

IN THE WAITANGI TRIBUNAL

**WAI 3060
WAI TBC**

IN THE MATTER OF

The Treaty of Waitangi Act
1975

AND

IN THE MATTER OF

Wai 3060 – Justice System
Kaupapa Inquiry

AND

IN THE MATTER OF

a claim by **Te Mauri Kingi**,
and **Billy McFarlane** on
behalf of themselves, their
whānau and their iwi.

STATEMENT OF CLAIM

Dated this 29th day of April 2022



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Waitangi Tribunal

2 May 2022

Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

He Mana

He Mauri

He Tapu

Ruia

Taitea

Kia Toitū

Ko Taikākā Anake

Ngā Kaitono – The Claimants

1. This Statement of Claim is filed on behalf of Te Mauri Kingi of Rotorua, Consultant and Billy McFarlane of Rotorua, Program Manager ("the claimants"), for and on behalf of themselves, their whānau, their hapū and their iwi.
2. This claim is also submitted on behalf of those Māori and groups of Māori who have been affected by the actions and omissions of the Crown in breach of Te Tiriti o Waitangi/The Treaty of Waitangi and its principles which have failed to ensure that the systems of justice which operated under the first law of Aotearoa/ New Zealand are maintained, adequately resourced and recognised within their own rohe (tribal territories).
3. The claimants say that the justice system which operated in Aotearoa/ New Zealand, is one that has been imposed on Māori since 1840 with the signing of Treaty of Waitangi and was built initially on the subjugation of Māori legal processes and the denial for a long time that Māori even had law or legal processes.
4. The claimants say this has been to their detriment and the detriment of their whānau, hapū and iwi and has resulted in the marginalisation of Māori processes of resolution and the undermining of Māori authority in the important context of maintaining wellbeing for whānau and hapū.

5. The named claimants' have each had significant first-hand experience with the introduced justice system and its negative impacts on Māori. The claimants individually and with the support of their whānau, hapū and iwi have worked systematically to reclaim Tikanga Māori as the first law of this nation as part of their efforts to re-establish Māori Justice systems in their rohe (tribal territories). As part of this process of reclamation the claimants are committed to Kaupapa Māori models of practice built on values of whanaungatanga; manaakitanga; rangatiratanga and mana Motuhake being designed and instituted. Notwithstanding these efforts the initiatives are piecemeal and adhoc responses which require resources, both human and financial, to enable medium- and long-term solutions to evolve.
6. The claim is advanced because the claimants assert that they have seen too many families affected by the failure of the Pākehā Justice system to give effect to Māori rights and Māori philosophies in the way solutions for harmful behaviour are identified and then addressed which has caused enormous harm; spiritually and physically to their whānau; their hapū and their iwi.

Jurisdiction

7. The claimants are Māori for the purposes of s 6(1) of Treaty of Waitangi Act 1975.
8. The claimants assert that Māori have been, continue to be and are likely to be, prejudicially affected by Crown actions and inactions in breach of Te Tiriti.
9. The core of this claim is that the Crown has breached principles of Te Tiriti by failing to actively protect the taonga and other interests of the claimants.
10. The claimants are suffering significant, irreversible and ongoing prejudice as a result of the effect of the Crown's acts and omissions, and as particularised in this Statement of Claim.

TE TIRITI O WAITANGI AND ITS PRINCIPLES

11. The Crown had and continues to have duties to recognise and actively protect Māori rights and interests under Te Tiriti and its principles.

12. The principles are informed by the words of Te Tiriti and inferred from Te Tiriti in its entirety.
13. Without limiting Te Tiriti, the claimants assert that the following are principles of Te Tiriti, each of which they say is relevant to the present claim.

Active Protection

14. It is now well established that the Crown owes a duty of active protection to Māori under Te Tiriti. This is the duty to protect Māori rights and interests arising from the plain meaning of Te Tiriti.
15. In accordance with Article II of Te Tiriti and the principle of active protection, the Crown is required to actively protect taonga Māori which includes tikanga Māori. Where adverse disparities are persistent between Māori and non-Māori, the Crown is obliged to take appropriate legislative and policy measures to minimise their causes and effects.
16. The guarantee of taonga is described by the Waitangi Tribunal in the Muriwhenua Fishing Report as:¹

Te tino rangatiratanga o ratou taonga' tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.

17. Te Tiriti guaranteed to Māori the protection of tamariki mokopuna as a taonga in terms of Article II. In developing policies and law for the administration of justice, the Crown are required to consult with their Treaty partner. Article III gives to Māori the same protection and status under the law as non-Māori.

¹ Waitangi Tribunal *Muriwhenua Fishing Report* (Wai 22, 1989) at 181; see pages 179-180 for a discussion of the concept of taonga.

Tino Rangatiratanga

18. The overarching principle set out in Article II guarantees Māori the right to self-government, law, and justice and full tino rangatiratanga, mana, power, authority over their lands. This Tiriti principle acknowledges and protects “unqualified exercise of chieftainship and confirms and guarantees to Māori their property and other rights.”² Inherent in Māori autonomy is their own customary law and institutions, and the right to determine their own decision makers and land entitlements.³
19. This necessarily qualifies or limits the Crown’s authority to govern⁴ and supports the principle mentioned above which obliges the Crown to not only recognise Māori interests specified in the Treaty but to actively protect them.⁵
20. This was of fundamental importance to Māori, for they would not have entered into the Treaty if their tino rangatiratanga was not guaranteed:⁶

The principle that the cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga is fundamental to the compact or accord embodied in the Treaty and is of paramount importance

21. The principle that the Crown should actively protect te tino rangatiratanga is paramount to the claimants. This protection is not merely a simple acknowledgement of tribal autonomy and self-management, it also includes a requirement that the Crown actively protect and support the claimants in the exercise of their rangatiratanga.

² I. H. Kawharu, “Treaty of Waitangi - Kawharu Translation” (2011) Waitangi Tribunal – Te Rōpū Whakamana i te Tiriti o Waitangi. Retrieved from: <http://www.waitangitribunal.govt.nz/treaty/kawharustranslation.asp%3E>.

³ Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui* (Wai 785, 2008) at 4.

⁴ Waitangi Tribunal, *Te Whanganui a Tara Me Ona Takiwa: Report on the Wellington District* (Wai 145, 2003) at 74.

⁵ Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 69.

⁶ Waitangi Tribunal, *Turangi Township Report* (Wai 84, 1995) at 284.

22. The late Dr Moana Jackson outlines that like all concepts of power mana or tino rangatiratanga is made up of a number of different but inseparable constituent parts. These include:
- a) **The power to define** – that is the power to define the rights, interests and place of both the collective and of individuals as mokopuna and as citizens;
 - b) **The power to make tikanga as law** – that is power to frame the normative codes by which people would live and the associated means and institutions to apply such law and expect compliance with and understanding of it;
 - c) **The power to protect** – that is the power to be kaitiaki, to manaaki and maintain the peace, and to protect everything and everyone within the polity;
 - d) **The power to decide** – that is the power to make decisions about everything affecting the wellbeing of the people, including how best to maintain good relationships and how to restore them when they were disturbed through the commission of a hara or hē;
 - e) **The power to reconcile** – that is the power to restore, enhance and advance whakapapa relationships in peace and most especially after conflict through processes such as hohou rongo or other restorative processes; and
 - f) **The power to develop** – that is the power to change in ways that are consistent with tikanga and conducive to the advancement of the people.

Partnership

23. In accordance with Te Tiriti principle of partnership and reciprocity, the Crown and Māori are required to act reasonably toward one another, with the utmost good faith and with each party acknowledging the needs and interests of the other. This includes co-operation and the will to achieve mutual benefits. It also includes respect for each partner's aspirations and spheres of authority.

Equity

24. The obligations arising from kāwantanga, partnership, reciprocity and active protection required the Crown to act fairly to both settlers and Māori – the

interests of settlers could not be prioritised to the disadvantage of Māori.⁷ Where Māori have been disadvantaged, the principle of equity – in conjunction with the principles of active protection and redress – requires that active measures be taken to restore the balance.⁸

Right to Development

25. This principle encapsulates the right of Māori to develop as a people, in cultural, social, economic and political senses.⁹ It is the Crown's responsibility to ensure Māori have the right to develop as such development is essential to Māori wellbeing.¹⁰

Redress

26. Where the Crown has acted in breach of the principles of Te Tiriti, and Māori have suffered prejudice as a result, the Crown has a duty to restore the honour and integrity, mana and status of Māori.¹¹

The Claim

27. The core of this claim is that the Crown has breached Te Tiriti o Waitangi and its principles in:

- a) denying Tikanga Māori as the First Law of Aotearoa/New Zealand;
- b) usurped the right for Māori to administer their own justice within their own tribal territories and in accordance with their own systems of Tikanga Māori (Māori Law);
- c) disregarded the means from which Māori can adequately have access to justice; and

⁷ Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2008) at 61-4.

⁸ Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui* (Wai 785, 2008) at 5.

⁹ Waitangi Tribunal, *He Maunga Rongo* (Wai 1200, 2008) at 914.

¹⁰ Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26 & 150, 1990) at 41-43; and Waitangi Tribunal, *Radio Spectrum Management and Development Claims (Interim)* (Wai 776, 1999) at 7.

¹¹ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 134.

- d) developing, implementing, and administering a unitary justice system without the free prior informed consent of Māori that continues to fail and prejudice Māori whānau, hapū and iwi
28. The Claimants assert that the devolvement of power needs to happen to ensure that their tino rangatiratanga and mana motuhake is recognised within the whānau, and subsequently, within the hapū and the iwi to enable models of Māori justice to flourish for the wellbeing of its members.
29. Whilst justiciability within the Claimants' own territorial boundaries remains a distant dream at present, with adequate support and investment, the Claimants' say that whānau, hapū and iwi will be able to deal with situations of harm that are committed within their own territories in accordance with Tikanga Māori proscribed processes of justice.

Background

30. The Westminster system brought with it the individual right to life, liberty and property as a cornerstone attribute in its administration of justice. It was instrumental in the global spread of colonisation as it made other British determined 'colonies' subordinate to its power and alienation of indigenous lands much easier. Ani Mikaere has criticised this system of law by calling it the 'imposter legal system' as it was 'fiercely antagonistic to any expression of Māoriness' or as evidenced, to any form of indigeneity.¹²
31. Tikanga Māori, however, is a system of governance that predates colonisation and is built upon whakapapa; heralding its longevity through whanaungatanga or interconnectedness. Its focus is collectivity; with individual rights often being usurped by collective interest. However, with the onset of colonisation, successive governments sought to ensure that the collective nature of justice under tikanga Māori was vitiated by way of individualisation; this being advanced early by the Native Land Acts of 1862 and 1865.
32. The consequence of the latter of enactments was s 23 whereby the Court could:

¹² Ani Mikaere *He Ruruku Whakaaro* (Huia Publishers, Wellington, 2013).

...order a Certificate of Title to be made and issued which Certificate shall specify the names of the persons or of the tribe who according to native custom own or are interested in the land ... Provided always that no Certificate shall be ordered to more than ten persons.

33. This legislation and the colonial order that pervades its passages are but an example of a series of early legislation that had been enacted against the wishes of Māori and diametrically opposed the philosophical underpinnings of tikanga Māori.
34. The interaction between the two laws and the collision that has occurred can be traced through the jurisprudence in the following cases:
 - a) *R v Symonds* (1847) NZPCC 388
 - b) *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72
 - c) *Nireaha Tamaki v Baker* (1901) NZPCC 371; (1902) AC 561
 - d) *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA)
 - e) *Baldick v Jackson* (1911) 13 GLR 398
 - f) *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321
 - g) *Waipapura v Hempton* (1914) 33 NZLR 1065
 - h) *Arani v Public Trustee of New Zealand* (1919) NZPCC1 (PC)
 - i) *Hoani Te Heuheu Tukino v Aotea District Maori Land Court* (1941) AC 308.
 - j) *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680
 - k) *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.
 - l) *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, (1987) 6 NZAR 353.
 - m) *Ngāti Apa v Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643
 - n) *Takamore v Clark* [2012] NZSC 116
 - o) *Proprietors of Wakatū v Attorney-General* [2017] NZSC 17.
 - p) *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2020] NZCA 86; [2020] NZRMA 248.
 - q) *Edwards (Te Whakatōhea No. 2)* [2021] NZHC 1025
 - r) *Peter Hugh McGregor Ellis v The Crown* SC 29/2019.
35. Whilst there has been a trend towards a morphism of both tikanga Māori and the British colonial law, Frederick Bastiat highlights the dissonance and the

potential risk of pursuing such when there is perversion of it by those who have been given the power to legislate:¹³

See whether the law takes from persons that which belongs to them, to give to others what does not belong to them. See whether the law performs, for the profit of one citizen, and, to the injury of others, an act that this citizen cannot perform without committing a crime. Abolish this law without delay; it is not merely an iniquity – it is a fertile source of iniquities, for it invites reprisals; and if you do not take care, the exceptional case will extend, multiply, and become systematic.

36. The systemic issues that are inherent within the British colonial order has been highlighted by many Māori scholars. Of note, are the Whaipānga Hou reports completed by the late Dr Moana Jackson. Across a 30-year time span, his reports highlight how the inequities within the prison system between Māori and Non-Māori have not been addressed, evidencing a systemic bias that is geared towards the prosecution and incarceration of Māori.
37. Dr Jackson highlights that through the centuries, most indigenous peoples established a system that saw wrongdoing as an offence against the relationships which held the community together, including the relationships with the land and waters upon which the life of every person ultimately depended.¹⁴
38. In instances of personal harm, it sought remedy by restoring the balance between the wrongdoer and the victim through mediation processes involving sanction and recompense.¹⁵
39. Indeed, the idea of utu (which is still misunderstood as “revenge”) was actually a means of restoring balance. And the idea of confining a wrongdoer in something like a prison would have been culturally incomprehensible. Maintaining “law and order” simply involved holding the individual wrongdoer

¹³ Frederick Bastiat *The Law* (12th Media Services) at 9.

¹⁴ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

¹⁵ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

accountable, while easing the hurt of the victim within a broad set of collective and reciprocal obligations.¹⁶

40. The aim of the law was to restore whakapapa, in its broadest sense of an interrelationship between peoples, and between people and their environment. And reconciliation was the logical conclusion of the legal process.¹⁷
41. These considerations inform the nature of the claim that is being advanced by the claimants and should be seen to colour the substantive part of the causes of action.

FIRST CAUSE OF ACTION: Funding Regimes for Claimants

42. **In breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles, the Crown have failed to adequately fund participants to have their claims properly substantiated and considered within the justice system in general and in a number of particular jurisdictions in the justice system where there is a disproportionate representation of Māori such as the Family Court; the Criminal Jurisdictions of the District Court; High Court; Court of Appeal and Supreme Court and a range of Tribunals including the Waitangi Tribunal; the Employment Tribunal and the Disputes Tribunal.**

Particulars

43. The funding regimes available for claimants bringing matters to Courts is often inaccessible and limited by criterion that many claimants are unable to meet. Where claimants meet criterion, there is strict provisions on how that funding ought to be utilised and properly accounted for. The basis of these regimes is predicated on the need for the protection of the fundamental rights and freedoms of the individual as opposed to the collective rights and obligations possessed in accordance with Tikanga by whānau; hapū and iwi.

Civil Legal Aid Regime

¹⁶ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

¹⁷ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

44. Efforts by esteemed Kaumātua to seek legal aid assistance in the context of claims made for and on behalf of whānau, hapū and iwi are limited by the present Civil Legal Aid regime and the failure of the regime to consider how the collective rights and obligations of whānau; hapū and iwi are to be supported in the context of a system that is predicated on the basis of giving assistance to those asserting individual rights and claims.
45. The New Zealand Bill of Rights Act 1990 protects the civil and political rights of all New Zealanders. The Act covers the following categories of rights and freedoms:
- a) Life and security of the person;
 - b) Democratic and civil rights;
 - c) Non-discrimination and minority rights;
 - d) Search, arrest and detention;
 - e) Criminal procedure, and
 - f) The right to justice;
46. Section 27 of the New Zealand Bill of Rights Act 1990 is the provision which proscribes for the fundamental right to justice:

27 Right to justice

(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

47. In the case of *Edwards v Legal Services Agency* [2003] 1 NZLR 145, the Court of Appeal discussed at length whether the provisions of the Legal Services Act 1991 allowed for individuals who brought claims for the benefit of a body of persons (i.e. a hapū and/or iwi) to be funded via the extant provisions of the

Legal Services Act 1991. Section 27 (1) explicitly barred a body of persons ... incorporated or unincorporated from being funded.

48. Mr Edwards and Ms Te Hau brought separate proceedings in the High Court seeking relief against decisions of the Treaty of Waitangi Fisheries Commission – Te Ohu Kai Moana (the Commission). Mr Edwards was a respected kaumatua of Muriwhenua, a grouping of five iwi in the far North (Ngāti Kahu, Te Rarawa, Te Aupouri, Ngāti Kuri and Ngai Takoto). He sued '*on behalf of himself and on behalf of his tribe*'. He and 12 other plaintiffs, including Te Rūnunga O Muriwhenua Inc were seeking to prevent allocation of fishing quota according to a method proposed by the Commission.
49. In their separate cases, a District Legal Services Subcommittee acting under s 33 of the Legal Services Act 1991 (the Act) refused legal aid. The Legal Aid Review Authority (the Authority), acting under s132 of the Act, confirmed that decision. Each appellant, being dissatisfied with the Authority's decision, appealed to the High Court under s136 on a question of law. The appeals were heard together by a Full Court (Wild and Ronald Young JJ) which dismissed them in a reserved judgment delivered on 20 September 2001 in the High Court at Wellington, reported as *Edwards v North Auckland District Legal Services Subcommittee* [2002] 1 NZLR 706.
50. In its deliberations the Court of Appeal observed that:

Section 27(1) denies legal aid to a 'body of persons'. The addition of the words 'whether corporate or unincorporate' simply makes it clear that the disqualification of bodies is not restricted to those which have been incorporated. It is to extend also to persons who together are properly to be regarded as a body rather than as a number of individuals. Subject to the exceptions in subs(2) and (3), legal aid is to be available only to one or more individuals. It would therefore be incongruous, and contrary to the evident parliamentary intention, if an individual who had no right in the matter greater than is derived from the fact of membership of a body of persons could obtain a grant of legal aid. It would not be

aid for that individual's claim. The benefit would then, impermissibly, be extended to the body.

An applicant therefore cannot avoid the bar in s27(1) by saying that he or she is a natural person if the right asserted in the proceeding for which aid is sought is no greater than that of membership of a body and the proceeding is in substance for the benefit of that body, even if there is no formal agency and the member has taken it upon him or herself to bring the proceeding. It is of no moment that were legal aid to be granted the self-appointed claimant would not be under the control of the body and that he or she alone could give instructions to the legal representatives. The test must be whether their work would be directly for the benefit of the applicant or whether the direct benefit – the damages or other relief granted – would accrue to the body, with the applicant participating only through membership. (In contrast, an individual would not be barred from a grant of legal aid where he or she had a personal claim not derived through membership of the body even though the body might itself benefit, but that situation might well fall within s71 to which reference is made below.)

51. The Court also commented that;

Section 27(3) – the exception relating to applications to the Waitangi Tribunal – supports the view that subs(1) bars legal aid from claims made in the name of an individual but in substance for the benefit of a body of persons. It enables legal aid to be granted notwithstanding subs(1) where the claim is 'for the benefit' of a group of Maori of which the applicant is a member. Such a group must include an unincorporated body, for otherwise subs(3) would achieve nothing. Mr Mathieson may very well be right when he says that the word 'group' – a wider term than 'body of persons' – has been used for consistency with the 1975 Act. But the use of the term in

connection with a carefully limited exception does not suggest that Parliament was intending thereby to indicate that an unnaturally restricted meaning is to be given to 'body of persons'.

52. It was ultimately found that due to the structure of iwi, it fell within the definition of being a body of persons and therefore were not eligible for funding from Legal Aid. This decision set a precedent whereby many iwi and hapū were not funded for the claims that were brought before the general courts by individuals seeking judicial review of matters from the Waitangi Tribunal; the Environment Court; and other jurisdictions where the collective rights of Māori were being asserted.
53. The approach is inconsistent with the express terms of Te Tiriti o Waitangi/The Treaty of Waitangi which by virtue of Article 1, 2 and 3 guaranteed the protection of the collective rights interests and obligations of whānau; hapū and iwi.

Waitangi Tribunal Funding Regime

CFRT

54. The Crown Forestry Rental Trust was set up under the Crown Forest Assets Act 1989, after the New Zealand Māori Council and Federation of Māori Authorities took court action to protect Māori interests in the Crown's commercial forests. The Act allowed the Crown to sell licences for forestry but prevented it from selling the land itself until the Waitangi Tribunal recommends who has ownership of the land – Māori or the Crown.
55. Crown Forestry Rental Trust ('the Trust'):
 - a) operates within a Trust Deed;
 - b) provides funding to eligible Māori claimants to prepare, present and negotiate claims against the Crown, which involve, or could involve, Crown forest licensed lands, and

- c) reports annually to the Minister of Finance, who is the Trustees' Crown appointor, and to the New Zealand Māori Council (NZMC) and Federation of Māori Authorities Incorporated (FOMA), who are jointly the Trustees' Māori Appointor.
56. The Trust funds come from annual rental fees for licences to use certain Crown forest licensed lands. Until the beneficial owners of the lands have been determined, the Trust:
- a) invests the rental proceeds and holds them in trust, and
 - b) applies the interest earned on the rental proceeds to help eligible Māori claimants prepare, present, and negotiate claims which involve or could involve Crown forest licensed lands.
57. The accumulated rental fees for all Crown forest licensed lands are returned to successful claimants who are the confirmed beneficiaries as a result of achieving negotiated settlements with the Crown. If, at the end of the Trust's operational life, it retains any Trust funds (which have not been returned to successful claimants), these funds will be returned to the Crown.
58. Settling claims is the responsibility of claimants and the Crown.
59. In accordance with district inquiry funding policy, CFRT makes contributions to district inquiry cost under three key funding categories:
- a) Operating funding: human resources, administration and hui costs.
 - b) Hearing week costs: judicial conferences, hearings attendance (including travel and accommodation), site visits, tāngata whenua witness preparation and presentation costs; and
 - c) Research and mapping: research, mapping and printing costs.
60. The claimant guide states that “the Trust does not fund costs related to Urgent hearings in the Waitangi Tribunal (except for urgent Remedies Hearing for the resumption of a CFLL)” and the “Trust does not fund any costs associated with a Waitangi Tribunal Kaupapa inquiry.”

Ministry of Justice- Legal Services Agency

61. The Ministry of Justice funding for legal aid services in the Waitangi Tribunal primarily covers cost of lawyers, and, in some circumstances, specialist/expert witnesses and non-claimant witness costs incurred for the preparation of their case.¹⁸
62. A significant omission in the funding regime is the provision of a robust funding model for claimant funding to enable proper participation for them in Kaupapa Inquiries; Urgent inquiries; Mediation Processes and Historical Inquiries where there is no access by claimant groups themselves to CFRT funding assistance.
63. The lack of funding means that claimants are not easily able to commission their own research and have no financial support to prepare for and attend Tribunal fixtures.

Ministry of Courts – Ministry of Justice

64. The Claimants recognise that the Waitangi Tribunal is a unique tribunal and has a constitutional dimension both in its role and its operation by virtue of the fact it is a bijural and bicultural institution with specialist obligations and responsibilities with respect to the interpretation of the Te Tiriti o Waitangi;/ The Treaty of Waitangi.
65. The Claimants say that the Waitangi Tribunal is significantly underfunded when compared to the level of financial assistance granted to other commissions of inquiry.
66. The Claimants assert that the Crown has failed to meet the obligations of equal treatment and equity preserved expressly by virtue of Article 3 in the Te Tiriti o Waitangi/Treaty of Waitangi in the ongoing operations of the Waitangi Tribunal.

Access to Justice Legal Services Agency

¹⁸ Ministry of Justice, *Granting aid for Waitangi Tribunal matters, Operation policy* [June 2016], at [25]. See also: Ministry of Justice, *Legal Aid Services Grants Handbook* [November 2019], at 117-118.

67. Adequate funding for legal aid providers has recently come under fire as “Legal aid lawyers are unable to cope with demand, are too poorly paid to deal with the complex cases... so they quit the legal aid system.”¹⁹
68. The inability of the Crown to adequately fund legal aid providers is concerning as it directly correlates the right of Māori to access justice. If lawyers, especially Māori, are choosing to quit the legal aid system based on poor remuneration, this affects the type and quality of representation that Māori receive. Statistics show that 52.7% of the prison population are Māori;²⁰ with most having to access legal aid to have adequate legal representation.
69. The strain on Māori and Pasifika legal aid lawyers is particularly immense. Lawyers working in Māori and Te Tiriti o Waitangi Law carry the heaviest legal aid burden and spend nearly twice as much time providing free legal services (on average) as most lawyers. Legal aid lawyers who identify as Pacific peoples are also more likely to have done legal aid work in the last 12 months and are working excessive hours; 54 hours a week compared with 50 hours for legal aid lawyers and 47 for all lawyers.²¹
70. Pay parity has long been denied as prosecutors have a maximum hourly rate of \$309, whereas legal aid providers have a maximum of \$159 per hour. Former Law Society President Tiana Epati has noted that more than 20,000 people were turned away by legal aid lawyers in one year, with Dame Helen Winklemann saying that the system is broken and may collapse if nothing is done about it.”²²
71. The Claimants say that, in breach of Te Tiriti, the Crown has failed and continues to fail to provide a sustainable and fair regime for funding the preparation; presentation and advancement of their claims in the Waitangi Tribunal and that the legal aid system that it is in place has caused significant prejudice to them in

¹⁹ Farah Hancock “Legal Aid: Thousands Turned Away By Lawyers in ‘Collapsing System’” *RNZ* (online ed, 11 November 2021).

²⁰ “Prison Facts and Statistics” (March 2021) Arapoutama Aotearoa <www.corrections.govt.nz>

²¹ New Zealand Law Society *Access to Justice Research 2021* (October 2021).

²² Farah Hancock “Legal Aid: Thousands Turned Away By Lawyers in ‘Collapsing System’” *RNZ* (online ed, 11 November 2021).

their ability to assert their fundamental rights to a fair trial and to access to justice generally.

SECOND CAUSE OF ACTION: The Criminal Justice System is discriminatory in its effect and denies Māori Authority in its decision-making processes.

72. In breach of the Treaty of Waitangi, the Crown has deliberately designed; implemented administered and permitted the development of a system of justice that incarcerates Māori in disproportionate rates to those of Non-Māori in breach of the active protection obligations and duties due to Māori whānau, hapū and iwi and their social and legal institutions by virtue of the Te Tiriti o Waitangi Guarantees/Treaty of Waitangi Guarantees in Article Two and Article Four.

73. To contextualise, an American Lawyer Bryan Stevenson has written about perverse administration of the justice system:²³

With the criminal justice system playing such a dominant role in the lives of the poor people and people of color, the integrity and credibility of the system has become a central issue. If the administration of criminal justice is perceived to be unfair, corrupt, biased and error-plagued, it is not seen as a corrective or necessary component of public safety. Instead, it is viewed as an oppositional system of social, economic, and political control that marginalises and exploits the problems of the poor in a highly stratified society.

Particulars

74. Statistics of September 2021 show that Māori, despite being a minority population of 16.5% in New Zealand, make up 52.5% of the prison population.²⁴ And with the total prisoner population being 8,034, that puts Māori at roughly 4,200 of those incarcerated.²⁵ Notwithstanding these statistics, the effects of incarceration go beyond numbers and ethnicity. “The widespread incarceration

²³ Bryan Stevenson “Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases” (2006) 41 HCRCL 339 at 342.

²⁴“Prison Facts and Statistics” (September) Arapoutama Aotearoa <www.corrections.govt.nz>

²⁵“Prison Facts and Statistics” (September) Arapoutama Aotearoa <www.corrections.govt.nz>

of men in low-income communities has ... a profound negative impact on social and cultural norms relating to family and opportunity.”²⁶

75. In rural, low socio-economic communities with high numbers of Māori, the effect of incarceration impacts those who are left outside the wire to continue to support and raise the family. The child/ren of those families are then bereft of any concept of whānau.
76. The current focus of the Department of Corrections is to “break the cycle of re-offending” with the goal of “keeping our communities safe and changing lives”.²⁷ The antithesis of these statements however is that at 2018 rates of recidivism were as high as 60%;²⁸ over half of sentenced prisoners find themselves back in prison once they have been released. The fact of disproportionately of Maori incarcerated mean that the impacts on Maori communities and their whanau is the greatest.
77. The punitive focus of the justice system is not working and goes against that which the Department of Corrections purports to achieve - breaking the re-offending cycle and keeping our communities safe. The current design promotes lives of recidivism and as Justice Joe Williams has put it, the gathering of those with shared experience in the displacement of the marginalised has a “magnifying effect when it gathers in one place.”²⁹
78. Prisons are breeding grounds for crime and are not conducive to the rehabilitation and reintegration of prisoners back into society. This is simply evidenced by the high rate of recidivism and the lack of change that has occurred since the publication of He Whaipānga Hou over 30 years ago.³⁰

²⁶ Bryan Stevenson “Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases” (2006) 41 HCRC 339 at 341.

²⁷ “Our Vision Goal & Priorities” Arapoutama Aotearoa <www.corrections.govt.nz>

²⁸ “Re-Offending Rates Shows New Approach Needed – Little” *RNZ* (New Zealand, 16 June 2018)

²⁹ *R v Rakuraku* [2014] NZHC 3270 at 58.

³⁰ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

79. Today, prisons are such an accepted part of the criminal justice system that their relatively recent introduction is forgotten, and they seem just a natural part of how crime needs to be dealt with.³¹
80. Although notions of offender rehabilitation and even restorative practices are promoted within the criminal justice system, the punitive restrictions of imprisonment remain its ultimate threat. As a result, New Zealand now has one of the highest rates of imprisonment in the world — and it is building jails at a pace that matches, in per capita terms, the prison industrial complex in the United States.³²
81. The human tragedies behind that rush to lock people up, hover over every claim that the country makes to be a humane, liberal society. They lurk, too, behind every claim that it makes to be leading the world in settling the wrongs of a colonising history.³³
82. Most distressingly, they also mock the many changes made in recent decades to construct a Treaty-based society, especially as the majority of those behind bars are Māori, and the system itself reflects a punishing and very real racism.³⁴
83. While colonisation has been driven by interconnected political and economic motives, its base rationalisation has always been the racist assumption that non-white “others” were inferior. Those who came here in the first waves of colonisation learned that racism, and they gave social and political expression to it in their justifications for taking Māori land and power.³⁵
84. Yet the fact of racism is denied like an embarrassing family history that is hidden away in case it disturbs the good impression people wish to create. If it is

³¹ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

³² Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

³³ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

³⁴ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

³⁵ Dr Moana Jackson “Prison Should Never be the Only Answer” *E-Tangata* (online ed, October 14 2017)

acknowledged, it is repositioned as an individual failing, such as when a young Māori is profiled by an over-zealous security guard as a potential shoplifter.³⁶

85. If instances of institutional racism are identified, they tend to be described as operational shortcomings, which leave unchallenged the racism implicit in the institution's original imposition in a land which already had its own sites of power and its own way of managing harm.³⁷
86. Māori and other indigenous peoples aren't born genetically poor nor collectively dysfunctional. Instead, it has been the dispossession through colonisation that has created the deprivation and that has destroyed the cohesion of once strong family units.³⁸
87. No Māori prisoner can be isolated from the collective costs of that traumatic dispossession. Nor from the racism which underpins it. Yet the criminal justice system, like society itself, shies away from that reality and shies away from even naming its racism.³⁹
88. The acknowledged existence of police discrimination is, for example, renamed as "unconscious bias", and academics regularly suggest that the word "racist" should not be used in describing the criminal justice system because it is emotive and unhelpful.⁴⁰
89. On the positive side, among the many policy initiatives in recent years, there has been an emphasis on the obvious links between the damage done to Māori culture in the past and the consequent cultural deprivation still suffered by many Māori today.⁴¹

³⁶ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

³⁷ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

³⁸ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

³⁹ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

⁴⁰ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

⁴¹ Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

90. Those links are important, and the replacement of the cultural denigration of the past with greater cultural respect now is helpful in restoring some pride and sense of belonging for those often-young Māori who end up in prison. However, learning a waiata or the reo doesn't address the underpinning racism which prisons represent. Neither does it reduce the number of incarcerated Māori, or the rate of reoffending.⁴²

THIRD CAUSE OF ACTION: The Crown's omission to adhere to recommendations to remedy the structural dimensions of the institutional racism in the Criminal Justice System shows a continuing denial on their part to honour the Te Tiriti guarantees of Tino Rangatiratanga and Maori Mana Motuhake.

91. In breach of Te Tiriti o Waitangi/The Treaty of Waitangi obligations to provide remedy to Maori where breaches of Te Tiriti o Waitangi/The Treaty of Waitangi have been found, the Crown has failed to do so.

Particulars

92. An early report into legal aid services from 1988, Te Whaingā I te Tika, highlighted the issues with legal aid and recommended that:⁴³

- a) Legal services providing access to justice must actively promote structural change.
- b) Legal services must reflect our bi-cultural heritage
- c) Legal services must promote participatory justice and self-reliance.
- d) Legal services must be controlled by and responsive to consumers of those services.
- e) Government has a duty to provide effective legal services as an essential social service.

93. Te Whaingā I te Tika further recommended:

⁴² Dr Moana Jackson "Prison Should Never be the Only Answer" *E-Tangata* (online ed, October 14 2017)

⁴³ <https://www.ojp.gov/pdffiles1/Digitization/108668NCJRS.pdf>

A Rūnanga Tikanga Māori/Māori Lore Commission should be established to assist transition towards a bi-cultural justice system. It should advise government on steps towards implementing te Tiriti o Waitangi; monitor proposed legislation; monitor legal and judicial services to Māori people; promote development of bi-lingual courts...

94. These recommendations were made in light of the Treaty of Waitangi power sharing obligations which underpin the guarantee of tino rangatiratanga and the fact of the increasing number of Māori who were entering the Criminal Justice system.
95. The claimants highlight also that despite recommendations from a number of reports, there has been a persistent denial to incorporate biculturalism within the decision-making processes of the justice system, other than in particular situations relating to the allocation of property rights, so that it essentially remains monocultural and operates to the exclusion of Māori whānau; hapū and iwi and the operation of Tikanga Māori.
96. Similar recommendations have been repeated within a range of reports completed since *Te Whaingā I Te Tika* with *Turuki! Turuki! Paneke! Paneke!*⁴⁴ and *Ināia Tonu Nei*⁴⁵ - the most recently published analysis of these matters. While these two reports have been only recently released it is concerning that the sentiments shared between those reports and that expressed by the authors of *Te Whaingā I Te Tika* are not dissimilar; showing the Crown's lack of urgency to address disparities within the system over many years.
97. The seminal works of written by the late Dr Moana Jackson He *Whaipānga Hou* which is a body of research undertaken over 30 years demonstrate this ongoing deliberate failure on the Crown's part to effect structural change and power sharing as the Te Tiriti o Waitangi contemplated.
98. The prejudice that has resulted for Māori is best illustrated in the damning annual statistics published by the Department of Corrections and the Ministry of Justice where Māori, despite being a minority population, still comprise over half of the prison population.

⁴⁴ Te Uepū Hāpai i te Ora *Turuki! Turuki! Paneke! Paneke!* (Ministry of Justice, 2020).

⁴⁵ *Ināia Tonu Nei Hui Māori Report* (July 2019)

RELIEF SOUGHT

99. The Claimants seek any or all of the following relief:

- a) A finding of fact in their favour
- b) A finding that the claim is well founded
- c) A finding that the Crown breached the principles of Te Tiriti alleged within this Statement of Claim
- d) The claimants seek a commitment by the Crown to develop and implement a comprehensive approach to reform Aotearoa's justice system based on abolishing prisons by 2040.
 - i. This approach must be underpinned by, inclusive of and encompass the following:
 - 1) Inclusion of Te Ao Māori, tikanga Māori and Te Tiriti o Waitangi.
 - 2) Mana Ōrite model of partnership to be established and nurtured between Māori and all Crown agencies and departments.
 - 3) All legislation and policy settings in Aotearoa to reflect Te Ao Māori, Tikanga Māori and Te Tiriti o Waitangi.
 - 4) High-trust relationships must be established and nurtured between Māori and all Crown agencies and departments.
 - 5) The Crown must take responsibility for colonisation and stop all ongoing effects of colonisation. > Prisons are abolished in New Zealand.
 - 6) Oranga Tamariki is disestablished.
 - 7) Lived experience must influence policy and legislative developments.
 - 8) The justice system must reflect the true intentions of Puao-te-ata-tu.

9) The justice system must reflect the true intentions of He Whaipānga Hou.

e) Any other relief that the tribunal sees fit.

100. The Claimants reserve the right to further particularise this claim as needed.

Dated this 29th Day of April 2022.



Annette Sykes



Hinerau Rameka



Te Maiora Rurehe

This Statement of Claim is filed by **Annette Sykes, Hinerau Rameka** and **Te Maiora Rurehe**, Solicitors for the Claimants, of the firm **Annette Sykes & Co**. The address for service of the Claimants is at the office of Annette Sykes & Co, Barristers and Solicitors, 8 Marguerita St, Unit 1, Rotorua. Documents for service on the Claimants may be left at that address for service or may be:

(a) Posted to the Solicitors at 8 Marguerita St, Unit 1, Rotorua 3010; or

(b) Emailed to the solicitors at asykes@annettesykes.com