Te Aka Matua o te Ture: *The Parent Vine of the Law*

Hui-ā-tau o te Hunga Rōia Māori o Aotearoa, 2 July 2021

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Introduction

Since joining the Commission, I have had a few opportunities to discuss our objectives concerning te ao Māori. Today I want to take a broader view, so that our work on these matters can be seen in the context of the Commission as a law reform institution.

There is much I did not know about the Law Commission before becoming a Law Commissioner. For example, I did not know that the Commission was an independent Crown entity, or what that even meant. I knew it had produced an excellent report on arbitration law in 1991, and on reforms to the land transfer system in 2010.[1] Both these reports have informed my research and teaching on those subjects in my prior time as an academic. I think this may be a common perception of the Commission: we produce substantial reports that lead to major reforms on core areas of law.

The purpose of my talk today is to address two things. The first concerns the reasons for the establishment of the Law Commission and the incorporation of a Māori dimension into the Commission's statutory mandate. The second concerns how we are going about fulfilling – or attempting to fulfil – that part of our mandate.

1 Establishment of Te Aka Matua o te Ture

Early reform institutions and their replacement

The Law Commission was established by the Law Commission Act 1985 with the ambitious overarching purpose to "promote the systematic review, reform and development" of the law.[2] In explaining this purpose, I thought I might start by describing what we replaced.

Semi-formal law reform institutions have been in place in Aotearoa since 1937, when the then Minister of Justice and Attorney General Rex Mason established and chaired what was called the *Law Revision Committee*. There was no formal constitution for the committee and its membership comprised people invited by the Minister to join it. Proposals for reform projects

* Tumu Whakarae o Te Aka Matua o te Ture. My thanks to Toni Wharehoka for her footnoting assistance.

[1] Te Aka Matua o te Ture | Law Commission *Arbitration* (NZLC R20, 1991); and Te Aka Matua o te Ture | Law Commission *A New Land Transfer Act: In Conjunction with Land Information New Zealand* (NZLC R116, 2010).

[2] Law Commission Act 1985, s 3.

were generated by committee members, the New Zealand Law Society and the Department of Justice. Papers and reports were prepared by members or co-opted lawyers and academics.

This system was replaced in 1965 by a new *Law Revision Commission*, which was later renamed the *Law Revision Council*. The Commission / Council was established as an oversight body, which allocated law reform projects to new specialist committees covering particular fields of law. These included, for example, a Property Law and Equity Committee, and a Public and Administrative Law Committee. The new committees were more specialised and were therefore viewed as more effective, but as with the predecessor model, membership was part-time and voluntary.

It is important to acknowledge the contribution of these committees to the development of law by and for this country. Between 1937 and 1965 for example, the Law Revision Committee made around 160 proposals for legislative reform, the great majority of which were taken up. [3] Among these reforms, the Committee was responsible for the Law Reform (Testamentary Promises) Act 1949 – I make special mention of this legislation because we are now reviewing it as part of our current review of succession law.

In addition to the work of these reform committees, law reform was also achieved through other committees, government departments and special commissions. But the generally voluntary and ad hoc nature of the law reform institutions had some serious limitations. The committees were not supported by their own research capacity, and they were practically limited to discrete work of a technical nature. There was no clear mandate or institutional purpose. There was no real institutional accountability either, except that any reforms would need to pass through the ordinary parliamentary process.

Overseas, law reform agencies were being established in places like Canada (for example, in Ontario, 1964), the United Kingdom (the English and Scottish commissions, in 1965) and Australia. These developments highlighted limitations in New Zealand's committee-based approach. Other factors also contributed to the sense that new and better machinery for law reform was required. These included changes in social values over time; better recognition of the complexity of our society and that we are not homogenous; the increase in the volume of statute law (that would benefit from some general oversight and consistency in its development); and the growing influence of international law on domestic law.

[3] Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 16–17.

In light of these issues, the Labour Party included the creation of a law reform agency in its 1984 manifesto. A Law Commission Bill was introduced and then passed in 1985 through the leadership of Sir Geoffrey Palmer, and the Commission began operations in 1986. (Sir Geoffrey also served as President from 2005 to 2010.) The Public and Administrative Law Committee survived in a modified form to become the Legislation Advisory Committee, which is now called the Legislation Design and Advisory Committee or LDAC.

The Commission was established with high expectations for a systematic approach to law reform. In many respects that goal is not achievable, at least with our current resources. In preparation for the interview for my role, I identified around two dozen statutes that probably needed review – they include, for example, the Maori Housing Act 1935, which defines "Maori" to include "any Polynesian who is a native of any island of the South Pacific Ocean and any person who is a descendant of such a Polynesian if, in either case he is a New Zealand citizen or he has lived in New Zealand for 3 years…".[4] I thought a cultural audit of legislation might be in order.

I was not asked in the interview if I had any ideas about law reform projects. This is probably just as well, because in hindsight a systematic review of the statute books is unrealistic – the task is too great. We do however systematically review relevant parts of it in the context of our projects, and, as I will explain later, we are also developing our systematic approach to our consideration of te ao Māori.

Distinctive features of Te Aka Matua o te Ture

I wish to highlight some distinctive features about the Commission.

Our name

The first is that there was deliberate choice not to include the word "reform" in our name (in contrast to the names of some overseas agencies). This was to make clear the intention that the Commission would have wider constitutional responsibilities than updates to statute law, including through advice on how legislation should be written, and through contributions to the development of the law in general.[5]

A good example of a contribution to law's development is the series of study papers published by the Commission.[6] Unlike a report, a study paper does not result in advice to the

[4] Maori Housing Act 1935, s 2A.
[5] Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 38. The Australian federal agency is called the Australian Law Reform Commission, although the reference to 'reform' in its name does not seem to have disinclined the ALRC to engage in interesting conversations on constitutional matters.
[6] The Commission has a broad statutory function to "take and keep under review in a systematic way the law of New Zealand" and may initiate studies for this purpose. See Law Commission Act 1985, ss 5(1)(a), 6(2)(a) and 6(2)(b).

Minister with recommendations for law reform. Instead, it is publicly released to provide guidance on legal concerns, to promote discussion of its content, and to support the Commission's other work. The Commission's 2001 Study Paper, *Māori Custom and Values in New Zealand Law*, is one of our most highly cited publications, and it has made a significant contribution to the understanding of tikanga Māori as a legal system.[7] We have recently initiated another study paper project concerning the country's legal and institutional framework for emergencies. It will focus on pandemics, but we expect it will guide responses to other emergency threats as well.[8]

Returning to the matter of our name. Our ingoa Māori, Te Aka Matua o te Ture, was given to the Commission many years ago but I am yet to discover exactly by whom or how. It translates as the 'parent vine of the law'. Many of you will be familiar with the pūrākau of the parent vine that Tāwhaki used to climb up to the heavens. At the foot of the ascent, he and his brother, Karihi, find their grandmother Whaitiri, who guards the vines that form the pathway up to the sky. Karihi tries to climb the vines first but makes the mistake of climbing up the aka taepa, a hanging vine. He is blown around by the winds and falls to his death. Following Whaitiri's advice, Tāwhaki climbs the aka matua, reaches the heavens and receives the three baskets of knowledge.

I recently came across a Ngāti Whātua manuscript. It was translated in the 1950s but was written much earlier. It varies the script. In this version, Tāwhaki instructs his brother to return home to care for their families.[9] It is less dramatic, but the same message is clear – the path to true knowledge can be long and difficult, and it may be important to hear from others when deciding which path to take.

Our work programme

The second feature to note about us is that Te Aka Matua has the power to self-initiate projects (again, in contrast to some overseas agencies).[10] The emergencies project I mentioned is self-initiated work, although as a study paper project it will not produce recommendations for law reform. That said, the power to initiate our own work is seldom exercised given our resource limitations. Self-initiated projects have also been less successful than government referred work in terms of eventual implementation.[11] It is probably stating the obvious that work which is wanted by government is more likely to be implemented,

[7] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001).
[8] The study paper will be written by Professor Janet McLean QC FRNZ who has been commissioned by Te Aka Matua o te Ture for this purpose.
[9] Hauraki Paora *This was the beginning* (transl 1958) 26. Original held in the Alexander Turnbull Library collection.
[10] Law Commission Act 1985, ss 6(2)(a) and 6(2)(b). In contrast for example with the situation of the ALRC, which works solely on projects referred by the Attorney General.
[11] Geoffrey Palmer *Evaluation of the Law Commission* (Ministry of Justice, 28 April 2000) at 60.

although there is always the chance of a change in government and a future government wanting it less. It may also be obvious that our reputation and perhaps existence depends on at least a reasonable amount of work being implemented.[12]

Almost all of our work therefore is referred by government or occasionally Parliament. When deciding what laws really need reform, it can be difficult to separate out legal, social and political issues from each other. To help determine what projects should be referred to the Commission, potential projects are assessed against criteria included in a Cabinet Office circular.[13] They include whether the project requires fundamental review, or independent consideration to promote informed debate or because of a significant difference of views, or at the other end of the scale, because the work is of such a technical 'lawyers' law' nature that it might otherwise be overlooked.[14]

On our current work programme, we are reviewing:

a. class actions and litigation funding,

b. succession law,

c. surrogacy, and

d. adult decision-making capacity.

Our independence

The third feature to note is that we are an independent Crown entity or in the language of Wellington, an ICE. We are not independent in all respects: we liaise with government in the development of our work programme and receive that programme from our responsible Minister; we bid for budget increases; and have myriad reporting obligations to ensure accountability for how we spend our pūtea.

We are independent in the sense that it is not our role to translate government policy into law reform advice. In this respect we differ fundamentally from government departments and ministries that carry out directions from their minister and give effect to government wishes. At the Commission, our independence from those considerations can support our ability to engage with stakeholders, who may be confident that we will approach our work with an open mind. We can challenge and educate on law reform issues. We also strive to

[12] The limited resourcing allocated to implementation and the lack of a strong law reform culture within the Executive and Parliament is a problem many law commissions face.
[13] Cabinet Office "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (24 April 2009) CO 09/1 at [8].
[14] Cabinet Office "Law Commission: Processes for Setting the Work Programme and Government Response to Reports" (24 April 2009) CO 09/1 at [8].

make recommendations which are relevant, practical and implementable. To be implementable, recommendations have to be accepted. There will be times when a balance has to be struck between principle and pragmatism.

We currently operate with three Law Commissioners: Donna Buckingham, Helen McQueen and me. We have a talented and dedicated staff of thirteen legal and policy advisers and five law clerks, all supported by a hard-working corporate staff of four.

I am (only) the fourth Māori Law Commissioner – my predecessors are Sir Eddie Durie, Sir Ngatata Love and Judge Denese Henare. We are supported in our work by a standing Māori Liaison Committee comprising Māori judges and experts in te ture Pākehā and tikanga Māori. The Committee may advise on how we engage with Māori, on tikanga, and on how we frame our recommendations. The Committee has been chaired since 2013 by Justice Joe Williams.[15]

2 Te ao Māori and Te Aka Matua o te Ture

The section 5(2)(a) obligation to take into account te ao Māori

Against that background, I now want to introduce the ao Māori dimension to our work: our statutory duty to take into account te ao Māori; our thinking on te Tiriti o Waitangi; and how we go about seeking to inform ourselves about te ao Māori within our different projects.

Section 5(2)(a) of our Act requires the Commission to *consider* the multicultural character of New Zealand society. The same provision requires the Commission to *take into account* te ao Māori. Interpreting these two obligations together, the Act views Aotearoa inclusively as a multicultural country with a bicultural foundation.[16]

It is also clear that reflecting upon Māori law and its relationship with state law was envisaged for the Commission at the outset. There were really only two key issues that were debated in the House on the Law Commission Bill. One was whether to have a permanent law reform agency, and the other was how to ensure the proposed agency would approach law reform in a way that suits the circumstances of the country.

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 expressed some despair at the "derivative tendencies" that dominate legal thinking in this country, and our cut and paste approach to law reform. He also said:[17]

[15] See Te Aka Matua o te Ture | Law Commission "Māori Liaison Committee Terms of Reference" <www.lawcom.govt.nz>.
[16] This view of Aotearoa is also taken, for example, in Claire Charters "Law reform: Te Ao Māori" (Keynote address at the Law Commission 30th Anniversary Symposium, Wellington, 3 November 2016).
[17] (3 December 1985) 468 NZPD 8643.

> 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.

The commitment to including te ao Māori within the Commission's mandate was not seriously disputed. From the Opposition side, Katherine O'Regan proposed deleting the word "shall" as it related to the Commission having regard to New Zealand's multicultural character. She suggested that would be taking things a bit too far, but also that the proposed change would not detract from the commitment to Māori.[18] Another Opposition member, Paul East had considerable reservations about the obligation to take into account te ao Māori, owing to the lack of any requirement for a Māori Commissioner.[19]

These comments from the legislative history address two important themes. The first 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 Māori perspectives on what justice means, and what is needed to achieve it, are important. People are more likely to accept laws if they perceive them to be just. Both these themes are encompassed by the duty in section 5(2)(a) of the Law Commission Act.

No Treaty clause

It is also relevant to note at this point that there is no mention of te Tiriti o Waitangi, the Treaty of Waitangi, or the principles of either, or both, in our legislation. A Treaty clause was initially proposed for the Act, but I believe it was removed because of concerns about its uncertain scope, as well as the lack of public conversation about what a reference to the Treaty of Waitangi in the Act could mean for the Commission. Apparently, including the obligation to take into account te ao Māori was a compromise.[20]

The obligation 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 the Māori text, te Tiriti o Waitangi (te Tiriti). In this respect it was an inspired

[18] (3 December 1985) 468 NZPD 8644.
[19] (12 November 1985) 467 NZPD 7967.
[20] My understanding of the situation stems from conversations with former Commissioners.

compromise which may have given the Commission a degree of latitude that a Treaty clause may anyway have lacked.

Te Aka Matua o te Ture jurisprudence

The statutory duty to take into account te ao Māori provides an opportunity for Te Aka Matua to undertake a normative role and contribute to a wider and more enduring understanding and recognition of te ao Māori, including with respect to te Tiriti and tikanga Māori. We have an opportunity to examine the place of tikanga in the context of our work programme, and to consider how Māori perspectives can be advanced and maintained within each project.

An early example of the Commission's Treaty jurisprudence can be found in the Commission's 1989 paper *Mataitai: Ngā Tikanga Māori me te Tiriti o Waitangi*, where we examined Māori customary fishing rights and their protection under the Treaty. (I refer to 'the Treaty' generically, to include both the English and Māori texts and the principles.) There is some equivocation in the Commission's Treaty analysis. Māori fishing rights had become highly politicised, and political events (and the political settlement in respect of fisheries) overtook the advice the Commission had been asked to provide. Even so, in some respects the paper was ahead of its time. Demonstrating the value of our independence, it also challenged some basic assumptions.[21]

For instance, 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.[22] In response to the Court's interpretation of the Treaty in *Lands*, the Commission said in the *Mataitai* paper that:[23]

> 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.

It is interesting how the Commission, in 1989, recognised the possibility that the Treaty is not only about the protection of legal rights but also the source of those rights, and that there

[21] Te Aka Matua o te Ture | Law Commission *Maitaitai: Ngā Tikanga Māori me te Tiriti o Waitangi | The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989). Neither of the texts needs to be secondary, we said (in case the English text might be thought to govern): at [7.4].
[22] *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (HC) at 664. [para???].
[23] Te Aka Matua o te Ture | Law Commission *Maitaitai: Ngā Tikanga Māori me te Tiriti o Waitangi | The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) 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.

are two possible sources of legal authority operating in this country. The paper also questions the Court's discussion of the Treaty principle of partnership, essentially finding it under-done, commenting that the implications would need to be explored,[24] and at any rate, the analysis should start by asking "how was and is authority to be shared".[25] It is reassuring to know that, as we develop our current thinking, we have some robust in-house precedent.

Another key example is the 2001 Study Paper *Māori Custom and Values* I mentioned earlier, together with the working papers that formed the basis of the study paper.[26] (In-house, we call it SP9, or Study Paper number nine.) The paper was initiated at the suggestion of Sir Eddie Durie in 1994, when he was Chief Judge of the Māori Land Court. He thought that some knowledge of tikanga would assist judges in carrying out their judicial functions and help to cast tikanga in more jurisprudential terms. In the event, the paper does more than provide guidance. It also encourages, in light of the Treaty, a broader discussion about the role of tikanga in the development of the law.

In its conclusion, the paper says:[27]

> If society is truly to give effect to the promise of the Treaty of Waitangi to provide a secure place for Māori values within New Zealand society, then the commitment must be total. It must involve a real endeavour to understand what tikanga Māori is, how it is practised and applied, and how integral it is to the social, economic, cultural and political development of Māori, still encapsulated within a dominant culture in New Zealand society.

We have not always approached Māori issues through a Treaty lens. There is extensive discussion of Māori concerns in a report on the sale of alcohol, but this is not in the context of what the Treaty (or te Tiriti) might require in response to those concerns. Māori alcohol consumption, including high rates of hazardous drinking among Māori, is identified as a problem. Despite the absence of a constitutional framing, the problem is contextualised very

[24] Te Aka Matua o te Ture | Law Commission *Maitaitai: Ngā Tikanga Māori me te Tiriti o Waitangi* | *The Treaty of Waitangi and Māori Fisheries* (NZLC PP9, 1989) at [14.12].
[25] At [7.50].
[26] These include working papers on tikanga written by Sir Eddie Durie, Whaimutu Dewes, Dame Joan Metge, Justice Joe Williams, David V Williams and others. See Te Aka Matua o te Ture | Law Commission "Our publications" <www.lawcom.govt.nz>.
[27] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [402]. At [403], the paper adds: However, it is critical that Māori also develop proposals which not only identify the differences between tikanga and the existing legal system, but also seek to find some common ground so that Māori development is not isolated from the rest of society.

frankly in terms of a legacy of colonialism and cultural alienation, and as a further driver of ongoing inequality.[28]

Our view on the Treaty texts. Last year we published a report on the collection and use of DNA in criminal proceedings. More recently, we published an issues paper (consultation document) on succession law. In both publications, we explain the well-known differences between the two treaty texts and note how the overwhelming majority of Māori signatories signed the Māori text rather than the English one.[29] In the succession paper, we articulate our view on the relationship between articles one and two of the Māori text. We observe that rangatiratanga is exercised within te ao Māori every day and independently of state law, but also that in some contexts, consistency with te Tiriti may require that provision be made for tino rangatiratanga in legislation. We say in the succession paper that this approach allows an end to debating the different texts in an effort to try understand what was exchanged between the Crown and Māori. Instead, it focusses our attention on the relationship between tino rangatiratanga and kāwanatanga and working through how the relationship should be given substance in a given law reform context.[30]

Our role in supporting responsible kāwanatanga. More generally, a focus on te Tiriti allows us to consider the idea that, through the process of te Tiriti, the signatories were each asserting their mana in the expectation of a new and ongoing relationship in ways that made sense to them. I think of the reconciliation that took place between the Ngāpuhi rangatira, Hone Heke Pokai and Governor Grey. They finally met about two years after the abandonment of Ruapekapeka. Heke offered Grey his mere, as a token of his acceptance of Grey's kāwanatanga. But to Heke, Grey's acceptance of the mere was also a token of Grey's recognition of his rangatiratanga.[31] Heke was not giving anything away; quite the opposite. It is now for Māori to restore the honour of the Crown, and for the Crown to remember, recognise and respect the mana of Māori. As an agency created to give law reform advice to government, we think the Commission has a role in supporting the Crown's responsible exercise of kāwanatanga, including by asking when this requires provision for the exercise or recognition of tino rangatiratanga in legislation.

[28] Te Aka Matua o te Ture | Law Commission *Alcohol in our Lives: Curbing the Harm* (NZLC R114, 2010) at [3.36], [3.95] and [3.104]—[3.110].
[29] Te Aka Matua o te Ture | Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [2.6]—[2.29]; and Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021) at [2.16]—[2.21].
[30] Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana | Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021) at [2.21].
[31] I H Kawharu *Dimensions of Rangatiratanga* (unpublished manuscript, 1995-96) at 14.

Tikanga and state law. As foreshadowed in SP9, te Tiriti may require appropriate facilitation of tino rangatiratanga in accordance with tikanga. This also then raises further questions about the relationship between tikanga and state law, including whether the reflection of tikanga within state law is primarily to protect Māori interests, to inform better state law, or both. In the DNA report and the succession issues paper, we explain the constitutional significance of tikanga in terms of its tuakana status, te Tiriti o Waitangi, the recognition of tikanga by state law, and its protected status within the international human rights regime.[32] Thus, in the succession paper, and having set out our thinking on te Tiriti, we identify three ways to consider law in relation to te ao Māori and succession:

1. Giving Māori the choice as to whether general succession law or tikanga should apply to succession. We raise this but do not elaborate an option for reform as it raises profound constitutional questions that go beyond the succession project.
2. The second way would preclude general succession law applying to taonga.
3. The third way would be to create better succession law that recognises the values underpinning both tikanga and state law. This option could operate in tandem with the exclusion of taonga from state succession law in accordance with 2. above.

Engagement

The big question is how to apply these ideas within a given project, especially (given the pillars of our approach to projects), in our engagement and research. Their influence will vary from project to project depending on the nature of the subject matter and the scope of our review.

Engagement raises a number of challenges. One is that we seek both expert advice and an understanding of on the ground lived experiences, to inform ourselves of relevant issues and develop an evidence base for recommendations. But with the many issues already confronting our communities, it can be difficult for people to find the time to think about the kinds of issues we are raising and then be able to respond. Secondly, we have national reach, in the sense that law reform is broadly applicable to the whole country, but we are a small agency with limited capacity to develop our networks. Thirdly, some of the Commission's projects may not appear to be directly responsive to current needs. At the same time, all

[32] Te Aka Matua o te Ture | Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara* | *The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at ch 2; and Te Aka Matua o te Ture | Law Commission *He arotake i te āheinga ki ngā rawa a te tangata ka mate ana* | *Review of Succession Law: Rights to a person's property on death* (NZLC IP46, 2021) at ch 2.

laws in some way shape the values that underpin the state law system, and Māori collectively have an interest in that system.

We were pleased to enter into an MoU with Te Hunga Rōia Māori o Aotearoa last year, to provide a framework for ongoing cooperation. We remain grateful for Te Hunga Roia's ongoing contributions to our work, which we value highly. I mentioned earlier the support we receive from the Māori Liaison Committee. The Tumuaki of Te Hunga Rōia are also ex officio members of the Committee.

Te Hunga Rōia's recent submission on our class actions and litigation funding project is a good example of a recent contribution. A class action is a device of civil procedure that provides for the aggregation of similar claims so that they can be heard together. The procedure exists in many overseas jurisdictions. The major issue is whether we should adopt a class actions regime in Aotearoa and if yes, how should it be shaped to suit the circumstances of the country. Te Hunga Rōia's submission is having an influence on the project in perhaps unexpected ways.

At first it was difficult to know whether class actions and litigation funding would resonate with existing Māori legal concerns, or whether tikanga might have any role or fit into a pre-existing model for this type of litigation. There is a small number of class action cases that have been taken overseas to pursue claims of indigenous peoples, but the cases rely on causes of action that are probably not available in this country. The project is not directly about how Māori collective litigation should best be facilitated, although that is an interesting and important question. In addition, a class action is not exactly a procedure for collective litigation, where a case is based on a single claim held by a collective such as a hapū or iwi. Rather, it has been developed for aggregating similar individual claims.

Nonetheless, the procedure may work for some types of claims involving (some or predominantly) Māori class members. We also recognised that tikanga has constitutional significance. It seemed there would be an opportunity for tikanga to influence a future class actions regime, so we asked in our issues paper whether it should. Another question we asked was whether, when a plaintiff wants to represent the interests of a hapū or iwi, the court should inquire into their suitability to represent the group in terms of the iwi or hapū's tikanga.

Te Hunga Rōia's submission helpfully responded to these questions and has given us a steer on both. In responding to those particular questions, the submission has also prompted us to think more broadly about how we articulate and analyse concerns with the status quo.

One of the principles which underpins class actions regimes, and the regulation of litigation funding, is access to justice. We had described access to justice in fairly conventional rule of law terms in our issues paper. In a society governed by law, the rule of law requires access to courts to enable people to seek a determination and vindication of their rights. Access to justice is what we receive in exchange for our consent to abide by laws in a democratic state, and so on.

Te Hunga Rōia's submission addressed core tikanga values including whanaungatanga, ea, and take-utu-ea. The submission's account of these tikanga can, I think, enrich our understanding of access to justice and the importance of dispute resolution and harmonious relations among people to peaceful society and stable democracy. The concepts bring the desired outcomes of the rule of law to the fore and address them directly.

Research

In addition to questions of engagement, a second key challenge for the Commission concerns how we approach researching tikanga. We recognise the significance of tikanga to our work, but also that we are not experts in tikanga, and that tikanga is contested. Because of these factors, we need to think carefully about how we should go about presenting information on potentially relevant tikanga, to support our engagement and the development of reform recommendations.

At law school law, lawyers are generally taught through the common law method, with some opportunities for learning about statutory interpretation along the way. There are also increasing opportunities for learning some basics about tikanga. However, our law schools seldom teach conflicts of laws or comparative laws. This is a shortcoming, because these disciplines would help provide tools to better understand and manage the relationship between tikanga and state law as distinct legal systems and would assist the development of new law from both.

One of the differences that has been highlighted between judge-made law and statute law is that the common law uses the building blocks of precedent.[33] The building process is forever ongoing as it adapts to new situations. Core principles can be derived from what has been built. Reasoning is inductive, in the sense that the common law reasons from the dispute to a general rule.

[33] Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLJ 505 at 518.

In this respect, one of the differences between the common law and tikanga is that tikanga exists, at its core, as a koru of interconnected principles,[34] whereas the common law "does not exhibit an over-arching set of theories towards which it strives".[35] On the other hand, the two are similar in that both are humble, and look to the past for inspiration.

The policy analysis that underpins law reform is deductive, reasoning from general aims and problem definition to more specific reform recommendations to overcome the problem, and change behaviour. Unlike tikanga, statute law arrives on the scene fully formed – it may or may not take a clear break from the past. But like tikanga, it is more abstracted from fact situations and presents a principled-framework approach to problem solving.[36] There is a risk that direct reference to tikanga in legislation may result in the application of a tikanga principle becoming overly inflexible. This may have advantages, if a policy decision has been made to prefer a tikanga-informed approach.[37] There is also a possibility that, in the policy process, tikanga considerations will be balanced against other competing ideas. The constitutional status of tikanga does however accord tikanga particular significance (and protection) within this process. Perhaps what I am really suggesting is that Te Aka Matua, staffed by legal and policy advisers, is well positioned to contemplate the kinds of bridging exercises needed to make sense of te ao Māori in the law reform exercise.

In order to develop our understanding of tikanga and draw out some differences between it and state law, we have had to learn new ways of researching (from those learnt as law students), for example, by consulting texts which we might not ordinarily think of as legal texts, drawing on past practices and philosophy as a different kind of legal authority, re-interpreting past analyses of those practices for our own purposes and, most importantly, consulting with experts.

In our review of surrogacy for example, we prepared a working paper that draws upon a wide range of tikanga sources. We applied a framework proposed by Sir Hirini Mead to these sources, to consider their potential application to surrogacy. The framework consists of a series of tests which lead to questions such as, does surrogacy breach tapu? Or does

[34] Te Aka Matua o te Ture | Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at [126].
[35] Geoffrey Palmer "Reforming the Law" (The Levitt Lecture 2011, College of Law, University of Iowa, Iowa City, 2011) at 3.
[36] See Lon Fuller "Human Interaction and the Law" in Kenneth Winston (ed) *The Principles of Social Order: Selected Essays of Lon Fuller* (revised ed, Hart Publishing, Oxford, OR, 2001) at 231.
[37] For example, in our DNA report we recommend that a person's DNA profile be removed from the offenders index of the DNA databank after the person's death, following advice that keeping DNA information of dead people in the same place as living people would be inconsistent with tikanga: see Te Aka Matua o te Ture | Law Commission *Te Whakamahi i te Ira Tangata i ngā Mātai Taihara | The Use of DNA in Criminal Investigations* (NZLC R144, 2020) at [20.46].

surrogacy impact on a person's mauri? These tests can be used to establish a tikanga position on matters not previously encountered in te ao Māori. We then approached a select group of tikanga and legal experts to comment on the paper, to enable us to refine the discussion of these matters. We are not seeking to establish any tikanga of surrogacy but are informing ourselves of matters that may be of concern for Māori arising from tikanga, in order to facilitate engagement and inform recommendations for reform.

Conclusion

One of my predecessors once commented that, "[f]or some, reform is a road to ruin. For others, it is a beacon of hope for a better life".[38] Some examples of previously divisive reform include the abolition of slavery, the secret ballot and the expansion of the franchise. We know that Māori legal issues, and te Tiriti o Waitangi, can excite media attention. We also know that law reform is close to politics. That said, the Commission was established to question the status quo. A formal structure for law reform was preferred in place of ad hoc committees, among other things, to help improve state law's responsiveness to Māori concerns and to the fact that in-depth and independent review may be necessary to reform law in a multicultural and constitutionally bicultural country. We aim to bring our independence, engagement, and research to these concerns, taking a patient but deliberate path to greater knowledge and better law.

[38] Geoffrey Palmer "Reforming the Law" (The Levitt Lecture 2011, College of Law, University of Iowa, Iowa City, 2011) at 2.