KO NGĀ TAKE TURE MĀORI

Hearing the Māori Voice: The Case for Proper Implementation of Tikanga and Treaty Principles in Natural Justice Analysis

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The courts can do more to make administrative law consistent with the Treaty of Waitangi. In natural justice review, courts prescribe the procedural steps that administrative decision makers must take to give individuals affected by their decisions a fair hearing. In large-scale decisions relating to land and resources, Treaty principles are enforced upon the Government through the duty to consult. However, in individual-level administrative decisions affecting Māori, procedural fairness review references neither tikanga nor the Treaty. This discrepancy is theoretically unsound and must be reformed. This article argues that judicial natural justice analysis must take both tikanga values and Treaty principles into account where a Government decision impacts individual Māori. While a novel approach, accommodating these Treaty principles is consistent with current administrative law precedent. Tikanga is also a relevant component of procedural fairness review under the precedent set in Takamore v Clarke. This approach means that Māori are more likely to be afforded an extensive forum to express their views on upcoming Government decisions that affect them. Māori could have more say on matters like Board of Trustee hearings on school suspensions and expulsions, parole decisions, prison discipline and even proposed Oranga Tamariki uplifts. This reform is

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needed to ensure that Government agents hear the Māori voice on issues that directly impact them.

I INTRODUCTION

> "No government can ever again rule Maori people while at the same time dishonouring the Treaty, for the honour of the Crown itself is at stake."[2] — Ranginui Walker

There is no doubt that the principles of the Treaty of Waitangi and the values underpinning tikanga have a place in New Zealand's public law landscape. The Treaty has been referred to as "essential to the foundation of New Zealand" and "part of the fabric of New Zealand society".[3] Tikanga has more recently gained recognition as a relevant component of New Zealand's common law in *Takamore v Clarke*,[4] a precedent the Supreme Court will likely reinforce in its forthcoming reasons in *Ellis v R*.[5] Debate arises, however, when academics and judges alike attempt to negotiate the exact place of the Treaty and tikanga within the law. In this article, I will explore one specific area of public law — the natural justice ground of judicial review.[6] I will argue that Treaty principles and tikanga values should be incorporated into the procedural fairness requirements placed upon administrative decision makers where their decisions impact Māori.[7]

Treaty principles are already present in procedural fairness review to a certain extent. In large-scale decisions on land and

2 Ranginui Walker *Ka Whawhai Tonu Matou: Struggle Without End* (2nd ed, Penguin Books, Auckland, 2004) at 265.

3 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210.

4 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

5 Though the Court's reasons have not yet been published, the Supreme Court has ruled that Mr Ellis' appeal against conviction may continue despite his death, after receiving arguments that this outcome is consistent with tikanga — see *Ellis v R* [2020] NZSC 89 for the Court's ruling (without reasons). See also Natalie Coates, Kingi Snelgar and Chris Merrick "Tikanga & State Law—The Peter Ellis Case" (Indigenous Law Centre Series, Auckland Law School, Auckland, 15 October 2020) for discussion of the arguments advanced by Ellis' counsel.

6 For the purposes of this article, I have used the terms procedural fairness and natural justice interchangeably.

7 This article focuses specifically on the procedural entitlements within the right to a hearing, as well as the adjacent issues of sufficient notice and disclosure. Other aspects of procedural fairness, like the right to an unbiased decision maker and the somewhat disputed ground of the right to reasons, are not discussed.

resources, the courts have imposed a duty on the Government to consult Māori. However, when it comes to natural justice review beyond the duty to consult, both the Treaty and tikanga are conspicuously absent. In arguably smaller-scale decisions affecting individual Māori, the particulars of the Executive's duty to provide a fair hearing are influenced by numerous contextual factors. None of these factors touch on Māori-centric issues or the particular duty owed by the State to tangata whenua. However, when one examines various Treaty principles and tikanga values, it becomes apparent that they are highly relevant to concepts of natural justice. Incorporating these Treaty and tikanga principles into procedural fairness analysis is a novel approach. Nevertheless, it is consistent with existing precedent surrounding the Treaty, as well as the current momentum towards more significant inclusion of tikanga within our law.

Valuable academic work has been done on the role of the Treaty in administrative law.[8] However, no one has argued that natural justice review specifically can be reformed to better incorporate Treaty principles and tikanga, beyond the duty to consult.[9] I believe that adapting procedural fairness review of administrative decisions impacting individual Māori will better reflect the Government's duty to Māori under the Treaty. Various tikanga values and Treaty principles support more extensive natural justice rights for Māori — increasing the likelihood that courts will grant Māori oral hearings, the use of witnesses, legal representation and cross-examination. The courts are also more likely to require ample notice of the forthcoming decision and disclosure of materials relevant to the decision. Claire Charters indicated in a recent article that existing grounds of judicial review have the capacity to evolve and adapt to accommodate the rights and interests of Māori.[10] I would propose that

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8 See particularly Jack Oliver-Hood's work arguing for a separate ground of judicial review requiring administrative decisions to be consistent with Treaty principles: Jack Oliver-Hood "Our Significantly Indigenous Administrative Law: the Treaty of Waitangi and Judicial Review" (2013) 19 Auckland U L Rev 53.

9 Sid Dymond has argued for reform of the separate review ground of legitimate expectation, particularly in the context of Treaty settlements: see Sid Dymond "Treaty-Based Review: The Treaty Settlement Negotiation Process and Legitimate Expectation" (2018) 6 Te Tai Haruru 2.

10 Claire Charters "Wakatū in the Peripheral Vision: Māori-Rights Based Judicial Review of the Executive and the Courts' Approach to the United Nations Declaration on the Rights of Indigenous Peoples" [2019] NZ L Rev 85 at 104.

reforming judicial analysis of natural justice requirements in this way would, at the very least, allow the law to progress on this journey.[11]

Part II of this article outlines the current status of the Treaty and tikanga in natural justice review. While Treaty principles are regularly enforced within the duty to consult, they are absent in the natural justice analysis of individual-level decisions. This discrepancy is contrarian and rife with theoretical problems. In Part III, I will discuss the various Treaty principles relevant to natural justice, which include rangatiratanga, kāwanatanga and partnership.[12] Part IV will cover the tikanga values pertinent to procedural fairness: mana, utu and whanaungatanga. Part V will examine the legal justifications for including these factors in natural justice analysis. The inclusion of Treaty principles is consistent with other Treaty precedent in administrative law. Implementation of tikanga values in procedural fairness review is concordant with the legal pluralism encouraged under *Takamore*. Part VI will map out the ways inclusion of these factors will increase procedural entitlements for Māori. Finally, in Part VII, I will acknowledge the limitations of my approach and the ways in which it does not fully manifest the rights afforded to Māori under te Tiriti.

II THE CURRENT APPROACH TO NATURAL JUSTICE

Orthodox Natural Justice Analysis

In order to analyse the shortcomings of natural justice review, it is important first to understand what orthodox natural justice analysis entails. Procedural fairness review dictates the procedural steps administrative officials must follow to allow an individual to be heard before making a decision that impacts them. The baseline of natural justice analysis is that every individual whose rights or interests stand to be affected by an administrative decision is entitled to some form of a hearing.[13] The specific procedural entitlements afforded to individuals varies with context. In *CREEDNZ Inc v Governor-*

11 See *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181 [*Sweeney v Prison Manager*] at [75]. This recent case specifically acknowledged that tikanga has a place in judicial review, though the impact of this finding on natural justice analysis was not explored.

12 I have chosen to focus on applying Treaty principles in natural justice review, as opposed to the text of te Tiriti. This choice is discussed further in Part VII(A).

13 *Waitemata Health v Attorney-General* [2001] NZFLR 1122 (CA) at [96].

General, Richardson J outlined the full spectrum of natural justice entitlements:[14]

> In some instances bare public notification ... and an opportunity to make representations in answer will suffice. At the other extreme natural justice may require a full-scale hearing with the opportunity of presenting oral evidence and of cross-examination.

Courts assess whether or not an individual is entitled to an oral hearing,[15] the input of third parties,[16] legal representation[17] or cross-examination of witnesses.[18] Other questions revolve around the amount of notice an individual should receive to prepare to make submissions on the decision,[19] and the amount of information about the decision they should receive.[20] There is no set formula for assessing what procedural rights claimants are entitled to. Judges consider several factors, including:

- the seriousness of the impact a decision will have on the individual;[21]
- the nature of the interests at stake;[22]
- whether the decision affects an individual or a large group;[23]
- the need for decisions to be made with reasonable speed;[24]
- the ability of the claimant to respond effectively to the proposed decision;[25]
- whether points of law are likely to arise;[26]
- the complexity of the issues at hand;[27]
- the statutory context around the administrative powers being exercised;[28]

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14 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA) at 187.

15 See *R (Smith) v Parole Board* [2005] UKHL 1, [2005] 1 WLR 350 at [31].

16 *Waitemata Health*, above n 13, at [113].

17 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [58].

18 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC) at 693.

19 *A v Legal Complaints Review Officer* [2013] NZHC 1100 at [26]–[31].

20 *Secretary for Justice v Simes* [2012] NZCA 459, [2012] NZAR 1044 (CA) at [80].

21 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220.

22 *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 567.

23 *Ridge v Baldwin* [1964] AC 40 (HL) at 72.

24 *Drew*, above n 17, at [71].

25 *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115 at [2].

26 *Drew*, above n 17, at [71].

27 *Tauranga Boys College Board of Trustees v International Education Appeal Authority* [2016] NZHC 1381, [2016] NZAR 1029 at [115].

- whether credibility or facts are in issue;[29] and
- whether the decision is preliminary in nature.[30]

Even this long list of factors is not exhaustive. As noted in *R v Secretary of State for the Home Department, ex parte Doody*: "[t]he principles of [procedural] fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context … in all its aspects."[31] Given how malleable and context-dependent natural justice review is, it is remarkable that judges have incorporated neither Treaty principles nor tikanga when determining what fairness requires in a particular case.

The Current Place of the Treaty and Tikanga in Natural Justice

1 The duty to consult on large-scale decisions

Treaty principles can be found in one strand of procedural fairness review — namely, the duty to consult. This duty generally arises in decisions that impact many people, where legitimate expectations of consultation are created by past practice, or statute prescribes consultation procedure.[32] Both the courts and the Waitangi Tribunal have held that Treaty principles of partnership and active protection impose a duty to consult with iwi upon the Government.[33] This duty does not apply to every decision impacting Māori. Rather, it extends to "consultation on truly major issues".[34] This duty tends to be enforced by the courts in land and resource-related decisions. The duty has been applied in decisions on the sale of land rights,[35] resource-related tourism licensing,[36] government development of

28 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

29 Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomas Reuters, Wellington, 2021) at 1122 and 1127–1128.

30 *CREEDNZ Inc*, above n 14, at 190.

31 *Regina v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531 (HL) [Doody] at 560.

32 *Nicholls v Health and Disability Commissioner* [1997] NZAR 351 (HC) at 369–370.

33 Waitangi Tribunal *Tū Mai te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) [*Tū Mai te Rangi!*] at 23; *Mason-Riseborough v Matamata-Piako District Council* (1997) 4 ELRNZ 31 (EnvC) at 48; and *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) [*Lands Case*] at 683.

34 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) [*Forests Case*] at 152.

35 *Forests Case*, above n 34.

36 *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 533 (CA).

land[37] and decisions around the regulation of fisheries.[38] Factors that influence whether consultation is required include the significance of the interest and how well-informed the Crown is on the Māori interests involved in the absence of consultation.[39]

The duty is predominantly applied in cases where the governing statute requires consistency with the principles of the Treaty of Waitangi.[40] Consultation procedure has also been specifically codified in some statutes, notably the Resource Management Act 1991, which requires local authorities to consult with iwi on policy statements and plans.[41] Courts have held that the Government must give those consulted enough information about the proposed decision to be able "to respond with appropriate and accurate information on the potential effects on affected Maori".[42] Administrators must consider Māori when making the final decision; otherwise, the process amounts to "no more than window dressing".[43] Consultation, at times, may need to be extensive. As the Waitangi Tribunal has noted, consultation may require "hui where information is received, further hui where Māori debate and consider the information, and then again, hui where Māori make their views known".[44]

For decades, the courts have used the Treaty of Waitangi to secure a duty to consult and provide fairer processes for tangata whenua in large-scale decisions.[45] However, such concerns are not present in procedural fairness analysis as applied to individual-level Government decisions affecting Māori.

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37 *Beadle v Minister of Corrections* EnvC Auckland A74/02, 8 April 2002 at [534].

38 *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CP237/95, 24 April 1997.

39 Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, 1991) at [4.7.18]; and *Lands Case*, above n 33, at 683.

40 See State-Owned Enterprises Act 1986, s 9; and Resource Management Act 1991, s 8.

41 Jenny Vince "Maori Consultation Under the Resource Management Act and the 2005 Amendments" (2006) 10 NZJEL 295 at 306.

42 *Beadle*, above n 37, at [549].

43 *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496 (HC) at [86].

44 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Wellington, 2001) at 91.

45 It should be noted that these consultation processes are by no means perfect. Linda Te Aho points out that many Māori come away from consultation disillusioned, particularly as there is no guarantee the ultimate decision will be consistent with their views: see Linda Te Aho "Contemporary Issues in Māori Law and Society: Crown Forests, Climate Change, and Consultation – Towards More Meaningful Relationships" (2007) 15 Wai L Rev 138 at 148.

2 *Individual-level decisions impacting Māori*

Natural justice review of decisions impacting Māori on an individual level references neither Treaty principles nor tikanga values. There have been no judicial review cases on individualised decisions affecting Māori where judges have incorporated tikanga or the Treaty into procedural fairness analysis.[46] These principles are absent in decisions on a wide range of issues, including Government employment decisions,[47] political party procedure in excluding members,[48] funding decisions by CYFS[49] and the implementation of prison disciplinary regimes.[50] Though not a Government decision, it should be noted that when natural justice review was sought for the Māori Party's candidate selection process in *Takerei v Winiata*,[51] tikanga was not incorporated into the procedural fairness analysis, despite tikanga being quite literally written into the body's constitution.[52]

The courts are unwilling to infer Treaty principles into natural justice analysis beyond the strict confines of the duty to consult. Even in cases relating to land and resources, if Māori couch their claims within the language of natural justice review instead of consultation, Treaty principles are conspicuously absent. In *Te Runanga o Ngai Tahu v Waitangi Tribunal*, a Ngāi Tahu representative argued that the Tribunal's refusal to allow cross-examination of opposing witnesses until all evidence had been delivered was a breach of natural justice.[53] Similarly, in *Tangaere v Waitangi Tribunal* — a case related to an individual's land interests — the claimant argued that the Tribunal's decision to hear his request for an urgent inquiry on the papers was

46 Note that given the recent finding on tikanga's relevance in *Sweeney v Prison Manager*, above n 11, this approach may change in the near future.

47 *Poananga v State Services Commission* [1985] 2 NZLR 385 (CA).

48 *Awatere Huata v Prebble* [2004] 3 NZLR 359 (CA).

49 *Sweeney v Chief Executive Officer, Child, Youth and Family Service* [2004] NZAR 136 (HC).

50 *Percival v Attorney-General* [2006] NZAR 215 (HC); and *Genge v Visiting Justice at Christchurch Men's Prison* [2017] NZHC 3168. See also *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, which — while not explicitly a natural justice review decision — did discuss whether prisoner rights to natural justice under s 27 of the New Zealand Bill of Rights Act 1990 had been breached.

51 *Takerei v Winiata* HC Auckland CIV-2010-419-1071, 2 March 2011.

52 At [11].

53 *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2002] 2 NZLR 179 (CA) at [2].

procedurally unfair.[54] In neither case were Treaty or tikanga principles invoked in the procedural fairness analysis, even though the Waitangi Tribunal is a body explicitly dedicated to the principles of the Treaty, "bicultural" in its operation and with discretion to implement tikanga-based procedure where appropriate.[55]

There have been rare instances where the courts have flirted with the incorporation of tikanga and Treaty principles into natural justice review. In *Ngati Apa Ki Te Waipounamu Trust v Attorney-General*, multiple iwi sought judicial review of the Māori Appellate Court's decision on an inter-tribal boundary dispute on the basis that they had not been adequately represented to the Court.[56] They did not frame their claim in the language of the duty to consult, but rather general natural justice review.[57] Counsel for Ngāti Toa argued that the requirements of natural justice are heightened by the Treaty.[58] The Court of Appeal held that, on the facts at hand, additional obligations created under the Treaty would not have affected the outcome; so, the Court declined to rule on the relevancy of the Treaty to natural justice analysis.[59] While the High Court noted in *Raukawa Settlement Trust v Waitangi Tribunal* that the "tikanga of natural justice" reinforces the right to a hearing in the Waitangi Tribunal context, it did not elaborate nor formally incorporate tikanga values into the procedural fairness balancing exercise.[60] In the recent case *Sweeney v The Prison Manager, Spring Hill Corrections Facility*, the High Court held that courts can invoke tikanga-based reasoning within judicial review, and

54 *Tangaere v Waitangi Tribunal* HC Wellington CIV 2008-485-1177, 19 December 2008 at [13]–[17].

55 Law Commission *Māori Custom and Values in New Zealand Law* (NZLC SP9, 2001) at 75. Interestingly, in the recent case *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654, the High Court held that the Tribunal exercised their statutory powers in a way inconsistent with tikanga, and as a result set a Tribunal determination aside: see [104], [117] and [147]–[148]. While this tikanga-based analysis occurred in the context of illegality review and not natural justice analysis, it will be interesting to see whether future courts invoke tikanga when deciding what procedural fairness requires of the Tribunal.

56 *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA) at [8]–[12].

57 At [8]–[12].

58 At [29]–[30].

59 At [33].

60 *Raukawa Settlement Trust v Waitangi Tribunal* [2019] NZHC 383, [2019] 3 NZLR 722 at [69].

may in fact have an obligation to do so.[61] However, courts are yet to explore the impact of this finding on natural justice review.[62]

The courts remain reluctant to incorporate Treaty principles and tikanga into natural justice review, despite appearing open to the notion at times. The disconnect between the Treaty-based analysis in the duty to consult review and general natural justice analysis in individualised decisions is disconcerting.

3 Theoretical problems with the discrepancy

(a) The Treaty of Waitangi is relevant to more than land and resources

There are several theoretical problems with this discrepancy between natural justice and consultation review. The first and most obvious is that while the Treaty undoubtedly applies to large-scale land and resource decisions, it also applies more broadly to decisions that impact Māori welfare at an individual level. The Māori text of te Tiriti preserves Māori rangatiratanga generally, and not just in relation to lands, forests and fisheries as the English text denotes.[63] In the words of the Waitangi Tribunal, "the Treaty was directed to the protection of Maori interests generally and not merely … to the classes of property interests specified in article 2".[64]

Treaty principles apply to matters generally relevant to Māori welfare, like the delivery of social services,[65] health outcomes[66] and the administration of prisons.[67] These are the kinds of decisions for which Māori may seek natural justice review. Indeed, many existing natural justice cases with Māori claimants revolve around matters of prison discipline and administration.[68] The Treaty protects Māori interests that "go beyond property and encompass … Māori

61 *Sweeney v Prison Manager*, above n 11, at [75].

62 In *Sweeney v Prison Manager*, above n 11, tikanga influenced the administrative remedy offered by the Court, and not the finding on natural justice. See [52]–[53] and [76]–[77].

63 Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) at 390–391.

64 Waitangi Tribunal *Te Whanau o Waipareira Report* (Wai 414, 1998) [*Te Whanau o Waipareira Report*] at xxiv.

65 At 226–227.

66 See generally Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) [*Hauora Report*].

67 See generally *Tū Mai te Rangi!*, above n 33.

68 See the cases on this topic discussed above in Part II(B)(2).

themselves, as groups and individuals".[69] Treaty duties have been applied in areas where there are disparate social outcomes for Māori and non-Māori.[70]

Beyond incarceration rates and health outcomes, this principle can also be applied to disparate educational outcomes.[71] The current discrepancy in the rates of suspension and expulsion for Māori as compared to non-Māori[72] means Treaty principles are directly applicable to natural justice entitlements for Māori students in Board of Trustee hearings.[73] Indeed, Boards of Trustees have a statutory Treaty mandate to seek equitable outcomes for Māori students.[74] To properly enforce the duties associated with the Treaty, the court must acknowledge that the Treaty bolsters procedural fairness requirements in decisions affecting Māori beyond those on land and resources.

(b) Individualised decisions attract procedural fairness requirements

The arguably "smaller" scale of individualised decisions does not diminish the procedural entitlements owed to Māori. In fact, where administrative decisions specifically impact an individual, the courts tend to enforce stricter natural justice requirements on the Executive. The first criteria the courts evaluate before invoking natural justice principles is whether the decision impacts the personal circumstances, rights or interests of an individual.[75] Where decisions are large-scale and affect many people, the courts are less likely to apply strict

69 Te Puni Kōkiri, above n 44, at 95.

70 *Hauora Report*, above n 66, at 29.

71 Ann Sullivan "The Treaty of Waitangi and Social Well-being: Justice, Representation, and Participation" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 123 at 124. It should be noted that a Waitangi Tribunal kaupapa inquiry is forthcoming on this topic: see Waitangi Tribunal "Kaupapa inquiries" (1 September 2020) <https://waitangitribunal.govt.nz>.

72 Schools stand-down, suspend and exclude Māori at a greater rate than other ethnicities. A Māori student is also twice as likely to be expelled as a Pākehā student. See these and other relevant statistics at Education Counts "Stand-downs, suspensions, exclusions and expulsions from school" (July 2020) <www.educationcounts.govt.nz>.

73 There have been cases where Boards of Trustees have failed to properly respect student natural justice rights in the past: see generally *J v Bovaird and Board of Trustees of Lynfield College* [2007] NZAR 660 (HC); and *D v M and Board of Trustees of Auckland Grammar School* [2003] NZAR 726 (HC).

74 Education and Training Act 2020, s 127(1)(d)(iii).

75 See *Daganayasi*, above n 28, at 145–146.

procedural fairness requirements.[76] The courts have also previously enforced the Treaty in matters affecting Māori individuals, notably in the family law context.[77] The Court of Appeal has explicitly noted that the Treaty is a source of both group and individual rights.[78] Mason Durie posits that while a tension exists between recognition of these group and individual rights, neither replaces the other.[79] The individualised nature of the decisions typically reviewed for procedural fairness should be no barrier to the courts prescribing more extensive natural justice entitlements for Māori.

The dismissal of individual Māori natural justice rights in child uplift cases has especially dire effects. The Ombudsman has found that Oranga Tamariki has regularly used emergency court orders to uplift children without whānau consultation.[80] The courts have ruled that overuse of these without notice uplift orders in the absence of urgent circumstances is a breach of natural justice.[81] In a harrowing 2019 case, a Māori woman was targeted by a without-notice order five days after she gave birth.[82] During an overnight standoff, whānau and midwives prevented police from taking the child.[83] After an internal review, Oranga Tamariki found that it had relied on inaccurate historical information about the woman's situation and had not made a sufficient effort to communicate with the woman's whānau about her current circumstances before deciding to uplift.[84] This flagrant breach of natural justice led to a deeply traumatising event for this wahine and her whānau. Oranga Tamariki has acknowledged its misconduct and pledged to only use without-notice orders when necessary in the

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76 See *Ridge v Baldwin*, above n 23, at 72.

77 See *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

78 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (CA) at 344.

79 MH Durie "The Treaty of Waitangi: perspectives for social policy" in IH Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280 at 288.

80 Peter Boshier *A Matter of Urgency: Investigation Report Into policies, practices and procedures for the removal of newborn pēpi by Oranga Tamariki, Ministry for Children* (The Office of the Ombudsman, August 2020) at 10.

81 *CLM v Chief Executive of the Ministry of Social Development* [2011] NZFLR 11 (HC) at [38]–[39] and [59].

82 Melanie Reid "Don't take my baby" (16 July 2020) Newsroom <www.newsroom.co.nz>.

83 Reid, above n 82.

84 Oranga Tamariki "Hawke's Bay Practice Review" (5 November 2019)<www.orangatamariki.govt.nz>.

future.[85] However, given that on average three Māori babies are uplifted a week from hospitals,[86] the courts should remain vigilant of potential abuses of natural justice.

(c) Natural justice requirements are not dependent on statutory support

Tikanga and Treaty considerations may even be imported into the natural justice analysis of decisions where there is no legislation mandating Treaty consistency. The duty to consult tends to stem from legislation that contains Treaty consistency sections. Nevertheless, the statutes relevant to many of the decisions that Māori may seek natural justice review for as individuals do not contain Treaty consistency sections. There may not be an obvious Treaty provision relevant to Government employment decisions. The Parole Act 2002, which regulates parole hearings, does not contain a Treaty section. Neither does the Corrections Act 2004,[87] which governs prison discipline, though the Minister of Corrections has indicated that Treaty-based amendments are on the political agenda.[88]

However, natural justice review has never been conditional on statutory support. Natural justice is largely a creature of common law — and while legislative context is one of the many factors that shape the procedural requirements mandated in any given case, they have never been solely determinative.[89] To ensure fairness in the decision-making process, courts regularly "[supplement] the procedures laid down in the legislation".[90] Similarly, the courts have been willing to import Treaty considerations as an extrinsic aid in other cases even when not explicitly named by statute.[91] The absence of Treaty consistency sections in legislation governing administrative decisions that impact individual Māori is not a theoretically sound obstacle to Treaty-based natural justice review.

85 Oranga Tamariki, above n 84.

86 Reid, above n 82.

87 Interestingly, the decision reviewed in *Sweeney v Prison Manager*, above n 11, was made under the Corrections Act 2004, and tikanga was invoked in the remedy reasoning despite the absence of a Treaty provision.

88 Department of Corrections *Hōkai Rangi: Ara Poutama Aotearoa Strategy 2019–2024* (2019, Wellington) [*Ara Poutama Strategy*] at 19.

89 See *Daganayasi*, above n 28, at 141.

90 *Birss v Secretary for Justice* [1984] 1 NZLR 513 (CA) at 516.

91 See *Huakina Development Trust*, above n 3, at 210.

III TREATY PRINCIPLES RELEVANT TO NATURAL JUSTICE

The current dichotomy between consultation and natural justice review in Treaty jurisprudence is illogical. To remedy this, the Treaty principles relevant to natural justice must be identified. There are three core Treaty principles that promote imposing stricter procedural fairness requirements on the Crown: rangatiratanga, kāwanatanga and partnership. Natural justice requirements regulate the interaction between the Crown and the public when administrators make impactful decisions. Similarly, the Treaty of Waitangi explicitly regulates the relationship between the Crown and Māori.[92] In this context, it is unsurprising that Treaty principles are strikingly relevant to matters of natural justice.

Rangatiratanga

The Treaty principle of rangatiratanga reinforces Māori natural justice entitlements. Rangatiratanga has been defined by the Waitangi Tribunal as the Māori right to "manage their affairs, in accordance with Maori custom and values".[93] It includes: the "freedom to be distinct peoples; the right to territorial integrity of their land base; the right to freely determine their destinies; and the right to exercise autonomy and self-government".[94] The rangatiratanga principle promotes the Crown's duty to consult Māori.[95] Consultation is required "[b]efore any decisions are made by the Crown … on matters which may impinge upon the rangatiratanga of a tribe or hapu over their taonga."[96] Consultation has been mandated on matters like the safety of Māori communities.[97] These procedural fairness entitlements can be translated to the individualised decisions evaluated under natural justice review. Rangatiratanga means "it is for Māori to say what their interests are, and to articulate how they might best be

92 See *Tū Mai te Rangi!*, above n 33, at 22.

93 *Te Whanau o Waipareira Report*, above n 64, at 15.

94 Waitangi Tribunal *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake* (Wai 2417, 2015) [*Mana Motuhake Report*] at 26.

95 Te Puni Kōkiri, above n 44, at 92.

96 Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993) at [5.1.6].

97 *Tū Mai te Rangi!*, above n 33, at [4.2.3].

protected".[98] As such, Māori are entitled to an extensive forum to share their views when an administrative decision may impact them. In the words of the Waitangi Tribunal, "rangatiratanga demands that Māori be substantially involved in matters affecting them".[99] Justice Joseph Williams argues that tikanga is an essential aspect of rangatiratanga.[100] As such, the enforcement of rangatiratanga extends to protection and respect for tikanga. This further bolsters the role of tikanga values in natural justice analysis, which is discussed in more depth in Part IV.

Many academics believe that since te Tiriti o Waitangi did not cede sovereignty to the British, rangatiratanga can never be fully realised in a constitutional system where the Crown retains ultimate power. Moana Jackson argues that rangatiratanga amounts to nothing less than "total political authority" for Māori.[101] The Waitangi Tribunal has also recently acknowledged that iwi did not cede sovereignty to the British in 1840.[102] They note that in Treaty negotiations, Māori were assured of "perfect independence" by Crown representatives.[103] This ruling is likely to change how rangatiratanga is interpreted and applied in the future, but at this stage the Tribunal has made no comment on how the Treaty principles may be affected.[104] To extrapolate the arguments of academics like Jackson, invoking rangatiratanga to colour the procedural rights of Māori when the decision maker retains ultimate authority over the decision does not reflect the true extent of the right. The Tribunal has held that rangatira signing the Treaty believed that where the spheres of iwi and Crown power overlapped, the Treaty parties would reach an outcome co-operatively, through negotiation.[105] This is not the reality of

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98 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) vol 2 at 681.

99 *Tū Mai te Rangi!*, above n 33, at 26.

100 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 9.

101 Moana Jackson "The Treaty and the Word: the Colonization of Māori Philosophy" in Graham Oddie and Roy W Perrett (eds) *Justice, Ethics and New Zealand Society* (Oxford University Press, Auckland, 1992) at 5 as cited in Ani Mikaere *Colonising Myths - Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 85.

102 Waitangi Tribunal *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) [*He Whakaputanga Report*] at [10.4.4].

103 At 526.

104 At 527.

105 At 524.

administrative decision-making. Indeed, consultation is not negotiation.[106] The official has the final say. They must consider the claimant's views but are required to do no more than that. Despite these limitations, more extensive procedural rights for Māori at least reflect rangatiratanga better than the current approach.

Kāwanatanga

Kāwanatanga is the Treaty principle that articulates the position of the Crown within the Treaty partnership. The duties associated with this role reflect the Crown's obligation to afford Māori extensive natural justice rights. According to the Waitangi Tribunal, kāwanatanga "affirm[s] the role of the Crown to govern the State of New Zealand".[107] The Crown has a corresponding role "in collaboratively developing legislation or administrative arrangements for Māori and for providing reasonable support for Māori within their sphere of authority".[108] When exercising this governance authority, the Crown must ensure its "policy processes are sufficiently informed by Māori knowledge and opinions".[109] Consultation is necessary to appropriately balance kāwanatanga with rangatiratanga.[110] The Crown must honour its obligation of good governance by ensuring it is adequately informed on the consequences its decisions have for Māori interests.[111] When transposed to the natural justice context, these kāwanatanga duties require administrators, in exercising their public governance responsibilities, to adequately inform themselves of the interests of the Māori individual impacted by their decisions. Decision makers are under a duty to grant Māori extensive procedural fairness entitlements so that they can fully communicate how a decision affects them. Like rangatiratanga, the meaning of kāwanatanga is currently in flux, given the Waitangi Tribunal's recent finding regarding sovereignty. However, current Tribunal jurisprudence indicates that kāwanatanga requires the Crown to provide Māori more extensive and meaningful natural justice entitlements.

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106 See *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.

107 *Mana Motuhake Report*, above n 94, at 40.

108 At 40.

109 Waitangi Tribunal *The Offender Assessment Policies Report* (Wai 1024, 2005) at 11.

110 *Te Whanau o Waipareira Report*, above n 64, at [3.5].

111 See Waitangi Tribunal *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Wai 2870, 2020) at 12.

Partnership and Co-operation

The related Treaty principles of partnership and co-operation feed into the expansive natural justice duties owed by the Crown to Māori. The partnership principle reflects that Māori and the Crown were both parties to the Treaty, and therefore have a duty to act fairly, reasonably and in good faith towards each other.[112] Where conflicts arise, "the Treaty partners should work out their own agreement ... [and] make a genuine effort to do so".[113] The partnership principle reinforces the duty to consult.[114] This compromise requires a balance of competing Crown and iwi interests — as such, the Government has a duty to inform itself fully of Māori interests impacted by the decisions it makes.[115] Both parties must acknowledge "the needs and interests of the other".[116] Partnership bolsters the natural justice rights of individual Māori where pending administrative decisions affect them. The Government should afford them an expansive hearing right so they can completely communicate their perspective on the upcoming decision. The decision maker must give proper regard to the decision's impact upon Māori, in conjunction with the State's interest, to make a decision that reflects the partnership between Māori and the Crown. Additionally, an oral hearing better represents the Treaty partnership. In oral hearings, the decision maker and the individual can quickly exchange views, addressing new issues as they come up.[117] This process embodies co-operation better than written submissions.

However, like rangatiratanga, it is unlikely that co-operation and partnership could ever be fully realised in an administrative law context. The Waitangi Tribunal has held that partnership describes "a relationship where one party is not subordinate to the other".[118] Natural justice review can never properly achieve this — while the individual impacted may be able to present their views fully, they remain powerless when it comes to the actual outcome of the decision.

112 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304. See also *Lands Case*, above n 33.

113 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) at 529 as cited in Te Puni Kōkiri, above n 44, at 79.

114 *Hauora Report*, above n 66, at 28.

115 Te Puni Kōkiri, above n 44, at 80.

116 *Tū Mai te Rangi!*, above n 33, at 23.

117 *Goldberg v Kelly* (1970) 397 US 254 at 269 as cited in *R (Smith) v Parole Board*, above n 15, at [31].

118 *Te Whanau o Waipareira Report*, above n 64, at xxvi.

Though a lesser boon, heightened natural justice rights for Māori still promote partnership and co-operation procedurally, if not substantively.

IV TIKANGA PRINCIPLES RELEVANT TO NATURAL JUSTICE

Multiple tikanga values are also relevant to natural justice. This list is not intended to be exhaustive, but relevant values include mana, utu and whanaungatanga. I should note that, as an author, I have consciously relied on sources discussing tikanga that were either written by tangata whenua or in consultation with tangata whenua. As a Pākehā person, I am aware that it is not my place to dictate the meaning of tikanga. I hope my analysis of these principles and their relevance to natural justice theory does not unfairly distort their meaning. I agree wholeheartedly with the Law Commission's statement that "ultimately it is only Māori who can decide what their values are and how each value applies in a particular context".[119]

Mana

One tikanga value relevant to natural justice is mana. Mana has been defined as the "authority, control, influence, prestige, and power" intrinsic to the human person under tikanga.[120] Every Māori person is born with an increment of mana.[121] Mana is sourced from the sacred power of the gods, the power of the land, the power of one's ancestors, and the deeds and abilities of a person.[122] People have different levels of mana, depending on their place within their whānau and iwi.[123] Under tikanga, "mana must be respected and public events should enhance the mana of participants".[124] Mana is an inherently

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119 Law Commission, above n 55, at 28.

120 At 32–33.

121 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (2nd ed, Huia Publishers, Wellington, 2016) at 55. I should also note here that counsel in the Ellis case (above n 5) argued that non-Māori can possess mana: see Kate Mackay "Peter Ellis, Tikanga and a Precedent For Posthumous Appeals" (30 September 2020) Equal Justice Project <www.equaljusticeproject.co.nz>.

122 Cleve Barlow *Tikanga Whakaaro: Key concepts in Māori culture* (Oxford University Press, Auckland, 1991) at 61–62.

123 Mead, above n 121, at 33–34.

124 At 34.

social quality — it requires that others appropriately recognise and respect it.[125] There are two core ways that mana is relevant to natural justice review: first, where the administrative decision may negatively impact a person's mana; and secondly, in that an extensive hearing right better reflects the mana of the individual affected.

The kind of administrative decisions Māori seek natural justice review for often have the potential to negatively impact the claimant's mana. The mana of a person can be decreased when the decision is disciplinary in nature — Mead writes that when a person is seen to commit "thoughtless, crooked and evil actions", their mana will diminish.[126] Matters of prison discipline are pertinent. In *Genge v Visiting Justice at Christchurch Men's Prison*, a Māori man argued his natural justice rights had been violated in a hearing to determine whether he had threatened a prison doctor.[127] The court did not consider his mana as a factor that increased his natural justice rights — despite the fact that the Department of Corrections' recently published policy platform promises to uphold the mana of prisoners.[128] In other criminal justice contexts, the mana of offenders has been acknowledged — namely in the Rangatahi Court, where tikanga and te reo are employed to rebuild the mana of the offender while simultaneously holding them accountable.[129]

Employment decisions may also negatively impact an individual's mana, particularly where the claimant serves other Māori in their role. The mana of a person is increased through services to their iwi.[130] This concern is particularly apparent in the case of *Sweeney v Chief Executive Officer, Child, Youth and Family Service*, where the claimant was made redundant from his job providing pastoral support for Māori with addiction issues after CYFS revoked funding from his employer due to his conviction history.[131] At no point in the decision did the judge consider the detrimental effect this decision would have on the claimant's mana. In an interesting development, 17 years later, the same claimant argued for judicial review of a prison's decision to revoke his access to prisoners for the purposes of addiction counselling. This time, the claimant did argue

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125 At 56.

126 Mead, above n 121, at 57.

127 *Genge*, above n 50.

128 Ara Poutama Strategy, above n 88, at 16.

129 Kaipuke Consultants *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Ministry of Justice, 17 December 2012) [*Ngā Kooti Rangatahi Report*] at 25–27.

130 Mead, above n 121, at 67.

131 *Sweeney*, above n 49.

that his mana had been negatively impacted by the decision — and this factor weighed in favour of the High Court granting him a declaration of illegality.[132]

Success in political or public service work can also increase a person's mana.[133] In decisions such as *Poananga v State Services Commission*,[134] where a Māori woman was transferred without notice from her government position, there is potential to influence a claimant's mana. Additionally, disrespect or depreciation of an individual's mana also reflects on the mana of their wider whānau.[135] In traditional marae dispute resolution, when a transgression was committed, the wider family would be held liable, not just the individual.[136] The wrong of the individual was seen to be the wrong of the collective.[137] One of the key determinations the judiciary makes in procedural fairness analysis is on the input of third parties — whether the individual is entitled to a simple oral interview or a full hearing with the support of witnesses.[138] By allowing an individual's whānau to contribute to a hearing, the Government also acknowledges their mana.

The inherent respect afforded to individuals through extensive procedural fairness rights is also relevant to mana. Mana is partially sourced from a person's knowledge and expertise.[139] Extensive natural justice rights indicate the respect the State has for the individual's opinion and knowledge on the matter at hand. It is an acknowledgement of the individual's ability to make valuable contributions on the matter. The Rangatahi Court works particularly hard to emphasise this respect, asking the offender for their views and opinions to build their personal pride and confidence.[140] When a person is granted an oral hearing under the tenets of procedural fairness, their mana is enhanced. Indeed, in the traditional marae context, leading speakers at hui are those known for their skill in oratory and tribal history, whose great mana reflects on that of the

132 *Sweeney v Prison Manager*, above n 11, at [71] and [76]–[77].

133 Mead, above n 121, at 67.

134 *Poananga*, above n 47.

135 See Coates' argument on the detrimental impact of Peter Ellis' conviction on his whānau in Mackay, above n 121.

136 Williams, above n 100, at 4.

137 At 5.

138 See, for example, *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 122.

139 See Barlow, above n 122, at 62.

140 *Ngā Kooti Rangatahi Report*, above n 129, at 36–37.

entire marae.[141] Kanohi ki te kanohi, or face-to-face speaking "gives mana to one's kōrero" and emphasises "a person's credibility in words, actions, or intentions".[142] In this sense, expansive natural justice rights, and particularly oral hearings, reflect the claimant's mana.

Utu

The tikanga principle of utu is directly applicable to questions of procedural fairness. Utu denotes "reciprocity between individuals, between descent groups and between the living and the departed".[143] Utu is required to "maintain balanced relationships between people".[144] In tikanga-based conflict resolution, utu was the primary goal — Valmaine Toki writes that when a transgression occurred, whānau would come together to restore "mana through utu; to achieve a balance in the relational networks and to achieve a consensus".[145] One of the main ways to promote reciprocity in administrative decision-making is to allow Māori an extensive forum to present their views. Without an extensive natural justice right, the administrative officer making the decision holds all the power — they pursue their course of action based solely on their own information and viewpoints. However, when the individual impacted by a decision is allowed an opportunity to fully present their position on the matter, there is more reciprocity between the administrator and said individual. This is also more consistent with the reciprocal speaking patterns on marae, which seek where possible to have visitors and hosts speak alternately.[146] A competent Government officer should want to make the best decision possible — a decision that adequately balances the needs and interests of Government with the rights and

141 Barlow, above n 122, at 85.

142 Acushla Deanne O'Carroll "Kanohi ki te kanohi – A Thing of the Past? Examining the Notion of "Virtual" Ahikā and the Implications for Kanohi ki te kanohi" (2013) 11 Pimatisiwin: A Journal of Aboriginal and Indigenous Community Health 441 at 442.

143 Law Commission, above n 55, at 38.

144 Robert Joseph "Re-creating Legal Space for the First Law of Aotearoa-New Zealand" (2009) 17 Wai L Rev 74 at 88.

145 Valmaine Toki *Indigenous Courts, Self-Determination and Criminal Justice* (Routledge, Abingdon, 2018) at 44.

146 It should be noted that alternate kawa also exist. For instance, under the pāeke system, all speakers from the host side speak first, followed by the manuhiri speakers. See Basil Keane "Story: Marae protocol – te kawa o te marae" (5 September 2013) Te Ara – The Encyclopaedia of New Zealand <www.teara.govt.nz> at 1.

interests of individuals. Natural justice provides an avenue through which individuals can raise these concerns, allowing decision makers to strike an appropriate balance between both sides. Similarly, under tikanga "[b]oth parties to the dispute must be present to exchange their views and opinions".[147] However, like rangatiratanga, the true balance envisioned under utu can never be fully realised in the administrative law context.

While an extensive hearing right creates a procedural reciprocity, the actual decision-making power still rests with the Government official — the individual impacted has no control over the extent to which their concerns will be accommodated. Toki articulates this well in the criminal justice context when she writes that: "[reciprocity has] no equal in the State justice system. The judge is the ultimate decisionmaker".[148] However, affording Māori extensive natural justice rights is, at the very least, the first step in making Government decision-making processes more reflective of utu.

Whanaungatanga

Finally, whanaungatanga is highly relevant to natural justice, particularly in determinations on third party support at hearings. Whanaungatanga reflects the belief that "relationships are everything – between people; between people and the physical world; and between people and the atua (spiritual entities)".[149] Under whanaungatanga, whānau have a responsibility to support the claimant, if they can, as they challenge decisions that may negatively impact them. Mead writes that "[i]ndividuals expect to be supported by their relatives near and distant" under whanaungatanga.[150] It is important that "everyone [looks] after one another to sustain the community".[151] This duty translates to an onus on family members to contribute to claimants' hearings in the form of supporting evidence and witness statements. All whānau who wish to contribute in administrative hearings should be allowed to — as Stephanie Vieille notes, "[t]he active participation and contribution of community

147 Stephanie Vieille "Māori Customary Law: A Relational Approach to Justice" (2012) 3(1) The International Indigenous Policy Journal 1 at 8.

148 Toki, above n 145, at 218.

149 Law Commission, above n 55, at 30.

150 Mead, above n 121, at 32.

151 Vieille, above n 147, at 8.

members … is an inherent element of a worldview based on the centrality of relationships."[152]

Whanaungatanga is also relevant to procedural fairness as it captures the impact of individualised administrative decisions on wider whānau. Under whanaungatanga, "the well-being of any person or group [is] intimately connected to the well-being of their kin".[153] This interconnectedness "begets active involvement and participation of all community members for the well-being of the collective".[154] The wider familial impact is particularly obvious in matters of prison administration and parole. The Waitangi Tribunal noted that "[w]hen released, it is to their whānau, hapū, and iwi that offenders will return, and it is they who have an interest in [the offender's] ability to live crime-free."[155] Incorporating whanaungatanga as a natural justice consideration is also consistent with policies present in the family law space that emphasise whanaungatanga. When a child's wellbeing is at risk, Oranga Tamariki has jurisdiction to call a family group conference, wherein a youth's wider whānau meet to develop a plan to promote the child's welfare.[156] In these conferences, anyone in the "family group" may attend, which includes whānau, hapū and iwi.[157] Administrative hearings should make similar accommodations for the input of the broader community to reflect whanaungatanga.

V THE LEGAL PLACE FOR TIKANGA AND THE TREATY IN NATURAL JUSTICE

There are a range of Treaty principles and tikanga values relevant to concepts of natural justice. The question now becomes what the legal basis is for incorporating these considerations into natural justice review. Incorporation of Treaty principles is consistent with existing judicial review precedent on the inclusion of Treaty principles as

152 At 8.

153 *He Whakaputanga Report*, above n 102, at 23.

154 Vieille, above n 147, at 6.

155 *Tū Mai te Rangi!*, above n 33, at 26.

156 Oranga Tamariki "About family group conferencing" (1 July 2019) <www.practice.orangatamariki.govt.nz>.

157 Community Law "Family Group Conferences: Official action from Oranga Tamariki" <www.communitylaw.org>.

mandatory relevant considerations.[158] Though the courts have not yet fully explored the *Takamore* ruling that tikanga has a place in the common law, even conservative understandings of this precedent lend themselves to incorporation of tikanga values in procedural fairness analysis, which itself is a creature of common law. This approach is further supported by the recent finding in *Sweeney v Prison Manager*, to be discussed below.

Treaty Principles as Mandatory Relevant Considerations

Importing Treaty principles as factors in procedural fairness analysis is consistent with other administrative law precedent. In the separate ground of illegality review, the courts have labelled Treaty principles as mandatory relevant considerations, which the administrator is required to consider before making their decision. This approach is commonly invoked when a governing statute mandates Treaty consistency. In *Ngai Tahu Maori Trust Board v Director-General of Conservation*, for example, the Court of Appeal held that when granting a whale-watching license, the Director-General had to consider "protection of the interests of Ngai Tahu in accordance with Treaty of Waitangi principles".[159] This decision was governed by the Conservation Act 1987, which mandated Treaty consistency.[160] It follows that decision makers must also accord natural justice rights to Māori claimants with regard to Treaty principles, particularly where the governing statute requires Treaty consistency. For example, a Board of Trustees may be required to grant extensive hearing rights if doing so is necessary for the school to give effect to the Treaty.[161] Hearing rights in matters governed by the Oranga Tamariki Act 1989 (like decisions to seek child uplifts) must also be influenced by Treaty principles.[162] Prison disciplinary hearings will also be required to

158 It should be noted that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) similarly has import as a mandatory relevant consideration and bolsters existing Treaty duties. However, the author has chosen not to explore this argument in the current piece for the sake of brevity. For discussion of the role the UNDRIP has in the application of Treaty duties generally, see the *Mana Motuhake Report*, above n 94.

159 *Ngai Tahu Maori Trust Board*, above n 36, at 561.

160 At 557–558.

161 Education and Training Act 2020, s 127(1)(d).

162 Section 4(1)(f) specifies that Treaty consistency is achieved through the methods outlined in the Act. It is not a general Treaty consistency section. Though natural justice concerns for Māori are not specifically articulated in the Act, in my opinion this wider legislative context lends itself to the

reflect Treaty consistent natural justice rights once the Corrections Act is amended with the proposed Treaty provision.[163] If an administrator neglects to provide procedural fairness entitlements that properly reflect Treaty principles, their decision should be invalidated by the courts.

Some decisions Māori may seek natural justice review for are not governed by statutes with Treaty consistency provisions, as noted in Part II(B)(3)(c). However, procedural fairness review in these decisions should still accommodate the Treaty. Under *Huakina Development Trust v Waikato Valley Authority*, all statutory powers governing decisions that may impinge on Treaty rights must be interpreted consistently with Treaty principles.[164] As such, the Treaty has been incorporated as a required consideration even where relevant statute makes no mention of it, provided it is contextually relevant.[165] Charters notes that examples of this "contextual" importation of Treaty considerations have been few and far between in recent years — but that cases like *Huakina Development Trust* remain good and applicable precedent today.[166] Incorporating relevant Treaty principles to allow Māori more extensive natural justice rights, despite the lack of explicit Treaty content in the governing legislation, is consistent with existing precedent within the illegality ground of review.

Tikanga and the Common Law

Incorporating relevant tikanga values into natural justice analysis is consistent with the precedent set in *Takamore* that tikanga has a role to play in the common law of New Zealand. The forthcoming reasons in the *Ellis* decision will likely further confirm this precedent.[167] Procedural fairness review is predominantly a common law doctrine. Given the relevance of tikanga to the common law under *Takamore*, judges should determine the procedural fairness requirements of

Treaty being an implied statutory mandatory relevant consideration. Section 7AA of the Oranga Tamariki Act 1989 describes the specific duties of the Chief Executive in adhering to the Treaty.

163 See Ara Poutama Strategy, above n 88, at 19.

164 *Huakina Development Trust*, above n 3, at 210 and 223.

165 Joseph, above n 29, at 979.

166 Charters, above n 10, at 92.

167 The Supreme Court ruled that Peter Ellis' appeal against conviction may continue after his death, after hearing arguments that this was consistent with tikanga: see *Ellis*, above n 5; and Coates, Snelgar and Merrick, above n 5. The Supreme Court has not yet released its reasoning, but it is likely that it will further confirm the place of tikanga in New Zealand's common law. The particular weight the Court will ascribe to tikanga remains to be seen.

administrative decisions affecting Māori through both British precedent and the tikanga relevant to natural justice.

It is important to note at the outset that the precedent in *Takamore* is by no means straightforward. The judges of the Supreme Court — while coming to the same ultimate conclusion that the right to decide the burial place of Mr Takamore lay with his wife as executrix of his estate — ascribed different levels of importance to tikanga. With the most tikanga-centric reasoning of the judges, Elias CJ stated that the power to decide Takamore's burial place did not automatically rest with the executrix (as common law would dictate) nor with Takamore's Tūhoe family (as tikanga would dictate).[168] Allocation of the right in question would instead depend on the circumstances of the case.[169] On the other hand, the majority held that the right rested by default with the executrix and she was simply required to consider tikanga when making the burial decision.[170] Some academics have, appropriately I believe, criticised the majority's judgment for not going far enough in accommodating tikanga.[171] Both judgments did, however, note that tikanga forms part of the common law of New Zealand. Elias CJ stated that tikanga is "part of the values of the New Zealand common law".[172] Even under the more conservative majority judgment, it was held that "the common law of New Zealand requires reference to the [relevant] tikanga".[173] The common law rule was not displaced in this case. Nevertheless, these comments indicate that New Zealand courts are open to common law balancing exercises — such as those undertaken in natural justice analysis — being influenced, at least in part, by tikanga. Such an approach is bolstered by the recent finding in *Sweeney v Prison Manager*, where Palmer J held, continuing from *Takamore*, that the courts can invoke tikanga in their judicial review reasoning.[174] In fact, the learned judge commented that the courts may be *required* to do so.[175] While this precedent has not yet been implemented in the specific context of natural justice review, it stands to reason that it soon will be.

168 *Takamore*, above n 4, at [12].

169 At [90].

170 At [164]–[165].

171 See particularly Rebecca Walsh "Takamore v Clarke: A Missed Opportunity to Recognise Tikanga Māori?" (2013) 19 Auckland U L Rev 246 at 247.

172 *Takamore*, above n 4, at [94].

173 At [164] per McGrath J.

174 *Sweeney v Prison Manager*, above n 11, at [75].

175 At [75].

VI IMPLEMENTATION OF THE NEW NATURAL JUSTICE CALCULUS

Accommodating the relevant tikanga and Treaty principles in natural justice review could lead to very real increases in the procedural entitlements afforded to Māori when an administrator makes a decision that impacts them. Part VI explores these procedural benefits, with particular regard to administrative hearings affecting prisoners. Matters of prison discipline and parole disproportionately impact Māori, who are overrepresented in the prison population.[176] Toki writes that this statistical trend means that every second parole hearing is likely to concern Māori, and as such there is a particular need for parole hearing procedure to respond to Māori needs and concerns.[177] Similar disproportionality may exist with regards to prison discipline. Indeed, many of the existing natural justice review cases concerning individual Māori relate to matters of prison discipline.[178] The Government has recently acknowledged their Treaty mandate to treat prisoners fairly,[179] and increased natural justice entitlements are one way to achieve this.

Generally Increased Natural Justice Rights

Incorporating Treaty principles and tikanga values into the natural justice balancing exercise promotes increased procedural fairness rights for Māori generally. As explained in Part II(A), when judges determine the procedural requirements an administrator must follow to comply with the tenets of natural justice, they make rulings on a series of substantive procedural entitlements. Treaty principles of kāwanatanga, rangatiratanga and partnership all generally promote a more expansive natural justice right for Māori, as do the tikanga values of utu and mana. These principles, as discussed above, promote the Māori right to more extensive dialogue with Crown agents about upcoming administrative decisions. Decision makers must acknowledge Māori views and provide an appropriate forum for them to express their opinion. Therefore, on balance with other considerations, it is more likely that Māori will be granted:

176 See Valmaine Toki "Are Parole Boards working? Or is it time for an [Indigenous] Re entry Court?" (2011) 39 IJLCJ 230 at 232.

177 At 230–231.

178 See generally *Percival*, above n 50; *Genge*, above n 50; and *Taunoa*, above n 50.

179 Ara Poutama Strategy, above n 88, at 5.

- increased notice about an upcoming decision to prepare;
- higher levels of information disclosed about the upcoming decision;
- an oral hearing as opposed to written submissions;
- the input of witnesses;
- the ability to cross-examine witnesses from opposing parties; and
- the right to legal representation.

Significantly, the Department of Corrections has already acknowledged the need to aid Māori in exercising their natural justice rights in respect of parole hearings. The Department has pledged to work with the Parole Board to provide better guidance on "what to expect, guidance around how to prepare a submission, and mock interviews".[180] This indicates the Government is already aware that the natural justice rights of Māori prisoners need to be better respected. Of the procedural benefits listed above, the right to cross-examination and legal representation is particularly important for prisoners. In *Percival v Attorney-General*, several prisoners, including a Māori man, successfully argued that their natural justice rights had been breached when they were not permitted to cross-examine an expert witness who claimed they had tampered with their urine samples.[181] Legal representation is also frequently litigated in prison discipline cases, and has produced landmark natural justice cases like *Drew v Attorney-General*.[182] The use of witness evidence is also especially important in prison discipline, where prisoners often argue that they did not commit the wrong.[183] The procedural benefits my approach affords, while advantageous for Māori generally, could greatly benefit Māori prisoners.

Input of Third Parties

The tikanga consideration of whanaungatanga specifically strengthens the right of Māori to have witnesses from their wider whānau and iwi support them in administrative hearings. One of the core determinations a judge has to make in the course of natural justice

180 At 29.

181 *Percival*, above n 50, at [44].

182 See generally *Drew*, above n 17.

183 See the argument pursued by the Māori claimant in *Genge*, above n 50, at [11] that it was a breach of natural justice to proceed with the hearing when his material witness was unable to give evidence that day.

review is whether the individual concerned is entitled to an extensive hearing with witness input. Currently, the factor that most directly influences this determination is whether facts are in dispute.[184] However, I would posit that whanaungatanga allows the whānau of Māori individuals, should they wish to contribute their support, input on administrative decisions. This is consistent with the obligations of whanaungatanga discussed in Part IV(C), as well as the ripple effect of administrative decisions on the whānau and community of Māori individuals discussed therein. Similar influence of whanaungatanga can be seen in the Rangatahi Court, where youth offenders are monitored for compliance with a rehabilitation plan designed in conjunction with family in a family group conference.[185] In the Matariki Court, whānau have a similar role to play in constructing sentences, but for adult offenders.[186] Natural justice review should similarly adapt to recognise the valuable input of whānau.

Wider whānau and community input is particularly important in parole hearings. Family testimony helps prove to the Parole Board that prisoners can positively contribute to society upon release. Additionally, the continued imprisonment of family members impacts whānau particularly harshly — contributing to the ongoing separation of the family unit as well as the loss of an income earner in the family.[187] Current accommodations for family support in parole hearings are lacklustre. In *Kerr v New Zealand Parole Board*, the Board declined to hear the oral testimony of the offender's family, despite the fact that they were in attendance.[188] The Court ruled that their oral testimony could be overlooked in favour of written submissions.[189] Significantly, the Government has pledged to work more closely with whānau on parole matters going forward in order to honour their Treaty obligations.[190] The Sentencing Act 2002 makes provision for whānau members to make submissions on the family and cultural background of the offender[191] — similar accommodations should be present in the parole hearing context. The parole hearing process might better reflect whanaungatanga by allowing a kaumātua or kuia to testify on prisoners' behalf — similar to the Canadian

184 Joseph, above n 29, at 1122.

185 Williams, above n 100, at 27.

186 At 27.

187 Tū Mai te Rangi!, above n 33, at 25.

188 *Kerr v New Zealand Parole Board* [2014] NZHC 1473 at [5] and [31].

189 At [33].

190 Ara Poutama Strategy, above n 88, at 23.

191 Sentencing Act 2002, s 27.

system — where tribal elders can submit evidence.[192] Whether in the parole context or the wider context of administrative decisions, the courts should be more willing to grant Māori the input of third party witnesses under whanaungatanga.

Oral Hearings and Tikanga-based Practice

The tikanga values relevant to questions of natural justice promote procedural requirements that are more in line with tikanga protocol. Currently, courts tend to require oral hearings where there are factual disputes, but the oral hearing entitlement can be enforced where the broader significance of the interest at stake requires it.[193] I would posit that tikanga should also factor towards an oral hearing. This article has previously noted that in the marae context, the right to lead discussion on matters of import is a post associated with great mana. In the administrative context, an extensive oral hearing is more consistent with the respect owed for the claimant's knowledge on the issue and the inherent mana that they hold. This preference for oral process is also more widely consistent with tikanga practice. In traditional marae dispute resolution processes, holding those who have committed wrongs "verbally accountable" was seen as essential to facilitate proper communication.[194] Similarly, the Waitangi Tribunal has noted the strong preference of Māori communities for face-to-face "kanohi ki te kanohi" consultation.[195] Kanohi ki te kanohi limits misunderstandings and misapprehensions, and reflects the parties' respect for one another.[196] It strengthens relationships and connotes the credibility and mana of the parties.[197] These tikanga considerations should be in play when courts determine whether Māori are entitled to oral hearings under the tenets of natural justice.

Given the relevance of tikanga to natural justice, tikanga-based practice should also be mandated in administrative hearings when the individual concerned requests it. This could include many of the tikanga consistent procedures present at other judicial venues, like the Rangatahi Court. In the Rangatahi Court, a karakia takes place, the

192 Toki, above n 176, at 235–236.

193 *Osborn*, above n 25, at [74] and [81].

194 Vieille, above n 147, at 9.

195 Te Puni Kōkiri, above n 44, at 91.

196 Te Taka Keegan "Tikaŋa Māori, Reo Māori ki te Ipuraŋi: Māori Culture & Language on the Internet" (Seminar Series of the Department of General and Applied Linguistics, University of Waikato, Hamilton, 11 August 2000) at 1.

197 O'Carroll, above n 142, at 443 and 449.

offender is encouraged to address the Court in te reo and those in attendance hongi at the end of each appearance.[198] Such procedure has greatly benefited offenders, who have stated that it encourages freer and more comfortable dialogue between the youth, lawyers, judges and kaumātua.[199] More extensive tikanga procedures that occur when proceedings are held on a marae (like the pōwhiri in the Rangatahi courts)[200] may not be appropriate, depending on who the decision maker is and their knowledge and ability to appropriately follow pōwhiri procedure. Though, in the right context, a pōwhiri may be appropriate — it is true that tikanga-consistent pōwhiri can occur outside of marae grounds.[201] Another relevant factor is the cost of more lengthy tikanga-based procedure, and its potential to impede an administrator's ability to hold multiple hearings.[202] However, when it comes to less time-consuming aspects of tikanga protocol, like the karakia and hongi listed above, these concerns are less of an issue. Again, parole procedure specifically could be reformed to be more tikanga consistent. In *Kerr,* a prisoner, though Pākehā, claimed that he was not permitted to give a mihi before the Board, despite the fact that his involvement in tikanga-centric reform programs was central to his argument for parole.[203] The tikanga values relevant to natural justice should inform judicial requirements for tikanga consistent procedure in administrative hearings, where individuals request such procedure.

VII LIMITATIONS OF THIS APPROACH

Limits of the State-law Framework

The core limitation of my approach in its recognition of Māori rights is that it is couched within the existing State-law framework. Scholars like Ani Mikaere firmly believe that te Tiriti o Waitangi's wording makes it clear that Māori did not cede sovereignty to the British in 1840.[204] Rangatiratanga is not a right to be preserved at the whim of the State, but rather to complete Māori political self-management, and

198 Williams, above n 100, at 27.

199 Ngā Kooti Rangatahi Report, above n 129, at 36.

200 Williams, above n 100, at 27.

201 Mead, above n 121, at 126.

202 Toki, above n 145, at 85.

203 *Kerr*, above n 188, at [13] and [29].

204 See generally Mikaere, above n 101, at 87.

to maintain the same level of independence that they had in pre-colonial times.[205] She argues that "the essence of Te Tiriti, te tino rangatiratanga, has been sacrificed at the altar of Crown sovereignty".[206] I have purposefully used the language of "Treaty principles" throughout the article to acknowledge this distinction and have not claimed that my approach is consistent with the text of te Tiriti. I have also relied on the principles, in part, to be consistent with existing administrative law jurisprudence — where the Treaty principles have been applied broadly, even in cases without a principles-based provision.[207] However, Mikaere argues that Treaty principles are a convenient scapegoat the Crown uses to incorporate Treaty considerations without challenging its own authority. In her words, they are a tool used to "neutralise the threat posed by Te Tiriti".[208]

My approach does not reflect the full extent of Māori autonomy afforded under te Tiriti. Instead, it incorporates Treaty principles and tikanga within a legal doctrine coined and developed by the British, placing them alongside a raft of other State-law sourced considerations. This development, however incremental, does better reflect Māori rights than the status quo. Nevertheless, Mikaere would argue that it further obscures the true extent of rangatiratanga. Indeed, she posits that tikanga can never be adequately recognised when it is subordinate to common law, and dependent on the State judiciary's recognition and incorporation.[209] Others have argued that true rangatiratanga can only be achieved through constitutional reform to introduce bodies like a bicameral Māori/Crown parliament.[210] I also acknowledge Mikaere's point that "it is illogical for Maori to turn unquestioningly to Western legal concepts for the answers to problems which have been [sourced from] the imposition of Western

205 At 84–85 and 87.

206 At 92.

207 See *Huakina*, above n 3, at 210.

208 Mikaere, above n 101, at 91.

209 Ani Mikaere "The Treaty of Waitangi and Recognition of Tikanga Māori" in Michael Belgrave, Merata Kawharu and David Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (Oxford University Press, Melbourne, 2005) 330 at 342.

210 See Moana Jackson's proposal as discussed in Andrew Erueti "Conceptualising Indigenous Rights in Aotearoa New Zealand" (2017) 27 NZULR 715 at 742 and the various proposals discussed in *Matike Mai Aotearoa He Whakaaro Here Whakaumu mō Aotearoa: The Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation* (January 2016).

law".[211] Despite these objections, I think change that benefits Māori is most likely to be accepted by the judiciary and actually enforced when it is incremental and legally justified in the context of existing precedent. I do not pretend my proposal represents the upper limits of the rights that should be recognised for Māori — but at the very least, it can help Māori today obtain a better forum to express their views when an administrative decision threatens to impact what matters most to them.

Tikanga and the Judiciary

Another problematic aspect of my proposed reform relates to judicial navigation of tikanga. When the courts are required to interpret and apply tikanga, they risk misinterpreting and misapplying the concepts. Mead notes, for one, that a person's understanding of tikanga when one is not fluent in te reo is necessarily different from that of a person who obtained their knowledge of tikanga through te reo.[212] Erueti writes that "[f]ew New Zealand judges are Māori or have any real knowledge of tikanga Māori."[213] Coates posits that when the courts interpret tikanga, they risk misinterpreting the norms and altering the substance of tikanga, simultaneously codifying these incorrect assumptions.[214] All I can hope is that when applying tikanga norms the judiciary relies on Māori experts, embracing the spirit of Elias CJ's statement in *Takamore* that "[t]he role of the Court is not to judge the validity of traditions or values within their own terms."[215] Certainly, the Supreme Court's reliance on evidence sourced from a wānanga held over multiple days with various tikanga experts in the *Ellis* case is encouraging.[216] This wānanga occurred after Crown counsel agreed tikanga was relevant and the two parties collaborated on the evidence as agreed fact.[217] However, not every instance of tikanga application in the courts will be as non-adversarial, nor will

211 Annie Mikaere "Collective Rights and Gender Issues: A Māori Woman's Perspective" in Nin Tomas and Te Tai Haruru (eds) *Collective Human Rights of Pacific Peoples* (International Research Unit for Māori and Indigenous Education, Auckland, 1998) 79 at 83.

212 Mead, above n 121, at 2.

213 Erueti, above n 210, at 735.

214 Natalie Coates "The Recognition of Tikanga in the Common Law of New Zealand" (2015) 1 NZ L Rev 1 at 29.

215 *Takamore*, above n 4, at [97].

216 Coates, Snelgar and Merrick, above n 5.

217 Coates, Snelgar and Merrick, above n 5.

resources always be present for tikanga experts to analyse the case in such depth.

VIII CONCLUSION

For decades the judiciary has proclaimed the flexibility of the tenets of natural justice. They have argued that it is, first and foremost, motivated by what is fair and right — what procedure is needed to achieve justice.[218] To actually live up to this mandate, procedural fairness review must change to reflect the rights of Māori. The House of Lords has stated that "[t]he standards of fairness are not immutable. They may change with the passage of time".[219] I would argue that change is long overdue with respect to natural justice review, and that the courts are obligated to promote standards of procedural fairness that reflect the rights of tangata whenua.

This article has argued that there is scope to reform natural justice review to accommodate both tikanga and Treaty principles where pending administrative decisions may impact Māori, even as individuals. The discrepancy between the Treaty focus in consultation review, and the absence of Treaty and tikanga considerations in individualised procedural fairness review, is disconcerting and theoretically unsound. Several Treaty principles are relevant to natural justice — including rangatiratanga, kāwanatanga and partnership. Tikanga values of mana, utu and whanaungatanga are also pertinent to natural justice concepts. Reforming procedural fairness review to incorporate these considerations will lead to a variety of increased procedural entitlements for Māori. It is important to acknowledge that my approach does not represent the full extent of the rights owed to Māori under te Tiriti, but at the very least means that Māori will be provided with a more appropriate forum to share their views when Crown decisions affect them. The benefits of these increased natural justice rights apply in a wide variety of situations affecting Māori, including Board of Trustee hearings, Oranga Tamariki uplift decisions, matters of prison discipline and parole hearings.

In a 2015 paper, Justice Joseph Williams posed a profound question to the Māori Law Society. He asked them "can you see the island?"[220] In his mind, the island was a truly bi-cultural and bi-legal

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218 *Dotcom v United States of America* [2014] NZSC 24, [2014] 1 NZLR 355 at [120].

219 Doody, above n 31, at 560.

220 Joseph Williams "Can You See the Island?" (2015) 9(10) Māori LR 21.

Aotearoa, where both British law and tikanga were respected as equal sources of law.[221] I concede that my approach comes nowhere near achieving this goal. However, I would hope that in enforcing Māori natural justice rights that reflect the obligations of the Treaty and the values of tikanga, the law can come one step closer in its journey to that island.

221 At 24.