EDITOR'S NOTE

Jayden Houghton*

2021 marked another year of the COVID-19 pandemic at the forefront of every New Zealander's mind, with a new COVID-19 response framework, a nationwide vaccination regime, and shifting travel and isolation rules. Even so, the year was also characterised by an array of milestones with profound implications for Māori across various spheres, including health, civics, government and environment.

In December, the Waitangi Tribunal released *Haumaru: The COVID-19 Priority Report*, its examination of the Crown's response to COVID-19 in respect of Māori.[1] The Tribunal found that the Crown breached the Treaty principles of tino rangatiratanga, active protection, equity, options and partnership in several aspects of the COVID-19 vaccination programme and the shift to the COVID-19 Protection Framework (commonly referred to as the Traffic Light system). The crux of these breaches arose from the Government's rapid transition from the Alert Level System to the Protection Framework, against strong opposition from Māori and despite several District Health Boards not having reached the vaccination targets previously required to lift restrictions.

In the High Court, the Government's COVID-19 response was further put to the test. The Māori health agency Whānau Ora (headed by Te Tai Haruru alumnus John Tamihere) challenged the Ministry of Health's refusal to release Māori vaccination data.[2] Following this successful judicial review, the Ministry reconsidered its refusal, and released data on unvaccinated and single-dose vaccinated Māori to Whānau Ora to better inform its strategy and enable targeted responses to increase vaccination uptake in the Māori population.

The pandemic reminds us that New Zealand's healthcare system is in a critical state. The Government turned its attention to major reforms of the current District Health

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1 Waitangi Tribunal *Haumaru: The COVID-19 Priority Report* (Wai 2575, 2021).

2 *Te Pou Matakana Ltd v Attorney-General* [2021] NZHC 3319.

Board system, reworking it into one national organisation.[3] This organisation would be accompanied by a sister authority, the Māori Health Authority / Te Mana Hauora Māori, to support Māori health outcomes.

Elsewhere in Government, Oranga Tamariki vowed to undergo "generational change" in response to Ministerial Advisory Board reports and the Waitangi Tribunal inquiry into its operations.[4] This follows a legacy of tense relations between Māori and the agency over State intervention in Māori whānau. Recommendations for new leadership, engagement with Māori, policies and strategies are intended to reduce the number of Māori tamariki being moved into State care and to give greater effect to Treaty-consistent outcomes.

Key local government reforms were implemented to promote and support Māori civic participation. The Local Government (Ratings) Act 2002 was amended to empower local authorities to change rating processes and rules, remove rates arrears, and rework rules relating to how houses on whenua Māori are rated, to stimulate development and remove barriers for Māori landowners.[5] In anticipation of the 2022 local elections, Parliament also amended the Local Electoral Act 2001 to empower each local authority to make its own decisions about Māori wards and constituencies, which many local authorities have already capitalised on.[6]

After several false starts, the Labour Government finally introduced legislation to establish Matariki as a public holiday.[7] The rise of the Matariki star cluster — or, in areas where it is not possible to see it, Puanga — in mid-winter marks the beginning of the new year in the Māori lunar calendar. Matariki is significant for being Aotearoa's first uniquely Indigenous public holiday: one that is grounded in Māoridom — neither borrowed from foreign lands nor a sore reminder of our history of colonisation.

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3 Pae Ora (Healthy Futures) Bill 2021.

4 *Hipokingia ki te Kahu Aroha Hipokingia ki te katoa: The initial report of the Oranga Tamariki Ministerial Advisory Board* (Oranga Tamariki, July 2021); and Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīnga Whāruarua Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021).

5 Local Government (Rating of Whenua Māori) Amendment Act 2021.

6 Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021.

7 Te Pire mō te Hararei Tūmatanui o te Kāhui o Matariki/Te Kāhui o Matariki Public Holiday Bill 2021 (76-1).

The year also brought significant protest and legal action to protect te taiao — Aotearoa New Zealand's natural environment. In a landmark case on mining works in the Exclusive Economic Zone, the Supreme Court found that a decision-making committee of the Environmental Protection Authority should have given more weight to the Treaty of Waitangi in exercising its statutory decision-making powers.[8] The Court also considered that the relevant legislation strongly directed the committee to have regard to tikanga-based customary rights and interests, which should have been given greater weight in deciding whether or not to grant the permit to mine iron sands.

A decade after the introduction of the Marine and Coastal Area (Takutai Moana) Act 2011, the first applications for customary marine title and protected customary rights were heard in the High Court.[9] In granting the first recognition orders under that Act, *Re Edwards* lays out fundamental principles for assessing applications under the Act, including matters of whakapapa and holding land in accordance with tikanga. In related news, the High Court overturned the Environment Court's decision to uphold consents for a marae despite cultural objections from iwi.[10] Central to the case was the Court's finding that local iwi are the ultimate authority on the cultural effects of resource management decisions made in relation to their whenua. Finding otherwise would have been contrary to te Tiriti o Waitangi, the Resource Management Act 1991, and various other planning and policy instruments.

Outside of the courts, protestors led by Dame Rangimarie Naida Glavish (Ngāti Whātua) occupied Matahārehare Pā to obstruct the erection of a memorial to the 1979 Mount Erebus Disaster on the pā. The memorial would threaten a longstanding heritage pōhutukawa tree, and the group also considered the memorial inappropriate for the pā site.

Following the Supreme Court's final refusal to block development at Kennedy Point Marina,[11] the Protect Pūtiki movement continued to occupy Pūtiki Bay out of concern

8 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.
9 *Re Edwards (Te Whakatōhea No. 2))* [2021] NZHC 1025; and *Re Ngāti Pāhauwera* [2021] NZHC 3599.
10 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492.
11 *SKP Inc v Auckland Council* [2021] NZSC 35.

for the effects on taonga, whenua and moana. Development is at a standstill, as protestors persist in the face of court orders and arrests.

Finally, two notable appointments of wāhine Māori were made in academia and government. Associate Professor Khylee Quince (Te Roroa/Ngāpuhi and Ngāti Porou), an alumna of Te Tai Haruru, was appointed as the first Māori Dean of Law in New Zealand, holding the position at Auckland University of Technology (AUT). Dame Cindy Kiro (Ngāpuhi, Ngāti Hine, Ngāti Kahu) was appointed as the first wahine Māori Governor-General of New Zealand, following a distinguished career of public service. Congratulations to you both on your illustrious appointments!

I turn now to the content of this year's issue. Issue 8 is structured in two parts. The first is dedicated to special features. It features a lecture and presentation delivered by two prominent Māori advocates: Annette Sykes and Associate Professor Claire Charters. The features are presented in chronological order.

On 5 December 2020, Annette Sykes delivered the fourth annual Nin Tomas Memorial Lecture at the University of Auckland. Annette is a Māori activist and Indigenous rights lawyer who has tirelessly and unreservedly fought for the recognition of Māori rights, tikanga Māori and tino rangatiratanga in her representation of Māori clients and through her fierce advocacy. Annette is of Ngāti Pikiao and Ngāti Makino descent. Her lecture, entitled "The Myth of Tikanga in the Pākehā Law", reminds us through personal experience that achieving tino rangatiratanga or a tikanga-based legal system will not be easy. Annette discusses her upbringing as a wahine Māori, as well as her involvement in early Waitangi Tribunal claims and the criminal justice system. She then surveys recent cases involving tikanga through a decolonisation lens, before concluding that they are all window-dressing participants of colonial law. Māori must stand up for systemic, constitutional change.

On 7 May 2021, Associate Professor Claire Charters presented to the annual hui of the International Association of Women Judges. In the feature, which is a transcription of her presentation, Claire discusses how the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP), and particularly its right to self-determination,

has been interpreted both domestically and internationally.[12] She then discusses recent recommendations for constitutional change to give effect to te Tiriti o Waitangi and the UNDRIP, including the recent *He Puapua* report. Finally, Claire challenges the courts to adjudicate Indigenous issues with Indigenous interpretations, rather than deferring to the state, because the state's legitimacy in law is questionable.

The second part of the issue presents six articles. Josie Butcher critically analyses jurors' prejudices, unconscious biases and implicit stereotypes, and how those factors impact Māori that come before the courts. Josie explores whether the right to trial by a jury of *your* peers requires representative juries or equal opportunity for selection. Josie notes that random selection is not truly random in light of peremptory challenges: challenges for cause and voir dire questioning result in juries that are more likely to be biased against Māori defendants. In response, Josie explores the pros and cons of the Canadian approach, which accepts that jurors may be biased, as a suitable quick-fix. Finally, Josie presents long-term reforms, such as all-Māori juries or abolishing juries completely.

Morgan Dalton-Mill examines the Waitangi Tribunal's recommendation that the Crown facilitates tikanga-based processes in the Treaty settlement process to resolve overlapping claims disputes between iwi claimants.[13] Morgan argues that tikanga-centric processes are necessary, with the Crown's role being to contribute information, resources and funding. Such processes can result in more durable, meaningful and tika settlements because Māori have the mātauranga to resolve multiple mana whenua claims.

George Barton contemplates a standalone ground of judicial review requiring executive action to be consistent with te Tiriti or the Treaty principles. George identifies three paths to achieve this, before concluding that the doctrine of legitimate expectations and the UNDRIP is the easiest: Māori have a legitimate expectation that the Crown will act consistently with UNDRIP — and, therefore, te Tiriti as well. While George argues

12 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).
13 Waitangi Tribunal *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2020).

this is the best judicial route to give effect to te Tiriti, he explores the other paths too: through the use of "inferred" express reference review; and by way of contextual review and the courts' inherent supervisory jurisdiction.

Rewa Kendall argues that Māori knowledge can be admitted, presented and weighed as expert evidence while still recognising tikanga Māori. Rewa contrasts Māori knowledge in tikanga Māori with how the law currently deals with expert evidence. For instance, the definition of "expert" should be broadened to better recognise mana. Also, the current, adversarial presentation of evidence goes against the tapu nature of Māori knowledge. Rewa concludes that tertiary and judicial education is necessary so that the legal profession can better apply tikanga jurisprudence.

Zoe Stowers evaluates Te Whare Whakapiki Wairua (the Alcohol and Other Drug Treatment Court). Māori have disproportionately succumbed to addiction due to colonisation and systemic incarceration. Whilst the Pākehā court has been of some benefit to those needing help and coercive treatment, Zoe argues that a separate Māori system would be best to support whānau to truly escape the impacts of addiction. Even then, the government needs to tackle social issues like poverty so that whānau can overcome wider social disadvantages.

Finally, James Harper examines the intersection between Māori data sovereignty and the development of an artificial intelligence application to suggest the study pathways that students are most likely to complete. The data of Māori (and other Indigenous peoples) is unique, as James investigates, and requires Māori involvement in its governance. Unfortunately, there are areas, including in statute, that do not adequately protect Māori data. James examines the Treaty obligations that New Zealand universities have and considers how such a career path application could satisfy these obligations.

I would like to thank Christian Poland, Sophie Reedy-Young, Jonathan de Jongh, Pearlyn Tan and Shaun Gallagher for their editorial assistance. I have appreciated your enthusiasm, diligence and careful attention to detail. As always, I would too like to thank my Te Tai Haruru colleagues for their support, especially Geremy Hema and Maureen Malcolm for being my consultants on tikanga Māori aspects of some articles.