

# **THE COHERENT ZEAL THAT NIN TOMAS BROUGHT TO HER RESPONSIBILITIES AS A LAW TEACHER AND RESEARCHER**

Bruce V Harris<sup>1</sup>

I am humbled to be invited to contribute to this collection of writing honouring the life and work of Dr Nin Tomas. Nin was my friend, colleague in the Auckland Law School for nearly twenty years, and fellow descendant of the 1830s union of Te Rangahau and John Leaf. The whakapapa link was only realised when I relatively recently discovered my Māori ancestry and traced it back to the Hokianga. Nin and I were good friends before this discovery but our friendship took on a new dynamic when we found that we shared a common Māori lineage.

I learned from Nin's attitude to life, her contributions to the life of the Law School and her passionate sharing of Māori perspectives on the law. Nin taught me a lot about how Māori really feel and think about things. She helped me to better appreciate how Māori see New Zealand's colonial history, the Treaty of Waitangi and the development and organisation of New Zealand society since 1840.

Nin often dropped into my office for a chat. The conversation would range across family, sport, the Law School and the ongoing struggle between the position of Māori and the current provision of the law. Nin's mind was always busily at work, constantly reflecting on what she was observing and reading. She expressed strong and clear views on all matters. These opinions were honest, well-reasoned and often well ahead of where many others were courageous enough to go with their thinking.

The academic role as critic and conscious of society came naturally to Nin. The expression of her views was not constrained by any desire to court popularity. She was concerned to recognise where change in New Zealand society and law was needed in order to bring about improvement, especially in the law's appreciation of Māori perspectives.

One was inspired by not only Nin's capacity for critique but also the enthusiasm and energy that she was willing to bring to giving practical effect to the aspirations that she was espousing. These practical achievements were evident in her leadership of the Māori teaching and student community within the Law School and in her own

---

<sup>1</sup> Professor of Law, The University of Auckland.

teaching and research.

When I was Dean of Law from 1995 to 2000, Nin and I worked closely together with the aims of strengthening the Māori teaching and research within the Law School and enhancing the support of the Māori law students. Nin was absolutely committed to these goals.

The Faculty had the capacity to employ additional staff who identified with strengthening the Māori dimension. However, notwithstanding energetic advertising and searching, it was not possible to encourage suitably qualified and experienced applicants to come forward. Able Māori lawyers were finding fulfilling careers in private practice and elsewhere in the law. The Faculty had to think laterally. We embarked upon a programme of “growing our own”. Advertisements were placed for threshold lecturers in the law related to Māori issues who would be allocated modest teaching loads and given the opportunity to pursue postgraduate qualifications in law. Two able former students, Khylee Quince and Shane Heremaia, accepted appointments to these positions in 1997.

Nin gave a lot of energy to the Māori law student community. Not only did she stand closely behind Te Rākau Ture, the Māori Law Students Association, encouraging and providing wise counsel to their officers, but she was always available to help Māori students on a one to one basis with Law School and life problems. Colleagues in the Law School do not always fully appreciate the time and energy that Māori staff give to the individual support of students. Like all her Māori colleagues, Nin wanted to facilitate Māori students gaining the most they possibly could from their law school experience, including particularly helping them to better understand their Māori culture and the relationship between that culture and the law.

Nin was a natural teacher. I shared lecturing with her in Legal Method and Public Law. She brought to the class room humour, infectious energy and a clearly developed critical understanding of whatever area of law she was addressing. Our discussions about what should be taught, and how it should be taught, were always laced with Nin’s practical suggestions about how things could be done better.

Nin’s move into teaching the Treaty of Waitangi part of the compulsory LLB course Public Law was the result of such a concern. Nin thought that students would benefit from being exposed to a Māori point of view on the Treaty. Similarly, her introduction of the comparative courses on Indigenous peoples and the law was a practical response

to a recognised student learning need. These courses were taught in a shared way across different jurisdictions through video links.

This journal is a manifestation of Nin's capacity to follow up her aspirations in the area of research with practical action. Nin drove the establishment of *Te Tai Haruru – Journal of Māori Legal Writing*, now *Te Tai Haruru – Journal of Māori and Indigenous Issues*. She was adding finishing touches to the editing of Volume 4 only weeks before her death. Nin thought that there needed to be a legal academic journal dedicated to Māori legal writing that would provide a vehicle for putting research by both established scholars and students before the academic and wider community. She turned the perceived need into reality.

There was a coherence to Nin's commitment to support of Māori colleagues and students, her teaching and her research and writing. In all these activities Nin was driven daily to advance Māori interests whether it be Māori students being better equipped to achieve their potential as lawyers and in other aspects of their lives, or be it better informed teaching of Māori perspectives on law or, through her research, better accommodation by the New Zealand legal system of Māori perspectives.

Nin wanted to mesh her lively capacity for critical analysis with the discipline of a scholar expected to build faithfully off the work of others. She was concerned to place her advocacy within a paradigm of internationally recognised jurisprudence notwithstanding the foundation of her knowledge of the Māori perspective being authentic "flax roots" rather than learned from books.

Nin's major scholarly work is the unpublished PhD thesis entitled *Key Concepts of Tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present* completed in 2006.<sup>2</sup> The thesis is original and ambitious. It attempts to locate evidence of Māori customary practices in the mid-Tai Tokerau region as revealed in the proceedings of the Native Land Court in the early 20<sup>th</sup> Century and more contemporaneously in evidence put before the Waitangi Tribunal in two hearings.

Nin attempted to bring some order to the revealed cultural practices with a view to showing how research may be able to put forward rules of Māori custom that may

---

<sup>2</sup> Nin Tomas "Key concepts of tikanga Māori (Māori Custom Law) and their use as regulators of human relationships to natural resources in Tai Tokerau, past and present" (PhD Dissertation, University of Auckland, 2006).

be capable of being recognised as justiciable common law rules in current New Zealand courts. There is no doubt that a potential exists for the New Zealand courts to recognise proven Māori custom in some circumstances as capable of being enforced by the courts as current law.<sup>3</sup> One major challenge, with the effecting of such modern judicial recognition, is persuading the court to accept the original Māori custom given the practical difficulties often associated with establishing evidence of the custom's existence and regular observation. In researching and writing the thesis, Nin set about illustrating what needs to be done to provide a sufficient evidential foundation for current court recognition of such custom law.

Nin's interest in tikanga Māori and its judicial recognition naturally led to engagement with the issue of the relationship between potential court recognition of tikanga Māori when it is, or appears to be, in conflict with competing common law. Well before *Takamore v Clarke* came before the courts,<sup>4</sup> Nin had gained research funding to investigate the way that New Zealand law providing for decisions surrounding human burial could accommodate possible tikanga Māori expectations that a person should be buried according to the wishes of their whānau pani (wider family) in the tribal territory of those relatives. In short, the deceased should be returned to their tribal territory for burial according to the expectations of wider whānau so that the culture of whakapapa will be upheld.

The facts of *Takamore* will be known from other contributions to this journal.<sup>5</sup> There is an irreconcilable conflict between two packages of legitimate interest. On the one hand there is the responsibility an executor may be thought by the law to have in respect of the disposal of the body of the deceased and the interests of the surviving partner and their children in having the deceased buried where they can easily access the grave. On the other hand, tikanga Māori expects burial decisions to be made by the whānau in keeping with Māori culture.

By a majority (Tipping, McGrath and Blanchard JJ) the Supreme Court found the common law gave the decision-making responsibility to the executor who was

---

<sup>3</sup> See *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 (CA); *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

<sup>4</sup> *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573; *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

<sup>5</sup> See Natalie Coates, "The Recognition of Tikanga in the Common Law of New Zealand" (2015) (1) NZLR 1 and reprinted in this edition of *Te Tai Haruru – Journal of Māori and Indigenous Issues*.

obliged to take into account, inter alia, tikanga Māori interests.<sup>6</sup> The decision of the executor was considered to be vulnerable to being overridden by the courts should the discretion be considered by the court to be exercised “inappropriately”.<sup>7</sup> The Chief Justice (Elias CJ) and William Young J were not willing to recognise the existence of a common law rule giving the discretion to the executor.<sup>8</sup> Their Honours thought the affected parties should attempt to settle among themselves a suitable place of burial. If such agreement cannot be achieved, any party should be able to refer the matter to the High Court, which should consider the relevant factors and decide how the decision should be best made in the circumstances.

Both paths of reasoning meant the tikanga position was not to be determinative. The *Takamore* decision does not undermine the generic principle that in some circumstances tikanga may be recognised by the court as capable of metamorphosing into justiciable common law. However, none of the Supreme Court judges was willing to countenance, in the context of the burial of a Māori, a common law principle that tikanga should always prevail.

A critic sympathetic to tikanga Māori being recognised as justiciable common law may be disappointed with the approach adopted in the Supreme Court judgments in *Takamore*. Such a critic could argue that what is being accepted as justiciable law is being determined through a Crown/Pākehā law lens contrary to the spirit of the Treaty of Waitangi. The Treaty saw two equal partners entering into an agreement about the future governance of New Zealand and this is a context where, especially in the light of Article 2, the Māori perspective is not being given a sufficiently decisive influence.

The counter-argument would be that the rule of tikanga, if it meets the criteria for recognition as common law,<sup>9</sup> has to be considered in the same way as any rule of the common law which is found to be in irreconcilable conflict with another common law rule. The court has to first recognise the tikanga as common law and then determine which aspect of the conflicting common law should be allowed to prevail. This decision should turn on a comparative weighing by the court of all the justifications for the operation of each rule in the circumstances.

---

<sup>6</sup> *Takamore v Clarke* [2012] NZSC 116; [2013] 2 NZLR 733 at [152] and [164] per Tipping, McGrath and Blanchard JJ.

<sup>7</sup> At [162] and [164] per Tipping, McGrath and Blanchard JJ.

<sup>8</sup> At [12] and [101]-[108] per Elias CJ; At [173], [175] and [176], per William Young J.

<sup>9</sup> See *The Public Trustee v Loasby* (1908) 27 NZLR 801 (SC) at 806-807 per Cooper J; *Takamore v Clarke* [2011] NZCA 587, [2012] 1 NZLR 573 at [109]-[111] per Glazebrook J.

It is this latter approach which appears to have been adopted by the majority of the Supreme Court in *Takamore*. Both the High Court,<sup>10</sup> and the Court of Appeal,<sup>11</sup> in *Takamore* expressly accepted in principle that tikanga could be recognised as justiciable common law, provided that certain criteria were met. Surprisingly, none of the Supreme Court judges expressly discussed whether the Tūhoe tikanga burial practice had been elevated to common law status, but the majority thought it a relevant consideration for the executor when deciding how and where the burial should take place.<sup>12</sup> Elias CJ and William Young J thought it relevant to any High Court determination of burial should the relatives not be able to agree.<sup>13</sup>

The majority weighed the competing justifications and decided that the testator's decision was appropriate, mainly because of the deceased's "life choices, in relation to living in Christchurch with his partner and now adult children".<sup>14</sup> In coming to this conclusion the court was preferencing the decision of an individual executor over that of the wider collective whānau and their expectation of the return of the body to the tribal territory for burial.

Nin thought the approach of the Supreme Court in *Takamore* to be wrong.<sup>15</sup> She advocated a more certain approach which gave greater force to a common law rule that could be derived from tikanga in the circumstances. Nin argued that where tikanga would expect the whānau to retrieve the body for burial in its tribal territory, that principle should prevail over the wishes of the executor. This should be so even if the executor is supported by the partner and children of the deceased, unless the deceased has indicated prior to death, by some legally recognised means, their intention that their burial should not be in accordance with the expectations of tikanga.

This approach, while preserving the deceased's personal autonomy, gives a stronger legal force to tikanga. However, the executor does have his or her discretion taken away, and the immediate, possibly non-Māori family, may have their preference thwarted. These reservations may be countered by pointing to the solution being in

---

<sup>10</sup> *Clarke v Takamore* (2009) 27 FRNZ 676 (HC).

<sup>11</sup> See *Takamore v Clarke* [2011] NZCA 478, [2012] 1 NZLR 573 at [109]-[111] per Glazebrook J.

<sup>12</sup> See *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [152] and [164] per Tipping, McGrath and Blanchard JJ.

<sup>13</sup> At [101] and [102] per Elias CJ and at [176] per William Young J.

<sup>14</sup> At [169] per Tipping, McGrath and Blanchard JJ.

<sup>15</sup> Nin Tomas "Recognising Collective Cultural Property Rights in a Deceased – *Clarke v Takamore*" (paper presented to the author, 2013).

the hands of the deceased, since he or she has the opportunity to avoid the default position in favour of tikanga with appropriate formal pre-death instructions. Foresight is demanded from the deceased. Nin acknowledges that the adoption of the approach that she suggests would require the abandonment of the common law principle holding that nobody has a property interest in a body.

It is no surprise that Nin supported an approach that provides a stronger possibility of tikanga being enforced as justiciable common law. All aspects of Nin's professional life were constantly devoted to advancing the Māori cause. Her advocacy of this point of view was heartfelt, honest and forceful. No doubt it followed naturally from her life experience as a Māori woman, her knowledge of tikanga Māori and her understanding of New Zealand law as a trained lawyer.

The New Zealand legal system continues to evolve in its recognition of Māori perspectives. The importance of the law and its operation being influenced by such perspectives has been acknowledged as a desirable policy direction by the legislature,<sup>16</sup> the executive,<sup>17</sup> and the judiciary.<sup>18</sup> Much work remains to be done to translate the policy direction into a legal reality that meets the expectations of those who believe Māori perspectives require greater recognition. Evolution in this direction depends on strong well researched advocacy of the kind advanced by Nin. The status quo needs to be forcefully confronted with convincing justifications for change or otherwise those responsible for making the law, that is Parliament, the executive and the courts, will not be prompted to bring about change. The attitude of many in society also will not be prompted to change.

My life, and I am sure that of many colleagues, students and others, is considerably richer for having been exposed to Nin and her devotion to advancing the influence of Māori perspectives in contemporary New Zealand. Her chosen task was not easy, given the difficulty the Māori minority (approximately 15% of the population) has had in protecting and advancing its interests in a community where the democratic majority has so much power. In this, the New Zealand Māori experience has a lot in common with that of most other Indigenous minorities.

---

<sup>16</sup> See Treaty of Waitangi Act 1975.

<sup>17</sup> See Cabinet Office *Cabinet Manual 2008* at [7.60(a)] and [7.61].

<sup>18</sup> See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

Notwithstanding Nin's zeal to see the ideals she so passionately held manifest in societal and legal change, she accepted that Māori perspectives should not necessarily automatically prevail over the perspectives of other groups within New Zealand's pluralistic community. Nin just wanted the Māori history and point of view to be more thoroughly understood and, where justified, built into the law.



# **TIKANGA IN AOTEAROA/NEW ZEALAND**

