Public Interest Law Journal of New Zealand

(2024) 11 PILJNZ 1

EDITOR'S NOTE

New Beginnings

ALTHEA TARROSA*

This issue is published at a moment of transition, both for the Journal itself and the broader legal and social landscapes of New Zealand. While change often has connotations of uncertainty, it also creates a space for reflection and growth. This issue marks such a moment of new beginnings.

My involvement with the Journal began in 2018 as a Citations Editor. Since then, publishing and editorial work became a passion. When I first joined, the Journal was in its early years, only on its fifth issue. Most editors recruited, like myself, were new to the editing scene. Some editors part of the team had prior experience or simultaneously volunteered with other well-established university journals. The involvement of experienced editors contributed to the Journal's early development and positioning. The Journal operates on a national level. It is open to be led by students and to publish articles written by students from universities all over the country. However, in most years, it has been predominantly led by University of Auckland students.

Issue 11 marks my first issue as the Journal's appointed Editorial Director, taking over from my predecessor Jayden Houghton. I have big shoes to fill, and I am deeply grateful to Jayden for his service to the Journal of more than 10 years. It should be acknowledged that his commitment to the Journal has been vital during the Journal's formative stages, ensuring its ongoing development and continuity. Similarly, my primary role focuses on stewardship—to keep the Journal alive, and its contents relevant, accessible and attuned to issues of public interest in New Zealand. Rather than reinventing the Journal, this new beginning builds upon the work of editors, authors and supporters before me, whose commitment ensured its continued relevance. It is my hope that this issue and subsequent issues will continue to encourage dialogue on pertinent legal questions of public interest, and meaningfully contribute to conversations about public good, justice and equity.

Mā te kimi ka kite, Mā te kite ka mōhio, Mā te mōhio ka mārama.
Seek and discover. Discover and know. Know and become enlightened.

* BCom/LLB, University of Auckland. All opinions expressed in this Editor's Note are my own. This was written on behalf of all members of the editorial team.

There has been a growing engagement with Māori legal issues and te ao Māori in New Zealand over the years. This is reflected not only in legal education, where tikanga is proposed to be a required stand-alone compulsory subject within law schools,[1] but also in wider public consciousness. In November 2024, thousands of people participated in a nine-day hīkoi protest against the Principles of the Treaty of Waitangi Bill introduced in Parliament.[2] The hīkoi was arguably "New Zealand's largest-ever protest".[3] These events and the public's interest in it are examples of an ongoing moment of reflection within New Zealand.

Issue 11 directly mirrors the growing relevance of Māori legal rights in New Zealand, with approximately half of the articles addressing Māori-centred legal topics. These include legal personhood of taonga species, Tiriti obligations within international affairs, legislative framework for recognition of customary rights, relationship between tikanga and the common law, and the rights and well-being of tamariki Māori.

The articles also respond to contemporary pressures felt in New Zealand. In recent years, there has been a growing interest with artificial intelligence (AI) tools aiming to enhance efficiency by assisting with legal research, drafting and analysis. The integration of AI in the legal space prompted reconsideration of AI use within the courts.[4] Generative AI guidance for lawyers was released to manage the legal profession's ethical and privacy obligations.[5] Such technological developments demand thoughtful evaluation. On one hand, it enhances access to information, decision-making and efficiency. But on the other, it may also pose ethical concerns and threats to privacy, with vulnerable communities being at particular risk. From a similar perspective, one of the articles in this issue examines the contemporary phenomenon of "sharenting" and its implications for privacy.

Another example of a contemporary pressure felt in 2024 was economic in nature,[6] placing strain on the justice system. Nearly 6,500 jobs were lost in the public sector to save costs across Government agencies.[7] There was no budget increase for legal aid, creating sustainability issues for both the scheme and lawyers.[8] Additionally, legal aid funding was removed for background and cultural reports under s 27 of the Sentencing Act 2002, and

1 New Zealand Law Society "The case for tikanga Māori: The LLB degree curriculum in a contemporary context" (2024) 958 LawTalk 24.

2 Radio New Zealand "Hīkoi mō te Tiriti day one: 'Let's make this hīkoi build a nation'" (12 November 2024) <www.rnz.co.nz>.

3 Joel McManus "Was the hīkoi New Zealand's largest-ever protest?" (20 November 2024) The Spinoff <https://thespinoff.co.nz>.

4 Courts of New Zealand | Ngā Kōti o Aotearoa *Guidelines for Use of Generative Artificial Intelligence in Courts and Tribunals: Judges, Judicial Officers, Tribunal Members and Judicial Support Staff* (7 December 2023).

5 The New Zealand Law Society produced some guidance on artificial intelligence use, identifying risks and how to manage them: New Zealand Law Society "Generative AI guidance for lawyers" (14 March 2024) <www.lawsociety.org.nz>.

6 There was a technical recession, rising rate of unemployment, stall in economic growth and a fall in GDP per capita. The COVID-19 pandemic caused spending overruns, which led an increase in the government spending to GDP ratio. There was a focus on better control of government spending to keep fiscal consolidation on track. See *OECD Economic Surveys: New Zealand 2024* (OECD, May 2024) at 13.

7 Azaria Howell "Budget 2024: Impact on public servants revealed, ministries cutting back millions of dollars" *The New Zealand Herald* (online ed, Wellington, 30 May 2024).

8 New Zealand Law Society "Budget 2024 for the legal profession" (30 May 2024) <www.lawsociety.org.nz>.

concerns were raised about its impact on access to justice.[9] Read within the same context, the articles in this issue engage with a range of contemporary concerns, including topics on tax, inequality, discrimination and human rights.

This issue features 10 articles. **Angela Black** explores the modern phenomenon of "sharenting"—parents sharing their children's lives online, largely without the children's consent—and the risks it poses on children's privacy. Black argues that New Zealand's current laws are inadequate in protecting the interests of children. She proposes that we should look overseas for ideas for future reform, such as a statutory right to erasure, recognition of a tort of misappropriation of likeness, and a public-health campaign to educate parents about the harms of sharenting. These, she concludes, would better protect children's digital identities while respecting parental autonomy and freedom of expression.

Imogen Burrows explores eligibility regulations imposed on women athletes. Prompted by the European Court of Human Rights' ruling in the Caster Semenya case, Burrows scrutinises the Court of Arbitration for Sport (CAS) and its ability to fairly address human rights disputes. She highlights concerns about the culture within CAS and its shortcomings in protecting women's rights, particularly against the backdrop of discriminatory eligibility rules. Burrows considers potential reforms that could better safeguard female athletes in future sports-related dispute resolution processes.

Melissa Connolly revisits the Waitangi Tribunal's landmark Wai 262 Report, which affirmed that true partnership under Te Tiriti o Waitangi requires shared decision-making between the Department of Conservation and kaitiaki in conservation management. Through Ngāti Koata's relationship with their taonga species, the tuatara, Connolly evaluates both the Tribunal's recommendations and the Government's limited response. She concludes that current measures fall short of enabling Māori to fully exercise rangatiratanga as kaitiaki. Connolly argues for extending the legal personality model to taonga species, ensuring each hapū's unique relationships are protected in law and that the Crown meets its obligations to safeguard taonga under art 2 of Te Tiriti o Waitangi.

Shaun Gallagher examines how tax distortions create horizontal inequity and stifle economic growth. He traces the origins of New Zealand's portfolio investment entity (PIE) regime—introduced in 2007 to eliminate major distortions in collective investment—and highlights how, despite its successes, it has produced new inefficiencies. Gallagher argues that the PIE regime contributes to New Zealand's low savings rates and preference for unproductive investment. In response, he proposes aligning PIE tax rates more closely with personal rates, alongside reforms to the taxation of shares to make managed funds more appealing.

Charles Harmer explores New Zealand's proposed digital services tax, which aims to address the tax challenges posed by multinational digital enterprises. Harmer outlines how these companies currently benefit from New Zealand's market without establishing the physical presence necessary to incur tax liability, creating a significant gap in the nation's revenue base. While a multilateral solution remains the ideal, he argues that such coordination is unlikely in the near term. Harmer argues that the digital services tax offers a practical interim measure to curb base erosion and, importantly, lays the groundwork for a more durable long-term solution.

Danica Loulié-Wijtenburg argues that as Aotearoa becomes increasingly engaged in global issues, the Crown must do far more to uphold its Tiriti o Waitangi obligations in

9 New Zealand Law Society "Access to justice impacted by proposed repeal of sentencing report funding" (8 February 2024) <www.lawsociety.org.nz>.

shaping the nation's positions on international affairs. Drawing on Matike Mai's spheres-based constitutional models, she contends that genuine Tiriti partnership requires international engagement to begin in a relational sphere, where both partners contribute equally. Loulié-Wijtenburg critiques the Waitangi Tribunal's Wai 262 recommendations for privileging Crown authority over tino rangatiratanga and demonstrates how the Crown's current ad hoc consultation processes fall short of honouring Māori rights. She concludes by proposing a Tiriti-consistent model grounded in rangatiratanga, kāwanatanga and relational spheres, and explores how such an approach could be practically implemented in international policy-making.

Bryce Lyall examines the Marine and Coastal Area (Takutai Moana) Act 2011, a distinctive framework for recognising customary rights in Aotearoa New Zealand's foreshore and seabed. Although the Act offers significant potential benefits for successful applicants, courts have struggled to align its outcomes with its stated purposes, and the Waitangi Tribunal has found it inconsistent with Te Tiriti o Waitangi. Lyall argues for new legislation to be developed while the current Act remains in place. He proposes practical interim reforms to keep the regime functioning and contends that the least prejudicial path forward is for Parliament to adopt a tikanga-based test, enabling broad and meaningful recognition of customary rights.

Talia Nicol shines a light on an often-overlooked form of workplace inequality: discrimination arising from menstruation and menopause. Drawing on case law, empirical research, and international legal responses, she illustrates how claims of menstrual and menopausal discrimination are frequently suppressed and why miscarriages of justice can occur even when such claims reach formal processes. Nicol reviews New Zealand's current legal framework and assesses potential reforms, including menstrual leave provisions and an expanded interpretation of sex discrimination.

Ben Roberts examines the Supreme Court's recent expansion of tikanga's role within Aotearoa New Zealand's common law, marking a significant shift away from the constraints of colonial-era precedent. As the relationship between tikanga and the common law develops case by case, Roberts highlights key challenges: uncertain legal boundaries, the need to preserve the integrity of tikanga, and the courts' capacity to adjudicate complex tikanga matters. He argues that current procedural uncertainties place tikanga at unnecessary risk and calls for the common law to adapt its traditional methodologies, adopting approaches grounded in tikanga to ensure its proper and respectful application.

Sally Stroobant examines the repeal of s 7AA of the Oranga Tamariki Act 1989, a provision designed to safeguard the well-being of tamariki and rangatahi Māori and their whānau, hapū, and iwi. Stroobant argues that the repeal highlights the vulnerability of Tiriti o Waitangi rights to political discretion and underscores the need for stronger safeguards. She proposes empowering the Waitangi Tribunal with context-dependent binding authority over legislation that implements te Tiriti, including Bills before Parliament, with recommendations becoming binding if an agreement between the Crown and Māori representatives is not reached within 90 days. This approach aims to strengthen the protection of Māori rights while ensuring meaningful accountability in legislative processes.

I hope our readers enjoy engaging with the ideas and perspectives offered across these 10 articles. Finally, I would like to acknowledge the Editors-in-Chief, Maria Romero De Medeiros and Zoelle Wong, for their excellent editorial work and steady leadership. Thank you to the editors for their diligence. Many thanks to Jayden Houghton and Ana Kathrin (Kyra) Maquiso for their continued guidance and support, and to the Academic Review Board for their feedback and recommendations during the article selection process.