Te Tiriti o Waitangi and alcohol law

How Te Tiriti o Waitangi could be given appropriate effect in alcohol law and why it is important to do so

April 2022

te hiringa hauora
HEALTH PROMOTION AGENCY

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Tēnei te mihi maioha ki a koutou mo o koutou kete matauranga, mo o koutou koha aroha hoki ki tēnei kaupapa. Mauri ora.

Cover art

Cover art: “The Promise” by Zyanja Rudge

Zyanja Rudge is Kristen’s 12 year old niece, pictured here with her brother Nikau in “Tamariki say Taihoa” t-shirts. ‘TAIHOA – Ease up on the drink’ was a campaign developed by the Alcohol Advisory Council of New Zealand in 2012 to engage and support Māori to make positive choices around alcohol use.

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The Treaty to me has never been about Treaty rights, it's always been about the rightness that comes from people accepting their obligations to each other. And that was a profound, and I think, visionary base upon which to build a country. And it's certainly my belief that Māori will never let go of that promise and the challenge is always how well the Crown will respond.

DR MOANA JACKSON[1]

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1 https://natlib.govt.nz/he-tohu/korero/interview-with-moana-jackson

Whakarāpopoto

Purpose

In preparation for the anticipated review of the Sale and Supply of Alcohol Act 2012 (the SSAA), this paper presents ideas on how Te Tiriti o Waitangi could be given appropriate effect in alcohol law and why it is important to do so.

Context

The difficulties for Māori and communities to participate in decisions about alcohol in their localities has been raised in various reports. It was an issue highlighted in the 2020 Te Hiringa Hauora/Health Promotion Agency's report on *Māori Wardens presence and potential in the alcohol space*. This report recommended that Te Hiringa Hauora undertake further work to address this issue, focusing in particular on the potential benefits and implications of having a Treaty provision in the SSAA. This paper responds to this recommendation. It has been informed primarily by a rapid review of key literature, documents and submissions, and the perspectives of a variety of people (mostly Māori) with expertise and experience in alcohol matters or in the application of the Treaty in law and policy.

This paper refers to Te Tiriti o Waitangi (Te Tiriti) in some places and the Treaty of Waitangi (the Treaty) in others. This is deliberate. Te Tiriti refers to the Māori version of the Treaty only, which is the authoritative text according to the international legal doctrine of *contra proferentem*. The Treaty is used instead of Te Tiriti when referring to the Treaty more generally (ie, where it is not explicitly referring to the Māori version only) or to reflect how it has been referred to, or used, in the source documents themselves.

This paper has been written with the current socio-political environment in mind, most notably, the Government's focus on enhancing the Crown Māori Treaty relationship and achieving health equity. It also takes into account various developments underway, such as the health and resource management reforms and local government review, which could potentially inform and support the direction of the SSAA review.

Considerations for developing a Tiriti-informed alcohol law

Over the years there have been numerous calls for alcohol legislation to reflect the Treaty and the special status of Māori. Of late, and of most significance, is the SSAA WAI 2624 claim by David Ratū, which is being heard as part of stage two of the Health Inquiry in late 2022/early 2023.

A brief analysis of key Treaty documentation (including relevant Waitangi Tribunal reports) suggests that to be Tiriti-informed alcohol legislation must at the very least:

- empower whānau/hapū/iwi/rōpū Māori to meaningfully and effectively participate (and, where appropriate, lead and have the senior authority) in decisions being made about alcohol in their communities, including as co-designers of policy and decision-makers, should they wish to
- enable the achievement of equitable health and social outcomes for Māori. This is especially important, given the evidence that unequivocally shows that Māori experience a disproportionate amount of alcohol-related harm compared to the general population. This stark inequity has also persisted over time.

Key conclusions and suggestions for moving forward

This paper concludes that the current alcohol regulatory regime and process for enabling Māori to meaningfully participate in alcohol decisions that affect their communities requires considerable change to become Tiriti-consistent. It also concludes that alcohol legislation, as presently structured, is completely inept for achieving equity.

An initial frame of ideas and suggestions for moving toward a Tiriti-informed statute is presented in the table below. These ideas and suggestions are grouped under the five key themes that emerged from the analysis of relevant documents and participant perspectives. It describes, under each key theme/objective:

- the main issues and barriers associated with the theme/objective
- suggestions for legislative change to address the issues/barriers and to enable the achievement of the overall objective (with some suggestions being very explicit, while others are more general to accommodate the various ways in which these could be achieved)
- the rationale for these suggestions and/or other factors to consider alongside these ideas.

Objective 1:

There is a need to specifically refer to Te Tiriti in alcohol legislation and to ensure that references are precisely worded and integrated throughout – a holistic approach is required

Issue(s)

There is no reference to Te Tiriti in the SSAA. The absence of a Treaty clause has been interpreted by members of District Licensing Committees (DLCs) and the Alcohol Regulatory and Licensing Authority (ARLA) as meaning that it is not a factor to be taken into account in alcohol licensing decisions. This is in spite of the common law presumption (recently confirmed by a Supreme Court case) that legislation should be read in accordance with Treaty principles, regardless of whether there is an explicit Treaty provision or not. The decisions that have been made (which the evidence suggests is overwhelmingly in favour of granting licences) increases the accessibility and availability of alcohol. This in turn arguably impacts detrimentally on Māori communities without Māori having any real say or control in the decision-making process.

Suggestions

Incorporate a Tiriti clause upfront [in the SSAA] that includes both a general and more descriptive statement. Also refer to Te Tiriti in the appropriate places throughout the legislation and be explicit about how it can be given practical effect.

The purpose of a general statement would be to capture that 'all' persons with functions and powers under the statute (which includes the decision-makers, the agents inquiring into applications, and anyone else with functions and powers under the SSAA) must give effect to Te Tiriti. The purpose of a prescriptive statement would be to outline the various provisions within the statute that specifically give effect to Te Tiriti.

Use more proactive wording such as 'give effect to' or 'act in a manner consistent with', rather than weaker versions such as 'have regard to' or 'take into account'.

Also refer to 'Te Tiriti o Waitangi' or 'Te Tiriti o Waitangi and its principles' rather than 'the Treaty of Waitangi' or 'the principles of the Treaty of Waitangi'.

Comment

There is a need to incorporate an explicit Treaty clause in alcohol legislation, so that there is no question whatsoever that DLCs and ARLA (in particular) must consider Te Tiriti when they are making decisions on issuing alcohol licences and in any other matters.

Establishing a Tiriti clause that incorporates both a general and a more descriptive statement and using proactive wording was raised by many of the iwi Māori submitters to the Pae Ora (Healthy Futures) Bill. This will also be the likely feedback from iwi throughout the SSAA review process if not addressed upfront. It also ensures that persons exercising functions and powers under the SSAA are clear that Te Tiriti is to be considered in 'all' matters, while also providing some necessary guidance on how it is to be practically applied.

The most recent law reforms with Treaty clauses refer to Te Tiriti o Waitangi instead of the Treaty and this is the wording that is preferred by iwi submitters to the Pae Ora Bill. It also reflects the international legal doctrine – *contra proferentem*, which places Te Tiriti (the Māori language version of the Treaty) as the authoritative text.

Iwi submitters were also generally consistent in their comments that the clause should refer to Te Tiriti only. As such, if the principles are also to be referred to, this may be better accomplished by making it secondary to Te Tiriti (ie, Te Tiriti and its principles).

Objective 2:

Alcohol legislation needs to ensure that whānau/hapū/iwi/rōpū Māori can meaningfully and effectively participate in the decisions about, and determine what happens with, alcohol in their communities

Issue(s)

The process and environment for making decisions on alcohol matters generally works in favour of the applicant and the alcohol industry, and against those Māori and the wider community who object or wish to object to a licence.

The process is adversarial, and hearings typically take place in settings and at times that make it difficult for Māori and other community members to attend.

There is no mechanism for ensuring that local whānau/hapū/iwi/rōpū Māori are aware of a licence application in their rohe or for local Māori to participate, as of right, in the process should they wish to. There have also been cases where Māori have been refused the right to object to a licence in their rohe based on the current factors that are taken into account as to who has 'standing' to object.

There are no explicit criteria that requires those persons with functions and powers under the SSAA to consider the impact of a licence application on the local Māori community, or to consider effects important to Māori, or to engage Māori in the process of determining the merits of a licence.

There is no requirement for Māori to be represented on DLCs or ARLA, nor is there any requirement for members of these bodies to have an understanding of tikanga Māori or their local Māori community or Te Tiriti.

All of these factors combined means that DLCs and ARLA are generally ill-equipped to make decisions on alcohol matters that are in the best interests of local Māori. It also means that local Māori have little to no control over alcohol matters in their rohe.

Suggestions

To address the significant issues/barriers identified above, ensure that the statutory framework explicitly enables:

- a process and environment for alcohol licencing that is culturally appropriate and community-friendly, and ensures that hearings are easily accessible to Māori and the general public
- all applicants to demonstrate why the issuing of a licence is necessary, what efforts they would be taking to minimise alcohol-related harm (especially any impact on Māori) and to say who they have consulted with on the application, particularly what engagement has taken place with local Māori
- mana whenua to be notified of all licence applications in their rohe and to have a say, or to have their perspectives known (should they wish to), in any licensing decision within their rohe
- mana whenua to be co-designers in any local alcohol policies (LAPs), and to be involved in determining the alcohol-related effects to be taken into account when assessing licences in their rohe, as well as the appointment of members to any licensing decision-making body in their rohe
- local Māori to be represented on any licensing decision-making body, and where appropriate to be given the senior decision-making authority on particular applications, such as applications in highly Māori populated areas
- decision-making bodies to be able to competently consider the impacts of alcohol on the local Māori community and make licensing decisions appropriate to context, by ensuring these bodies have an understanding of tikanga Māori, issues of importance to local Māori, and Te Tiriti
- Māori participation in determining alcohol-related outcomes to be appropriately resourced.

Comment

Participants in this process offered a range of specific ideas for achieving the various outcomes (see section on 'Emerging themes and ideas' below). Some of these ideas overlap, and a more in-depth and robust analysis would be required of these, as well as a comprehensive analysis of other relevant factors to identify the most efficient and effective pathway for achieving each of the outcomes.

I am also very mindful that hapū/iwi/Māori are often covering a breadth of activity, with limited capacity and resources to respond to it all. It will therefore be important to ensure that provisions designed to better enable Māori to meaningfully participate in alcohol decision-making comes with the corresponding resources to support and sustain this. It will also be useful to explore other potential ways to lift this burden, while also ensuring that mana whenua participation is not undermined in any way. For example, the Iwi Māori Partnership Boards, being established under the Pae Ora Bill, could potentially support and enhance mana whenua participation in alcohol processes.

Objective 3:

Alcohol legislation must facilitate the elimination of inequities between Māori and non-Māori in the alcohol space and achieve health equity

Issue(s)

Māori experience a disproportionate amount of alcohol-related harm and this has been persistent for some time. Yet, there is no requirement for decision-makers to consider an equity lens when deliberating on alcohol matters.

There are also a number of evidence-based legal measures (eg, to reduce the availability of alcohol, restrict alcohol marketing and increase the price of alcohol with the additional revenue tagged to initiatives designed to eliminate inequity) that could reduce overall alcohol-related harm and inequities. However, the current statutory framework does not provide for these or needs considerable strengthening to be effective.

Suggestions

Incorporate an explicit 'equity' provision as an object or principle of the SSAA.

Put in place and/or strengthen legislative provisions that will:

- prohibit any increase of off-licence premises in specific locations identified in partnership with mana whenua
- proactively reduce the amount of off-licence premises in specific locations identified in partnership with mana whenua
- increase the price of all alcohol products, with a particular focus on the cheapest alcohol
- ringfence a significant portion of the additional revenue generated from increased alcohol prices and/or an increased alcohol levy toward a fund to eliminate inequity in alcohol-related harm, determined and distributed by local Māori
- restrict alcohol marketing.

Place particular priority on legislative provisions to reduce the amount of off-licence premises in high-density, highly Māori populated areas and to ringfence funding for efforts to eliminate inequity.

Comment

There is an explicit equity provision in the purpose section of the Pae Ora Bill (clause 3). This provision, with the suggested amendments from iwi submitters to the Bill (ie, to replace 'reducing disparities' with 'eliminating inequity') would provide useful guidance for what an equity provision could look like in alcohol legislation. Such a provision would also give prominence to issues of inequity and enable an equity lens to be applied in the decision-making process.

While there is a lack of evaluation of the effectiveness of the legal measures (eg, availability, price, marketing) specific to Māori, there is also some evidence to suggest that many Māori will still likely benefit from putting in place and/or strengthening these. This is particularly so if local Māori are involved in determining how these measures (especially reducing availability and a ringfenced fund) could best work in their rohe.

Of all the legal measures mentioned above, reducing the amount of off-licence premises in high-density, highly Māori populated areas and ringfencing funding for efforts to eliminate inequity were the most popular measures identified by participants. Logic would also suggest that they are the measures most likely to be effective for eliminating inequity. Reducing the amount of alcohol outlets would also likely reduce exposure to alcohol marketing and potentially increase the price of alcohol, given that there will be less outlets to compete against in a specific area. A ringfenced fund, specifically targeted toward efforts to eliminate inequity and that involves local Māori in their design and delivery, is also likely to be more responsive to the needs of local Māori and effective in reducing alcohol-related harm and inequity.

Objective 4:

There is a need to put in place effective accountability and monitoring structures and ensure that meaningful data is utilised to measure progress on eliminating inequity and meeting Te Tiriti obligations

Issue(s)

There is no cohesive system in place to monitor and assess whether alcohol legislation is producing the desired effects, particularly once provisions to give effect to Te Tiriti and achieve equity are in place.

Suggestions

Incorporate legislative provisions that would:

- establish a robust accountability and monitoring system to effectively and efficiently measure and report on the performance of the alcohol regime in meeting Te Tiriti obligations and achieving equitable outcomes in alcohol-related harm
- require inspectors to identify and monitor licence compliance of higher risk off-licences in high Māori population areas and to collaborate with the other two agents (ie, police and the medical officer of health) to enhance data collection in these areas.

Comment

The health and resource management reforms are currently considering the establishment of robust accountability and monitoring systems and could provide useful guidance and/or support for this. In particular, the monitoring and reporting of key Māori alcohol-related outcomes and Tiriti performance of the alcohol system could potentially be supported by, and/or transferred to, the proposed Māori Health Authority.

It will also be important to put in place specific mechanisms to monitor the inclusion and/or strengthening of the legal measures above, to ensure that they are achieving the desired effect, given the lack of evaluations on these measures particular to Māori.

The specific and enhanced monitoring, data collection and compliance activity proposed for inspectors would also support strengthened measures to reduce access to, and the availability of, alcohol in highly Māori populated areas. It would also ensure that agencies collect much better data on these areas, given that only three of the 11 public health units (PHUs) could respond to the 2021 Official Information Act (OIA) request on how many applications they had received in high Māori population areas.

Objective 5:

There is a need to ensure that the 'process' for redesigning alcohol legislation to give effect to Te Tiriti is also consistent with Te Tiriti and its principles

Issue(s)

Māori engaged in this process were primarily people with expertise, knowledge and/or experience in the alcohol area. There was no specific engagement with local whānau/hapū/iwi in the process of developing this paper and there needs to be.

Suggestions

Undertake a comprehensive and Tiriti-appropriate engagement process with whānau/hapū/iwi once the review of the SSAA is underway. This would involve providing early and sufficient opportunity for hapū and iwi to have meaningful input in developing and determining the options for legislative change and to be co-designers of any new provisions.

Comment

The process of engagement for the resource management reforms may be a useful example to consider.

The purpose of this paper

This paper provides some initial ideas for considering how Te Tiriti o Waitangi could be given appropriate effect in alcohol legislation.[2] Its purpose is to provide a starting point for sparking a much broader conversation about this kaupapa in preparation for the anticipated review of the Sale and Supply of Alcohol Act 2012 (SSAA).

2 The use of the terms 'alcohol legislation' or 'alcohol law' throughout this report refer to the primary law regulating the sale and supply of alcohol in Aotearoa New Zealand (currently the SSAA).

Background

The SSAA does not make any reference to Te Tiriti, despite the significant impact that alcohol has on the lives of many Māori whānau and communities. Māori, on average, experience a disproportionate amount of alcohol-related harm compared to the general population.[3]

In 2020, Te Hiringa Hauora engaged with Māori Wardens throughout the motu to ascertain the alcohol-related issues that they were observing in their communities, their current efforts in the alcohol space and the support required to enhance these efforts. Among other things, Māori Wardens raised concerns about how difficult it was for Māori and communities to participate in decisions about alcohol in their localities, primarily because of the SSAA. As a result, one of the recommendations that emerged from this engagement process was for Te Hiringa Hauora[4] to undertake a robust analysis on the potential benefits and implications of having a Treaty provision within the SSAA.

3 Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand.* Auckland: Alcohol Healthwatch; Alcohol Healthwatch. (2019). *Submission to the Māori Affairs Select Committee on the Inquiry into health inequities for Māori.*

4 Te Hiringa Hauora is arguably the best placed organisation ‘within the public sector’ to progress this work, given its specialist expertise in alcohol, broad networks into the alcohol sector and community, focus on a Treaty-dynamic approach to improving equity and autonomous statutory advisory function on alcohol.

Process undertaken

I was commissioned in March 2021 to undertake this mahi. I began with a rapid review of the literature, starting with a number of submissions to the select committee overseeing the Alcohol Reform Bill that were made 10 years ago by iwi Māori organisations. I then moved on to working through a variety of more recent papers that touched on inequities, the key issues with the SSAA and how these could be resolved, and evidence about what works to address alcohol-related harm.

I also briefly canvassed some Waitangi Tribunal reports and other key documents providing guidance on the Treaty and its application in policy and law. These latter documents included consultation summaries with whānau/hapū/iwi on the inclusion or strengthening of Treaty clauses in legislation and the subsequent reports and advice that resulted (eg, resource management reform, Cannabis Bill). I also briefly looked at some of the decisions by the District Licensing Committees (DLCs) and the Alcohol Regulatory and Licensing Authority (ARLA) and other relevant case law, as well as the international literature touching on indigenous involvement in alcohol control measures. Some of the reviewed documentation was recommended or provided to me by those I spoke to as part of this process.

The original plan for the first phase of this mahi also included the establishment of an expert advisory group to guide the process and develop a set of preliminary ideas. This idea was abandoned after engaging in some initial conversations with agencies and a few other key stakeholders in favour of a more organic, conversational process. This organic process began with initial conversations with some key stakeholders who would then refer us to others – creating a snowball effect. These referrals included people with first-hand experience of the SSAA processes and/or expertise in Treaty and Te Ao Māori perspectives and law, some of whom we would not have necessarily come across or accessed otherwise.

Te Hiringa Hauora, the person who identified other key individuals, or myself initiated contact with the identified stakeholders by email to ask whether they would like to inform this early stage of the mahi. Most of those invited to participate did agree to take part, and the conversations typically took place by Zoom using an unstructured type of interviewing approach. The intention behind the unstructured approach was to allow the participant to freely and broadly express their perspectives on how the SSAA could give effect to Te Tiriti without any of my own preconceived ideas and biases potentially influencing theirs. I then subsequently narrowed in with some specific questions or prompts based on what was initially revealed.

Overall, 26 individuals took part in the process. Most of these participants had a sole or partial focus on alcohol-related harm and worked in a range of organisations (eg, government, non-government, community-based, academia) and across a variety of disciplines (eg, justice, local government, Māori development, public health, law). Most had been working in the alcohol space for many years and are very well known for their knowledge and expertise in this area. Some of the participants were members or past members of DLCs or had participated in DLC hearings. Others had specialist knowledge in Māori customary law and/or the application of Mātauranga Māori and the Treaty in policy and legislation. The perspectives gauged were broad and diverse, but all tended to agree on the key high-level outcomes that needed to be achieved if alcohol legislation was to reflect and give effect to Te Tiriti.

The information gathered through the literature review and conversations was brought together and thematically analysed. At the end of August 2021, I verbally presented an initial set of ideas that had emerged through phase one of the process to Te Hiringa Hauora. This presentation became the basis for the second phase of the process, which began in early September.

The second phase involved presenting and discussing this set of initial ideas with groups (or individuals representative of a particular organisation) specifically engaged and/or interested in preventing and reducing alcohol-related harm, most of whom were Māori. The intention was to test the ideas and ignite a slightly broader, yet informed, conversation on this kaupapa. This wider audience included Māori alcohol and other drug practitioners and experts,[5] Māori Wardens and members of the New Zealand Māori Council, Te Maruata (comprising Māori elected members of local authorities), the Kōkiri ki Tāmaki Makaurau Trust, CAYAD (Community Action on Youth and Drugs), the Safety Collective Tāmaki and a District Health Board General Manager, Māori. The second phase of the engagement process generally confirmed the overall direction and approach that had emerged from phase one and helped to refine and prioritise the preliminary ideas.

In late October 2021, the Pae Ora (Healthy Futures) Bill was introduced to Parliament. Given its direct relevance to this mahi, I briefly canvassed a number of the submissions made by mainly Iwi Māori organisations.[6] This partial review was to get a general feel of iwi perspectives on the Pae Ora Bill, particularly their views on its attempt to honour Te Tiriti and achieve health equity. This overview of submissions[7] provided a particularly valuable insight into iwi perspectives on incorporating Te Tiriti and an equity lens in legislation, and it has also helped to refine the initial ideas and conclusions in this paper.

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5 This engagement occurred at the Pre-Cutting Edge (Oraka Ararau) Virtual Māori hui on 8 September 2021. At its peak, 72 people participated in the online hui and an audience of over 60 was maintained for most of the day.

6 I reviewed 24 submissions, 20 of which were submitted by Iwi Māori organisations. The Iwi Māori submissions were found through searching the submission site using keywords such as 'Māori', 'Iwi', 'hapū' and 'Rūnanga'.

7 This overview involved reviewing each of the 24 Pae Ora Bill submissions I had identified as relevant to this mahi (from a very quick search of the submission site), and then summarising and thematically analysing the 20 Iwi Māori submissions.

I am mindful that there are other perspectives and documentation that could have usefully informed this mahi, which have not been captured because of time and resource constraints. As such, there are obvious limitations with this approach. However, despite these limitations some level of consistency was still achieved across the literature and kōrero that was captured, as reflected in the ideas that have emerged. This paper provides:

- a snapshot of the current landscape that is most relevant to this mahi
- a brief commentary on the calls for a Treaty clause in alcohol legislation and the Treaty considerations particularly relevant and useful to this kaupapa
- a discussion of the key themes that emerged from the process (which forms the basis of the initial draft frame of ideas and considerations for giving appropriate effect to Te Tiriti in alcohol legislation that is outlined above)
- some concluding thoughts.

Snapshot of the current landscape

Shortly after starting this mahi, it became obvious that there was a lot of energy and activity in this space relevant to this kaupapa and the potential direction it could take.

First, on 2 June 2021 the Minister of Justice, Kris Faafoi, announced that he was:

> *...considering potential timing and options for a review of SSAA...[and] expects such a review would commence later in the parliamentary term.*

He has since reiterated his expectation that a review will occur in this parliamentary term in response to subsequent questions in the house.[8] The scope of this review has yet to be confirmed, but there has since been a flurry of activity, particularly from public health advocate groups who are pushing for a substantive rather than cursory review of the SSAA.

Secondly, there are a number of Bills in the pipeline seeking some amendments to the SSAA. The SSAA (Renewal of Licences) Amendment Bill was introduced in February 2018 to amend the Act so that DLCs and ARLA must take into account any inconsistency between a relevant local alcohol policy (LAP) and the renewal or consequences of the renewal of a licence. In response to the select committee hearing a number of Supplementary Order Papers were released in July 2021 to amend the Bill, which is currently awaiting its second reading.

Chloe Swarbrick has also submitted a Private Members Bill, which is intended to remove appeals on LAPs and ban some forms of alcohol sponsorship/advertising.[9] Some of the submissions and comments that I have seen on the Bills suggest that the proposed amendments are tracking in the right direction toward increasing the efficacy of the SSAA in reducing alcohol-related harm, but need to go much further to make any real difference (see for example the New Zealand Drug Foundation 2018 submission on the SSAA (Renewal of Licences) Amendment Bill). There are a few other Private Members Bills related to the SSAA in the ballot, but these appear to be more about further liberalising alcohol use rather than restricting its impacts.

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8 It was also indicated through the engagement process that there may be a Māori Select Committee inquiry into alcohol commencing in 2023.

9 The Bill intends to ban alcohol sponsorship and advertising of all streamed and live sports and alcohol sponsorship at all sporting venues.

Thirdly, the Labour Government has been more explicit about its focus on equity, enhancing Māori participation in matters that are important to them, and in meeting its Treaty obligations than its predecessor. The Government's consideration of the recent Waitangi Tribunal Kaupapa Māori claims (in particular, the *Hauora report on stage one of the health services and outcomes inquiry* – WAI 2575) and response to the health and disability system review (more specifically the establishment of a Māori Health Authority) provide evidence of this, as well as opportunities to leverage off this. We have also seen an increased focus on the Treaty in policy and legislation during the Labour Government's term, most notably:

- the Cabinet Office circular issued on 22 October 2019 provides guidance to policy makers on considering the Treaty in policy development and implementation (CO 19(5) refers)
- section 14 of the new Public Service Act 2020 stipulates that "the role of the public service includes supporting the Crown in its relationships with Māori under the Treaty"
- the resource management reform, which (among other things) aims to ensure Māori have an effective role in the resource management system consistent with Te Tiriti principles
- the Treaty analysis that has informed the content of the Cannabis Bill
- the intention in the Pae Ora Bill to honour Te Tiriti and achieve health equity.

There are key learnings and aspects from these examples that are useful for informing how alcohol legislation could give effect to Te Tiriti.

Fourthly, there are other reviews being undertaken at this time that are likely to have some bearing on this kaupapa as well, most notably, the review into the future for local government that was announced on 23 April 2021.[10] An initial report – *Navigating critical 21st century transitions* – was released in late 2021, which describes five critical transitions for protecting and augmenting social, economic, environmental and cultural wellbeing, and for increasing equity. A draft report for public consultation is scheduled to be released in late 2022, with a final report due on 30 April 2023.

Lastly, and arguably most directly relevant to this mahi, is the WAI 2624 SSAA claim and other associated claims on aspects of alcohol-related harm.[11] David Ratū filed an application on 11 February 2019 to have the WAI 2624 claim considered urgently by the Waitangi Tribunal on the grounds that the SSAA fails to:

- contain or include a 'Treaty clause' and/or appropriate references to the Treaty and/or Māori
- ensure Māori representation in deciding whether a licence is granted for the sale and supply of alcohol under the SSAA
- take into account the social impact on Māori communities when deciding whether a licence is granted.

10 The overall purpose of this review is to identify how local government needs to evolve over the next 30 years to improve the wellbeing of New Zealand communities and the environment, and actively embody the Treaty partnership.

11 For example, aspects of the WAI 2700 Mana Wahine Kaupapa Inquiry associated with wahine Māori experiencing disproportionate alcohol-related harm.

While the claim was refused urgency, Judge Savage noted that the alcohol-related harm experienced by Māori was '"continuous and serious".[12] He further stated:

> *...I do not accept that it is beyond the remit of the Health Inquiry to deal with the way in which decisions are made in relation to the supply of deleterious substances.* (p. 7)

In other words, it would appear from this statement and other comments made by Judge Savage, that in his opinion the SSAA claim would be better addressed within the broader context of stage two of the Health Inquiry (WAI 2575)[13] rather than in isolation to this.

The WAI 2624 claim has also since been amended to include foetal alcohol spectrum disorder (FASD). The SSAA aspect of the claim will likely follow the FASD component and is anticipated to be heard at the end of 2022/early 2023.

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12 WAI 2624 #2.5.3. *Decision on application for a urgent hearing* (30 April 2019).

13 Stage one of the Health Inquiry (WAI 2575) considered the legislative and policy framework of the primary health care system. Stage two covers three priority areas: Māori with disabilities, Māori mental health and issues of alcohol, tobacco and substance abuse.

The Treaty and alcohol legislation

This section presents a brief background on the various calls to incorporate a Treaty clause in alcohol legislation and the Treaty considerations deemed to be particularly relevant and useful for providing guidance on this kaupapa.

Calls to incorporate a Treaty clause in the SSAA

As outlined in the Statement of Claim filed by David Ratū, in 2010 the Law Commission in its report *Alcohol in our lives: Curbing the harm* outlined the broad and disproportionate impact of alcohol use and misuse on Māori. Of note, the Law Commission commented that it was more difficult for Māori to regain control of the causes of alcohol-related harm to their whānau and community, and that alcohol may not simply be reflecting existing inequalities between Māori and others, but may be 'actively driving' these.[14] Despite these significant concerns, the Law Commission made no specific recommendations to address these or to include any statutory recognition of the Treaty.

Te Rūnanga o Ngāi Tahu[15], in its 2011 submission to the select committee overseeing the Alcohol Reform Bill, did address some of the concerns raised by the Law Commission and specifically suggested the inclusion of a Treaty clause and other explicit references to the Treaty and Māori interests throughout the Bill. As stated in their submission:

> *The Bill maintains a status quo wherein iwi are not directly involved in local alcohol policy or licensing decision-making. We request that the Crown enter into immediate dialogue with iwi on potential arrangements that more effectively embody the Treaty relationship – in particular, arrangements that make better provision for Iwi in co-governance roles in relation to alcohol regulation and health policy generally.* (p. 8)

These suggestions by Te Rūnanga o Ngāi Tahu, however, were not taken on board at that time.

More recently, there have been further calls from a range of stakeholders in the alcohol space and within a variety of reports to ensure that the proper recognition of the Treaty and the special status of Māori is reflected in the SSAA.[16] Most notably, David Ratū in his WAI 2624 claim is seeking:

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14 See paragraphs 3.103 to 3.115, particularly 3.108 of the Law Commission's Report.

15 Te Rūnanga o Ngāi Tahu. (2011). *Submission ki te Justice and Electoral Committee e pā ana ki te Alcohol Reform Bill.*

16 See for example: Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand*. Auckland: Alcohol Healthwatch; Allen and Clarke. (2021). *Community Law Alcohol Harm Reduction Project: A formative evaluation*. Wellington: Te Hiringa Hauora; PolicyWorks. (2021). *Support for Territorial Authorities (TAs) and the public around alcohol licensing* (Unpublished draft); Te Hiringa Hauora. (2020). *Māori Wardens presence and potential in the alcohol space*. Wellington: Te Hiringa Hauora.

...recommendations that the Act [the SSAA] be amended to reflect the principles of active protection, consultation and good faith...[and] as a bare minimum, legislative change to the Act to ensure the proper recognition of the Treaty and the special status of Māori. (p. 25 of the Statement of Claim)

Several claimants in the WAI 2700 Mana Wāhine Kaupapa Inquiry are also seeking a Tribunal recommendation that would see the SSAA amended "to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi."

Proposed Treaty guidance for this kaupapa

The Treaty of Waitangi is one of the major sources of New Zealand's constitution and is regarded as a founding document of the government of New Zealand.[17] Despite this, and a growing body of Treaty jurisprudence, there are still ongoing debates about how best to interpret and apply the Treaty to policy and legislation. Rather than getting caught up in these debates, for the purposes of this mahi I decided to draw on those sources that appeared most relevant and useful to this particular kaupapa, most of which are strongly informed by a Māori perspective (eg, WAI 2624 Statement of Claim 2019 by David Ratū, Te Rūnanga o Ngāi Tahu submission to the select committee considering the Alcohol Reform Bill in 2011, the 2019 Waitangi Tribunal *Hauora* report[18] and Iwi Māori submissions to the Pae Ora Bill). I also found the model of 'spheres of influence' as outlined in the Matike Mai Aotearoa report[19] and *He Puapua 2020-2040*[20] particularly useful for articulating, in a simplistic way, the essence of the Treaty.

The key Crown Treaty considerations and obligations (emerging from a synthesis of these sources), which are especially relevant and applicable to this kaupapa, are to:

- *Actively protect Māori health and wellbeing, including the right for Māori through their iwi, hapū or other organisations to make decisions over their own affairs according to their own preferences, as far as practicable* – The Tribunal in the *Hauora* report noted that while active protection does not automatically privilege Māori as a group, the existence of significant health disparities requires the Crown to implement positive steps to provide for the pursuit of Māori health equity, and this obligation is heightened where adverse disparities in health status are persistent and marked.

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17 Cabinet Office circular providing guidance to policy-makers on considering the Treaty in policy development and implementation – 22 October 2019 (CO 19(5) refers).

18 Note that in the *Hauora* report (2019) the Waitangi Tribunal considered what previous Tribunal reports had said about health issues and the health system, the application of the Treaty to the social sector and state policy more broadly, and what the parties submitted in this claim.

19 Matike Mai Aotearoa, the independent working group on constitutional transformation, was first promoted at a meeting of the Iwi Chairs' Forum in 2010. Members of the working group were nominated by Iwi and other organisations or were co-opted. Between 2012 and 2015, Professor Margaret Mutu (the Iwi Chairs' forum representative and Chair of the working group) and Dr Moana Jackson (the Convenor) facilitated 252 hui to discuss constitutional transformation, including the Treaty. The 2016 report includes an analysis of these hui discussions and feedback from 70 rangatahi wananga, written submissions, focus groups and one-on-one interviews.

20 Report of the working group on a plan to realise the United Nations Declaration on the Rights of Indigenous peoples in Aotearoa New Zealand (2019).

- *Focus attention on inequities and, if need be, to provide additional resources to address the causes of those inequities and to ensure that all services are culturally appropriate and kaupapa Māori solutions are also available across the system* – The *Hauora* report suggests that the Crown is required to act, to the fullest extent practicable, to achieve equitable health outcomes for Māori, including ensuring that it, its agents and its Treaty partner are well-informed on the extent, and nature, of both Māori health outcomes and effort to achieve Māori health equity.
- *Work in partnership with Māori, particularly where disparities in outcomes exist and where Māori are expressly seeking an effective role in the process of developing and/or implementing policy* – The Tribunal in the *Hauora* report endorsed a modern Treaty partnership that empowers Māori communities to be actively involved in policy decision-making in matters affecting them. There was some emphasis on Māori being co-designers and decision-makers rather than just influencing or participating in decision-making. The Tribunal also commented that any practical arrangement or framework that is intended to implement partnership requires constant evaluation to ensure that it continues to fulfil its purpose in meeting Treaty obligations. In making this comment the Tribunal noted that the provisions of the Resource Management Act 1991 (RMA) had considerable promise for facilitating partnership arrangements but had failed in its implementation, due to being ignored or used ineffectively, and were therefore no longer Treaty-compliant.

Another, possibly more simplistic, way to look at the Treaty relationship is to visualise three 'spheres of influence' – two independent/separate spheres (ie, the rangatiratanga sphere and the kāwanatanga sphere) and an interdependent/joint sphere where joint decisions over issues of mutual concern are made by working together as equals (ie, the relational sphere). According to Matike Mai Aotearoa, the relational sphere is where the Treaty relationship will operate and where a conciliatory and consensual, rather than adversarial and majoritarian democracy, is most needed.

Similarly, the brief analysis of iwi Māori submissions to the Pae Ora Bill and subsequent kōrero from Treaty and Māori public health experts suggests that a Treaty relationship is one that supports and empowers tino rangatiratanga and upholds good governance (kāwanatanga). Such a relationship would therefore be demonstrated by shared decision-making powers (both nationally and locally). It would also involve joint responsibility for lifting Māori wellbeing outcomes, with Māori being the senior authority and lead on Māori matters, including determining the structures and outcomes to support these matters. Anything less is not a Treaty relationship/partnership, as it creates a power imbalance within the Treaty relational/overlapping sphere with the kāwanatanga sphere dominating the rangatiratanga one. This is the typical model prevalent in Aotearoa New Zealand.

The authors of *He Puapua 2020-2040* point out that across the sector the rangatiratanga sphere is currently very small, the kāwanatanga sphere very large, and that the difference in size and influence is also reflected in the relational sphere where the two distinct spheres overlap. Interestingly, when applying this analysis to the SSAA, there is no point of overlap between the spheres or operational Treaty relationship at all. The only sphere in operation, by way of that statute, is the kāwanatanga sphere.

In summary, this brief analysis reinforces the complete absence of any Treaty consideration within the SSAA and suggests that, at the very least, to be Tiriti-informed alcohol legislation must:

- empower whānau/hapū/iwi/rōpū Māori to meaningfully and effectively participate (and, where appropriate, lead and have the senior authority) in decisions being made about alcohol in their communities, including as co-designers of policy and decision-makers, should they wish to
- enable the achievement of equitable health and social outcomes for Māori, especially given that the evidence unequivocally shows that Māori experience a disproportionate amount of alcohol-related harm compared to the general population and that this inequity has persisted over time.[21]

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21 Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand*. Auckland: Alcohol Healthwatch. The evidence also shows a persistent disparity in the rates of hazardous drinking between Māori and non-Māori over time and that in some cases the disparity has also grown.

Emerging themes and ideas

This paper focuses specifically on how alcohol legislation could give effect to Te Tiriti and why this is necessary. While it is acknowledged that a much broader non-legislative programme of work and associated resourcing would need to be put in place to support any legislative change and to eliminate alcohol-related harm inequities, this paper does not address this in any way. Its primary concern is to identify key legislative barriers that would need to be removed and potential enablers that could be put in place to ensure the proper recognition of Te Tiriti in alcohol legislation. This section of the paper outlines the key themes and ideas that have emerged.

There is a need to specifically refer to Te Tiriti in alcohol legislation and to ensure that references are precisely worded and integrated throughout – a holistic approach is required

The Cabinet Office circular suggests that a Treaty clause within legislation is not really needed as there is a presumption that legislation should be read in accordance with Treaty principles regardless of its absence. The circular states:

> *New Zealand courts have held that Māori rights might be recognised by the common law, without statutory expression, and* ***a decision maker may be required to weigh the Treaty rights/interest even where there is no Treaty reference in statute****. The courts will generally presume that Parliament intends to legislate in accordance with Treaty principles.* (p. 3, emphasis added)

A recent Supreme Court decision (*Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board and others* [2021] NZSC 127) confirmed this presumption and the constitutional significance of the Treaty to the modern Aotearoa New Zealand state.

> *The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that [where there are] Treaty clauses [these] should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.* (para 151)

However, some DLCs and ARLA appear to be unaware of this common law presumption or the constitutional significance of the Treaty. This is evidenced by comments made by these decision-makers that because there is no Treaty reference in the SSAA, that it is not a factor to be taken into account in decisions about alcohol licences. For example, in *Te Ariki Morehu v Lake Rotoiti Hot Springs Ltd* [2017] NZARLA 313, the judge stated that:

> *Section 8 of the [Resource Management Act] requires all persons exercising functions and powers under that Act, in relation to managing the use, development, and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi…There is, however, no equivalent provision in the [SSAA] which incorporates the Treaty of Waitangi or its principles. Nor is the Treaty of Waitangi part of the general law of New Zealand. As a result, the Treaty of Waitangi and its principles are not matters to which a DLC must have regard to under s 105 of the Act. On this basis, the Authority is satisfied a cause of action based on failure to have regard to cultural values is clearly untenable and cannot possibly succeed.* (paras 26-27)

Similar conclusions have been drawn by other DLCs and ARLA in cases where opposition to a licence refers to Treaty considerations. As such, first and foremost it would seem that there is a need to incorporate some explicit reference to the Treaty in alcohol legislation so that it is consistently factored into the decision-making.

Secondly, some might argue that the incorporation of a Treaty clause in itself within the SSAA would suffice. However, the absence of any specificity as to what that means for decision-makers can make it a tokenistic gesture only. There are also risks of creating perverse outcomes, such as unhelpful precedents, should the Treaty for example be considered but dismissed as irrelevant because the decision-makers had no statutory direction on how to appropriately apply it. This risk was also acknowledged by one of the Māori lawyers consulted as part of this process.

Another participant also highlighted that "Council Treaty responsiveness is different to Government Treaty responsiveness" so there was "a real need to be very blunt and blatant." A case in point is *L&H Graces Place Mangere Limited (trading as HI Sports Bar)* [2018] NZDLCAK 39054 (12/7/18). In this hearing it was argued that the Auckland DLC had an obligation to consider Māori and the Treaty and perhaps provide a Māori impact assessment. However, this argument was rejected, with the DLC highlighting that section 4 of the Local Government Act 2002 (LGA) had no relevance to DLC decision-making and that members were limited to considering only the matters set out in the SSAA. The DLC referred to a former ARLA case – *Super Liquor Holdings Ltd v Auckland City Council* [2017] ARLA 250 – that made reference to section 4 of the LGA.[22] The judge in that case stated (at paragraph 58 of the judgment) that:

> *Section 4 does not impose the principles of the Treaty on local government. Instead, s4 restates that it is the Crown's responsibility to take appropriate account of the principles of the Treaty.*

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22 The *Super Liquor Holdings Ltd* appeal decision forms part of a composite ARLA decision reported as *Redwood Corporation and Others v Auckland City Council and Others* [2017] NZARLA PH247-254.

This statement suggests that without being specific, decision-makers (many of whom are elected Council members) may tend to interpret any Treaty clause in the SSAA in the most reductionist way possible.

To achieve the kind of specificity needed requires a more holistic and integrated approach to incorporating the Treaty in alcohol legislation and ensuring that it is appropriately reflected within the key decision-making points of the system. This was the approach taken in the Cannabis Bill according to one of the justice officials involved in developing it. Rather than using the more typical generic Treaty clause that is seen in other statutes, the Cannabis Bill Te Tiriti clause (clause 5) listed the various provisions within the Bill where the principles of Te Tiriti were to be given effect and how these were to be given practical effect (eg, that the Cannabis Regulatory Authority operates in a way that develops meaningful relationships with iwi and Māori representatives and requires that membership to the advisory committees includes their representation). It also outlined a number of other provisions throughout the Bill that recognised Māori interests in regulating cannabis.[23]

Although not enacted, this more novel way of reflecting the Treaty in the Cannabis Bill and the importance of being explicit about what it means to give practical effect to it was commended by at least two people I spoke to. One of the Māori lawyers, in particular, commented that given the dominant western-based ideals and values that underpin alcohol legislation, even with the strongest Treaty clause in place nothing would probably change if it was not prescriptive enough and reiterated and reinforced throughout the statute. This overall sentiment was also generally supported throughout the broader engagement process.

The trend in recent years to move toward a more prescriptive approach to expressing the Crown's obligations under the Treaty in legislation was specifically noted by the Supreme Court in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board and others* [2021] NZSC 127. It has also been the approach adopted in the Pae Ora Bill (see clause 6). As outlined in the Bill's explanatory note the intention is to place:

> *Tiriti/Treaty-informed decision-making at the heart of the system by ensuring that decisions made by health entities will be genuinely informed by the health principles identified by the Tribunal [in the Hauora report], and that the legislation will support system-wide accountability for Māori health outcomes.*

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23 A comparable approach to the SSAA would require additions (reflecting Treaty obligations and participatory involvement of Māori) to at least the following provisions: section 3 – purpose; section 179 – composition of ARLA; sections 189-192 – composition of DLCs; section 193 – appointment of Commissioners; sections 201-207 – procedures; sections 102, 128, 140 – rights of status to object and objection grounds; sections 105, 131, 142 – licence criteria; sections 77-79 – LAPs.

Despite this admirable intention, iwi submitters highlighted that the Bill still falls considerably short of achieving a genuine Treaty relationship and the transformational system change it is seeking. They also pointed out the various aspects of the Bill that required strengthening to achieve these goals. For example, many Māori submitters commented that the Tiriti clause needed to apply to 'all' those exercising functions and powers under the statute and not just some of them. Similarly, Māori engagement should also apply to 'all' not just a few. A large number of Māori submitters also commented that the statute needed to reflect a true and equal Treaty partnership, which involved shared decision-making powers and a collective responsibility for lifting Māori health outcomes, while also empowering Māori to determine their own health outcomes and to have the senior decision-making authority on hauora Māori. On this, submitters pointed out that under the proposed structure the Māori Health Authority was not truly autonomous and the decision-making power (which includes appointing members to the Māori Health Authority) still ultimately rests with the Crown.

The Pae Ora Bill is currently with the select committee, which is due to report on 27 April 2022. The outcomes of its considerations should be of direct interest and relevance to this kaupapa.

In summary, while there is a presumption that legislation should be read in accordance with Treaty principles regardless of its absence, this is not occurring at all under the SSAA. As such, there is a need to specifically and meaningfully incorporate Te Tiriti in alcohol legislation. As reiterated throughout the engagement process, provisions (especially those directed at decision-makers) also need to be particularly clear and prescriptive to ensure that the policy intention to give effect to Te Tiriti is appropriately applied in practice. Te Tiriti also needs to underpin all aspects of the legislation and apply to 'all' those exercising statutory functions and powers.

Alcohol legislation needs to ensure that whānau/hapū/iwi/rōpū Māori can meaningfully and effectively participate in the decisions about, and determine what happens with, alcohol in their communities

Ensuring effective and meaningful Māori participation in decisions about alcohol in their communities was by far the subject most talked about in the various conversations that were had on this kaupapa. In particular, the comments focused mainly on the many failings of the SSAA, and barriers to enabling any meaningful participation from Māori and the general community. Participants also generally acknowledged the irony of the current situation, given that a key objective of the 2011 Alcohol Law Reform was to give local communities a greater say in alcohol decision-making.

Some of the key failings/barriers mentioned by participants had already been anticipated by Te Rūnanga o Ngāi Tahu in their submission to the select committee overseeing the Alcohol Reform Bill in 2011. At that time, the Rūnanga recommended the need for a requirement for greater iwi input into the development of LAPs and decision-making by DLCs. They used an example of localised prohibition among Australian indigenous communities and how a fundamental element to the apparent success of that action was "the provision for communities to initiate the alcohol restrictions and for decision-makers to take into account community views." They also highlighted that this provision created an impetus for decision-makers to "engage directly with tangata whenua to ascertain and provide for relevant values and interests." (p. 10)

A systematic review of quantitative evaluations of Indigenous-led alcohol controls similarly concluded that:

> *…community-led alcohol controls characterised by their development and/or implementation by Indigenous communities globally have been shown to be effective in improving health and social outcomes.*[24] (p. 12)

However, as outlined below it is challenging enough for Māori and the wider community to participate in SSAA processes, let alone influence the outcomes of these.

More recently, issues with Māori participation in alcohol decision-making have been highlighted as Treaty breaches in David Ratū's WAI 2624 Statement of Claim:

> *Self-regulation or self-management must include active participation in processes and matters that directly impact Māori, their way of life and their quality of life. This must include participation in the process of granting an alcohol licen[c]e, especially given the alcohol related prejudice suffered by Māori…The Act [SSAA] and its failure to include Māori in decision making processes in respect of alcohol denies the existence of Māori and their constitutional status. Subsequently, Māori are prejudiced further, by being unable to exercise that right to manage matters such as the sale and supply of alcohol within their communities according to their own preferences. That failing in turn leads to further downstream prejudice, namely the alcohol related prejudice suffered by Māori.* (pp. 16-17)

A key point that also emerged from the Māori consultation process for the Cannabis Bill was the view that Māori have had little influence in the decisions that have been made about alcohol in their communities and that these decisions have been harmful. Those Māori who were consulted therefore wanted to ensure that the cannabis regime did not repeat the same mistakes of the SSAA and instead enabled meaningful Māori participation in the decision-making process.

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24 Muhunthan, J., Angell, B., and Hackett, M.L., et al. (2017). Global systematic review of Indigenous community-led legal interventions to control alcohol. *BMJ Open* 2017;7: e013932. doi:10.1136/bmjopen-2016-01-013932.

The lack of Māori input into alcohol licence applications was further highlighted by an OIA request by the Kōkiri ki Tāmaki Makaurau Trust that was transferred to PHUs across the country. Of the 32,100 alcohol licence applications investigated by 11 PHUs from July 2018 to May 2021, only 87 of the lodged applications were undertaken in consultation with Māori (ie, less than 0.3%, most of which were in Auckland). Comments from PHUs on why they did not consult with Māori and/or the general public about an application included that they were "unable to", their "current investigation does not routinely involve consultation with Māori", and "there is no obligation under the SSAA to consult with Māori."[25]

Ideas for addressing key failings and barriers within the SSAA were also spoken about at length by participants. While there were divergent and, in some cases opposing, views on how to address the failings/barriers there was an overriding consensus about the endpoint to be achieved (ie, that alcohol legislation needed to enable effective and meaningful Māori and community participation in alcohol matters that affect their community).

The analysis of Treaty considerations most relevant to this kaupapa (as outlined above) would also suggest that enabling meaningful, effective and 'equal' participation by Māori in decisions about alcohol in their community is a 'must' if the aim is to have a statute that truly reflects Te Tiriti. To achieve this means first addressing the existing power imbalance in favour of the applicant and alcohol industry that is accentuated and perpetuated by the SSAA. This power imbalance was highlighted by numerous participants, many of whom called for the need to put in place the right structures to address this. It was also a key finding of the draft PolicyWorks report on '*Support for Territorial Authorities and the public around alcohol licensing*' (yet to be published):

> *Applicants are generally well supported and better understand how the DLC hearing process works. They can effectively engage with the process and use this to their advantage. They have explicit rights under SSAA to view all objections and can approach objectors directly. Objectors often do not have the legal expertise or understanding to appropriately represent themselves at the DLC hearings. They are not able to appropriately express their views and therefore influence outcomes. There is a power imbalance that favours applicants.* (p. 32)

Changing the power dynamic will require, among other things, modifying who is making the decisions, the criteria for appointing the decision-makers, the factors influencing the decision-making and the predominant tikanga that is being followed.

The comments and ideas proffered by participants and the literature were focused mainly on the licensing process (although the comments/ideas were all interconnected in some way) and tended to fall into the following categories:

- the nature of the decision-making process
- who is able to participate, as of right, in hearings
- the factors taken into account when making decisions
- the decision-makers themselves.

25 Kōkiri ki Tāmaki Makaurau Trust. (2021). *Alcohol position statement* (pp 17-18); letter from Kōkiri ki Tāmaki Makaurau Trust to Minita Faafoi, e whā o Mahuru 2021.

Nature of the decision-making process

Many of the participants I spoke to commented on the adversarial nature of the decision-making process, and that this type of process only hindered community participation while benefiting the applicant and alcohol industry. As one participant commented, "When lawyers are involved that means you need to have money to meaningfully participate and straight away that puts the community at a disadvantage." The cost and the philosophy/environment within which hearings take place were seen as key barriers to Māori and community participation by a number of participants.

For example, one participant (who is a trained medical doctor and a Māori health and public health expert) spoke about their experience of opposing a licence for an eighth alcohol outlet in a 1 km radius within their community. This participant was reluctant to participate in the licensing process again unless it was substantially changed. From their experience, the process was not only unfair and stacked in support of the applicant (who was represented by a lawyer who specialised in licensing applications), but it was also considerably disabling and disempowering. As highlighted by this participant, even with their level of education and specialisation in public health and alcohol-related harm, they felt significantly disempowered by it, particularly the "disrespectful and gruelling way" in which their perspectives and values were challenged.

The participant also mentioned that the police officer who had opposed the application eventually withdrew their opposition due to what the participant perceived to be the 'intimidating nature of process'. It also did not matter that over 60 people in their community made submissions opposing the licence application. The only evidence that was given weight by the DLC was that of alcohol-related litter in the area, reports of alcohol-related behaviours that have impacted on the local school and emergency department admissions attributed to alcohol.

The participant commented that the time invested in opposing the application was in vain because as expected the licence was granted anyway, although some minor conditions were added. The call from this participant was for the process to be Tiriti-aligned so that tikanga Māori underpinned it. Such values, from the participant's perspective, would enable a more mana-enhancing process to take place where the community's voice was actually heard and influenced decision-making, rather than the disempowering and tokenistic situation that they had just experienced. The need to recognise and give effect to local tikanga was also echoed by other participants for similar reasons, with one asserting that the licensing process should operate as a bi-cultural system in equal partnership with Māori.

The experience of the Māori/public health expert outlined above appears to be similarly shared by many others. For example, the draft PolicyWorks report on *Support for Territorial Authorities and the public around alcohol licensing* found that many of the people they had spoken to discussed how intimidating and off-putting the DLC public hearing process was, and how community members felt that they were not treated fairly. For example, one interviewee commented that, "[t]hey tried to discredit us, almost saying that we had staged the photos..." (p. 32), and another aptly stated, "[i]t's an uneven playing field, preparing me to be smarter and better won't change the outcome, we need to change the playing field." (p. 30)

Also, as noted in David Ratū's WAI 2624 Statement of Claim:

> *Māori are afraid to involve themselves in the foreign DLC process. They are intimidated by adversarial lawyers who appear on behalf of alcohol applicants in a litigious environment. These factors act as a major deterrent to Māori becoming involved in the DLC process, and subsequently becoming appointed as a DLC commissioner.* (p. 18)

I also spoke to one Māori participant who was a DLC member for only half a meeting. This participant chose to walk out half-way through the first and only meeting they attended, because it became quite clear that the committee was not interested in anything Māori and in enabling the community to effectively participate. This participant's call for change was that everything about the DLC needed to change. In their view, factors that could improve the situation included having a specific Māori Co-Chair, Māori representation on the DLC and having a focus that is of relevance to Māori as well.

One participant, while making the point that the litigious nature of the process was problematic, also asserted that there would always be a need for some sort of judicial body to make decisions on licences because of the technical/complex nature of alcohol legislation. On this point, a couple of participants mentioned how the DLC was a Commission of Inquiry and should therefore not be adversarial anyway. One of these participants further commented that under the current legislative framework, alcohol was being treated more as a 'right' than a 'privilege', and that this was part of the issue that needed to change as it was reflected in where the evidential onus tended to fall. In other words, some participants suggested that rather than the objector having to prove actual or potential harm from the renewal/granting of a licence, the onus should fall on the applicant instead. The applicant should have to prove why the community needed the alcohol licence (ie, privilege) in the first instance and how 'amenity and good order' would be maintained in the locality.

It was also suggested by a number of participants that applicants should stipulate what measures they would be taking to prevent and reduce a broader range of alcohol-related harm and to provide an account of any consultation they had undertaken with Māori (including marae committees in the vicinity of the premise) and the broader community. Demonstrating how an applicant's enterprise would benefit communities and requiring them to provide community referees were matters being considered as part of the Cannabis Bill.

A few participants also asserted that applicants need to consult with the local iwi in their area and demonstrate how they would minimise alcohol-related harm and inequity.

Some participants advocated for de-lawyering the process altogether and either removing appeals or restructuring the ARLA so that the right of appeal would be substantially narrowed to further reduce the adversarial nature of the licensing regime. Both lawyers and appeals involve significant cost, which "favours well-resourced… [applicants and the alcohol industry] much more than general members of the communities."[26]

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26 PolicyWorks. (2021). *Support for Territorial Authorities (TAs) and the public around alcohol licensing* (Unpublished draft). (p. 34)

While several participants suggested removing lawyers from the process, a few were against this. Those in opposition suggested that there was a need for cross-examination of some kind to test the evidence being put forward but that this role should be confined to DLCs only. Others in opposition suggested that the process could be made less adversarial, despite lawyer involvement, by putting in place a pre-hearing mediation process, limiting or removing the ability for lawyers to cross-examine and/or ensuring that good advocates are available for community members participating in the process.

Participants also commented on the underlying tikanga of the process, which was reinforced not only by the way the hearing was conducted, but also where it was held and when. One participant commented that almost all of the hearings are held in council buildings between 9am to 5pm on weekdays. They went on to say that community members are expected to go to these premises to give evidence and those who work full-time are expected to take time off work to attend and, in some cases, may not even be heard on that day. Another participant confirmed this situation and spoke about a community member taking the time off work and having to travel some way to attend the hearing and not being heard that day. These comments were also supported by the various kōrero presented in the draft PolicyWorks report:

> *All of the DLCs are paid to be there – hearings should be in the weekends or after work – this is unfair to the public particularly those that are deprived.*
>
> *One person attended for the whole day and didn't get to speak and she couldn't come the next day.*
>
> *We have to traipse in to town to the Council building, I have to pay for parking.* (p. 33)

The draft PolicyWorks report goes on to suggest that:

> *DLC public meetings should be run in a way that meets requirements for natural justice and which is a culturally and emotionally safe place for participants.* (p. 41)

Some of the participants I spoke to suggested that meetings should be held in community spaces and particularly at local marae. They also thought that the approach to the hearings should be an inclusive and whānau ora one that makes community members feel as comfortable as possible, underpinned by tikanga Māori, with parts of the proceedings being bilingual. The hearing times should also be more flexible and take into account the community members' particular circumstances.

Who is able to participate, as of right, in hearings

Communities can participate in alcohol licensing hearings either as an objector to the granting or renewal of a licence themselves, or as a witness for another objector or one of the statutory agents opposing the licence. However, not anyone can object to a licence being granted or renewed. As a general member of the community, you must have a "greater interest in the application than the public generally" (sections 102(1) and 128(1) of the SSAA). This 'greater interest' has become typically known as having 'standing' to object.

On the other hand, there are three statutory agents that get to view all applications and can oppose these, as of right, ie, the appropriate district licensing inspector, police officer or medical officer of health in an application area (section 103 of the SSAA).

The WAI 2624 claim addresses both of these pathways to objecting/opposing licences and claims that they are both in breach of the Treaty, for failing to recognise and provide for the special status of Māori.

Standing to object to a licence

DLCs and the ARLA have typically determined that an objector has standing when they reside within a 'one to two kilometre geographical radius' of the applicant's premises. This narrow geographic interpretation has led to a situation where iwi and Māori organisations (in some cases) have been deemed as having 'no' standing to object to the granting or renewal of an alcohol licence within their rohe, regardless of concerns about the potential impact this would have on their Māori community. For example, in *Gisborne Liquormart Ltd v Ka Pai Kaiti Trust* [2018] NZARLA 316, one of the grounds for appeal against the Gisborne DLC's refusal to grant an alcohol licence was that it erred in allowing a local Māori Trust with mainly Māori interests, whose office was just over 2 km away from the proposed premises, 'standing'. While ARLA acknowledged the kaupapa of the Māori Trust, it found that it was no different in nature to other community-based groups concerned about alcohol-related harm. As such, it was not convinced that the Trust had 'an interest greater than the public in respect of the particular application'.

More recently, Hāpai Te Hauora (a Māori public health service that advocates for Māori health rights) was also denied standing. The DLC was not convinced that Hāpai Te Hauora "[would] be affected in some way by the grant of the application"[27] and therefore did not satisfy the threshold that it had 'an interest greater than the public in respect of the particular application'. The Chairpersons of both the Waikato and the Waipā DLCs also denied leave for Hāpai Te Hauora to appear in the proceedings under section 204(2)(c) of the SSAA. While acknowledging that Hāpai Te Hauora had an interest in potential alcohol-related harm within the application area, both DLCs concluded that it did not have 'an interest in the application that is apart from any interest in common with the public' to justify granting leave to appear at the hearing. These decisions (from one participant's point of view) demonstrate how this requirement for 'standing' has been used as a powerful tool to keep Māori out of the process.

David Ratū in his WAI 2624 claim similarly highlights that:

> *...if Māori are not granted 'standing', they are actively prevented from participating in the DLC and ARLA processes and suffer all resultant prejudice including the full and complete abrogation and denial of their Treaty right to participate in processes that actively and directly impact upon their health and well-being. This leads to a greater potential likelihood of the alcohol related prejudice suffered by Māori materialising.*
> (p. 23 of the Statement of Claim)

Conversely, DLCs and ARLA have determined that Māori Wardens and Chairs of District Māori Councils (within the application area) do have an 'enhanced status' or interest greater than the public generally because of their specific alcohol-related role under the Māori Community Development Act 1962 (see for example *Kinara Trustee Ltd (intending to trade as Super Liquor Manukau)* [2016] ADLC OF430, *T Smart Ltd (trading as Discount Liquor East Tamaki)* [2017] NZDLCAK 24733 and [2017] Auckland DLC OF98 and *Flaxmere Liquor* [2019] NZARLA 94).

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27 *A One Ltd (trading as Taupiri Wine Shop)* [2021] Waikato DLC 10 (para 32),

However, in *Kinara Trustee Ltd*, while the committee was satisfied that the Trust representing the Māori Wardens was a 'person' meeting the requirements of section 102(1) of the SSAA, they also noted that the applicant had not advanced an argument in opposition to the Trust's standing. The DLC in *T Smart Ltd* also commented that while they accepted the decision of *Kinara Trustee Ltd* that the Trust was a legitimate objector and had standing, they also commented that they were not necessarily bound by the decision of another committee. These comments suggest that the door could still be potentially open to an alternative interpretation on standing. Despite this potential risk, my understanding is that the 'enhanced status' for Māori Wardens and District Māori Council members has not been overturned to date.

One participant also noted that although Māori Wardens and District Māori Council members have been recognised as having an enhanced status to object, not all wardens and members see this as their role, and those who do are not resourced to participate in these processes.

Some participants called for a specific legislative provision that widens the geographic radius that typically determines standing (see above) from 1-2 km to at least 5 km . Several others suggested that the SSAA be amended so that Māori, or at least particular Māori groupings, have automatic standing within their rohe. The groupings suggested for automatic standing included:

- mana whenua
- Māori Wardens and District Māori Council members (so that they do not have to prove a right to object at every hearing)
- Māori organisations with a focus on the health and wellbeing of their local Māori community.

Agencies receiving notice of all licence applications

In a similar vein, the WAI 2624 claim asserts that section 103 of the SSAA also breaches the Treaty as it:

> *...fails to include Māori on the list of those who must receive notice that an application for a licence has been lodged and then inquire into it.* (p. 24 of the Statement of Claim)

Many participants commented on the need to ensure that Māori have a voice in all alcohol licensing decisions. One participant suggested that for mainly Māori regions, it should be mandatory for a DLC to at least have a Māori advisory group in place that is made up of the region's iwi leaders.

Two other ideas (associated with section 103 of the SSAA) were put forward by participants for ensuring that a Māori perspective was obtained for all applications. The first idea (as implied by the claim above) is to ensure that Māori are able to inquire into every alcohol licence application in the same way that the police, medical officer of health and inspector are able to under section 103 of the SSAA – a fourth agent. The second idea (which could be done in combination with the first) is requiring that one, two or all three of the agents inquiring into applications include a Māori perspective in their reports to the DLC.

Section 103 of the SSAA stipulates that the police, medical officer of health and inspector closest to the premises of which an alcohol licence is being sought must inquire into the application. While it is mandatory for the inspector to produce a report on every application to the DLC, the police and medical officer of health only have to provide a report if they oppose the application in some way.[28] Regardless, these three agents receive a copy of 'every' alcohol licence application.

Conversely, while the applicant must also give public notice of the application and place notice of it on or adjacent to the premises, these notifications are not always seen in time by those in the community who may want to object to it. In fact, public notification of alcohol licence applications and the timeframe for responding (once the notice has been seen) were raised as key issues by a number of participants and within some of the literature I reviewed. The main theme that emerged from the interviews and literature on this issue was that those Māori and other community members affected by the application often miss the opportunity to object because they have not seen the notice or been made aware of it in time. These participants called for increased public visibility of any new alcohol licence applications.

Having a fourth agent and/or agent(s) focused on providing a Māori perspective, and/or notifying those Māori in the community most affected, could certainly help address this particular issue. The Marlborough Māori Wardens highlighted that they are notified of applications and are well briefed about these by the public health advisor that they work closely with, and found this process to be a safe and useful one. While this is an example of good practice, the recent OIA request into PHUs' consultation with Māori on alcohol licensing applications suggests that this situation is more the exception than the norm.[29]

A few participants also raised that, consistent with Te Tiriti, the Māori agent should be given some form of prominence/veto or priority weighting in the process, particularly in areas with high Māori populations, as an exercise of tino rangatiratanga. Moreover, the Kōkiri ki Tāmaki Makaurau Trust, in its position statement, suggests that the Māori agent should determine whether or not any licence application should be considered by the DLC in the first instance based on some form of pre-hearing assessment of the community's perspective. The Trust cites research[30] that found a reduction in Māori alcohol-related harm when Māori assessors had greater statutory authority over their alcohol environment, including the power to veto any new licences and the renewal of existing ones.

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28 It appears to be very unusual for all three agents to oppose an application. For example, research undertaken by the Auckland Regional Public Health Service found that out of 16,000+ applications, over 99% of these were not opposed by the three agencies. Sourced from Kōkiri ki Tāmaki Makaurau Trust. (2021). *Alcohol position statement* (p 21).

29 As mentioned, less than 0.3% of alcohol licensing applications investigated by 11 PHUs over a three-year period involved consultation with Māori.

30 The source cited was: Hutt M. (1999). *Te Iwi Māori me te Inu Waipiro: He Tuhituhinga Hitori: Māori and alcohol: A history.* Wellington: Health Services Research Centre.

Some participants suggested that the role of the Māori agent would be to provide a Māori impact assessment. It was proposed that such an assessment should form part of the criteria under section 105 of the SSAA that DLCs and ARLA consider when deciding whether or not to issue a licence. Alternatively, some participants suggested that at least one of the other three agents could commission and consider a Māori impact assessment as part of their inquiry.

The question of who could possibly take on this Māori agent role in each locality was left relatively open. However, one participant raised that it should not fall only on hapū/Iwi, as they are already quite stretched and overworked. Another participant suggested that perhaps the District Māori Councils could play a role in this. The other idea, which has emerged from the health reforms, is the possibility of iwi Māori partnership boards taking on this role. The specific functions and powers of these boards are still being worked through, but the intention is for the Pae Ora Bill to provide "a statutory purpose and framework for recognising Iwi Māori partnership boards as a vehicle to exercise tino rangatiratanga and mana motuhake at the local level." However, as some of the Iwi submitters to the Pae Ora Bill cautioned, these proposed Māori entities would need to enhance (not undermine) tikanga and hapū/iwi Treaty relationships. With this in mind, iwi Māori partnership boards do appear to be a promising option should a fourth Māori agent role be included in alcohol legislation.

Decision-making factors

As mentioned above, section 105 of the SSAA outlines the criteria for deciding whether to issue a licence or not. There are no explicit criteria under section 105 that requires decision-makers to consider Te Tiriti or the impact of alcohol on the Māori community. The absence of such criteria has enabled DLCs and ARLA to side-step any consideration of the Treaty or impact on Māori and assert that they are only required to consider the matters set out in section 105 when issuing a licence. For example, in *L&H Graces Place Mangere Limited (trading as Hi Sports Bar)* [2018] NZDLCAK 39054, the committee stated:

> *There is nothing in the criteria contained in the Act [SSAA] that prescribes that we must consider the Treaty of Waitangi or provide an impact report pursuant to that… That is not to say that we do not turn our minds to the impact of any application on Māori, it simply points out that* ***we are restricted by the Act as to the criteria that we are able to consider.*** (paras 57.2 to 57.3, emphasis added)

The WAI 2624 claim refers to this failure of DLCs and ARLA to consider the impact that alcohol has on Māori on issuing licences as a breach of the Treaty and, in particular, the principle of active protection. As outlined in the Statement of Claim:

> *The criteria listed at section 105 of the Act can potentially result in over exposure of alcohol outlets leading to the alcohol related prejudice suffered by Māori.* (p. 12)

Not surprisingly, many participants raised the need to add to the list of criteria in section 105 a consideration of the:

- impact on local whānau/hapū/iwi
- Crown's Te Tiriti obligations.

For the reasons outlined earlier, it will also be important to provide as much specificity and practical guidance on such criteria to support decision-makers to apply these as intended. For instance, requiring (as referred to above) that a newly established fourth Māori agent and/or at least one of the other three agents inquiring into applications prepare a Māori impact assessment, which could include a Treaty analysis, would certainly help in this respect. Alternatively (or concurrently), applicants could be required to provide an impact statement that includes an assessment of the effects on Māori, similar to an assessment of environmental effects that applicants for resource consents are currently required to do.

A number of participants spoke about the need for local Māori to be directly involved in identifying the effects/harms/behaviours to be taken into account in such an assessment, including any positive effects.[31]

The narrow, Eurocentric view of alcohol-related harm, coupled with the retrospective limited range of evidence that was typically taken into account by DLCs and ARLA, were seen as highly problematic by a number of participants. One participant stated that the only evidence of harm the DLC considered in the hearing that they participated in were photos of empty alcohol containers littered throughout the community, reports of alcohol-related behaviours that impacted on the local school and data on emergency department hospitalisations. In other words, the only evidence considered in that hearing was harm 'already done'. There was no opportunity to demonstrate what the potential for future harm on the community would be or the cumulative effect of having yet another alcohol outlet in that community, which a more proactive and protective approach would enable.

Another participant likewise asserted that only harm-specific isolated events are considered in the decision-making process. Decision-makers typically do not turn their minds to consider what the broader effects of any increase in the availability of alcohol would be on whānau, Māori communities and the wider community. This participant called for the general proliferation of premises to be a focus, rather than individual applicants, and raised that in some cases it would be entirely inappropriate to have another bottle store in a particular place, regardless of who is operating it.

As such, participants, spoke rather passionately about the inadequacy of the current licensing criteria and the need for these to change to capture a Te Ao Māori perspective and all of the effects of alcohol use. Changes envisaged included capturing collective, social and cultural impacts (both negative and positive), as well as past, present and future effects. Some participants went further to say that these effects should be spelt out through specific statutory criteria, and/or a provision that empowers Māori and the wider community to identify the effects particular to their communities.

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31 The matter of positive effects was raised by a couple of participants who referred to the Cannabis Bill and some of the potential benefits that Māori could see from a licensed cannabis regime and participating in it. They pondered whether the same benefits and opportunities might be similarly relevant in the alcohol space. Two of the examples given were: a small country pub that provided a safe and controlled environment for whānau and the community to gather frequently and have a drink or two; and iwi owning half of the licensing trusts.

Regardless, the key message proffered was that decision-makers needed to view an application more holistically, through a Māori lens and in context, rather than the current practice of assessing applications in isolation and to the specifics of just the one application. Decision-makers also needed to take into account a broader range of evidence, including evidence of any effects that local whānau/hapū/iwi deem as particularly pertinent to them.

The decision-makers

Participants were generally critical of the typical make-up of the decision-makers under the SSAA, and the lack of any requirement for members to know their Māori communities or to understand tikanga Māori or Te Tiriti. For example, a number of participants (including members of Te Maruata) commented that most of the people they knew that had been appointed to DLCs had limited to no knowledge of their Māori community or the impact that alcohol has on Māori and should become better informed on this.

The SSAA provisions governing the membership/composition of DLCs and ARLA do not include any requirement to involve Māori in any way in the composition or appointment of members to DLCs and ARLA, nor is there any requirement of members to have knowledge or an understanding of matters of importance to Māori, tikanga Māori or Te Tiriti. The WAI 2624 Statement of Claim asserts that this is a breach of the Treaty and further notes that:

> *[t]he current pattern of Māori underrepresentation in local government and other community decision making bodies indicates that without a statutory requirement to include Māori members, it is unlikely that Māori will be represented as members of a DLC or ARLA. The claimant has appeared before many DLC's, of which to his knowledge, there has never been a Māori member.* (p. 18)

The lack of Māori membership on DLCs and ARLA and/or requirements for members to have an understanding of Māori communities, tikanga Māori and Te Tiriti was also perceived by many participants as unacceptable. Not surprisingly, most of the participants called for a dramatic change in the current situation or for a completely different structure to be put in place. Common themes emerging from the various kōrero included that:

- every DLC and ARLA should have Māori representation
- all members must have an understanding of tikanga Māori and the issues for Māori
- all members should have the opportunity to participate in cultural training
- there should be cultural competencies in place for appointed decision-makers.

Other participants were more insistent on ensuring that an equal partnership was operating, with some also raising that Māori should hold the decision-making veto right. For example, one participant suggested that of the three DLC members, at least two of the three should be local Māori. Others discussed replacing the current structure of decision-makers with a co-governance arrangement that is tikanga-based or replacing DLCs with permanent commissioners, with most of these being Māori.

One participant cautioned that it is one thing to set up a representative/co-governance model (which they considered was important), but it is another to ensure the sustainability of Māori representation. They highlighted issues with Māori appointments to the District Health Board as an example of this,[32] and suggested that appropriate mechanisms would need to be put in place to ensure effective representation is maintained. A few of the agencies consulted as part of the Māori Wardens' report also suggested facilitating Māori Warden appointments to DLCs.

The issue of membership to decision-making bodies also came up as part of the Cannabis Bill consultation with Māori. An emerging theme from those consulted was that the decision-making bodies should have a minimum number of Māori representatives. There was also some commentary about cannabis licensing decisions being made by those who live in the communities and whose whānau is most affected, rather than by or through councils (which is what currently occurs within the alcohol licensing regime).

In line with this kōrero, some participants mentioned that to be Tiriti-consistent, it was important to ensure that mana whenua were directly involved in the decisions made on DLC membership. Te Rūnanga o Ngāi Tahu, in their 2011 select committee submission, highlighted that iwi have a right under the Treaty to being a decision-maker on the supply and regulation of alcohol within their respective ancestral lands and recommended that provision be made for:

> *Iwi authorities to appoint a suitably qualified representative to the committee. This will further enable iwi to be involved in decisions that impact directly on the health and well-being of their tribal members within their respective tribal rohe.* [Te Rūnanga also recommended that the collective skill set of ARLA include] *capacity to address and recognise specific Māori issues and solutions in respect to alcohol related harm.* (p. 11)

Munhunthan et al. (2017) also refer to international instruments which highlight indigenous peoples participation in decision-making on matters that affect their lives as a fundamental human right. Quoting from a *United Nations (UN) handbook for parliamentarians on the UN Declaration on the Rights of Indigenous Peoples* (a UN Declaration which the New Zealand Government signed up to in 2010), they also point out that:

> *...the UN has cautioned member states that a failure to ensure these rights can lead to further marginalisation and inequities among Indigenous people.* (p. 2)

Local Alcohol Policies (LAPs) and resourcing participation

Some participants mentioned LAPs as being another opportunity to reinforce Te Tiriti obligations and to require meaningful whānau/hapū/iwi engagement and co-design in the development process. While not mandatory, LAPs (among other things) can stipulate the number and location of premises in a district and trading hours.

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32 While statute requires at least two Māori members to be appointed to District Health Boards, in this participant's experience these positions were often not filled.

Given that decision-makers must have regard to a LAP in considering whether to issue a licence, they can be useful mechanisms for reducing the availability of outlets, alcohol-related harm and inequity (eg, by putting restrictions in highly Māori populated areas). However, in 2021, only 41 of 67 councils (just over 60%) have LAPs in place. The four largest cities in Aotearoa New Zealand (Wellington, Hamilton City, Christchurch and Auckland) have no LAP in place and 16 councils have chosen not to proceed with one.[33] I understand that the main reason for councils not having a LAP in place is due to the expensive and time-consuming process of having to defend appeals from the alcohol industry on draft LAPs. As such, participants suggested removing or limiting the ability to appeal a LAP (something that Chloe's Swarbrick's Private Members Bill[34] is proposing). Some have also called for LAPs to be mandatory. However, to be Tiriti-consistent, there would also need to be an explicit provision in place that ensures whānau/hapū/iwi involvement as co-designers of LAPs and/or as joint reviewers of existing LAPs. This would ensure that hapū and iwi perspectives were appropriately reflected within LAPs in their rohe.

Some participants also highlighted the need to ensure that Māori participation (of any kind) in alcohol licensing decision-making was adequately resourced. This matter of sufficiently resourcing Māori participation was also raised by iwi submitters to the Pae Ora Bill who suggested that there be an explicit statutory provision to that effect to make sure that it occurs. Ways to appropriately address the current lack of resourcing for iwi participation in resource management processes are also being considered as part of the resource management reforms.[35]

Summary

According to this synopsis of information, the current legislative structure and process for enabling Māori (and I might add the wider community) to meaningfully participate in alcohol decisions that affect their communities is abysmal and requires considerable change.

As identified in this section (and highlighted by the WAI 2624 SSAA claim), there are a large number of issues and barriers in the SSAA to Māori meaningfully participating in alcohol decisions in a way that is consistent with Te Tiriti. However, the good news is that (short of throwing out the SSAA and starting from scratch) there are a number of useful ideas emerging from this process that could potentially address some of these failings.

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33 Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand.* Auckland: Alcohol Healthwatch. (p. 21)

34 As mentioned, this Bill intends to ban alcohol sponsorship and advertising of all streamed and live sports and alcohol sponsorship at all sporting venues.

35 As outlined in the Ministry for the Environment's (MfE) discussion materials – 'Our future resource management system', "MfE is exploring what provisions and guidance can be provided in the future system, to set clear expectations regarding who should pay for what, and to support the availability and use of appropriate funding tools." (p. 42)

First, to resolve the significant power imbalance issue (emphasised throughout this process), a substantive shift is required from the current adversarial and western-based approach to a conciliatory/consensual tikanga Māori-based process. Suggestions for creating such a shift, which could be explicitly legislated for, included:

- banning lawyers from the process altogether or strictly limiting or removing their ability to cross-examine and/or ensuring that good advocates are available for those objecting to a licence
- putting in place a pre-hearing mediation process[36] for those objecting to licences to attend, which does not involve lawyers
- shifting the evidential onus from those objecting to licences to prove actual and potential harm to the applicant, to demonstrate the benefits of having the alcohol licence and how they intend to minimise alcohol-related harm (including evidence of who they have consulted with)
- using more appropriate community settings for hearings (such as marae) that members of the community can easily access
- incorporating te reo me ngā tikanga Māori, where appropriate, in hearings
- ensuring that hearing times work for those objecting to licences.

Secondly, Māori don't get to automatically see or inform decisions being made on licence applications in their rohe like other agents do. In fact, some Māori organisations who have wanted to appear at a hearing to object to an application have been refused the right to do so. This is clearly problematic and is compounded by the absence of any requirement in the decision-making criteria (section 105 of the SSAA) to consider the impact on whānau/hapū/iwi (which would involve engaging directly with local Māori) or to consider Te Tiriti. Ideas suggested to remedy this situation included:

- enabling automatic standing for all Māori (or at least for mana whenua and other specific groupings of Māori)
- establishing a fourth Māori agent, alongside the current three agents, to inquire into every application (section 103 of the SSAA), with priority weighting to be placed on their assessment or power to veto applications in certain circumstances
- requiring that all three agents provide a Māori perspective in their reports
- requiring at least one of the three agents to provide a Māori impact assessment
- requiring applicants to provide an impact statement, which includes an assessment of the effects on Māori
- adding to the list of criteria (section 105 of the SSAA) consideration of the impact on whānau/hapū/iwi and Te Tiriti (which would form the basis of a Māori impact assessment).

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36 Note that the ability for mediation between applicants and community objectors already exists but does not appear to be used often. The foundation for it can be found in sections 188 and 203 of the SSAA. See *Gunpowder Limited* [2015] Wellington DLC 49B/2015/1464.

It is also imperative that any Māori impact assessment is based on what whānau/hapū/iwi determine are the effects/harms/behaviours that decision-makers should take into account when issuing a licence in their rohe. This would mean that the effects (determined by local Māori) and evidence to be considered in licensing decisions would likely be much broader than the current narrow, western-based approach allows. This is because a Te Ao Māori perspective would likely capture collective, social and cultural impacts (both negative and positive), as well as past, present and future effects, most of which are not being currently considered in licensing decisions.

Thirdly, the SSAA does not address Māori representation on decision-making bodies and/or require that decision-makers have an understanding of Māori communities, tikanga Māori and Te Tiriti. To address this, suggestions included:

- requiring all decision-makers to have some understanding of tikanga Māori, issues of importance to Māori and Te Tiriti
- involving local whānau/hapū/iwi in the process for appointing members to DLCs
- ensuring that every DLC and ARLA has Māori representation (preferably equal representation, with the ability for Māori to veto applications in certain circumstances).

Fourthly, LAPs need to appropriately reflect whānau/hapū/iwi perspectives. This could be achieved by putting in place an explicit statutory provision that ensures local Māori involvement as co-designers of LAPs and as joint reviewers of existing LAPs.

Finally, Māori participation in this process needs to be adequately resourced and with the resourcing of Māori participation explicitly recognised in legislation.

Alcohol legislation must facilitate the elimination of inequities between Māori and non-Māori in the alcohol space and achieve health equity

It is a well-known fact that Māori experience a disproportionate amount of alcohol-related harm compared to non-Māori and that this has been persistent.[37] As highlighted, in the *Hauora* report:

> *Achieving health equity should be among the ultimate purposes of any just health system –* ***that commitment starts with legislation.*** (p. 164, emphasis added)

37 The inequitable alcohol-related harm experienced by Māori compared to non-Māori is well documented. For more detail on these inequities and disparities in alcohol use see for example: Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand*. Auckland: Alcohol Healthwatch; and Alcohol Healthwatch. (2019). Submission to the Māori Affairs Select Committee on the Inquiry into health inequities for Māori. For further information on Māori drinking patterns see: Muriwai, E., Huckle, T., and Romeo, J. (2018). *Māori attitudes and behaviours towards alcohol*. Wellington: Health Promotion Agency.

Participants were very clear that the aim of the system must be to 'eliminate' inequity rather than just 'reduce' it. This too was emphasised in iwi Māori submissions on the Pae Ora Bill. These submitters raised the need to explicitly acknowledge and address the social determinants of health and the ongoing impacts of colonisation, racism and discrimination that Māori experience in order to effectively eliminate inequity.[38]

Likewise, those participating in this process also spoke about the social determinants of health and the impact of colonisation, intergenerational trauma, ongoing discrimination, and social and political marginalisation, and how all of these have created and perpetuated the inequity in alcohol-related harm. As Te Rūnanga o Ngāi Tahu asserted in its submission in 2011:

> *Where risks and poorer health and socio-economic status, among others, are already present, there is a presumption that alcohol will serve to exacerbate such risks. Clearly, the harmful use of alcohol is inhibiting many Māori from realising their potential…* (p. 7)

A few participants spoke about the importance of Māori having a sense of control over their destiny and that the path to equity comes from tino rangatiratanga (self-determination). This point was equally raised by a number of iwi submitters to the Pae Ora Bill. In a similar vein, one participant also cautioned that the aspirations for equity needed to be defined by mana whenua rather than the Crown.

Most of the participants and earlier Māori submitters in 2011 called for the inclusion of stronger evidence-based measures in the SSAA to reduce alcohol-related harm generally and inequity more specifically. These measures formed part of the 5+ solution framework and, more recently, the World Health Organization's SAFER framework (2018).[39]

It was particularly notable that in 2011 most of the Māori organisations who made a submission to the select committee overseeing the alcohol law reform at that time commented on the need to implement all of the Law Commission's recommendations. There was a concern from these submitters that the key proposals from the Law Commission had not been adopted by the Government and the Bill therefore failed to address important issues, such as price, availability and advertising. These submitters called for the select committee to put in place the evidence-based measures (noted above).

More recently, wahine presenting evidence in the WAI 2700 Mana Wāhine Kaupapa Inquiry on the disproportionate amount of alcohol-related harm experienced by Māori women have also asked the Tribunal to provide relief, which includes implementing some of these measures.

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38 Similar comments on socio-political factors and the impact on equity are also made in reports such as: Waitangi Tribunal. (2019). *Hauora report on stage one of the health services and outcomes inquiry* – WAI 2575; and Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand.* Auckland: Alcohol Healthwatch.

39 Four of the five measures within each of the frameworks are the same. These are: reducing the availability and accessibility of alcohol; restricting alcohol advertising and sponsorship; raising the price of alcohol; and further addressing drink driving counter-measures. The 5+ solution also includes raising the purchase age as its fifth measure, while the SAFER framework includes facilitating access to screening, brief interventions and treatment.

These evidence-based measures were commented on by most of the participants engaged in this process, with a number emphasising that given the youthfulness of the Māori population and the disparities in alcohol misuse, Māori should benefit more so from strengthening these measures than non-Māori. However, in a 'global systematic review of indigenous community-led legal interventions to control alcohol' Munhuthan et al. (2017) caution that while these measures have been beneficial for many populations worldwide, indigenous peoples across the world still carry a disproportionate burden of alcohol-related harm. They go on to suggest that these measures may be ineffective because (in part and as referred to above) they do not address the social determinants of health, nor do they address the experiences of discrimination, colonialism and marginalisation shared by many indigeneous peoples throughout the world. Munhuthan et al. (2017) further point out that:

> *There have been limited evaluations of the effectiveness of such legal measures and their appropriateness in shaping alcohol-related behaviours in Indigenous communities.* (p. 1)

This lack of evaluation specific to Māori is of concern and would need to be addressed, alongside the socio-political factors impacting on equity, when considering these measures.

While many participants supported the implementation of the package of measures listed in the 5+ solution and SAFER frameworks, it also became clearer throughout the engagement process that particular measures tended to find more favour than others. For example, attendees at the Oraka Ararau hui were invited to participate in a survey poll to identify, from a list of measures based on these frameworks, which three they considered to be most effective for eliminating inequity in alcohol-related harm. Forty-five people participated in the survey. The most popular measure selected (35 of the 45 or 78% of participants) was 'ringfencing funding for prevention/treatment initiatives specifically for Māori'. The second most popular measure was 'reducing the availability of alcohol', with 28 of the 45 participants (62%) choosing this option, closely followed by 'restricting alcohol advertising/sponsorship' (26 of the 45 or 58% of participants). 'Increasing the purchase age' was next (13 or 29% of participants), followed by 'increasing the price of alcohol' (selected by 7 or 16% of participants). Only three participants (7%) chose 'further addressing the drink driving limits' as one of the top three most effective measures for eliminating inequity.[40]

These survey poll results are generally consistent and reflective of the various kōrero and research evidence I briefly reviewed. 'Reducing availability of alcohol' and 'funding prevention/treatment initiatives specifically for Māori' both featured as the most popular measures for achieving equity, followed by 'restricting alcohol advertising/sponsorship'. However, the next measure most frequently discussed and highlighted in the research that I reviewed was 'raising the price of alcohol'. On the other hand, 'increasing the purchase age' was seldom referred to, while 'addressing drink driving measures' was the least mentioned of all of the measures.

40 Note that there was also a general 'other' category that six survey participants selected (13%). However, there was no opportunity within the survey poll to explain what these other measures might be.

This section of the paper only touches on availability, price and interventions (combined) and advertising/sponsorship. This is because these were the measures most frequently discussed by participants and/or considered to be most effective (as a package of initiatives) for accelerating progress toward eliminating inequity.[41]

Reduce the availability of alcohol, with a particular focus on off-licence premises

Participants spoke at some length about alcohol being highly normalised and accessible. They were particularly concerned about the proliferation and location of off-licence premises being in high social deprivation areas where many Māori reside, or being close to places such as schools and marae which many Māori frequent.[42] The other immediate concern, raised by a number of participants, was remote/online sales.[43]

Not surprisingly, participants called for restrictions to remote/online sales and for more stringent minimum requirements and strict density caps on alcohol outlets, particularly off-licence premises in highly Māori populated and high deprivation areas.

There is a strong evidence base to show that greater availability of alcohol increases alcohol-related harm and that measures to restrict availability decreases harm.[44] The WAI 2624 Statement of Claim points to research that shows that people living in high deprivation areas with a greater density of alcohol outlets would be more frequently exposed to alcohol advertising and cheap alcohol, which contributes to greater alcohol-related harm. It also highlights that many Māori live in these areas, so are particularly susceptible to alcohol-related harm as a result of the high density of outlets in their neighbourhoods. In a 2020 report on *Māori Wardens presence and potential in the alcohol space*, wardens also commented on the large number of alcohol outlets that they observe in relatively small communities and suburbs where many whānau reside. Wardens were concerned that the increased accessibility to alcohol in these areas would only compound the poverty and violence already prevalent in those communities.

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41 Note that this section does not go into any depth about the evidence supporting these measures or ways to address these, as this is already well documented. See for example: the 2022 alcohol position statements for Te Hiringa Hauora; Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand*. Auckland: Alcohol Healthwatch.

42 He Oranga Pounamu in its 2013 submission on the Chistchurch LAP stated that under no circumstances should alcohol outlets (both on and off licence) be permitted near schools, marae, churches, community centres and health providers, which many tamariki Māori and whānau frequent.

43 Online sales have grown exponentially since the SSAA was enacted and as a result of COVID-19. There is particular concern about the much lower levels of scrutiny with online sales in comparison to physical stores (eg, underage or intoxicated persons could be easily provided with alcohol given the lack of face-to-face interaction that typically occurs) and the rapid delivery (in under two hours) of alcohol. These issues with remote/online sales signal that there are considerable gaps in the law that need to be immediately addressed. Sourced from: Alcohol Healthwatch. (2020). *Evidence-based alcohol policies: Building a fairer and healthier future for Aotearoa New Zealand*. Auckland: Alcohol Healthwatch.

44 See for example: the references cited in Te Hiringa Hauora. (2022). *Alcohol access and availability position statement.*

As the Kōkiri ki Tāmaki Makaurau Trust point out, many Māori communities are already saturated with bottle stores. Any progress toward achieving equity would therefore mean not only prohibiting any increase in high-density highly Māori populated areas, but also reducing the amount of bottle stores already in these areas. On this, many participants called for the adoption of a sinking lid policy for off-licence premises, particularly in areas with high Māori populations and/or high deprivation localities. A couple of participants also suggested that rather than waiting for each licence to come up for renewal in those particular areas, that a date be negotiated and set for reviewing them all at once, with Māori leading (or at least meaningfully participating) in that process.[45]

Others spoke about the need to incorporate a 'do no harm' precautionary principled approach to the legislation, as the granting of new licences can only increase harm, therefore the presumption should always be against granting any new off-licence (in particular). Given the research that shows that most applications to grant or renew a licence are approved,[46] such a principled approach requires serious consideration.

More stringent outlet density and location requirements, including sinking lids and restricting remote/online sales, could be achieved through tightening up or including new statutory provisions that also addressed the current issues with the alcohol licensing regime and LAPs (outlined above). Consistent with Te Tiriti, whānau/hapū/iwi would need to be at the centre of establishing these requirements/restrictions within their rohe. To accelerate progress toward eliminating inequity, priority would also need to be given to focusing on areas with high Māori populations, particularly where these are also areas of high density and high social deprivation.

Increase the price of alcohol and ringfence funding for initiatives to eliminate inequity in alcohol-related harm

Research shows that alcohol is now more affordable than ever before in Aotearoa New Zealand[47]. There is also evidence to suggest that increasing the price of alcohol is effective in reducing alcohol consumption and harm. However, studies indicate that specific pricing options are likely to have differing effects on different populations. For example, one UK modelling study found that minimum pricing[48] was much better at targeting hazardous and harmful drinkers than more general increases in alcohol prices (such as through increasing excise tax).[49]

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45 This approach is also suggested in: Kōkiri ki Tāmaki Makaurau Trust. (2021). *Alcohol position statement.*

46 See for example: commentary in the 2019 ARLA annual report that suggests investigating the low number of refusals for applications; an analysis from the Auckland Regional Public Health Service on 16,000+ applications over a three-year period, which showed that 99% of the applications were unopposed; and the results of a recent OIA request, which showed that out of over 31,000 applications nationally from July 2018 to May 2021, only 2% were declined or there was a negotiated outcome for that application. Sourced from: Kōkiri ki Tāmaki Makaurau Trust. (2021). *Alcohol position statement.*

47 See for example research cited in: Te Hiringa Hauora. (2022). *Price of alcohol position statement*; Jackson, N.U.E., and Adams, J. (2020). *A road map for alcohol pricing policies: Creating a fairer and healthier Aotearoa New Zealand.* Auckland: Alcohol Healthwatch.; New Zealand Drug foundation. (2017). Fixing the cost of alcohol, 15 May 2017, www.drugfoundation.org.nz/matters-of-substance/archive/may-2012/fixing-the-cost-of-alcohol/ (accessed 10 January 2022); and Ministry of Justice. (2014). *The effectiveness of alcohol pricing policies.*

48 A minimum pricing policy sets a 'price floor' or minimum price from which alcohol can than be sold, so it targets the cheapest alcohol.

49 Excise taxes are applied to all types of alcohol being sold.

It also found that young binge drinkers were less affected by minimum pricing policies than drinkers in general.[50] Alcohol Healthwatch in its report on evidence-based alcohol policies also highlights international studies to show that heavy drinkers and low income drinkers were, or are likely to be, the greatest beneficiaries from a minimum pricing regime. From these studies, Alcohol Healthwatch (2020) conclude that:

> *…MUP [minimum unit pricing] is shown to be the most pro-equity alcohol pricing policy – having the potential to narrow socio-economic, alcohol-related health inequities the most.* (p. 18)

Research suggests that heavy drinkers (including young people) and frequent drinkers tend to purchase cheap alcohol[51]. Research also shows that both Māori men and women tend to drink more hazardously than the general population and that Māori are also more likely than any other ethnic group (with the exception of Pacific peoples) to purchase the cheapest alcohol.[52] Based on the evidence above, this would suggest that increasing the price of the cheapest alcohol would have an impact on many Māori drinkers.

However, concerns have also been raised about the potential negative impacts that an increase in alcohol price might have on Māori. For example, some participants in this process were concerned that it would create other problems and harms. These other problems included shifting to home brews, which could be even more harmful for the individual, or whānau going without food so that the drinker maintained their drinking pattern. This latter issue was something that Māori Wardens also commented on:

> *…it seemed that alcohol was a priority over food for some whānau (as sometimes evidenced by supermarket trolleys with little food but lots of alcohol).*[53]

The possibility of increased financial hardship on Māori was also highlighted in the Alcohol Healthwatch 2019 submission to the Māori Affairs Select Committee on the *Inquiry into health inequities for Māori.*

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50 This study was cited in: New Zealand Drug Foundation. (2017). *Fixing the cost of alcohol*, 15 May 2017, www.drugfoundation.org.nz/matters-of-substance/archive/may-2012/fixing-the-cost-of-alcohol/ (accessed 10 January 2022).

51 Research cited in: Jackson, N.U.E., and Adams, J. (2020). A *road map for alcohol pricing policies: Creating a fairer and healthier Aotearoa New Zealand*. Auckland: Alcohol Healthwatch.

52 National Research Bureau.(2012). *The alcohol purchasing patterns of heavy drinkers in New Zealand*. Auckland: NRB, www.health.govt.nz/system/files/documents/publications/research-report- alcohol-purchasing-patterns-heavy-drinkers-nrb-june14.pdf (accessed 1 August 2019). Cited in Jackson, N.U.E., and Adams, J. (2020). *A road map for alcohol pricing policies: Creating a fairer and healthier Aotearoa New Zealand*. Auckland: Alcohol Healthwatch. (p. 11)

53 Te Hiringa Hauora. (2020). *Māori Wardens presence and potential in the alcohol space*. (p. 10)

Despite these potential negative effects, most participants in this process and public health advocates are calling for the adoption of both minimum unit pricing and an increase in alcohol excise tax rates in line with the Law Commission's (2010) recommendation (ie, a 50% increase in excise tax). A 50% increase in excise tax would result in an increase in the overall prices of alcohol by 10%, and an estimated $300 million more in tax revenue per year.[54]

It is the additional revenue generated from increased alcohol prices that makes a pricing policy more attractive from an equity perspective, but only if the extra revenue is directed at efforts to eliminate inequity in alcohol-related harm. On this, participants called for the additional revenue to be ringfenced for initiatives, such as community-based wellbeing programmes specifically designed by and for local Māori. It would also seem that there is a definite need to ringfence funding specifically for Māori initiatives of this kind. A Ministry of Health response to a recent OIA request revealed that despite the Crown gaining over $1 billion in excise tax revenue, the total expenditure of the Vote Health budget for alcohol-related harm prevention services and initiatives for Māori in 2020/21 was just $287,000.[55]

Some of the participants in this process suggested that the investment required for the ringfenced fund need not only come out of an increase in the alcohol excise tax rates, but could also be funded by the alcohol levy.[56] A couple of participants commented that 'half' of the levy should go to a Māori institution, such as the Māori Health Authority. The Health Coalition Aotearoa in its submission to the Pae Ora Bill recommended (to give effect to Te Tiriti and in recognition of the inequity in alcohol outcomes) that the Māori Health Authority receive the lion's share of the alcohol levy (ie, 80%) to use as they see fit.

Many participants commented that the local Māori community needed to determine what the scope and criteria of the fund would be in their rohe and to distribute this accordingly. This was to ensure that the funding criteria was appropriate and responsive to the needs of whānau/hapū/iwi and broad enough to capture initiatives that not only address the symptom (ie, alcohol misuse and harm), but also its root causes. Participants were mindful of the need to also tackle social determinants and the ongoing impacts of colonisation (such as intergenerational trauma), wherever possible, to have any chance of achieving equity.

Providing access to sustainable culturally appropriate resourced treatment programmes for Māori, particularly Māori youth, was highlighted in most of the Māori submissions on the Alcohol Law Reform in 2011. Māori submitters noted that the proposed reforms were silent on alcohol treatment programmes and urged that consideration be made to address this, particularly programmes that target Māori. Some of the Māori engaged as part of Cannabis Bill consultation process also raised the need for a substantial proportion of profits to be directed to help whānau affected by substance abuse. Initiatives suggested included targeted education support, kaupapa Māori services, whānau and community capacity building programmes, and increased specialist support services.

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54 This estimate was identified as part of the Regulatory Impact Statement for the Alcohol Reform Bill in 2010 and is cited in: Jackson, N.U.E., and Adams, J. (2020). *A road map for alcohol pricing policies: Creating a fairer and healthier Aotearoa New Zealand*. Auckland: Alcohol Healthwatch. (p. 18)

55 Kōkiri ki Tāmakimakaurau Trust. (2021). *Alcohol position statement*. (p. 29)

56 This is a small, hypothecated levy paid by producers and importers and is used to fund initiatives to reduce alcohol-related harm. Te Hiringa Hauora are the current recipients of the alcohol levy.

At present, alcohol excise tax is not earmarked for initiatives to reduce alcohol-related harm and/or to achieve equity in alcohol-related outcomes. Jackson and Adams (2020) point out that the alcohol excise tax goes instead towards core Crown revenue to be used for any purpose. They also highlight that there are precedents for earmarking excise tax revenue (eg, the excise tax on petrol contributes toward the costs of developing and maintaining New Zealand roads).

It is critical that at least a significant portion of the extra funding collected through increased alcohol prices is invested in efforts to reduce alcohol-related harm and inequity. This is especially important, given the potentially negative impact that an increase in the cost of alcohol could have on some Māori and their whānau. Ringfenced funding was also seen by one participant as the restorative justice element for rectifying the harm caused by the systems, structures and institutions that have created and supported these alcohol inequities and outcomes.

Restrict alcohol marketing

There is strong evidence to show people who are exposed to alcohol marketing are more likely to start drinking at a younger age and to engage in heavy and hazardous drinking. Young people are particularly vulnerable to being exposed to alcohol marketing and Māori children are five times more likely to be exposed than other children.[57] The fact that Māori are a relatively youthful population compared to the general population heightens the inequity in exposure to alcohol marketing found for Māori children.

Most of the participants I spoke to mentioned the need to restrict alcohol marketing and supported a staged approach to phasing it out, consistent with the recommendations of the Law Commission in 2010 and the Ministerial Forum on alcohol advertising and sponsorship in 2014.

Chloe Swarbrick's Private Members Bill also aims to restrict alcohol sponsorship, although a few participants commented that it needed to go much further to be effective in reducing alcohol-related harm and inequity.[58]

Summary

The Waitangi Tribunal has been clear in its various reports that the Treaty principle of active protection requires that the Crown takes positive steps (including providing additional resources) to achieve equitable outcomes for Māori. This obligation is heightened when the inequities are persistent and marked, which is certainly the case for alcohol-related harm. Māori have for some time now experienced, and continue to experience, a disproportionate amount of alcohol-related harm compared to non-Māori.

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57 See for example studies cited in: Te Hiringa Hauora. (2022). *Alcohol advertising, promotion and sponsorship position statement*; Chambers T., Jackson N., and Hoek, J. (2021). New Zealand's proposed ban on alcohol sponsorship of sport: A cost-effective, pro-equity and feasible move towards reducing alcohol-related harm. *The Lancet Regional Health – Western Pacific, 13*, 100218.

58 Chambers, Jackson & Hoek (2021) also noted that: "[t]he Bill should be viewed as a first step towards comprehensive legislative restrictions on alcohol marketing. However it requires strengthening to enhance its effectiveness and mitigate risks." (p. 1)

Alcohol legislation, as currently structured, is completely inept for achieving equity. There are no provisions within alcohol law that have been specifically designed with equity in mind and evidence-based measures that could potentially reduce inequity (such as targeting availability, marketing, purchase age and price) are very weak.

Stronger legal measures to reduce the availability of alcohol, restrict alcohol marketing and increase price (with the additional revenue tagged to prevention/intervention efforts aimed at eliminating inequity) offer a particularly promising package of initiatives for reducing alcohol-related harm and inequity. The relatively youthful Māori population and disparities in alcohol misuse suggest that Māori could benefit more from strengthening these measures than non-Māori. However, the lack of evaluation of the effectiveness of these legal measures specific to Māori is concerning and will need to be addressed, alongside the socio-political factors impacting on equity, when designing legal provisions to strengthen them.

Consistent with Te Tiriti, whānau/hapū/iwi would also need to be involved in determining how these measures could best work in their rohe.

There is a need to put in place effective accountability and monitoring structures and to ensure that meaningful data is utilised to measure progress on eliminating inequity and meeting Te Tiriti obligations

Putting in place appropriate legislative provisions that are intended to give effect to Te Tiriti and eliminate inequity is an important first step. However, as some of the participants highlighted, there is also a need to put in place effective accountability and monitoring systems to ensure these provisions are producing the desired effects. This involves establishing appropriate outcomes and targets,[59] in partnership with hapū and iwi, and collecting meaningful data (that is equity centred and evidence informed) to indicate the progress being made toward these targets.

The health and resource management reforms may provide particularly helpful guidance on these matters. These reforms propose, and/or are working through what is required legislatively, to ensure robust monitoring and accountability systems are in place for measuring performance (including monitoring of Treaty performance). Both reforms appear to have taken into account Waitangi Tribunal recommendations and/or feedback from iwi in developing these proposals, and aim to provide greater opportunities for Māori to be involved in monitoring activities. Both also propose establishing a Māori national entity to undertake monitoring and reporting activities.

59 One participant suggested putting statutory targets in place to ensure a serious focus on reducing alcohol-related harm and inequity and to facilitate political accountability and transparent reporting. Other participants highlighted the need to ensure a Māori worldview is incorporated into any of the outcomes being sought.

Some of the participants in this process suggested that a Māori entity should also monitor and report on the performance of the alcohol system for meeting Te Tiriti obligations and achieving equity. Most intimated that this role could be taken up by the proposed Māori Health Authority,[60] with one participant insisting that whatever entity takes up the monitoring role, it must have sufficient teeth and must also facilitate a whole-of-government approach.

A few participants and key players in the alcohol space further commented that the Māori Health Authority could also provide some leadership in the alcohol area. For example, the Kōkiri ki Tāmaki Makaurau Trust in its position statement suggests that the strategic leadership of alcohol licensing could be placed under the Māori Health Authority. The Trust also recommended increasing the monitoring of higher risk licences, namely, bottle shops and taverns in high Māori population areas. This specific monitoring activity could potentially be achieved by amending sections 197 and 295 of the SSAA, which require inspectors to monitor licence compliance and for the three agents to collaborate to ensure the ongoing monitoring of licences and enforcement of the Act. Amendments to these sections could also require agencies to collect much better data, given that eight of the 11 PHUs (as part of a 2021 OIA request) did not know, or refused to answer, how many of the 32,100 applications that they had received were made in high Māori population areas.[61]

In a similar vein, some participants suggested mandating data sharing and the collecting and reporting of data across the sector to get a better picture of the inequities in alcohol-related harm and any progress being made to eliminate these. Participants in this process also proposed requiring in law that the alcohol industry provide sales and price data (which was also a recommendation in the Law Commissions 2010 report). Others suggested including reporting from DLCs to get a better picture of how well they are responding to their community's needs and giving effect to Te Tiriti. Other participants spoke about establishing a national strategy to prevent alcohol-related harm among Māori, which could be something mandated and monitored by law, with Māori communities driving the kaupapa and leading the gathering of data.

Overall, participants were insistent that a robust accountability and monitoring system needed to be in place to effectively measure the performance of the alcohol regime in meeting Te Tiriti obligations and achieving equitable outcomes in alcohol-related harm. The health and resource management reforms offer ideas on how such a system could be achieved. The health reform proposals (particularly those pertaining to the functions of the Māori Health Authority) also offer promising opportunities for supporting the monitoring and reporting of key Māori alcohol-related outcomes and the Tiriti performance of the alcohol system.

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60 The explanatory note in the Pae Ora Bill on the establishment of a Māori Health Authority states that it will be an independent statutory entity that will drive improvement in hauora Māori. It will co-commission and plan services with Health New Zealand, commission kaupapa Māori services and monitor the performance of the system for Māori. The Māori Health Authority will work with the Ministry of Health to prepare national strategies and provide advice to the Minister.

61 The OIA information was sourced from: Kōkiri ki Tāmaki Makaurau Trust. (2021). *Alcohol position statement*.

As mentioned, it will be particularly important to monitor any of the legal measures[62] being pursued to assess whether (both individually and collectively) they are positively impacting on equity or not. Given the lack of evaluations on these measures specific to Māori, it will be critical to ensure these measures are achieving the desired effect and not producing any adverse ones, especially price-related measures.

There is a need to ensure that the 'process' for redesigning alcohol legislation to give effect to Te Tiriti is also consistent with Te Tiriti and its principles

Several participants commented on the need to ensure that the process for redesigning alcohol legislation to give effect to Te Tiriti was also in itself Tiriti-informed. On this, some participants suggested scrapping the SSAA altogether and instead reimagining/rebuilding alcohol legislation with Te Tiriti at the forefront and centre of the reform process. These participants highlighted that starting the rebuild from scratch would have the advantage of beginning from first principles again, ensuring that the Treaty relationship is appropriately reflected throughout and involving iwi/Māori as co-designers of the new legislation right at the outset. A few participants also raised that beginning anew would also provide an opportunity to reset the language and narrative about alcohol in this country.[63]

Regardless of whether a wholesale review of the SSAA is undertaken or not, the primary concern emphasised by participants was that the process for redesigning alcohol legislation to give effect to Te Tiriti must be Tiriti-consistent itself. This means providing ample opportunity for hapū/iwi and Māori organisations to have meaningful input in developing and determining the options for legislative change and to be co-designers of any new provisions. It also means ensuring that the specific views of mana whenua in their particular rohe are appropriately captured as part of the process.[64]

The engagement process with iwi adopted for reforming the resource management system may be a useful example to follow. There has already been a round of public consultation and engagement with iwi rōpū, as well as opportunities to provide submissions on particular proposals for reform. For example, iwi engagement is currently occurring on an early exposure draft of the Natural and Built Environment Bill. Feedback from this engagement will help to inform particular policy proposals before the Bill gets introduced to Parliament.

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62 For example, measures to reduce availability of alcohol, increase the price of alcohol and restrict alcohol marketing.

63 This was a particular point strongly emphasised by one of the participants I spoke to. This participant, with their years of experience in alcohol and other drug harm and its effects on young people, spoke about the benefits of undertaking a proper rethink of alcohol legislation with the Treaty as the foundation of it. They stressed the need for resetting the law so that, rather than accentuating 'personal responsibility' which the alcohol industry tends to also emphasise, it instead highlighted other more Māori ideals 'so to speak' (such as community connection, social responsibility, the effects of alcohol use on whānau/collectives) as well. Another participant also stressed that while the SSAA had some good intentions/aspects to it, their experience with implementing DLCs when they were first established demonstrated just how fundamentally flawed the Act was from the beginning.

64 One participant also suggested that this could include facilitating conversations between mana whenua and current members of the DLC in their rohe.

Conversely, the iwi engagement process for the health reforms may be one to learn from. iwi submitters to the Pae Ora Bill were somewhat critical of the hurried process that they perceived occurred in drafting it. They expressed a desire to be more adequately consulted before firm conclusions were made on the reform proposals.

These recent examples of legislative reform would suggest that whānau/hapū/iwi would need to be involved early in the process of reviewing the SSAA, including determining the scope and focus of the review. To be Tiriti-consistent, they would also need to be adequately supported to lead and participate in this process and their voice and views must be given priority weighting.

In summary, the purpose of this paper is to provide a 'starting point only' for a broader conversation with whānau/hapū/iwi and the general public on what is required to give effect to Te Tiriti in alcohol legislation. A much more comprehensive and Tiriti-appropriate engagement process with whānau/hapū/iwi would need to be undertaken once the review of the SSAA is underway.

Concluding thoughts

I joined the Alcohol Advisory Council of New Zealand (ALAC) in 2008. At that time the Law Commission was establishing its team to undertake a review of the alcohol regulatory regime. I recall that there was a lot of excitement and expectation associated with this review. I often heard mantras such as, 'licences are too easy to get and hard to lose' and that the review will change that and ensure the community had a real 'say' in alcohol licence decision-making. I also remember my colleagues taking Sir Geoffrey Palmer and/or his team to South Auckland and Flaxmere (two areas with high Māori populations) and other places throughout the motu, to see what was really happening at the grass roots level. Sir Geoffrey was apparently intrigued by the visits. I was also told that he had been particularly moved by a young Māori girl in her high school uniform standing up at the forum in South Auckland and pleading with him to help her whānau as they were being destroyed by alcohol.

I can see how these experiences shaped some of the thinking and recommendations in the 2010 Law Commission report. I can also see why these recommendations were generally supported by iwi Māori organisations and others at that time and continue to be supported by many today.

But then the country was presented with the SSAA – an alcohol legislative regime that didn't take up some of the most important Law Commission recommendations, is devoid of any Treaty considerations, and has arguably perpetuated the disproportionate burden of alcohol-related harm that Māori experience.

This paper has shown that there are still many barriers to Māori or any community member meaningfully participating in alcohol licensing decisions in their communities. Some Māori organisations have been actively prevented from presenting their concerns about the impact that a licence may have on the local Māori community. DLCs and ARLA have also explicitly said that there are no criteria in the SSAA that directs them to take into account any impact that the issuing of an alcohol licence might have on local Māori, so they don't need to consider this. All of this seems unacceptable in light of the marked and persistent inequities in alcohol-related harm.

In the process of writing this paper I have attempted to faithfully capture and reflect the range of thoughtful perspectives and ideas for giving effect to Te Tiriti in alcohol legislation from the people I spoke to and the documents I reviewed. However, I cannot help but feel that moving forward the current western-based framework and associated engrained thinking will likely impact on how these ideas are embodied. In my mind, this tends to be one of the major barriers to achieving any real systemic and transformational change in this country.

While the preference would be to start from scratch and build alcohol legislation on a Tiriti foundation with Te Ao Māori and Mātauranga Māori at the forefront, the current political indications for alcohol reform suggest that this is unlikely to happen, at least in this review period. On the other hand, I am hopeful that the particular Treaty emphasis in recent legislative reforms means that there is political will to at least address the considerable Treaty failings in a statute that also appears to be perpetuating inequities in alcohol-related harm. This would seem to be particularly so in light of the government response to stage one of the Health Inquiry (WAI 2575).

There is also an opportunity for the government to front-foot the pending WAI 2624 claim on the SSAA (to be considered in stage two of the Health Inquiry), and address the Act's considerable failings and Crown breaches of the Treaty before the claim is heard.

An absolute priority revealed from this process is therefore addressing the current power imbalance in favour of the applicants and alcohol industry, as well as the other significant barriers to Māori meaningfully participating in alcohol decisions in their rohe. Judge Savage even alluded to this in his decision on urgency for the WAI 2624 claim:

> *...it is clear to me that the issue is so important to Māori that it can be well said that Māori who appear to suffer more than the general population, should have an active role in decision-making in relation to the supply of alcohol.* (p. 7)

In a similar vein, there is much more that could be done immediately to reduce the significant inequities in alcohol-related harm between Māori and non-Māori. Most notably, incorporating a package of evidence-based legal measures focused on reducing the availability of alcohol, restricting marketing and raising the price of alcohol, with the additional revenue directed to initiatives whose goals are to eliminate inequity. These legal measures, also sanctioned by the World Health Organization, were recommended over a decade ago by the Law Commission and subsequent reports and evidence of these measures continue to support the need to strengthen and/or put them in place. Yet, despite the overwhelming evidence in support of these legal measures there has been little to no movement to change the situation. This highlights the power differential/imbalance between the alcohol industry and community. It also suggests that courage will be required, as well as very careful consideration of proposals for legislative change, if the intention is to give effect to Te Tiriti in alcohol legislation. As one participant shared, "the alcohol industry tends to see colours in a rainbow that no-one else can see." So, it will be particularly important to be on the alert for any unintended consequences and interpretation angles that the alcohol industry may exploit to its advantage.

The benefit right now for undertaking a review of the SSAA is that there are reforms and other particular pieces of work that can provide useful guidance and/or potentially support the ideas for legislative change suggested in this paper. The perspectives and feedback of iwi within these reform processes (particularly on Treaty interpretations) also provide important clues as to what iwi are likely to want to see in a Tiriti-consistent alcohol statute. There are also other legislative reviews (such as the LGA, Māori Community Development Act 1962) that could have important implications for the SSAA or would be useful to keep abreast of in anticipation of the SSAA review. These reforms and reviews present opportunities for strengthening the consistency and linkages across the legislative regime, and therefore the effectiveness of the whole system for meeting the Crown's Tiriti obligations and for reducing alcohol-related harm. It also supports a more holistic view of the system, given the various interconnections and interdependencies between alcohol and other health and social factors.

Of all the most recent developments, the Pae Ora Bill will likely have the most implications for a review of the SSAA, with potential roles and functions perhaps being picked up by the proposed Māori Health Authority and iwi partnership boards. Given the considerable influence that the stage one Health Inquiry has had on the drafting of the Pae Ora Bill, one would anticipate that a similar response to address the failings of the SSAA would likely be forthcoming once the Tribunal has heard the WAI 2624 claim as part of stage two of the Health Inquiry.

Herein though lies a particular dilemma for alcohol legislation. While the SSAA claim comes under the umbrella of health, the stewardship of the Act sits within the Ministry of Justice. A justice lens when applied over the SSAA is somewhat different to a health one and alcohol arguably sits across a number of agencies. It is suggested that this particular anomaly be considered more deeply and addressed as part of the review of the SSAA, particularly given the potential overlap with and opportunities presented by the Pae Ora Bill.

While this paper focuses only on the legislative aspects of the alcohol regime, I am critically aware that there are non-legislative initiatives that will also need to be considered and put in place, to support the ideas for legislative change and to accelerate progress toward achieving equity.

In summary, while this paper has highlighted that there is much work to be done to create an alcohol statute that is Tiriti-consistent, it also offers thoughtful ideas and suggestions on how this could be achieved. My hope is that the review of the SSAA will consider many, if not all, of the ideas and suggestions offered in this paper, and that as intended these will be used to ignite a much broader conversation with whānau/hapū/iwi and the wider community.

Overall, despite the many Tiriti failings of the SSAA identified in this paper, I believe that 'the time is always right to do the right thing', and as many participants raised throughout this process, 'getting alcohol legislation right for Māori is getting it right for everyone!'

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Health Coalition Aotearoa: Rōpū Apārangi Waipiro (Expert Alcohol Panel).

Hei Āhuru Mōwai: Māori Cancer Leadership Aotearoa.

Kāpō Māori Aotearoa New Zealand Inc., and Parents of Vision Impaired (NZ) Inc.

Local Government New Zealand.

Māori Equity, Strategy and Research Team of the Waikato District Health Board.

National Iwi Chairs Forum: Pou Tangata Co-Chairs, Rahui Papa and Kahurangi Dame Naida Glavish.

Regional Public Health for the greater Wellington region.

Te Awhi Whānau Charitable Trust.

Te Hā o Hine-ahu-one: Palmerston North Women's Health Collective.

Te Hiringa Hauora: Health Promotion Agency.

Te Kāhui Rongoā Trust.

Te Ohu Rata o Aotearoa: Māori Medical Practitioners Association.

Te Pūtahitanga o Te Waipounamu.

Te Rōpū Wahine Māori Toko i te Ora: Māori Women's Welfare League Inc.

Te Rūnanganui o Ngāti Hikairo.

Te Rūnanga o Aotearoa Tōpūtanga Tapuhi Kaitiaki o Aotearoa.

Te Rūnanga o Ngāi Tahu.

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Te Rūnanga o Toa Rangatira.

Te Whakakitenga o Waikato Incorporated (Waikato-Tainui).

Te Whānau o Waipareira Trust.

Whānau Ora Commissioning Agency.

te hiringa hauora
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