

Māori Law Review

A MONTHLY REVIEW OF LAW AFFECTING MĀORI

Pūnaha whakawā – Criminal justice

Criminalising care and protection issues – child offenders in Aotearoa New Zealand

Article by Katherine Werry

Hei tīmatanga – Introduction

Judges of the Youth Court have recently adopted the term “criminalisation of care and protection” to describe a spectrum of actions or inactions in youth justice and care and protection.^[1] While this phrase has only recently been coined, the issues have been present for many years. These issues encompass children and young people being treated criminally for care and protection concerns. Some examples are first, when a child or young person’s behaviours that originate in care and protection are treated as a criminal issue when they are in the Youth Court, such as when running away from placements is treated as absconding, second, when care and protection supports and services step back their involvement once a child or young person is charged in the Youth Court, and third, when the Youth Court imposes bail conditions and uses powers of arrest and detention to manage care and protection concerns.^[2]

The focus of this article is on child offenders (aged 10 to 13) in Aotearoa New Zealand, who are subject to a significantly different system than youth offenders (aged 14 to 17). This article argues that the current approach to child offenders in Aotearoa New Zealand is a troubling continuation of the trend of criminalising care and protection matters. This is particularly concerning given the inherent vulnerabilities that children possess. Further, given the overrepresentation of Māori in the cohort of child offenders, the approach has a disproportionately severe impact on Māori children.

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Kōrerorero – Discussion

Overrepresentation of Māori

Māori are overrepresented at all stages of the criminal justice process, and the demographic of child offenders is no exception. Police are more likely to charge and take proceedings against young Māori: in 2020/21, the offending rate^[3] for Māori children aged 10 to 13 was over six times higher than the rate for European/other.^[4] Whilst diversion is a central pillar of Aotearoa New Zealand's youth justice system, with the majority of young offenders diverted away from formal court processes, young Māori are more likely to have offending that leads to a Family Group Conference or court action. In 2020/21, the proportion of Māori children whose offending led to one of these two events was over four times higher than that for European/other.^[5] The rate of proceedings for Māori children was over eight times higher than the rate for European/other.^[6] The disparities in these statistics have not been improving – in fact, the differences are worse than those in 2019/20.

The majority of children aged 10 to 13 who have proceedings taken against them by Police, or who appear in court, are Māori. The following sobering statistics demonstrate this. In the year ending June 2021, there were 18 total children aged 12-13 who were charged in court. Twelve of these, or two thirds, were Māori.^[7] In the year prior, 80 per cent were Māori. Further, when in the Youth Court, Māori are more likely to be subject to a Youth Court order. Of those 18 children in court in 2020/21, 15 received a total discharge under s 282 of the Oranga Tamariki Act 1989. The three others, who received a Youth Court order under ss 283(a)-(o), were all Māori children.^[8] Therefore, the practices and measures in place for dealing with child offenders will have a greater impact on young Māori than on other groups.

In a recent set of judgments, a Youth Court Judge identified five cases in which the children had concurrent proceedings in the Youth Court and the Family Court. In each of these cases, the Youth Court powers of arrest, bail and detention were used to manage care and protection concerns – a clear example of the criminalisation of care and protection. The cases also involved discussion of s 7AA of the Oranga Tamariki Act, which refers to duties in relation to te Tiriti o Waitangi (or the Treaty of Waitangi). While only two of these judgments have been published, all of the children in these five cases are Māori.^[9] This article seeks to raise awareness of these cases and the harmful effects of this practice. In order to do so, it is first necessary to understand the nature and legislative process for dealing with child offenders.

Welfare approach for child offenders

The system for dealing with child offenders (aged 10 to 13) in Aotearoa New Zealand differs significantly from that for young offenders (aged 14 to 17). The child offender system takes a predominantly welfare approach, which views the offending against a background of concerns about inadequate care and protection.^[10] This reflects the stark reality that most

children entering the youth justice system have some previous, or present, care and protection involvement. From 2014/15 to 2020/21, 96 per cent of all children referred for a youth justice Family Group Conference had been the subject of a report of concern to Oranga Tamariki regarding their care and protection.^[11] In 2020/21, for females aged 10 to 13, this figure was 100 per cent.^[12] The Office for the Children's Commissioner remarks that:

[m]ost children who offend come from backgrounds of trauma and disadvantage. Frequently they have violent and damaging backgrounds. They have complex needs.^[13]

Thus, the general purpose of the system for dealing with children who offend is two-fold: “[a]s well as holding children accountable for their offending, plans should address their care needs in a meaningful way”.^[14] The legislative process for child offenders reflects this welfare approach.

Legislative process

Minimum age of criminal responsibility

To understand the relevant legislative processes, it is first necessary to have a basic understanding of the jurisdictional age limits of the youth justice system in Aotearoa New Zealand. The minimum age of criminal responsibility (MACR) in Aotearoa New Zealand is 10 years, although 10 and 11 year olds may only be charged with murder or manslaughter.^[15] Following reforms to the youth justice system in 2010, 12 and 13 year olds may now be charged with certain serious offences, and where they are a previous offender and commit an offence of sufficient seriousness.^[16] From age 14, young people may be charged with any offence. Those aged under 14 are called children under the Oranga Tamariki Act, while those of or over the age of 14 years but under 18 years are defined as young people.^[17]

The MACR in Aotearoa New Zealand is well below that recommended by the United Nations and by child's rights advocates. Although the Convention on the Rights of the Child does not specify a required MACR, the United Nations Committee on the Rights of the Child recommends one of at least 14 years, and commends States parties that have a higher minimum age.^[18] The Committee notes that 12 and 13 year olds are “unlikely to understand the impact of their actions or comprehend criminal proceedings” due to their undeveloped frontal cortex.^[19] The Children's Commissioner has consistently pushed for Aotearoa New Zealand to raise their MACR, stating that “[n]o child under 14 should ever be charged in the criminal justice system – either the youth justice system or the adult system”.^[20]

Prior to 2010, Aotearoa New Zealand's MACR was essentially 14 years, with the exception of murder and manslaughter. The 2010 reforms were the culmination of the National Party's election campaign, during which John Key outlined plans to “[roll] up our sleeves to prevent New Zealand's youth crime problem from becoming tomorrow's crisis”.^[21] The promises to reform the youth justice system built upon the often widespread fears that youth offending is spiralling out of control, despite strong evidence to the contrary – for example, the overall offending rate for children is only 69 per 10,000.^[22] As a result, the Children, Young Persons, and Their Families

(Youth Courts Jurisdiction and Orders) Amendment Act 2010 brought children aged 12 to 13 years into the Youth Court.

Despite these legislative changes, the number of children charged with criminal offences is low, and decreasing. In 2020/2021, only 144 children aged 10 to 13 had offending that led to a Family Group Conference or court action, a reduction of 61 per cent since 2010/2011.^[23] This is in large part due to professionals and stakeholders tempering the effect of the provisions, for example with Police using “discretionary diversionary procedures” for children who come to their attention.^[24] Diversion away from formal court has been used to effectively minimise the effect of the 2010 legislative reforms. For those who do come before the Family Court or the Youth Court – the majority of whom are Māori – the following processes apply.

Family Court process

Child offenders experience a unique interface of the provisions in the Oranga Tamariki Act on youth justice and care and protection. A child may be brought before the Family Court by an application for a care and protection order under s 14(1)(e) of the Oranga Tamariki Act. This provision states that a child is in need of care and protection if they have “committed an offence or offences of sufficient number, nature, or magnitude to cause serious concern for the well-being of the child”.

If the level of offending is so great as to reflect that intervention is needed, the Family Court may make a number of orders.^[25] To make a care and protection order under s 14(1)(e), the Family Court must be satisfied that they would have found the child guilty had the proceedings been brought in a criminal court, and that the child knew their act or omission was wrong or contrary to law.^[26] This means that the hearing of the allegations in the Family Court essentially amounts to a criminal trial.^[27] If a Family Group Conference is directed in relation to the child’s offending, it is convened by a youth justice co-ordinator, as opposed to a care and protection one.^[28] The Court can make “support orders”^[29] with additional conditions^[30] which are almost identical to bail conditions used in the Youth Court. For example, the Court can direct that a child is subject to a curfew, undergoes counselling or therapy, or cannot associate with any specified persons. Finally, the court may make additional orders for child offenders, including admonishment, reparation and forfeiture to the Crown,^[31] again echoing those orders more commonly found in the criminal jurisdiction. The object of these orders is not to punish, but “to provide sound, meaningful intervention at the level that the child and the child’s family require”.^[32]

Youth Court process

If a child is instead brought before the Youth Court for serious or persistent offending that meets the criteria under s 272, there is the ability for the Court to refer the matter back to the prosecution to consider whether to make an application for a care and protection order or to deal with the matter in another way.^[33] This has been deemed the “pushback” provision and may be used when it becomes apparent to the Youth Court Judge that the child may be in need of care and protection. The charge before the Youth Court may be discharged by the Youth Court Judge at any time, but

it is automatically discharged when the application for a care and protection order first comes before a Family Court judge.^[34] This is a total discharge under s 282, with the effect that it is as if the charge was never filed.

If the charge remains in the Youth Court, there are some further protections for children that young people do not receive. They may not be remanded into Police custody pending hearing,^[35] they may not be transferred to the District or High Court under ss 273-277 or 283(o) and they may receive a total discharge under s 282 for a category four offence.^[36] However, in some instances there is a lack of any safeguards. For example, charges for homicide are automatically transferred from the Youth Court to the High Court, regardless of the age of the child or young person.^[37]

Concurrent Family Court and Youth Court proceedings

A continuation of the trend of criminalising care and protection has resulted in concerning instances of children having concurrent proceedings in both the Family Court and the Youth Court, with both proceedings emerging from the same incident(s) – offending as a child. Proceedings are being brought in the Family Court, recognising that the offending stems from care and protection concerns, but concurrent proceedings are also being brought in the Youth Court, seemingly for the purpose of having Youth Court powers of arrest, detention and bail available, should they be needed. It is not clear whether this is a national trend or isolated to certain geographic pockets. However, alarm bells were raised in the recent case of *New Zealand Police v JV*, where this practice was described as an “uncoordinated, dysfunctional process”.^[38]

New Zealand Police v JV

JV is a 13 year old of Māori and Pasifika ethnicity. He was brought before the Youth Court for a charge of aggravated burglary committed when he was 12. The Police also applied to the Family Court for a care and protection order, in relation to that incident and other less serious offending. This was one of five cases in the same region in a similar time period identified by Youth Court Judge FitzGerald as having concurrent Family Court and Youth Court proceedings. His Honour noted:^[39]

Common to all five cases is the question of whether it is appropriate for children who have offended to be dealt with in contemporaneous, parallel proceedings in both the Youth Court and Family Court as the police wish to do so, so as to be able to use powers of arrest and detention if necessary whilst otherwise accepting that a care and protection approach should be taken.

JV faced the significant logistical difficulties of having to come to court on different days, to appear before different judges, with different lawyers and other court professionals, for essentially the exact same thing.^[40]

Judge FitzGerald noted that the pushback provision was indicative of Parliament’s intent that “the matter either be in the Youth Court or in the Family Court, rather than both simultaneously”.^[41] Parliament did not envision concurrent proceedings for the same incident. In this case, his

Honour could not utilise the pushback provision, as the Family Court proceedings were already underway. By already applying to the Family Court under s 14(1)(e), the Police had circumvented the ability of the Youth Court Judge to utilise the pushback provision and deem the charge discharged.

His Honour emphasised the principles in the Oranga Tamariki Act, highlighting the importance of not instituting criminal proceedings against a child if there is an alternative means of dealing with the matter.^[42] Given that the two plans for the two courts in this case were identical, the only difference between the substance of the two proceedings was the existence of bail conditions in the Youth Court.^[43] His Honour noted:^[44]

12 and 13 year old children who can come before both courts on account of offending, are not and should not be dual status in relation to the very same thing they have been brought to court for by the police – concern about their offending. To do so, especially if it is only for the purpose of using youth justice powers and facilities of arrest and detention, is another form of the criminalisation of care and protection I referred to in [LV].

The Judge resolved this case by discharging the Youth Court charge under s 282 and directing a further Family Group Conference to discuss care and protection issues. However, JV's case is by no means the only one of its kind.

New Zealand Police v JF

JF was another of the five cases in a similar time period identified by Judge FitzGerald as having concurrent proceedings and similar issues. JF's situation was slightly different as he already had pre-existing Family Court care and protection proceedings, based on previous offending, when charges were laid in the Youth Court.^[45] JF is a 13 year old of Māori descent on both his mother's and father's side. When he was 12, Police applied to the Family Court for a care and protection order on the grounds in s 14(1)(e). The Family Court Judge directed a s 101 care and protection order and approved a social worker's plan. At age 13, JF appeared before the Youth Court for five charges of burglary and one charge of aggravated robbery. He admitted his offending at an FGC, and plans were made for both the Youth Court and Family Court proceedings.

The two plans were almost identical: the Youth Court plan only covered monitoring of JF's progress at a marae, writing apology letters and having bail conditions imposed while the Family Court plan only covered Oranga Tamariki providing financial assistance and psychological and cultural reports being obtained.^[46] The Judge questioned the intention of almost identical plans in different courts on the same point: concerns about JF's offending.^[47] His Honour noted that most provisions in the Youth Court plan could be sought in the Family Court, including bail conditions and apology letters. There were only two powers that the Family Court did not have: to order monitoring at a marae and powers of arrest and detention.^[48] It was the Police's desire for this second power that the Judge viewed as the "reason for the proposal to keep running parallel proceedings in the two courts for twelve months".^[49]

Thus, although the circumstances were slightly different to those in *New Zealand Police v JV*, the underlying issues remain the same, and the Judge made similar comments about how concurrent court proceedings is a form of criminalising care and protection.

Section 7AA and te Tiriti o Waitangi

Section 7AA of the Oranga Tamariki Act, introduced with a raft of other changes in 2019, imposes duties on the Chief Executive of Oranga Tamariki to recognise and provide a practical commitment to the principles of te Tiriti o Waitangi (te Tiriti). These principles, well traversed by the Waitangi Tribunal and in court decisions, include (but are not limited to) the principle of partnership and the principle of active protection.^[50]

Further provisions of the Oranga Tamariki Act support these duties. One of the purposes of the Oranga Tamariki Act is to promote the well-being of children, young people, their families, whānau, hapū, iwi and family groups by providing a practical commitment to the principles of te Tiriti.^[51] Other provisions recognise and affirm mana tamaiti (tamariki), defined as:^[52]

the intrinsic value and inherent dignity derived from a child's or young person's whakapapa (genealogy) and their belonging to a whānau, hapū, iwi, or family group, in accordance with tikanga Māori...

Many argue that these provisions do not go far enough, in particular s 7AA, and that the monitoring and accountability mechanisms under this section are inadequate.^[53] Former Children's Commissioner Judge Becroft described s 7AA as "a pale imitation of the Treaty obligations imposed on the Crown".^[54]

One of the claimants in the Waitangi Tribunal Oranga Tamariki Inquiry stated that "[s]ection 7AA may help to reduce disparities but Māori want equity. It is not good enough to reduce disparities by 0.01% every year, we want equity".^[55] The stark differences in the proportion of Māori and non-Māori children who have proceedings taken against them by Police, or who appear in court, clearly show that these disparities still exist. While the overall numbers in the Youth Court are decreasing at a significant rate, the differences remain, and equity has not been achieved.

In its inquiry the Tribunal noted that the provisions relating to te Tiriti, as set out above, are in tension with other principles in the Act, particularly those relating to the well-being and best interests of the child – the judgment of which is typically not done from a te Ao Māori perspective.^[56] The Tribunal found that the Crown failed to comply with the principle of partnership, due to the limited nature of s 7AA, and the onus it places on smaller Māori organisations, whānau, hapū and iwi.^[57] In terms of the principle of active protection, the Tribunal held that this required "substantive changes designed to address structural conditions".^[58]

This article does not intend to provide a comprehensive discussion of s 7AA and what it entails.^[59] Rather, it intends to discuss s 7AA as it relates to Māori child offenders, as illustrated through the recent above cases. In both cases, the Judge recognised that while s 7AA only imposes a duty on the Chief Executive, all individuals exercising powers under the Oranga

Tamariki Act should aim to provide a commitment to the principles of te Tiriti.^[60] The commitment must be practical, “mean[ing] something real in the lives of the children concerned and their whānau, hapū and iwi”.^[61] The actors in these cases failed to demonstrate a practical commitment to the principles of te Tiriti.

JV is one of eight children, and had been living with either his mother or his aunt, both in overcrowded houses. He had been out of school for 18 months and was thought to have ADHD and FASD, although assessments had not been completed. The Youth Court Judge indicated that a practical commitment to the principle of active protection would require addressing the issues of poverty, overcrowding, and the need for support and services.^[62] The principle of partnership would require inviting the three iwi to which JV belongs to the Family Group Conference, and involving them in his case – none of which had happened, despite Oranga Tamariki having strategic partnerships with each of the iwi.^[63] The Judge recommended that invitations should be sent to iwi, hapū and whānau in every case.^[64]

The issues in JF’s case were similar. JF’s mother has extensive care and protection experience, which has affected how she perceived institutions like Oranga Tamariki and the court. The stresses of poverty, overcrowding, and disengagement from school were also prevalent.

Ngā kupu whakatepe – Concluding comments

Child offenders are an extremely vulnerable group, by virtue of their age, immaturity, and underdeveloped brains. These inherent vulnerabilities exacerbate other common issues, including care and protection involvement and a high prevalence of neuro-disabilities. It is concerning that the checks and balances that are meant to protect child offenders failed in these cases, with no concerns being previously raised about the concurrent court proceedings. It is even more concerning that this issue is predominantly affecting Māori children.

It is well understood that involvement in the youth justice system can set children and young people on a pathway to further offending, and this is why the principle of diversion away from court forms the backbone of the youth justice system in Aotearoa New Zealand. Using the Youth Court powers of detention, arrest and bail to manage care and protection concerns runs contrary to this principle. Not only that, but it may also increase the likelihood that young Māori come into further contact with the justice system in the future. Māori are already overrepresented in the Youth Court, and real efforts should go towards trying to mitigate this. A change in practice relating to dealing with child offenders is a practical step towards this goal.

Running concurrent proceedings in both the Youth Court and the Family Court also has the potential to extend the youth justice process beyond its intended length. Plans in the Family Court have a much wider scope than those in the Youth Court, including matters relating to parents and guardians: their responsibilities, personal objectives, and behavioural changes they must make.^[65] These may include, for example, plans addressing parental drug and alcohol use. Should these not be completed,

a Judge could theoretically declare a concurrent Youth Court plan incomplete, extending the proceedings. This is particularly important given that a child's or young person's sense of time is different to that of an adult,^[66] and the effect of protracted proceedings is likely to be much more significant.

Further, it is clear that more needs to be done to uphold s 7AA and the principles underlying it, inadequate as the provision itself may be. This could include clearly and explicitly stating how the obligations under s 7AA will be upheld in a child or young person's plan, as well as inviting their iwi, hapū and whānau to be involved in the case and attend the Family Group Conference. The onus should not be on iwi, hapū and whānau, but placed squarely on Oranga Tamariki who has the necessary resources to ensure this occurs. It is incumbent upon all those who exercise powers under the Oranga Tamariki Act to give practical effect to the principles of te Tiriti. As the Judge demonstrated in *JV* and *JF*, practical effect requires tangible actions that are meaningful to young people and promote those principles including active protection and partnership.

The issues described in this article do not sit in isolation, but form part of a wider context of Māori in the criminal justice system and interactions between Māori and the state. An overwhelming proportion of adult Māori offenders in the criminal justice system have had previous Youth Court appearances, and care and protection history in the Family Court. The Waitangi Tribunal's Oranga Tamariki Inquiry, referred to above, discusses the guarantee in te Tiriti of tino rangatiratanga over kāinga, meaning "nothing less than a guarantee of the right to continue to organise and live as Māori".^[67] The number of tamariki Māori being uplifted from their whānau, taken into state care, arrested, charged and heard in court, and eventually imprisoned, is a breach of this guarantee, a breach that the Tribunal describes as "born of hostility to the promise itself".^[68] I consider that the issues I have raised in this article warrant further analysis from a kaupapa Māori perspective, as the principles of partnership and active protection, as well as the guarantee of tino rangatiratanga over kāinga, are crucial when dealing with tamariki, among one of the most vulnerable groups in our society.

Ngā kupu āpiti – Notes

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^[1] See *New Zealand Police v LV* [2020] NZYC 117; *New Zealand Police v JF* [2021] NZYC 251; and *New Zealand Police v JV* [2021] NZYC 248.

^[2] For a full explanation, see Katherine Werry "Crossover kids in New Zealand" [2021] NZLJ 312.

^[3] The offending rate measures the volume of children who Police take proceedings against for allegedly breaking the law compared to total populations of the same age.

^[4] Ministry of Justice *Youth Justice Indicators Summary Report – December 2021* (Wellington, 2021) at 8.

- [5] At 10.
- [6] At 13.
- [7] “Children and young people charged in court – most serious offence fiscal year” Stats NZ Tatauranga Aotearoa <<https://www.stats.govt.nz/information-releases/child-and-youth-prosecution-statistics-june-2021-fiscal-year-nz-stat-tables>>.
- [8] “Children and young people charged in court”, above n 7.
- [9] Information provided by the presiding Youth Court Judge.
- [10] Office of the Children’s Commissioner *Children with Offending Behaviour* (August 2020).
- [11] Ministry of Justice, above n 4, at 17.
- [12] At 17.
- [13] Office of the Children’s Commissioner, above n 10, at 5.
- [14] *Child Offenders Manual* (Chief Judge’s Chambers, Wellington, 1999) at 43.
- [15] Oranga Tamariki Act 1989, s 272(1)(a).
- [16] See section 272(1)(b)-(c) for the full criteria.
- [17] Section 2. Note that for certain purposes the definition of young people extends beyond 18 years, see s 386AAA.
- [18] General comment No. 24 (2019) on children’s rights in the child justice system UN Doc CRC/C/ GC/24 (18 September 2019) at [21]-[22].
- [19] At [22].
- [20] Office of the Children’s Commissioner, above n 11, at 4.
- [21] John Key, Leader of the Opposition “2008: A Fresh Start for New Zealand” (State of the Nation Speech, 29 January 2008).
- [22] Ministry of Justice, above n 4, at 8.
- [23] Ministry of Justice, above n 4, at 10.
- [24] Nessa Lynch *Youth Justice in New Zealand* (3rd ed, Thomas Reuters, Wellington, 2019) at 25.
- [25] *Child Offenders Manual*, above n 14, at 4.
- [26] Oranga Tamariki Act 1989, s 198(1).
- [27] *New Zealand Police v JV*, above n 2, at [38].
- [28] Oranga Tamariki Act 1989, s 18(3).
- [29] Sections 91-92.
- [30] Section 96.
- [31] Section 84.
- [32] *Child Offenders Manual*, above n 15, at 4.
- [33] Oranga Tamariki Act 1989, s 280A(2)(a).
- [34] Section 280A(3).

[35] Section 238(1)(e).

[36] Section 272(1)(c).

[37] Sections 272(2) and 275.

[38] *New Zealand Police v JV*, above n 1, at [44].

[39] At [11].

[40] At [12].

[41] At [20].

[42] At [23].

[43] At [27].

[44] At [37].

[45] *New Zealand Police v JF*, above n 1, at [12].

[46] At [7]-[8].

[47] At [9].

[48] At [9]-[11].

[49] At [11].

[50] Te Puni Kōkiri, *He Tirohanga o Kawa ki te Tiriti o Waitangi: A Guide to the Principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* (Te Puni Kōkiri: Wellington, 2002).

[51] Oranga Tamariki Act 1989, s 4(1)(f).

[52] Oranga Tamariki Act 1989, ss 4(1)(a)(i), 4(1)(g), 5(1)(b)(iv). The definition of mana tamaiti is provided in s 2.

[53] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 105.

[54] At 119.

[55] At 111.

[56] At 149.

[57] At 155.

[58] At 19.

[59] For such discussion, see Judge Sharyn Otene *Te Hurihanga Tuarua? — Examining amendments to the Oranga Tamariki Act 1989 that took effect on 1 July 2019* (2019) 9 NZFLJ 139; Oranga Tamariki – Ministry for Children *Improving outcomes for tamariki Māori, their whānau, hapū and iwi | Te whanake i ngā hua mō ngā tamariki Māori, o rātau whānau, hapū, iwi anō hoki* (Oranga Tamariki – Ministry for Children, Wellington, July 2020); and Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua*, above n 54.

[60] *New Zealand Police v JV*, above n 1, at [56]; and *New Zealand Police v JF*, above n 1, at [50].

[61] *New Zealand Police v JV*, above n 1, at [57].

[62] At [60].

[63] At [61].

- [64] At [62].
- [65] Oranga Tamariki Act 1989, s 130(1)(ea).
- [66] *Churchward v R* [2011] NZCA 511, (2011) 25 CRNZ 446 at [87].
- [67] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua*, above n 53, at 12.
- [68] At 12.

Te Kōti Pīra – Court of Appeal

Status of land – new title required before change of status

Short v Stowers

[2021] NZCA 697
17 December 2021

Report by Toni Love

Whakataunga – Overview and result

Unsuccessful appeal from a Māori Appellate Court decision that the Māori Land Court has no jurisdiction to grant a status order conditional on the issue of separate title. Title must exist to change the status of land under the legislation.

Status of land – conditional status order – no jurisdiction – new title required before change of status	
Date	17 December 2021
Case	Short v Stowers (447 KB PDF)
Citation	[2021] NZCA 697
Court	Te Kōti Pira – Court of Appeal
Judge(s)	Miller, Clifford and Courtney JJ
Earlier/later decisions	<i>Short v Stowers – Tumu Kaituna 14 Block</i> (2018) 199 Waiariki MB 188 (199 WAR 188); Short v Stowers – Tumu Kaituna 14 Block [2020] Māori Appellate Court MB 141 (2020 APPEAL 141).
Legislation cited	Te Ture Whenua Māori Act, ss 73, 122, 123, 135, 137, 301-303; Resource Management Act 1991, s 11(1); Property Law Act 2007, s 4; Land Transfer Act 2017, s 5.
Cases cited	Management Committee of Mangatāwa Papamoa Blocks Inc – Lot 1 DPS 65413 (2018) 156 Waikato Maniapoto MB 77 (156 WMN 77).
Overview and result	This appeal was about whether the Māori Land Court (MLC) has jurisdiction to make a conditional status

	order affecting only part of a block of Māori freehold land, where the change of status would only be effected following the subdivision of that part of the block. Two additional issues included whether the Māori Appellate Court (MAC) wrongly found that the criteria in s 137 of Te Ture Whenua Māori Act 1993 for a status order was not met and whether the MAC wrongly addressed the level of engagement with owners on the change of status proposal. The trustees of Te Tumu Kaituna 14 Trust ("the Trust") have a block of Māori freehold land in the Bay of Plenty ("the block") where local authorities are planning a substantial development. The trustees wish to participate in this development, which would require construction on part of the block. Construction requires external funding, which is difficult to obtain due to the alienation restraints on Māori freehold land. As such the trustees propose to obtain consent to subdivide the block into two new titles and an order from the Māori Land Court to change the status of the smaller parcel to General land, which will then be transferred to a new "development entity" beneficially owned by the current beneficial owners. This development entity could then borrow the necessary funding for the development. The MLC dismissed the application for want of jurisdiction and the MAC dismissed an appeal by the trustees regarding the change in status. Both courts concluded that the appropriate course of action was to seek a partition of the block before or contemporaneously with seeking a status order. Held, appeal dismissed. The Court of Appeal agreed that the MLC does not have jurisdiction to grant a status order conditional on the issue of separate title. The trustees must first seek a new title before a change of status is sought. The Court considered the scheme of the Act and in particular those parts addressing change of status, alienation and reorganisation of titles. The Court considered that while the Act does not expressly preclude a change of status of part of a block of land, it does not expressly allow it and reading the relevant provisions together it is clear that the change of status of part of a block is not envisioned. Although the Court agreed there was some inconsistency in the Court's reasoning this did not occur in its ultimate conclusion. It is clear that under s 129(1), land parcels can only have one status at a time and there is no basis for concluding that ss 135 and 137 could be interpreted as including part of land. The Court looked to the definition of land within the Act and distinguished this definition from the broad definitions contained in the Property Law and Land Transfer Acts. Section 129 depends on title
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	to land, therefore, land in the Act is identifiable by its title. As such, references to land in ss 135 and 137 must be taken to exclude parts of land. Regarding the conditional aspect of the application, the Court agreed that the MAC did not engage with the legislative provisions put forward by the trustees that provide for conditional orders. However, in terms of s 73, the Court noted that such orders required the presence of an order. In other words, conditions could not include satisfaction of statutory requirements. The Court considered that the jurisdiction of the MLC only enabled orders where the Court is satisfied there is title to the affected land. The Court concluded that the MAC had wrongly concluded that the criteria in s 137(1) were met. However, the Court considered this made no difference to the outcome because the MAC was not considering whether the s 137 criteria had been met. Regarding the comments in the judgment appealed from about adequacy of notice and the nature of appropriate consultation, the Court agreed that these comments were not necessary to address the jurisdictional point the MAC was considering. However, it did not consider such comments conveyed specific criticism but were carefully crafted as simply advisory. As such, it did not engage further with this ground of appeal. The trustees sought to rely on the MLC's decision in <i>Management Committee of Mangatawa Papamoa Blocks Incorporation</i>, which granted conditional partition and change of status orders. However, the Court noted that the propriety of the orders made in that case was not at issue.
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Te Kōti Matua – High Court

Ngā whakataunga tiriti – interim relief refused

Maniapoto v Maniapoto Māori Trust Board

[2022] NZHC 455

15 March 2022

Report by Stuart Leslie

Whakataunga – Overview and result

This case concerned the proposed settlement of Maniapoto historical claims. Mr Maniapoto applied for an injunction and freezing orders, both of which were refused.

Ngā whakataunga tiriti – interim relief to prevent settlement – injunction and freezing orders – refused – Parliamentary privilege – serious question – balance of convenience	
Date	15 March 2022
Case	Maniapoto v Maniapoto Māori Trust Board (431 KB PDF)
Citation	[2022] NZHC 455
Court	Te Kōti Matua – High Court
Judge(s)	Gault J
Earlier/later decisions	
Legislation cited	Senior Courts Act 2016, s 13; High Court Rules 2016, part 18; Parliamentary Privilege Act 2014, s 4(1)(b).
Cases cited	Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General [2020] NZCA 2, [2020] 3 NZLR 1; Ngāti Whātua Ōrākei Trust v Attorney-General [2018] NZSC 84, [2019] 1 NZLR 116; <i>Commerce Commission v Viagogo AG</i> [2019] NZCA 472, [2019] 3 NZLR 559; <i>Dold v Murphy</i> [2020] NZCA 313, [2021] 2 NZLR 834; <i>Paper Reclaim Ltd v Aotearoa International Ltd</i> [2007] NZSC 26, [2007] 3 NZLR 169; <i>Amaltal Corporation Ltd v Maruha Corporation</i> [2007] NZSC 40, [2007] 3 NZLR 192; <i>Finnigan v New Zealand Rugby Football Union Inc</i> [1985] 2 NZLR 181 (HC).
Overview and result	Mr Maniapoto applied for an interim injunction and freezing orders against the Maniapoto Māori Trust Board (MMTB) in relation to the settlement of historic claims of Maniapoto against the Crown. Mr Maniapoto is chairman of Maniapoto ki Te Raki (MKTR) a Treaty settlement body established to coordinate hapū and individual claims in the Waitangi Tribunal's Te Rohe Pōtae Inquiry. Mr Maniapoto is also chairman of the Te Kawau Mārō (TKM) Mandate Body established to seek a mandate to negotiate a settlement for Maniapoto and other iwi. MMTB withdrew participation from TKM and took over the role of seeking the mandate to settle Maniapoto historical claims. The Crown recognised a deed of mandate submitted by MMTB. The Waitangi Tribunal inquired urgently into claims about this and found the Crown's recognition of the MMTB mandate was reasonable given its support, infrastructure and involvement in previous settlement. Mr Maniapoto was advised on 24 October 2021 MMTB intended to sign the deed of settlement and issued these proceedings subsequently. After the proceeding was commenced, and before these applications were considered by the Court, the Maniapoto Claims Settlement Bill was introduced to Parliament. Held, grounds for the applications for interim injunction and freezing orders were not made out. In considering the application for an interim injunction,

the Court held there was a serious question to be tried as to whether MMTB acted in breach of fiduciary duty, but no serious question to be tried in relation to non-monetary substantive relief. First, this is because the historical claims are not assets owned by MMTB, but the issue is whether they are to be included in the settlement proposed with the Crown. Secondly, the relief sought is to remove the claims from the proposed settlement which requires amendment of the Bill. Due to Parliamentary privilege it is difficult to see how the Court can give a remedy impinging on the inclusion of claims in the proposed settlement. Thirdly, the fiduciary claim is for loss of opportunity to lead negotiations and obtain a mandate. However, the benefit of the redress goes to the post-settlement governance entity (PSGE), rather than MMTB. Any remedy for breach made out would be limited to equitable compensation or a declaration to restore mana.

The Court held the balance of convenience also weighed against granting interim relief. The Court accepted damages may not compensate Mr Maniapoto for other loss such as of mātauranga Māori. However, an interim order is conditional on the provision of an undertaking as to damages which Mr Maniapoto had not provided. The Court held this was not a case where the Court can dispense with this requirement as this case was not a judicial review, but a breach of fiduciary duty claim seeking relief including damages. The Court did not accept the submission that MMTB's conduct justifies an interim injunction. The court considered that as the Bill will not pass through the House for 12 to 18 months there is plenty of time to conclude the proceeding. This weighs against interim relief. Further, the delay between the alleged breach in 2017 and the action taken in October 2021 weighed against interim relief.

The Court concluded the overall justice is strongly against granting an interim injunction.

The Court found the requirements to secure a freezing order were not made out because, even if there was an arguable case and MMTB has assets to which the order can apply, there is no real risk of dissipation. There is no suggestion MMTB will remove its assets from New Zealand or dispose of them otherwise. MMTB was created by, and is governed by statute. The redress from the settlement will go to the PGSE. In the meantime the PGSE is not under the control of MMTB.

Te Kōti Whenua Māori – Māori Land Court

Partition – dismissed – house building purpose

Solomon v Otte – Te Awapatiki 2B2 and 2B3

(2021) 74 Te Waipounamu MB 125 (74 TWP 125)
3 December 2021

Report by Elizabeth Derby

Whakataunga – Overview and result

Application seeking to partition an area to build a house and engage in permaculture and regenerative farming, dismissed.

Partition – dismissed – purpose of building a house – sufficient notice – insufficient support – not necessary for effective utilisation of the land – applicant to consider other options	
Date	3 December 2021
Case	Solomon v Otte – Te Awapatiki 2B2 and 2B3 (320 KB PDF)
Citation	(2021) 74 Te Waipounamu MB 125 (74 TWP 125)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Reeves
Earlier/later decisions	<i>Solomon v Solomon – Manukau Lands Trust</i> (2020) 66 Te Waipounamu MB 207 (66 TWP 207).
Legislation cited	Te Ture Whenua Māori Act 1993, ss 288(1)(a-c), 288(2)(a) and (b), 288(4)(a), and 289.
Cases cited	Hammond – Whangawehi 1B3H1 (2007) 34 Gisborne Appellate MB 185 (34 APGS 185); Whaanga v Niania – Anewa [2011] Māori Appellate Court MB 428 (2011 APPEAL 428); <i>Brown v Māori Appellate Court</i> [2001] 1 NZLR 87.
Overview and result	Application to partition Te Awapatiki 2B2 from Te Awapatiki 2B2 & 2B3, a block of Māori freehold land located on Rēkohu (the Chatham Islands). The applicant sought the partition to build a house and to engage in permaculture and regenerative farming. The grounds for the application included the applicant's wish to settle on and develop his own block of land, to live peacefully without interference by other hūnau members, and to revive the land, which has been exhausted by orthodox pastoral farming methods. The applicant noted the partition of this block would cause the least interruption to the current farming operation, and would not interfere with continued access by hūnau members to the homestead site or kaimoana reefs adjacent to the land. Held, application dismissed. The Court found that the applicant had failed to demonstrate both a sufficient degree of support for the application and that the partition was necessary to facilitate the effective

	operation, development, and utilisation of the land. The Court found that the historical significance of the block to the owners tended against granting the partition, as did the matter of access to kaimoana reefs from the block. The Court also did not believe that a partition of the land would dispel the potential for further disputes between the applicant and other hūnau members. The Court suggested that an occupation order would be a reasonable alternative for the applicant to consider.
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Trusts – removal of trustee – duty to be active – non-attendance at meetings

Wynyard v Waata – Manawakore C1 and D

(2022) 247 Taitokerau MB 4 (247 TTK 4)
25 March 2022

Report by Stuart Leslie

Whakataunga – Overview and result

An application for removal of trustees for breach of duty to be active. Three of the trustees breached this duty and refused to act as trustee in failing to attend trust meetings. Trustees removed.

Trusts – removal of trustee – duty to be active – non-attendance at trustee meetings	
Date	25 March 2022
Case	Wynyard v Waata – Manawakore C1 and D (288 KB PDF)
Citation	(2022) 247 Taitokerau MB 4 (247 TTK 4)
Court	Te Kōti Whenua Māori – Māori Land Court
Judge(s)	Judge Wara
Earlier/later decisions	Wynyard v Waata – Manawakore C1 and Manawakore D (Pa Te Aroha Marae) (2019) 205 Taitokerau MB 207 (205 TTK 207).
Legislation cited	Te Ture Whenua Māori Act 1993, s 240; Māori Reservations Regulations 1994, r 3.
Cases cited	Taurua v Harawira – Te Tii Waitangi A [2017] Māori Appellate Court MB 328 (2017 APPEAL 328); Rihari v Auckland – Takou (2021) 240 Taitokerau MB 42 (240 TTK 42); <i>Perenara v Pryor – Matata</i> 930 (2004) 10 Waiariki Appellate MB 233 (10 AP 233).
Overview and result	This case concerned an application for removal of trustees from the Pa Te Aroha Marae for breach of their duty to be active. There was evidence of ongoing absences from respondent trustees at a series of trust meetings. Between 12 December 2016 and 29 September 2018, trust minutes record attendance at 13 trust meetings where respondent trustees would arrive

	late, leave early or submit apologies. Both Ms Harris and Ms Robinson tabled their resignations in 2018. Section 240 of Te Ture Whenua Māori Act 1993 (the Act), as amended, requires a new approach for removal of trustees. First, the prescriptive grounds set out in s 240(1)(b) must be met. Second, removal must be desirable for the proper execution of the trust having regard to the principles and kaupapa of the Act. This test is focussed on whether it is desirable to remove a trustee, not whether there is a failure to perform duties satisfactorily. Held, the duty to be active as trustee remains irrespective of whether the trustee has a reasonable excuse or leave of absence from a meeting. An apology does not abrogate the duty to be active (at [43]). A breach of this nature is a serious breach where some trustees have failed their duty. Removal remains subject to principles (at [21], applying <i>Rihari</i>): removal is a serious step and is not undertaken lightly; the trustees at risk of removal must be properly notified in advance; technical breaches of trust and governance instruments may not lead to removal unless the trust assets have been put at risk or there has been a serious loss or malfeasance; generally, the Court must be satisfied that there is evidence of real abuse, failure or malfeasance and the absence of any tenable defence. Under step one of the test, the Court held Ms Jull, Ms Harrison and Ms Harris have all breached their duty to be active and have repeatedly refused to act as a trustee. However, as Ms Harris had resigned as trustee there was no live ground for removal for cause. Under step two of the test, the Court held that it is desirable to have active trustees who are fully engaged in trust business. Ms Jull and Ms Harrison failed to meet this standard. The Court held it is desirable to remove both Ms Jull and Ms Harrison in accordance with s 240(1)(b)(i) of the Act.
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Paenga-whāwhā 2022 – additional content online

Te Kōti Whenua Māori – Māori Land Court

[Alienation of Māori freehold land](#) – right of first refusal – seller not bound to accept an offer not on equivalent terms – *Logan v Logan – Patangata 2F Section 2B* (2022) 95 Tākitimu MB 52-76 (95 TKT 52-76) – Stuart Leslie