Ngā tāpaetanga a Te Hunga Rōia Māori o Aotearoa

Submissions of Te Hunga Rōia Māori o Aotearoa – The Māori Law Society

Te rā 16 o Hōngongoi 2021

To: Rules Committee, Te Kōti Matua o Aotearoa | High Court of New Zealand

Re: Consultation on improving access to civil justice

A. Kupu whakataki | Introduction

1. Te Hunga Rōia Māori o Aotearoa – the Māori Law Society (**THRMOA**) was formally established in 1988. Since then, the Society has grown to include a significant membership of legal practitioners, judges, parliamentarians, legal academics, policy analysts, researchers and Māori law students. Our vision is Mā te Ture, Mō te Iwi – by the Law, for the People.

2. THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.

3. When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi, but rather, seeks to provide a whakaaro Māori based legal analysis and submissions on law reform.

4. THRMOA welcomes the opportunity to make written submissions to the Rules Committee of the High Court on its consultation with the legal profession and wider community on improving access to civil justice.

He whakarāpopototanga | Summary

5. This submission will comment on the High Court Rules 2016 (**the Rules**) in relation to te reo Māori within the Court system.

6. Specifically, we will comment on:

   i. high level changes that we consider to be necessary to ensure the full exercise of the right to speak te reo Maori in a proceeding; and
   ii. recommendations on how the Rules Committee can improve access to civil justice by way of amendment to the current rules concerning te reo Māori.

Ngā tāpaetanga a THRMOA | THRMOA Submissions

(i) General comments and background

7. It is worth starting with a very brief summary of the history of te reo Māori in the court system. As noted by Williams J and others, following the introduction of the

second law of Aotearoa New Zealand in the 19th Century,[1] te reo Māori was often the ordinary language of the Courts, particularly in the Resident Magistrates Court and the Native Land Court.[2] However, at the turn of the 19th Century and throughout the early to mid-20th Century, te reo Māori experienced a significant decline as a civic language, both within government and in the Court system.[3] This significant decline is perhaps best characterised by the case of *Mihaka v Police*, where, in response to Mr Mihaka's request for his hearing to be carried in te reo Māori, Bisson J responded that the language of the Courts in New Zealand had been English since the Pleadings in English Act 1362.[4]

8. However, the late 20th Century to today has seen a revival in the use of te reo Māori both in general society, and in the Courts. A good example of this is the current announcements in courts throughout the country, which utilise te reo Māori.

9. The use of te reo Māori in the Courts is governed by Te Ture mō Te Reo Māori 2016 | Māori Language Act 2016. The Act recognises Māori language as an official language of Aotearoa New Zealand and a taonga of iwi and Māori[5] Under s 7 of that Act, members of the Court, parties, witnesses, or counsel may speak Māori in legal proceedings, and if a person intends to do so, the presiding officer must ensure that a competent interpreter is available.

10. Despite this right, the use of spoken and written reo Māori in the Court system is still governed by the Rules, as s 7(5) of Te Ture mō Te Reo Māori 2016 dictates that Rules of court or other appropriate rules of procedure may be made requiring any person intending to speak Māori in legal proceedings to give reasonable notice of that intention, and generally regulating the procedure to be followed if Māori is, or is to be, spoken in those proceedings.

11. Under r 1.11 of the Rules, if a person wishes to speak Māori in a proceeding or at the hearing of an interlocutory application, that person, or, if the person is a witness, the party intending to call that person, must file and serve on every other party to the proceeding a notice of his or her intention to speak Māori. That notice must be filed and served no less than 10 working days before the case management conference or hearing at which the person intends to speak Māori.

12. Under r 1.12, a person upon whom a document is served in any proceeding is entitled to receive a translation of the document into reo Māori if they apply orally, or in writing to the Registrar in the place where the proceeding is pending, within 10 working days after the date of service, for a translation of the document into

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[1] The second law of New Zealand is also known as the common law. As acknowledged by the Courts, the first law is tikanga Māori. The Courts are currently grappling with the increasing interface with these two legal systems, and the possible evolution of a third law, sometimes referred to as "Lex Aotearoa". See Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 12 Waikato Law Review 1; *Re Edwards* [2021] NZHC 1025 at [69]; and *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [103].

[2] See Joseph Williams "Toi te Kupu, Toi te Mana" (2020) 26 Auckland Law Review 15 at 23.

[3] See Tai Ahu "Te Reo Māori as a language of New Zealand Law: The Attainment of Civic Status" (LLM Dissertation, Victoria University of Wellington, 2012); and Māmari Stephens and Phoebe Monk "A Language for Buying Biscuits? Māori as a Civic Language in the Modern New Zealand Parliament" (2012) 3 VUWLR 14.

[4] See Joseph Williams "Toi te Kupu, Toi te Mana", above n 2, at 23; and *Mihaka v Police* [1980] 1 NZLR 453 (HC) at 458-459.

[5] Sections 3 and 4.

reo Māori and satisfies the Registrar that they would be unable to read the document but could read it if it were translated into reo Māori.

13. Under r 1.13, a failure to comply with r 1.11 does not prevent a person speaking Māori at a hearing or proceeding, but the court may adjourn the conference or hearing to enable the Registrar to arrange for a translator to interpret Māori to be available, and the court may treat the failure to comply as a relevant consideration in an award of costs.

14. Broadly, we consider these rules impose requirements that are onerous for those who intend to use written or spoken te reo Māori in the Courts, and also characterise te reo Māori as a disadvantage or a hindrance in the justice system, rather than an official language.

15. THRMOA's position is that rr 1.11 to 1.14 should be removed and replaced with our suggested new "Part" provision as set out in our comments below. In our submission, this new "Part" would more effectively recognise the right provided in Te Ture mō Te Reo Māori 2016, would remove the current barriers to the use of te reo Māori and would improve access to justice for those who wish to speak te reo Māori in the Courts.

(ii) Specific Concerns with the current rules and reasons for removal

16. We disagree with the notice rule in r 1.11(5) generally and a new approach is outlined in our comments regarding the new "Part". However, and broadly speaking, we consider that the 10 working days' notice requirement is too onerous, and effectively discourages parties or counsel from speaking te reo Māori in the courtroom.

17. If the underlying reason for such a long notice period is to allow for the other parties and the court time to engage an interpreter then the Courts should increase their capacity with te reo Māori speakers, interpreters, and transcribers so that there are always appropriate staff available to be engaged for a proceeding at short notice. We recognise that this could require a significant undertaking for the Courts, but consider that it is an action that will likely need to occur if the Courts are serious in supporting te reo Māori as an official language to be spoken.

18. We disagree with the structure and requirements of rule 1.12. In particular, it is difficult to understand why, if a person wishes to receive a translation of a document into te reo Māori, they need to apply orally or in writing within 10 working days after the date of service for that translation, *and* must satisfy the Registrar that they would be unable to read the document unless it was translated into to reo Māori.

19. We see three issues with the current rule:

    i. First, it is arguably unfair that if a person wishes to speak te reo Māori, they must give at *least* 10 working days' notice, but if a person wishes to have a document translated into te reo Māori, their application must be given *within* 10 working days. This again disadvantages and discourages the use of te reo Māori within the courtroom, as Māori-to-English translation is given greater flexibility than English-to-Māori translation;

ii. Second, as noted above, it is unclear why the Registrar must be satisfied that the applicant must not be able to read the particular document unless it is translated into te reo Māori. If te reo Māori is an official language of Aotearoa New Zealand and a taonga of iwi and Māori, then any party or counsel or party should be able to request a translation of documents into te reo Māori, regardless of whether they can understand those original documents. The presence of what is effectively a disadvantage requirement for written reo Māori is obviously intended to limit resources spent, but in our view, there are other ways to limit costs other than relying on a disadvantage test that completely undermines the hard-won status of of te reo Māori as an official language but more importantly, as a taonga;[6]

iii. Third, and as a corollary of the second point, we disagree with the framing of the requirements under this rule. They illustrate an approach whereby the right to use written reo Māori in the courtroom can only be upheld for those able to demonstrate disadvantage so as to ensure non-discrimination. Te reo Māori should not be characterised as a disadvantage to be remedied by the Registrar when they deem it necessary and/or appropriate.

20. As with r 1.12, we express our discomfort with the framing of r 1.13.

21. While r 1.13(a) rightly acknowledges that a failure to comply with r 1.11 does not prevent a person speaking Māori at a case management conference or pre-trial conference or hearing, we find r 1.13(b) concerning. Under this provision, the court may treat the failure to comply as a relevant consideration in an award of costs.

22. While it should be acknowledged that failure to comply with r 1.11 in its current state would potentially hinder the Court and the parties if they did not understand what was being said in the courtroom (and would likely have to adjourn the proceeding), we do not think that this should result in what is effectively a financial penalty in the form of a costs award against the Māori-speaking party.

23. The overriding principle behind costs under the Rules is that they are at the discretion of the court.[7] While this discretion is not unfettered[8] (as it is qualified by the specific costs rules and principles set out in rr 14.2-14.10) there is still significant scope for a court to award costs in a range of circumstances.

24. The Courts thus already have sufficient discretion to award costs against a party if they are wasting court time, acting improperly, or ignoring a direction. Therefore, there is no need for a specific rule adverting to a possible costs award if r 1.11 is not followed. In the very rare event that any person does use te reo Māori improperly or to make things difficult for other parties, then the Court already has the discretion to award costs against them.

25. The fact that r 1.13 considers the use of te reo Māori (without sufficient notice) to be a consideration in an award of costs is, in our submission, essentially cautioning those intending to speak te reo Māori that there could potentially be punishment for speaking an official language of Aotearoa. In our submission, this is in direct

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6 For more discussion on this issue, see Māmari Stephens "Taonga, Rights and Interests: Some Observations on WAI 262 and the Framework of Protections for the Māori Language" (2011) 42 VUWLR 241.

7 High Court Rules 2016, r 14.1.

8 See *Manakau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109 at [7].

contravention to the purpose of Te Ture mō Te Reo Māori 2016 stating that te reo Māori is a taonga and furthermore, is a breach of Te Tiriti o Waitangi.

(iii) Proposed New Part for te reo Māori

26. As set out above, we consider that a broader structural change within the Rules needs to occur. Within the High Court (and District Court Rules), we consider a new "Part" should be inserted to deal with provision relating to the use of te reo Māori in Courts. We consider that in order to properly elevate the mana of te reo Māori within the court system, rules concerning te reo Māori (and day to day tikanga Māori issues that the Court may face) ought to sit within their own section, rather than as a subpart to "Rules of general application".

27. This Part would essentially be a section within the Rules that is triggered where any party (or the Court themselves) indicate there are issues that relate to Māori interests and/or will have Māori participation (whether that is witnesses, counsel, experts, or the Judiciary themselves).

28. The Part would then list all the processes that the Court must have in place in all Court proceedings relating to that matter. These processes could include (but not limited to):

    i. The requirement of translator for every proceeding where the Part is engaged. As discussed above, our position is that the Courts should increase their capacity with te reo Māori speakers and interpreters, and should look into employing translators/interpreters (and more transcribers) rather than having a list of possible Māori speakers on call;

    ii. Rules concerning audio and translation services - the Part should set out that simultaneous translation needs to occur unless, by agreement, parties prefer something else (such as consecutive translation or transcription). We acknowledge that while the Supreme Court in *Abdula v R* stated that consecutive interpretation "at all times is highly desirable",[9] that case concerned the rights of a person charged, under s 24 of the New Zealand Bill of Rights Act 1990. The Supreme Court's justification for their approach in that decision was that consecutive interpretation enables an accused to react in response to what is said in court immediately and without being distracted by the voices of counsel and witnesses speaking at the same time as the interpreter.[10] This is obviously an important consideration in the criminal jurisdiction. However, in the civil jurisdiction, we consider that simultaneous translation is more efficient, cost-effective, and less time-consuming, as well as allowing for better and less arrested flow of speech from the reo Māori speaker. In the civil jurisdiction, justice is better served by the courts following the lead of the Waitangi Tribunal, and implementing simultaneous translation. Time and cost efficiency are particularly important factors in large-scale hearings which involve significant use of te reo Māori;[11]

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9 See *Abdula v R* [2011] NZSC 130 at [60].

10 At [60].

11 For example, the recent Ngāti Whātua hearings in Tāmaki Mākarau, or the Marine and Coastal Area application hearing in Rotorua in 2020, with both cases spanning a number of weeks.

iii. Granting the High Court jurisdiction to engage pou tikanga who may advise the Court on day to day processes, particularly in relation to matters of tikanga and te reo Māori. For example, a more strongly-worded version of s 99 of the Marine and Coastal Area (Takutai Moana) Act 2011 could be inserted into the Part,[12] compelling the High Court to engage pou tikanga either generally as advisors, or specifically for particular cases where the Part is triggered; and

iv. A "marae provision" whereby if the parties agree that the hearing should go to a marae, then the Court must order accordingly (if an appropriate venue can be found), and that the costs associated with that change in venue be covered by the Ministry of Justice.

(iv) Recommendations

29. We suggest the following four recommendations to the Rules Committee in order to improve access to justice for te reo Māori within the civil justice system:

i. Firstly, and most importantly, the Rules Committee should engage in a broader process of reviewing and consulting on the use of te reo Māori in the courtroom, particularly in relation to the current Rules. This should be carried out in conjunction with other groups such as the access to justice advisory group, the governing board of Te Kura Kaiwhakawā, and THRMOA.

ii. That a new "Part" to the Rules be inserted, in line with our comments and recommendations set out in Section iii above.

iii. We also recommend that if these rules are amended and a new "Part" is inserted, that the Rules Committee issue a practice note detailing the new amendments and how they might practically apply and/or differ from the current rules.

iv. Finally, we suggest that the courts, and in particular Te Kura Kaiwhakawā, should develop a more detailed bench book on the use of te reo Māori within the Courts and encouraging judicial engagement with reo Māori.

In Closing

1. THRMOA acknowledges the work of the Rules Committee undertaken thus far on access to justice, and broadly supports the Committee's efforts to improve access to justice within the civil jurisdiction.

2. Should you have any pātai or wish to discuss any aspect of our submissions, please feel free to contact Nopera Dennis-McCarthy at

Ngā mihi nui ki a koutou

Nopera Dennis-McCarthy
On behalf of THRMOA

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[12] Section 99(1)(b) provides that on questions of tikanga, the Court may obtain the advice of a court expert (a pukenga) appointed in accordance with the High Court Rules 2016 who has knowledge and experience of tikanga.