TE TIRITI INTO THE FUTURE

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INTRODUCTION

The question posed for this session is whether the Treaty and te Tiriti have a future. The topic we have been asked to consider is te Tiriti into the future. This foreshadows the answer: te Tiriti has a future. One of the matters we are grappling with in Te Aka Matua o te Ture concerns what role we have, as an independent Crown entity but nevertheless part of the state, to contribute to that future and support the Crown's responsible exercise of kāwanatanga. It is our potential role and contribution that I would like to discuss today.

Because we are independent, we are not constrained in how we think or what we say in the way that other agents of the state may be. We can challenge, educate, and promote community consciousness of the impacts of law and the benefits of law reform. On the other hand, we are limited by the work programme which is referred to us in the sense that some projects lend themselves more readily to Treaty analysis than others. Meaningful engagement on te Tiriti matters with Māori may be limited by a combination of general consultation fatigue and the nature of the work we have before us at any given time. We also strive to make recommendations which are practical and implementable, and this – given current constitutional arrangements and the implications of te Tiriti[1] – can limit aspiration.

I should clarify that, when I refer to te Tiriti, I mean the Māori text. We recently adopted a convention at Te Aka Matua to refer to "the Treaty of Waitangi" as a generic term to capture both the Māori and English texts, as well as the Treaty principles which have

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[1] As to which, see, for example, Claire Charters "The Elephant in the Court Room: An Essay on the Judiciary's Silence on the Legitimacy of the New Zealand State" in Simon Mount and Max Harris (eds) *The Promise of Law: Essays marking the retirement of Dame Sian Elias as Chief Justice of New Zealand* (LexisNexis, Wellington, 2020) 91.

developed over time through jurisprudence. If we say "te Tiriti" we mean the Māori text and the "English text" means just that.

It is no longer unusual to refer to te Tiriti as the Māori text rather than simply a Māori translation of the word treaty.[2] The increased recognition of te Tiriti in recent years is an important development in Aotearoa New Zealand jurisprudence and discussion, although we could also say that it has taken a long time for us to catch up on some important historical facts.[3]

I also wonder whether some recent statutory references to te Tiriti o Waitangi were intended as mere translations and symbolic gestures,[4] perhaps without realising that te Tiriti can be understood to mean the Māori text. Either that or there has indeed been a remarkable development in the law: for example, without debate on the change from earlier legislation, under the new Education and Training Act 2020 university councils must now acknowledge the principles of te Tiriti, rather than the principles of the Treaty.[5]

In our most recent report *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* | *The Use of DNA in Criminal Investigations* (*DNA* report), we observe that tino rangatiratanga is exercised within te ao Māori every day and independently of state law. We also say that in some situations, consistency with the Treaty may require that

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[2] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti* |*The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 11.

[3] For the record, it has long been acknowledged that most of the 500 plus rangatira who signed the Treaty, signed te Tiriti not the English text, following their debate and discussion in Māori. While some signed the English sheet, most if not all of them would have relied on the oral explanation of the Treaty's terms, in Māori, which likely reflected te Tiriti. See Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Te Mana Whatu Ahuru* | *Report on Te Rohe Pōtae Claims: Pre-Publication Version Parts I and II* (Wai 898, 2018) at 130, 136, 139–140 and 146. Also see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *He Whakaputanga me te Tiriti* |*The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 522:

> We … agree with the approach adopted by the Tribunal in previous reports, which have given special weight to the Māori text in establishing the treaty's meaning and effect. They have done so because the Māori text was the one that was signed and understood by rangatira - and indeed by Hobson himself.

Further, Ned Fletcher refers to the English text as the draft, which was then translated into Māori for signature. He also demonstrates that the British did not intend to acquire absolute sovereignty at the time: Ned Fletcher "A Praiseworthy Device for Amusing and Pacifying Savages? What the Framers Meant by the English Text of the Treaty of Waitangi" (PhD Thesis, University of Auckland, 2014) at xi and 99.

[4] See, for example, where the Resource Management Review Panel proposed referring (solely) to te Tiriti as an "important symbolic step": Resource Management Review Panel *New Directions for Resource Management in New Zealand* (June 2020) at 101.

[5] Compare Education Act 1989, ss 1A(3)(c)(iv), 181(b), sch 6 cl 16(2) and sch 21 cl 1(4)(b)(v); and Education and Training Act 2020, ss 4(d), 5(4)(c)(iii), 6(2), 9, 127(1)(a), 281(1)(b), 476(4)(b)(v) and sch 13 cl 4(d)(i).

provision for its exercise be made in state law through legislation.[6] In other words, te Tiriti is not only about the claim to tino rangatiratanga. It also requires us to think about what good kāwanatanga looks like.

Within our work at the Commission, te Tiriti has implications for how we should approach governance issues, tikanga Māori, and the development of better law for everyone in Aotearoa New Zealand. Drawing on the Commission's past, recent and current law reform work,[7] I have identified three inter-related issues for discussion today:

1. How to provide for tino rangatiratanga in national level governance.
2. The Commission's role in examining tikanga Māori within our work.
3. The Commission's role in developing Treaty principles.

TINO RANGATIRATNGA – KĀWANATANGA

I begin by briefly setting out a working understanding of tino rangatiratanga and kāwanatanga to provide a basis for the comments that follow. I also note that much of the Treaty discussion about tino rangatiratanga has focussed on its juxtaposition to the notion of sovereignty. For instance, tino rangatiratanga from article two of te Tiriti has been translated as the "unqualified exercise of … chieftainship".[8] The concept of rangatiratanga, when viewed from within, is more complex.

Rangatira are weavers of people. Rangatiratanga can embody the authority of a rangatira as well as that of the people.[9] It involves the exercise of mana in accordance with and qualified by tikanga and its associated kawa, and through tikanga, the managing of a dynamic interface between people, their environment and the non-material world.[10] Rangatira are responsible for coordinating community efforts, safeguarding kainga and whenua, mediating and arbitrating disputes, weaving the

[6] *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [2.16].
[7] In particular, *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi | The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989); *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006); and *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020).
[8] IH Kawharu translation of te Tiriti in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 662–663.
[9] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Report of The Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 132-133.
[10] New Zealand Māori Council *Kaupapa: te wāhanga tuatahi* (1983) at 5–6.

people and repairing the fabric. Rangatira exercise diplomacy and promote and defend whānau, hapū and wider interests.[11]

It is the substance of this rangatiratanga that needs to be upheld and not interfered with. For their part, rangatira accepted and supported the Crown governing settlers and establishing kāwanatanga in Aotearoa New Zealand within an atmosphere of mutual tolerance and respect. In effect, te Tiriti envisages the co-existence of different but intersecting systems of political and legal authority.[12]

THREE ISSUES

1. Tino rangatiratanga in national governance

Te Tiriti is premised, on the Māori side, on decentralised hapū level political leadership and governance. In this respect it provides an "important link" between Māori legal traditions and legal pluralism.[13] Today, in many contexts governance now also needs to operate more widely at iwi and even national levels. One of the challenges therefore is to determine how tino rangatiratanga can be recognised and exercised within these wider contexts. This includes consideration of whether national political unity is desirable or achievable. Over the decades since 1840 there have been numerous examples of national organisations which have successfully advanced Māori interests. Questions of authority and long-term sustainability may however remain somewhat unresolved.[14]

At a more micro level, a challenge for the Commission is to consider when and how we should develop proposals for securing the expression of tino rangatiratanga within specific regimes operating in state law, or independently of it. We may also need to be cognisant of the inherent limitations of national level governance when measured in terms of the more traditional kinship-based leadership which is expressed in te Tiriti.

[11] New Zealand Māori Council *Kaupapa: te wāhanga tuatahi* (1983). The Council said, "[i]n pragmatic terms, [rangatiratanga] means the wise administration of all the assets possessed by a group for that group's benefit: in a [Pākeha] word, trusteeship.": at 5.
[12] See Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) at 42.
[13] At 42.
[14] See IH Kawharu "Common property, Māori identity and the Treaty of Waitangi" in Peter Larmour (ed) *The Governance of Common Property in the Pacific Region* (ANU E Press, Canberra, rev ed 2013) 89 at 98–101.

In our recently completed DNA project, it became evident through consultation and our research that the collection, use and storage of DNA for the purpose of criminal investigations could engage tikanga in significant ways through methods of collection and analysis and the holding of whakapapa information by the state. As in the criminal justice system more generally, Māori are also well over-represented in the DNA collection statistics. We concluded that DNA legislation, as a minimum, should (a) provide for ongoing Māori participation in oversight, (b) enable Māori to articulate how Māori rights and interests are engaged by the regime to ensure their protection by the Crown, and (c) provide the means for the Crown to promote equity.[15]

We considered various options for Māori participation in oversight, such as whether there should there be a separate Māori body involved, and if so, what should be the scope of its mandate and to whom should it report. A separate Māori body might enable a wide range of Māori views to be represented, but we concluded it would also create potential for conflict and uncertainty.[16]

We decided instead to recommend a shared model of a single oversight committee comprising between 5 and 7 members with a minimum number of three members who are Māori.[17] Among its functions, we recommend the committee monitor the impact of the proposed regime on Māori and advise Police on collection procedures. We recommend that the committee should be able to regulate its own procedures, including in relation to whether the Māori caucus should have its own responsibilities (such as exercising a kaitiaki role over Māori DNA).

The proposal cannot assure the representativeness of members in terms of Māori society as a whole, nor engagement with hapū. That said, we expect the Māori caucus would be able to meet separately and consult with Māori as needed. We also recommend appropriate consultation on appointments.[18]

[15] *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [2.28].
[16] At [5.91].
[17] At [5.90].
[18] At [5.90] and [5.92].

2. Tikanga

The second issue concerns the relationship between te Tiriti and tikanga Māori.

Here, the work for the Commission includes:

- interpreting social problems in terms of tikanga (rather than asking what the tikanga answer is to a predetermined legal question); and
- examining whether the answers to those problems may lie in the exercise of Māori tino rangatiratanga, in the recognition of tikanga in the development of state law (in regimes for the benefit of Māori specifically, or for the benefit of everyone), or in a combination of these approaches.

In our current review of Succession Law for example, we intend to present our consideration of ao Māori issues within a Treaty framework, recognising that the review triggers the guarantee of tino rangatiratanga. We have heard from some Māori during our preliminary engagement that there is a strong desire to exercise authority over succession matters in accordance with tikanga.

Broadly, relevant questions we intend to ask in our Issues Paper include:

- Is the application of general law to succession a problem?
- If yes, does this relate to all property, or only taonga?
- Should tikanga be able to operate without being affected by state law?
- If yes, should it be recognised by state law?
- Or, should tikanga be recognised within state law?

Looking back, in the Commission's 1989 paper *Mataitai: Nga Tikanga Māori me te Tiriti o Waitangi*, we examined Māori customary fishing rights as well as rights to the foreshore and their protection under the Treaty.[19] There is some tension and equivocation in the Commission's Treaty analysis; it reflects its time, but in some respects – and demonstrating our independence – it was also ahead its time and challenged some basic assumptions.[20]

[19] As an aside, the Commission used Aotearoa to refer to the place that Māori came to, and to New Zealand as the colonised state: *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi | The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [5.3] and [5.4].

[20] Neither of the texts needs to be secondary, we said (in case the English text might be thought to govern): at [7.4].

The paper discusses the *Lands* case and the Court of Appeal's conclusion that the principles of the Treaty require the Crown to respect, guarantee and actively protect Māori rights.[21] Recognising that the Treaty is not only about rights, but also their source, the *Mataitai* paper goes on to say in response to *Lands*:[22]

> A choice of approaches, however, exists, and is fundamental. What is the proper starting point of a consideration of Māori fishing claims? Hitherto, this has been taken as Crown sovereignty over the sea and the seabed. The alternative is Māori 'rangatiratanga' over fishing resources.

The comment foreshadows the reorientation we are increasingly seeing today towards the co-existing governance structures that are envisaged in te Tiriti. In *Mataitai* the Commission also cautioned against analysing rights through familiar Western concepts of authority and property and encouraged the development of new arrangements and thinking which is premised on tikanga perspectives.[23] For the future, matters that will need to be further examined include how such arrangements can be developed not only upon tikanga-based jurisprudence, but also the extent to which and how they can be developed and supported without being dependent on state legislation for their existence.

Given the political settlement in respect of Māori fishing rights, the Commission did not need to make recommendations or give advice about law reform. Even so, the paper records the Commission's extensive research into the then available anthropological literature on tikanga pertaining to fishing rights, including literature concerning how those rights were identified and maintained in some areas.[24] It is a good illustration of the depth of knowledge about certain tikanga that has long been reduced into writing, but will not be found in many law libraries. Given the political settlement, the Commission did not consult on the findings from its research to ascertain whether, for

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[21] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641.
[22] At [2.12]. In making this statement, the Commission referred to the Waitangi Tribunal's Muriwhenua Report: Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988). The Commission commented that the essence of the Tribunal's position was that the true question is to ask what the Crown can seek from Māori rather than what it should concede to Māori.
[23] See *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* | *The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [3.9]–[3.11] and [14.12]. Settlements in respect of Te Urewera and Whanganui River are examples of such arrangements which have been adopted since *Mataitai*.
[24] See generally *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* | *The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at ch 6 and 16.

example, the relevant practices had changed over time or were limited to particular areas.

Several years later in the Commission's 2006 *Waka Umanga* report, we set out a proposed law for Māori governance entities. The report was a follow up to our 2002 advisory report to Te Puni Kōkiri and others which found significant deficiencies with the legal models available to Māori for receiving settlement assets.[25]

The report's recommendations were not implemented for a range of political and substantive reasons. The Māori Party commented that the Waka Umanga Bill "derails the possibility of hapū and iwi developing models of governance consistent with and expressive of tikanga Māori and tino rangatiratanga, and having those models duly recognised".[26] Ani Mikaere described the Waka Umanga proposal as an attempt to maintain Crown domination in the guise of cultural sensitivity.[27]

The overarching objective of the proposed law was to contribute to the rebuilding of Māori institutions by providing a process and model which could be adapted to suit the needs of individual hapū and iwi.[28] The need was, and still is, a pressing one. I think the basic approach was right: Government, exercising kāwanatanga, has a responsibility to support hapū and iwi governance,[29] but perhaps this could be achieved through devising a collaborative process for recognition rather than by providing tikanga inclusive templates.

More recently in the *DNA* report, we say that tikanga is constitutionally significant to the development of the law in four respects:[30]

- First, as an in dependent source of rights and obligations in te ao Māori and the first law of Aotearoa.
- Second, where tikanga values comprise a source of the common law or have been integrated into state law by statutory reference.

[25] *Treaty of Waitangi Claims: Addressing the Post-Settlement Phase — An Advisory Report for Te Puni Kokiri, The Office of Treaty Settlements and the Chief Judge of the Māori Land Court* (NZLC SP13, 2002).
[26] Waka Umanga (Māori Corporations) Bill 2008 (175-2) (report) at 21.
[27] Ani Mikaere *Colonising Myths — Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 267–268.
[28] *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2008) at [1.1]–[1.2].
[29] *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2008) at [1.2]–[1.3].
[30] At [2.30].

- Third, in terms of the Treaty rights and obligations that pertain to tikanga. These include the guaranteed exercise of tino rangatiratanga in accordance with tikanga.[31]
- Fourth, to give effect to the country's international obligations in relation to Māori as indigenous people, including under the UNDRIP.

Each of these reasons may be sufficient on their own, but collectively they are also mutually reinforcing. For example, the decentralising interpretation of te Tiriti outlined earlier supports the operation of tikanga in different normative settings, and thus the generation of contemporary tikanga practices. Such contemporary practices should in turn help to sustain the recognition of tikanga values in the common law.

In the *DNA* report we seek to provide for rangatiratanga (through oversight) according to tikanga values which we embed in our recommendations for new legislation. For example, in the criteria for issuing sample compulsion orders, where we acknowledge that Māori collective responsibility can worsen the power imbalance between police and criminal suspects.[32] We do not propose that tikanga concepts themselves be applied directly. This approach may help address the concern that tikanga values may be distorted through misunderstandings in their application in practice. The approach may also contribute to subtle changes in the underlying values of state law. We explicitly identify where we think there are differences between tikanga Māori and Pākehā values as they relate to the collection and use of DNA.[33]

3. Treaty principles and equality

The third issue concerns Treaty principles. There is a need to direct Treaty principles towards achieving the aspirations of te Tiriti, rather than the principles becoming the aspirations themselves, and here I think the Commission can play a useful role. For example, in the *Mataitai* paper, we questioned the partnership paradigm, describing

[31] The guaranteed protection of tikanga is also reflected in the so-called "fourth article" of te Tiriti (which arose from the "Pompallier episode"). This is discussed in *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* | *The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [16.9]–[16.10].
[32] *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* | *The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [8.29].
[33] *At* [2.50].

the partnership ideal as "valid and fruitful but insufficient".[34] In each case we said, one must start by asking "How was and is authority to be shared"?[35]

The Commission also has a role in developing jurisprudence through the application of Treaty principles to different projects and articulating new principles when answers cannot be found in the existing ones. In effect, the Waka Umanga proposal was an attempted application of the principle of options that had earlier been discussed by the Waitangi Tribunal in *Muriwhenua*.[36]

Article 3 of te Tiriti provides that the Crown will ensure Māori have the same rights and duties of citizenship as the people of England. At a minimum, article 3 secures equal treatment under the law.[37] Article 3 also works to bring together the first two articles and for this purpose gives rise to more nuanced principles that help to secure that outcome.

In the *DNA* report for example, we explain that the principle of equity that arises from article 3, and the principle of active protection, operate together to impose on the Crown an obligation to reduce iniquities between Māori and non-Māori in the collection and use of DNA by Police.[38]

In *Mataitai*, we discussed article 3 in terms of equality. We connected the minimum condition of article 3 to the rule of law principle that requires those in like circumstances to be treated alike. We also observed that the rule of law in the full sense has to do with the content of the law as well as its equal application. Law "arises out of the circumstances and reflects the experience, perspectives and values of those who make it".[39] Subjecting Māori to the "rules of English derived law" we said, "is to deny

[34] *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* | *The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [7.50].
[35] We also asked "[w]hat things in New Zealand … belong to 'sovereignty' and what to 'rangatiratanga'": at [7.50].
[36] Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1988) at 195.
[37] The notion that "everyone in New Zealand who is a citizen has the same rights and obligations as every other citizen" was proposed as a Treaty principle in the failed Treaty of Waitangi (Principles) Bill 2005, cl 8.
[38] *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* | *The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [2.5]–[2.6].
[39] *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi* | *The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [13.5].

rather than promote real equality".[40] By implication, good (state) law treats the values of tikanga Māori and English derived law as equals and needs to draw from both.[41]

CONCLUSION

Kia whakatōmuri te haere whakamua. We walk backwards into the future. In that spirit, and having considered the Commission's past and then projected into our future, it is appropriate that I end with a quote from TS Eliot's poem, *Burnt Norton*, which was reproduced in the *Mataitai* paper:[42]

> Time present and time past
>
> Are both perhaps present in time future
>
> And time future contained in time past

Burnt Norton is the first of Eliot's Four Quartets. The Quartets were his final poems and are considered by many to be his finest. As one reviewer has noted, "these four great poems are a total statement after which there was nothing much left for him to say".[43] In a future report, I can imagine Te Aka Matua o te Ture wanting to be able to include a passage from *The Dry Salvages*, Eliot's third Quartet. It reads:

> Here the impossible union
>
> Of spheres of existence is actual
>
> Here the past and future
>
> Are conquered and reconciled

[40] At [13.7].
[41] On equal citizenship, see Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal *Mangonui Sewerage Report* (Wai 17, 1988) at 60. The wider objective of equal citizenship was also evidenced by the discussion of the Waitangi Tribunal in *He Whakaputanga me te Tiriti |The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 524.
[42] *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi | The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at v.
[43] Roz Kaveny "Four Quartets: TS Eliot's struggle to make the real world right in a spiritual realm" *The Guardian* (online ed, London, 19 May 2014). Kaveny discusses Eliot's use of spiritual and metaphysical themes to address hope, regret, loss and redemption. Considering Kaveny's discussion, I think Eliot's spheres of existence may refer to the hope we hold for a better future and our regret at what we have not yet achieved, where the contemplation of both creates the path towards the 'destiny of our souls'.