

## EDITOR'S NOTE

Jayden Houghton\*

It is challenging when reflecting on 2020 to think beyond the COVID-19 pandemic and the immense changes it has wrought on people's lives around the world. Yet this has also been a year of significant legal developments for Māori.

In June, the Supreme Court, in *Ellis v R*, heard arguments on whether a convicted child sex offender should be allowed to appeal his controversial convictions even after his death.<sup>1</sup> Te Tai Haruru alumna Natalie Coates acted as counsel for Mr Ellis. Coates argued, among other things, that tikanga Māori is so woven into New Zealand common law that, even as a Pākehā man, Mr Ellis' mana continues after his death, and allowing the appeal would be consistent with his right to restore that mana. The Supreme Court allowed the appeal in September, but did not provide any reasons for that decision. Thus, the precedent that *Ellis* sets for the use of tikanga Māori in the courts will remain unclear until the substantive judgment is released. Watch this space.

In July, Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019 passed its third reading. The resultant Act, which comes into force on Waitangi Day 2021, aims to allow Māori landowners to better connect with and utilise their lands, including through a new tikanga-based mediation service. Unlike the 2016 attempt at Māori land law reform,<sup>2</sup> this new Act has enjoyed fairly widespread support from Māori landowners. As a lecturer of Māori Land Law, I will certainly be monitoring the transition with interest.

In December, the Labour Government announced that it had reached an agreement to resolve the impasse at Ihumātao. Since 2016, mana whenua had been occupying the disputed land, owned by Fletcher Building, to protest a proposed housing

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\* Rereahu Maniapoto. Lecturer, Faculty of Law, University of Auckland.

1 See generally *Ellis v R* [2020] NZSC 89. See also *Ellis v R* [2019] NZSC Trans 31; and *Ellis v R* [2020] NZSC Trans 19.

2 Te Ture Whenua Māori Bill 2016.

development on the site. The deal, blessed by the Kīngitanga, would see the government buy the land from Fletchers for almost \$30 million, with mana whenua having a role in deciding the future of the land.<sup>3</sup> Whilst the terms of the deal are not yet clear, the fact that the government has been willing to reach such an outcome already marks a more progressive attitude to Māori land protests than in the past. In any case, it remains to be seen whether Ihumātao will set a precedent for the Crown to intervene to return private land to Māori in the future.

2020 is also the 30th anniversary of Te Rākau Ture, our University of Auckland Māori Law Students' Association. To mark the occasion, I invited Amelia Kendall, Tumuaki Wāhine for 2020, to reflect on the history and future of the rōpū, and share insights into the anniversary celebrations. Kendall's piece is featured in this issue. Looking back, Kendall discerns that Te Rākau Ture's strength is in its people — staff, students and alumni — who support each other to succeed in legal and non-legal worlds while remaining committed to te ao Māori. Looking forward, Kendall challenges those who gather at the tree's branches in the future to progress the kaupapa of those who have come before and fearlessly transform Aotearoa New Zealand to be a better place for Māori.

Issue 7 is structured in two parts. The first part of the issue is dedicated to special features. In addition to Kendall's reflection, it features lectures and speeches on Māori and Indigenous issues delivered by three prominent members of the New Zealand judiciary: Deputy Chief Judge Caren Fox of the Māori Land Court; the Hon Justice Christian Whata of the New Zealand High Court; and the Hon Justice Dame Susan Glazebrook of the Supreme Court of New Zealand. The features are presented in chronological order.

On 16 September 2018, Deputy Chief Judge Caren Fox delivered a speech at the *Ngā Taonga Tuku Iho Conference on Māori Cultural and Intellectual Property Rights* at Whakatū Marae, Nelson, on whether legislation is the best way to protect

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3 See Jane Patterson "Ihumātao: Deal struck between government and Fletcher Building to buy disputed land" (17 December 2020) RNZ <[www.rnz.co.nz](http://www.rnz.co.nz)>.

mātauranga Māori. Her Honour argued that because Aotearoa’s intellectual property statutes are so deeply imbued with Western and human rights values, their effectiveness at protecting mātauranga Māori ultimately depends on the political will of governing parties. Her Honour concluded that it will be up to Māori and the Crown to debate what further measures are needed to protect mātauranga Māori. Soon after Deputy Chief Judge Fox’s speech, the Labour-led Government introduced Te Pae Tawhiti, a work programme to address the Crown’s breaches of its guarantee under Te Tiriti o Waitangi 1840 to allow Māori to exercise tino rangatiratanga over our mātauranga Māori and taonga. As her Honour anticipated, Te Pae Tawhiti envisages that Māori and the Crown will negotiate a substantive framework to address the Crown’s breaches.<sup>4</sup> Te Puni Kōkiri seems to be confident that the framework will be co-designed by the two Treaty partners: Māori and the Crown.<sup>5</sup> But how might this work in practice? This year, about 50 law students took my new elective “Mātauranga Māori and Taonga | Cultural Property and Indigenous Intellectual Property”, in which the students and I worked to problem-solve some of these complex questions. There is much yet to be worked out, but it is exciting to know that our new law graduates are more qualified than ever to support the Treaty partners to reconcile on these fundamental issues wherever they end up working, whether that is for Māori, for the Crown or in some other related role.

On 8 November 2018, Deputy Chief Judge Fox delivered the second annual Nin Tomas Memorial Lecture hosted by the Aotearoa New Zealand Centre for Indigenous Peoples and the Law at the University of Auckland. In reflecting on the role of a Māori Land Court judge after 18 years on the bench, her Honour saw the enactment of Te Ture Whenua Maori Act 1993 as a turning point in the Māori Land Court’s ethos. Whereas the Court used to be associated with colonisation and land alienation, it is now an institution that promotes the retention and development of Māori land for owners, their whānau and their hapū. Whilst her Honour acknowledged that there is

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4 See Jayden Houghton “An opportunity for Māori and the Crown to reconcile” (6 February 2020) <[www.newsroom.co.nz](http://www.newsroom.co.nz)>.

5 See Jayden Houghton “The New Zealand government’s response to the Wai 262 report: the first ten years” (2021) 25 International Journal of Human Rights (forthcoming).

more that can be done to improve the Māori land system, she anticipated that the Māori Land Court will remain an integral part of Aotearoa's judicial landscape in the future.

On 25 July 2019, Justice Christian Whata delivered a public lecture at the University of Auckland, hosted by the Aotearoa New Zealand Centre for Indigenous Peoples and the Law. His Honour argued that formal equality, properly understood, actually mandates — and is vindicated by — affirmative action in favour of Māori in the criminal justice system. Nonetheless, his Honour acknowledged that there may be statutory limitations to taking any given Māori-centred measure.<sup>6</sup>

On 26 September 2019, the Hon Dame Susan Glazebrook also delivered a public lecture at the University of Auckland, hosted by the Aotearoa New Zealand Centre for Indigenous Peoples and the Law. Her Honour surveyed the significance of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Aotearoa.<sup>7</sup> Her Honour explored the different ways that the Declaration has been used, and argued that the Declaration has become increasingly embedded in Aotearoa's legal framework. In particular, her Honour acknowledged the work that the government has been doing to integrate the Declaration into its indigenous policies across government.

The second part of the issue presents five articles. First, Isabel Kelly critically analyses Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 through the lens of the right to self-determination. Whilst Kelly acknowledges that the legal personhood model *does* express certain elements of self-determination for Whanganui iwi in a public manner, she finds that the Act does not go as far as it should to express the iwi's right to self-determination.

Peter Muzariri and James Adams discuss the Tax Working Group's recommendation that the 17.5 per cent income tax rate for Māori authorities be extended to their

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6 Justice Whata and I would like to acknowledge that the version published in this issue reflects some minor revisions made by his Honour after the lecture.

7 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

wholly owned subsidiaries.<sup>8</sup> Muzariri and Adams argue that the recommendation would resolve the practical problems of Māori authorities accumulating excess unusable imputation credits and resorting to alternative, more complicated, corporate structures. Further, Muzariri and Adams engage with debates about whether the Māori authority regime as a whole is justified, and conclude that implementing the Tax Working Group's recommendation would recognise the unique role of land in Māori culture, particularly land returned as part of Treaty settlements.

Paula Lee examines the End of Life Choice Act 2019 and argues that the Act in its current form does not comply with Te Tiriti. This is because the Act fails to mention Te Tiriti or properly respond to the concern that assisted dying is inconsistent with tikanga Māori. In her article, Lee argues that an individualised interpretation of mana motuhake can render assisted dying acceptable in tikanga Māori, and proposes several recommendations to make the End of Life Choice Act more compliant with Te Tiriti.

Tiana Tuialii discusses the recent amendments to the Oranga Tamariki Act 1989<sup>9</sup> as they affect crossover children — a particular class of vulnerable people who have charges before the Youth Court as well as care and protection proceedings before the Family Court. Tuialii argues that the amendments cannot be implemented effectively because they currently function within an institutional framework that has an historically-ingrained disregard for te ao Māori. In any case, Tuialii remains hopeful that the amendments will help Māori crossover children and affirm the promises of Te Tiriti.

In the final article, Samantha Shanks uses the Māori Land Court's decision in *Hall v Opepe Farm Trust*<sup>10</sup> to assess whether Te Ture Whenua Maori Act 1993

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8 See Tax Working Group *Future of Tax: Final Report Volume I – Recommendations* (21 February 2019) at 17.

9 See generally the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017.

10 *Hall v Opepe Farm Trust* (2010) 19 Waiariki MB 258 (19 WAR 258).

strikes an appropriate balance between utilisation and retention. Shanks then considers whether the National Government's and Labour-led Government's proposed reforms strike an appropriate balance,<sup>11</sup> and, finding issues with both proposals, explains how each could be improved to strike an appropriate balance.

It remains for me to thank my Te Tai Haruru colleagues for their support with this issue, including organising the events at which the judges delivered the lectures featured in this issue, and supervising those students whose dissertations and papers have now been published here as articles. We began 2020 with the wonderful news of Associate Professor Amokura Kawharu's appointment as the President of the New Zealand Law Commission — the first woman and the first person of Māori descent to serve in the role. We were sad to farewell Kathryn Arona, who was our long-serving Pouāwhina Māori — and, more recently, Kaiārahi. But we were also fortunate to be joined by Jeremy Hema as our new Kaiārahi. As at December 2020, Te Tai Haruru is (in alphabetical order by surname): Grace Abbott, Associate Professor Claire Charters, Associate Professor Andrew Erueti, Jeremy Hema, Jayden Houghton, Maureen Malcolm, Claire Mason, Dr Fleur Te Aho and Tracey Whare. I am grateful to work with, and constantly learn from, such an incredible rōpū. It is inspiring to be part of a group that is so passionate about creating positive change, whether that is for one or for Aotearoa.

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11 See Te Ture Whenua Māori Bill 2016; and Te Ture Whenua Maori (Succession, Dispute Resolution, and Related Matters) Amendment Bill 2019.