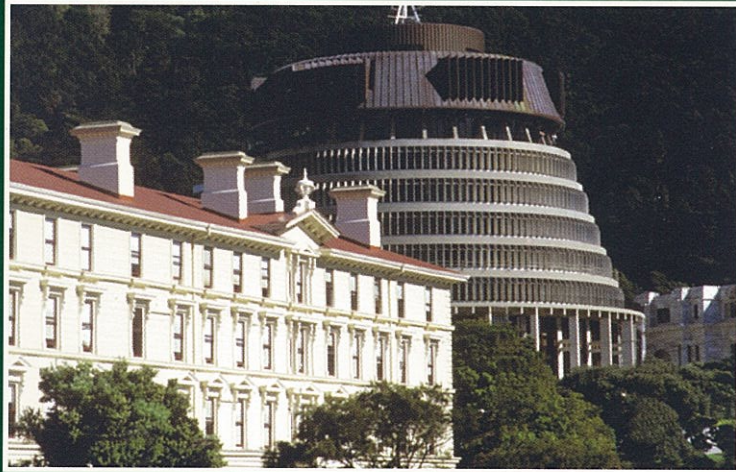


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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Rt Hon Sir Kenneth Keith

Juliet Philpott

Duncan Webb

Fiona Wright

Elisabeth McDonald

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VICTORIA UNIVERSITY OF WELLINGTON

*Te Whare Wānanga o te Ūpoko o te Ika a Māui*



FACULTY OF LAW  
*Te Kauhanganui Tatai Ture*

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## CONTENTS

### *Essay*

The ICJ — Some Reflections on my First Year <i>Rt Hon Sir Kenneth Keith</i> .....	201
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### *Articles*

Damages Under the United Kingdom's Human Rights Act 1998 and the New Zealand Bill of Rights Act 1990 <i>Juliet Philpott</i> .....	211
Keeping the Crown's Conscience: A Theory of Lawyering for Public Sector Counsel <i>Duncan Webb</i> .....	243
Law, Religion and Tikanga Māori <i>Fiona Wright</i> .....	261

### *Legislative Comment*

Discrimination and Trans People: The Abandoned Proposal to Amend the Human Rights Act 1993 <i>Elisabeth McDonald</i> .....	301
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# LAW, RELIGION AND TIKANGA MĀORI

*Fiona Wright\**

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*This article addresses the interface between New Zealand's legislative protection of Māori culture, with its inherent spirituality, and religious freedoms. The author argues that tikanga Māori and religion have enough in common that the legislative protection of tikanga has the potential to affect New Zealand's status as a secular State and its protection of religious freedoms. A survey of tikanga Māori in New Zealand law identifies that it is affecting membership of advisory boards and decision-making bodies, influencing policy and decision-making, both procedurally and substantively, and affecting freedom of information. Although the tikanga provisions do not amount to "establishment" of tikanga values in the constitutional sense, it is suggested that the provisions are not currently being enacted with sufficient care to avoid potential risks to religious freedoms. This article recommends that legislative references to tikanga Māori should come with a clear statement of purpose. In addition, many tikanga Māori provisions should prompt advice to the Attorney-General under section 7 of the New Zealand Bill of Rights Act 1990, even though few may ultimately warrant a section 7 report being tabled in Parliament.*

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## **I INTRODUCTION**

The global renaissance of indigenous peoples in the latter part of the 20<sup>th</sup> century has brought with it a resurgence of indigenous religions and spiritualities. This is hardly surprising as indigenous culture and religion are invariably intertwined.<sup>1</sup>

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

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\* Legal and Policy Advisor, New Zealand Law Commission. I would like to thank the following people for their comments on this article: Professor Bill Atkin, Law Faculty, Victoria University of Wellington; Professor Paul Rishworth, Dean of the Faculty of Law, University of Auckland; Sir Geoffrey Palmer, President, New Zealand Law Commission; Taihakurei (Eddie) Durie, former Waitangi Tribunal chairman and Chief Judge of the Māori Land Court; the Honourable Justice William (Bill) Wilson, judge of the Court of Appeal and former member of the Waitangi Tribunal; and the anonymous reviewer. The views expressed in this article are the author's own, and do not represent the views of the Law Commission.

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

indigenous people.<sup>2</sup>

Tikanga Māori has become a common term in our world today, but understandings of what it means vary considerably. Though a few people are quite knowledgeable, the vast majority know little about the subject ...<sup>3</sup>

This article addresses the interface between New Zealand's legislative protection of Māori<sup>4</sup> culture, with its inherent spirituality, and religious freedoms. Its genesis was a 2003 article by Rex Ahdar,<sup>5</sup> which discussed the dilemma that arises when a secular state privileges spiritual concerns over others in the name of "fostering indigenous culture".<sup>6</sup> Ahdar looked at two instances of the courts grappling with Māori spiritual issues, and went on to consider whether official recognition of Māori spirituality was workable, or indeed appropriate.

While Ahdar's article concluded that Māori spirituality has been distinctly advantaged over others in recent State policy,<sup>7</sup> it did not review the extent to which Māori spiritual values were protected by legislation, nor the range of effects that they could have. Addressing those questions is the first objective of this article. A subsequent objective is to analyse the various legislative effects of tikanga Māori from both constitutional and human rights perspectives. Tikanga Māori has a sufficient nexus with religion that its increasing presence in legislation has implications for New Zealand's secular constitution and its respect for religious freedoms and equality rights, which must be weighed against its obligation to protect minority rights and Māori rights under the Treaty of Waitangi.

In order to establish how tikanga Māori engages the law–religion debate, Part II examines the concepts of tikanga Māori and religion, and concludes that they do have elements in common. Part III explores a range of State–religion constitutional frameworks, and considers New Zealand's constitutional arrangements in the light of historical influences and the Treaty of Waitangi. Part IV surveys the presence and use of Māori spiritual values in New Zealand law, looking primarily at English language provisions that refer to tikanga Māori. Parts V and VI address in turn the constitutional and rights implications of the provisions found. While Part V concludes that the

2 Ibid, 612.

3 Hirini Moko Mead *Tikanga Māori – Living by Māori Values* (Huia, Wellington, 2003) 2.

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

5 "Indigenous Spiritual Concerns and the Secular State", above n 1.

6 Ibid, 611. See also Rex Ahdar "Religious Liberty in a Temperate Zone: A Report from New Zealand" (2006) 21 *Emory Intl L Rev* 205 ["Religious Liberty in a Temperate Zone"].

7 "Indigenous Spiritual Concerns and the Secular State", above n 1, 627; see also Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, South Melbourne, 2003) 280–281.

current provisions do not undermine New Zealand's secular status, Part VI suggests that tikanga Māori provisions do have the potential to interfere with rights and freedoms protected by the New Zealand Bill of Rights Act 1990 (NZBORA). Part VII discusses possible ways to mitigate that risk.

## II TIKANGA MĀORI AND RELIGION

The word tikanga is commonly used to refer to Māori custom or culture, but the concepts are not entirely synonymous. The New Zealand Law Commission, which is statutorily obliged to take into consideration te ao Māori (the Māori dimension),<sup>8</sup> released a report in 2001 entitled *Māori Custom and Values in New Zealand Law*.<sup>9</sup> The report examined the existing impact of Māori custom and values on New Zealand law and considered ideas for future law reform projects that would give effect to Māori values.<sup>10</sup> In its report, the Commission used tikanga Māori as a general term for Māori custom law, but acknowledged that a simple translation downplayed the complexity of tikanga.<sup>11</sup> It described tikanga as follows:<sup>12</sup>

"Tikanga" derives from the adjective "tika" meaning "right (or correct) and just (or fair)". The addition of the suffix "nga" renders it a noun which, in this context, may be defined as "way(s) of doing and thinking held by Māori to be just and correct, the right Māori ways".

Tikanga includes measures to deal firmly with actions causing a serious disequilibrium within the community. It also includes approaches or ways of doing things which would be considered to be morally appropriate, courteous or advisable, but which are not rules that entail punitive sanctions when broken. For example, it is tika to purify oneself through cleansing with fresh water following proximity to death, but if this is not done there is no law with a specified penal sanction for non-compliance. ... [M]any Māori believe that failure to do what is tika may attract supernatural punishment if it involves a breach of tapu.

Tikanga Māori comprises a spectrum with values at one end and rules at the other, but with values informing the whole range. It includes the values themselves and does not differentiate between sanction-backed laws and advice concerning nonsanctioned customs. In tikanga Māori, the real challenge is to understand the values because it is these values which provide the primary guide to behaviour.

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

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

10 Ibid, para 2.

11 Ibid, paras 5, 68.

12 Ibid, paras 73–75, footnotes omitted.

The extract shows that tikanga Māori combines rules with values, and procedures with principles. This combination engages the law–religion debate when tikanga Māori is given legislative effect because some of the values underlying tikanga are inherently spiritual.

It is beyond the scope of this article to identify and separate the aspects of tikanga that reference spiritual values from those that do not, but the distinction can be made. Tapu, for example, is an underlying value of tikanga that Hirini Moko Mead describes as having a source that "goes to the heart of Māori religious thought".<sup>13</sup> In comparison, there is no overt spiritual content in underlying values such as manaakitanga and whanaungatanga. Mead describes manaakitanga as emphasising nurturing relationships and caring about others, and whanaungatanga as emphasising the importance of family relationships.<sup>14</sup> Christian values have also influenced and in some cases overlaid traditional Māori spiritual values.<sup>15</sup>

The idea of spirituality suggests ways of thinking framed by matters of the human spirit rather than by material or physical things. However, finding a general definition of religion is difficult. Even the experts find it a difficult concept to pin down.<sup>16</sup> A religion can be anything from an organised and established system of belief, such as Christianity or Islam, to a broad societal movement about what is holy, to entirely personal beliefs and practices.<sup>17</sup> One dictionary of religion describes the following definition as "adequate":<sup>18</sup>

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

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13 Mead, above n 3, 30.

14 Ibid, 28–29. Mead's 398-page book on tikanga Māori includes the following proviso (at 7):

The aim here has been to limit the scope of the book because the author is not proposing to write an encyclopaedia. This is an introduction to tikanga Māori, a beginning of serious study of the subject in order to meet a need for information. There is far more to tikanga Māori than is covered in this book.

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

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

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

18 *The HarperCollins Dictionary of Religion*, above n 16, 893.



form of benevolent or malevolent spirits who cause good or harm to a person or community. Furthermore, the definition requires that such superhuman beings be specifically related to beliefs and practices, myths and rituals.

Nor is there an accepted legal definition of religion.<sup>19</sup> Where religion is concerned, a definition can raise "the danger of discrimination based on a definitional bias against unknown, or unpopular, religions (precisely those which are in the greatest need of legal protection)."<sup>20</sup> In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* Murphy J said:<sup>21</sup>

Religious freedom ... has been asserted by men and women throughout history by resisting the attempts of government, through its legislative, executive or judicial branches, to define or impose beliefs or practices of religion. Whenever the legislature prescribes what religion is, or permits or requires the executive or the judiciary to determine what religion is, this poses a threat to religious freedom.

However undesirable it may be to rule on matters of religion, questions of religion invariably come before the courts. Australian and New Zealand courts have said that religion involves belief in a supernatural being, thing or principle as well as canons of conduct that give effect to that belief.<sup>22</sup> Canadian courts have described religion as a "particular and comprehensive system of faith and worship" combined with "belief in a divine, superhuman or controlling power":<sup>23</sup>

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

In the United States, religion has been held to involve a comprehensive system of belief.<sup>24</sup> It is often characterised by formal ceremonies or insignia, and will usually address "fundamental and ultimate questions having to do with deep and imponderable matters".<sup>25</sup> A religion need not be

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19 Peter Radan "International Law and Religion" in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion* (Routledge, Abingdon (Oxfordshire), 2005) 12; see also James A R Nafziger "The Functions of Religion in the International Legal System" in Mark W Janis and Carolyn Evans (eds) *Religion and International Law* (2 ed, Martinus Nijhoff Publishers, Leiden/Boston, 2004) 155, 156–159.

20 See Wojciech Sadurski "On Legal Definitions of 'Religion'" in Wojciech Sadurski (ed) *Law and Religion* (Dartmouth, Aldershot (Hampshire), 1992) 297, 297–298.

21 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, para 7 Murphy J.

22 Ibid, para 14 Mason CJ and Brennan J; *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673 (HC).

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

24 *Africa v Pennsylvania* (1981) 662 F 2d 1025, 1031 (3d Cir).

25 Ibid, 1032.

organised or popular, and the sincerity of beliefs is more significant than their objective legitimacy.<sup>26</sup>

These judicial definitions suggest that the law "finds" religion where beliefs of a transcendental nature coincide with organisation of those beliefs. Tikanga Māori blends an underlying system of values, some spiritually based, with accepted customs and protocols that are based on those values. It also commonly involves practices such as karakia, which are overtly spiritual in nature. Therefore, it is not unreasonable to consider tikanga from a law and religion perspective. Although aboriginal religions can be religions for the purposes of the law,<sup>27</sup> this article does not claim that tikanga Māori is a religion. It is unlikely that those who practise tikanga would see it as such. It is not a church or a form of worship in the traditional sense, unlike, for example, the Catholic Church or even the institutionalised forms of Māori Christianity such as the Ringatu and Ratana faiths.<sup>28</sup> But that does not mean that it is irrelevant to discussions about law and religion.

The spiritual aspects of tikanga mean that its incorporation into legislation may have implications for New Zealand's status as a secular State, as well as for religious freedoms and equality rights. The next Part of this article describes the constitutional framework against which these questions are assessed.

### **III CONSTITUTIONAL FRAMEWORK**

#### **A Religion and Constitutional Arrangements**

[T]here are myriad diffuse and intangible influences that the state exerts upon religion, and vice versa.<sup>29</sup>

The State–religion relationship can take many forms, from complete fusion of religious and State institutions to a degree of separation that amounts to complete hostility between them. A number of possible State–religion relationships are identified in Figure 1 and discussed below in order to provide a framework for assessing New Zealand's constitutional standpoint on religion.<sup>30</sup>

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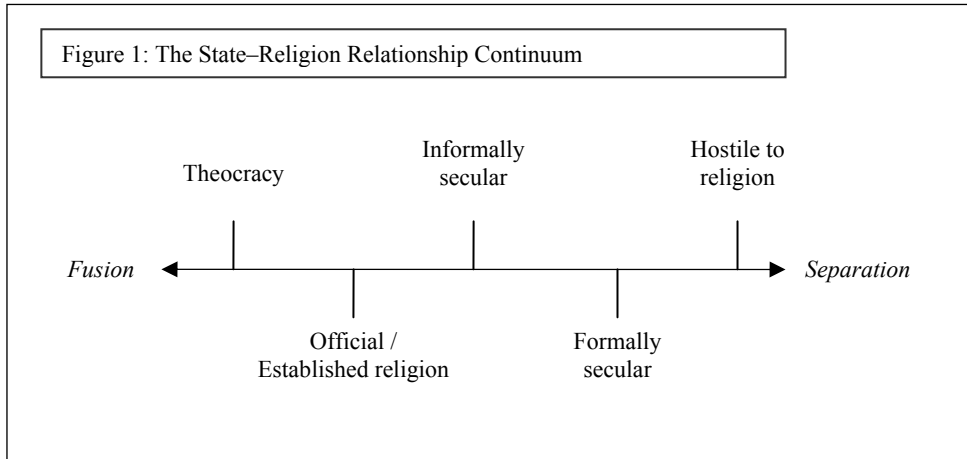
26 *United States v Ballard* (1944) 322 US 78, 86–87.

27 "Indigenous Spiritual Concerns and the Secular State", above n 1, 612; Rishworth and others, above n 7, 281.

28 See generally William Greenwood *The Upraised Hand, or, the Spiritual Significance of the Ringatu Faith* (Polynesian Society, Wellington, 1942) and Newman, above n 15.

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

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



At the fusion end of the continuum are theocracies, where governing authority is sourced directly from God (or other deity). In a theocracy, the State furthers religious interests by implementing and enforcing divine laws.<sup>31</sup> However, states may give a religion legal status without necessarily fusing the so-called "two kingdoms"<sup>32</sup> of temporal and spiritual authority. For example, the Anglican Church of England is England's established church<sup>33</sup> and the Lutheran church is established in Norway, but the governments of those nations do not exist solely to further religious interests. Established churches can simply have a privileged position with regard to State recognition and support.<sup>34</sup>

In a secular State, the institutions of government and God are separated, with the State neither supporting an established church nor impairing religious liberty.<sup>35</sup> The lines of separation may be formally drawn by constitutional anti-establishment provisions, such as in the United States by the First Amendment<sup>36</sup> and in Australia by section 116 of its Constitution,<sup>37</sup> or may be loosely arranged and merely a matter of State practice.

31 Ahdar and Leigh, above n 29, 70. For example, both Iran and Afghanistan have been under theocratic rule in recent times to the extent that political authority and social arrangements were wholly controlled by clerics.

32 See Michael W McConnell "Why is Religious Liberty the 'First Freedom'?" (2000) 21 *Cardozo L Rev* 1243, 1246.

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

34 Ahdar and Leigh, above n 29, 76.

35 Robert Audi "The Separation of Church and State and the Obligations of Citizenship" in Sadurski (ed), above n 20, 29, 30.

36 US Constitution, amendment I:

A formal guarantee of secularism is not necessarily more effective than informal arrangements at preventing religion from influencing the law.<sup>38</sup> For example, the First Amendment of the US Constitution has been said to come close to excluding religion from the public sphere,<sup>39</sup> but the Christian persuasion of the US political leadership is often evident. When President George W Bush addressed a joint session of Congress and the American people shortly after the terrorist bombing of the World Trade Centre in 2001, he concluded: "[i]n all that lies before us, may God grant us wisdom, and may He watch over the United States of America."<sup>40</sup> At a memorial service following a mass shooting at a university campus in April 2007, he said: "As the scripture tells us, don't be overcome by evil, but overcome evil with good".<sup>41</sup>

The Australian anti-establishment provision is drafted in similar terms to that of the United States, but has proven to be less restrictive in practice. The High Court of Australia has held it to invalidate only laws whose purpose is the creation of a national church.<sup>42</sup> Australian laws that incorporate or further religious values in less extreme ways are not unconstitutional.<sup>43</sup>

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

37 Australian Constitution, s 116:

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

38 Ahdar and Leigh, above n 29, 68: "At the level of beliefs and ideology, the state may be predisposed, or hostile, to a religion (or religions generally) whatever the official constitutional position espoused."

39 Peter Radan, Denise Meyerson and Rosalind F Croucher "Introduction" in Radan, Meyerson and Croucher (eds), above n 19, 2.

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

41 Reuters "Students turn to God in wake of Virginia shooting" 19 April 2007 <<http://www.stuff.co.nz/>> (last accessed 19 April 2007). On religion in politics and church-State separation in the United States, see Amanda Harmon Cooley "God and Country: The Dangerous Intersection of Religion and Patriotism in the First Term of the George W Bush Administration" (2006) 16 Kan J L & Pub Pol'y 157; Steven G Gey "Vestiges of the Establishment Clause" (2006) 5 First Amend L Rev 1; David A Bosworth "American Crusade: The Religious Roots of the War on Terror" (2006) 7 Barry L Rev 65.

42 See Tony Blackshield "Religion and Australian Constitutional Law" in Radan, Meyerson and Croucher (eds), above n 19, 81-115.

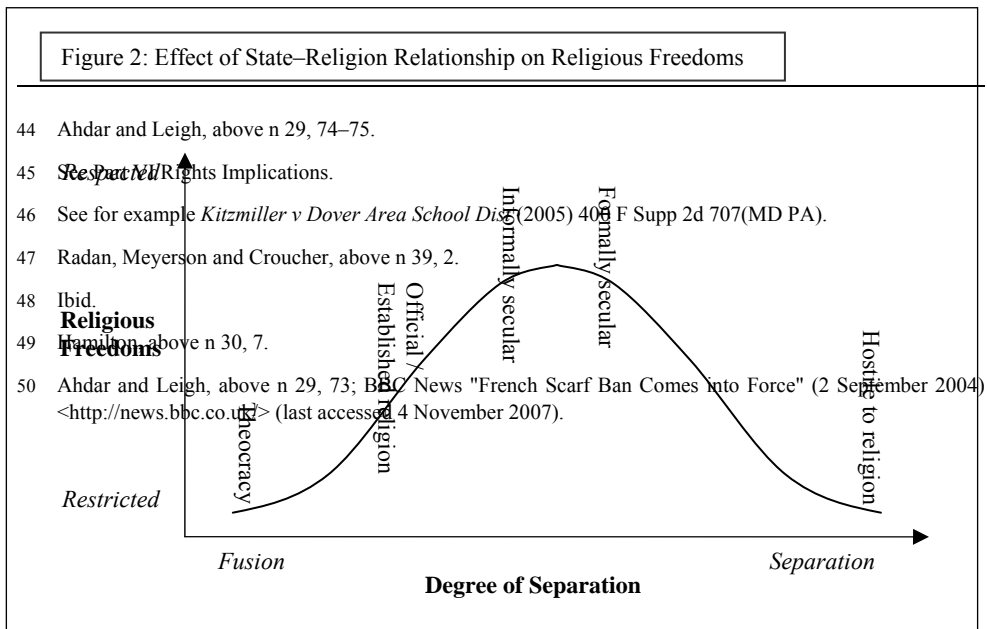
43 See Tony Blackshield and George Williams *Australian Constitutional Law & Theory* (The Federation Press, Sydney, 2002) 1115-1125.

At the far right of the State–religion relationship spectrum, God and government are wholly divorced. Governments may go further than just separating themselves from religious influences, and actively oppose religion in all forms: hostile, rather than benign, separation.<sup>44</sup>

Constitutional State–religion relationships can have a tremendous impact on individual religious freedoms: the right to have religious beliefs, the right to manifest them and the right not to be discriminated against because of them. The scope of these rights is discussed below,<sup>45</sup> but it suffices at this point to say that a relationship can be drawn between constitutional arrangements and religious freedoms. A State's attitude to religion may influence the content of school curricula (for example, whether creationism may be taught<sup>46</sup>), State funding of religious schools and the observance of public holidays.<sup>47</sup> It can determine the extent to which citizens can demand exemption from laws that are inconsistent with their religious beliefs, such as education or drug laws.<sup>48</sup>

Figure 2, below, maps a theoretical relationship between State–religion arrangements and religious freedoms. Of the constitutional arrangements discussed above, those at the extremes of the continuum are most likely to be inconsistent with religious freedoms: theocracies allow belief in only one religion and States hostile to religion allow belief in none. The degree to which an established or official religion will undermine religious freedoms will depend on internal constitutional arrangements. For example, although England has an established church, religious freedom was increasingly tolerated and eventually promoted there from the 19<sup>th</sup> century.<sup>49</sup> A State's international law obligations will also be relevant.

Secular States arguably allow the greatest scope for religious freedoms, but the extent of such freedoms in any regime again depends on individual constitutional and political arrangements. In France, for example, which has been formally secular since 1905, religious clothing and insignia have been recently banned from schools: arguably a State restriction on religious freedom because the law was aimed predominantly at Muslim students wearing headscarves.<sup>50</sup>



### ***B New Zealand: A Secular State?***

It is generally accepted that New Zealand does not have a national established church.<sup>51</sup> In the early days of the colony, Parliament and the courts stated that there would be no state church or state-supported church, but rather equality of religious denominations,<sup>52</sup> and the courts have been generally reluctant to interfere in ecclesiastical matters, particular those that require them to consider aspects of faith and belief.<sup>53</sup> However, that secular status is informal. New Zealand law has no equivalent to the anti-establishment clauses in the United States or Australian Constitutions. With no written constitution, no entrenched Bill of Rights and no second legislative chamber, Parliament is supreme:<sup>54</sup> it can theoretically support or suppress particular religions as it sees fit. Without de jure separation, secularism depends on de facto separation, and the degree of separation between State and religion in New Zealand is open to interpretation.

Nineteenth century New Zealand did not follow England in establishing a national church, but early law-makers were predominantly Christian. Accordingly, Christianity helped to shape New

---

51 This was restated by the Court of Appeal in *Mabon v Conference of the Methodist Church of New Zealand* [1988] 3 NZLR 513, 523 (CA) Richardson P for the Court.

52 (1854–1855) NZPD 4–6; *Carrigan v Redwood* (1911) 30 NZLR 244, 253 (SC) Cooper J.

53 *Marshall v NSA of the Bahá'is of NZ Inc* [2003] 2 NZLR 205, paras 31–38 (HC) Randerson J.

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

Zealand's culture, tradition and law.<sup>55</sup> Its influence is still evident. Christmas Day, Good Friday and Easter Monday – sacred days to the Christian faith – are public holidays.<sup>56</sup> Christmas Day, Good Friday and Easter Sunday are kept free of radio and television advertising,<sup>57</sup> as well as most retail trading.<sup>58</sup> Television advertising is further prohibited on Sunday mornings generally.<sup>59</sup> At the second reading debate of the Broadcasting Bill in 1989, it was noted that Sundays, Anzac Day, Christmas Day, Good Friday and Easter Sunday "are special in our society, and should be retained as such."<sup>60</sup> In Canada, similar restrictions have been described as preserving the "religious sanctity of the Christian Sabbath".<sup>61</sup>

In criminal law, the only crime under the heading of "crimes against religion" in the Crimes Act 1961 is blasphemous libel.<sup>62</sup> Although not applied in New Zealand since 1922,<sup>63</sup> blasphemous libel has not been used to punish attacks on any faith other than Christianity. That position derives from the English common law.<sup>64</sup> However, it is unlikely that a New Zealand court would find a justification today for protecting Christianity but not other religions.<sup>65</sup>

As a final example, in the Marriage Act 1955, "marriage" has been interpreted to mean "a union between a man and a woman",<sup>66</sup> despite the Act's gender-neutral language. This definition echoes the oft-quoted common law definition of marriage from *Hyde v Hyde*: "Marriage as understood in

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55 I L M Richardson *Religion and the Law* (Sweet & Maxwell, Wellington, 1962) 61, cited in Rex Ahdar "New Zealand and the Idea of a Christian State" in Rex Ahdar and John Stenhouse (eds) *God and Government: The New Zealand Experience* (University of Otago Press, Dunedin, 2000) 63.

56 Holidays Act 2003, s 44(1).

57 Broadcasting Act 1989, s 81.

58 Shop Trading Hours Act Repeal Act 1990, ss 3–4A. Three Members Bills proposing Easter trading reform have recently been defeated: Easter Sunday Shop Trading Amendment Bill, no 42-2; Shop Trading Hours (Easter Trading Local Exemption) Bill, 168-1; Shop Trading Hours Act Repeal (Easter Trading) Amendment Bill, no 51-2.

59 Broadcasting Act 1989, s 81.

60 Margaret Austin MP (16 May 1989) 498 NZPD 10507.

61 See Rishworth and others, above n 7, 286.

62 Crimes Act 1961, s 123.

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

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

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

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

Christendom is the voluntary union for life of one man and one woman, to the exclusion of others."<sup>67</sup>

The factors leading to the predominance of Christian values in New Zealand may be largely historical: New Zealand's growing commitment to both secularism and human rights is gradually eroding Christianity's informally privileged status.<sup>68</sup> The increasing legal recognition of personal relationships other than traditional Christian marriages is an example of this. Criminal sanctions against homosexual relationships were abolished in 1986,<sup>69</sup> the Matrimonial Property Act 1976 was renamed the Property (Relationships) Act 1976 in 2002, giving legal rights to de facto couples, the Civil Union Act 2004 provides a legal alternative to marriage for same-sex couples, and family law reforms in 2004 have recast notions of parenthood and guardianship beyond traditional family models.<sup>70</sup> The wane of Christian values in law is matched by the waning popularity of Christianity in society. New Zealanders identifying as Christian fell from 86 per cent of the population in 1961 to 55.6 per cent in 2006. Most defectors appear to have joined the "no religion" camp, which went from just 0.7 per cent of the population in 1961 to 34.7 per cent in 2006.<sup>71</sup>

If legal and social tides are eroding Christian values from the bedrock of New Zealand law, they may also simultaneously be leaving behind deposits of Māori spiritual values via increasing statutory protection of tikanga Māori.<sup>72</sup> There are several constitutional and social factors behind this trend, with an increasing acknowledgement of the Treaty of Waitangi perhaps paramount among them.

### ***C The Treaty of Waitangi***

The Treaty of Waitangi, signed in 1840 between Māori chiefs and the Queen of England, is one of New Zealand's founding constitutional documents. There are two ways in which the Treaty may oblige the State to protect tikanga Māori and its spiritual values: as taonga under Article 2 of the Treaty, or as ritenga under the Treaty's so-called "Fourth Article".

The English text of Article 2 contains the Queen's confirmation and guarantee to Māori of:<sup>73</sup>

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

68 See "Religious Liberty in a Temperate Zone", above n 6, 213.

69 Homosexual Law Reform Act 1986.

70 Care of Children Act 2004.

71 *New Zealand Official Yearbook 1970* (Department of Statistics, Wellington, 1970) 87; Statistics New Zealand "Quick Stats About Culture and Identity" <<http://www.statistics.govt.nz>> (last accessed 25 September 2007) 11–12.

72 See "Religious Liberty in a Temperate Zone", above n 6, 219.

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



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

The Māori text of Article 2 translates "undisturbed possession" as "te tino rangatiratanga" and "other properties" as "taonga", with the result that the Māori version of Article 2 literally guarantees Māori "the unqualified exercise of chieftainship over their lands, villages, and all their treasures".<sup>74</sup> The significance of describing the objects of the Article 2 guarantee as taonga is that Article 2 has been interpreted to guarantee intangibles such as culture, language and religion<sup>75</sup> as well as the tangible possessions listed: land, forests and fisheries.<sup>76</sup> The Waitangi Tribunal has said that:<sup>77</sup>

[T]he Crown's guarantee of te tino rangatiratanga is meaningless if the tikanga that sustain and regulate the rangatira and his relationship to the people, and the land, are discounted and undermined. Indeed, we go further. We say that in order properly to fulfil the role of Treaty partner, and actively protect the cultural foundation of what it is to be Māori, the Crown must itself be schooled in the essentials of tikanga.

It has also been argued that there was an oral codicil to the Treaty, which provided that "every form of distinctiveness – including that of custom and religion" would be respected.<sup>78</sup> Claudia Orange describes the so-called "Fourth Article" as a "verbal commitment given only by chance",<sup>79</sup> and reports that it arose from a discussion on religious freedom and customary law between Bishop Pompallier, a Catholic, and William Colenso, an Anglican missionary.<sup>80</sup> The discussion prompted Pompallier to ask Captain William Hobson (who had the responsibility of achieving a treaty) to publicly guarantee religious freedom to Māori. To undermine the authority of a clause he perceived as favouring the Roman Catholic faith, Colenso suggested the insertion of Māori custom, translated as "ritenga".<sup>81</sup> Hobson accordingly agreed to read the following statement to the assembly at

74 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 663 (CA) Cooke P.

75 See Rishworth and others, above n 7, 415.

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

77 Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071* (Legislation Direct, Wellington, 2004) 3.

78 *Māori Custom and Values in New Zealand Law*, above n 9, para 313.

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

80 *Ibid*; Newman, above n 28, 112–113.

81 Orange, above n 79, 53.

Waitangi before the Treaty was signed: "The Governor says that the several Faiths (Beliefs) of England, of the Wesleyans, and Rome, and also Māori custom shall alike be protected by him."<sup>82</sup>

Orange suggests that the Fourth Article was more an expression of "sectarian jealousy" than a genuine recognition of Māori custom, and that it can therefore be given little weight.<sup>83</sup> Sir Geoffrey Palmer and Matthew Palmer suggest that, in any case, it could add little to existing legal protections for religious freedom.<sup>84</sup> Nevertheless, the Fourth Article does reinforce that Māori custom was likened to religion at the time that the Treaty of Waitangi was signed. Whether or not the oral Fourth Article can be relied upon, tikanga Māori is protected as a taonga under Article 2 of the Treaty.

The Treaty of Waitangi has been described as "part of the fabric of New Zealand Society",<sup>85</sup> and has a pervasive influence on New Zealand law-making. The *Cabinet Manual* lists the Treaty as one of the sources of the constitution, noting that it "may indicate limits in our polity on majority decision making" and may sometimes require the law to give "special recognition to Māori rights and interests."<sup>86</sup> Special recognition will not be required in all cases because, under Article 3 of the Treaty, Māori are part of the larger New Zealand community and can be subject to the same law as other citizens.<sup>87</sup> The Legislative Advisory Committee recommends that policy-makers consider early on whether to consult with Māori about the policy to be enacted, and also consider whether the policy creates potential conflicts with Treaty principles or with Māori rights and interests protected at common law.<sup>88</sup>

Both the Waitangi Tribunal and the Courts have accepted and asserted the importance of tikanga.<sup>89</sup> This, and the constitutional processes described above, explains why tikanga Māori

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82 Newman, above n 28, 112–113 but compare the slightly different wording cited in Orange, above n 79, 53.

83 Ibid.

84 Palmer and Palmer, above n 54, 334.

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

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

87 See Legislation Advisory Committee *Legislation Advisory Committee Guidelines: Guidelines on Process and Content of Legislation, 2001 Edition and the 2003 Supplement* (Wellington, 2001/2003) 126 [*LAC Guidelines*].

88 See generally *LAC Guidelines*, above n 87, ch 5.

89 See for example Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy: Wai 1071*, above n 77; *Huakina Development Trust v Waikato Valley Authority*, above n 85; *Beadle v Minister of Corrections* (8 April 2002) EC WN A074/2002. See also *Māori Custom and Values in New Zealand Law*, above n 9, paras 312–316.

warrants legislative protection.<sup>90</sup> The next Part of the article looks at how it has been incorporated to date, and what effects it is having.

#### ***IV TIKANGA MĀORI IN NEW ZEALAND LAW***

For the purposes of this article, primary legislation was surveyed for references to tikanga Māori. While there are certainly references to tikanga Māori in delegated legislation,<sup>91</sup> including some expansive definitions,<sup>92</sup> it is the references in primary legislation that are most significant in terms of the religious freedoms discussion that follows. Statutes are not subject to the same administrative checks and balances as delegated legislation, such as the scrutiny of the Regulations Review Committee, potential for disallowance by the House under the Regulations (Disallowance) Act 1989, and challenges to legitimacy via judicial review. If primary legislation is inconsistent with protected rights and freedoms in the NZBORA, including religious freedoms, it may be read down by the courts but cannot be struck down.<sup>93</sup> Also, statutory provisions using the word "tikanga" within Māori prose were not analysed, such as where the Māori text of the Treaty of Waitangi was incorporated,<sup>94</sup> or in descriptive passages such as preambles or apologies.<sup>95</sup> These provisions were excluded for two main reasons. First, it was beyond the skill of the author to translate them for analysis. Secondly, the complexity of tikanga Māori is less likely to be misunderstood within its own linguistic context:<sup>96</sup>

[O]ne's understanding of tikanga Māori is informed and mediated by the language of communication. One's understanding through te reo Māori is different from one obtained through the English language.

After these exclusions, 32 Acts were found that referred to tikanga Māori. The oldest tikanga Māori provision currently in force is in the Maniapoto Māori Trust Board Act 1988, which

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90 Although Ahdar suggests that Māori culture and spirituality may be "a particularly suitable focus in a climate made up of such diverse ideological streams as post-modernism, anti-colonialism, post-colonial guilt feelings, and fascination with New Age values". "Religious Liberty in a Temperate Zone", above n 6, 220.

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

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

93 New Zealand Bill of Rights Act 1990, ss 4, 6. Note, though, that there is a recurring thread in judicial and academic writings suggesting that parliamentary sovereignty is limited in fact by "deep lying rights": See for example M D Kirby "Lord Cooke and Fundamental Rights" in P Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon* (Butterworths, Wellington, 1997) and Hon Michael Kirby "Deep Lying Rights – A Constitutional Conversation Continues" (2005) 3 NZJPIL 195.

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

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

96 Mead, above n 3, 2.

establishes the Maniapoto Māori Trust Board as an administrative body to represent the Maniapoto iwi.<sup>97</sup> The Act establishes a Council of Elders (Te Mauri o Maniapoto), whose function is to advise the Board on "matters involving tikanga, te reo, and kawa [ceremony]".<sup>98</sup> A similar provision applying generally to all Māori Trust Boards was added to the Māori Trust Boards Act 1955 by a 1988 statutory amendment,<sup>99</sup> although this did not come into force until 1989. These two Acts contain the only statutory references to tikanga enacted in the 1980s.<sup>100</sup> Twelve of the remaining 30 Acts identified by the survey were enacted (or relevantly amended) in the 1990s, and 18 were enacted (or relevantly amended) between 2000 and 2006. This suggests an increasing frequency of use. However, there is not yet uniformity of use or definition.

Only just over half of the Acts that use tikanga Māori attempt to define it. Seven define tikanga Māori in their interpretation sections as "Māori customary values and practices",<sup>101</sup> which expressly combines the values-based and procedural elements. A further 10 Acts define tikanga Māori in the process of giving it operative effect, by way of a short definition enclosed in brackets. Four of these are no different from the definition used in interpretation sections – "Māori customary values and practices"<sup>102</sup> – but one definition adds that tikanga Māori can "involve both rights and obligations".<sup>103</sup> The Education Act 1989 explains tikanga Māori in one section as "Māori culture"<sup>104</sup> and as "Māori custom" in another.<sup>105</sup> Other bracketed definitions include: "Māori custom and practice",<sup>106</sup> "Māori protocol and culture" (two instances)<sup>107</sup> and, interestingly, "Ngai

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

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

99 Māori Trust Boards Act 1955, s 23A, added by Māori Trust Boards Amendment Act 1988, s 2.

100 Clauses referencing the principles of the Treaty of Waitangi began to be used at about the same time: Rishworth and others, above n 7, 412. The principles were given substance by the Court of Appeal in *New Zealand Māori Council v Attorney-General*, above n 74. See Palmer and Palmer, above n 54, 321.

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

102 Code of Good Faith for Public Health Sector, cl 10, in sch 1B of the Employment Relations Act 2000; Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 13(3); Ngati Awa Claims Settlement Act 2005, s 13(3); Te Arawa Lakes Claims Settlement Act 2006, s 12(3).

103 Ngaa Rauru Kaitiaki Claims Settlement Act 2005, s 13.

104 Education Act 1989, s 61.

105 *Ibid*, s 162.

106 Local Government Act 2002, s 33.

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

Tahu customary values and practice",<sup>108</sup> which highlights that tikanga Māori is not ascertainable by reference to a pan-Māori standard, but varies from iwi to iwi.<sup>109</sup>

The statutory definitions of tikanga are not particularly helpful, because concepts such as culture, custom and values are more illustrative than definitive. They indicate what kind of thing tikanga Māori is, but do not specify the values or practices that it can encompass. Whether spiritual aspects of tikanga Māori are included will depend on the nature of the situation in which it is to be applied, and on who is required to interpret it.

As well as definitional provisions, there are six categories of operative provision:

1. In the first category, tikanga Māori is an express, relevant consideration in decision-making.
2. Second-category provisions ensure a knowledge base of tikanga Māori on certain statutory bodies.
3. Provisions in the third category allow procedural aspects of tikanga Māori to be followed in certain proceedings.
4. The fourth usage of tikanga Māori justifies the confidentiality of certain official information.
5. The fifth category comprises relationship-defining references to tikanga that may have a derivative effect on administrative decision-making.
6. In the sixth category, tikanga Māori forms part of a policy directive.

The following sections describe the categories more fully with reference to the provisions that fall into them, before drawing some conclusions.

#### *A A Relevant Consideration for Decision-Makers*

The first category of provisions makes tikanga Māori relevant to executive and judicial decision-making. With these provisions, Parliament has effectively delegated responsibility for determining what tikanga Māori means in particular situations. For example, Māori Land Court judges are required to consider tikanga Māori under Te Ture Whenua Māori 1993 (Māori Land Act 1993) in the context of determining interests in land,<sup>110</sup> and under the Foreshore and Seabed Act 2004 in the context of making customary rights orders.<sup>111</sup>

The Governor-General also has a law-making function in which tikanga Māori is relevant, which is exercised on ministerial advice. The Minister for the Environment advises the Governor-

<sup>108</sup> Resource Management (Waitaki Catchment Amendment) Act 2004, s 8.

<sup>109</sup> Mead, above n 3, 8.

<sup>110</sup> Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), ss 106, 107, 114, 129, 132, 150D.

<sup>111</sup> Foreshore and Seabed Act 2004, s 50.

General in relation to water conservation orders, made under the Resource Management Act 1991.<sup>112</sup> These orders can provide for the "protection of characteristics which any water body has or contributes to, and which are considered to be of outstanding significance in accordance with tikanga Māori."<sup>113</sup>

Tikanga Māori is also a relevant consideration under section 162 of the Education Act 1989, which requires the Minister of Education to recommend to the Governor-General whether particular bodies should be established as tertiary institutions. The section indicates that a wānanga is characterised by, among other things, its "application of knowledge regarding ahuatanga Māori (Māori tradition) according to tikanga Māori (Māori custom)".<sup>114</sup>

### ***B A Presence on Decision-Making Bodies***

Under the second category of provisions, decision-makers are required to consider tikanga Māori in the context of appointing people to statutory bodies. For example, the Governor-General is responsible for appointing judges to the Māori Land Court, and must only appoint judges who have suitable "knowledge and experience of te reo Māori, tikanga Māori, and the Treaty of Waitangi".<sup>115</sup> Ministers have similar considerations with regard to making appointments to the Environmental Risk Management Authority,<sup>116</sup> the New Zealand Historic Places Trust Board,<sup>117</sup> the Local Government Commission,<sup>118</sup> the Archives Council,<sup>119</sup> and, under the Resource Management Act 1991, boards of inquiry constituted to consider matters relating to proposals of national significance.<sup>120</sup> The obligations on Ministers vary, from appointing individuals with knowledge, skills or experience in tikanga Māori to ensuring that such knowledge, skills or experience are adequately represented on the body as a whole. Knowledge of tikanga Māori is also a relevant consideration for determining membership of the Ethics Committee of the Health Research Council<sup>121</sup> and choosing directors and board members of the Māori Television Service (Te Aratuku Whakaata Irirangi Māori),<sup>122</sup> although these decisions are made by the bodies themselves, rather

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112 Resource Management Act 1991, s 214.

113 Ibid, s 199(2)(c).

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

115 Te Ture Whenua Māori Act 1993 (Māori Land Act 1993), s 7(2A).

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

117 Historic Places Act 1993, s 42.

118 Local Government Act 2002, s 33.

119 Public Records Act 2005, s 14.

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

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

than by the responsible minister. Where decision-making bodies are required to have a certain level of appreciation of and expertise in tikanga Māori, tikanga must be part of the decision-making context for those bodies, whether their decisions affect only Māori or both Māori and tauwi.<sup>123</sup>

### ***C Influencing Decision-Making Procedures***

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

- Under the Resource Management Act 1991, both local authorities and the Environment Court must, where appropriate, recognise tikanga Māori when determining their procedures for hearings or court proceedings;<sup>124</sup>
- The Minister of Health gives procedural instructions to inquiry boards constituted to conduct special health inquiries under the New Zealand Public Health and Disability Act 2000, and those instructions may include recognising tikanga Māori where appropriate;<sup>125</sup>
- The Chief Executive of the Department of Building and Housing must recognise tikanga Māori with regard to the procedure of making determinations about various matters relating to the building code;<sup>126</sup>
- Board of inquiry hearings about proposed pest management strategies under the Biosecurity Act 1993 must be held without unnecessary formality, which may require recognising tikanga Māori.<sup>127</sup>

### ***D Justifying Withholding Information***

The fourth category of provisions deals with freedom of information. The risk of causing serious offence to tikanga Māori can justify blocking access to information arising from submissions, hearings or inquiries. This risk is often paired with the risk of disclosing the location of wāhi tapu.<sup>128</sup> The Acts under which tikanga Māori can have this effect are:

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

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

124 Resource Management Act 1991, ss 39, 269.

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

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

127 Biosecurity Act 1993, sch 1, cl 3.

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

- The Biosecurity Act 1993: boards of inquiry can protect information gained in hearings about proposed pest management strategies;<sup>129</sup>
- The Crown Minerals Act 1991: the restriction can apply to information contained in submissions made to the Chief Executive of the Ministry of Economic Development on draft minerals programmes, and allows information to be withheld by any department or minister from whom it is requested;<sup>130</sup>
- The Fisheries Act 1996: a Fisheries Dispute Commissioner can protect information gained in the course of an inquiry into a dispute;<sup>131</sup>
- The Resource Management Act 1991: local authorities can restrict access to hearings or to information gained in the course of any proceedings – whether or not that information is material to those proceedings;<sup>132</sup> and
- The Local Government Official Information and Meetings Act 1987: avoiding serious offence to tikanga Māori constitutes a good reason for withholding official information in the context of applications for resource consents or water conservation orders, or requirements for designations or heritage orders.<sup>133</sup>

### ***E Defining Māori Connections with Land, Water or Iwi***

The fifth category covers the incorporation of tikanga Māori in Claims Settlements Acts, which record formal settlements by the government of claims under the Treaty of Waitangi. There are currently 14 such Acts, two that apply to Māori generally<sup>134</sup> and 12 that are iwi-specific. Eight of the iwi-specific Acts refer to tikanga Māori in English language provisions.<sup>135</sup> In these Acts, tikanga Māori is used in the context of defining connections of both people and landscapes to the iwi to which the Act applies. For example, the Ngati Mutunga, Ngati Tama and Ngati Ruanui Claims Settlement Acts allow iwi membership to be recognised by reference to tikanga if blood

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

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

131 Fisheries Act 1996, s 121(2).

132 Resource Management Act 1991, s 42.

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

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

135 Ngaa Rauru Kīitahi Claims Settlement Act 2005, Ngai Tahu Claims Settlement Act 1998, Ngati Awa Claims Settlement Act 2005, Ngati Mutunga Claims Settlement Act 2006, Ngati Ruanui Claims Settlement Act 2003, Ngati Tama Claims Settlement Act 2003, Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, Te Arawa Lakes Settlement Act 2006.



relationships do not suffice,<sup>136</sup> and the Ngati Awa, Ngati Mutunga, Ngati Tuwharetoa (Bay of Plenty) and Te Arawa Lakes Claims Settlement Acts define customary rights with reference to tikanga.<sup>137</sup>

Three Claims Settlement Acts use tikanga Māori in statutory acknowledgments,<sup>138</sup> which are intended to facilitate "cultural redress".<sup>139</sup> Via statutory acknowledgements, the Crown accepts statements made by an iwi about its "particular cultural, spiritual, historical, and traditional association"<sup>140</sup> with defined physical areas. The legal effect of statutory acknowledgements is that the Environment Court, the Historic Places Trust and consent authorities must have regard to them.<sup>141</sup> Statutory acknowledgements do not have to be accepted as fact,<sup>142</sup> but they can be taken into account by the bodies mentioned above in exercising their functions. Via statutory acknowledgements, tikanga Māori thus becomes a relevant consideration in administrative decision-making. In that respect, the fifth category of provisions is similar to the first. However, references to tikanga in Claims Settlement Acts have been categorised separately here because they are largely descriptive, and because their relevance to administrative decisions is derivative, being reliant on external operative provisions.

#### ***F Policy Directives***

Two further references to tikanga fall into the sixth and final category, in which tikanga Māori is part of a policy directive. The first example is in the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003, which requires the Māori Television Service to promote both te reo Māori and tikanga Māori.<sup>143</sup> The second example is in the Education Act 1989. Section 61 of that Act obliges Boards of Trustees to prepare and maintain school charters for each school they administer. School charters must include:<sup>144</sup>

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136 Ngati Tama Claims Settlement Act 2003, s 10(1)(b)(i); Ngati Ruanui Claims Settlement Act 2003, s 13(2), Ngati Mutunga Claims Settlement Act 2006, s 13(5).

137 Ngati Awa Claims Settlement Act 2005, s 13(3); Ngati Mutunga Claims Settlement Act 2006, s 13(4); Ngati Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005, s 13(3); Te Arawa Lakes Claims Settlement Act 2006, s 12(3).

138 Ngaa Rauru Kiihahi Claims Settlement Act 2005, Ngai Tahu Claims Settlement Act 1988, Ngati Awa Claims Settlement Act 2005.

139 See for example, Ngaa Rauru Kiihahi Claims Settlement Act 2005, s 5(5).

140 Ibid, s 40.

141 See for example, *ibid*, s 41.

142 See for example, *ibid*, s 47(2).

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

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

... the aim of ensuring that all reasonable steps are taken to provide instruction in tikanga Māori (Māori culture) and te reo Māori (the Māori language) for full-time students whose parents ask for it ...

### **G Conclusions**

Five key conclusions can be drawn from this analysis. First, tikanga Māori is being used more frequently in legislation.<sup>145</sup> Secondly, tikanga Māori is being used in relatively predictable ways: there are just six categories of operative provision. Thirdly, tikanga Māori is legislatively defined either cursorily or not at all. This raises concerns not just about the nature and content of tikanga that was intended to be given legislative effect, but also about the consistency of its interpretation across those who have to apply it.

Fourthly, tikanga Māori may be applied to both Māori and tauwiwi. Of the 32 Acts containing relevant provisions, 14 are specific to Māori or Māori issues<sup>146</sup> and 18 are of general application, in areas ranging from resource management, local government and building to health, biosecurity, employment and education. It is the prospect of the spiritual aspects of tikanga Māori being applied to those who do not subscribe to its values that raises religious freedom issues. Whether the existing provisions are having an inappropriate effect is discussed further in Part V of this article.

The final key conclusion to be drawn from this analysis is that, via tikanga Māori, Māori spiritual values are part of New Zealand law. Tikanga helps to shape some advisory boards and decision-making bodies; it can be called upon to influence policy and decision-making, both procedurally and substantively; and it can justify restricting freedom of information. The constitutional implications of this are addressed in Part V below.

### **H Beyond Tikanga**

This article refers mainly to tikanga Māori provisions, but tikanga is not the sole vehicle for Māori spiritual values. The following list gives examples of other ways in which those values have been given legislative protection (with reference to the six categories identified above):

- Under the Children, Young Persons and their Families Act 1989, the Chief Executive of the Ministry of Social Development must ensure that all departmental policies and services "have particular regard for the values, culture, and beliefs of the Māori people"<sup>147</sup> (a category one provision);

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<sup>145</sup> This is true of Māori terms generally. Ministry of Justice *He Hīnātore ki te Ao Māori: A Glimpse into the Māori World* (Ministry of Justice, Wellington, 2001) iii [*He Hīnātore ki te Ao Māori*].

<sup>146</sup> The eight Claims Settlement Acts referred to in Part III E Defining Māori Connections with Land, Water or Iwi, along with the Foreshore and Seabed Act 2004, the Māori Trust Boards Act 1955, the Maniapoto Māori Trust Board Act 1988, the Māori Fisheries Act 2004, the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003; and Te Ture Whenua Māori Act 1993 (Māori Land Act 1993).

<sup>147</sup> Children, Young Persons, and their Families Act 1989, s 7(2)(c)(ii).

- The Human Assisted Reproductive Technologies Act 2004 provides for the establishment of an Advisory Committee of between eight to 12 members.<sup>148</sup> The Committee must include one or more Māori members "with expertise in Māori customary values and practice and the ability to articulate issues from a Māori perspective"<sup>149</sup> (a category two provision);
- The Local Government Act 2002 requires that whenever local authorities are considering significant decisions in respect of land or a body of water, they must: "take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga"<sup>150</sup> (another category one provision);
- The Broadcasting Act 1989 requires the Broadcasting Commission to promote both Māori language and culture<sup>151</sup> (a category six provision);
- Finally, it is also possible, if culture is recognised as a taonga of the Māori people, that it is legislatively protected by every Act of Parliament that must be interpreted consistently with the principles of the Treaty of Waitangi.<sup>152</sup>

Although the method of incorporating Māori values may vary, the examples given in this section suggest that provisions referencing Māori cultural and spiritual values perform fairly uniform functions, whether or not tikanga Māori is expressly mentioned. No examples were found that fell outside the six categories identified above.

The next Part of this article addresses whether the express recognition of Māori values in legislation, which necessarily includes some values of a spiritual nature, affects New Zealand's secular status.

#### *V CONSTITUTIONAL IMPLICATIONS*

Part III of this article described a range of law–religion constitutional arrangements, and identified that New Zealand is overtly secular but with law that has been influenced by Christian values. The Treaty of Waitangi was identified as a source of New Zealand's unwritten constitution requiring the law to give special recognition to Māori rights and interests in some situations. Part IV analysed tikanga Māori provisions as one aspect of the legislative response to that imperative. The constitutional question is whether those provisions only ensure special recognition or whether they elevate the values underlying tikanga Māori to a quasi-establishment status. Either way, tikanga

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

149 Ibid, s 34(4)(d).

150 Local Government Act 2002, s 77.

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

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

Māori in New Zealand law is constitutionally significant. The question is whether it is significant from a law and religion perspective.

The initial conclusion is straightforward: New Zealand's status as an informally secular State is unchallenged by the current legislative protection of tikanga Māori. The values underlying tikanga Māori are not constitutionally privileged at the expense of others. The constitutional objective is to ensure that the values of both Treaty partners have a place in New Zealand law. The State does not promote tikanga as a form of religion,<sup>153</sup> and is not obliged to assist or support any group that does so.<sup>154</sup> New Zealanders have not been asked to acknowledge that tikanga Māori provides "the religious grounds for political life."<sup>155</sup> Tikanga Māori has none of the hallmarks of an established religion.

Tikanga Māori does however have a considerable civil status in addition to its legal status. There has been a "renaissance of Māori participation in public life",<sup>156</sup> such that tikanga Māori often plays a highly visible role in public ceremonies and protocols. Ahdar notes that "Māori ritual has been eagerly co-opted to function as a sort of civil religion in New Zealand".<sup>157</sup> Choosing Māori ceremonial protocol over Christian prayer to punctuate public life may seem a less "religious" choice, but nonetheless the result has been described as a "degree of public religious expression that would not otherwise have been permitted, nor even contemplated."<sup>158</sup>

A civil religion has been defined as "that set of religious or quasi-religious beliefs, myths, symbols and ceremonies that unite a political community and that mobilize its members in pursuit of common goals."<sup>159</sup> Although the moral and religious significance of a civil religion is unclear,<sup>160</sup> it could be argued that it is constitutionally significant. The increasing prominence of Māori culture in the ceremonial aspects of public life may amplify the significance of its legal status. As more people observe tikanga Māori, whether they understand its spiritual aspects or not, it may exert a stronger influence on policy and law-making.

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153 Establishment may be as little as "the legal promotion of a particular religion". Ahdar and Leigh, above n 29, 80.

154 *Halsbury's Laws of England* (4 ed, Butterworths, London, 1975) vol 14 Ecclesiastical Law, 3 para 344.

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

156 Rishworth and others, above n 7, 304.

157 "Indigenous Spiritual Concerns and the Secular State", above n 1, 631. See also "Religious Liberty in a Temperate Zone", above n 6, 220–221.

158 Rishworth and others, above n 7, 304.

159 *The HarperCollins Dictionary of Religion*, above n 16, 274.

160 Ibid.

The increasing prevalence of tikanga in public life corresponds with a growing awareness and understanding of tikanga in New Zealand society generally.<sup>161</sup> This seems to be socially, rather than constitutionally, driven and does not undermine the conclusion that New Zealand is still an overtly secular State. However, as mentioned above, a country's constitutional standpoint on religion is not necessarily determinative of its protection of human rights. The next Part of this article considers the potential for the identified categories of tikanga Māori provisions to impact on protected rights and freedoms.

## **VI RIGHTS IMPLICATIONS**

Before analysing rights implications, it is important to restate the extent to which tikanga Māori and religion coincide. Tikanga Māori is not a religion. It is a range of practices and procedures underpinned by a set of cultural beliefs and values. Some of those practices and values, but not all of them, reference the spiritual world of gods and ancestors. The legal protection or promotion of tikanga Māori therefore engages two different sets of rights. On one hand, tikanga Māori provisions may have the potential to limit religious freedoms and equality rights. However, these rights must be balanced against Māori rights, both under the Treaty of Waitangi and via the minority rights protected by the NZBORA, to have their culture and beliefs accounted for in New Zealand law. Section A of this Part deals with religious freedoms, Section B with equality rights, and Section C with minority rights. Section D considers how these rights can be balanced in respect of the tikanga Māori provisions.

### **A Religious Freedoms**

Religious freedoms are protected by sections 13 and 15 of the NZBORA. Section 13 protects the right to freedom of thought, conscience and religion, which includes the right to hold opinions without interference. Section 15 protects the right to manifest one's religion or belief "in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private."

It has been suggested that freedom of religious belief is one of the most important human rights,<sup>162</sup> because "the freedom to think and believe as one pleases, in religion of all things, is the essence of individualism".<sup>163</sup> Section 13 does not protect the religion or belief itself, but the "individual *autonomy* in matters of religion and belief."<sup>164</sup> Sections 13–15 of the NZBORA were drafted with reference to section 2 of the Canadian Charter of Rights and Freedoms and Article 18

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161 Mead, above n 3, 4, 11.

162 See generally McConnell, above n 32, and also Rishworth and others, above n 7, 277–278.

163 Rishworth and others, above n 7, 277.

164 *Ibid*, 279 (emphasis in the original).

of the International Covenant on Civil and Political Rights<sup>165</sup> (ICCPR<sup>166</sup>). Article 18 is one of only a handful of ICCPR rights that are non-derogable even in times of public emergency,<sup>167</sup> and the Human Rights Committee (HRC), in its General Comment on Article 18, has described the freedoms it protects as "far-reaching and profound".<sup>168</sup> The preamble to the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based upon Religion or Belief states that:<sup>169</sup>

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

Because religious freedoms protect autonomy of belief rather than the beliefs themselves, it is fitting that section 13 is not limited to religion: it expressly extends to thoughts, conscience and beliefs generally. It has been held to protect theistic, non-theistic and atheistic beliefs, and includes "the freedom *not* to believe in, or adhere to, any ideology or religion".<sup>170</sup> Section 15 has a similarly wide scope. It extends to "all religions and beliefs, including those without the established doctrines and customs of traditional religions."<sup>171</sup>

Sections 13 and 15 protect more than individual rights to hold and express religious or other beliefs. Together, they protect individuals' rights not to believe in or to be made to manifest beliefs they do not hold. The Ministry of Justice notes that "the Government cannot be seen to take sides in matters of religion or belief or opinion",<sup>172</sup> and that "non-belief and refusals to participate in religious practice" must also be respected.<sup>173</sup> Thus, sections 13 and 15 protect freedom *from* religion as much as freedom *of* religion.<sup>174</sup> Because of this, they can be seen as "limited anti-

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165 White Paper "A Bill of Rights for New Zealand" [1984–85] I AJHR A6 78–81.

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

167 Ibid, art 4(2).

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

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

170 Ministry of Justice *The Handbook of the New Zealand Bill of Rights Act 1990* (Ministry of Justice, Wellington, 2004) 51 (emphasis in original) [*The Handbook of the New Zealand Bill of Rights Act 1990*].

171 Ibid, 57. See also "General Comment 22", above n 168, para 2.

172 *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 170, 51.

173 Ibid, 57.

174 See also Rishworth and others, above n 7, 285–286.

establishment"<sup>175</sup> provisions that apply to beliefs as well as religions. The HRC, in its General Comment on Article 18 of the ICCPR, notes that:<sup>176</sup>

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

Whether or not tikanga Māori is comparable to a religion, and whether or not its tenets are ever seen as New Zealand's official ideology, individuals must retain their right to hold and to manifest different beliefs. As mentioned above, a State's preference for one religion (or ideology) over another is not necessarily inconsistent with the recognition and protection of religious freedoms in practice. The test is whether non-believers suffer discrimination — whether they experience "coercive pressures that abrogate their freedom to have a different belief."<sup>177</sup> Equality rights are thus relevant to any discussion of religious freedoms.

### ***B Equality Rights***

Equality rights are protected by section 19(1) of the NZBORA, which provides that "everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The prohibited grounds of discrimination include religious belief,<sup>178</sup> ethical belief ("the lack of a religious belief, whether in respect of a particular religion or religions or all religions")<sup>179</sup> and race.<sup>180</sup>

Discrimination requires more than just differential treatment between comparable groups or individuals. The differential treatment must be based on one of the prohibited grounds of discrimination, and it must, in New Zealand, fail to be demonstrably justified in a free and democratic society.<sup>181</sup> In Canada, whose Charter of Rights and Freedoms is similar enough to the NZBORA for meaningful comparison, this final element is couched in terms of offence against

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175 Rishworth and others, above n 7, 289.

176 "General Comment 22", above n 168, para 10.

177 Rishworth and others, above n 7, 285; see also "General Comment 22", above n 168, paras 9–10.

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

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

180 *Ibid*, s 21(f).

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

"essential human dignity",<sup>182</sup> although the Ministry of Justice describe this as an unnecessary "gloss" in the New Zealand context.<sup>183</sup>

Section 19(2) provides that affirmative action measures are not discriminatory if they are "taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of [unlawful] discrimination", which is discrimination on one of the prohibited grounds listed in the Human Rights Act 1993. The measure must not only be linked to pre-existing unlawful discrimination, but the Ministry of Justice advises that "[a]ffirmative action programmes are non-discriminatory only during the time it takes to address the disadvantage experienced by the targeted group."<sup>184</sup>

Religious freedoms may call for equality in the law with respect to spiritual values, but the State's obligation to protect Māori culture and values may provide cogent reasons for the law to differentiate. Māori rights under the Treaty of Waitangi are discussed above,<sup>185</sup> but the following sections deals with rights that are not specific to Māori: minority rights under the NZBORA.

### **C Minority Rights**

The protection of minority rights generally is "directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole."<sup>186</sup> In New Zealand, minority rights are protected by section 20 of the NZBORA, which includes the rights of individuals belonging to "ethnic, religious or linguistic minorities" to "enjoy the culture, to profess and practise the religion, or to use the language, of that minority". It has been suggested that the structure of the section limits the enjoyment of culture to ethnic minorities, the profession or practice of religion to religious minorities and the use of language to linguistic minorities.<sup>187</sup> However, "culture and religion are

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

183 Ministry of Justice *The Guidelines on the New Zealand Bill of Rights Act 1990: A Guide to the Rights and Freedoms in the Bill of Rights Act for the Public Sector* (first published November 2004) Section 19 Freedom from Discrimination <<http://www.justice.govt.nz>> (last accessed 28 September 2006) [*Guidelines on the New Zealand Bill of Rights Act 1990*]; see also Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, Wellington, 2005) para 17.10.1.

184 *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 170, 66; see also Human Rights Committee "General Comment 18: Non-discrimination" (10 November 1989) HRI/GEN/1/Rev.6/146, para 10.

185 See Part III C The Treaty of Waitangi.

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

187 Rishworth and others, above n 7, 398.



inseparably intertwined in a holistic Māori worldview",<sup>188</sup> so tikanga Māori may fit within the rubric of either, provided that Māori are a minority to which the section applies.

For the purposes of section 20, a minority is:<sup>189</sup>

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

Māori comprised 14.6 per cent of the population at the 2006 census.<sup>190</sup> They are culturally distinct from the majority population (77.6 per cent of the population identified as Europeans or New Zealanders),<sup>191</sup> and demonstrate obvious desire to preserve their culture, language, religion and traditions.<sup>192</sup> Although section 20 does not apply exclusively to Māori in New Zealand, they are within its scope.<sup>193</sup>

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

188 "Indigenous Spiritual Concerns and the Secular State", above n 1, 635.

189 *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 170, 69.

190 Statistics New Zealand <<http://www.statistics.govt.nz>> (last accessed 4 November 2007).

191 *Ibid.*

192 David Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 *Wai L Rev* 120, 130.

193 Ministry of Foreign Affairs and Trade "Brief for the Special Rapporteur on the Situation of the Human Rights and Fundamental Freedoms of Indigenous Peoples" (November 2005) 9, available at <<http://www.mfat.govt.nz/>> (last accessed 4 November 2007); Butler and Butler, above n 183, para 17.23.1.

194 *Ibid.*

195 Rishworth and others, above n 7, 402.

196 Butler and Butler, above n 183, para 17.27.1; Rishworth and others, above n 7, 403–405.

interference."<sup>197</sup> The State's obligation under section 20 is merely to avoid making laws that promote "cultural homogeneity".<sup>198</sup>

Section 20 is based on Article 27 of the ICCPR, which the HRC *does* see as imposing positive obligations on States. In its General Comment on Article 27, the HRC said that States must not deny or violate minority rights,<sup>199</sup> which means that they may have to act positively to avoid or remedy transgressions by the legislative, executive or judicial branches of government.<sup>200</sup>

With regard to the freedom *of* religion, section 20 is thought to add little to the general religious freedom provisions in the NZBORA that are discussed immediately above.<sup>201</sup> However, in terms of freedom *from* religion, section 20 may justify laws that promote minority spiritual values ahead of others.<sup>202</sup>

#### ***D Tikanga Māori Provisions and Competing Rights***

It is clear that some rights call for differentiation in the law with respect to spiritual values, while other rights call for there to be none. The State may need to differentiate on the basis of belief in order to:

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

However, such differentiation may conflict with the State's obligations to (unless demonstrably justified in a free and democratic society):<sup>203</sup>

1. Respect individual autonomy of belief, which includes "the freedom not to believe in, or adhere to, any ideology or religion" (the section 13 right);<sup>204</sup>

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

198 *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 170, 70; see generally Rishworth and others, above n 7, 403–405.

199 "General Comment 23", above n 186, para 6.1.

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

201 Rishworth and others, above n 7, 401, 408.

202 See Part V B Tikanga Māori Provisions and Competing Rights.

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

204 *The Handbook of the New Zealand Bill of Rights Act 1990*, above n 170, 51 (emphasis added).

2. Respect individual rights "not to participate in religious practice" (the section 15 right),<sup>205</sup> and
3. Not discriminate on prohibited grounds (the section 19 right).

There are two approaches to resolving rights conflicts: definitional balancing and ad hoc balancing. Definitional balancing requires, at first instance, reading down one protected right so that it does not infringe upon another protected right. Ad hoc balancing requires competing rights to be broadly defined at first instance, with any degree of potential conflict resolved by a subsequent justified limitation analysis under section 5 of the NZBORA.<sup>206</sup> Both approaches have been used by the New Zealand Court of Appeal, the ad hoc balancing method most recently.<sup>207</sup> Although it is not clear which approach will be used in the future,<sup>208</sup> commentators suggest that the ad hoc approach is preferable,<sup>209</sup> because generous and purposive interpretation is a more appropriate starting point for human rights instruments.<sup>210</sup> This article therefore considers the need for a section 5 analysis in line with the ad hoc balancing approach, starting from the position that rights have a broad scope. If tikanga Māori provisions have the potential to interfere with a broadly drawn right, then the reasonableness of even minor interference should be assessed by way of a section 5 analysis, which considers whether rights limitations can be demonstrably justified in a free and democratic society.

This article does not seek to reach a firm conclusion on whether particular provisions are demonstrably justified in a free and democratic society. Such an assessment would require further research into the current position of Māori in New Zealand society, the relationship between the objectives of the particular Acts and the identified effects of tikanga Māori, and how particular tikanga Māori provisions are being applied in practice.<sup>211</sup> Instead, the following discussion seeks to identify whether there are provision types that might require such an analysis.

As mentioned above, an initial test for infringement of religious freedoms is whether non-believers of the values underlying tikanga Māori are experiencing "coercive pressures that abrogate

205 Ibid, 57.

206 See Rishworth and others, above n 7, 55–56.

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

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

209 Rishworth and others, above n 7, 56; *The Laws of New Zealand* (Butterworths, Wellington, 1992) Human Rights, para 55; Ministry of Justice *The Handbook of the New Zealand Bill of Rights Acts 1990*, above n 170, 19–20.

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

211 For a discussion of two particular applications of Māori spiritual values by the courts, see "Indigenous Spiritual Concerns and the Secular State", above n 1.

their freedom to have a different belief".<sup>212</sup> Coercive pressure includes an indirect pressure on people to believe.<sup>213</sup> The only category of provisions with the potential to threaten this "internal sphere"<sup>214</sup> of religious freedom is category six, where tikanga Māori becomes part of a policy directive. The two Acts with provisions in category six are the Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003 and the Education Act 1989.

Promoting tikanga Māori via television broadcasting hardly constitutes coercive pressure on viewers to believe its underlying values. Viewing is not compulsory. Promoting tikanga Māori via a school charter is more problematic, because school attendance can be mandatory, but the provision identified by the survey does build in an element of choice. It requires school charters to include an aim of providing instruction in te reo Māori and tikanga Māori "for full-time students *whose parents ask for it*."<sup>215</sup> However, this safeguard does not extend to another sub-paragraph in the same section, which requires school charters to include "the aim of developing, for the school, policies and practices that reflect New Zealand's cultural diversity and the unique position of the Māori culture".<sup>216</sup>

Depending on how schools incorporate this aim into their charters, there is potential for tikanga Māori to be promoted in schools in a way that could, directly or indirectly, influence people's beliefs. As an example of how this directive may filter through the education system, one of the Ministry of Education curriculum publications includes the following statement on cultural inclusiveness:<sup>217</sup>

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

It is certainly interesting that schools may have to instruct some students in tikanga Māori and promote it in other ways, if it is accepted that tikanga Māori has spiritual content, because state primary schools are otherwise obliged to have entirely secular curricula.<sup>218</sup> The issue of tikanga Māori in secular schools definitely invites further analysis from a law and religion perspective. However, with regard to the freedom of belief, the tikanga Māori provisions do not amount to

212 See above n 177.

213 Butler and Butler, above n 183, para 14.6.15.

214 Ibid, para 14.2.5.

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

216 Ibid, s 61(3)(a)(i).

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

218 Education Act 1964, s 77(b).

coercive pressure on students to subscribe to the underlying values of tikanga. The purpose of the provisions is educational rather than indoctrinatory: they promote balance rather than bias.

With regard to the freedom of manifestation of religion and belief, the State is required to respect individuals' refusals to participate in religious practice. This right is more obviously at risk from tikanga Māori in schools than the right to freedom of belief. The Education Act 1989 does allow for students to be released from tuition in particular classes or subjects on cultural or religious grounds.<sup>219</sup> However, even if students (or their parents) do have a choice whether to participate in expressions of tikanga Māori, which may include karakia or blessings of new school facilities,<sup>220</sup> such a choice must be real and not subject to inappropriate peer pressure.

The Canadian Charter of Rights Decisions Digest notes that "[t]he peer pressure and the classroom norms to which children are acutely sensitive are real and pervasive and operate to compel members of religious minorities to conform with majority religious practices."<sup>221</sup> Exercising a choice to opt out of Māori cultural activities could be construed as a racially-based decision and therefore subject to disapproval. For this reason, it is suggested that pressure from peers or teachers may limit such choices in reality.<sup>222</sup> Even the government is "wary of being seen to abrogate Māori rights and appears to avoid acting adversely in respect of Māori rights generally."<sup>223</sup> Not all Māori cultural activities reference spiritual values, but some may. Therefore, compulsory participation in Māori cultural activities may have the potential in individual cases to infringe the rights of students to refuse to participate in manifestations of belief.

The right to refuse to participate in religious practices is also relevant to category three provisions, which allow tikanga Māori to shape decision-making procedures. Most of the provisions in this category had a proviso: decision-makers were required to recognise tikanga Māori in determining procedure, but only where appropriate. With such a proviso, the category three provisions are unlikely to engage section 15 rights, because the correct exercise of the discretion should prevent procedures based on tikanga Māori being used with respect to those who object to its underlying values. The discretion may be difficult to exercise, however, when tikanga Māori is appropriate to some but not all parties.

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219 Education Act 1989, s 25A.

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

221 Canadian Charter of Rights Decisions Digest, Section 2(a) [freedom of conscience and religion] <<http://www.canlii.com/>> (last accessed 4 November 2007), citing *AGBC v Board of School Trustees* (1985) 19 DLR (4th) 166 (BC SC).

222 See also "Religious Liberty in a Temperate Zone", above n 6, 219.

223 Catherine J Iorns Magallanes, above n 200, 263.

The larger concern about category three provisions is they may come without such a proviso. For example, section 186 of the Building Act 2004 says that the Chief Executive of the Department of Building and Housing *must* recognise tikanga Māori in respect of the procedure of making determinations under the building code. There is no administrative discretion. Nor are these determinations applicable only to Māori. Under section 177 of the Act, a party may apply to the Chief Executive for a determination on "whether particular matters comply with the building code"<sup>224</sup> or about specified decisions or exercises of powers by a building consent authority, territorial authority or regional authority.<sup>225</sup> Although the Chief Executive's obligation is to *recognise* rather than *apply* tikanga Māori, and is attached to the procedure rather than the substance of decision-making, the lack of administrative discretion may leave parties to a determination with no choice about whether or not to participate. For example, if one party to a determination wanted to start proceedings with a spiritually-based karakia, the Chief Executive would seem to be obliged to allow that, regardless of the views of others who might be present.

A mandatory application of tikanga Māori to a decision-making process of general application may intrude upon the section 15 right to the extent that the tikanga in question references spiritual values. A section 5 analysis would be appropriate for provisions of this type.

The next aspect of religious freedom to consider is the section 19 right to be free from discrimination on the grounds of religious belief. Discrimination requires first that there be differential treatment based on a prohibited ground of discrimination. Most categories do satisfy the initial threshold of differential treatment based on religion, because they give tikanga Māori an express presence in law that other religious value systems tend not to have. However, in most cases the provisions do not recognise tikanga Māori to the exclusion of other value systems. They merely ensure that the historical dominance of tauiwi values in administrative decision-making is balanced by consideration of Māori values. Express instructions to decision-makers to consider Māori values, including spiritual values, help to ensure that decision-makers do not overlook the State's Treaty of Waitangi obligations.<sup>226</sup> In that respect, the provisions aim to achieve equal rather than differential treatment. However, the fact that they do so by creating a legal distinction means that a section 5 analysis would not be inappropriate.

If the potential breach is in respect of section 19, a precursor to a section 5 analysis would be to see whether the exception in section 19(2) applied. In other words, a section 5 analysis may not be needed if the differential treatment is for the purposes of affirmative action. The only categories of tikanga Māori provisions to which s 19(2) could be relevant are the category five provisions, within

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224 Building Act 2004, s 177(a).

225 Ibid, s 177(b)–(f).

226 See for example Waitangi Tribunal *Kaituna River Claim: Wai 4* (Waitangi Tribunal, Wellington, 1984) para 9.3.5.

Claims Settlement Acts, and the category six provisions – in particular, the promotion of tikanga Māori in schools. However, affirmative action programmes are supposedly, by definition, "short-lived as they only have legitimacy for the time such that is required to address the effect of previous disadvantage."<sup>227</sup> Neither the Claims Settlement Acts nor the school charter requirements under the Education Act 1989 purport to implement temporary measures.

This section has so far considered the impact of tikanga Māori provisions on the religious freedoms of those who may not subscribe to its underlying values. But what of those who do? The Treaty of Waitangi and section 20 of the NZBORA protect the rights of Māori to enjoy their culture. The discussion above identified that the section 20 right may oblige the State to take positive steps to ensure that it is not breached. However, it is possible that the increasing promotion of tikanga Māori by the State cheapens rather than protects its core values, particularly when the State calls for it to be interpreted, applied or promoted by those who do not fully understand it. A completely different rights issue might arise in this regard – one that calls for the State to stop coopting tikanga Māori for its own purposes. United States Supreme Court Justice Brennan, in his dissenting opinion in *Marsh v Chambers*, identified that one purpose of "separation and neutrality" was "to prevent the trivialization and degradation of religion by too close an attachment to the organs of government".<sup>228</sup>

## VII WAYS FORWARD

This article has so far concluded that legislative references to tikanga Māori do not challenge New Zealand's secular status but do have the potential to limit rights and freedoms. As the use of such provisions increases, the risk of infringing protected rights and freedoms may also increase. There are two obvious ways to respond to such a risk. First, Parliament could stop enacting tikanga Māori provisions. Alternatively, it could better utilise purpose statements, definitions, and existing checks and balances on the legislative process.

Removing all legislative references to tikanga Māori would reduce its potential to be misinterpreted by decision-makers or courts, or to inadvertently bring spiritual values into the law. However, the constitutional significance of tikanga Māori means that it may still be relevant even if not expressly incorporated. A deletion approach has already been mooted with respect to the phrase "the principles of the Treaty of Waitangi", with the New Zealand First party introducing the Principles of the Treaty of Waitangi Deletion Bill into the House on 29 June 2006. The Bill's stated aim was to "correct an anomaly which has harmed race relations in New Zealand since 1986 when the vague term 'the principles of the Treaty of Waitangi' was included in legislation." The explanatory note and parliamentary debates clarify that New Zealand First's main issue with

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<sup>227</sup> *Guidelines on the New Zealand Bill of Rights Act 1990*, above n 183, Section 19 Freedom from Discrimination; see also above n 184.

<sup>228</sup> *Marsh v Chambers* (1983) 463 US 783, 804.

referring to Treaty principles in legislation is that they are not defined, and that it is perhaps not possible to do so. During the Bill's introduction speech, Doug Woolerton MP said that:<sup>229</sup>

There is no clear definition on widely diverse interpretations of what the principles might mean in certain circumstances. The simple answer is that the definitions have not been defined and they cannot be, and we believe they should be removed. ... [W]e think it demeans the Treaty if words are put in that cannot be defined and that lead – in my words – to a bun fight on every single bit of legislation.

Tikanga Māori may be just as impossible to define adequately for legislative purposes. As the Law Commission has put it, some Māori terms – including tikanga – will always be poorly served by a brief explanation.<sup>230</sup> Even lengthy explanations in English are likely to be inadequate.<sup>231</sup> However, dealing with the problem by removing references to tikanga Māori does not seem an appropriate response in light of the fact that Māori is an official language of New Zealand,<sup>232</sup> and that the State is obliged to protect Māori culture and values under the Treaty of Waitangi and to meet domestic and international obligations with regard to minority rights. Eradicating tikanga Māori from the law may simply shift the problem,<sup>233</sup> and flow against the "steady trend in all civilised states ... to greater recognition of indigenous values".<sup>234</sup> Without tikanga Māori in New Zealand law, there would need to be alternative strategies in place to ensure that indigenous values are not marginalised.

If tikanga Māori is to remain in New Zealand law, as the author believes it should, it could be more expansively defined, or enacted with a clearly stated purpose in each case. As already stated, the problem with relying on more expansive definitions is that tikanga does not lend itself easily to definition. However, providing greater guidance on the purpose behind each tikanga Māori provision may reduce misunderstandings about which of tikanga's underlying values are intended to be encompassed by each provision. Incorporating such a complex and value-laden concept as tikanga Māori in legislation without elaborating on the specific purpose of doing so seems an incredible delegation to the executive and the judiciary. Interpreting tikanga is not only extremely challenging within administrative and judicial constraints,<sup>235</sup> but because it can potentially impact

229 (26 July 2006) 632 NZPD 4454.

230 Law Commission *Legislation Manual: Structure and Style* (NZLC R35, Wellington, 1996) para 193; Mead, above n 3, 7.

231 *Māori Custom and Values in New Zealand Law*, above n 9, para 127.

232 Māori Language Act 1987, s 3.

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

234 *Ibid*, 3.

235 See the discussion in "Indigenous Spiritual Concerns and the Secular State", above n 1, 615–621.



on protected rights and freedoms, it is arguably an inappropriate role for Parliament to delegate. It may be oversimplistic to suggest that an explanation of purpose will obviate the potential problems. It might assist those who have to interpret and apply the law, but the judiciary will be the ultimate arbiters if disputes arise, and at present, only Māori Land Court judges are statutorily required to be knowledgeable about tikanga. Descriptions of purpose would be desirable but are unlikely to be sufficient on their own.

Another approach would be to make better use of existing checks and balances on the legislative process. The NZBORA provides one mechanism for alerting Parliament to rights implications before it enacts legislation.<sup>236</sup> Section 7 of the Act requires the Attorney-General to bring to the attention of the House, usually on a Bill's introduction, "any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights." The Attorney-General exercises this function on advice from the Ministry of Justice, or from the Crown Law Office for Justice Bills. Since 2003, this advice has been publicly available, regardless of whether the Attorney-General has gone on to table a section 7 report.<sup>237</sup>

Although 13 statutes have been enacted since 2003 that include tikanga Māori provisions, the Attorney-General has not been advised on the religious freedom implications of any of them. Several category two provisions, via which membership of statutory bodies can require knowledge or experience in tikanga Māori, did trigger advice in relation to section 19 of the NZBORA.<sup>238</sup> The advice was that category two provisions create a prima facie distinction based on race, because those with the requisite knowledge and experience in tikanga Māori will most likely be Māori, but the conclusion in each case was that the provisions did not breach the NZBORA. The advice did not touch on potential implications of the spiritual content of tikanga Māori.

It is curious that tikanga Māori provisions have not triggered the section 7 mechanism in respect of religious freedom implications, because the State is not unaware of the spiritual values involved. The Ministry of Justice noted in 2001 that "[t]ikanga grew out of, and was inextricably woven into, the spiritual and everyday framework of Māori life",<sup>239</sup> and the Law Commission reported at length in 2001 on Māori custom and values in New Zealand law, including the "spectrum of tikanga" and

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236 For other checks and balances, see *LAC Guidelines*, above n 87; *Cabinet Manual 2001*, above n 86; and Cabinet Office *Step by Step Guide* (Department of the Prime Minister and Cabinet, Wellington, 2001, last updated May 2007).

237 Ministry of Justice <<http://www.justice.govt.nz>> (last accessed 4 November 2007).

238 The Māori Fisheries Bill 2003, the Historic Places Amendment Bill and the New Organisms and Other Matters Bill, which amended the Hazardous Substances and New Organisms Act 1996. See "Advice provided by the Ministry of Justice and the Crown Law Office to the Attorney-General on the consistency of Bills with the Bill of Rights Act 1990", available on the Ministry of Justice website <<http://www.justice.govt.nz>> (last accessed 26 August 2007).

239 *He Hinātore ki te Ao Māori*, above n 145, v.

its underlying values.<sup>240</sup> Nor is Parliament oblivious to the consequences of incorporating spiritual values into the law. In 2003, references to spiritual qualities, and cultural and ancestral landscapes were removed from the definition of historic heritage in the Resource Management Amendment Bill (No 2)<sup>241</sup> during the Committee of the whole House. Arguing to have these references removed, the Hon Bill English (then Leader of the Opposition) commented that:<sup>242</sup>

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

If the rights of some are not to unreasonably take precedence over the rights of others, the implications of incorporating tikanga Māori into legislation need to be fully appreciated in advance. If tikanga is to continue to have a role in New Zealand legislation, Parliament should be aware of potential rights implications before tikanga Māori provisions are enacted. It can then make informed decisions about whether potential limitations can be demonstrably justified in a free and democratic society, which will require consideration of the importance of State protection and promotion of tikanga. Utilising the section 7 process in this way would ensure that the spiritual content of tikanga is not overlooked when tikanga Māori provisions are inserted in legislation.

### VIII CONCLUSION

This article has suggested that tikanga Māori is partly based on spiritual values. Therefore, its use in legislation may raise religious freedom issues. The analysis in Part VI identified ways in which religious freedoms might be affected by tikanga Māori provisions. The conclusion was not that particular provisions *are* unreasonably limiting religious freedoms, but that they *could*. Because the incorporation of tikanga Māori in legislation is likely to continue, it is important that Parliament acknowledges the risks involved. This article has suggested that existing mechanisms for addressing the rights implications of tikanga Māori provisions are being under-utilised.

If tikanga Māori provisions are to continue to be used in New Zealand legislation, their purpose should be more clearly explained. In addition, more Bills that refer to tikanga Māori need to be generating advice to the Attorney-General assessing their potential impacts on the rights protected by sections 13, 15, 19 and 20 of the NZBORA. In the majority of cases, the potential impacts of tikanga Māori clauses may be minimal, or clearly justified, such that they do not need to be brought to Parliament's attention via a section 7 report. However, it is important that the initial advice to the Attorney-General identifies all potential limitations and extends to a consideration of whether they

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240 *Māori Custom and Values in New Zealand Law*, above n 9, paras 116–201.

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

242 (8 May 2003) 608 NZPD 5562.

can be demonstrably justified in a free and democratic society. It is surprising that the section 7 process is not already being used in this way. If tikanga Māori is to continue to be incorporated into New Zealand legislation, it is important that this is done with proper recognition and respect of all the rights and values at stake.

