

HOW MIGHT TIKANGA CONCEPTS INFORM THE USE OF MĀORI KNOWLEDGE AS EXPERT EVIDENCE?

Rewa Kendall*

Māori knowledge is grounded in tikanga Māori but has been drawn on beyond this context, including in criminal and civil proceedings. In cases concerning Māori interests, Māori knowledge comes before the courts to support the fact-finding purpose of the Evidence Act 2006. The article applies two lenses to the manner in which Māori knowledge is admitted, presented and weighed as expert evidence. One lens examines how Māori knowledge has been related to the legal concept of expert evidence. The other lens considers how Māori knowledge relates to the tikanga concepts of mana, whanaungatanga and tapu. Each lens is discussed separately to avoid conflating the relationship between Māori knowledge and evidence law with the relationship between Māori knowledge and tikanga. This structure is designed to highlight that Māori knowledge is grounded in tikanga Māori, which is distinct from its use in evidence law. The article then explores how expert Māori evidence can continue to be admitted to support the fact-finding purpose of evidence, while also recognising its basis in tikanga.

1 Introduction

Māori knowledge is admitted, presented and weighted as expert evidence under the Evidence Act 2006. Still, Māori knowledge remains an expression of a tikanga Māori framework, which should be considered when utilised in evidence. This article argues that Māori knowledge can be admitted, presented and weighted as expert evidence, recognising tikanga concepts such as mana, whanaungatanga and tapu.

* He uri o Te Rarawa. LLB(Hons), BA (Māori Studies), University of Auckland. This article is adapted from my dissertation, and it represents both te taonga tuku iho and the guidance of Associate Professor Scott Optican.

The first half of the article will compare and contrast evidence law with the tikanga Māori concepts of mana, whanaungatanga and tapu. Part II defines these concepts.¹ Part III will outline the thresholds for characterising and admitting expert evidence, including expert evidence based on Māori knowledge. The relationship between mana and whanaungatanga and Māori knowledge will be interpreted and then contrasted with those thresholds. The same approach will be taken in Part IV to discuss how expert evidence is presented in an adversarial legal system, and how this contrasts with the tapu nature of Māori knowledge. Part V will then look at how Māori knowledge was weighted as expert evidence in the cases of *Takamore v Clarke*,² *R v Mason* and *R v Mason (No 2)*.³ It will be argued that the weighting of the evidence in those cases was more accommodating of Western legal principles than tikanga.

The second half of this article will attempt to reconcile the differences identified between the evidence and tikanga frameworks. Part VI advocates that the judiciary be educated and assisted in understanding the relationship between mana, whanaungatanga and Māori knowledge. This would recognise sources of Māori knowledge, which can then be drawn on to expand the pool of evidence available to the courts. Part VII supports a proposed amendment to the Evidence Act to regulate the presentation of expert Māori evidence with consideration of tapu. The Waitangi Tribunal and concurrent evidence presentation are explored as models for that regulation. Finally, Part VIII explores how the weighting of expert tikanga evidence might become more accommodating of tikanga. Short term recommendations include judges being assisted by sources of mana on Māori evidence. As a long term approach, it will be advocated that the jurisprudence of tikanga be taught in law schools to build capacity within the legal profession to accept and apply that jurisprudence.

1 These definitions are interpretations of existing definitions, and others may define the concepts differently. The reader is encouraged to read more widely on these concepts.

2 *Takamore v Clarke* [2012] NZSC 116, [2012] 1 NZLR 733.

3 *R v Mason* [2012] NZHC 1361, [2012] 2 NZLR 695; and *R v Mason* [2012] NZHC 1849 [*R v Mason (No 2)*].

II Interpreting Māori Knowledge and Tikanga Concepts

A Māori knowledge

The term “Māori knowledge” is used in this article to include, but not encompass, mātauranga. Mātauranga is “the unique Māori way of viewing the world”, encompassing both traditional knowledge and culture.⁴

B Mana

Hirini Moko Mead likens mana, but does not limit it, to authority, power and prestige.⁵ This article acknowledges that mana is expressed in different forms of Māori knowledge. For example, mana tangata can be understood as authority, power or prestige sourced from one’s personal attributes, and can manifest in personal knowledge, skill or abilities.⁶ Mana atua can be understood as authority, power or prestige as sourced from Māori deities and observed in those who are highly skilled and knowledgeable in spiritual practices and beliefs.⁷ Mana tupuna is sourced from one’s ancestors and can manifest in knowledge of whakapapa.⁸ These characteristics of mana are not mutually exclusive.

C Whanaungatanga

Closely tied to mana is the concept of whanaungatanga, which encompasses relationships that are central to the Māori world.⁹ In this article, mana is understood as something that can be gained or even diminished by the way that one conducts

4 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011) vol 1 at 1.

5 Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, New York, 2013) at 49. See also the other meanings cited by Mead: “control”, ‘influence, ... ‘psychic force’, ‘effectual, binding, authoritative’”.

6 Cleve Barlow *Tikanga Whakaaro: Key Concepts in Māori Culture* (Oxford University Press, Auckland, 1991) at 62.

7 Mead, above n 5, at 62.

8 Carwyn Jones “Māori Dispute Resolution: Traditional Conceptual Regulators and Contemporary Processes” in Morgan Brigg and Roland Bleiker (eds) *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai’i Press, Honolulu, 2011) 115 at 120.

9 At 119.

themselves in their relationships. For example, mana tangata is linked to whanaungatanga within iwi, hapū and whānau, and the skills and contributions that a person has made to those groups.¹⁰ Equally, mana atua and mana tupuna are both sourced from and regulated by whanaungatanga. Mana atua creates a responsibility to atua (deities) and mana tupuna is the connection between people and their tupuna (ancestors).¹¹ These features of whanaungatanga are not mutually exclusive, as whanaungatanga is a network of relationships.¹²

D Tapu

Tapu is an intangible sanctity that comes from the creation of the Māori world by atua (deities).¹³ All things and people that have come from that creation signify the presence of tapu in the human world.¹⁴ For example, Māori knowledge was gifted to Māori by Tāne Te Wānanga (God of Knowledge).¹⁵ As a product of this god-given creation, Māori knowledge is tapu.¹⁶ Similarly, there is tapu within Māori people by virtue of being born from the Māori creation story.¹⁷ In some cases tapu can be taken away¹⁸ or it can vary in degree.¹⁹ The active nature of tapu therefore gives rise to a code for social conduct and adapting one's behaviour towards that tapu.²⁰ This regulation is aimed at preventing harm to the tapu of things, people and places.²¹ In some cases,

10 Mead, above n 5, at 50.

11 Jones, above n 8, at 120–121.

12 This network of relationships may extend to non-Māori people and things as well.

13 Barlow, above n 6, at 128.

14 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 7.

15 Eru Kapa-Kingi "Kia Tawharautia Te Matauranga Maori: Decolonising the Intellectual Property Regime in Aotearoa New Zealand" (2020) 51 VUWLR 643 at 664.

16 Tania Waikato "He Kaitiaki Mātauranga: Building a Protection Regime for Māori Traditional Knowledge" (2005) 8(2) Yearbook of New Zealand Jurisprudence 344 at 384.

17 Mead, above n 5, at 56.

18 Barlow, above n 6, at 128.

19 Mead, above n 5, at 62.

20 Mason Durie "The Application of Tapu and Noa to Risk, Safety, and Health" (Presentation to Challenges, Choices and Strategies, Mental Health Conference 2000, Wellington, 16 November 2000) at 4.

21 Waikato, above n 16, at 352.

tapu will require a process of setting aside for particular purposes.²² More generally, tapu denotes a requirement to show respect through conduct.²³

III Admitting Māori Knowledge as Expert Evidence

The Evidence Act 2006 is the statutory framework for categorising and admitting expert evidence in civil and criminal courts. The Evidence Act defines an expert as “a person [with] specialised knowledge or skill based on training, study or experience”.²⁴ Expert evidence is evidence “based on the specialised knowledge ... of that expert”, including evidence in opinion form.²⁵ The Act prescribes a relevance and substantial helpfulness threshold for admitting expert evidence.

This Part will discuss how Māori knowledge has been both characterised and admitted as expert evidence. It will also look at the relationship between Māori knowledge, mana and whanaungatanga. It will then be argued that Māori knowledge has been characterised and admitted consistently with the Evidence Act but without recognition that Māori knowledge is an expression of mana and whanaungatanga.

A Characterising Expert Evidence under the Evidence Act

This section examines how Māori knowledge has been categorised as specialised knowledge, based on experience, training and study, or opinion. It also discusses the nature of Māori knowledge as an expression of mana and whanaungatanga, which contrasts with the categories of expertise recognised in the Evidence Act.

1 Specialised knowledge based on experience

Expert evidence based on experience has at times been limited by an expert’s lack of specialised qualifications, especially where the underlying knowledge is traditionally gained through formal education. In *Tong v R*, the appellant faced charges for

22 Mead, above n 5, at 26.

23 At 51.

24 Evidence Act 2006, s 4(1) definition of “expert”.

25 Section 4(1) definition of “expert evidence”.

sexual violation.²⁶ The defence called a general practitioner to give expert evidence on Alzheimer's disease, from which the complainant suffered.²⁷ The practitioner's testimony was considered expert because of her experience treating patients with Alzheimer's disease.²⁸ However, the Court acknowledged that the witness' experience-based expertise was limited, as she had not pursued specialised study on that particular disease.²⁹ In *Hohipa v R*, the Court of Appeal accepted that Police officers had ad-hoc specialised knowledge by virtue of repeatedly listening to particular communications.³⁰ However, that ad-hoc experience was not equated with expertise on voice identification and was not admitted as expert opinion under s 25 of the Evidence Act.³¹ Where experience is the basis for knowledge, a lack of formal education may preclude its categorisation as 'expert', particularly where that knowledge is often supported by a formal qualification.

The courts have admitted Māori knowledge as expert evidence where it is supported by formal study, despite cultural experience being a key source of Māori knowledge. The Environment Court in *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* considered the tangata whenua claim of Ngāti Awa over the Whakatane area.³² In this case, there was an apparent contrast between the way that the witness perceived his own expertise and the Court's understanding of his expert status. The expert on Ngāti Awa tikanga, Hirini Moko Mead, explained his expertise with respect to him having observed Ngāti Awa tikanga for all of his life.³³ By contrast, the Court credited his expert status to extensive academic achievements and his contributions to the study of tikanga Māori within universities.³⁴ This is consistent with the cases discussed above, *Tong v R* and *Hohipa v R*, wherein formal qualifications, rather than experience, were recognised as the basis for expertise.

26 *Tong v R* [2011] NZCA 211 at [1]–[2].

27 At [10].

28 At [15].

29 At [15].

30 *Hohipa v R* [2015] NZCA 73, [2018] 2 NZLR 1 at [77].

31 At [83].

32 *Ngāti Hokopu Ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 111 (NZEnvC) at [1].

33 At [93].

34 At [94].

From a perspective based in mana and whanaungatanga, Māori expertise is often drawn from those with experience, whether they have completed formal education or not. Mana tangata manifests in personal knowledge and skill, and whanaungatanga explains that this is enhanced through experience and relationships in communities.³⁵ Mead himself argues that the most familiarity with tikanga knowledge comes from experience in homes and communities.³⁶ For example, kaumātua and kuia have traditionally held the status of keepers of Māori knowledge and practices.³⁷ They have this mana tangata by virtue of engaging with their iwi, hapū and whānau over time.³⁸ From this perspective, those who are understood to have mana tangata, and are without a qualification in formal education, could be understood to have experience-based expertise.

The linkage between Māori knowledge, experience and mana tangata was recognised in the case of *Ministry of Agriculture and Fisheries v Hakaria*. The experience-based Māori knowledge was considered no less authoritative than formal education.³⁹ In this case, the customary fishing rights of Ngati Raukawa were to be determined and the expert Māori evidence was based on 20 years' worth of personal research.⁴⁰ The District Court described the expert as being "steeped in the lore of his people" and considered a lack of formal historical qualifications to be "irrelevant" to the determination of his expert status.⁴¹ In fact, the Court described his knowledge as the "product of true scholarship by any standard".⁴² The expert evidence was admitted on this reasoning, while maintaining consistency with the Evidence Act.

2 Specialised knowledge based on training and study

Specialised knowledge based on training and study can be admitted as expert evidence, including that which is based on knowledge gained through mainstream institutions.

35 Mead, above n 5, at 50.

36 At 27–28.

37 Barlow, above n 6, at 40–59.

38 Mead, above n 5, at 27.

39 *Ministry of Agriculture and Fisheries v Hakaria* [1989] DCR 289 at 290.

40 At 294.

41 At 290.

42 At 290.

This same approach has been taken to admit expert Māori knowledge. In *R v Mason*, the High Court was to determine whether the defendant, Mr Mason, could be tried under an alternative criminal justice system based on tikanga Māori.⁴³ Moana Jackson gave expert evidence, and was cited as a tikanga expert based on his education within universities.⁴⁴ In that context, Jackson's expertise status was attributed to his formal qualifications in a mainstream institution. In *Te Atiawa Tribal Council v Taranaki Regional Council*, there was a more explicit preference for expertise based on institutional training. A port company applied to the Taranaki Regional Council for a coastal permit that would allow the dredging of sand at Port Taranaki.⁴⁵ Māori witnesses gave evidence as to detrimental effects on the port, which was based on generations of practice. However, as the witnesses did not possess "systematic scientific training", they were not considered expert witnesses.⁴⁶ The interpretation of expertise in these two cases appears to give weight to training and study within mainstream institutions, including when the evidence is based on Māori knowledge.

Māoridom offers its own spaces for training and study in Māori knowledge that are independent from mainstream institutions. For example, mana tangata can be enhanced on the marae.⁴⁷ The arts of karanga and speechmaking are observed and learnt in this space.⁴⁸ These oratory practices are integral to the transmission of Māori knowledge forms and the marae provides that learning opportunity. When speaking about tikanga Māori, Haare Williams said "the marae is my university".⁴⁹ Spiritual training can also be pursued in wānanga spaces outside of universities to enhance one's mana atua. For example, tohunga are highly proficient in spiritual knowledge and practices.⁵⁰ They are trained in whare wānanga spaces and are able to study and

43 *R v Mason*, above n 3.

44 At [5].

45 *Te Atiawa Tribal Council v Taranaki Regional Council* NZEnvC New Plymouth A15/98, 13 February 1998.

46 At [1].

47 Barlow, above n 6, at 62.

48 At 43.

49 Interview with Haare Williams, Kaumātua (Justine Murray, Te Ahi Kaa, RNZ, 26 April 2020).

50 Mead, above n 5, at 35. Tohunga can be less able or willing to articulate their spiritual knowledge let alone in cross-examination, which may limit their capacity to be a legal witness.

observe other tohunga in different contexts over time.⁵¹ Whanaungatanga is integral to these marae and wānanga spaces, as Māori knowledge is a culmination of several lifetimes of listening between generations.⁵² Evidently, training and study in Māori knowledge can be engaged beyond mainstream education institutions, and in spaces that embody mana and whanaungatanga.

3 Specialised knowledge in opinion form

Expert evidence also includes evidence that is categorised as opinion. In an evidence sense, it is important to determine the distinction between fact and inference.⁵³ This supports the fact-finding purpose of evidence law and the genuine intention of a judge to receive accurate evidence. For example, in *R v Munro*, the distinction was necessary for enabling the jury to better evaluate competing theories.⁵⁴ Further, opinion as evidence is inadmissible, unless it falls into an exception category, one of which is expert opinion evidence. This type of expert evidence can be admitted under s 25 of the Evidence Act, so long as it is considered substantially helpful to the case.⁵⁵ This will be discussed further in Section B below.

Māori knowledge might also be understood as housing differing opinions. Whanaungatanga speaks to the centrality of relationships in Māori social organisation. For example, iwi are the largest social and or political unit in Māori society and sometimes comprise many hapū.⁵⁶ Each group might have a unique understanding of particular aspects of Māori knowledge, such as different language dialects, different applications of tikanga practices. These variations may be understood as opinions, but not in the same way as expert opinion evidence. Variations in Māori knowledge are

51 At 108. See also Te Aka Māori Dictionary (online ed) at [whare wānanga]: the dictionary definition outlines that whare wānanga were traditionally places where tohunga taught the sons of rangatira their people's knowledge of history, genealogy and religious practices. See also Te Taura Whiri i te reo Māori "He rākau tau matua, he huinga manu" (2008) 21(4) He Muka 1, which suggests that in more modern times, whare wānanga have been likened to universities or polytechnics.

52 Margaret Mutu and others *Ngāti Kahu: Portrait of a Sovereign Nation* (Huia Publishers, Wellington, 2017) at xiii.

53 Elisabeth McDonald and Scott Optican (eds) *Mahoney on Evidence: Act and Analysis* (Thomson Reuters New Zealand Ltd, Wellington, 2018) at 17.

54 *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [174].

55 Evidence Act, s 25.

56 Barlow, above n 6, at 33.

not mutually exclusive and exist as a range of different truths.⁵⁷ Some custom might be more true to particular groups or contexts.⁵⁸ In Māoridom there is not the need to distinguish those variations as fact or opinion, as is necessary for the courts to admit expert opinion evidence. In this sense, Māori knowledge does not fit easily within the paradigm of evidence law.

B Admitting Māori Knowledge as Expert Evidence under the Evidence Act

Once Māori knowledge is categorised as expert, it must be admissible as expert evidence, and this section will discuss the thresholds for admissibility. The substantial helpfulness test is used to admit expert evidence based on opinion. This test is an extension of the relevance threshold for admitting all evidence, and this section considers the application of the relevance and substantial helpfulness thresholds to Māori knowledge. It also considers how the application of those tests lacks recognition of the fact that Māori knowledge is an expression of mana.

1 Section 7 — the relevance threshold

All evidence must satisfy s 7 of the Evidence Act to be admissible. This section requires the evidence to meet a threshold of relevance.⁵⁹ In essence, the evidence must have a probative tendency against a material point in the case.⁶⁰ This assessment falls to the judge, as the gatekeeper of the court.⁶¹ Judges may be influenced by their own knowledge and experiences of human nature when applying the legal test of relevance. As Chief Justice Helen Winkelmann has suggested extrajudicially, judges' key competencies are both "knowledge of the law and society".⁶²

The relevance threshold has been applied to admit Māori evidence, and the judges' understanding of the material issues influenced the relevance assessment. In the case

57 Ataria Sharman "Mana Wahine and Atua Wāhine" (Master of Arts in Māori Studies Thesis, Victoria University of Wellington, 2019) at 111.

58 Jones, above n 8, at 118–119.

59 Evidence Act, s 7(2).

60 Section 7(3).

61 McDonald and Optican, above n 53, at 55.

62 Helen Winkelmann "What Right Do We Have? Securing Judicial Legitimacy in Changing Times" (Dame Silvia Cartwright Address, Auckland, 17 October 2019).

of *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc*, the determination of the definition of the Māori word, “iwi” was made.⁶³ The material issue was the entitlement of different iwi to pre-Treaty Settlement assets, and evidence was provided for the definition of iwi. The determination was treated as one of statutory interpretation and the relevant evidence was considered to be dictionary definitions of iwi and the word tribe as used in the English Treaty of Waitangi.⁶⁴ This approach defined iwi in the abstract, rather than with relevance to the affected iwi and their particular interests. The Privy Council later criticised the Court of Appeal for failing to admit evidence that commented on the meaning of iwi in the particular context of the case, particularly as such evidence was both relevant and admissible.⁶⁵ This case demonstrates how the perceived relevance of Māori evidence can differ between judges’ understanding of the Māori interests concerned.

The assessment of the relevance of expert Māori evidence allows for limited expression of the relationship between Māori knowledge and mana. As discussed, mana tangata can represent one’s knowledge that has been built up by experience within Māori communities. The judiciary represents a lack of this mana tangata with respect to Māori knowledge, with Māori being underrepresented and Pākehā are overrepresented.⁶⁶ This is particularly evident in the senior courts. Justices Christian Whata, Layne Harvey and Kiri Tahana sit in the High Court, and Justice Sir Joseph Williams is the first and only Māori judge of the Supreme Court.⁶⁷ All judges on the bench have a level of mana in their own right, however, there are more cases concerning Māori interests than there are Māori judges to preside over them. The genuine enthusiasm of non-Māori judges to engage with Māori issues is difficult to reconcile with minimal proficiency in te reo or tikanga Māori across the judiciary.⁶⁸ This impacts judges’ perceived relevance of

63 *Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Inc* [1996] 3 NZLR 10 (CA).

64 At 18.

65 *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 (PC) at 514.

66 Winkelmann, above n 62.

67 See Anusha Bradley “90 percent of High Court, Court of Appeal judges Pākehā” (20 September 2021) RNZ <www.rnz.co.nz>.

68 Paranihia Walker and Horiana Irwin-Easthope “The enduring importance of Tikanga Māori and Te Reo Māori for the legal profession” in Matthew SR Palmer (ed) *Professional Responsibility in New Zealand* (online ed, LexisNexis, 2019) at [2.6].

expert Māori evidence in relation to Māori issues, as was demonstrated in *Te Runanga o Muriwhenua*.

2 Section 25 — the substantial helpfulness threshold

Expert evidence will often be categorised as opinion, and the threshold for admission of expert opinion evidence is substantial helpfulness.⁶⁹ This standard assesses both the relevance and reliability of expert opinion evidence.⁷⁰ The relevance assessment is a heightened version of the s 7 relevance threshold. In this sense, the lack of mana tangata as to Māori knowledge within the judiciary poses similar restrictions for expert Māori opinion evidence. In addition, the assessment for reliability imposes another judicial function onto Māori evidence. Given that the law is based on written precedent, the bench may hold conceptions of reliability that are inconsistent with the oral tradition of Māori knowledge. For example, reliability is assessed depending on the nature of the evidence, but this is often through empirical testing.⁷¹ Given that Māori knowledge is largely sourced from oral history and is more anecdotal than other forms of knowledge, empirical testing may be inappropriate for assessing the reliability of expert Māori opinion, or even impossible. When presented in any form, Māori knowledge is a culmination of several lifetimes of listening between generations,⁷² without a comprehensive database to subject to testing. Therefore, the method for assessing that reliability may need to be adapted when the reliability of expert Māori opinion is questioned.

C Conclusion

In essence, this Part has identified that the thresholds for categorising and admitting expert evidence are distinct from the tikanga concepts that underpin Māori knowledge.

69 Evidence Act, s 25.

70 Section 25.

71 McDonald and Optican, above n 53, at 146.

72 Mutu and others, above n 52, at xiii.

When Māori knowledge is admitted as expert evidence, this becomes apparent. Expert evidence is often interpreted with respect to formal qualifications or study and training in mainstream institutions. From a perspective based in mana and whanaungatanga perspective, Māori knowledge derives from experience, training and study in Māori spaces, such as marae. Consequently, the courts are at risk of excluding valuable sources of Māori knowledge that are currently not categorised under the legal interpretation of an expert. At the stage of admissibility, it is the judges' role to assess relevance and reliability. It can be recognised that mana tangata in relation to Māori knowledge is not commonly held in the judiciary, and this will likely influence the perception of Māori knowledge and its ability to be admitted as expert evidence. In recognising that the categorisation and admission of expert evidence lacks cognisance of mana and whanaungatanga, this article will later suggest how this might be resolved.⁷³

IV Presenting Māori Knowledge as Expert Evidence

The traditional order for presenting evidence, including expert evidence, begins with evidence in chief and is followed by cross-examination. Both processes are prescribed within the Evidence Act and also govern the presentation of Māori knowledge as expert evidence. The tikanga concept of tapu is inherent in Māori knowledge and also relevant in this context.

Section A of this Part will examine the process of giving evidence in chief by way of oral testimony, and section B will look at the process of cross-examination within the adversarial context. Section C will discuss the presentation and examination of evidence in te reo Māori. Each of these sections will be discussed with reference to tapu.

73 See Part VI.

A Evidence in Chief

1 Oral testimony

Evidence can be given by oral testimony, although this may not be true for every case.⁷⁴ At first instance, it appears that oral testimony accommodates Māori oral tradition. However, the rationale for oral testimony in evidence is legal, rather than cultural. As described in *Taniwha v R*, oral testimony upholds the open administration of justice.⁷⁵ This suggests that where evidence is given in front of a court in real-time, public access to the justice system is better served. In essence it creates a public right to access information shared in trial proceedings.⁷⁶ This right can be qualified by provisions in the Evidence Act that offer privilege and confidentiality rights. For example, s 58 confers a privilege for communications with ministers of religion.⁷⁷ These provisions do not explicitly cover Māori contexts and so the open justice policy may apply where Māori knowledge is presented as expert evidence.

The open justice principle contrast with the understanding, from a Māori world view, that all knowledge has been gifted to humankind by atua via a spiritual relationship.⁷⁸ From this perspective, Māori knowledge indicates the presence of tapu in the human world, and the knowledge holder has a sense of responsibility to protect it.⁷⁹ For example, whakapapa knowledge describes the relationships between Māori and their ancestors since the time of creation.⁸⁰ Iwi, hapū and whānau have the responsibility to protect such knowledge, which is distinct from a right to public access. In fact, to expose Māori knowledge to the public may degrade its tapu.⁸¹ Chief District Court Judge Heemi Taumaunu has spoken extrajudicially to the importance of preventing spiritual harm during the presentation of Māori evidence. Taumaunu referred to the possibility of harm being inflicted on humans where spiritual forces are

74 Evidence Act, s 83(1)(a).

75 *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [35].

76 McDonald and Optican, above n 53, at 580.

77 Evidence Act, s 58.

78 Mutu and others, above n 52, at 167.

79 Waikato, above n 16, at 352.

80 At 387.

81 Kapa-King, above n 15, at 652.

disrupted.⁸² Arguably, such harm might eventuate where cultural knowledge that is inherently spiritual is shared openly in a more secular space, such as the courtroom. Evidently, the courts have a role in upholding the open justice policy, and this may have implications for the inherently spiritual nature of Māori knowledge.

B Cross-examination

1 Adversarial context

Cross-examination is used to contest evidence and is preserved under s 84(1)(b) of the Evidence Act. In some cases, questioning may go to the accuracy of the evidence;⁸³ otherwise, the purpose of questioning may be to elicit favourable facts from the witness.⁸⁴ Where a witness holds themselves out as an expert, their testimony is less likely to be understood, in the minds of the jury, as easily as the evidence of a lay witness. As such the cross-examination of such witnesses may be more comprehensive. In addition, the testimony of an expert may carry heightened weight in the eyes of a jury, and this provides reason for counsel to obtain control over the information that the expert witness presents to the court. This strategy is supported by the nature of cross-examination, in which each witness is questioned individually, with counsel asserting influence over the interaction.⁸⁵ Drawing the threads together, cross-examination can be a process of interrogation or a strategic exercise, and this generates a degree of hostility.⁸⁶ This is consistent with an adversarial system in which evidence must be contestable, and cross-examination remains a minimum standard for criminal procedure under the New Zealand Bill of Rights Act 1990.⁸⁷

The adversarial and individual nature of cross-examination may be at odds with the concept of tapu, if not altered to respect the status of the expert and the spiritual nature of their evidence. It is not that Māori knowledge is not immune from

82 Law Commission *Te Arotake Tuarua o te Evidence Act 2006* (NZLC R142, 2019) at 37.

83 McDonald and Optican, above n 53, at 588.

84 At 588.

85 At 590.

86 Emily Henderson "Bigger fish to fry: should the reform of cross-examination be expanded beyond vulnerable witnesses?" (2015) 19 *The International Journal of Evidence & Proof* 83 at 90.

87 New Zealand Bill of Rights Act 1990, s 25.

contestability, rather, its inherent tapu invokes a cultural code of conduct. The Waitangi Tribunal has proved that this can be achieved in the cross-examination of Māori witnesses. In *Te Runanga o Ngai Tahu v Waitangi Tribunal*, the High Court acknowledged that Māori evidence is not subject to the same style of cross-examination in the Tribunal. The Tribunal's process will be elaborated in Part VII, but its aim in differentiating its approach is to show respect for the witnesses.⁸⁸ The individual nature of cross-examination may also be inconsistent with tapu connected to expert Māori testimony. The pōwhiri is a context for the expression of Māori knowledge and its protocols centre on respect for the tapu environment. Under certain tikanga, the order of speaking in a pōwhiri process allows speakers to comment on things that have been omitted by other speakers, or to clarify their points.⁸⁹ This is distinct from the context of cross-examination, wherein witnesses are examined individually, and the implications of this for civil and criminal courts will be explored in Part VII.

C The Use of Te Reo Māori

Te reo Māori is itself a form of Māori knowledge, but it has not always featured in evidence presentation and examination. The Court of Appeal in *Mihaka v Police* considered the use of te reo Māori in proceedings to be subject to a lack of proficiency in English.⁹⁰ In the Family Court case of *RPT v AHH*, a witness's evidence in chief was given in te reo Māori, and the witness questioned the accuracy of the English interpretation.⁹¹ The Judge found that the witness was able to "give evidence, cross-examine and make submissions very adequately in English", so the interpreter was dismissed.⁹² Evidently, the 1980s sentiment in *Mihaka v Police* was still present in 2012. Since these cases, the right to use te reo in proceedings, regardless of proficiency in another language, has been confirmed.⁹³ The legal rationale for this decision sits

88 *Te Runanga o Ngai Tahu v Waitangi Tribunal* [2001] 3 NZLR 87 (HC) at [111].

89 At 176.

90 *Mihaka v Police* [1980] 1 NZLR 453 (CA) at 462.

91 *RPT v AHH* FC Auckland FAM-2006-027-000161.

92 At [18].

93 *Green v Te Rōpu Whakamana i te Tiriti o Waitangi (Waitangi Tribunal)* [2014] NZHC 723 at [21]–[22].

closely with the recognition of te reo as an official New Zealand language in Te Ture mō te reo Māori 2016.⁹⁴

Although the right to speak te reo Māori in legal proceedings is confirmed, it is subject to the availability of court-appointed interpreters because te reo is not widely spoken in New Zealand generally. Expert evidence offered in te reo often needs to be interpreted by an appointed competent interpreter in order to be communicated to the judge and to the jury. The inherent difficulty in determining the accuracy of interpretations is that they cannot always be taken at face value.⁹⁵ This issue was central to the case of *R v Hillman* in the District Court, which determined the overall purposes of the Māori Language Act 1987.⁹⁶ Mr Hillman was giving evidence to the Court in te reo Māori, but two different interpreters could not agree on the correct meaning of his testimony in English. The Judge's ability to receive accurate evidence was compromised.⁹⁷ Further, the true meaning of the te reo Māori that was used to communicate the evidence was not determinable.

Applying the concept of tapu to Māori knowledge includes recognising that te reo serves a sacred purpose. More specifically, tapu can dictate that certain things are set aside for particular uses,⁹⁸ and te reo Māori is the primary language for communicating Māori knowledge. It is, therefore, significant that te reo has been facilitated as a language of the court, including in evidence presentation. It is also important that the use of te reo in evidence is supported by accurate and effective interpretation. Where an accurate interpretation can be facilitated, the fact-finding purpose of the evidence is upheld but so too is the purpose of te reo Māori.

94 Te Ture mō Te Reo Māori 2016, s 5.

95 Section 7(4).

96 *R v Hillman* [1991] DCR 68.

97 DL Bates "Māori Language: Some Observations upon its use in Criminal Proceedings" (1991) NZLJ 55 at 60.

98 Mead, above n 5, at 26.

D Conclusion

While evidence must remain contestable, the inherent tapu nature of Māori knowledge invokes a culturally grounded code of conduct. The open justice policy is a principle of New Zealand's legal system, but there also exists a spiritual relationship between atua, tupuna and Māori knowledge holders that requires protection. The hostility and individuality of the cross-examination process is consistent with the adversarial system, but it can be at odds with the concept of tapu, which requires respect for the sanctity of people and things. With respect to te reo Māori in evidence presentation, its interpretation and translation limits the extent to which it is reserved as the vehicle for communication of Māori knowledge. In light of these tensions, Part VII will discuss models for recognising the inherent tapu of Māori knowledge during the presentation and examination of expert Māori evidence.

V Weighting Māori Knowledge as Expert Evidence

The weighting of expert evidence is an exercise for the judge, including when the evidence is given by an expert on tikanga Māori. This Part will discuss the cases of *Takamore v Clarke* and *R v Mason* to identify common themes in the weighting of expert tikanga evidence.⁹⁹ The themes identified will highlight how the weighting of expert Māori evidence limits the utility of tikanga principles within a fact-finding paradigm. While evidence supports fact-finding, tikanga Māori provides more than a body of facts, and is based on a framework of values and practices.

A Takamore v Clarke

In *Takamore v Clarke*, the Supreme Court determined whether Ms Clarke, the partner and executrix for Mr James Takamore, had the right to determine the disposal of his tūpāpaku when he passed away. Mr Takamore had lived in Christchurch with Ms Clarke and their children for the majority of his adult life. After Mr Takamore's death, members of his Whakatōhea and Tūhoe whānau buried his tūpāpaku in Kutarere in

⁹⁹ *Takamore v Clarke*, above n 2; and *R v Mason*, above n 3.

accordance with the tikanga of his hapū. In the High Court, Ms Clarke succeeded in seeking to have his tūpāpaku exhumed and reburied in Christchurch. Mr Takamore's sister then appealed that decision to the Court of Appeal. The Supreme Court granted Ms Takamore leave to appeal from the Court of Appeal, although Ms Clarke was again successful.

1 The jurisprudence of tikanga

In *Takamore v Clarke*, the expert tikanga evidence was taken and weighed as fact, despite the legal character of tikanga having been acknowledged. In this case, Pou Temara gave expert evidence as to the existence of the burial tikanga of Whakatōhea and Tūhoe.¹⁰⁰ He explained the importance of the custom within the Takamore family and within Māoridom more generally.¹⁰¹ Elias CJ accepted that the evidence supported the identification of the relevant tikanga and the claim that the wider Takamore family had conformed to it.¹⁰² The Supreme Court went to the extent of acknowledging that tikanga was “customary law”.¹⁰³ However, Elias CJ stressed that the Court could not engage in law-creation.¹⁰⁴ As such, the tikanga described in evidence would not be weighted towards the substantive determination in the same way as existing Western legal principles. While this was ultimately consistent with the fact-finding purpose of evidence law, the jurisprudential nature of tikanga was limited in that context.

2 The practicability of tikanga

Takamore v Clarke also suggests that expert tikanga evidence is weighted with consideration of the practicability of tikanga. It was acknowledged that the migration of Māori away from their tribal lands and towards urban centres has impacted the ability for Māori to practice tikanga. In the High Court decision, Fogarty J accepted the expert witness' assessment of the increasing difficulty for Māori to maintain tribal links

100 *Takamore v Clarke*, above n 2, at [14].

101 At [14].

102 At [96].

103 At [29].

104 At [95].

and practice tikanga when living in urban contexts.¹⁰⁵ His Honour's recognition of the impacts of urbanisation on tikanga Māori ultimately impacted the weight given to the tikanga practices that were being explained in evidence. It was found that because Mr Takamore had chosen to live outside Tūhoe custom, it could not reasonably be enforced against him nor his personal representative.¹⁰⁶ Elias CJ accepted that it would be culturally unsafe to state that Mr Takamore had severed his connection to Tūhoe or that he did not value it.¹⁰⁷ However, her Honour also stated that tikanga might have to evolve under the pressures of urbanisation.¹⁰⁸ It appears that the weighting of expert tikanga evidence is impacted by the judges' perception of its practicability in the particular circumstances. In this case, cultural disconnect became relevant to the Court's decision on the weight to be given to the evidence on tikanga Māori.

3 Weighting tikanga consistently with Western law

The Supreme Court decision also highlights that expert tikanga is weighted in a manner that maintains consistency with relevant common law principles. The majority of the Court considered personal representatives to have a well-established common law right to determine the disposal of the body of the deceased.¹⁰⁹ The weight given to the evidence that established the burial tikanga was considered alongside that existing legal principle. The majority considered that the tikanga could be taken into account but would not preclude the personal representative from acting in accordance with their own views.¹¹⁰ Elias CJ instead argued that the personal representative's wishes are not always primary, and that the common law could allow burial in accordance with whānau wishes and with tikanga.¹¹¹ It was however acknowledged that tikanga could not be forced onto Ms Clarke, as a Pākehā,¹¹² and that the common law also favoured

105 At [99].

106 At [27].

107 At [17].

108 At [99].

109 At [152].

110 At [158].

111 At [83].

112 At [93].

spousal wishes.¹¹³ In this cocktail of circumstances, the expert tikanga evidence was weighted against legal principles that were inherently at odds with cultural values.

The relevant statutory framework was also consistent with the common law position that spousal rights be prioritised over cultural practice. Relevant legislation was directive on the manner in which a deceased might be buried but not prescriptive on where determinative authority would sit. According to the expert tikanga evidence, the statutory background included consideration of the interests of the deceased's family and their custom.¹¹⁴ Elias CJ accepted that the statutory framework at least indicated a recognition of Māori cultural practices and that statutory provisions would properly influence Judge-made common law.¹¹⁵ In recognising the gap left between the evidence and the statute, the majority advocated that where there is statutory silence on a matter, recourse can be made to the common law.¹¹⁶ Therefore, the expert tikanga evidence was weighed alongside common law spousal rights, which took primacy in the final outcome.¹¹⁷ The weight given to the expert tikanga evidence was limited in a context where both common law and statute recognised spousal rights over cultural practices.

B R v Mason

In the case of *R v Mason*, the High Court was to determine whether Mr Mason could be tried for murder and attempted murder in accordance with tikanga Māori.¹¹⁸ Heath J found that it was unlikely that the criminal trial process could ever accommodate such a system given the enactment of the Crimes Act 1961. However, his Honour was able to integrate tikanga Māori considerations into Mr Mason's sentencing, in *R v Mason (No 2)*.¹¹⁹

113 At [101].

114 At [42].

115 At [47].

116 At [110].

117 This also suggests that where expert tikanga evidence supports rights that are explicitly recognised in statute, this could influence the weight given to that evidence.

118 *R v Mason*, above n 3.

119 *R v Mason (No 2)*, above n 3.

1 The jurisprudence of tikanga

In *R v Mason*, Heath J was to determine whether Mr Mason's claim that he be tried under a system of customary Māori law could be upheld. Expert evidence was required to determine whether a customary system existed and so expert tikanga evidence was called to identify a factual basis for a criminal justice system based in tikanga Māori.¹²⁰ Heath J acknowledged that Mr Jackson was an expert in tikanga and made recourse to his evidence, which discussed relevant tikanga concepts and practices.¹²¹ His Honour accepted that the expert evidence established the existence of a customary system in pre-European times, and that tikanga was itself a body of customary law at that time.¹²² Ultimately though, Heath J interpreted that the Crimes Act has distinguished the customary system.¹²³ This bears similarity to the case of *Takamore v Clarke*, in which the legal character of tikanga was acknowledged, but limited by a Western legal framework.

2 The practicability of tikanga

The judgment of Heath J in *R v Mason* also suggests that the weight given to the expert tikanga evidence was cognisant of the impacts of colonisation on the practicability of tikanga Māori. As the expert witness, Moana Jackson established the existence of a pre-European customary system and also expressed his desire that the validity of the Māori jurisprudential outlook be recognised.¹²⁴ However, he also acknowledged that the practicability of tikanga as a legal process would need to be rebuilt, given the damage done to tikanga since 1840.¹²⁵ Heath J directly acknowledged this part of Jackson's evidence as giving rise to a valid practical difficulty with recognising the customary system in law.¹²⁶ The expert evidence had both established the existence of a customary system and acknowledged that it required a degree of revitalisation to be

120 *R v Mason*, above n 3, at [5]–[6].

121 At [22].

122 At [19].

123 At [37].

124 At [48].

125 At [48].

126 At [48].

legally practicable. Both of these aspects were acknowledged by Heath J when determining the substantive outcome.

3 Weighting tikanga consistently with Western law

Perhaps the most significant factor weighted alongside the expert tikanga evidence was the need for Heath J to determine the case consistently with the Crimes Act. After Moana Jackson had established that the Māori customary system existed in expert evidence, Heath J found that it had been extinguished in law. The judgment stated that no person can be tried for a criminal offence by a procedure other than that laid down in the Crimes Act.¹²⁷ To give considerable weight to the expert evidence, which had established a customary procedure outside of that Act, would have been inconsistent with the clear terms of the statute. Further, the Crimes Act prescribes the framework of principles that guide the determination of criminal charges in Aotearoa. This suggests the Crimes Act operates as a barrier to giving considerable weight to expert tikanga evidence in criminal trials. Weighing expert tikanga evidence consistently with existing criminal law limits the recognition of tikanga Māori.

In *R v Mason (No 2)*, the expert tikanga evidence was also weighted consistently with sentencing principles. Heath J referenced his ability to sentence in a manner that reflects the cultural background of the defendant.¹²⁸ On this basis, his honour did not exclude the possibility that utu could influence the sentencing process, as described in expert evidence.¹²⁹ This would mean that his sentence could be inclusive of a customary reconciliation process between Mr Mason, the victim, and the victim's family.¹³⁰ However, Heath J acknowledged the primary sentencing goal of providing a community response that addresses the seriousness of the crime.¹³¹ This suggested that the degree of seriousness perceived in the offending would affect the weight that

127 At [31].

128 At [39].

129 *R v Mason (No 2)*, above n 3, at [40].

130 At [50].

131 *R v Mason*, above n 3, at [49].

customary law could have over the sentencing outcome. In this case, the weight extended to facilitating a customary process, while ultimately determining the substantive outcome with reference to the principles of sentencing under statute.

C Analysis

The above discussion highlighted the features of Western law in the weighting of expert tikanga evidence. These cases will now be discussed to suggest some features of tikanga that were also relevant in the weighting process.

1 The jurisprudence of tikanga

One of the key themes across *Takamore* and *Mason* was the limited recognition of the jurisprudence of tikanga. Despite acknowledging that tikanga is customary law, it was stressed that the evidence of that tikanga could not be interpreted as common law. This approach is true for all types of expert evidence, such as scientific and commercial, because evidence is a fact-finding paradigm. However, unlike those disciplines, tikanga Māori is a body of law in itself, which can be somewhat elaborated here. Justice Sir Joseph Williams extrajudicially described tikanga Māori as the first law of Aotearoa designed for small kin-based communities.¹³² Whanaungatanga, mana and tapu underpin the many law-like directives that tikanga provides. The management of whanaungatanga relationships requires directives or laws and is the Māori source for rights and obligations of kinship.¹³³ Inherent in the concept of mana is the rights and obligations of leadership.¹³⁴ Additionally, the value of tapu speaks to the directives that control social behaviour, particularly towards those things and people with a spiritual element.¹³⁵ Arguably then, tikanga and state law both form a body of law that regulates a society, and this will be explored in Part VIII.

132 Williams, above n 14, at 3.

133 At 3.

134 At 3.

135 At 3.

2 The practicability of tikanga

In the weighting of expert tikanga evidence, both *Takamore* and *Mason* discussed the practicability of tikanga. In *Takamore*, Mr Takamore's affinity with his Tūhoe heritage was acknowledged within the context of urbanisation, and this limited its practical application. In *Mason*, the practicability of the tikanga in expert evidence was reduced by recognition that tikanga Māori had changed since European contact. Although not explicit, this essentially acknowledged that tikanga has been impacted by colonisation, whereby Māori law was systemically replaced by that of the British.¹³⁶ The effects of that process were acknowledged in these cases, but the response to those impacts exists well beyond the courts. Mana tangata within Māori communities, wherein tikanga is being additionally and distinctly developed, can be drawn on to consider the practicability of tikanga to society's issues. One example of tikanga evolving beyond the courts arises from the Whakaari (White Island) explosion in 2019. The people of Whakatāne observed a rāhui over the area, not because it was prescribed in law, but as a matter tikanga. While the decisions in *Takamore* and *Mason* were made with consideration of the impacted practicability of tikanga, the practicability of tikanga can be understood beyond what is offered in the context of expert evidence.¹³⁷ Part VIII will suggest that judges should be assisted by Māori expertise when weighting expert tikanga evidence.

3 Weighting tikanga consistently with Western law

In *Takamore*, *R v Mason* and *R v Mason (No 2)*, the Judges were cautious to weight the expert tikanga evidence consistently with existing common law and statute. In *Takamore*, the weighting was reflected in the final outcome, which was consistent with existing common law precedent. In *R v Mason*, the Crimes Act was given primacy, and in *R v Mason (No 2)*, the concept of utu was applied consistently with sentencing principles.¹³⁸ In these cases, the tikanga evidence could only be given weight towards

136 Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 176.

137 Williams, above n 14, at 33.

138 *R v Mason*, above n 3, at [40].

procedural questions because substantive law precluded more substantial recognition of tikanga values. Although these decisions were consistent with law, they limited the jurisprudential nature of tikanga. Reconciling this tension is challenging, particularly where existing law reflects a preference for legal principles over cultural values. However, it is important to understand that what is correct in law, may not be correct for tikanga. As contended by Justice Sir Joseph Williams extrajudicially, “[i]n a tikanga context, it is the values [such as mana and whanaungatanga] that matter more than the surface [level] directives.”¹³⁹ Part VIII will suggest how the jurisprudence of tikanga can be better understood by judges, beyond the context of expert evidence.

D Conclusion

This Part argued that expert tikanga evidence has been weighed consistently with law, and it also highlighted features of tikanga Māori that were limited in the weighting process. In *Takamore* and *Mason*, expert tikanga evidence was interpreted as fact, despite tikanga being customary law. Further, while the practicability of tikanga was questioned, the role of Māori communities in restoring that practicability was not expressly acknowledged. Expert tikanga evidence was weighed consistently with existing law that already limited cultural interests, without exploring further how that tension could be reconciled. Part VIII suggests how judges might enhance their affinity with tikanga and tikanga as law, and draw on Māori expertise during the weighting of expert tikanga evidence.

VI Recognising Mana and Whanaungatanga when Admitting Māori Knowledge as Expert Evidence

As discussed in Part II, mana is expressed in Māori knowledge, and whanaungatanga is the agent for gaining that knowledge through experience, training, and study. It is open to the courts to interpret Māori knowledge as expert evidence based on the mana tangata and whanaungatanga it is sourced from. Adopting such an interpretative approach recognises the expertise within Māoridom and broadens the pool of

139 Williams, above n 14, at 3.

expert Māori evidence available to the court. Further, it enables the courts to admit the expert Māori evidence that is most relevant to issues before it.

However, the judiciary requires support to inform their recognition of mana and whanaungatanga in the categorisation and admission of Māori knowledge as expert evidence. In this spirit, section A argues that statutory reform would not be the most effective tool. Section B instead recommends judicial education on the relationship between mana, whanaungatanga and Māori knowledge. Section C recommends that judges take guidance from contexts such as the Waitangi Tribunal and wānanga where mana and whanaungatanga influence the use of evidence. Section D will look for international comparisons which help inform New Zealand specific recommendations.

A Statutory Reform

Statutory reform would most likely take the format of an amendment to the Evidence Act. However, this will not guarantee recognition of mana and whanaungatanga when Māori knowledge is categorised or admitted as expert evidence. Such an amendment may direct judges to consider tikanga when admitting Māori knowledge as expert evidence. However, such a direction would be futile without judicial education on that tikanga and acceptance of Te Ao Māori. Furthermore, there does not appear to be an appetite for legislative reform. In its Report on the Evidence Act, the Law Commission did not identify issues with the admissibility of Māori knowledge in case law, and it denied that statutory amendment to substantive rules, such as admissibility, would be necessary.¹⁴⁰

B Judicial Education

An alternative to statutory reform is to take a 'soft law' approach – the education of the bench. Education enables judges to understand the relationship between mana, whanaungatanga and Māori knowledge. Some Māori lawyers have emphasised that the judiciary cannot solely educate themselves on Māori knowledge through expert

140 Law Commission, above n 82, at 36.

evidence submitted before them.¹⁴¹ Instead, the judiciary must actively seek education on Te Ao Māori. Te Kura Kaiwhakawā (Te Kura) — The Institute of Judicial Studies is one body that is enabled to facilitate the educational development of judges. Te Kura's latest prospectus offers judges the opportunity to learn both te reo and tikanga Māori.¹⁴² For more proficient speakers, Te Kura offers a rumaki (immersion) style wānanga to strengthen the depth, quality, and fluency of their reo and tikanga.¹⁴³ These wānanga aim to open judges' minds and practicing styles to Te Ao Māori.

Te Kura might also help judges to identify sources of mana. While the courses are facilitated by Te Kura, they are led by Māori people and Māori education providers. This is distinct from learning about tikanga through expert evidence in a courtroom, wherein the witness participates in, rather than leads, the process. It also familiarises judges with sources of mana tangata in relation to Māori knowledge, beyond the experts that they have already encountered in the courts. Through these experiences, judges' may establish more informed views about the nature and effect of Māori expertise. This may lead to judges expanding their interpretation of the definition of expert evidence in s 4 of the Evidence Act.

It is also important that judges can workshop the application of Māori expert evidence, in order to transfer knowledge into practical ability. Te Kura offers several practical workshops on evidence law which could be amended to incorporate examples of expert Māori evidence being admitted to various proceedings.¹⁴⁴ Following the call of the Law Commission to develop strategies other than empirical testing for assessing the reliability of expert opinions, Te Kura might also look to workshop how to appropriately assess the reliability of Māori knowledge.¹⁴⁵ Judicial education on these matters concerning Māori expert evidence could embed both respect for this evidence within

141 Walker and Irwin-Easthope, above n 68, at [2.6].

142 Te Kura Kaiwhakawā *Prospectus 2021* (2021) at 5.

143 At 5.

144 At 5.

145 McDonald and Optican, above n 53, at 146.

judicial practice, as well as an ability to recognise its relevance to proceedings before the court.

C Beyond the Civil and Criminal Courts

1 The Waitangi Tribunal

The Waitangi Tribunal can be considered a model for civil and criminal courts to categorise Māori knowledge as ‘expert’ based on the mana it is sourced from. In the Tribunal, forms of Māori knowledge that originate in traditional spaces, such as waiata, haka and ancient Māori legend, are admissible.¹⁴⁶ Waiata, haka and legends express mana tangata, mana atua and mana tupuna, as they are a repository for Māori history, custom, spirituality and whakapapa. For example, the waiata, *Hapaitia*, describes Te Rarawa whakapapa by referencing waka that affiliate with Te Rarawa ancestors.¹⁴⁷ Waiata, or other forms of Māori knowledge that explain whakapapa, ought to be recognised as expert whakapapa evidence in civil and criminal courts. Whakapapa evidence has already assisted the courts in determining Māori issues. In *Takamore v Clarke*,¹⁴⁸ the party’s connection with their tikanga was evidenced through whakapapa. Moreover, waiata are expressions of mana that can be learnt through study, training and experience, and could therefore be interpreted consistently with the notion of expert under the Evidence Act.

Courts might also take guidance from the Waitangi Tribunal to recognise which particular sources of mana on Māori knowledge are the most relevant to the issues at hand. In 2007, the Tribunal released the Te Arawa Settlement Process Reports.¹⁴⁹ The Tribunal stressed the importance of the Crown understanding the tikanga that underpins practical expressions of concepts such as mana.¹⁵⁰ The Tribunal advocated for the determination of ‘mana whenua’ over land in Whakarewarewa, with reference

146 Waitangi Tribunal “How claimants can prepare evidence” (19 September 2016) <www.waitangitribunal.govt.nz>.

147 Te Rūnanga o Te Rarawa *He Manu Rongo: Ngā waiata o Te Rarawa* (Kaitiāia, 2017) at 25.

148 *Takamore v Clarke*, above n 2.

149 Waitangi Tribunal *The Te Arawa Settlement Process Reports* (Wai 1353, 2007).

150 At 21.

to a number of sources.¹⁵¹ This was important as the determination of mana whenua on that evidence would establish rights, and those rights would have practical ramifications for the whenua. In that case, "the tikanga that underpins the practical expression" of mana whenua, is the process of consulting a number of sources on where that mana whenua should sit.

Following the Tribunal's lead, the High Court ought to take up opportunities for recognising the relevance of sources of mana or Māori knowledge, so that they are admitted as expert Māori evidence. In *Sweeney v The Prison Manager, Spring Hill Corrections Facility*, Palmer J recognised the concept of mana in law, but did not consider expert evidence relevant to determining what 'mana' meant in that context.¹⁵² Palmer J granted a declaration that the revocation of Mr Sweeney's prison visitation permit was unlawful,¹⁵³ on the basis that the permit's revocation did not uphold Mr Sweeney's mana.¹⁵⁴ Interestingly, Palmer J stated that the meaning of mana did not need to be defined as it is "understood implicitly by Māori and, now, by most New Zealanders".¹⁵⁵ Despite showing a positive judicial attitude towards upholding tikanga Māori, the decision may set a precedent for judges to determine the meaning of tikanga concepts, without acknowledging the relevance of expert Māori evidence. This is troubling in an environment where the intersection between tikanga and state law is still being explored. The courts might take lead from the Tribunal to admit relevant expert Māori evidence, when determining the meaning of tikanga concepts in the context of the proceeding at hand.

2 Wānanga

Expert evidence can be admitted in opinion form, and wānanga might be used to recognise the mana behind Māori knowledge that is classed as opinion. Wānanga are discussion-based gatherings that bring together the mana of a number of people.

151 At 195–197.

152 *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181, [2021] 2 NZLR 27.

153 At [1].

154 At [78].

155 At [76].

In the current *R v Ellis* proceedings, the Supreme Court used wānanga to determine the meaning of mana in evidence.¹⁵⁶ This article recognises that there is a need to make the law, including criminal procedure and evidence law, more cognisant of and responsive to Māori issues. To reconsider the expert evidence paradigm with respect to tikanga is to ask the law to better reflect the society it is empowered to serve. Impact on the mana of Mr Ellis and his family was considered, and, therefore, the meaning of mana had to be determined.¹⁵⁷ While there was still disagreement as to different interpretations of mana, the experts were able to find consensus on mana's fundamental principles in Mr Ellis' case.¹⁵⁸ This formed a report of evidence that would be submitted to the Court, while still respecting the mana of each expert and their opinion. Wānanga enable the courts to admit expert Māori evidence that houses a body of opinion, whilst still recognising the mana behind each of those opinions.

D International Recognition of Indigenous Knowledge

A cross-jurisdictional analysis of the admissibility of Indigenous knowledge also provides a basis for the suggestions in this article. In Aotearoa, Māori knowledge has been recognised as expert evidence with more progression than in Canada and Australia, for example. However, this did not preclude continued progression in our recognition of Indigenous values in evidence law.

Australian and Canadian courts have not accepted the knowledge of indigenous peoples in the same way as New Zealand courts have accepted Māori knowledge as expert. In the Federal Court of Australia, knowledge of aboriginal histories held by non-Indigenous witnesses has been characterised as expert evidence.¹⁵⁹ In the same decision, aboriginal knowledge of those histories was treated as lay evidence.¹⁶⁰ In the words of the Australian High Court, such evidence is at risk of "fragility ...

156 See Interview with Natalie Coates (Julian Wilcox, Saturday Morning, RNZ, 19 September 2020).

157 Coates, above n 156.

158 Coates, above n 156.

159 *AB (dec'd) (on behalf of the Ngarla People) v Western Australia (No 4)* [2012] FCA 1268, (2012) 300 ALR 193 at [64].

160 At [63].

exaggeration, embellishment, wishful thinking ... and self-interest".¹⁶¹ Misclassifying indigenous evidence in this way undermines the knowledge of Indigenous communities, as well as the nature of oral history that is common to indigenous communities worldwide. In Canadian courts, admitting oral evidence is also met with resistance.¹⁶²

Australia and Canada can admittedly be distinguished from New Zealand's acceptance of oral Māori knowledge as expert evidence. In the New Zealand context, the Treaty of Waitangi is unique to our constitution and clearly imparts the duty of active protection of Māori interests onto the Crown. This active duty provides impetus to continue to modify our own evidence laws to be more amenable to Indigenous knowledge. The suggestions discussed in this Part are intended as contributions to that discourse. By adopting the proposed suggestions, New Zealand can serve as an example for other jurisdictions to reconsider their treatment of Indigenous evidence.

VII Recognising Tapu in the Presentation of Māori Knowledge as Expert Evidence

It is important to ensure that the presentation of expert evidence is modified to recognise the tapu of Māori knowledge, including te reo Māori. As discussed in Part II, tapu requires one to alter their behaviour to respect the sanctity of people, places, and things, including Māori knowledge. This can be difficult to uphold within the courts, which are adversarial by nature. However, procedural modifications are not only a possible, but necessary step towards respecting the tapu of Māori knowledge when presented as evidence.

This Part sketches out a series of procedural modifications to the presentation of expert Māori evidence. Section A supports an amendment to the Evidence Act, that will ask judges to alter the presentation of expert Māori evidence. Section B recommends that

161 *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58, (2002) 214 CLR 422 at [143].

162 Kirsten Manley-Casimir "Creating Space for Indigenous Storytelling in Courts" (2012) 27 Can JL & Soc 231 at 237.

the Waitangi Tribunal be explored as a model for implementing that amendment in practice. Section C looks at “hot tubbing” as an alternative to evidence-in-chief and cross-examination.

A Statutory Amendment

In the latest review of the Evidence Act, the Law Commission recommended that an amendment be made to recognise tikanga Māori in the giving of evidence. This amendment would mean judges may regulate the procedure for giving evidence in a manner that recognises tikanga Māori, provided it is not inconsistent with the Act or another enactment.¹⁶³ Based on this wording, there is scope for tapu to be recognised in the giving of expert Māori evidence. Currently, the recognition of tapu in evidence is limited. For example, although judges can allow karakia (prayer) to be said before the giving of Māori evidence, this relies on the agency of the parties and the willingness of the judge to facilitate that request.¹⁶⁴ Instead, the proposed provision provides a legal framework upon which a judge has a responsibility to support the recognition of tikanga, including tapu, in the presentation of expert Māori evidence.

B The Waitangi Tribunal

The Waitangi Tribunal is a model for implementing reforms that consider tikanga in evidence presentation, such as the proposed statutory amendment. For example, the Tribunal has a specific discretion to limit attendance at hearings, instead of the hearing being open to the public.¹⁶⁵ The Tribunal does not specify on what grounds attendance can be limited, but it appears an option open to the tribunal on a discretionary basis. Given that much of the evidence that comes through the Tribunal is based on Māori knowledge, which is tapu, it may be appropriate to limit attendance. To do so would be to recognise the social code of tapu that requires a modification of behaviour or procedure. In civil and criminal courts, the proposed amendment to consider tikanga

163 Law Commission, above n 82, at 36.

164 At 36.

165 *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (August 2018) at 29.

could include limiting who has access to the Māori knowledge shared in evidence. This could include evidence that is particularly tapu, such as whakapapa.¹⁶⁶

The Tribunal is also a procedural model for the recognition of tapu, as it often convenes in locations where tikanga is the operational protocol. When possible, the Tribunal will convene its hearings on the marae of the claimant group, and it will follow the tikanga that is appropriate to for that particular marae.¹⁶⁷ In particular, as a traditional space for the sharing of Māori knowledge, the marae is home to protocols that respect tapu. The courts should strive to adopt the approach of the Tribunal insofar as it is consistent with the Evidence Act as amended. This may mean hearing expert evidence on the marae of the witness, where their tikanga can be followed and where that can be practically facilitated. Alternatively, it may mean the court hears the evidence in accordance with tikanga that the witness deems appropriate. Already counsel can make applications for their witness' preferred mode of evidence, for example, in domestic or sexual violence cases. The rationale supports the nature of the offending and the vulnerability of the witness. In the same vein, the nature of Māori issues and the tapu of Māori knowledge may require that expert Māori evidence be given in an alternative manner, and in order to respect its tapu.

Finally, it is critical that evidence given in te reo Māori is interpreted effectively in order to respect the tapu of the evidence.¹⁶⁸ The Tribunal ensures that its processes for interpreting te reo are effective. In the Tribunal, where a witness is able to interpret or translate their own testimony, the Tribunal will defer to this interpretation.¹⁶⁹ Further, an interpreter does not require formal training.¹⁷⁰ Instead, the interpreter must be competent in the eyes of the claimant group, such that they are familiar with the local idiom and custom.¹⁷¹ From a traditional Western perspective, these procedures may seem subject to bias. However, as recognised by whanaungatanga,

166 Waikato, above n 16, at 384 describes whakapapa as tapu. See also discussion of *Takamore v Clarke*, above n 2, in Part V, wherein evidence of whakapapa was admitted.

167 Waitangi Tribunal, above n 165, at [5.3].

168 Barlow, above n 6, at 114.

169 At 33.

170 At 33.

171 At 33.

Māori knowledge can be gained within Māori social groups. In this sense, the closer the connection between the witness or the interpreter and the specific nature of the knowledge, the more accurate the interpretation might be. Moreover, claimants are allowed to challenge the accuracy of interpretation or translation. The Tribunal is open to discussion to ensure that the true intention of the witness is communicated.¹⁷² These procedures represent comprehensive efforts to facilitate the effective interpretation of te reo Māori. These procedures ought to be adapted by courts when te reo Māori is to be interpreted during the giving of evidence, including expert Māori evidence.

C Hot Tubbing

1 What is hot tubbing?

Hot tubbing allows experts to give evidence concurrently and in a structured discussion with each other, the parties, counsel, and the judge.¹⁷³ This is a procedure that originated in Australia and Canada, and has been adopted in New Zealand. In *Commerce Commission v Cards NZ Ltd (No 2)*, the Commerce Commission sought presentation of expert evidence by the hot-tub method. The High Court allowed experts to give their evidence in front of one another within a limited time frame.¹⁷⁴ Following the collective session, each expert had the opportunity to comment on one another's evidence.¹⁷⁵ Cross-examination would also be collective, as counsel could ask their own expert to comment on the answer of another expert witness.¹⁷⁶ Hot tubbing makes the presentation of evidence a concurrent exercise for witnesses, and ultimately, it is adopted to bolster the fact-finding purpose of evidence.

172 At 33.

173 Luke Hinchey and Tom Lane "Testing the water: hot tubbing, expert evidence and the Environment Court" (2009) 8 BRMB 95 at 95.

174 *Commerce Commission v Cards NZ Ltd (No 2)* (2009) 19 PRNZ 748 (HC) at [5].

175 At [5].

176 At [5].

2 Is hot tubbing conducive to respecting the tapu of Māori knowledge?

Caution must be taken with adopting a method that originates beyond Aotearoa. Hot tubbing has been used in Australia and Canada where Indigenous knowledge has not yet been considered expert. It may be that concurrent evidence presentation and examination be adopted for expert Māori evidence, without prescribing to hot tubbing as it has been developed in Canada and Australia.

Concurrency is said to help judicial understanding of expert evidence, by comparing and contrasting differing expert opinions in real-time.¹⁷⁷ Where expert Māori witnesses were giving their evidence concurrently, the judge would be able to identify and discuss the points of disagreement in the moment. This collaborative format focuses on clarifying the evidence being presented to the court, and bolsters the fact-finding process. It may also alleviate some of the ability for counsel to take an interrogative approach to a witness, or to manipulate the witness' testimony. In a context where expert Māori evidence was being presented or examined in this way, its integrity may be better preserved, as well as its tapu. Concurrency might also be helpful when non-Māori expert evidence and expert Māori evidence is being presented. The court is presented with evidence based on two different world views, and where these worldviews can be explained and contextualised against each other, they may be clearer to the judge and appropriately reconciled and distinguished. As Māori knowledge does not form a common part of judicial expertise, concurrency could support judges' genuine intention to understand expert Māori evidence when presented to them. Equally, it amends the court procedure to show respect for the knowledge and the knowledge holders engaged in the presentation of evidence.

177 Hinchey and Lane, above n 173, at 95.

VIII Recommendations for Recognising Mana and Whanaungatanga when Weighting Māori knowledge as Expert Evidence

Across *Takamore v Clarke*, *R v Mason* and *R v Mason (No 2)*,¹⁷⁸ three key themes were identified in the weighting of expert tikanga evidence. The jurisprudence of tikanga was acknowledged, but received limited recognition when weighted as expert evidence. Both Courts considered the practicability of tikanga within the law, without acknowledging that Māori communities are exercising their mana and practising tikanga beyond the courts. Also identified was the process of weighting expert tikanga evidence against Western law that inherently limits cultural values.

This Part makes recommendations towards reconciling the above tensions, which are intended as tentative contributions to an ongoing discourse. Section A suggests that the jurisprudence of tikanga and its relationship to Māori communities be taught at a tertiary level. Sections B and C then make more short term suggestions. Section B describes te Hunga Rōia Māori as a source of mana on the importance and weight of Māori evidence. Section C recommends that Māori Land Court judges and pūkenga be given a defined role to assist civil and criminal judges when weighting expert tikanga evidence.

A Education on Indigenous law

When tikanga forms expert evidence, its jurisprudence receives limited recognition. By and large, this tension comes down to evidence being a fact-finding paradigm, rather than a tool for law creation. However, the jurisprudence of tikanga can be explored at a tertiary level, so as not to limit this exploration to the courtroom when students become lawyers and lawyers become judges. Further, the mana of Māori communities in relation to that jurisprudence can be taught and accepted early on in the pipeline towards the legal profession. Assuming law students become lawyers and then judges, this knowledge could carry through to the legal profession. The eventual

178 *Takamore v Clarke*, above n 2; *R v Mason*, above n 3; and *R v Mason (No 2)*, above n 3.

outcome of such an approach would be that tikanga was not confined to evidence, but rather, that it was accepted and applied as a source of law in Aotearoa.

1 Jurisprudence of tikanga

The Bachelor of Laws (LLB) has traditionally taught tikanga as a flavour of New Zealand law, rather than law in of itself. Tikanga often forms one of many modules in a law course, creating the impression that it is a set of principles with limited legal effect. This can be understood both as a reflection of institutional inertia, but also of a lack of Māori representation in legal academia. Now, the University of Auckland LLB provides a course that identifies and teaches tikanga Māori as customary law.¹⁷⁹ This course represents the presence and utilisation of Māori knowledge within academia, and an increased acceptance of tikanga as law. This progress has also been supported by the Council for Legal Education, which is the governing body of legal education in Aotearoa. In May 2021, the Council decided that tikanga Māori will be taught in all core LLB and LLB (Hons) papers across New Zealand universities.¹⁸⁰ Ideally, this will allow students to explore the relevance of tikanga principles across a number of practice areas. Equally, it might encourage students to deepen their knowledge of those principles by looking to the practices in which they manifest. Whether or not the Council's decision leads to curriculum changes remains to be seen.

2 Practicability of tikanga

In *Takamore* and *Mason*, the ability for tikanga to develop in law was acknowledged, but the judges considered that its applicability had been weakened by cultural disconnect and the imposition of Western law in New Zealand. While these observations may be true, the courts failed to acknowledge the ability of Māori communities to revitalise and maintain tikanga practices. Beyond the courts, Māori communities demonstrate an ability to use the jurisprudence of tikanga to respond to

179 University of Auckland "Law Public" (2021) <www.calendar.auckland.ac.nz>. The University of Auckland now also offers a certificate, Ngā Toki o te Ture, which recognises a student's dedication to studying Māori law content at law school.

180 New Zealand Council of Legal Education "Te Ao Māori and Tikanga Māori" (2021) <www.nzcle.org.nz>.

issues that affect Māori and non-Māori alike. As discussed, when the Whakaari White Island explosion occurred, the local Māori community issued a rāhui which was complied with by Māori and non-Māori. Tikanga can and is being developed in communities, and this should not be overlooked as a means to limit its application in law. Rather, the applicability of tikanga to law and society can be explored at a tertiary level, and in a more comprehensive manner than is presently being achieved.

In the Bachelor of Laws in Aotearoa, tikanga concepts such as mana and whanaungatanga form part of the curriculum. At times, the jurisprudential character of those concepts may also be taught. More focus might be placed on how tikanga manifests in practice – drawing on the rich lived experiences of tikanga being developed in Māori communities all over the motu. In-situ teaching, is something that could be developed in New Zealand universities to explore the practices that underpin tikanga principles. However, this requires more than an annual observation by students of a pōwhiri at the university marae. The marae is not only an example of tikanga practices but of its jurisprudence in state law. For example, some marae have trust boards, and these are governed by a combination of tikanga principles and trust law, each being as operational as the other. Educating students on the active and dynamic legal character of tikanga is integral to engendering their understanding of the practicability of that tikanga. It makes clear that Māori communities exercise their mana to develop tikanga independently, and also in tandem with, the law. To teach this at a tertiary level is to develop the ability of the profession to deal with the intersection between state law and tikanga, including in evidence.

3 Equality between state and Indigenous law

In Canada, parity between state law and Indigenous law is beginning to be explored within law degrees, which might influence tertiary legal education in Aotearoa. The University of Victoria offers a joint degree in Canadian Common Law and Indigenous Legal Orders (JD/JID).¹⁸¹ This puts Indigenous law and state law side by side, with a view to developing recognition of the legal character of Indigenous law.

181 University of Victoria (Canada) “JD/JID Program Overview” (2020) <www.uvic.ca>.

For example, Dr Kegeдонce John Burrows teaches Anishinaabe constitutional law, which recognises the independent jurisprudential outlook of Indigenous knowledge.¹⁸²

The University of Victoria's JD/JID is also an example of taking law students into Indigenous communities to observe how their law is applied on a day to day basis. Students are able to observe Indigenous law being applied in-situ from community experts,¹⁸³ which recognises the existence of Indigenous law beyond theory. The University of Victoria is able to provide students with an understanding of how Indigenous communities practice their law in their autonomous spaces. In doing so, students observe that Indigenous law exists first in its own right, and can also be related to state law.

While, in New Zealand, Māori communities, lawyers and academics are still grappling with the question of whether and how tikanga should be taught in legal education, Canada has a working model. This is accepted, along with the fact Canada presents its own unique relationship with the number of populations that are Indigenous to Canada. However, the joint degree is the first of its kind in the world, and it can be observed to then consider how it might influence New Zealand legal education.

B Te Hunga Rōia Māori — Hui-ā-Tau

Te Hunga Rōia Māori o Aotearoa, the Māori Law Society, is a source of mana on the utility of expert Māori evidence. Each year, Te Hunga Rōia hosts an annual conference, Hui-ā-Tau, which invites discussion on kaupapa Māori within the law. The Hui-ā-Tau held in 2021 discussed the cultural reports that are available as evidence for the courts in the sentencing process. Although cultural reports are usually written by independent parties, Kylie Quince spoke at Hui-ā-Tau about the weight that the views of whānau members can have in proceedings. This perspective had been shared by Chief District Court Judge Hemi Taumaunu a year earlier. He had considered the limited role that whānau and victims play in criminal proceedings to be one of the most

182 University of Victoria (Canada), above n 181.

183 University of Victoria (Canada), above n 181.

notable ways that the law is inconsistent with tikanga Māori.¹⁸⁴ As such, his address at Hui-ā-Tau introduced the new Te Ao Mārama court model, with one of its functions being to allow whānau members to speak directly to the court as a form of cultural report. Although te Hunga Rōia is itself for Māori legal actors, the discussion and action that arises from that space can inform judges' understanding of the importance, or weight, of Māori evidence.

Te Hunga Rōia also has a unique ability to transcend cultural lines, and inform the world views of non-Māori legal actors, including judges. In 2017, Dame Sian Elias CJ addressed Te Hunga Rōia Māori, speaking to the value she found in her relationships with Māori. In her own words: "You cannot serve the people if you do not love them. You cannot love them unless you know them."¹⁸⁵ Dame Elias' remarks represent an affinity between both Māori and non-Māori legal actors. This affinity is essential to judges' openness to Te Ao Māori, and equally, it is essential to enhance judges' willingness to draw on that expertise when weighting expert tikanga evidence.

C Power Sharing in the Weighting of Expert Tikanga Evidence

When it comes to weighting expert Māori evidence, judges in the Māori Land Court have a unique level of mana. It may be appropriate that Māori Land Court Judges have a role in assisting civil and criminal judges when weighting expert Māori evidence. Māori Land Court judges consistently deal with complex tikanga questions, and in doing so, they must consider evidence on tikanga. In *Hohua – Estate of Tangi Biddle or Hohua*, the Māori Appellate Court advised that it was open to the court to call a tohunga as an expert tikanga witness.¹⁸⁶ The calling of a culturally unique spiritual expert witness is indicative of the Judge's understanding of the relevance of expert Māori evidence. Equally, he was himself in a position to hear, interpret, and weigh the evidence.

184 Heemi Taumaunu, Chief District Court Judge "Calls for transformative change and the District Court response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato, Hamilton, 11 November 2020).

185 Sian Elias, Chief Justice of New Zealand "Te Hunga Roia Maori o Aotearoa: Maori Law Society Annual Conference" (Address to Te Hunga Rōia Māori o Aotearoa, AUT South Campus, Manukau, 18 November 2017).

186 *Hohua – Estate of Tangi Biddle or Hohua* (2001) 10 Rotorua Appellate MB 43 (10 APRO 43) as cited in *Northcroft – Estate of Wallingford Northcroft* (2006) 175 Aotea MB 189 (175 AOT 189) at [11].

The Māori Land Court has an ability with respect to tikanga, and this should be utilised in the civil and criminal courts. This is not to disregard the genuine enthusiasm of civil and criminal court judges to engage with Māori issues, nor to understate their experience and skill. Rather, it considers how that enthusiasm and skill might be best utilised and supported by the mana of Māori Land Court judges.

The Māori Land Court deals with a high volume of cases, which might limit the practicability of assisting civil and criminal judges. However, the concept of Māori expertise informing the determination of tikanga issues and the weighing of tikanga evidence has been explored in other capacities. In some instances, pūkenga have been appointed to sit with judges in cases that have a tikanga dimension. pūkenga are widely acknowledged as holding expertise in tikanga Māori, they have an awareness of applicable regional variations in tikanga, and they have no direct interest in the case.¹⁸⁷ Under the Marine and Coastal Area (Takutai Moana) Act 2011, pūkenga can be appointed to advise on matters of tikanga and oversee the assessment of evidence presented to recognise customary title.¹⁸⁸ However, the role of the pūkenga is relatively undefined, even in the contexts in which they have already assisted. There may be scope to consider working with pūkenga in civil and criminal cases, provided that their mandate be further explored.

The High Court has weighed in on the utility of pūkenga, considering their role in the weighting of evidence to be limited. Palmer J determined that the utility of pūkenga is where a court otherwise has insufficient evidence of tikanga.¹⁸⁹ In this sense, pūkenga could essentially be described as fact-finders, making it difficult to distinguish them from expert tikanga witnesses that the court already has access to. It may be that the bench reserves some hesitancy to power-share with pūkenga in the weighting of evidence. In *Ngāti Whātua Ōrākei Trust v Attorney-General*, Palmer J declined to appoint pūkenga, stating that it was the Court's role to determine the issue on the evidence.¹⁹⁰ However, it is difficult to accept that judges who are less versed in tikanga

187 *Re Tipene* [2015] NZHC 2923, [2015] NZAR 1796 at [6].

188 Marine and Coastal Area (Takutai Moana) Act 2011, s 99.

189 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2020] NZHC 3120 at [39].

190 At [39].

than pūkenga would not benefit from assistance when weighing the differences between and amongst the testimony of expert tikanga witnesses.¹⁹¹ As well as expert tikanga evidence, pūkenga can be a source of education and assistance for judges. Judicial willingness to power-share and more clarification as to the pūkenga role could lend to their appointment in civil and criminal cases. The appointment of pūkenga would draw on the mana of Māori, as well as the skill of learned judges together to weigh expert tikanga evidence.

IX Conclusions

Evidence law is an important, yet overlooked, aspect of the intersect between state law and tikanga Māori. There is a need to make the law, including criminal procedure and evidence law, more cognisant of and responsive to Māori issues. To reconsider the expert evidence paradigm with respect to tikanga is to ask that the law to better reflect the society it is empowered to serve and whose faith it must maintain. As such, this article has overlaid the expert evidence paradigm with the tikanga concepts, and it has also explored how the tensions arising might be reconciled.

The notion of an “expert” in the Evidence Act can be expanded by the tikanga Māori concepts of mana and whanaungatanga. To do so would be to assist judicial understanding of the nature and relevance of Māori knowledge in proceedings, and it would increase the pool of evidence available to the courts. To support this purpose, existing sources of knowledge on Māori evidence can be drawn on, including the Waitangi Tribunal.

The presentation of expert evidence is traditionally adversarial, which can be at odds with the tapu nature of Māori knowledge. Statutory reform and guidance from the Waitangi Tribunal are options for recognising tikanga in the presentation of expert Māori evidence. Concurrent evidence presentation also provides a compelling model for upholding the tapu of Māori knowledge.

191 Annette Sykes “The Myth of Tikanga in the Pākehā Law” (2021) 8 Te Tai Haruru Journal of Māori and Indigenous Issues 7 at 27.

The jurisprudence of tikanga is limited when explored in evidence and on a case-by-case basis. As a short term remedy, judges can draw from Māori expertise to enhance their knowledge of tikanga and their ability to weight expert tikanga evidence. The mana of Māori Land Court judges and pūkenga can also be utilised in this process. Tikanga jurisprudence should also be taught at a tertiary level, drawing on the present momentum within law schools to do so. Over time, more of the legal profession and the judiciary can then understand and apply the jurisprudence of tikanga, so that its utility is not confined to fact-finding.