FIONA WRIGHT

TIKANGA MĀORI:
WHAT IS IT DOING IN NEW ZEALAND LAW?

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FACULTY OF LAW
VICTORIA UNIVERSITY OF WELLINGTON

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ABSTRACT

This paper addresses the interface between New Zealand's legislative protection of Māori culture, with its inherent spirituality, and religious freedoms. Through a steadily increasing presence of tikanga Māori in statutes, Māori spiritual values have reached a privileged position in New Zealand law: they shape advisory boards and decision-making bodies; they influence policy and decision-making, both procedurally and substantively; and they justify limiting freedom of information. An official preference for any set of spiritual values has significant implications for New Zealand's constitutional law–religion relationship, as well as its capacity to respect freedoms *from* as well as *of* religion and belief. However, existing mechanisms for alerting Parliament to potential rights breaches are currently underutilised with regard to tikanga Māori. This paper recommends that every proposed legislative use of tikanga Māori should prompt advice to the Attorney-General about how it affects the rights protected by sections 13, 15 and 19 of the New Zealand Bill of Rights Act 1990 (NZBORA). If rights will being limited in a way that cannot be demonstrably justified in a free and democratic society, the Attorney-General should, under section 7 of the NZBORA, alert Parliament to that fact.

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises exactly 15,523 words.

I INTRODUCTION

> [F]reedom of religion and belief should … contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination.[1]

This paper addresses the interface between New Zealand's legislative protection of Māori culture,[2] with its inherent spirituality, and religious freedoms. Its genesis was a 2003 article by Rex Ahdar,[3] who discussed the dilemma that arises when a secular state privileges spiritual concerns over others in the name of "fostering indigenous culture".[4] Ahdar looked at two instances of the courts grappling with Māori spiritual issues, and went on to consider whether official recognition of Māori spirituality was workable, or indeed appropriate.

While Ahdar's article identified that "[t]he weight of recent state policy demonstrates a distinct advantaging of Māori spirituality ahead of others",[5] it did not review the extent to which Māori spirituality was legislatively protected, nor the range of effects that it could have. Addressing those questions is the first objective of this paper.

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1 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based upon Religion or Belief (23 November 1981) GA RES 36/55, preamble.

2 Throughout this paper, references to sources that use the word "Maori" without a macron are reproduced as "Māori". Likewise, references to "pakeha" are reproduced as "pākehā". The macron indicates a long vowel sound; its use is a matter of style. See *Write Edit Print: Style Manual for Aotearoa New Zealand* (AGPS Press and Lincoln University Press, Victoria, 1997).

3 Rex Ahdar "Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments" (2003) 23 OJLS 611 [Ahdar "Indigenous Spiritual Concerns and the Secular State"].

4 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 611.

5 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 627; see also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) 280–281.

A subsequent objective is to take the identified effects of tikanga Māori and analyse them from both a constitutional and a human rights perspective. Tikanga Māori has a sufficient nexus with religion that its increasing presence in legislation raises serious questions about New Zealand's respect for religious freedoms and its assumed constitutionally secular status.

Constitutional State–religion arrangements are canvassed in Part II of this paper, and New Zealand's constitutional arrangements with regard to religion are discussed. Although it has never claimed to have an established church,[6] New Zealand has historically privileged Christianity over other religious beliefs and has been labelled a de facto Christian State.[7] However, the influence of Christianity on New Zealand law is diminishing. It is arguably being supplanted by references to Māori culture and values.

In order to establish how tikanga Māori engages the law–religion debate, Part III examines the concepts of tikanga Māori, Māori spirituality and religion. Part IV surveys and analyses the use of tikanga Māori in legislation, and identifies other legislative words and phrases which may encompass Māori spiritual values.

Part V revisits the issue of New Zealand's constitutional status with respect to religion, and concludes that, as well as fulfilling a role as New Zealand's civil religion, tikanga Māori is at least partly established by law. The human rights implications of this are considered in Part VI. The competing rights at stake are Māori rights, under the Treaty of Waitangi and the New Zealand Bill of Rights Act 1990 (NZBORA), to have their culture protected, and the rights of non-Māori (tauiwi[8]) under the NZBORA to have their religious freedoms respected:

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6 Rex Ahdar "New Zealand and the Idea of a Christian State" in Rex Ahdar and John Stenhouse (eds) *God and Government: The New Zealand Experience* (University of Otago Press, Dunedin, 2000) 59, 61 [Ahdar "New Zealand and the Idea of a Christian State"].

7 Rishworth and others, above n 5, 280; Ahdar "New Zealand and the Idea of a Christian State", above n 6, 63.

8 Tauiwi is used in this paper to refer to non-Māori. In New Zealand's multicultural society, this may be a more appropriate term than the usual "pākehā", which more accurately denotes only people of European descent.

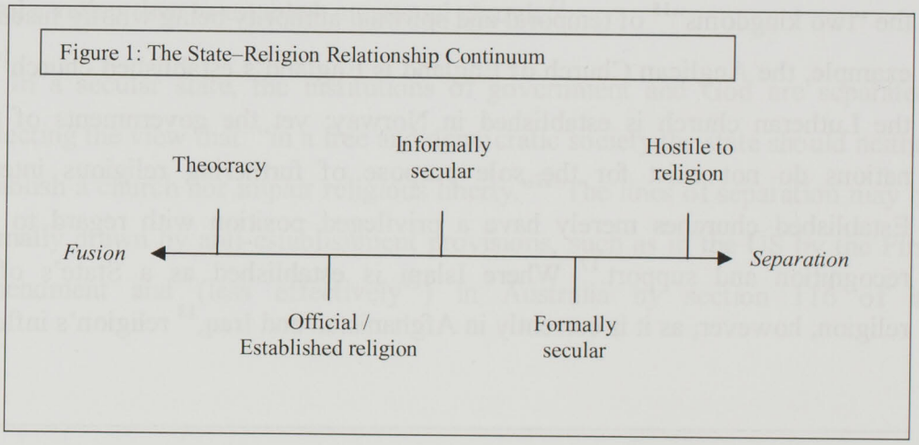
in other words, their right not to be compelled by a supposedly secular State to actively honour the spiritual values of a religious minority. To mitigate any potentially negative rights implications, Part VII proposes three solutions.

II CONSTITUTIONAL STANDPOINTS ON RELIGION

> [T]here are myriad diffuse and intangible influences that the state exerts upon religion, and vice versa.[9]

The State–religion relationship can take many forms, from complete fusion of religious and State institutions to a degree of separation that amounts to complete hostility between them. A number of possible State–religion relationships (see Figure 1) are described briefly below, with a view to analysing New Zealand's constitutional arrangements with respect to religion.[10]

Figure 1: The State–Religion Relationship Continuum



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9 Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State* (Oxford University Press, Oxford, 2005) 68.

10 For other models of State–religion relationships, see Ahdar and Leigh, above n 9, ch 3; Carolyn Hamilton *Family, Law and Religion* (Sweet & Maxwell, London, 1995) 2–4; Elizabeth Odio Benito *Elimination of All Forms of Intolerance and Discrimination based on Religion and Belief* (United Nations Centre for Human Rights, New York, 1989) 18–19.

A State–Religion Relationships

At the fusion end of the continuum are theocracies, where governing authority is sourced directly from God (or other deity). In a theocracy, the State furthers religious interests by implementing and enforcing divine laws.[11] Both Iran and Afghanistan have been under theocratic rule in recent times to the extent that political authority and social arrangements were wholly controlled by *Sharia* clerics,[12] but purer theocracies operated in ancient societies such as Egypt, where the Pharaohs were thought to wield divine power. An alternative model of fused State–religion institutions is Erastianism, in which the State, rather than religion, dominates, and religion is used to further State policies rather than vice versa.[13] China, with its support of authorised religion and suppression of others, has been likened to an Erastian State.[14]

States may imbue a religion (or even more than one) with legal status without the "two kingdoms"[15] of temporal and spiritual authority being wholly fused. For example, the Anglican Church of England is England's established church[16] and the Lutheran church is established in Norway; yet the governments of those nations do not exist for the sole purpose of furthering religious interests. Established churches merely have a privileged position with regard to State recognition and support.[17] Where Islam is established as a State's official religion, however, as it is currently in Afghanistan and Iraq,[18] religion's influence

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11 Ahdar and Leigh, above n 9, 70.

12 Ahdar and Leigh, above n 9, 70.

13 See Ahdar and Leigh, above n 9, 71 and Michael W McConnell "Why is Religious Liberty the 'First Freedom'?" [2000] 21 Cardozo L Rev 1243, 1249.

14 Ahdar and Leigh, above n 9, 71.

15 See McConnell, above n 13, 1246.

16 Revised Canons Ecclesiastical, Canon A1 (UK). See also *Halsbury's Laws of England* (4 ed, Butterworths, London, 1975) vol 14, Ecclesiastical Law, paras 334, 345.

17 Ahdar and Leigh, above n 9, 76.

18 Constitution of Afghanistan, art 2; Iraqi Constitution, art 2.

on State affairs may be greater, given the nature of the Islamic religion: "Islam rejects a dualistic worldview that would compartmentalize areas of life into the religious/sacred versus the secular/profane. All of life is lived in submission to Allah, everyday mundane activities included."[19]

The rationale for establishment may be historical rather than contemporary. For example:[20]

> England's Established Church was Parliament's attempt to rein in the deadly strife of the Reformation in the interest of internal tranquillity and external relations with the Roman Catholic Church. By contrast, "Establishment" had become a dirty word one hundred years later when the American founding fathers set about building the "wall of separation" between church and state … .

By the time England exported law to its colonies, the historical justifications for establishment were often no longer cogent, and many colonies chose to be secular rather than to establish a national church.[21]

In a secular state, the institutions of government and God are separated, reflecting the view that: "in a free and democratic society the state should neither establish a church nor impair religious liberty."[22] The lines of separation may be formally drawn by anti-establishment provisions, such as in the US by the First Amendment and (less effectively[23]) in Australia by section 116 of its

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19 Ahdar and Leigh, above n 9, 5.

20 Keith Mason "Preface" in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion* (Routledge, Abingdon (Oxfordshire), 2005) ix.

21 Including the United States, Canada, South Africa, Australia and New Zealand: US Bureau of Democracy, Human Rights and Labor "International Religious Freedom Report" (15 September 2006) <http://www.state.gov/g/drl/rls/irf/2006/> (last accessed 2 October 2006).

22 Robert Audi "The Separation of Church and State and the Obligations of Citizenship" in Wojciech Sadurski (ed) *Law and Religion* (Dartmouth, Aldershot (Hampshire), 1992) 29, 30.

23 Rishworth and others, above n 5, 285.

Constitution,[24] or may be loosely arranged and merely a matter of State practice. A formal guarantee of secularism, however, may be no better than informal arrangements at preventing religion from influencing the law:[25]

> The *de jure* relationship between religion and the state may not necessarily coincide with the *de facto* connection. At the level of beliefs and ideology, the state may be predisposed, or hostile, to a religion (or religions generally) whatever the official constitutional position espoused.

Although it has been said that the US Constitution's First Amendment "comes close to expelling religion from the public sphere",[26] the Christian persuasion of its political leadership is often evident. For example, when President George W Bush addressed a joint session of Congress and the American people shortly after the terrorist bombing of the World Trade Centre in 2001, he concluded with the following words:[27]

> Fellow citizens, we'll meet violence with patient justice – assured of the rightness of our cause, and confident of the victories to come. In all that lies before us, may God grant us wisdom, and may He watch over the United States of America.

The Australian anti-establishment provision, on the other hand, has been interpreted narrowly by the High Court of Australia to invalidate only a law

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24 US Constitution, amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Australian Constitution, s 116: "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

25 Ahdar and Leigh, above n 9, 68.

26 Peter Radan, Denise Meyerson and Rosalind F Croucher "Introduction" in Radan, Meyerson and Croucher (eds), above n 20, 2.

27 President George W Bush "Address to a Joint Session of Congress and the American People" (20 September 2001) <http://www whitehouse.gov/> (last accessed 13 March 2006.

whose purpose is the creation of a national church,[28] thus allowing laws that incorporate or further religious values in less extreme ways.

At the far right of the State–religion relationship spectrum, God and government are wholly divorced. Governments may go further than just separating themselves from religious influences, and actively oppose religion in all forms: hostile, rather than benign, separation.[29] Hostility may arise where a State's political ideology is incompatible with acknowledging potentially competing values systems:[30]

> Totalitarian and authoritarian regimes seek to control religious thought and expression. Such regimes regard some or all religious groups as enemies of the state because of their religious content. The practice of religion is often seen as a threat to the state's ideology or the government's power.

States that suppress religion to some extent include Burma, China, Eritrea, Iran, North Korea, Saudi Arabia, Sudan and Vietnam. These States have been criticised by the international community for their curtailing of religious freedoms.[31] The following comments relate to North Korea:[32]

> Recent defector, missionary, and nongovernmental organization (NGO) reports indicate that religious persons engaging in proselytizing in the country, those who have ties to overseas evangelical groups operating across the border in the People's Republic of China (China), and specifically, those repatriated from China and found to have been in contact with foreigners or missionaries outside the country, have been

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28 See Tony Blackshield "Religion and Australian Constitutional Law" in Radan, Meyerson and Croucher (eds), above n 20, 81–115.

29 Ahdar and Leigh, above n 9, 74–75.

30 US Bureau of Democracy, Human Rights and Labor, above n 21, "Executive Summary", Part I.

31 US Bureau of Democracy, Human Rights and Labor, above n 21, "Executive Summary", Part I.

32 US Bureau of Democracy, Human Rights and Labor, above n 21, "Korea, Democratic People's Republic of".

> arrested and subjected to harsh penalties. Defectors continued to allege that they witnessed the arrests and execution of members of underground Christian churches by the regime in prior years.

Constitutional State–religion relationships have a tremendous impact on individual religious freedoms: the right to hold religious values, the right to manifest them, and the right not to suffer discrimination based on them. The scope of these rights is discussed in Part VI below, but it suffices at this point to say that a relationship can be drawn between constitutional arrangements and religious freedoms. A State's attitude to religion may influence the content of school curricula (for example, whether creationism may be taught[33]), State funding of religious schools, and the observance of public holidays.[34] It can determine the extent to which citizens can demand exemption from laws that are inconsistent with their religious beliefs, such as education or drug laws.[35]

Figure 2, below, maps a theoretical relationship between State–religion arrangements and religious freedoms. Of the constitutional arrangements discussed above, those at the extremes of the continuum are most likely to be inconsistent with religious freedoms: theocracies allow belief in only one religion and States hostile to religion allow belief in none. The degree to which an established or official religion will undermine religious freedoms will depend on internal constitutional arrangements. For example, although England has an established church, religious freedom was increasingly tolerated, and eventually promoted, in England from the 19th century.[36] A State's international law obligations will also be relevant.

Secular States arguably allow the greatest scope for religious freedoms, but the extent of such freedoms in any regime again depends on individual constitutional and political arrangements. In France, for example, which has been

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33 See for example *Kitzmiller v Dover Area School Dist* (2005) 400 F Supp 2d 707 Jones DJ.

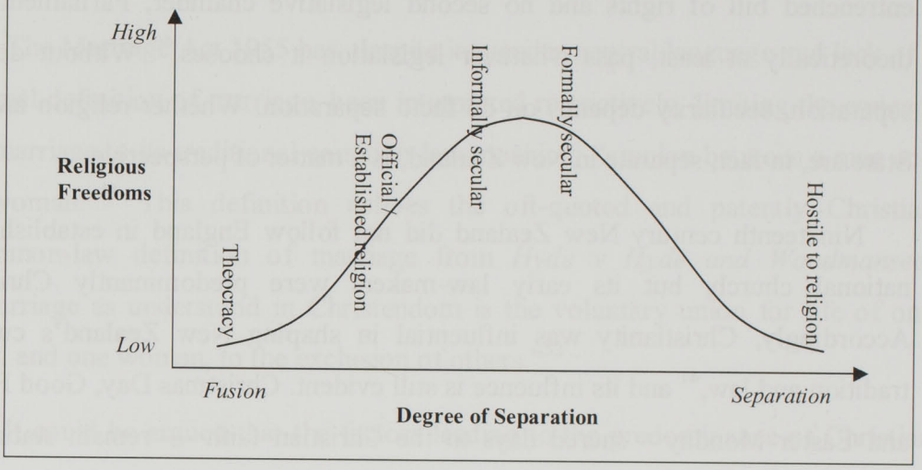
34 Radan, Meyerson and Croucher, above n 26, 2.

35 Radan, Meyerson and Croucher, above n 26, 2.

36 Hamilton, above n 10, 7.

legally secular since 1905, religious clothing and insignia have been recently banned from schools: arguably a restriction on religious freedom because the law was aimed predominantly at Muslim students wearing headscarves.[37]

Figure 2: Effect of State–Religion Relationship on Religious Freedoms



B New Zealand: A Secular State?

For a long time, New Zealand has regarded itself as a secular state. In the early days of the colony, its Parliament and its courts stated that there was no state church, but rather equality of religious denominations.[38] Sir Robert Stout, in 1879, stated that New Zealand "as a nation [had] nothing to do with religion", that "[e]very religion [had] equal rights before the law", and that no religions were "supported by the State". More recently, the Court of Appeal has affirmed

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37 US Bureau of Democracy, Human Rights and Labor, above n 21, Europe and Eurasia, France, Section II Status of Religious Freedom; Ahdar and Leigh, above n 9, 73; BBC News "French Scarf Ban Comes into Force" (2 September 2004) <http://news.bbc.co.uk/> (last accessed 1 October 2006).

38 (1854–1855) NZPD 4–6; *Carrigan v Redwood* (1911) 30 NZLR 244, 253 (SC) Cooper J.

that, in accordance with the separation of church and State, New Zealand has no national established church.[39]

However, the secularity of New Zealand's constitutional arrangements is informal, rather than formal. New Zealand law includes no anti-establishment clause akin to those in the US or Australian Constitutions. Further, with no entrenched bill of rights and no second legislative chamber, Parliament can, theoretically at least, pass whatever legislation it chooses.[40] Without de jure separation, secularity depends on de facto separation. Whether religion and the State are, in fact, separate in New Zealand, is a matter of perspective.

Nineteenth century New Zealand did not follow England in establishing a national church, but its early law-makers were predominantly Christian. Accordingly, Christianity was influential in shaping New Zealand's culture, tradition and law,[41] and its influence is still evident. Christmas Day, Good Friday and Easter Monday – sacred days to the Christian faith — remain statutorily protected as public holidays.[42] These days are also kept pure of radio and television advertising,[43] as well as most retail trading.[44] Television advertising is further prohibited on Sunday mornings generally,[45] presumably to "preserve the religious sanctity of the Christian Sabbath".[46] The only crime in the Crimes Act 1961 under the heading "crimes against religion" is that of blasphemous libel,[47]

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39 *Mabon v Conference of the Methodist Church of New Zealand* [1988] 3 NZLR 513, 523 (CA) Richardson P for the Court.

40 See Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Oxford, 2004) 156–157.

41 I L M Richardson *Religion and the Law* (Sweet & Maxwell, Wellington, 1962) 61, cited in Ahdar "New Zealand and the Idea of a Christian State", above n 6, 63.

42 Holidays Act 2003, s 44(1).

43 Broadcasting Act 1989, s 81.

44 Shop Trading Hours Act Repeal Act 1990, ss 3–4A.

45 Broadcasting Act 1989, s 81.

46 See Rishworth and others, above n 5, 286, describing a Canadian law prohibiting Sunday trading.

47 Crimes Act 1961, s 123.

which, although not applied since 1922,[48] has yet to be extended by the New Zealand courts beyond attacks on the Christian faith. The notion that section 123 is aimed at the protection of Christianity is based on the English common law,[49] but it is arguable whether Christianity forms part of New Zealand law in the same way as it does the law of England, such that it should justify being protected from blasphemy over and above other religions.[50]

The Marriage Act 1955 has, despite its gender-neutral language and lack of a formal definition of marriage, been interpreted restrictively, limiting the concept of marriage to its traditional common-law meaning: "a union between a man and a woman."[51] This definition echoes the oft-quoted and patently Christian common-law definition of marriage from *Hyde v Hyde and Woodmansee*: "Marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of others."[52]

It could be argued that the factors leading to the predominance of Christian values in New Zealand are largely historical, and that New Zealand's growing commitment to both secularity and human rights is gradually eroding Christianity's informally privileged status. The increasing legal recognition of personal relationships other than traditional Christian marriages may be an example of this. For example, criminal sanctions against homosexual relationships were abolished in 1986;[53] the Matrimonial Property Act 1976 was renamed the Property (Relationships) Act 1976 in 2002, giving legal rights to de facto couples; and family law reforms in 2004 have recast notions of parenthood

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48 *R v Glover* [1922] GLR 185.

49 *R v Chief Metropolitan Stipendiary Magistrate ex parte Choudhury* [1991] 1 All ER 306 (QB).

50 See generally Hon Bruce Robertson (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington, Crimes Act, 1992) vol 1, para CA 123.01–123.03 (last updated 29 April 2005).

51 *Quilter v Attorney-General* [1988] 1 NZLR 523, 526 (CA) Richardson P.

52 *Hyde v Hyde and Woodmansee* [1861–73] All ER 175, 175 (Con Ct) Lord Penzance.

53 Homosexual Law Reform Act 1986.

and guardianship beyond traditional family models.[54] The waning dominance of Christian values in law may echo the decreasing popularity of Christianity in society. New Zealanders identifying as Christian fell from 86 per cent of the population in 1961 to 62 per cent in 2001. Most defectors appear to have joined the "no religion" camp, which went from just 0.7 per cent of the population in 1961 to 31 per cent in 2001.[55]

If legal and social tides are in fact eroding Christian values from New Zealand law, they may be simultaneously leaving behind deposits of Māori spiritual values, via the increasing statutory protection of tikanga Māori and other such linguistic values-carriers. Whether the protection of Māori culture automatically privileges Māori spiritual values, and whether those values can be compared to Christian values in terms of the law–religion debate, depends a great deal on what the terms "tikanga Māori" and "religion" mean, and how they are used and understood. The next part of this paper addresses these definitional issues.

III DEFINING TIKANGA MĀORI, MĀORI SPIRITUALITY AND RELIGION

A Tikanga Māori

Tikanga is commonly understood to be synonymous with culture, but translating "tikanga" as "culture" does no justice to the concept's complexity. The New Zealand Law Commission, which is statutorily obliged to take into consideration te ao Māori (the Māori dimension),[56] released a report in 2001

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54 Care of Children Act 2004.

55 *New Zealand Official Yearbook 1970* (Department of Statistics, Wellington, 1970) 87; Statistics New Zealand <http://www.statistics.govt.nz> (last accessed 8 September 2006). At the time of writing, detailed 2006 census results were not available.

56 Law Commission Act 1985, s 5(2).

entitled *Māori Custom and Values in New Zealand Law.*[57] This report examined the existing impact of Māori custom and values on New Zealand law and considered ideas for future law reform projects that would give effect to Māori values.[58] In its report, the Commission used tikanga Māori as a general term for "Māori custom law", but acknowledged that a simplistic translation could not properly express the term's meaning.[59] The following extract from the report illustrates this point:[60]

> "Tikanga" derives from the adjective "tika" meaning "right (or correct) and just (or fair)". The addition of the suffix "nga" renders it a noun which, in this context, may be defined as "way(s) of doing and thinking held by Māori to be just and correct, the right Māori ways".
>
> Tikanga includes measures to deal firmly with actions causing a serious disequilibrium within the community. It also includes approaches or ways of doing things which would be considered to be morally appropriate, courteous or advisable, but which are not rules that entail punitive sanctions when broken. For example, it is tika to purify oneself through cleansing with fresh water following proximity to death, but if this is not done there is no law with a specified penal sanction for non-compliance. … [M]any Māori believe that failure to do what is tika may attract supernatural punishment if it involves a breach of tapu.
>
> Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning nonsanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour.

The extract emphasises the essentially dichotomous nature of tikanga Māori: it comprises both rules and values; both procedures and principles. The values

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57 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, Wellington, 2001).

58 Law Commission, above n 57, para 2.

59 Law Commission, above n 57, paras 5, 68.

60 Law Commission, above n 57, paras 73–75, footnotes omitted.

component of tikanga is what makes "culture" such an inadequate translation. "Culture" describes "the customs, ideas, and social behaviour of a particular people or group".[61] It is evidenced by what people do and say rather than by what they hold dear. Values – "principles or standards of behaviour"[62] – may be conceptualised separately from Western "culture", but they are indistinguishable from tikanga Māori. And, the values underlying tikanga are inherently spiritual.

B Māori Spirituality

An early Māori ethnographer, Elsdon Best, wrote in 1923 that "the ancestors of the Māori must have devoted much thought to the subjects of the whence and whither of man, and of his spiritual nature".[63] Although Best's sense of his own cultural superiority is evident from his writing (he said it may be "more correct to speak of Māori religious beliefs and practices than to dignify such by the name of religion"[64]), he did document the existence of a sophisticated indigenous belief system. Best identified four categories of *atua Māori* (Māori gods), noting that "the power that rendered the institutions of *tapu* and ritual formulæ effective emanated from the gods of all classes".[65]

In the highest category was Io, the supreme being:[66]

> He is called Io the Parentless because he was never born of parents. He was Io the Parent because all things originated from him, or through his agency, albeit he begat no being. He was known as Io the Permanent because he is eternal and unchangeable, and as Io-te-waiora because he is the welfare of all beings and all things in all realms.

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61 *Concise Oxford English Dictionary* (11 ed, Oxford University Press, Oxford, 2004) 349.

62 *Concise Oxford English Dictionary*, above n 61, 1597.

63 Elsdon Best *The Māori* (vol 1, Harry H Tombs Limited, Wellington, 1923) 234.

64 Best, above n 63, 233.

65 Best, above n 63, 238 (emphasis in the original).

66 Best, above n 63, 235.

Below Io sat the nature or "departmental" gods (such as Tane, who represented "sun, light and the male fructifying power"[67]), then the regional or district gods, also representing natural phenomena (for example, Aitupawa, who represents thunder, and Tamarau, representing meteors[68]), and, finally, family gods (deified spirits of ancestors).[69]

The sophistication of Māori spiritual beliefs meant that early Christian missionaries to New Zealand had extremely good raw material to work with. Historian Michael King, in his 2003 *Penguin History of New Zealand*, comments that Māori, as a "highly spiritual people", "were far more receptive to consideration and discussion of religious issues, once bilingualism made such discussions possible, than were, say, the secularised humanists of the European Enlightenment and their successors."[70] Accordingly, Māori uptake of Christianity was high. However, although missionaries claimed many successful "conversions", Christianity overlaid, rather than replaced, traditional Māori spiritual values. King continues:[71]

> [T]he high degree of spiritual energy which Māori had always shown, and their deep interest in religious questions and practice, came to be relocated in the practice of Christianity. Karakia Māori were increasingly replaced by karakia mihinare, although the point should be made that this often occurred *without* Māori relinquishing a belief in their own gods. In this sense, perhaps, Māori did not so much convert *to* Christianity as convert Christianity, like so much else that Pākehā had brought, to their own purposes.

Spiritual aspects of tikanga have more than survived colonisation and missionary fervour: they are now being revived and protected by a State

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67 Best, above n 63, 236.

68 Best, above n 63, 238.

69 Best, above n 63, 234.

70 Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003) 139–140, 387. See also Keith Newman *Ratana Revisited: An Unfinished Legacy* (Reed, Auckland, 2006) 33.

71 King, above n 70, 144 (emphasis in the original).

determined to embrace multiculturalism.[72] This trend is not unique to New Zealand:[73]

> The global renaissance of indigenous peoples in the latter part of the 20th century has brought with it a resurgence of indigenous religions and spiritualities. This is hardly surprising as indigenous culture and religion are invariably intertwined.

Māori spiritual values are unquestionably a significant part of Māori culture, and increasingly part of New Zealand law and policy.

This paper is concerned with the extent to which the protection of indigenous spiritual values threatens notions of secularism. For this reason, it is important to define exactly what is meant by the term Māori spirituality when it is used here. Māori spirituality has been recently defined as:[74]

> [T]hat body of practice and belief that gives the spirit (wairua) to all things Māori. It embraces prayer and the spirit. *Māori spirituality pervades all Māori culture (tikanga) and ways of life.*

For the purposes of this paper, Māori spirituality is not to be confused with institutionalised forms of Māori Christianity, such as the Ringatu and Ratana faiths.[75] Nor does this paper aim to prove that tikanga Māori is, or should be considered as, an organised religion of the ilk of Christianity or Islam, even though the scope of "religion" is broad.[76] Instead, this paper considers Māori spirituality to be that part of Māori culture that references the supernatural; the

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72 Newman, above n 70, 457; see also 455.

73 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 611.

74 Philip Cody *Seeds of the Word: Ngā Kākano o te Kupu* (Steele Roberts, Wellington, 2004) 21–22 (emphasis added).

75 See generally William Greenwood *The Upraised Hand, or, the Spiritual Significance of the Ringatu Faith* (Polynesian Society, Wellington, 1942) (Ringatu faith) and Newman, above n 70 (Ratana faith).

76 See below Part III C Religion.

higher authority that guides "the right Māori way";[77] the mystical elements that support tikanga Māori.

C Religion

The concept of spirituality suggests a way of thinking that is framed by matters of the human spirit rather than by material or physical things. Religion, on the other hand, can be perceived on several levels, from institutional religions such as Christianity or Islam to broad societal movements about what is holy to entirely personal beliefs and practices.[78] Finding a reliable definition of religion is difficult, for general as well as for legal purposes. Consider the following extract from *The HarperCollins Dictionary of Religion*:[79]

> Introductions to the study of religion routinely include long lists of definitions of religion as proof of this. However, these lists fail to demonstrate that the task of defining religion is so difficult that one might as well give up on the task. What the lists show is that there is little agreement on an adequate definition.

The text goes on to give examples of adequate and inadequate definitions. The following general definition, according to this text, is "adequate":[80]

> One may clarify the term religion by defining it as a system of beliefs and practices that are relative to superhuman beings. This definition moves away from defining religion as some kind of experience or worldview. It emphasizes that religions are systems or structures consisting of special kinds of beliefs and practices: beliefs and practices that are related to superhuman beings. Superhuman beings are beings who can do things ordinary mortals cannot do. They are known for their miraculous deeds and powers that set them apart from humans. They can be either male or

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77 See above n 57.

78 Bruce David Forbes and Jeffrey H Mahan (eds) *Religion and Popular Culture in America* (University of California Press, California, 2000) 8.

79 Jonathan Z Smith (ed) *The HarperCollins Dictionary of Religion* (HarperCollins, New York, 1995) 893.

80 *The HarperCollins Dictionary of Religion*, above n 79, 893.

> female, or androgynous. They need not be gods or goddesses, but may take on the form of an ancestor who can affect lives. They may take the form of benevolent or malevolent spirits who cause good or harm to a person or community. Furthermore, the definition requires that such superhuman beings be specifically related to beliefs and practices, myths and rituals.

The difficulty of defining religion for general purposes may explain why there is no formal definition of religion at international, let alone domestic, law.[81] Lawyers are, after all, more wary than most of the power of a definition: "any definitional constraint … involves the danger of discrimination based on a definitional bias against unknown, or unpopular, religions (precisely those which are in the greatest need of legal protection)."[82] However, the following definitions, from different jurisdictions, reveal some common definitional elements:

1. High Court of Australia (also adopted by the New Zealand High Court[83]): a religion involves both belief in a supernatural being, thing or principle and some canons of conduct that give effect to that belief;[84]

2. Supreme Court of Canada: religion involves a "particular and comprehensive system of faith and worship" and "belief in a divine, superhuman or controlling power":[85]

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81 Peter Radan "International Law and Religion" in Radan, Meyerson and Croucher (eds), above n 20, 12; see also James A R Nafziger "The Functions of Religion in the International Legal System" in Mark W Janis and Carolyn Evans (eds) *Religion and International Law* (2 ed, Martinus Nijhoff Publishers, Leiden/Boston, 2004) 155, 156–159.

82 See Wojciech Sadurski "On Legal Definitions of 'Religion'" in Sadurski (ed), above n 22, 297, 297–298 [Sadurski "On Legal Definitions of 'Religion'"].

83 *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC). See also *The Laws of New Zealand* (Butterworths, Wellington, 1992) Religion and Churches, para 3.

84 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, para 14 Mason ACJ and Brennan J.

85 *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, para 39 Iacobucci J for the majority.

> In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

3. Superior US Courts: a religion involves a comprehensive system of belief,[86] is often characterised by formal ceremonies or insignia, and will usually address "fundamental and ultimate questions having to do with deep and imponderable matters".[87] A religion need not be organised or popular, and the sincerity of beliefs is more significant than their objective legitimacy.[88]

What these definitions have in common is their suggestion that religion is characterised by both the transcendental nature of the beliefs involved and the systematic organisation of those beliefs: not just convictions, but conventions underlying convictions. It has been stated above that this paper is not trying to prove that tikanga Māori is a religion per se, but it is undeniable that tikanga Māori and religion have much in common. Tikanga Māori incorporates both beliefs that reach beyond the realms of science and reason, and protocols about how those beliefs should be respected in practice. It is very easy to align those features with definitions of religion.

It is not controversial to suggest that aboriginal religions can be religions for the purposes of the law.[89] A point that may have to be overcome, however, before tikanga Māori could be considered a religion, is that it is grounded in ethnicity as well as belief. John Kennedy, writing in 1991 for the Catholic

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86 *Africa v Pennsylvania* (1981) 662 F 2d 1025, 1031 (3d Cir) Adams CJ for the Court.

87 *Africa v Pennsylvania*, above n 86, 1032 Adams CJ for the Court.

88 *United States v Ballard* (1944) 322 US 78, 86–87 (SC) Douglas J for the Court.

89 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 612; Rishworth and others, above n 5, 281.

publication *AD2000* and criticising the Church's "deference to things Māori", had this to say:[90]

> Frankly, I cannot see why a Māori theology is necessary at all. A Māori spirituality, yes, because the Māori are a very sensitive people and deeply spiritual by nature. There are aspects of their life we can absorb and be the better for. But a Māori theology? It seems to me that a theology based on race is a contradiction.

Another factor against tikanga Māori being a religion is that adherents to a belief system may themselves have to perceive that the belief system is a religion.[91] It is by no means clear that those who practise tikanga Māori view it in this way.

In the end, whether religion is construed broadly or narrowly will depend on the priorities of those being asked to construe it. From an anti-establishment platform, one would define religion restrictively in order to maximise the activities in which the State may legitimately participate. Where protection of religious freedoms is the paramount consideration, on the other hand, religion must be broadly construed in order to extend protection to strange or unusual beliefs. From a religious freedoms perspective, it is inappropriate for the judiciary to rank the authenticity of differing religious beliefs.[92]

While Māori spirituality is not automatically synonymous with familiar institutional religions, its spiritual content does engage freedom of religion issues when it is given a privileged status in law, particularly as the NZBORA does not differentiate between religion and belief in its religious freedoms provisions.[93]

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90 John Kennedy "New Zealand Catholicism to put on Māori Clothing" (August 1991) 4 *AD2000* 7 <http://www.ad2000.com.au> (last accessed 26 September 2006).

91 *The Laws of New Zealand* (Butterworths, Wellington, 1992) Religion and Churches, para 1, citing *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)*, above n 84, 171 Wilson and Deane JJ.

92 Sadurski "On Legal Definitions of 'Religion'", above n 82, 297.

93 See below Part VI B Negative Implications for Religious Freedoms; also Rishworth and others, above n 5, 289.

The next section of this paper surveys the prevalence of tikanga Māori in New Zealand legislation, before Parts V and VI go on to consider how this impacts on New Zealand constitutional status and religious freedoms.

IV TIKANGA MĀORI IN NEW ZEALAND LAW

A Survey Parameters

The survey of legislative references to tikanga Māori for this paper was restricted to primary and public legislation – Acts of Parliament. While there are certainly references to tikanga Māori in delegated legislation,[94] including some expansive definitions,[95] it is the references in primary legislation that are most significant in terms of the religious freedoms discussion that follows. Statutes are not subject to the same administrative checks and balances as delegated legislation, such as the scrutiny of the Regulations Review Committee, potential for disallowance by the House under the Regulations (Disallowance) Act 1989, and challenges to legitimacy via judicial review. If primary legislation is inconsistent with protected rights and freedoms in the NZBORA, including religious freedoms, it may be interpreted restrictively by the courts but cannot be struck down. That view, however, is subject to the recurring thread in judicial and academic writings suggesting that parliamentary sovereignty is limited in fact by "deep lying rights".[96]

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94 For example, the Disputes Tribunals Rules 1989, r 35(c)(2); and the Tertiary Education Strategy 2002/07.

95 See for example Domestic Violence (Programmes) Regulations 1996, reg 27.

96 See for example M D Kirby "Lord Cooke and Fundamental Rights" in P Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) and Hon Michael Kirby "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 NZJPIL 195. Both articles refer to *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA), in which Cooke J (as he then was) suggested (at page 121) that "some common law rights may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them."

The survey also deliberately overlooked statutory provisions using the word "tikanga" within Māori prose, including reproductions of the Māori text of the Treaty of Waitangi[97] and descriptive passages such as preambles or apologies.[98] These provisions were excluded for two reasons. First, it was beyond the skill of the author to translate them for analysis. Secondly, it was assumed for the purposes of this paper that misunderstandings about the complexity of tikanga Māori would be less likely to occur if it fell to be interpreted within its own linguistic context.

Applying these parameters, 30 Acts were found to use the phrase "tikanga Māori" in English text.[99] The following sections analyse the tikanga Māori provisions in terms of their age, definitional content and operative effects.

B Dates

The oldest tikanga Māori provision currently in force is in the Maniapoto Māori Trust Board Act 1988, which establishes the Maniapoto Māori Trust Board as an administrative body to represent the Maniapoto iwi.[100] The Act establishes a Council of Elders (Te Mauri o Maniapoto), whose function is to advise the Board on "matters involving tikanga, te reo, and kawa [ceremony]".[101] A similar provision applying generally to all Māori Trust Boards was added to the Māori Trust Boards Act 1955 by a 1988 statutory amendment,[102] although

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97 Treaty of Waitangi Act 1975, Waitangi Day Act 1976, and several Claims Settlement Acts.

98 See, for example, Waikato Ruapatu Claims Settlement Act 1995, preamble; Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), preamble; and Ngai Tahu Claims Settlement Act 1998, s 5, which contains the Māori text of the Crown's apology to Ngai Tahu.

99 See Appendix: Statutes Referring to Tikanga Māori.

100 On the functions of Māori Trust Boards generally, see *The Laws of New Zealand* (Butterworths, Wellington, 1992) Māori Affairs, paras 1–2.

101 Maniapoto Māori Trust Board Act 1988, s 7(2).

102 Māori Trust Boards Amendment Act 1988.

this did not come into force until 1989. These two Acts contain the only statutory references to tikanga enacted in the 1980s, and it may be significant that the use of "Treaty clauses" in legislation became common at about the same time.[103] These practices began after the landmark Court of Appeal decision in *New Zealand Māori Council v Attorney-General* in 1987,[104] which was the first judicial decision to give "real weight and substance"[105] to the principles of the Treaty of Waitangi.

Of the remaining 28 Acts identified by the survey, 12 were enacted in the 1990s and 16 have been enacted so far since the beginning of 2000.[106] Three decades may only to be long enough to suggest, rather than confirm, a trend, but the figures do indicate that legislative references to tikanga Māori are becoming more common. However, although tikanga Māori is being increasingly referred to, it is not being defined consistently, if at all, in legislation.

C Definitions

It is noteworthy that only 16 of the 30 Acts – just over half – define tikanga Māori. Seven of these include tikanga Māori in their interpretation section, using the definition: "Māori customary values and practices".[107] This definition expressly incorporates both the values-based and procedural elements of tikanga Māori. The remaining nine Acts define tikanga Māori in the process of giving it

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103 Rishworth and others, above n 5, 412.

104 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

105 Palmer and Palmer, above n 40, 321.

106 See Appendix B Statutes Grouped by Year of Enactment (or Relevant Amendment).

107 Fisheries Act 1996, s 2; Foreshore and Seabed Act 2004, s 5; Māori Fisheries Act 2004, s 5; Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, s 6; Public Records Act 2005, s 4; Resource Management Act 1991, s 2; Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), s 3. Some of these sections simply refer to the definition in Te Ture Whenua Māori Act 1993 (Māori Land Act 1993).

operative effect, by adding an explanation in brackets after tikanga Māori is referred to. Three of these bracketed definitions (definitional asides), mirror the standard interpretation-section definition given above – "Māori customary values and practices"[108] – while one extends it by adding that tikanga Māori can "involve both rights and obligations".[109] The Education Act 1989[110] explains tikanga Māori in one section as "Māori culture"[111] and in a later section as "Māori custom".[112] Other bracketed definitions include: "Māori custom and practice",[113] "Māori protocol and culture" (two instances)[114] and, interestingly, "Ngai Tahu customary values and practice",[115] which shows that tikanga Māori may not be ascertainable by reference to a pan-Māori standard, but can vary from iwi to iwi.

These statutory definitions of tikanga are not particularly helpful, because concepts such as "culture", "custom" and "values" are more illustrative than definitive. They indicate what kind of thing tikanga Māori is, but do not specify the values or practices that it can encompass. Whether tikanga Māori includes spiritual values will depend on its interpretation in each legislative context. In that respect, the 16 Acts defining tikanga Māori are no better than the 14 Acts that do not: in each case, the content of tikanga Māori is left to be determined by those who have to apply it.

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108 Code of Good Faith for Public Health Sector, cl 10, in sch 1B of the Employment Relations Act 2000; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 13(3); Ngati Awa Claims Settlement Act 2005, s 13(3).

109 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 13.

110 The tikanga Māori provisions were added to the Education Act 1989 by a 1990 statutory amendment. See Appendix B Grouped by Year of Enactment (or Relevant Amendment).

111 Education Act 1989, s 61.

112 Education Act 1989, s 162.

113 Local Government Act 2002, s 33.

114 Historic Places Act 1993, s 42; Trade Marks Act 2002, s 179.

115 Resource Management (Waitaki Catchment Amendment) Act 2004, s 8.

D Effects

Leaving aside purely definitional references, the remaining tikanga Māori provisions fall into six categories. Legislative references to tikanga Māori can:

1. Make it a relevant consideration for decision-makers;
2. Ensure its presence, in terms of skills, knowledge and experience, on certain statutory bodies;
3. Allow its procedural elements to shape decision-making processes;
4. Justify the confidentiality of information that may offend against it;
5. Define Māori connections with land, water, or each other, in the context of settling Treaty of Waitangi claims; or
6. Constitute policy directives.

The six categories are clarified individually below, and the provisions that fall into them, discussed. In Part VI, which considers rights implications of the tikanga Māori provisions, the categories will be reassessed in the light of indigenous rights and religious freedoms.

1 A relevant consideration for decision-makers

The first category of provisions makes tikanga Māori relevant to administrative decisions. By making it part of the context for administrative decision-making, Parliament has effectively delegated, to a range of decision-makers, responsibility for determining what tikanga Māori means in practice. Some of the delegates are senior members of the executive branch of government: the Governor-General, for example (presumably on ministerial advice) is responsible for appointing judges to the Māori Land Court, and must only appoint judges who have suitable "knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi".[116] Māori Land Court judges

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[116] Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), s 7(2A).

are required to consider tikanga Māori under Te Ture Whenua Māori 1993 (Māori Land Act 1993) in the context of determining interests in land,[117] and under the Foreshore and Seabed Act 2004 in the context of making customary rights orders.[118]

As well as appointing judges, the Governor-General also has a law-making function in which tikanga Māori is relevant, and which is exercised on ministerial advice. The Minister for the Environment advises the Governor-General in relation to water conservation orders, made under the Resource Management Act 1991.[119] These orders can provide for the "protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Māori."[120]

Tikanga Māori is also a relevant consideration under section 162 of the Education Act 1989, which requires the Minister of Education to recommend to the Governor-General whether particular bodies should be established as tertiary institutions. The section indicates that a wānanga is characterised by, among other things, its "application of knowledge regarding ahuatanga Māori (Māori tradition) according to tikanga Māori (Māori custom)".[121]

2 A presence on decision-making bodies

Under the second category of provisions, Ministers are required to consider tikanga Māori in the context of appointing people to statutory bodies, including the Environmental Risk Management Authority,[122] the New Zealand Historic

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117 Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), ss 106, 107, 114, 129, 132, 150D.

118 Foreshore and Seabed Act 2004, s 50.

119 Resource Management Act 1991, s 214.

120 Resource Management Act 1991, s 199(2)(c).

121 Education Act 1989, s 162(4)(b)(iv).

122 Hazardous Substances and New Organisms Act 1996, s 16.

Places Trust Board,[123] the Local Government Commission,[124] the Archives Council,[125] and, under the Resource Management Act 1991, boards of inquiry constituted to consider matters relating to proposals of national significance.[126] The obligations on Ministers vary, from appointing individuals with knowledge, skills or experience in tikanga Māori to ensuring that such knowledge, skills or experience are adequately represented on the body as a whole. Knowledge of tikanga Māori is also a relevant consideration for determining membership of the Ethics Committee of the Health Research Council[127] and choosing directors and board members of the Māori Television Service (Te Aratuku Whakaata Irirangi Māori),[128] although these decisions are made by the bodies themselves, rather than by the responsible minister.

The fact that these decision-making bodies are required to have an appreciation of and expertise in tikanga Māori must mean that its underlying values are relevant to any decisions that those bodies make, whether they affect Māori, tauiwi or both.

3 Influencing decision-making procedures

In the third category, tikanga Māori affects the procedures of decision-making more than the decisions themselves, as the following examples illustrate:

- Under the Resource Management Act 1991, both local authorities and the Environment Court must, where appropriate, recognise tikanga Māori when determining their procedures for hearings or court proceedings;[129]

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123 Historic Places Act 1993, s 42.

124 Local Government Act 2002, s 33.

125 Public Records Act 2005, s 14.

126 Resource Management Act 1991, s 146(4).

127 Health Research Council Act 1990, s 26(2).

128 Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, sch 2, cl 1(h).

129 Resource Management Act 1991, ss 39, 269.

- The Minister of Health gives procedural instructions to inquiry boards constituted to conduct special health inquiries under the New Zealand Public Health and Disability Act 2000, and those instructions may include recognising tikanga Māori where appropriate;[130]

- The Chief Executive of the Department of Building and Housing must recognise tikanga Māori with regard to the procedure of making determinations about various matters relating to the building code;[131]

- Board of inquiry hearings about proposed pest management strategies under the Biosecurity Act 1993 must be held without unnecessary formality, which may require recognising tikanga Māori.[132]

4 *Justifying withholding information*

The fourth category of operative provisions deals with freedom of information. The risk of causing "serious offence to tikanga Māori" can justify blocking access to information arising from submissions, hearings or inquiries. This risk is often paired with the risk of disclosing the location of wāhi tapu.[133] The Acts under which tikanga Māori can have this effect are:

- The Biosecurity Act 1993: boards of inquiry can protect information gained in hearings about proposed pest management strategies;[134]

- The Crown Minerals Act 1991: the restriction can apply to information contained in submissions made to the Chief Executive of the Ministry of Economic Development on draft minerals programmes, and allows

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130 New Zealand Public Health and Disability Act 2000, ss 75(3)(b), 77(e).

131 Building Act 2004, s 186(1)(b).

132 Biosecurity Act 1993, sch 1, cl 3.

133 Sacred places, usually burial sites. Also "waahi tapu".

134 Biosecurity Act 1993, sch 2, cl 6(1).

information to be withheld by any department or minister from whom it is requested;[135]

- The Fisheries Act 1996: a Fisheries Dispute Commissioner can protect information gained in the course of an inquiry into a dispute;[136]
- The Resource Management Act 1991: local authorities can restrict access to hearings or to information gained in the course of any proceedings – whether or not that information is material to those proceedings;[137] and
- The Local Government Official Information and Meetings Act 1987: avoiding serious offence to tikanga Māori constitutes a good reason for withholding official information in the context of "an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order".[138]

5 Defining Māori connections with land, water or each other

The fifth category encompasses the incorporation of tikanga Māori in Claims Settlements Acts, which record formal settlements by the government of claims under the Treaty of Waitangi. There are 12 such Acts[139] – two that apply to Māori generally[140] and 10 that are specific to iwi – but only half of these were captured by the survey. The two Acts of general application were not included

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135 Crown Minerals Act 1991, s 17(7).

136 Fisheries Act 1996, s 121(2).

137 Resource Management Act 1991, s 42.

138 Local Government Official Information and Meetings Act 1987, s 7(2)(ba) (added in 1991 by the Resource Management Act 1991).

139 See Appendix C Claims Settlement Acts.

140 Māori Commercial Aquaculture Claims Settlement Act 2004 and Treaty of Waitangi (Fisheries Claim) Settlement Act 1992.

because they do not mention tikanga Māori at all, and four of the iwi-specific Acts[141] employ tikanga only in Māori-language provisions.

The remaining six Claims Settlement Acts use tikanga Māori in the context of defining connections of both people and landscapes to the iwi to which the Act applies. For example, the Ngati Tama and the Ngati Ruanui Claims Settlement Acts allow individuals' iwi membership to be recognised by reference to tikanga if blood relationships do not suffice,[142] and the Ngati Awa and Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Acts define customary rights as "rights according to tikanga Māori (Māori customary values and practices)".[143] The most significant use of tikanga Māori in these Acts, however, is in statutory acknowledgements. Statutory acknowledgements are used in three out of the six iwi-specific Claims Settlements Acts within the survey parameters,[144] but the acknowledgements perform the same functions from Act to Act and are expressed in largely similar terms. Examples drawn from the Ngaa Rauru Kiitahi Claims Settlement Act 2005 are used below to illustrate these provisions' general content and effect.

Statutory acknowledgements are intended to facilitate "cultural redress".[145] Via statutory acknowledgements, the Crown accepts statements made by an iwi about its "particular cultural, spiritual, historical, and traditional association"[146] with defined physical areas. The statutory acknowledgement of Ngaa Rauru Kiitahi's cultural, spiritual, historical, and traditional association with the

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141 The four excluded iwi-specific Claims Settlement Acts are the Ngati Turangitukua Claims Settlement Act 1999, the Pouakani Claims Settlement Act 2000, Te Uri o Hau Claims Settlement Act 2002, and the Waikato Raupato Claims Settlement Act 1995.

142 Ngati Tama Claims Settlement Act 2003, s 10(1)(b)(i); Ngati Ruanui Claims Settlement Act 2003, s 13(2).

143 Ngati Awa Claims Settlement Act 2005, s 13(3); Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 13(3).

144 Ngaa Rauru Kiitahi Claims Settlement Act 2005, Ngai Tahu Claims Settlement Act 1988, Ngati Awa Claims Settlement Act 2005,

145 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 5(5).

146 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 40.

Ototoka Scenic Reserve is representative of others. After a brief physical and historical description of the Reserve, the acknowledgement touches on spiritual matters: [147]

> Ngaa Rauru Kiitahi have another significant site at Ototoka, just north of State Highway 3. This site is significant for 2 reasons: it has a kaitiaki [guardian] that protects the kai [food], and it also bears a tohu Aitua [in this context, akin to a fatal curse]. The kaitiaki is in the form of a tuna [eel], and to sight or catch a tuna here will inevitably lead to the death of that Ngaa Rauru Kiitahi person.
>
> The tohu still stands today, and it is considered that, if a Ngaa Rauru Kiitahi person sights one, they have transgressed the tikanga of Ototoka.

The legal effect of statutory acknowledgements is that the Environment Court, the Historic Places Trust and consent authorities must "have regard" to them.[148] Statutory acknowledgements do not have to be accepted as fact,[149] but they can be taken into account by the bodies mentioned above in exercising their functions. Via the statutory acknowledgements, tikanga Māori thus becomes a relevant consideration in administrative decision-making. In that respect, the fifth category of provisions is similar to the first, because both make tikanga Māori relevant to administrative decision-making. However, references to tikanga Māori in Claims Settlement Acts have been categorised separately because they are largely descriptive, and because their relevance to administrative decisions is derivative: it depends on the functions given to the relevant bodies by other Acts.

6 Policy directives

This survey also identified two further references to tikanga Māori that fall into a sixth category, in which tikanga Māori constitutes a policy directive. The first example is found in the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, which requires the Māori Television Service to

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147 Ngaa Rauru Kiitahi Claims Settlement Act 2005, sch 8.

148 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 41

149 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 47(2).

"promote" both te reo Māori and tikanga Māori.[150] The second example comes from the Education Act 1989. Section 61 of that Act obliges Boards of Trustees to prepare and maintain school charters for each school they administer. School charters must include "the aim of ensuring that all reasonable steps are taken to provide instruction in tikanga Māori (Māori culture) and te reo Māori (the Māori language) for full-time students whose parents ask for it".[151]

E Conclusions

As outlined above, there are six categories of legislative effects arising from tikanga Māori provisions: in the first category, tikanga Māori is an express, relevant consideration in decision-making; second-category provisions ensure a knowledge base of tikanga Māori on certain statutory bodies; provisions in the third category allow procedural aspects of tikanga Māori to be followed in certain proceedings; the fourth usage of tikanga Māori justifies the confidentiality of "sensitive" official information, the fifth category comprises descriptive references to tikanga that may have a derivative effect on administrative decision-making, and in the sixth category, tikanga Māori forms part of a policy directive.

Five key conclusions can be drawn from this analysis. First, the data shows an increasing prevalence of tikanga Māori in legislation. In this, tikanga Māori is not alone: the Ministry of Justice in 2001 identified that "[o]ver recent years there has been a steady increase in Māori terms used in statutes."[152] Secondly, tikanga Māori is being referred to in a fairly consistent way: the provisions can be grouped straightforwardly into six categories. Thirdly, however, a meaningful definition of tikanga Māori is consistently absent from legislation, which raises concerns not just about the nature of its content, but about the consistency of its

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150 Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, preamble and ss 3, 8, 24.

151 Education Act 1989, s 61(3)(a)(ii).

152 Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) iii [Ministry of Justice *He Hīnātore ki te Ao Māori*].

interpretation across the numerous administrative decision-makers who have to apply it.

A fourth conclusion is that tikanga Māori can have legislative effect on both Māori and tauiwi. The 30 Acts identified in the survey include 12 that are specific to Māori or Māori issues:

- six Claims Settlement Acts;
- the Foreshore and Seabed Act 2004;
- the Māori Trust Boards Act 1955;
- the Maniapoto Māori Trust Board Act 1988;
- the Māori Fisheries Act 2004;
- the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003; and
- Te Ture Whenua Māori Act 1993 (Māori Land Act 1993).

The remaining 18 Acts identified by the survey are of general application, in areas ranging from resource management, local government and biosecurity to building, employment, health and education. It is the prospect of indiscriminate application of the spiritual values underlying tikanga Māori to those who may not subscribe to its values that raises religious freedom issues. This will be discussed further in Part VI of this paper.

The final key conclusion to be drawn from this analysis is that, via tikanga Māori, Māori spiritual values are occupying a privileged position in New Zealand law: they are shaping advisory boards and decision-making bodies; they are authorised to influence policy and decision-making, both procedurally and substantively; and they provide reasons to restrict the freedom of information. The constitutional implications of this for New Zealand's State–religion relationship are addressed in Part V, below

F Beyond Tikanga Māori

It must be reiterated that this survey looked only for express references to tikanga Māori. However, that phrase is not the sole vehicle for Māori spiritual values. The following list gives just some examples of other ways in which these values might gain legal protection.

- Under the Children, Young Persons and their Families Act 1989, the Chief Executive of the Ministry of Social Development must ensure that all departmental policies and services "have particular regard for the values, culture, and beliefs of the Māori people"[153] (a category one provision);
- The Human Assisted Reproductive Technologies Act 2004 provides for the establishment of an Advisory Committee of between eight to twelve members.[154] The Committee must include one or more Māori members "with expertise in Māori customary values and practice and the ability to articulate issues from a Māori perspective"[155] (a category two provision);
- The Local Government Act 2002 requires that whenever local authorities are considering significant decisions in respect of land or a body of water, they must: "take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga"[156] (another category one provision);

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153 Children, Young Persons, and their Families Act 1989, s 7(2)(c)(ii).

154 Human Assisted Reproductive Technologies Act 2004, ss 32–33.

155 Human Assisted Reproductive Technologies Act 2004, s 34(4)(d).

156 Local Government Act 2002, s 77.

- The Broadcasting Act 1989 requires the Broadcasting Commission to promote both Māori language and culture[157] (a category six provision);

- Finally, it is also possible, if culture is recognised as a taonga of the Māori people, that it is legislatively protected by every Act of Parliament that must be interpreted consistently with the principles of the Treaty of Waitangi.[158]

To summarise, there are various ways in which Māori culture and its underlying spiritual values have legislative protection. They range from direct incorporation of the term tikanga Māori to references to "values, culture, and beliefs", "customary values and practice" and "culture[,] traditions … and other taonga". References to the Treaty of Waitangi may also carry Māori spiritual values with them. Although the method of incorporating these values may vary, the examples given in this section suggest that provisions privileging Māori cultural and spiritual values perform fairly uniform functions, whether or not tikanga Māori is expressly mentioned. No examples were found that fell outside the six categories identified above.

It is debateable whether different terminology makes any difference to the nature of the values in question, but very difficult to argue that encapsulating Māori culture in secular terms can excise its spiritual content. Consider the following extract from schedule 12 of the Ngaa Rauru Kiitahi Claims Settlement Act 2005, which contains the iwi's statement of values relating to a site referred to as a "Toopuni". The Crown "acknowledges" the iwi's values relating to the Toopuni,[159] and the New Zealand Conservation Authority and various

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157 Broadcasting Act 1989, s 36(a)(ii).

158 For example those listed in clause 4(1) of the Principles of the Treaty of Waitangi Deletion Bill, no 66-1, but note that this list is not up to date: Christopher Finlayson MP (26 July 2006) 632 NZPD 4454–4456.

159 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 88.

conservation boards must have "particular regard" to the values and views expressed in the statement.[160] The spiritual nature of these values is patent:

> *Statement of Ngaa Rauru Kiitahi values relating to Toopuni*
>
> Rauru of the gods, sky, lands, and seas
>
> Ngaa Rauru Kiitahi emanated from the cosmogenic tree of the gods. It came by way of the legion of spirits who were not seen but heard, down through the generations of the Kaahui Rere and the genealogies of the "immediate assembly of elders". In this respect, Rauru is a progeny of both "divine and human parentage" and, therefore, so is Ngaa Rauru Kiitahi.
>
> This divine origin is particular to the sacred, mystical, and theological insight of the people of Ngaa Rauru Kiitahi. The esoteric nature of these claims is expressed through their own pertinent whakapapa link. It is through a knowledge and awareness of this whakapapa that one is able to gain a perception of the attitudes of the tribe towards the almighty powers of the celestial realm, the cosmic emanations of the divine beginning, the world and its creation, and the evolution of earth and its people.
>
> Ngaa Rauru Kiitahi makes a direct acclamation by stating its origins from the period of the Absolute Void to Rangi and Papa, to Rauru the man, and Ngaa Rauru Kiitahi the tribe. This claim draws together the spiritual and temporal manifestations of which Rauru is the central figure, it deals specifically with the origins of: the gods, man, vegetation, and taonga.
>
> Ngaa Rauru Kiitahi has a spiritual and physical relationship through whakapapa to its taonga. It is espoused within mana atua, mana whenua, and mana tangata. These taonga encompass the expanses of Ranginui (sky), the vastness of Tangaroa (sea), and the immensity of Papa-tua-nuku (land), from the Te Awa nui o Taikehu Patea River inland to the Matemateaonga Ranges, seaward to the river mouth of Whanganui to our furthermost fishing boundaries to the south, Te Moana o Raukawa, and across the western horizon then back inland to Te Awa nui a Taikehu Patea.

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160 Ngaa Rauru Kiitahi Claims Settlement Act 2005, s 87(1)(b).

The statement goes on to explain how the values have been practised in relation to the Toopuni, including:

> Wairuatanga: The relationship between Ngaa Rauru Kiitahi and Toopuni is expressed in waiata [song], kōrero [discussion], and karakia [prayer]. Karakia, in particular, have always been used when harvesting kai [food]. Wairua [spirituality] impacts upon the way in which individuals conduct themselves around kai, the harvesting of kai and the tikanga around the eating of kai.

The question to ask, then, is whether, while expressly recognising Māori spiritual values in legislation, New Zealand can still call itself a secular State. It may be that the incorporation of such values in legislation dos not reflect any intention by Parliament to erode the secular nature of New Zealand's constitution. However, an alternative conclusion – perhaps more unsettling – is that the readiness to refer to tikanga Māori may indicate a lack of appreciation on the part of law-makers of the inherently spiritual nature of Māori culture, and the implications for freedom of religion when it is given a privileged position in law.

V CONSTITUTIONAL IMPLICATIONS

It is hard to deny that Māori spiritual values are represented in New Zealand law in a way that other spiritual values are not, or that their legislative presence is increasing, rather than diminishing. Does this mean that Māori spiritual values are becoming "established" in the sense that that word is used in the law–religion discourse? Is tikanga Māori New Zealand's "civil religion"? These questions are addressed below.

A Establishment

There is more than one way to "establish" a religion. In one sense, an established religion is one formally declared to be the official religion or church of a State, with its values underpinning the State to such a degree that "all people within the nation [are] expected to acknowledge that this church provide[s] the

religious grounds for political life."[161] Legislative protection of tikanga Māori does not – yet, at least – fall into this category. No constitutional or legislative document expressly elevates the values underlying tikanga Māori to be the dominant values in New Zealand society.

However, an established church can also be a religious body recognised by law and given legal protection with regard to its property and rights, or any religious group that the State has a duty to support and assist.[162] Establishment may be as little as "the legal promotion of a particular religion".[163] It is conceivable that tikanga Māori has achieved this less formal level of establishment.

Not only is tikanga Māori increasingly protected by statute, but, in the early stages of the law-making process, policy-makers are required to consider whether they should consult with Māori about the policy to be enacted and whether the proposed legislation is likely to conflict with Treaty principles or with Māori rights and interests protected at common law.[164]

The Treaty of Waitangi has been described as "part of the fabric of New Zealand Society",[165] and has a pervasive influence on New Zealand law-making. The Cabinet Manual lists the Treaty as one of the sources of the constitution, noting that it "may indicate limits in our polity on majority decision making" and may sometimes require the law to give "special recognition to Māori rights and

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161 See Robert Wuthnow (ed) *The Encyclopaedia of Politics and Religion* (Vol II, Congressional Quarterly Inc, Washington, 1988) 606.

162 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1975) vol 14, Ecclesiastical Law, 3, para 334.

163 Ahdar and Leigh, above n 9, 80.

164 See generally Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation, 2001 Edition and the 2003 Supplement* (Wellington, 2001/2003) ch 5.

165 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210 (HC) Chilwell J.

interests."[166] Special recognition will not be required in all cases because, under Article 3 of the Treaty, Māori are part of the larger New Zealand community and can be subject to the same law as other citizens.[167]

The privileged legal position accorded to tikanga Māori is not replicated with respect to other religious or spiritual beliefs, unless one counts the lingering vestiges of Christian values that still pepper the statute book.[168]

B Civil Religion

As well as having legal status, tikanga Māori also has a civil status. There has been a "renaissance of Māori participation in public life",[169] such that tikanga Māori often plays a highly visible role in public ceremonies and protocols. It has been suggested that "Māori ritual has been eagerly co-opted to function as a sort of civil religion in New Zealand". Choosing Māori ceremonial protocol over Christian religious practices to punctuate public life may seem less overtly "religious", but nonetheless the result is a "degree of public religious expression that would not otherwise have been permitted, nor even contemplated."[170]

A "civil religion" has been defined as "that set of religious or quasi-religious beliefs, myths, symbols and ceremonies that unite a political community and that mobilize its members in pursuit of common goals."[171] Although the moral and religious significance of a civil religion is not certain,[172] it could be argued that it has clear constitutional significance. The prominence of Māori culture in the ceremonial aspects of public life may amplify the significance of its legal status.

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166 Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) 2. The Manual concludes on this point by noting that: "Policy and procedure in this area is still evolving."

167 See Legislation Advisory Committee, above n 164, 126.

168 See above Part II B New Zealand: A Secular State?

169 Rishworth and others, above n 5, 304.

170 Rishworth and others, above n 5, 304.

171 *The HarperCollins Dictionary of Religion*, above n 79, 274.

172 *The HarperCollins Dictionary of Religion*, above n 79, 274.

After all, the more people who observe tikanga Māori and allow their behaviour to be organised according to its tenets, whether they understand its spiritual nature or not, the greater its influence will be when it comes to policy and law-making.

C Conclusion

The fact that tikanga Māori is increasingly protected by positive law, as well as by policy and practice, suggests that Māori spirituality has a "civil religion" status that is tending towards establishment, although it is not there yet. As mentioned in the early parts of this paper, however, establishment is not necessarily inconsistent with strong State protection of human rights. The rights implications of the State's endorsement of tikanga Māori are discussed below.

VI RIGHTS IMPLICATIONS

> The modern secular liberal state['s] commitment to ideals of religious neutrality and equal treatment of faiths is clearly tested to the degree it privileges traditional indigenous religion in the name of fostering indigenous people.[173]

Privileging Māori spiritual values over other religious values in legislation engages two different sets of rights, one positively and the other negatively. On one hand, positivist protection or promotion of indigenous culture reinforces Māori rights under the Treaty of Waitangi, and may promote indigenous rights generally. At the same time, though, all New Zealanders are entitled to expect the law to be even-handed with respect to religion. The legal protection of only one set of religious values has the potential to marginalise those who hold different values, or, worse, compel them to manifest beliefs they do not hold. It may also result in discrimination on the ground of religious belief.

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173 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 612.

Both indigenous rights and religious freedoms are important: the infringement of either poses a dark human rights pitfall into which the New Zealand Parliament should not fall. The following sections outline the scope of the opposing rights, and then consider their application to the tikanga Māori provisions in order to ascertain whether Parliament is, at present, maintaining its balance.

A Positive Implications for Indigenous Rights

1 Treaty rights

One of New Zealand's founding constitutional documents is the Treaty of Waitangi, signed in 1840 between Māori chiefs and the Queen of England. There are two ways in which tikanga Māori and its spiritual values are protected by the Treaty: as taonga, or (less tenably) as ritenga.

The English text of Article 2 of the Treaty contains the Queen's confirmation and guarantee to Māori of:[174]

> ... the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.

The Māori text of Article 2 translates "undisturbed possession" as "te tino rangatiratanga" and "other properties" as "taonga", with the result that the Māori version of Article 2, literally translated, guarantees Māori "the unqualified exercise of chieftainship over their lands, villages, and all their treasures".[175] The significance of using "taonga" to describe the objects of the Article 2 guarantee is that Article 2 has been interpreted to guarantee intangibles such as culture,

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174 Treaty of Waitangi (6 February 1840) English text, art 2.

175 *New Zealand Māori Council v Attorney-General*, above n 104, 663 Cooke P.

language and religion[176] as well as the tangible possessions listed: land, forests and fisheries.[177]

The second way that tikanga Māori may be protected is via an oral Fourth Article to the Treaty, which provided that "every form of distinctiveness – including that of custom and religion" would be respected.[178] Described as a "verbal commitment given only by chance",[179] the Fourth Article arose out of a discussion on religious freedom and customary law between Pompallier (the Catholic Bishop) and William Colenso (the Anglican missionary).[180] The discussion prompted Pompallier to ask Captain William Hobson (who had the responsibility of achieving a treaty) to publicly guarantee religious freedom to Māori. To undermine the authority of a clause he perceived as favouring the Roman Catholic faith, Colenso suggested the insertion of Māori custom, translated as "ritenga".[181] Hobson accordingly agreed to read the following statement to the assembly at Waitangi before the Treaty was signed: "The Governor says that the several Faiths (Beliefs) of England, of the Wesleyans, and Rome, and also Māori custom shall alike be protected by him."[182]

Claudia Orange suggests that the Fourth Article was more an expression of "sectarian jealousy" than a genuine recognition of Māori custom, and that it can therefore be given little weight.[183] Other commentators suggest that, in any case,

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176 See Rishworth and others, above n 5, 415.

177 See Morag McDowell and Duncan Webb *The New Zealand Legal System* (3 ed, LexisNexis Butterworths, Wellington, 2002) 201 and *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA), affirmed in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC).

178 Law Commission, above n 57, para 313.

179 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin in associated with the Port Nicholson Press, Wellington, 1987) 53.

180 Orange, above n 179, 53; Newman, above n 70, 112–113.

181 Orange, above n 179, 53

182 Newman, above n 70, 112–113 but compare the slightly different wording cited by Claudia Orange, above n 179, 53.

183 Orange, above n 179, 53

it adds little to existing legal protections for religious freedom.[184] Nevertheless, the Fourth Article does reinforce that Māori custom could be likened to a religion at the time that the Treaty of Waitangi was signed. It is protected as a taonga under Article 2, whether or not the oral Fourth Article can be relied upon.

The significance of tikanga Māori being protected by the Treaty is that Māori spiritual values may be legally relevant even when not expressly incorporated into legislation. However, because the Māori and English texts of the Treaty cannot be reconciled, it is applied in practice by reference to its principles, which were first expressed in the *New Zealand Māori Council* case.[185] The principles that have been developed by the courts and the Waitangi Tribunal are:[186]

- The principle of partnership, which encompasses:
    - a duty on both parties to act reasonably, honourably and in good faith;
    - a principle of reciprocity and of mutual benefit;
    - a duty on the State to make informed decisions;
- The principle of active protection; and
- The principle of redress.

To comply with these principles, State bodies may need to have a base level of knowledge, skills and experience in order to make informed decisions affecting Māori; they may need to actively protect Māori culture and spirituality, as taonga, by taking it into consideration during administrative decision-making.

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184 Palmer and Palmer, above n 40, 334.

185 *New Zealand Māori Council v Attorney-General*, above n 104.

186 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti of Waitangi: The Principles of the Treaty of Waitangi as Expressed by the Courts and the Waitangi Tribunal* (Te Puni Kokiri, Wellington, 2001) 70–106.

2 Minority rights

The protection of minority rights is "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."[187] In New Zealand, minority rights are protected by section 20 of the NZBORA, which includes the rights of individuals belonging to "ethnic, religious or linguistic minorities" to "enjoy the culture, to profess and practise the religion, or to use the language, of that minority". It has been suggested that the structure of the section limits the enjoyment of culture to ethnic minorities, the profession or practice of religion to religious minorities and the use of language to linguistic minorities.[188] However, "culture and religion are inseparably intertwined in a holistic Māori worldview",[189] so tikanga Māori could use the rubric of either, provided that Māori are a minority to which the section applies.

For the purposes of section 20, a minority is:[190]

> [a] group that is numerically smaller than the rest of the population whose members share a recognisable ethnic, religious, or linguistic characteristic. Members of a minority should also demonstrate a desire to preserve their culture, language, religion, or traditions.

Māori comprised just over 14 per cent of the population at the 2001 census.[191] They are culturally distinct from the majority population (77 per cent European[192]), and demonstrate obvious desire to preserve their culture, language,

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187 Human Rights Committee General Comment 23 "The Rights of Minorities" (8 April 1994) CCPR/C/21/Rev.1/Add.5, para 9 [HRC General Comment 23].

188 Rishworth and others, above n 5, 398.

189 Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 635.

190 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990* (Ministry of Justice, Wellington, 2004) 69 [Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*].

191 Statistics New Zealand <http://www.statistics.govt.nz> (last accessed 8 September 2006). At the time of writing, detailed 2006 census results were not available.

192 Statistics New Zealand <http://www.statistics.govt.nz> (last accessed 8 September 2006).

religion and traditions. Although section 20 does not apply exclusively to Māori in New Zealand, they are within its scope.[193]

Minority rights under section 20 have not yet been fully expounded by New Zealand courts.[194] Even where the section has been put forward by plaintiffs, it has not been considered material to judicial decision-making.[195] However, the current view in New Zealand is that the right is not one that requires the State's active protection.[196] This interpretation derives from the section's negative wording, which frames the right as one that "shall not be denied" to members of minorities, rather than one which is guaranteed by the State. Keith J in *Mendelssohn v Attorney-General* held that "The very nature of [section 20] rights and freedoms means that they are freedoms *from* state interference."[197] The State's obligation under section 20 is merely to avoid making laws that promote "cultural homogeneity".[198]

Section 20 is based on Article 27 of the International Covenant on Civil and Political Rights[199] (ICCPR), and it is interesting that the Human Rights Committee (HRC) does see this right as imposing positive obligations on States. In its General Comment on Article 27, the HRC said that States must not deny or

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193 Ministry of Foreign Affairs and Trade "Brief for the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples" (November 2005) 9, available at <http://www.mfat.govt.nz/> (last accessed 25 September 2006); Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, Wellington, 2005) para 17.23.1.

194 Butler and Butler, above n 193, para 17.23.1.

195 Rishworth and others, above n 5, 402; *The Laws of New Zealand* (Butterworths, Wellington, 1992) Human Rights, para 137.

196 Butler and Butler, above n 193, para 17.27.1; Rishworth and others, above n 5, 403–405.

197 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, para 14 (CA) Keith J for the Court (emphasis in the original).

198 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 70; see generally Rishworth and others, above n 5, 403–405.

199 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171.

violate minority rights,[200] which means that they may have to act positively to avoid or remedy transgressions by the legislative, executive or judicial branches of government.[201]

With regard to the freedom *of* religion, section 20 is thought to add little to the general religious freedom provisions in the NZBORA that are discussed immediately below.[202] However, in terms of freedom *from* religion, section 20 is important when it comes to justifying laws that promote a minority religion in a way that infringes the rights of others.[203]

B Negative Implications for Religious Freedoms

There are three further dimensions to religious freedom protected by the NZBORA that are not specific to minorities. The first, freedom of religion, thought, conscience and belief, is an internally-exercised and individually-held right.[204] The second dimension, freedom to manifest religion and belief, is also an individual right, but of an external nature. The third dimension to religious freedom is the right not to be discriminated against on the basis of religion. This right can be held by both groups and individuals, and is a comparative right rather than one exercised directly by the groups or individuals themselves. The scope and relevance of these aspects of religious freedom is discussed below, with the first two aspects discussed together.

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200 HRC General Comment 23, above n 187, para 6.1.

201 HRC General Comment 23, above n 187, paras 6.1–6.2. See also Catherine J Iorns Magallanes "International Human Rights and their Impact on Domestic Law on Indigenous Peoples' Rights in Australia, Canada, and New Zealand" in Paul Havemann (ed) *Indigenous Peoples' Rights in Australia, Canada, & New Zealand* (Oxford University Press, Auckland, 1999) 238.

202 Rishworth and others, above n 5, 401, 408.

203 See below Part VI C Balancing Competing Rights.

204 Butler and Butler, above n 193, para 14.2.5; Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 51.

1 Freedoms of and from religion

Article 18(1) of the ICCPR was used as the basis for sections 13 to 15 of the NZBORA.[205] While section 14 deals with freedom of expression, sections 13 and 15 protect religious freedoms:

> 13. Freedom of thought, conscience, and religion—
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> 15. Manifestation of religion and belief—
>
> Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

It has been suggested that freedom of religious belief is one of the most important human rights,[206] because "the freedom to think and believe as one pleases, in religion of all things, is the essence of individualism".[207] Section 13 does not protect the religion or belief itself, but the "individual *autonomy* in matters of religion and belief."[208] The HRC, in its General Comment on Article 18, described this freedom as "far-reaching and profound",[209] and Article 18 is one of only a handful of ICCPR rights that are non-derogable even in times of public emergency.[210] The preamble to the United Nations Declaration on the

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205 Rishworth and others, above n 5, 281.

206 See generally McConnell, above n 13, and also Rishworth and others, above n 5, 277–278.

207 Rishworth and others, above n 5, 277.

208 Rishworth and others, above n 5, 279 (emphasis in the original).

209 Human Rights Committee General Comment 22 "The Right to Freedom of Thought, Conscience and Religion" (30 July 1993) CCPR/C/21/Rev.1/Add.4, para 1 [HRC General Comment 22].

210 International Covenant on Civil and Political Rights, above n 199, art 4(2).

Elimination of All Forms of Intolerance and of Discrimination Based upon Religion or Belief[211] states that:

> [R]eligion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed.

Because religious freedoms protect autonomy more than belief, it is fitting that section 13 is not limited to religion: it expressly extends to thoughts, conscience and beliefs generally. It has been held to protect theistic, non-theistic and atheistic beliefs, and includes "the freedom *not* to believe in, or adhere to, any ideology or religion".[212] Section 15 has a similarly wide scope. It extends to "all religions and beliefs, including those without the established doctrines and customs of traditional religions."[213]

The religious freedoms protected by sections 13 and 15 protect more than individual rights to hold and express religious or other beliefs. Together, they protect individuals' rights not to believe in or to be made to manifest beliefs they do not hold. The Ministry of Justice notes that: "the Government cannot be seen to take sides in matters of religion or belief or opinion",[214] and that "non-belief and refusals to participate in religious practice"[215] must also be respected. Thus, sections 13 and 15 protect the freedom *from* religion as much as the freedom *of* religion.[216]

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211 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based upon Religion or Belief, above n 1, preamble.

212 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 51 (emphasis added).

213 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 57. See also HRC General Comment 22, above n 209, para 2.

214 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 51.

215 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 57.

216 See also Rishworth and others, above n 5, 285–286.

If sections 13 and 15 of the NZBORA protect freedom from, as well as of, religion, they are operating as "limited anti-establishment"[217] provisions that apply to beliefs as well as religions. The HRC, in its General Comment on Article 18 of the ICCPR, notes that:[218]

> If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

Thus, it is immaterial whether one sees tikanga Māori as culture or religion: if its values become "official ideology", it has the potential to raise concerns about the rights protected by sections 13 and 15 of the NZBORA.

However, religious freedoms are not necessarily inconsistent with a State's preference for one religion (or ideology) over another. States with established churches and official religions can still recognise and respect religious freedoms. The test is whether non-believers of the protected religion suffer discrimination; whether they experience "coercive pressures that abrogate their freedom to have a different belief."[219] This is why the right to be free from discrimination is relevant to any discussion of religious freedoms.

2 Discrimination on the basis of religious belief

This right is protected by section 19(1) of the NZBORA, which provides that "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The prohibited grounds of discrimination include religious belief,[220] ethical belief ("the lack of a religious

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217 Rishworth and others, above n 5, 289.

218 HRC General Comment 22, above n 209, para 10.

219 Rishworth and others, above n 5, 285; see also HRC General Comment 22, above n 209, paras 9–10.

220 Human Rights Act 1993, s 21(c).

belief, whether in respect of a particular religion or religions or all religions"[221]) and race.[222]

Discrimination requires more than just differential treatment between comparable groups or individuals. The differential treatment must be based on one of the prohibited grounds of discrimination, and it must, in New Zealand, fail to be "demonstrably justified in a free and democratic society".[223] In Canada, whose Charter of Rights and Freedoms is similar enough to the NZBORA to provide a meaningful comparison, this final element is couched in terms of offence against "essential human dignity",[224] although the Ministry of Justice describe this as an unnecessary "gloss" in the New Zealand context.[225]

Section 19(2) provides that affirmative action measures are not discriminatory if they are "taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of [unlawful] discrimination", which is discrimination on one of the prohibited grounds listed in the Human Rights Act. The measure must not only be linked to pre-existing unlawful discrimination, but the Ministry of Justice advises that "[a]ffirmative action programmes are non-discriminatory only during the time it takes to address the disadvantage experienced by the targeted group."[226]

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221 Human Rights Act 1993, s 21(d).

222 Human Rights Act 1993, s 21(f).

223 New Zealand Bill of Rights Act 1990, s 5.

224 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, para 51 Iacobucci J for the Court.

225 Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (first published November 2004) Section 19 Freedom from Discrimination <http://www.justice.govt.nz/pubs/reports/> (last accessed 28 September 2006) [Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990*]; see also Butler and Butler, above n 193, para 17.10.1.

226 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 66; see also Human Rights Committee General Comment 18 "Non-discrimination" (10 November 1989) HRI/GEN/1/Rev.6/146, para 10 [HRC General Comment 18].

C Balancing Competing Rights

From the discussion above, it can be seen that one set of rights may require differentiation in the law with respect to religion, while the other set of rights opposes it. The State may need to differentiate on the basis of belief in order to:

1. Protect Māori culture and interests (Treaty of Waitangi rights); and
2. Ensure that Māori are not prevented from enjoying their culture, and practising and professing their religion (the section 20 right).

However, such differentiation may conflict with the State's obligations to (unless demonstrably justified in a free and democratic society[227]):

1. Respect individual autonomy of belief, which includes "the freedom *not* to believe in, or adhere to, any ideology or religion"[228] (the section 13 right); and
2. Respect individual rights "not to participate in religious practice"[229] (the section 15 right).
3. Not discriminate on prohibited grounds (the section 19 right).

There are two approaches to resolving rights conflicts: definitional balancing and ad hoc balancing.[230] Definitional balancing requires reading down a protected right so that it does not infringe upon another protected right, whereas ad hoc balancing requires competing rights to be initially broadly defined, with conflict resolved by the justified limitation analysis under section 5 of the NZBORA.[231] Both approaches have been used by the New Zealand Court of

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227 New Zealand Bill of Rights Act 1990, s 5.

228 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 51 (emphasis added).

229 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 190, 57.

230 *The Laws of New Zealand* (Butterworths, Wellington, 1992) Human Rights, para 53.

231 See Rishworth and others, above n 5, 55–56.

Appeal, the ad hoc balancing method most recently.[232] Although it is not clear which approach will be used in the future,[233] commentators suggest that the ad hoc approach is preferable,[234] because generous and purposive interpretation is a more appropriate starting point for human rights instruments.[235]

Any challenge to the provisions is likely to come from those whose rights are being infringed, so the next section assesses whether the tikanga Māori provisions limit the rights protected by sections 13, 15 and 19 of the NZBORA. In line with the ad hoc balancing approach, this assessment will consider the rights to have a broad scope. If the rights are infringed, then the Treaty of Waitangi and minority rights become relevant to a section 5 analysis, which considers whether the intrusions can be demonstrably justified in a free and democratic society. The question of justified limitations will be addressed in Part E Justified Limitations, below.

D Application to Legislative Effects of Tikanga Māori

Part IV of this paper identified what tikanga Māori is doing in New Zealand law. Legislative references to tikanga Māori can:[236]

1. Make it a relevant consideration for decision-makers;
2. Ensure its presence, in terms of skills, knowledge and experience, on certain statutory bodies;
3. Allow its procedural elements to shape decision-making processes;

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232 *Re J (An Infant)* [1996] 2 NZLR 134 (CA) (definitional balancing); *Living Word Distributors v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA) (ad hoc balancing).

233 *The Laws of New Zealand* (Butterworths, Wellington, 1992) Human Rights, para 55.

234 Rishworth and others, above n 5, 56; *The Laws of New Zealand* (Butterworths, Wellington, 1992) Human Rights, para 55; Ministry of Justice *The Handbook of the New Zealand Bill of Rights Acts 1990*, above n 190, 19–20.

235 See *Ministry of Transport v Noort* [1992] 3 NZLR 260, 271 (CA) Cooke P, 278 Richardson J; *Minister of Home Affairs v Fisher* [1980] AC 319, 328 (PC) Lord Wilberforce.

236 See above Part IV D Effects.

4. Justify the confidentiality of information that may offend against it;

5. Define Māori connections with land, water, or each other, in the context of settling Treaty of Waitangi claims; or

6. Constitute policy directives.

This section considers whether these categories of tikanga Māori provisions threaten religious freedoms.

1 Freedoms of and from religion

As mentioned above, an initial test for infringement of these rights is whether non-believers in the values underlying tikanga Māori are experiencing "coercive pressures that abrogate their freedom to have a different belief".[237] Coercive pressure includes an indirect pressure on people to believe.[238] The only category of provisions with the potential to threaten this "internal sphere"[239] of religious freedom is category six, where tikanga Māori has the effect of a policy directive. The two Acts in category six are the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003 and the Education Act 1989.

Promoting tikanga Māori via television broadcasting does not undermine freedom of religious belief, because people do have a real choice about whether to watch television or not. Promoting tikanga Māori via a school charter is more problematic, because school attendance can be mandatory, but the provision identified by the survey does build in an element of choice. It requires school charters to include an aim of providing instruction in te reo Māori and tikanga Māori "for full-time students *whose parents ask for it.*"[240] However, this safeguard does not extend to another sub-paragraph in the same section, which requires school charters to include "the aim of developing, for the school,

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237 See above n 219.

238 Butler and Butler, above n 194, para 14.6.15.

239 Butler and Butler, above n 194, para 14.2.5.

240 Education Act 1989, s 61(3)(a)(ii) (emphasis added).

policies and practices that reflect New Zealand's cultural diversity and the unique position of the Māori culture".[241]

Depending on how schools incorporate this aim into their charters, there is potential for tikanga Māori to be promoted in schools in a sweeping way that could, directly or indirectly, influence people's beliefs. As an example of how this directive may filter through the education system, one of the Ministry of Education curriculum publications includes the following statement on cultural inclusiveness:[242]

> New Zealand's bicultural heritage is unique and is important to all New Zealanders. Schools and teachers need to ... recognise that te reo Māori and ngā tikanga Māori are taonga and have an important place within the health and physical education curriculum.

It is certainly interesting that schools may have to instruct some students in tikanga Māori, and promote it in other ways, if it is accepted that tikanga Māori has spiritual content, because primary schools are otherwise obliged to have entirely secular curricula.[243] The issue of tikanga Māori in secular schools is overdue for further analysis from a law and religion perspective.

With regard to the freedom of manifestation of religion and belief, the State is required to respect individuals' refusals to participate in religious practice. This right is more obviously endangered by tikanga Māori in schools than the right to freedom of belief. Even if schools provide a choice to students whether to participate in expressions of tikanga Māori, which may include karakia or blessings of new school facilities,[244] such a choice must be real and not subject to inappropriate peer pressure: "The peer pressure and the classroom norms to which children are acutely sensitive are real and pervasive and operate to compel

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241 Education Act 1989, s 61(3)(a)(i).

242 Ministry of Education *Health and Physical Education in the National Curriculum* (Learning Media Ltd, Wellington, 1999) 50.

243 Education Act 1964, s 77(b).

244 See "New Zealand Public Education far from Secular" (29 August 2003) *The Press* Christchurch 10.

members of religious minorities to conform with majority religious practices."[245] Because exercising a choice to opt out of Māori cultural activities could be construed as a racially-based choice, it is suggested that peer pressure will limit such choices in reality. After all, even the government is "wary of being seen to abrogate Māori rights and appears to avoid acting adversely in respect of Māori rights generally."[246]

The right to refuse to participate in religious practices is also threatened by category three provisions, which allow tikanga Māori to shape decision-making procedures. Most of the provisions in this category come with a proviso: decision-makers must recognise tikanga Māori to determine procedure where it is "appropriate". That proviso goes some way towards saving the category three provisions from limiting section 15 rights, because the correct exercise of the discretion should prevent procedures based on tikanga Māori being used with respect to those who do not believe in its underlying values. The discretion may be difficult to exercise, however, when tikanga Māori is appropriate to some but not all parties to a dispute.

The more serious problem with category three provisions is that they may come without a proviso. Section 186 of the Building Act 2004 says that the Chief Executive of the Department of Building and Housing *must* recognise tikanga Māori when making a determination. There is no administrative discretion. Nor are these determinations applicable only to Māori. Under section 177 of the Act, a party may apply to the Chief Executive for a determination on "whether particular matters comply with the building code"[247] or about specified decisions or exercises of powers by a building consent authority, territorial authority or regional authority.[248] Although the Chief Executive's obligation is to *recognise*

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245 Canadian Charter of Rights Decisions Digest, Section 2(a) [freedom of conscience and religion] <http://www.canlii.com/> (last accessed 1 October 2006), citing *AGBC v Board of School Trustees* (1985) 19 DLR (4th) 166 (BC SC).

246 Catherine J Iorns Magallanes, above n 201, 263.

247 Building Act 2004, s 177(a).

248 Building Act 2004, s 177(b)–(f).

rather than *apply* tikanga Māori, the lack of administrative discretion may leave parties to a determination with no choice about whether or not to participate. A mandatory application of tikanga Māori to a decision-making process of general application clearly intrudes upon the section 15 right.

2 Discrimination on the basis of religious belief

Discrimination requires first that there be differential treatment based on a prohibited ground of discrimination. Category five provisions are within Claims Settlement Acts, which apply only to Māori for the purposes of settling historic Treaty claims. They apply only to Māori, so any distinction in treatment is based on race, not religion.

The other categories do satisfy the initial threshold of differential treatment based on religion. They allow tikanga Māori to have an effect in law that other religious value systems do not. For example, under category one provisions, a decision-maker might be required to have regard to tikanga Māori, but not Christian values; under category four provisions, the values underlying tikanga Māori can limit freedom of information in a way that other value systems cannot. Whether these distinctions constitute discrimination will depend on whether they can be demonstrably justified in a free and democratic society. This question of justified limitations is addressed below.

A section 5 analysis will not be required for a section 19 breach, however, if the differential treatment is for the purposes of affirmative action. In that case, the exception in section 19(2) will apply. The meaning and application of section 19(2) has not been addressed by the New Zealand courts,[249] but it has been suggested that affirmative action will be in the form of programmes targeting particular inequalities, and that "[s]pecial programmes aimed at assisting a

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[249] Ministry of Justice Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990*, above n 225, Section 19 Freedom from Discrimination.

disadvantaged individual or group should be designed so that restrictions within the programme are rationally connected to the objective of the programme."[250]

The only categories of tikanga Māori provisions that could constitute part of affirmative action "programmes" are the category five provisions, within Claims Settlement Acts, and the category six provisions – in particular, the promotion of tikanga Māori in schools. However, affirmative action programmes are supposedly, by definition, "short-lived as they only have legitimacy for the time such that is required to address the effect of previous disadvantage."[251] Neither the Claims Settlement Acts nor the school charter requirements under the Education Act 1989 give any indication of being temporary measures.

E Justified Limitations?

It is clear, then, that tikanga Māori provisions have the potential to infringe religious freedoms in New Zealand. However, before they will breach the NZBORA, they must also fail the justified limitation test in section 5. This paper does not seek to reach a firm conclusion on whether the potential infringements identified above can be demonstrably justified in a free and democratic society. Such an assessment would require further research into the current position of Māori in New Zealand society, the relationship between the objectives of the particular Acts and the identified effects of tikanga Māori, and how the tikanga Māori provisions are being applied in practice.[252] However, the following paragraphs canvas some factors that may be relevant to a section 5 analysis.

The HRC suggests that the right to freedom of belief (the section 13 right) can bear no limitations,[253] although trivial or unsubstantial interference with the

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250 *The Laws of New Zealand* (Butterworths, Wellington, 1992) Discrimination, para 95.

251 Ministry of Justice Ministry of Justice *Guidelines on the New Zealand Bill of Rights Act 1990*, above n 225, Section 19 Freedom from Discrimination; see also above n 226.

252 For a discussion of two particular applications of Māori spiritual values by the courts, see Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3.

253 HRC General Comment 22, above n 209, para 3.

right may not constitute a breach.[254] The right to freely manifest religion or belief, on the other hand (the section 15 right) may be subject to some limitations; for example, those that are necessary and proportionate to furthering minority rights under section 20.[255] It should be noted though, that:[256]

> Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.

Not all legislative references to tikanga Māori will automatically further section 20 rights in a way that justifies the negative impacts they may have on religious freedoms. The HRC, commenting on the comparable ICCPR right, notes that where States take positive measures to meet their Article 27 obligations:[257]

> [S]uch positive measures must respect the provisions of articles 2.1 and 26 of the Covenant [the equality provisions] both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, *as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27*, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

It is suggested that a similar approach should be taken to assessing whether tikanga Māori provisions further Treaty rights: any limitation on religious freedoms should be both necessary and proportionate to achieving consistency with the principles of the Treaty of Waitangi.

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254 See Canadian Charter of Rights Decisions Digest, Section 2(a) [freedom of conscience and religion] <http://www.canlii.com/> (last accessed 1 October 2006).

255 Rishworth and others, above n 5, 415.

256 HRC General Comment 22, above n 209, para 8.

257 HRC General Comment 23, above n 187, para 6.2.

VII WAYS FORWARD

This paper has so far shown that tikanga Māori provisions can potentially limit religious freedoms. Two examples are particularly concerning: the promotion of tikanga Māori in school charters and curricula under the Education Act 1989, and the mandatory recognition of tikanga Māori required of the Chief Executive making determinations under the Building Act 2004. The first example undermines both section 13 and section 15 rights, and the second undermines the section 15 right only. With the increasing use of tikanga Māori in legislation, such provisions may proliferate unless something is done to prevent it. This section suggests three possible ways forward, which are elaborated on below:

1. Eradication – removing all legislative references to tikanga Māori;
2. Elucidation – changing drafting policy to ensure that tikanga Māori is better defined; and
3. Augmentation – putting systems in place to ensure that legislative references to tikanga Māori are appropriate.

A Eradication

A "scorched earth" approach would be to remove all references to tikanga Māori from legislation. This would negate its potential to be misinterpreted by decision-makers or courts, or to unintentionally bring spiritual values into the law. Such an approach is consistent with a current political objective of the opposition, which is to reverse the "dangerous drift towards racial separatism in New Zealand".[258] In his 2004 "Nationhood" speech, Don Brash, Leader of the National Party, said that the present Labour Government was steadily moving

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[258] Don Brash MP, Leader of the National Party "Nationhood" (Address to the Orewa Rotary Club, Orewa, 27 January 2004) 2.

New Zealand towards becoming a "racially divided nation, with two sets of laws, and two standards of citizenship".[259]

This political viewpoint is not limited to the Opposition. On 29 June 2006, a member of the New Zealand First Party (currently party to a confidence and supply agreement with the Labour-led coalition government) introduced the Principles of the Treaty of Waitangi Deletion Bill to the House.[260] This is not the first time such a Bill has been introduced to Parliament. An identical Bill was introduced in 2005 by Winston Peters, Leader of New Zealand First (then in Opposition), but was defeated at its first reading.[261] This time, though, New Zealand First had secured, during government-formation negotiations after the 2005 general election, Labour's commitment to support the 2006 Bill at least as far as the select committee.[262] However, Labour's support on this issue is very unlikely to continue.[263]

The Bill's explanatory note says that its aim is to "correct an anomaly which has harmed race relations in New Zealand since 1986 when the vague term 'the principles of the Treaty of Waitangi' was included in legislation." The explanatory note and parliamentary debates clarify that New Zealand First's main issue with referring to Treaty principles in legislation is that they are not defined; and that it is perhaps not possible to do so. During the Bill's introduction speech, Doug Woolerton said that:[264]

> There is no clear definition on widely diverse interpretations of what the principles might mean in certain circumstances. The simple answer is that

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259 Don Brash MP, above n 258, 3.

260 Principles of the Treaty of Waitangi Deletion Bill 2006, no 66-1.

261 Principles of the Treaty of Waitangi Deletion Bill 2005 241-1; (8 June 2005) 626 NZPD 21184.

262 Labour-led Government "Confidence and Supply Agreement with New Zealand First" (17 October 2005) 4. The Bill has gone to the Justice and Electoral Select Committee, who have called for public submissions on the Bill by 2 October 2006.

263 Hon Steve Maharey, Minister of Education (26 July 2006) 632 NZPD 4457.

264 (26 July 2006) 632 NZPD 4454.

> the definitions have not been defined and they cannot be, and we believe they should be removed. … [W]e think it demeans the Treaty if words are put in that cannot be defined and that lead – in my words – to a bun fight on every single bit of legislation.

It is easy to see how these sentiments could be applied to the tikanga Māori provisions. Tikanga Māori is another concept that may be impossible to define adequately for legislative purposes. However, eradication seems a short-sighted way of dealing with the problem. The State's commitment to honouring the Treaty of Waitangi, along with its domestic and international obligations with regard to minority rights, means that eradicating tikanga Māori from the law may simply move the problem from the frying pan to the wider political fire. Making the law homogenous is not a good option.[265] As a visiting United Nations human rights expert recently commented, a "one law for all races" philosophy may only make race relations worse.[266] In any case, the "steady trend in all civilised states is to greater recognition of indigenous values"[267] – not less.

B Elucidation

If the problem can be traced to inadequate definitions, a second way forward would be to improve the way that tikanga Māori is explained in legislation. One way of doing this would be to provide consistent and more meaningful definitions, although it doubtful whether any number of English words could fully convey the complexity of tikanga Māori.[268] It was mentioned above that

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265 See David Baragwanath "What is Distinctive about New Zealand Law and the New Zealand Way of Doing Law? New Zealand Law and Māori" (Address to the Law Commission's 20th Anniversary Seminar, Wellington, 25 August 2006) 2.

266 See Ruth Berry "'One Law for All Races' Risky says Expert" (21 November 2005) *New Zealand Herald* Auckland; "Govt and Māori Party Back Peters' Attack on Brash" (2 October 2006) <http://www.stuff.co.nz> (last accessed 2 October 2006).

267 Baragwanath, above n 265, 3.

268 Law Commission, above n 57, para 127.

translation has its own problems:[269] defining tikanga with reference to culture or values does not resolve the issue of whether spiritual values are included.

Tikanga Māori is so complex that there may not even be agreement among Māori as to the specific values it encompasses in every situation, and it may cheapen the whole concept to try. As the Law Commission has put it, some Māori terms – including tikanga – just "do not lend themselves to brief explanation".[270] Coming up with a definition that resolves the problems identified in this paper could be a Herculean task.

A second way to elucidate tikanga Māori would be to focus on effects rather than definitions, and to explain, in every legislative context in which tikanga Māori is used, what purpose it is intended to serve. This could at least make the law more certain, as the judiciary take a purposive approach to statutory interpretation.[271]

Including such a complex and value-laden concept as tikanga Māori into legislation without elaborating on what parts of it are relevant in each context is an incredible delegation to the executive. Its interpretation is not only extremely challenging within administrative and judicial constraints,[272] but it has such significant implications for New Zealand's State–religion relationship that it is arguably an inappropriate role for Parliament to delegate in this way. Māori is an official language in New Zealand,[273] and should not be denied its place in New Zealand law, but policy-makers and drafters need to be aware of what can be lost – and gained – in translation.

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269 See above Part IV F Beyond Tikanga Māori.

270 Law Commission *Legislation Manual: Structure and Style* (NZLC R35, Wellington, 1996) para 193.

271 Interpretation Act 1999, s 5.

272 See the discussion in Ahdar "Indigenous Spiritual Concerns and the Secular State", above n 3, 615–621.

273 Māori Language Act 1987, s 3.

C Augmentation

The final approach is not aimed at the frequency of use or depth of meaning of tikanga Māori in legislation, but at its management. The NZBORA provides a mechanism for alerting Parliament to rights implications before it enacts legislation. Section 7 of the Act requires the Attorney-General to bring to the attention of the House, usually on a Bill's introduction, "any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights." The Attorney-General exercises this function on advice from the Ministry of Justice, or from the Crown Law Office for Justice Bills. Since 2003, this advice has been made publicly available on the Ministry of Justice website, regardless of whether the Attorney-General goes on to table a section 7 report.[274]

It is clear that this mechanism is not currently being triggered by legislative references to tikanga Māori. Since 2003, 11 statutes have been enacted that refer to tikanga Māori,[275] including the Bill that became the Building Act 2004, which was identified above as containing one of the more serious potential breaches of religious freedom. However, *none* of these Acts triggered advice to the Attorney-General related to sections 13 and 15 of the NZBORA, and only the Foreshore and Seabed Bill triggered advice about its impact on the right protected by section 19: that advice did not mention tikanaga Māori.[276]

It is curious why the section 7 mechanism is not being used for this purpose, because the State cannot be unaware of the spiritual nature of tikanga Māori. The Ministry of Justice noted in 2001 that "[t]ikanga grew out of, and was

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274 Ministry of Justice <http://www.justice.govt.nz/bill-of-rights/> (last accessed 29 September 2006).

275 See Appendix B Grouped by Year of Enactment (or Relevant Amendment).

276 See "Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990", available on the Ministry of Justice website <http://www.justice.govt.nz/bill-of-rights/> (last accessed 29 September 2006).

inextricably woven into, the spiritual and everyday framework of Māori life",[277] and the Law Commission reported at length in 2001 on Māori custom and values in New Zealand law, including the "spectrum of tikanga" and its underlying values.[278] Nor is Parliament oblivious to the dangers of incorporating spiritual values into the law. In 2003, references to "spiritual" qualities, "cultural landscapes" and "ancestral landscapes" were removed from the definition of "historic heritage" in the Resource Management Amendment Bill (No 2)[279] during the Committee of the whole House. Arguing to have these references removed, the Hon Bill English (then Leader of the Opposition) commented that:[280]

> [T]his is not how to progress sound, cross-cultural understanding in New Zealand. This is pushing it too far; this is pushing against the rights that every New Zealander might have, in order to privilege the spiritual values of a few. It is overbalancing the equation.

If the rights of some are not to unreasonably limit the rights of others, the implications of using tikanga Māori in legislation need to be fully appreciated before legislation is enacted, so that Parliament can make informed decisions about whether such limitations are demonstrably justified in a free and democratic society.

VIII CONCLUSION

This paper has suggested that tikanga Māori is based on spiritual values. Therefore, its use in legislation raises freedom of religion issues. The analysis in Part VI identified several ways in which religious freedoms could be affected by

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277 Ministry of Justice *He Hīnātore ki te Ao Māori*, above n 152, v.

278 Law Commission, above n 57, paras 116–201.

279 Resource Management Amendment Bill (No 2), no 39-2, cl 3(7). See also Ruth Berry "Spiritual Beliefs Dropped from Bill" (9 May 2003) *The Dominion Post* Wellington.

280 (8 May 2003) 608 NZPD 5562.

references to tikanga Māori, but two examples were particularly concerning: the policy directives in the Education Act 1962, which force tikanga Māori into schools, and the mandatory recognition of tikanga Māori in a generally applicable decision-making process under the Building Act 2004.

However, the point of the exercise was not to show that religious freedoms *are* being unreasonably limited by particular provisions, but to show that they *could* be. Because the incorporation of tikanga Māori in legislation is likely to continue, it is important that Parliament acknowledges the risks involved. This paper has suggested that existing mechanisms for alerting Parliament to the rights implications of tikanga Māori are being woefully underutilised.

Every Bill that mentions tikanga Māori should be generating advice to the Attorney-General that assesses its impact on the rights protected by sections 13, 15 and 19 of the NZBORA. In the majority of cases, the impacts may be trivial. However, the advice should extend to a consideration of whether each limitation can be demonstrably justified in a free and democratic society. It is surprising that the section 7 process is not already being used in this way.

The paper ends with two final points. The first is that a seemingly innocuous reference to tikanga Māori could prove to be a catalyst for constitutional change if it follows the same path as "the principles of the Treaty of Waitangi" in the State-Owned Enterprises Act 1986.[281] Tikanga Māori may yet move New Zealand further along the State–religion relationship continuum towards having an established religion.

The second point is that the impact of tikanga Māori on religious freedoms has only been considered in this paper from the point of view of tauiwi. However, it is questionable whether the increasing promotion of tikanga Māori by the State benefits or cheapens its core values, particularly when the State calls for it to be interpreted and applied by those who do not fully understand it.

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[281] See *New Zealand Māori Council v Attorney-General*, above n 104.

A completely different freedom of religion issue might arise in this regard – one that calls for the State to stop coopting tikanga Māori for its own purposes. After all, "one significant motivation in the decision to include freedom of religion in the [American] Bill of Rights was the concern to protect religion from worldly corruption."[282]

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[282] Rishworth and others, above n 5, 279.

APPENDIX: STATUTES REFERRING TO TIKANGA MĀORI

Note that A and B list statutes falling within the survey parameters outlined in Part IV A, above, whereas C includes all Claims Settlement Acts, notwithstanding that only six of them fell within the survey parameters.

A Listed Alphabetically

Biosecurity Act 1993

Building Act 2004

Crown Minerals Act 1991

Education Act 1989

Employment Relations Act 2000

Fisheries Act 1996

Foreshore and Seabed Act 2004

Hazardous Substances and New Organisms Act 1996

Health Research Council Act 1990

Historic Places Act 1993

Local Government Act 2002

Local Government Official Information and Meetings Act 1987

Maniapoto Māori Trust Board Act 1988

Māori Fisheries Act 2004

Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003

Māori Trust Boards Act 1955

New Zealand Public Health and Disability Act 2000

Ngaa Rauru Kiitahi Claims Settlement Act 2005

Ngai Tahu Claims Settlement Act 1998

Ngati Awa Claims Settlement Act 2005

Ngati Ruanui Claims Settlement Act 2003

Ngati Tama Claims Settlement Act 2003

Ngati Turangitukua Claims Settlement Act 1999

Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005

Pouakani Claims Settlement Act 2000

Public Records Act 2005

Resource Management (Waitaki Catchment Amendment) Act 2004

Resource Management Act 1991

Te Ture Whenua Māori Act 1993 (Māori Land Act 1993)

Trade Marks Act 2002

B Grouped by Year of Enactment (or Relevant Amendment)

2005 Ngati Awa Claims Settlement Act 2005

Ngaa Rauru Kiitahi Claims Settlement Act 2005

Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005

Public Records Act 2005

2004 Building Act 2004

Foreshore and Seabed Act 2004

Māori Fisheries Act 2004

Resource Management (Waitaki Catchment Amendment) Act 2004

2003 Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003

Ngati Ruanui Claims Settlement Act 2003

Ngati Tama Claims Settlement Act 2003

2002 Local Government Act 2002

Trade Marks Act 2002

2000 Employment Relations Act 2000

New Zealand Public Health and Disability Act 2000

Pouakani Claims Settlement Act 2000

1999 Ngati Turangitukua Claims Settlement Act 1999

1998 Ngai Tahu Claims Settlement Act 1998

1996 Fisheries Act 1996

Hazardous Substances and New Organisms Act 1996

1993 Biosecurity Act 1993

Historic Places Act 1993

Te Ture Whenua Māori Act 1993 (Māori Land Act 1993)

1991 Crown Minerals Act 1991

Resource Management Act 1991

Local Government Official Information and Meetings Act 1987

Tikanga Māori reference added to section 7(ba) on 1 October 1991 by the Resource Management Act 1991.

1990 Health Research Council Act 1990

1990 Education Act 1989

Tikanga Māori references added to section 61 on 23 July 1990 by the Education Amendment Act 1990, and to section 162 on 25 October 2001, by the Education Standards Act 2001.

1989 Māori Trust Boards Act 1955

Tikanga Māori reference added 18 January 1989 by the Māori Trust Boards Amendment Act 1988.

1988 Maniapoto Māori Trust Board Act 1988

C Claims Settlements Acts

	Incorporation of tikanga Māori		
	In English text	In Māori text – Treaty of Waitangi	In Māori text – general
Ngaa Rauru Kiitahi Claims Settlement Act 2005	✓	–	✓
Ngai Tahu Claims Settlement Act 1998	✓	✓	✓
Ngati Awa Claims Settlement Act 2005	✓	–	✓
Ngati Ruanui Claims Settlement Act 2003	✓	–	✓
Ngati Tama Claims Settlement Act 2003	✓	–	–
Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005	✓	–	✓
Ngati Turangitukua Claims Settlement Act 1999	–	✓	✓
Pouakani Claims Settlement Act 2000	–	✓	✓
Te Uri o Hau Claims Settlement Act 2002	–	✓	–
Waikato Raupato Claims Settlement Act 1995	–	–	✓
Māori Commercial Aquaculture Claims Settlement Act 2004	–	–	–
Treaty Of Waitangi (Fisheries Claims) Settlement Act 1992	–	–	–

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