Crown relying on the cessation of sovereignty in art 2 of the Treaty. What does it mean to distinguish between the Tiriti and Treaty texts and their principles in our law reform reviews? We are examining these issues in the context of each of our current projects. Our independence from government enables the Commission to engage in the relevant jurisprudence in innovative and progressive ways.

24. I think it is interesting to note that a Treaty clause was initially proposed for the Law Commission Act. I believe that the Treaty clause was removed because of concerns about its uncertain scope, as well as the lack of public conversation about what a reference to the Treaty in the Act could mean for the Commission. Apparently, including the obligation to take into account te ao Māori was a compromise.[20] In my view the obligation under the Act to take into account te ao Māori not only requires us to consider te ao Māori in terms of Māori law and interests, but it is also an opening for us to examine Māori perspectives on te Tiriti, or the Māori text of the Treaty. In this respect it was an inspired compromise which may give the Commission a degree of latitude that a Treaty clause may anyway have lacked. This is especially so because Treaty clauses can sometimes be quite limited in scope and effect.

The practical work of the Commission and the influence of te ao Māori

25. As a law commission we should do a range of work. Bringing up to date and keeping up to date general areas of law, laws that do not obviously fall within the province of any particular ministry and laws that straddle across several, and laws where independent review is desirable because, for instance, there is a strong difference of views.[21] The Commission has undertaken significant reviews in the criminal, family and public law areas recently.[22] Looking further back, the Commission has also undertaken significant work on general property law.[23] It is difficult to achieve a balance across different fields of law given our small size, although ideally we might undertake a little more work in the private law sphere in the future.

26. But to bring this talk to a conclusion, it is important for whatever work we do, that we not assume some legal problems will have a Māori dimension but others will not. To give an example, when I started at the Commission I assumed responsibility for the reviews of class actions and litigation funding. At first glance, the availability of a class action proceeding may appear to be of limited interest to Māori groups given rangatira and entities such as trusts and organisations like the New Zealand Māori Council exist and have pursued claims on behalf of the collectives they represent for decades.

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[20] My understanding of the situation stems from a conversation with a former President.

[21] Law Commission *Statement of Intent 1 July 2020–30 June 2024* (August 2020) at 7; Cabinet Office Circular "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (24 April 2009) CO(9)/1 at [8].

[22] See for example Law Commission *Review of the Property (Relationships) Act 1976 – Te Arotake o te Property Relationships Act 1976* (NZLC R143, 2019); Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua o te Evidence Act 2006* (NZLC R142, 2019); and Law Commission *Reforming the Law of Contempt of Court: A Modern Statute – Ko te Whakahou i te Ture mō Te Whawhati Tikanga ki te Kōti: He Ture Ao Hou* (NZLC R140, 2017).

[23] See for example Law Commission *A New Land Transfer Act* (NZLC R116, 2010).

27. That said, the class action may provide an alternative mechanism for people who wish to claim status as a collective, who wish to pursue a claim outside of the established group, or even to contest a claim against the established group. A class action procedure may also create a new expectation as to how collective claims should ordinarily be pursued. This may include an expectation that Māori claims be taken on a class action basis, at least where there is no legal entity to represent the collective – the Crown has made similar arguments against Māori litigants under the current High Court rules concerning representative proceedings.[24]

28. I was also interested in submissions made during the recent Supreme Court hearing in the *Ross* case, which involves a class action against Southern Response.[25] It is alleged that Southern Response misled certain people about the extent of their insurance entitlements following the Canterbury earthquakes. The key issue in the proceeding was whether class actions could proceed on an opt out basis; that is, everyone is in the class unless they opt out. Southern Response contended for an opt in approach, and argued this was more consistent with the principle of individual autonomy which helps to underpin our legal system. On the other hand, the New Zealand Law Society, as an intervener, noted that the common law also recognises tikanga values. Tikanga, they said, encompasses communal obligations and collective dignity.[26] These values are the kinds of values that we at the Commission should be taking into account in our law reform advice, where tikanga speaks for itself, to help build our laws and make them better.

[24] See *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17, 1 NZLR 423 at [649] and following; and *Paki v Attorney-General* [2014] NZSC 118, [2015] 1 NZLR 67.
[25] Leave to appeal was granted in *Southern Response Earthquake Services Ltd v Ross* [2019] NZSC 140, and the case was heard on 15–16 June 2020.
[26] New Zealand Law Society "Submissions for *Southern Response Earthquake Services Ltd v Ross,* SC 105/2019" (16 March 2020) at 2.