Wai 2915, #2.5.1
Wai 972, #2.35
Wai 1247, #2.33
Wai 1670, #2.5.7
Wai 1911, #2.5.5
Wai 2494, #2.5.7
Wai 2615, #2.5.10
Wai 2619, #2.5.7
Wai 2823, #2.5.4
Wai 2891, #2.5.2

OFFICIAL

THE WAITANGI TRIBUNAL

Wai 972
Wai 1247
Wai 1670
Wai 1911
Wai 2494
Wai 2615
Wai 2619
Wai 2823
Wai 2891

CONCERNING the Treaty of Waitangi Act 1975

AND applications for an urgent hearing concerning the settlement of grievances of Māori children placed in state care and the contemporary actions of Oranga Tamariki

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DECISION
ON APPLICATIONS FOR AN URGENT HEARING

25 October 2019

Introduction

1. This decision concerns seven applications seeking an urgent inquiry into the settlement of grievances relating to Māori children placed in state care. The applications were received from:

    (a) Wai 1247, Te Iwi Ngaro Rameka, Cynthia Rameka, Piki Te Ora Mitchell and others, on 14 March 2017 (Wai 1247, #2.6);

    (b) Wai 2615, Ian Shadrock, Marilyn Stephens and Tyrone Marks on behalf of Ngāti Te Wehi, Ngātiwai and Ngāti Raukawa, on 20 March 2017 (Wai 2615, #3.1.2);

    (c) Wai 1670, Ricky Houghton on behalf of Te Paatu Te Uri o Ratima, on 7 April 2017 (Wai 1670, #3.1.1);

    (d) Wai 972, Edward Penetito and others on behalf of themselves and the Kauwhata Treaty Claims Kōmiti, Te Marae Kōmiti o Kauwhata Trust and Ngā Uri Tangata o Ngāti Kauwhata, on 7 April 2017 (Wai 972, #2.8);

    (e) Wai 2494, Donna Awatere Huata on behalf of herself and her whānau, hapū and iwi, on 12 April 2017 (Wai 2494, #3.1.1);

    (f) Wai 2619, Dr Huhana Hickey on behalf of whānau members of Ngāti Tahinga, on 18 April 2017 (Wai 2619, #3.1.1); and

    (g) Wai 1911, Aaron Smale and Toni Jarvis, on 12 December 2018 (Wai 1911, #3.1.1).

2. This decision also concerns two applications specifically concerning the contemporary actions of Oranga Tamariki–Ministry for Children, which were received from:

    (a) Wai 2823, Jean Te Huia on behalf of all whānau who have been prejudicially affected by the practices, decisions and actions of Oranga Tamariki, on 18 June 2019 (Wai 2823, #3.1.3); and

    (b) Wai 2891, Dr Rawiri Waretini-Karena, Dr Jane Alison Green and Kerri Nuku on behalf of themselves, their whānau, hapū and iwi, and all Māori, on 2 July 2019 (Wai 2891, #3.1.2).

Procedural history

3. The first six applications listed above were filed with the Tribunal in early 2017, with submissions from the Crown and the applicants' submissions in reply filed shortly after.

4. During subsequent months, the Government announced that a Royal Commission of Inquiry (Royal Commission) would be established to inquire into the historical abuse of children in state care. I invited the Crown to provide an overview of the nature and scope of that inquiry (Wai 2615, #2.5.5). This was received on 9 February 2018 (Wai 2615, #3.1.13), followed by receipt of the final terms of reference for that inquiry on 16 November 2018 (Wai 2615, #3.1.18).

5. The seventh application, brought by the claimants for Wai 1911, was then received in December 2018, with the Crown's response and applicants' submissions in reply to the Crown being filed in early 2019.

6. The two applications concerning the contemporary actions and policies of Oranga Tamariki–Ministry for Children were received in June and July 2019. Submissions from the Crown and interested parties in response to the applications and from the applicants in reply were received soon after.

Applications concerning historical grievances of Māori children in state care

7. This section concerns the seven applications relating to the settlement of grievances of Māori children in state care. I have dealt with these claims together given the similarities of the allegations contained in each. Five broad issues are raised, which I now consider.

Crown processes for settling claims of abuse in state care

8. As outlined in affidavits filed by the parties (Wai 2615, #A1; Wai 2615, #A3; Wai 2615, #A4; Wai 2615, #A7 & Wai 1247, #A4; Wai 2615, #A9 & Wai 1247, #A6; Wai 2615, #A10; Wai 2615, #A11; Wai 1670, #A1, Wai 2494, #A2, Wai 2619, #A1 & Wai 972, #A4; Wai 1670, #A2, Wai 2494, #A3, Wai 2619, #A2 & Wai 972, #A5), the Ministry of Social Development (the Ministry) has a process that enables anyone who believes that they were abused in state care to lodge a claim. The claim may be inquired into and, where allegations are upheld, claimants may receive monetary compensation and an apology from the Crown.

9. As a part of the process, the claimant has access to their personal file, which documents their time in care. A representative from the Ministry speaks to the claimant, generally in person, to discuss their experiences. The claimant may take a support person with them. The claim is assessed by a senior social work advisor, who examines the social work service and care received to see whether it was to an acceptable standard and whether the claimant was harmed. Once the assessment is complete, a senior social work advisor arranges a meeting with the claimant to talk about whether the Ministry is able to assist in dealing with any issues related to the claimant's time in care. If an apology and payment is to be made, this is discussed with the claimant.

10. It can take three years or more to complete an assessment of a claim. Support is offered during this process, including counselling. If a complaint involves criminal conduct, the Ministry may share information about the alleged offending with the police.

11. Claimants can also choose to fast-track their claim. In these circumstances a claim is taken at face value and a fact check is done to ensure that the claimant was in state care and placed where they said they were at the time. If confirmed, the claim is compared with similar claims that have already been settled and all claims yet to be settled in the process. An offer is made to resolve the claim which is consistent with other payments and offers made.

12. The Ministry aims to complete the process by 2020.

13. The applicants submit that they are suffering and will continue to suffer significant and irreversible prejudice as a result of the Ministry's process (Wai 1247, #1.1(b); Wai 1247, #2.6; Wai 2615, #1.1.1; Wai 2615, #3.1.2; Wai 972, #1.1(e); Wai 972, #2.8; Wai 1670, #1.1.1(b); Wai 1670, #3.1.1; Wai 2619, #1.1.1(a); Wai 2619, #3.1.1; Wai 2494, #1.1.1(b); Wai 2494, #3.1.1; Wai 972, #2.17, Wai 1670, #3.1.5 & Wai 2619, #3.1.5; Wai 1247, #2.12; Wai 2615, #3.1.8; Wai 972, #2.18, Wai 1670, #3.1.6 & Wai 2619, #3.1.6; Wai 2494, #3.1.7; Wai 1911, #1.1.1(b); Wai 1911, #3.1.1; Wai 1911, #3.1.7). They allege that the Ministry's process is not appropriate for Māori as:

    (a) no prior engagement with Māori was undertaken before it was established;

    (b) it is not independent, transparent or open;

    (c) tikanga, whānau and hapū are absent from the process;

    (d) it does not allow for a full healing of the matters; and

    (e) there is no public admission of liability by the Crown.

14. The applicants submit that the failure by the Crown to provide explicitly for aspects of tikanga within the process disproportionately impacts on and discriminates against Māori given their overrepresentation in the state care system. Further, they allege that the Crown's approach of individualising the claims and undertaking narrow confidential investigations highlights an effort by the Crown to contain what is an extensive and pervasive issue. They submit that this fails to take into account the broader social effects on Māori whānau and hapū. This approach also limits the Crown's potential financial liability, failing to demonstrate the actions of an honourable Treaty partner.

15. The applicants say that the process also fails to provide a remedy for any claimants that make allegations relating to abuse after 31 December 2007, which ignores the ongoing issue of abuse in state care. They further submit that the Crown's 2020 deadline for the completion of the process will remove any avenue for their claims to be heard or to seek justice for the abuse and neglect that they suffered.

16. The applicants submit that the process does not recognise Article 3 of Te Tiriti, which guarantees to Māori the same rights and privileges as British citizens. Further, they allege that the process does not recognise the right of Māori to be free from discrimination as set out in the Human Rights Act 1993.

17. The Wai 2494 applicants state that the process is also inconsistent with international conventions, namely:

    (a) the United Nations Convention on the Rights of the Child;

    (b) the United Nations Declaration on the Rights of Indigenous Peoples; and

    (c) several recommendations from United Nations bodies that have called on the Crown to improve the situation of Māori children urgently (Wai 2494, #3.1.1).

18. The Crown challenges the applicants' allegation that the Ministry's process for settling claims is causing significant and irreversible prejudice, warranting an urgent inquiry (Wai 2619, #3.1.4). The Crown submits that the process is open and transparent, with publicly available information on its website that provides data on the number and types of claims resolved. Further, the Ministry regularly responds to requests under the Official Information Act 1982 regarding "claims received, the number and amount of settlement payments made, the basis on which settlement payments were made, and details about specific aspects of the MSD process" (Wai 2619, #3.1.4 at [20]), and redactions are only made to information that identifies individuals. The Ministry also regularly provides comment to the media about historical claims and has issued press releases (Wai 972, #2.16; Wai 2619, #3.1.4). Although the current Ministry process allows for expression of tikanga on an individual basis, the Crown recognises that the integration of tikanga into the process could be improved.

19. The Crown rejects the applicants' submissions that there is an arbitrary 2007 cut-off date. Counsel note that claims that allege abuse or neglect suffered up to 31 December 2007 fall within the Ministry's process, while claims alleging abuse on or after 1 January 2008 fall under a separate process conducted under Oranga Tamariki's "Complaints Resolution Policy". Should the allegations fall within both time periods, the Ministry will liaise with Oranga Tamariki on a case-by-case basis to find the best way in which to respond to the claim (Wai 972, #2.16).

20. The Crown submits that although the Ministry is committed to the timely and efficient resolution of historical abuse claims, the 2020 date is aspirational and not a deadline. Claims may be received from 2021 onwards and the Ministry will reassess the 2020 goal again as that date nears (Wai 972, #2.16).

21. The Crown further submits that the Royal Commission is expected to make interim recommendations on an ongoing basis, so corresponding changes may be made to the Ministry process during the course of its inquiry (Wai 1911, #3.1.5). Counsel submits that it would therefore not be efficient for the Tribunal to conduct its own inquiry into the Ministry process.

22. In reply (Wai 972, #2.18, Wai 1670, #3.1.6 & Wai 2619, #3.1.6), the applicants dispute the Crown's submission that information provided to Ministry claimants should be redacted when it relates to an individual's time in state care and submit that there should always be full disclosure. Further, the applicants submit that the Crown, as the party accused of misconduct, is not the appropriate entity to determine whether information should be released and that the question of transparency is a matter that needs to be investigated by the Tribunal.

23. The applicants reiterate that the Crown is under a duty to remedy past breaches and not take advantage of the elevated levels of poverty and subordination that have been imposed following Crown injustice. The applicants maintain that the lack of appropriate cultural mechanisms within the process is a reason why Māori survivors of abuse are hesitant to engage. The applicants also submit that the Crown's acknowledgement that tikanga is lacking from the Ministry process means that the process is currently flawed and prejudicial.

24. Responding to the Crown's assertion that there is no deadline for the completion of the Ministry process, the applicants submit that they are relying on the 30 November 2016 statement of then Minister Anne Tolley and that they are unaware of any formal Crown statement that has resiled from the intention then expressed (Wai 2615, #1.1.1; Wai 2615, #3.1.2; Wai 2615, #3.1.8; Wai 1911, #3.1.7).

25. The applicants submit that the Oranga Tamariki process for claims of abuse from 2008 onwards is neither Treaty-compliant nor tikanga-based and that it is therefore not an effective alternative remedy to be exercised by Māori (Wai 972, #1.1(e); Wai 1670, #1.1.1(b); Wai 2619, #1.1.1(a); Wai 972, #2.18, Wai 1670, #3.1.6 & Wai 2619, #3.1.6; Wai 1911, #1.1.1(b)). The applicants submit that it is in the best interests of any child abused in state care to have their complaint heard, and that the Oranga Tamariki complaints service is not adequate to achieve this. Further, while the establishment of the new Oranga Tamariki is positive, its establishment should not deny the applicants an urgent Tribunal inquiry into the Ministry process.

Ongoing risk of abuse in state care and reform of Oranga Tamariki

26. The applicants dispute the Crown's submissions that there are adequate systems in place to deal with abuse suffered in state care and say that the Crown is simply attempting to patch the holes in its flawed system as they are brought to light. They submit that Oranga Tamariki processes are currently undergoing reforms, which indicates that Oranga Tamariki does not have full faith in the present process. The applicants submit that these reforms will require several more years, which prejudicially affects the children currently in the state care system.

27. The Crown submits that a Tribunal inquiry into the Oranga Tamariki process would be premature as it is being reformed (Wai 972, #2.16). The Crown says that it proceeded with the reform programme following an independent review of the state care system by an Expert Advisory Panel (Wai 972, #2.16). The expert panel consisted of a chair and five members, two of whom, Peter Douglas and Helen Leahy, had experience in the Māori sphere (Wai 2615, #3.1.3).

28. The applicants submit that the expert panel referenced in the Crown's submission is not experienced in tikanga. In addition, none of the guiding principles that the expert panel relied upon referred to Treaty principles (Wai 2615, #3.1.8).

29. The applicants refer to allegations from the Iwi Leaders Group, Māori Women's Welfare League and others that the Crown failed to actively consult with Māori during the reforms. Further, the applicants rely on the findings and recommendations of the Children's Commissioner's *State of Care 2017* report on Oranga Tamariki's secure residences. The report, they say, found that fundamental system issues noted in the 2016 report remained and had not improved, and that "Oranga Tamariki will need to address these system issues in concrete ways to achieve gains for children and young people and their whānau" (Wai 2615, #3.1.8 at [14(n)]). The applicants suggest that an independent Māori advisory group be established to provide advice and support on best practice. They submit that the expert panel omitted to recommend this.

30. While acknowledging the various requests for an independent inquiry into the historical treatment of children in state care, the Crown initially submitted that it did not consider that an inquiry would assist with the successful progression of the Oranga Tamariki reforms. Rather, it would be likely to further reduce the resources available to Oranga Tamariki (Wai 2615, #3.1.3). The Crown submitted that the Tribunal should allow time for the reforms to be implemented before deciding on urgency. Any remaining concerns that the applicants had would then be better addressed through the future kaupapa inquiry into social services and social development.

An historical inquiry

31. The applicants submit that an independent and transparent historical inquiry into the circumstances, policies and practices that led to the abuse and neglect of Māori children in state care is required (Wai 1247, #2.6; Wai 2615, #1.1.1; Wai 2615, #3.1.2; Wai 972, #1.1(e); Wai 972, #2.8; Wai 1670, #1.1.1(b); Wai 1670, #3.1.1; Wai 2619, #1.1.1(a); Wai 2619, #3.1.1; Wai 2494, #3.1.1; Wai 972, #2.17, Wai 1670, #3.1.5 & Wai 2619, #3.1.5; Wai 1247, #2.12; Wai 2615, #3.1.8; Wai 972, #2.18; Wai 2494, #3.1.7; Wai 1911, #1.1.1(b); Wai 1911, #3.1.1).

32. The applicants submit that the Crown's interventionist welfare policies resulted in a disproportionate number of Māori children being removed from their whānau and placed into state care, where they experienced various forms of abuse. The resulting harm suffered included physical and mental health-related issues, increased risk of suicide, substance abuse and addiction, inferior quality education, a lower socio-economic status and increased risk of incarceration. Due to being placed in state care, Māori were dislocated from their traditional rohe and whānau and suffered a loss of cultural identity and language, the impact of which is apparent across generations.

33. The applicants argue that without an independent historical inquiry into these matters, the Crown cannot be certain that the current policies designed for implementation by Oranga Tamariki will ensure the safety of Māori children in state care.

34. In response, the Crown submits that any allegations of historical abuse are not a current or pending Crown action and do not therefore meet the Tribunal's threshold for an urgent inquiry (Wai 972, #2.16). The Crown further submits that the request for an independent inquiry is not a matter of urgency for the Tribunal to deal with.

35. In response to the applicants' submission that Māori children currently in state care are at risk of imminent harm, the Crown notes the absence of any specific examples and submits that the appropriate way to address those concerns is directly with Oranga Tamariki.

36. In reply (Wai 972, #2.17, Wai 1670, #3.1.5 & Wai 2619, #3.1.5; Wai 2615, #3.1.8; Wai 972, #2.18, Wai 1670, #3.1.6 & Wai 2619, #3.1.6), the applicants highlight the Crown's refusal to undertake an independent inquiry into the current state care system means that the reforms, particularly in relation to Oranga Tamariki, will not take into account past failings and deficiencies. Counsel submit that the Crown therefore cannot confirm that children are currently safe within state care.

37. The submissions on the Ministry and Oranga Tamariki claim processes and the need for an independent inquiry have been overtaken by the creation of the Royal Commission of Inquiry into Historical Abuse in State Care, which I discuss further below.

Alternative remedies

38. The applicants submit that there are no alternative remedies available to them. They note that a Tribunal inquiry is unlikely to issue a report for either the "Culture and Identity" or "Social Services, Social Development and Housing" kaupapa inquiries prior to the Ministry of Social Development's 2020 "deadline" (Wai 2615, #3.1.2; Wai 972, #2.8; Wai 1670, #3.1.1; Wai 2619, #3.1.1; Wai 972, #2.17, Wai 1670, #3.1.5 & Wai 2619, #3.1.5).

39. The applicants submit that although litigation is open to Māori, it is not an appropriate option as:

    (a) the court process lacks tikanga;

    (b) the Limitations Act 1950 bars claims of this nature based on time;

    (c) it would be an emotionally and financially stressful and lengthy proceeding; and

    (d) it could result in revictimisation of the victim.

40. Counsel for Wai 2615 notes the inability of some claimants to seek a remedy due to mental health, age and physical ill-health (Wai 2615, #3.1.1).

41. The Crown submits that the claimants have alternative avenues to pursue, including through engagement in the Oranga Tamariki complaint process. The Crown argues that any live concerns about children currently in the state care system should be addressed this way. They may also raise policy-level concerns with the Office of the Children's Commissioner, whose statutory function is to hear from the public on matters relating to the welfare of children. Finally, the Crown submits that the Tribunal should be cognisant of the fact that the applicants could have aired their concerns with the legislative aspects of the Oranga Tamariki reforms through parliamentary processes (Wai 2619, #3.1.4).

42. In reply (Wai 1911, #3.1.7), the applicants submit that the question of whether the claimants should have participated in the parliamentary processes concerning the Oranga Tamariki reforms is a matter for evidence not appropriate at this stage of the inquiry. They further submit that other Māori groups, such as the Māori Women's Welfare League, did make submissions but were largely ignored. They also submit that the involvement of the Ombudsman or the Children's Commissioner can only be extremely limited and is of very little practical use in addressing the issues that are the subject of these applications.

Royal Commission of Inquiry

43. As noted by Crown counsel (Wai 2615, #3.1.13, Wai 972, #2.22; Wai 1247, #2.19; Wai 1670, #3.1.9; Wai 2494, #3.1.10 & Wai 2619, #3.1.9; Wai 2615, #3.1.18, Wai 972, #2.33, Wai 1247, #2.32, Wai 1670, #3.1.14, Wai 2494, #3.1.16 & Wai 2619, #3.1.13; Wai 1911, #3.1.5), the Government has recently initiated a Royal Commission of Inquiry into

historical abuse in state care and faith-based institutions. As part of its terms of reference, the Royal Commission will examine, report and make findings on the current processes for resolving claims, compensation and rehabilitation. Any recommendations may be implemented following an interim report due by December 2020 and a final report due in January 2023.

44. The inquiry will investigate the circumstances that led to people being taken into state care, the nature and extent of abuse that occurred in state care, the intermediate and long-term impacts and the lessons to be learnt from the past. The Royal Commission will inquire principally into allegations of abuse that occurred between 1 January 1950 and 31 December 1999, though cases of abuse before 1950 and from 2000 to the present are also within its scope. A key focus of the inquiry will be to understand the differential impacts of abuse, including on Māori (Wai 2615, #3.1.13; #3.1.14 & #3.1.14(a)).

45. The inquiry will run in parallel with the Ministry redress process. Individuals will be able to pursue current and future Ministry claims or to put them on hold during the inquiry.

46. The six applicants who filed in March and April 2017 supported the commencement of the Royal Commission and its draft terms of reference, published in February 2018, but expressed certain reservations, including:

    (a) the Crown's failure to rely on or incorporate Treaty principles, leaving the Waitangi Tribunal as the more appropriate forum for Māori to have their grievances heard (Wai 2615, #3.1.13(a));

    (b) the indicated period of 1950 to 1999 being prejudicial to those who were abused before or after it (Wai 2615, #3.1.14);

    (c) an inquiry by the Waitangi Tribunal being necessary to enable claimants to have their claims heard and acknowledged through a Treaty-compliant process (Wai 1247, #2.23);

    (d) the Royal Commission not being required to look into the circumstances that led to an individual being placed in state care or be likely to examine the reasons behind the removal of Māori children from their homes, which extend beyond the state care system, for example to state schools (Wai 972, #2.24); and

    (e) the need for Māori to be appropriately represented in the decision-making process of the Royal Commission and for culturally appropriate inquiry processes that are consistent with tikanga (Wai 2494, #3.1.11).

47. Some of the above reservations were adopted by counsel for Wai 1911, who applied for urgency after the final terms of reference were promulgated in November 2018. Counsel submit that the Royal Commission is not an appropriate recourse for Māori because it is not focused specifically on Māori, the Crown's actions will not be addressed as breaches of the Treaty, there is no guarantee of a public admission of liability by the Crown, it will not deal with the systematic removal of Māori identity through the state care system, and the process will not allow for full healing (Wai 1911, #3.1.1). They submit that many

Māori will not engage with the Royal Commission because it does not adequately provide for the needs of Māori victims. They also argue that the inclusion of faith-based institutions will dilute the Royal Commission's focus on the actions of the Crown.

48. While acknowledging the importance of the Royal Commission, the applicants submit that it does not provide them with an opportunity to express their experiences appropriately. Further, a Waitangi Tribunal inquiry would not be limited in its ability to inquire into claims before 1950 or after 1999. Counsel submit that the Royal Commission does not render a Waitangi Tribunal inquiry unnecessary. The issues for Māori are pressing and urgent, and a general inquiry will not adequately address the concerns of Māori. The Waitangi Tribunal is the most appropriate avenue as it is "a familiar, tikanga consistent, permanent commission of inquiry, that provides a safe and supportive environment for the applicants to present their claims" (Wai 972, #2.24 at [8]).

49. Crown counsel submits that an urgent Tribunal inquiry is not required while the work of the Royal Commission is ongoing (Wai 1911, #3.1.5). Counsel submits that the Royal Commission was established with the express intent that it be attuned to the voices and interests of Māori and that the actions of the Royal Commission so far indicate that it is aware of and intends to be responsive to the particular needs of Māori and that it will recognise the Treaty. Counsel argues that it is therefore unnecessary and would be inappropriate for the Tribunal to inquire urgently into the parts of these claims that are within the scope of the Royal Commission and its work while that work is ongoing.

50. In reply, counsel for Wai 1911 submit that the Royal Commission's commitments regarding the Treaty are a procedural promise in relation to how the inquiry will be conducted, which is not the same as determining whether the treatment of Māori children in state care breached the principles of the Treaty (Wai 1911, #3.1.7). They also submit that the Royal Commission has made a number of decisions since its inception without officially consulting with any groups of survivors, in contrast to the Royal Commission set up to investigate the recent Christchurch massacre, which directly involved Muslims within two months of the shootings, demonstrating the unequal treatment of Māori. Finally, counsel submit that the Royal Commission appears extremely unlikely to reach its goal of an interim report by the end of 2020, so the Tribunal could report on these much narrower claims in plenty of time before the Royal Commission has concluded and the Royal Commission could then take the Tribunal's report into account in its own broader investigation.

Applications concerning Oranga Tamariki

51. This section concerns the two applications relating to the contemporary actions and policies of Oranga Tamariki–Ministry for Children.

The applicants' submissions

52. The applications concern the Oranga Tamariki Act 1989 / Children's and Young People's Well-being Act 1989 (the Act) and how the policies, practices and procedures of Oranga Tamariki–Ministry for Children implement that Act (Wai 2823, #3.1.3; Wai 2891, #3.1.2). The applicants submit that the current practices of Oranga Tamariki are inappropriate for Māori and prioritise the removal of the child from the whānau, while failing to

investigate sufficiently the capacity of the parent or the whānau to care for their child. They argue that this is the antithesis of the paramount consideration under the Act, which is the welfare and interests of the child. They submit that Māori are overrepresented in the state care system and further that while the Crown has acknowledged historical abuse of children in state care, it fails to acknowledge that this abuse is ongoing today.

53. The Wai 2823 applicants submit that despite the recommendations of the Pūao-te-Ata-Tū Report in 1988 and the vision of the original Act, the practices of Oranga Tamariki in removing children from their whānau continue to breach the Treaty. The Wai 2891 applicants submit that the impact of the Crown's failing policies and practices has in fact worsened in the last 30 years. In addition, the Wai 2891 applicants submit that the processes and policies of Oranga Tamariki fail to recognise the principles of the Treaty, particularly Article 3, and the right under the Human Rights Act 1993 not to be subject to discrimination.

54. The applicants submit that they are suffering significant and irreversible prejudice. They argue that this prejudice is not just to tamariki Māori taken into state care but also to the Māori parents and whānau of such children and to their hapū and iwi. They argue that because of the disproportionately high number of Māori children being uplifted, Māori are disproportionately prejudiced. The applicants further submit that if their allegations are not addressed, the children currently being put into state care under the Act may well be subjected to the same prejudice as that suffered by the historical abuse applicants.

55. Regarding reasonable alternative remedies, the applicants submit that none are available to them. They submit that it is highly unlikely that a kaupapa inquiry will hear the claim with the urgency necessary to address the issues pleaded. They further argue that these applications are wider than the anticipated scope of the Mana Wāhine kaupapa inquiry, because they concern the impact not only on mothers and women but also on their children, their entire whānau unit, and their hapū and iwi.

56. The applicants say that the Royal Commission also fails as an adequate alternative remedy because it will only consider historical experiences of abuse in state care, rather than contemporary claims of abuse and the current actions of Crown organisations in removing children from their whānau and placing them in state care. The Ministry of Social Development's historical complaints process also only considers experiences prior to 2008.

57. Although the applicants commend the Office of the Children's Commissioner for announcing the launch of a thematic review of Oranga Tamariki's policies, processes and practices relating to care and protection issues, this will only focus on Māori babies from birth to three months. The applicants submit that the scope of the issues extend beyond the impact of these processes on babies.

58. The applicants submit that other avenues to review the actions of Oranga Tamariki are insufficient. Parents or whānau members can complain about a decision or action of Oranga Tamariki to the Family Court for review, and decisions of the Family Court can be appealed to the High Court. However, these judicial bodies, the applicants submit, must apply the legislation as it stands and do not have jurisdiction to determine that the legislative and policy framework established by the Crown is in breach of the Treaty.

Likewise, complaints made to the Ombudsman to review an individual decision do not allow for an analysis of breaches of the Treaty.

59. Finally, the applicants submit that the internal Oranga Tamariki review of the process that led to a specific incident where a newborn Māori baby was uplifted in the Hawke's Bay is not an adequate alternative remedy. This review will only concern the facts of the individual case, rather than take a system-wide approach. It will be carried out privately and findings will not be released to the public. It also lacks independence because it is being carried out by Oranga Tamariki itself.

60. The applicants argue that the Tribunal is the best forum for this issue to be inquired into because it is the only body that can provide the remedies sought and it provides a uniquely suitable environment. The applicants seek findings that the procedures and policies of Oranga Tamariki are in breach of the Treaty and recommendations to the Crown to ensure that its Treaty obligations are met, which only the Tribunal has jurisdiction to make. Further, the Tribunal would provide a safe, kaupapa Māori framework within which whānau can feel comfortable to give their evidence, which is important because many witnesses do not trust any Oranga Tamariki processes. The applicants argue that the Tribunal has expertise, neutrality and a tikanga practice that cannot be provided elswhere.

The Crown's response

61. The Crown opposes the applications, principally on the grounds that the issues raised cannot be dealt with appropriately under urgency, an urgent inquiry would be premature, and the applicants have alternative remedies available to them (Wai 2823, #3.1.15; Wai 2891, #3.1.5).

62. The Crown also considers that some of the Wai 2823 applicant's allegations should be treated with caution. Contrary to the applicant's suggestions, the Crown submits that Oranga Tamariki is committed to keeping tamariki Māori with their whānau wherever possible and that the context surrounding the need to take a child into care is enormously complex.

63. Crown counsel submit that the issues raised by the applicant are important but also wide-ranging and complex and cannot be appropriately or properly addressed within the constraints of an urgent inquiry. They consider that the Tribunal could more effectively inquire into these matters through its kaupapa inquiry programme, most appropriately in the Mana Wāhine or Social Services and Social Development inquiries.

64. Crown counsel consider that the longer timeframe of a kaupapa inquiry would also enable a more thorough assessment of the effectiveness of the new Oranga Tamariki operating model and legislative changes. Oranga Tamariki is committed to a programme of work aimed at driving transformational change and specifically at improving outcomes for tamariki and rangatahi Māori.

65. The Crown argues that an urgent inquiry would be premature at this time because at least three inquiries are currently addressing these matters, incuding Oranga Tamariki's internal review in response to the specific situation arising from the uplifting of a child at Hawke's Bay Hospital and the reviews announced by both the Office of the Children's Commissioner and the Ombudsman.

66. Further, the Crown says that Oranga Tamariki is partway through the process of embedding its new operating model and supporting changes that respond to earlier, system-wide reviews and that seek to address issues impacting on tamariki Māori and their whānau. The changes include new legislation that came into force on 1 July 2019 amending the purposes and principles of the Act. Crown counsel argue that the effectiveness of those measures cannot be properly assessed at this point.

67. Crown counsel consider that there are alternative remedies available to the applicants. These include seeking to participate in the current inquiries, raising issues with the Ombudsman or the Office of the Children's Comissioner, and/or engaging directly with Oranga Tamariki. The Crown further submits that the terms of reference of the Royal Commission are broad enough to include consideration of current issues and experiences, and that the Royal Commission is committed to giving appropriate recognition to Māori interests, acknowledging the disproportionate representation of Māori in state care.

The applicants' reply

68. In reply to the Crown, the applicants submit that a Waitangi Tribunal urgent hearing can be a full inquiry informed by a range of views and participants (Wai 2823, #3.1.17; Wai 2891, #3.1.7). An urgent inquiry is not a truncated inquiry, just one that is heard rapidly. Further, they submit that while the issue of the removal of children exists in a wider context, it can be sufficiently ringfenced for an urgent inquiry.

69. In response to the Crown's suggestion that these issues should be considered as part of a kaupapa inquiry, counsel for Wai 2823 submits that the issues raised in the application span up to nine of the planned kaupapa inquiries. The issue cannot be effectively inquired into by being split across so many inquiries, and the Tribunal's kaupapa inquiry programme is likely to take more than ten years to complete. Counsel for Wai 2891 submit that this claim fits best within the proposed Social Services and Social Development kaupapa inquiry, which is not likely to commence for many years.

70. The applicants submit that Māori cannot simply "wait and see" whether the new operating model and legislative changes being implemented by the Crown and Oranga Tamariki will resolve the issues raised by the claimants. Permitting Oranga Tamariki more time to "get it right" directly exposes Māori to trauma and adverse outcomes, such as those pleaded in the present applications. Counsel submit that this approach would lead to a breach of the principles of partnership and good faith, particularly given the distrust that, the applicants submit, Māori already have of Oranga Tamariki and its practices. They argue that despite the new changes and legislation, the culture and attitude of Oranga Tamariki have not changed, citing public statements by Oranga Tamariki chief executive Grainne Moss and Minister for Children Tracey Martin. Further, two years since the establishment of Oranga Tamariki and associated reforms, there are now more Māori children in care than ever.

71. The applicants argue that the newly introduced s 7AA of the Act does not meet the standards for Treaty-compliant legislation set out by the Health Services and Outcomes Tribunal. Counsel submit that the new provisions will allow Māori to participate in Oranga Tamariki processes by enabling them to present their views about particular issues, but say that ultimately the real decision-making power remains with the Crown and that this

does not effectively remedy or resolve any of their concerns. Further the applicants submit that the legislative reforms will take a long time to be fully implemented. In support, counsel for Wai 2891 argues that statistics from Oranga Tamariki show that in the first quarter of 2019, over 100 children in state care, more than three-quarters of whom were Māori, were harmed sexually, physically or emotionally (Wai 2891, #3.1.7 at [30]).

72. The applicants reject the Crown's submission that seeking to participate in the existing inquiries or engaging directly with Oranga Tamariki are reasonable alternative remedies. They consider that the Oranga Tamariki review into the Hawke's Bay case will be insufficient: it is not independent, it is to be conducted privately, it is run by Oranga Tamariki and it is an isolated inquiry rather than a national one.

73. Further, the applicants argue that the independent public inquiries should not stop the Tribunal proceeding to an urgent hearing because the Ombudsman, the Office of the Children's Commissioner and the Royal Commission cannot inquire into allegations of Treaty breach, as the Tribunal can. Counsel submit that the issue of bringing children into care must be considered through a Treaty lens. For its part, the Whānau Ora Commissioning Agency's inquiry is not the first review to be led by Māori and is likely, the applicants submit, to be ignored by the Crown just as the Pūao-te-Ata-Tū report of 1988 was.

74. Counsel further submit that to divert the Royal Commission's attention to contemporary issues relating to the removal of children would be tangential to the initial purpose of the Royal Commission to consider historical abuse; and that there is little room for the issues raised by the applicants to be considered in full by the Royal Commission before the January 2023 date when it is expected to release its final report. The Tribunal is, they reiterate, a safe, Māori-friendly, culturally and tikanga-compliant place for Māori to give their evidence and seek to address and resolve these issues.

Interested parties' submissions

75. In my memorandum-directions of 17 July 2019, I granted interested party status in the Wai 2823 application to the following parties (Wai 2823, #2.5.3), who all expressed support for the application but made no further submissions:

    (a) the Whānau Ora Commissioning Agency (Wai 2823, #3.1.7);

    (b) Tasilofa Huirama, the claimant for Wai 2890, on behalf of Ziporah Grace Huirama (deceased) and her whānau (Wai 2823, #3.1.8);

    (c) Te Enga Harris, a claimant for Wai 1531, on behalf of the Harris whānau (Wai 2823, #3.1.8);

    (d) Piki Te Ora Mitchell, a claimant for Wai 1247 (Wai 2823, #3.1.10); and

    (e) the Māori Women's Welfare League (Wai 2823, #3.1.12).

76. Counsel for the respective parties also sought interested party status in the Wai 2891 application for Te Rūnanga o Ngāti Hine (Wai 682) and the Māori Women's Welfare League (Wai 381) (Wai 2891, #3.1.4 & #3.1.6), which I now grant.

Applications to join the proceedings

77. The Tribunal also received applications to join the proceedings from:

    (a) Jane Mihingarangi Ruka Te Korako, the claimant for Wai 1940, on behalf of the Grandmother Council of the Waitaha Nation (Wai 2823, #3.1.4);

    (b) the New Zealand Māori Council, if the Tribunal grants urgency for Wai 2823 (Wai 2823, #3.1.11);

    (c) Beverly Wiltshire-Reweti, the claimant for Wai 2850 (a claim concerning Māori children that were displaced from their whānau through adoption and state care legislation), and the Chairpersons of various District Māori Councils (Wai 2823, #3.1.14);

    (d) Te Rūnanga o Ngāti Hine, the claimants for Wai 682, if the Tribunal grants urgency for Wai 2891 (Wai 2891, #3.1.4); and

    (e) Noelene Hughes, Vanessa Komene, Nicola Dally-Paki and Carra Lindsay, as individual parties (Wai 2823, #3.1.13).

78. Counsel for the New Zealand Māori Council highlights the existence of other inquiries convened to investigate the removal of Māori children and suggests that the Tribunal consider how it frames any Tribunal inquiry into this matter accordingly. Counsel further notes that the New Zealand Māori Council is negotiating with Oranga Tamariki on the development of appropriate policy (Wai 2823, #3.1.11).

79. Counsel for Wai 2850 seeks directions as to whether matters relating to children in state care will be heard in the Health Services and Outcomes or Mana Wāhine kaupapa inquiries, a combination of both, or in a separate urgent inquiry. The claimants' preference is to be heard as a first stage of the Mana Wāhine inquiry, but submit that recent developments necessitate an urgent inquiry (Wai 2823, #3.1.14).

Joint hearing with claims concerning abuse in state care

80. Three of the parties with applications for urgency in relation to the settlement of historical grievances due to abuse in state care – Wai 972, 1911 and 2615 – have applied for their claims be heard jointly with Wai 2823 (Wai 2823, #3.1.9, 18, 19).

81. Counsel for Wai 2823 support the applications from the Wai 1911 and Wai 2615 claimants to be heard together with Wai 2823 (Wai 2823, #3.1.19). Counsel submit that the issues raised in the Wai 2823 application are 'heavily interwoven' with those raised in the Wai 1911 and Wai 2615 applications (at [5]). They submit that the Wai 2823 application is concerned not only with the Oranga Tamariki processes for removing children and placing them in state care, but also the downstream impacts that removal has on their children and whānau, demonstrating the relevance of the issues raised in the Wai 1911 and Wai 2615 applications.

Discussion

82. In this section, I will first consider the applications concerning the settlement of historical grievances. Next I consider the applications relating to the current practices and actions of Oranga Tamariki.

Urgency criteria

83. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

> In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:
>
> - the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
> - there is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
> - the claimants can demonstrate that they are ready to proceed urgently to a hearing.
>
> Other factors that the Tribunal may consider include whether:
>
> - the claim or claims challenge an important current or pending Crown action or policy;
> - an injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
> - any other grounds justifying urgency have been made out.
>
> Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Applications concerning the settlement of historical grievances

84. The suffering endured by many of the applicants and outlined in their evidence is tragic. The abuse suffered by children historically placed in the care of the state is now widely acknowledged and it is right that the Crown address their grievances. In considering these applications, however, my focus must be squarely on the current or pending Crown actions or policies that are alleged to be causing the applicants prejudice and on whether the case for an urgent Tribunal hearing has been made out in light of the factors set out above.

<u>Significant and irreversible prejudice as a result of current or pending Crown action</u>

85. The applicants submit that they are suffering significant and irreversible prejudice as a result of current Crown policy and action, namely the Ministry of Social Development process for settling historical grievances. The prejudice is said to arise primarily because that process is allegedly inappropriate for Māori and because the Crown is arbitrarily imposing a 2020 deadline for its completion, removing the applicants' ability to seek redress after that time. The applicants also consider Oranga Tamariki's complaints resolution process for resolving claims arising from 2008 onwards to be inadequate.

86. The focus of the applications is therefore not on the alleged Crown actions or failures that led to the historical abuse, but rather on the Crown's current policy and practice for resolving those grievances. Nonetheless, the applicants further argue that without an

inquiry into historical abuse in state care to enable the Crown to fully understand and remedy its past failures, there is a high risk of prejudice to children currently in state care.

87. The Crown disputes that the applicants are suffering significant and irreversible prejudice, and submits that the Ministry and Oranga Tamariki claim processes are appropriate and allow for the expression of tikanga on an individual basis. Although it recognises that the integration of tikanga into the Ministry process could be improved, the Crown argues that this does not justify an urgent hearing. The Crown also states that the 2020 target for completing the Ministry process is aspirational and not a deadline. Further, the Crown submits that the state care system has already been significantly reformed with the establishment of Oranga Tamariki and that the process of reform is ongoing.

88. Serious questions have been raised about the sensitivity of the Ministry process for the settlement of historical grievances to the needs of Māori claimants. However, I am not persuaded that it is currently causing significant and irreversible prejudice to the applicants, especially in light of the commencement of the Royal Commission of Inquiry. Regarding the applicants' arguments as to timeframes, there is no impending deadline for the submission or resolution of claims and the Crown has indicated that Ministry claimants are free to put their claims on hold while the Royal Commission is under way. Further, the Royal Commission is expected to make recommendations on an ongoing basis, which, as the Crown has argued, may lead to reform of the Ministry process during the course of an urgent inquiry if it were granted now.

89. The applicants have also argued that there is a risk of prejudice to Māori children currently in state care. This may or may not be the case, but I am not satisfied that the applicants have demonstrated that an urgent Tribunal inquiry into the Ministry process for settling the historical grievances of those previously abused in state care would have a significant, material impact on the risk to children who may currently or in the future be in the care of Oranga Tamariki beyond the likely effect of recommendations from the Royal Commission.

Alternative remedies

90. The applicants submit that there are no reasonable alternative remedies available to them. They do not consider the Royal Commission of Inquiry to be tikanga-compliant or appropriate for Māori, or that it will focus on the Crown's obligations under the Treaty. They further submit that the issue of abuse in state care is unlikely to fall within the scope of a Tribunal kaupapa inquiry in the near future and that litigation is not an appropriate alternative option.

91. The Crown argues that the Royal Commission of Inquiry is an appropriate alternative remedy for the applicants' grievances regarding historical abuse in state care. The Crown also submits that engagement with the Ombudsman, the Office of the Children's Commissioner and Oranga Tamariki are appropriate alternative remedies for concerns relating to children currently in state care.

92. I acknowledge the applicants' argument that the Royal Commission's focus is not on the Crown's fulfilment of its duties under the Treaty. That does not mean, however, that the Royal Commission is not cognisant of or unable to scrutinise prejudice arising from

legislation, policy and actions that engage the Crown's Treaty obligations to children in state care and their whānau. Its terms of reference state explicitly (at [6]) that:

> The inquiry will give appropriate recognition to Māori interests, acknowledging the disproportionate representation of Māori, particularly in care. The inquiry will be underpinned by Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, and will partner with Māori throughout the inquiry process.

93. Further, the Royal Commission's procedural statement on Treaty recognition and the Treaty principles it will apply to its engagement with Māori and iwi signals its commitment to Treaty compliance in conducting its proceedings.

94. The final terms of reference for the Royal Commission's inquiry are inclusive and comprehensive. They enable any claimant involved in past or present Crown processes to participate and they require the Royal Commission to consider both past and current frameworks for preventing and responding to abuse in care, as well as redress and rehabilitation processes for those who have suffered such abuse. While focused on the years 1950-1999, the Royal Commission is also open to claims of abuse arising before and after that period, up to the present day.

95. I consider that at the very least it would be premature, and an inefficient use of its resources, for the Tribunal to undertake an urgent inquiry into historical abuse in state care and the Crown's processes for settling the grievances of those abused when there is already a separate, independent process in progress investigating that abuse.

Readiness to proceed to hearing

96. The applicants all submit that they are ready to proceed urgently to hearing and this has not been challenged by the Crown. Their request for an inquiry also to cover historical abuse in state care and to investigate wide-ranging factors such as systemic causes and intergenerational impacts does nevertheless raise doubt as to whether sufficient witness, expert and other evidence has been prepared to enable the Tribunal to conduct an effective national inquiry under urgency.

Conclusion

97. For these reasons, I conclude that the grounds for urgency are not made out in relation to the applications concerning the Crown's settlement of the grievances of those historically abused in state care. These claims will, however, be heard in the future as a part of the appropriate kaupapa inquiry or inquiries. These future inquiries will also be able to take into account the outcome of the Royal Commission process.

Applications concerning Oranga Tamariki

98. I now turn to consider the applications made in relation to the current policies and actions of Oranga Tamariki against the criteria for granting an urgent Tribunal inquiry.

Significant and irreversible prejudice as a result of current or pending Crown action

99. The applicants submit that significant and irreversible prejudice is being suffered both by tamariki Māori who are taken into state care and by their whānau, hapū and iwi. They point both to evidence of current abuse in state care and to general and lasting prejudice

to Māori affected by the custodial regime. They allege that this prejudice is ongoing as a result of the current policies, practices and procedures of Oranga Tamariki, and that it is exacerbated by the actions of Oranga Tamariki in taking a disproportionately high number of tamariki Māori into state care.

100. Although the Crown submits that some of the applicants' substantive allegations should be treated with caution, it does not directly dispute or contest the claimants' allegation that Māori are suffering significant and irreversible prejudice due to the current state care system. Rather, it submits that an inquiry would be premature at this point because of the other inquiries under way and recent legislative changes.

101. In support of their allegations of continuing abuse in state care and of wider impacts, the applicants cite Oranga Tamariki data on findings of neglect or sexual, physical or emotional harm. As detailed in Oranga Tamariki's quarterly reports, these amounted to 490 findings of harm affecting 130, 97 and 103 children respectively in the three quarterly periods from July 2018 to March 2019, the majority being of Māori descent (Wai 2823, #A5(b)(i) & Wai 2891, #A5(a), Appendix C and Appendix E; Wai 2891, #A6(a), Appendix B). The extent of the wider impacts alleged by the applicants is indicated by the total of more than 3,700 tamariki Māori in state care during January to March 2019.

102. The data also indicate that Māori are disproportionately affected. The applicants say that the Ministry of Social Development advised that while in the 12 years preceding 2013 the number of Pākehā children in state care had fallen by 20%, the number of Māori children in state care had increased by 20% (Wai 2823, 1.1.1(a) at [23]; Wai 2891, #1.1.1 at [34]). The disproportion has widened further in recent years, with tamariki Māori accounting for most of the rise in total children in state care from approximately 5,000 in June 2015 to 6,400 in June 2018 (Ministry of Social Development *Annual Report 2014/2015* at 22; Oranga Tamariki–Ministry for Children *Annual Report 2017/2018* at 6). Oranga Tamariki's published statistics reveal that tamariki Māori comprised 59 per cent of the children in state care at 31 March 2019 and 76 percent of children with findings of harm during January to March 2019 (Wai 2891, #A6(a), Appendix B at 12).

103. The applicants further allege that Māori are greatly overrepresented in the uplifting of babies into state care. Jean Te Huia, the claimant for Wai 2823, states as follows (Wai 2823, #1.1.1(a) at [22]):

> Of the 821 children removed from their parents within three months of birth between 2016 and 2018, approximately 56% were Māori… This is despite Māori birth rates only making approximately 22% of births annually.

104. Ms Te Huia, citing data illustrating the over-representation of Māori children in state care, further states (Wai 2823, #1.1.1(a) at [24]):

> These statistics demonstrate at least two things:
>
> a. Unconscious bias and institutional racism present within Crown and Oranga Tamariki policy, and its interpretation and implementation of the Act;
>
> b. That what is working for non-Māori is not working for Māori.

105. I acknowledge the Crown's argument that the issues raised by the applicants are wide-ranging and complex, as are the reasons for children being taken into state custody. That complexity is illustrated by Oranga Tamariki data indicating that during January to

March 2019, more than half of the time spent by children in care was in placements with with family/whānau caregivers or their immediate family, and that the 12 per cent of time spent by children placed with their immediate family compares with 27 per cent of recorded findings of harm for this placement category (Wai 2891, #A6(a), Appendix B at [12]). Nonetheless, I am satisfied that the risk of significant and irreversible prejudice as a result of current Crown policy and action is sufficiently made out. Simply put, the over-representation of Māori in these statistics is pronounced and of major concern.

Alternative remedies

106. The applicants argue that there are no reasonable alternative remedies available to them. They submit that the application is wider in scope than the issues likely to be heard in the Mana Wāhine kaupapa inquiry, which they consider is unlikely to proceed with sufficient speed to address this urgent issue. They argue that the Royal Commission is not a reasonable alternative because it is focused on historical experiences rather than current policies and actions. The applicants further submit that engagement with the Office of the Children's Commissioner, the Ombudsman, the Ministry for Social Development or Oranga Tamariki or taking legal action in the courts are not appropriate alternatives. They argue that these avenues require the application of the law as it stands and that only the Tribunal can determine Treaty breaches by the Crown. They also advocate the Tribunal as a uniquely safe environment for the hearing of these claims.

107. In response, the Crown submits that the applicants do have a range of alternative remedies available to them, including seeking to participate in the inquiries that have been initiated or announced, or raising issues directly with the Ombudsman, the Office of the Children's Commissioner or Oranga Tamariki. Further, the Crown argues that the Tribunal could more effectively inquire into these matters as part of its kaupapa inquiry programme.

108. The applicants state that because the law in force is inconsistent with the Treaty, the courts, Oranga Tamariki and other official agencies do not provide alternative avenues for the redress they seek. However, depending on their powers and terms of reference, it should be acknowledged that independent inquiries are not necessarily limited.

109. Currently, at least four independent inquiries have been announced into various issues relating to children in state care. The comprehensive terms of reference of the Royal Commission have been considered above. They give the Commission discretion to investigate abuse in state care up to the present day, make explicit reference to the Treaty and its principles, and commit to partnership with Māori in the conduct of the inquiry. They cover both individual cases and 'the factors, including structural, systemic, or practical factors, that caused or contributed to the abuse of individuals in State care'. They extend to 'the impact of the abuse on individuals and their families, whānau, hapū, iwi, and communities, including immediate, longer-term, and intergenerational impacts', and 'the circumstances that led to individuals being taken into, or placed into, care and the appropriateness of such placements'. They further require the Commission to report on 'the current frameworks to prevent and respond to abuse in care; and any changes to legislation, policies, rules, standards, and practices, including oversight mechanisms, that will protect children, young persons, and vulnerable adults in the future'.

110. The two independent inquiries by official bodies both focus specifically on Oranga Tamariki's process for uplifting babies:

(a) the Chief Ombudsman has announced a "wide-ranging and independent investigation into the steps Oranga Tamariki takes when newborn babies are removed" (Wai 2823, #A5(b)(i) & Wai 2891, #A5(a), Appendix H); and

(b) the Office of the Children's Commissioner is undertaking "a thematic review of Oranga Tamariki's policies, processes and practice relating to care and protection issues for tamariki Māori aged 0-3 months" (Wai 2823, #A5(b)(i) & Wai 2891, #A5(a), Appendix G).

111. Finally, the Whānau Ora Commissioning Agency has produced draft terms of reference for a proposed Māori-led review of Oranga Tamariki that require it to report broadly on historical and contemporary removals, on contributing systemic and other factors, and on the impact on whānau, hapū, iwi and hapori, together with recommendations for reform.

112. Little practical purpose would be served by the Tribunal duplicating the work of other inquiries. Nor would doing so be an appropriate diversion of the Tribunal's finite resources, delaying its inquiry into other claims. The applicants seek from the Tribunal findings of Treaty breach and a conducive hearing environment. That they are entitled to have the Tribunal hear their claims is not in doubt. The question to be determined is whether they should be heard now under urgency or whether, taken together, the several other independent inquiries into many of the issues they raise afford an adequate alternative, until the claims are heard before the Waitangi Tribunal as a part of a comprehensive kaupapa inquiry into which their issues fall.

113. In my assessment, while the existing inquiries may in certain respects overlap the urgent inquiry sought by the applicants, they will not fully address all of the urgent issues that have been raised. The main focus of the Royal Commission is on historical abuse in state care, while the Children's Commissioner and Chief Ombudsman's inquiries will address the uplifting of babies up to three months old.

114. The applicants raise an issue that goes beyond those to be addressed by the Children's Commissioner and Chief Ombudsman's inquiries, namely the adverse impact of the state care and protection regime for Māori children on whānau, hapū and iwi. Specifically, the applicants' claims raise the issue of the disproportionately high and rising number of Māori children taken into state care and the potentially wide-ranging prejudice suffered by whānau, hapū and iwi. It does not appear that this issue will be fully covered by the three independent inquiries already in progress.

115. I note that this aspect of the applicants' claims is included in the draft terms of reference of the independent Māori-led inquiry. Its convenor, the Whānau Ora Commissioning Agency, has expressed support for the claimants and an urgent Tribunal inquiry. The Agency's inquiry is in its early stages and it is not yet clear what form and process it will adopt. I consider that the issue is of sufficient seriousness and urgency that a separate, Treaty-focused inquiry is warranted..

Readiness to proceed urgently to hearing

116. The applicants state that they are ready to proceed urgently to hearing. I enter the same reservation noted above, that the scope of inquiry they seek must raise doubt as to whether the evidence now available will suffice. I accept, however, that they are sufficiently ready to proceed to hearing on the issue of the over-representation of tamariki Māori taken into state care and the prejudice alleged to affect whānau, hapū and iwi.

Mode and scope of inquiry

117. Counsel for Wai 2891 submit that the placing of tamariki Māori in state care is a discrete issue that is well suited to consideration in an urgent inquiry. However, in reply to the Crown's submission that this issue cannot be appropriately inquired into urgently, counsel for Wai 2823 submit that they are not seeking a truncated inquiry but rather a full inquiry heard rapidly, with 'a thorough, exhaustive process of inquiry that considers the perspective of a range of witnesses' (Wai 2823, #3.1.17). Counsel also support the applications of the Wai 1911 and Wai 2615 claimants to be joined to the inquiry, expanding its scope and depth to include historical claims relating to the abuse of Māori children in state care (Wai 2823, #3.1.18, 19).

118. In contrast, the Crown submits that the issues raised in these applications are wide-ranging and complex and cannot be properly addressed within the constraints of an urgent inquiry. Rather, the Crown argues that these issues should be inquired into by the Tribunal as part of a comprehensive kaupapa inquiry, such as the Mana Wāhine inquiry or the future Social Services and Social Development inquiry. The Crown argues that the longer timeframe of a kaupapa inquiry would be appropriate because it would allow time for the Tribunal to consider the findings of the other current inquiries and more properly assess the effectiveness of the new Oranga Tamariki operating model and legislative changes.

119. I agree with the Crown that an urgent inquiry may not be best suited to a full hearing of of the wide-ranging and complex issues raised by the applicants: any urgent inquiry must proceed at speed and focus on matters bearing directly on allegations that current or pending Crown actions are resulting or may result in significant and irreversible prejudice. Related grievances not heard under urgency, or heard only in part, can be taken up in the appropriate future kaupapa inquiry.

120. However, I consider that an inquiry targeted on the issue of prejudice to whānau, hapū and iwi as a result of the disproportionately high and rising number of Māori children in state care is capable of being conducted under urgency. Although the factors influencing the circumstances in which decisions are made to remove children from their caregivers are undoubtedly complex, the question of whether the Crown's policies, practices and procedures surrounding the taking of Māori children into the care of the state are consistent with the Treaty is a relatively narrow one.

Conclusion

121. I conclude that there are sufficient grounds for an urgent inquiry into a specific contemporary issue concerning a risk of significant and irreversible prejudice to Māori

arising from current Oranga Tamariki policy and practice. That issue, which is not fully addressed in the other independent inquiries under way, can be stated as follows:

(a) Having regard to the rising and disproportionately high number of tamariki Māori taken into state care under the auspices of Oranga Tamariki, is Crown legislation, policy and practice inconsistent with the principles of the Treaty and the Crown's Treaty duties to Māori? If so,

(b) What changes to Crown legislation, policy and practice are required to ensure Treaty compliance?

122. While the claimants have sought to include some broader issues concerning children in state care in the urgent inquiry they seek, such issues can more appropriately be heard in future kaupapa inquiries, in particular the Social Services and Social Development inquiry and the Mana Wāhine inquiry.

Decision

123. I consider that a targeted urgent inquiry into the Treaty consistency of the Crown's current legislation, policies and practices for the taking of tamariki Māori into state care and protection is warranted. It is a pressing national issue for many Māori and there is a risk of significant and irreversible prejudice to whānau, hapū and iwi.

124. The inquiry will be limited to the issue of the disproportionately high and rising number of tamariki Māori being taken into state custody and will not extend, except for purposes of context and evidence of prejudice, to methods of uplifting children, cases of abuse in care, standards of care, historical grievances and the Ministry and Oranga Tamariki remedy processes, all of which are being addressed in other independent inquiries.

125. Accordingly, the Wai 2823 and Wai 2891 applications for urgency are granted in respect of the targeted inquiry outlined above. The Wai 2615 and 1911 applications to be joined to the inquiry are also granted.

126. As has been noted above, several parties have sought to participate as interested parties to this urgent inquiry, or indicated that they will seek to be joined to the inquiry if urgency is granted. All such applications will be dealt with by the inquiry panel.

127. As noted at paragraph 97 above, I conclude that the grounds for urgency have not been made out in relation to the applications concerning the settlement of the grievances of those historically abused in state care. Accordingly, the applications for urgency brought by the claimants for Wai 972, Wai 1247, Wai 1670, Wai 1911, Wai 2494, Wai 2615 and Wai 2619 are declined. These claims will still be heard as a part of the Tribunal's kaupapa inquiry programme, but will not be heard under urgency.

Appointment of a presiding officer and panel

128. Pursuant to cl 5(1)(a)(ii) of sch 2 to the Treaty of Waitangi Act 1975, I now appoint Michael Doogan, a judge of the Māori Land Court, as presiding officer for the inquiry into claims concerning Crown legislation, policy and practice in respect of the taking of tamariki Māori into state care and protection by Oranga Tamariki–Ministry for Children. This inquiry will be known as the Oranga Tamariki urgent inquiry and is assigned the reference number Wai 2915.

129. Pursuant to cl 5(1)(b) of sch 2 to the Treaty of Waitangi Act 1975, I also appoint Professor Pou Temara, Kim Ngarimu and Professor Rawinia Higgins as members of the Tribunal panel for the Oranga Tamariki urgent inquiry.

130. This panel will issue directions regarding the next steps shortly. At this time, I direct the Registrar to establish a new record of inquiry for Wai 2915. Wai 2823, Wai 2891, Wai 2615 and 1911 are to be aggregated into that record. All written material filed on those claims that relates to the applications for urgency will be transferred to the Wai 2915 record of inquiry. All future documents filed by parties in relation to the matters subject to this inquiry should now refer to this Wai number.

The Registrar is to send a copy of this direction to counsel for the applicants, Crown counsel and those on the notification lists for:

- Wai 972, the Ngāti Kauwhata ki te Tonga Surplus Lands Claim;
- Wai 1247, the Kororipo Lands and Resources Claim;
- Wai 1670, the Descendants of Te Uri o Ratima Claim;
- Wai 1911, the Adoption Act 1955 (Smale) Claim;
- Wai 2494, the Racism Against Māori Claim;
- Wai 2615, the Māori Children Placed in State Care Claim;
- Wai 2619, the Māori Disabled Claim;
- Wai 2623, the Māori Mothers Claim;
- Wai 2891, the Oranga Tamariki Claim; and
- Wai 2915, the Oranga Tamariki urgent inquiry.

DATED at Gisborne this 25th day of October 2019

Chief Judge W W Isaac
Chairperson
WAITANGI TRIBUNAL