BEFORE THE WAITANGI TRIBUNAL	**WAI 3060**
IN THE WAITANGI TRIBUNAL	**WAI 2478** **WAI 2494** **WAI 3133**
IN THE MATTER OF	The Treaty of Waitangi Act 1975
AND **IN THE MATTER OF**	Justice System Kaupapa Inquiry **(WAI 3060)**
AND **IN THE MATTER OF**	a claim by **Marise Lant** for and on behalf herself, her hapū and her iwi **(WAI 2478).**
AND **IN THE MATTER OF**	a claim by **Donna Awatere-Huata** for and on behalf herself, her hapū and her iwi **(WAI 2494).**
AND **IN THE MATTER OF**	a claim by **Te Mauri Kīngi** and **Billy McFarlane** for and on behalf themselves, their hapū and their iwi **(WAI 3133).**

BRIEF OF EVIDENCE OF PROFESSOR ELIZABETH JANE KELSEY

Dated this 1st day of August 2022

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MAY IT PLEASE THE TRIBUNAL

1. I have read the code of conduct for expert witnesses in the High Court Rules and agree to abide by it.

2. I am a Professor Emeritus of the Faculty of Law at the University of Auckland. I hold a Bachelor of Laws (first class honours) from Victoria University of Wellington, postgraduate law degrees from Oxford University and the University of Cambridge, and a PhD in Law from the University of Auckland. I was appointed to the Faculty of Law at Auckland University in 1979 as a lecturer, was awarded a personal chair in law in 1997, and retired in December 2021.

3. Throughout my career I have researched and taught on Te Tiriti o Waitangi/the Treaty of Waitangi, focusing on law and policy and Treaty jurisprudence, including in relation to the Waitangi Tribunal. My 900-page doctoral thesis examined tensions between the Labour Government's neoliberal policy programme and its promise to honour the Treaty of Waitangi, including the role of the courts and the Waitangi Tribunal in mediating that tension in favour of the Crown. That research was published in *A Question of Honour? Labour and the Treaty 1984-1989.* Subsequent policy developments, including shifts in the nature, function, powers, jurisprudence and resourcing of the Waitangi Tribunal, were analysed in several of my books, and in book chapters and academic articles.

4. I have presented briefs of evidence to a number of Waitangi Tribunal inquiries, including *He Maungo Rongoa: Report on Central North Island Claims* Stage One (Wai 1200), also submitted in support of the claimants in Te Waka Kaiora (Wai 262); *Wananga Capital Establishment Inquiry* (Wai 718); *National Fresh Water and Geothermal Resources Inquiry* (Wai 2358); *Te Paparahi o Te Raki* Stage Two (Wai 1400). I was the independent expert for the claimants throughout the *Trans-Pacific Partnership Agreement Inquiry* (Wai 2522). This evidence included analysis of Crown policies and practices that were the subject of those inquiries and the evolution of relevant Treaty jurisprudence and principles against which they were assessed.

5. As a socio-legal scholar my academic research and public service includes access to justice. In 1985 the Minister of Justice Geoffrey Palmer invited me to convene a Legal Services Advisory Committee to conduct community consultation on public needs for legal services in anticipation of a new Legal Services Act, published as *Te Whainga i Te Tika. In Search of Justice*.

6. I also worked closely with Dr Moana Jackson during the period when he and his research team wrote *He Whaipaanga Hou. Māori and the Justice System*, followed by the establishment of *Ngā Kaiwahakamārama i Ngā Ture/ Māori Legal Service* and the Crown's decision in 1999 to defund that initiative.

7. This brief of evidence addresses the following issues:

   (i) The Crown's obligations relating to access to justice under Te Tiriti o Waitangi/The Treaty of Waitangi and the relevant principles;

   (ii) The absence of any Tiriti-based approach to legal aid, including resourcing of Waitangi Tribunal claimants ;

   (iii) The failure of the Review of Legal Services 2009 ("**Bazley Review**") and the consequent Legal Services Act 2011 to address access to justice in the Waitangi Tribunal;

   (iv) How the historical development of the Waitangi Tribunal has affected access to justice for claimants;

   (v) The Legal Services Advisory Committee and its report *Te Whainga i te Tika/In Search of Justice*; and

   (vi) *He Whaipaanga Hou. Māori and the Criminal Justice System* and Ngā Kaiwahakamārama i Ngā Ture/ the Māori Legal Service.

Crown Obligations in relation to Access to Justice

8. The Waitangi Tribunal's function under Section 6 of the Treaty of Waitangi Act 1975 is to consider claims that the claimants are or are likely to be prejudicially affected by Crown laws, policies, practices, or omissions that

were or are inconsistent with the principles of the Treaty of Waitangi, and where that claim is well-founded to recommend appropriate redress.

9. In exercising this function, the Tribunal is mandated under Section 5(2) to consider the texts of Te Tiriti o Waitangi and The Treaty of Waitangi. My research has identified three distinct phases of Waitangi Tribunal jurisprudence in relation to this:

   (i) early Waitangi Tribunal reports, notably the *Motunui-Waitara*,[1] *Manukau Harbour*[2] and *Kaituna River*[3] inquiries, gave primacy to Te Tiriti o Waitangi when exercising that interpretive responsibility;

   (ii) that approach was displaced by the interpretive approach adopted by the courts following *New Zealand Māori Council v Attorney-General* (**the "*Lands* case**") in 1987;[4]

   (iii) a number recent reports, notably *Te Raki* Stage One[5], the *Maniapoto Mandate Inquiry* Report,[6] and the *Tuhoe* Report[7] have reinstated the primacy accorded to Te Tiriti o Waitangi as a source of Treaty principles.

10. In the context of access to justice, deriving principles of te Tiriti/the Treaty by giving primacy to the Māori text requires consideration of all four articles of Te Tiriti. The following summary of the four articles was developed by Dr Moana Jackson and myself last year for the purposes of conducting Tiriti o Waitangi audits of government policy:

[1] Report of the Waitangi Tribunal on the Motunui-Waitara Claim *(Wai 6),* Waitangi Tribunal, 1983.
[2] Report of the Waitangi Tribunal on the Manukau Claim *(Wai 8),* Waitangi Tribunal, 1985.
[3] Report of the Waitangi Tribunal on the Manukau Claim *(Wai 4),* Waitangi Tribunal, 1984.
[4] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641
[5] *The Report on Stage One of the Paparahi o te Raki Inquiry* (Wai 1040), 2014, p.527
[6] *The Maniapoto Mandate Inquiry Report* (Wai 2858), 2019, pp. 14-15
[7] *Report of the Waitangi Tribunal: Te Tono Ture Tikanga a Tuhoe – The Treaty and the Tuhoe Constitutional Claim, 1840–65* (Wai 894), Volume 1, p.134

Kawanatanga – Article 1 *provides for the Government to exercise authority over its people and authority delegated by Māori. Government authority is qualified by the obligation to recognise Rangatiratanga, as per Article 2, and ensure the protection of Māori rights, interests, duties and responsibilities. This aspect of the agreement is further established within the other articles of Te Tiriti.*

Tino Rangatiratanga - Article 2 *affirms the continued unfettered powers, duties and responsibilities of Rangatira to ensure the exercise of Māori authority collectively over their own affairs and resources in a manner consistent with tikanga Māori.*

Oritetanga - Article 3 *ensures parity and equity between Māori and the Crown's people and acknowledges that equity in rights and outcomes does not mean equal treatment or aspirations, but equal rights and capabilities to define and pursue aspirations according to a people's fundamental principles, laws and beliefs.*

Whakapono - 4th Article *guarantees the active protection and equal status of philosophies, beliefs, faiths and laws.*

11. For the purpose of this brief of evidence I have derived three principles in particular from Te Tiriti o Waitangi against which to assess the Crown's laws, policies and practices relating to access to justice in the Waitangi Tribunal:

    (i) **Mana motuhake**: the mana of Māori to control and manage according to their own preferences, which requires the development of a tikanga-based regime for access to justice, especially for the resolution of Crown breaches of its Tiriti obligations. How mana motuhake is balanced with the exercise of kawanatanga in the common law system and its forums is a matter for negotiation between the Tiriti parties.

(ii) **Active protection:** necessitates a process of shared decision-making with Māori in accordance with their tikanga to identify means to ensure the protection and effective exercise of their tino rangatiratanga or mana motuhake. In relation to the justice system, and especially the Waitangi Tribunal, there is a heightened obligation for active protection of mana motuhake to be developed in accordance with tikanga because these legal processes go to the very essence of the Crown's compliance with it obligations and delivery of guarantees to Māori under Te Tiriti o Waitangi.

(iii) **Equity**: in the third article of Te Tiriti, the principle of equity supplements the rights guaranteed to Māori under the second article, and ensures Māori rights to equal citizenship in a substantive sense. That includes recognising the inherent inequalities Māori face in the Crown's common law system, including at the Waitangi Tribunal. That is not just because of socio-economic disparities, which might be addressed by providing legal aid to those who are financially distressed. The conceptual foundations of common law are antithetical to tikanga. Moreover, the Crown has a monopoly over decisions, including resources, that can deny Māori access to substantive justice. That prejudice is especially profound with the Waitangi Tribunal where the Crown has a conflict of interest in minimising the risks and costs of adverse findings and recommendations.

Crown's legal aid policies ignore Te Tiriti

12. The Crown's policy documents on access to justice and legal services in relation to the Waitangi Tribunal or Māori generally, have consistently lacked any recognition of the Crown's obligations under Te Tiriti o Waitangi.

13. I have read the Brief of Evidence of Professor Al Gillespie in this inquiry setting out the history of New Zealand's legal aid policies and funding for

Waitangi Tribunal claimants.[8] I wish to add the following observations in relation to the Crown's Tiriti obligations.

14. The Legal Aid Act 1969 did not provide legal aid for Waitangi Tribunal inquiries. The nature of collective claims put claimants outside the financial criteria for civil legal aid. That was a clear breach of the Crown's Tiriti obligations and the related principles.

15. The settlement reached in the *Lands* case included the provision of legal aid for Tribunal claims. This was legislated in the Treaty of Waitangi (State Enterprises Act) 1988. Section 14 expanded the definition of "person" for the purposes of the Legal Aid Act 1969 and made it clear that legal aid applied to Waitangi Tribunal proceedings. However, the new Section 31A was negatively worded, precluding the granting of legal aid for Tribunal proceedings unless a number of restrictive criteria were satisfied, and subject to an obligation to contribute to the cost of proceedings. These criteria were that

    (i) The nature of the proceedings and personal interests of the applicant of a group to which they belong requires legal representation;

    (ii) Not granting legal aid would result in substantial hardship to the applicant or a group of Māori to which they belong, including whether they might reasonably be expected to contribute to the costs; and

    (iii) The personal interest of the claimant or a group to which they belong is not sufficiently protected by another claim.

    Moreover, the claim could be rejected if the claimant did not provide details of the financial resources all members of the group to which they belong (not including Māori land).

[8] Brief of Evidence of Professor Al Gillespie, 28 June 2022, Wai 3060, #A32

16. Despite its origins in the settlement of Tiriti o Waitangi litigation, this amendment made no pretence of addressing the Crown's Tiriti obligations under Articles 2, 3 or 4. Those non-compliant provisions were subsequently transposed unchanged into the Legal Services Act 1991.

17. The Office of Treaty Settlements developed separate funding to contribute to claimants' costs for negotiations and ratification of outcomes, but that is subject to Crown-determined criteria and approval.

18. The Crown Forestry Rental Trust became a separate source of funding for claims or settlement negotiations that involved Crown forestry licensed land under the Crown Forest Assets Act 1989. Again, this was the result of litigation to enforce the Crown's Tiriti obligations. Yet the scope of support, and eligibility, were limited. Moreover, the trust's income and assets are derived from annual rental fees for licenses, not from public finances, and any unallocated assets will ultimately revert to the Crown.

The Bazley Review

19. The Final Report of the Legal Aid Review led by Dame Margaret Bazley, *Transforming the Legal Aid System*,[9] adopted a policy paradigm that treats the justice system as a market in which the participants are purchasers, providers or consumers. Policy design and fiscal decisions are driven by efficiency criteria and concerns about provider capture.

20. The Terms of Reference described the purpose of the review as

… to take a first principles approach to reviewing New Zealand's legal aid system to ensure it:

- *delivers legal services to those who need them most*
- *manages costs effectively and is sustainable*
- *complements efforts to maintain and improve the effective*

[9] *Transforming the Legal Aid System*, Final Report of the Legal Aid Review, November 2009, pp. 3-4. Attached as Exhibit "A"

operation of the justice system, especially the court system

• is consistent with principles of natural justice and New Zealand's international obligations

• is based on objectives of fairness, efficiency, effectiveness, and quality

• provides value for money

• is simple and low-cost to administer.

21. The principal driver was clearly to cut costs, with the report required to reflect the Government's fiscal strategy. The report itself had to be agreed to by the Minister of Justice.

The review must align with Government priorities and take into account the projected fiscal environment of future years. In this respect, a key focus is on developing alternative approaches to manage or reduce costs. Existing models of public and private service provision (including other forms of social assistance) should be considered.

The review will be led by a Chair appointed by the Minister of Justice and supported by a panel of experts, who will develop a report in agreement with the Minister of Justice.

22. There was no equivalent weight given to the state's obligations to ensure access to justice in accordance with New Zealand's international obligations, let alone any recognition of the Crown's Tiriti o Waitangi obligations.

23. It was within these parameters that the Terms of Reference required the Review to consider legal aid in the Waitangi Tribunal and the impact of reform proposals on Māori (emphasis added):

The review is intended to be broad and include in scope:

all aspects of initial criminal legal services, legal information, education,

advice and representation, and in particular:

- *the areas of criminal, family, civil,* ***and Waitangi Tribunal legal aid***
- *all eligibility criteria, and eligible proceedings*
- *contracting and payment of providers*
- *operational issues, such as the assignment of cases including the "preferred lawyer" system*
- *spending in areas related to legal aid (for example, lawyers for the child and youth advocates etc)*
- *the administration and operation of the system.*

The review will not focus on issues relating to the wider justice system (for example, a shift to a more inquisitorial system of justice or the use of mediation for all civil disputes). The review will consider the impact of any legal aid reform proposals on the wider justice system and may consider linkages between the wider justice system and legal aid. ***Proposals will also be assessed in light of their impact on particular groups, such as Māori.***

24. Despite these Terms of Reference, the short, final section of the report addresses only "administrative arrangements" for Waitangi Tribunal claims. The three-page section is pre-occupied with the potential for double-dipping by lawyers and claimants when funding is being provided for Tribunal hearings and/or settlement negotiations by the Legal Services Agency, Office of Treaty Settlements and in some cases the Crown Forest Rental Trust.[10] Clarifying those funding streams is the only recommendation.

25. Regarding broader issues relating to the Waitangi Tribunal, the Report said that

... issues relating to Treaty of Waitangi legal aid are complex, and require careful and detailed consideration that has not been possible in the time allocated for my review of the legal aid system. I am conscious of the risk of proposing changes that may jeopardise the government's aim to have historic Treaty of Waitangi settlements concluded by 2014. Therefore, I consider that,

[10] *Transforming the Legal Aid System*, pp. 109-111

if the Government wishes to give further consideration to the administration of Treaty of Waitaigni legal aid, this needs to be done specifically and with deliberation.[11]

26. So, aside from proposing measures to deal with double-dipping, the Bazley Rview narrowed the issue to "administration" of legal aid, then deferred even that issue, perhaps on the assumption it would become moot after 2014.

27. That Report was in 2009. The Legal Services Act 2011 left the status quo under the Legal Services Act 2000 essentially unchanged. Those Waitangi Tribunal issues have still not been addressed.

28. In sum, the history of legal aid provision for Waitangi Tribunal claims has never acknowledged the Crown's Tiriti obligations of mana motuhake, active protection and equity, let alone sought to deliver them.

Systemic factors in the Waitangi Tribunal process

29. My research over four decades leads me to believe that the principal explanation for the Crown's abject failure to address access to justice in the Waitangi Tribunal is the Crown's conflict of interest, a matter raised in the Brief of Evidence of Richard Meade.[12]

30. The current lack of adequate support for actual and potential claimants to the Waitangi Tribunal dates back to the politicisation and legalisation of the Tribunal during the 1980s and 1990s.[13] These historical factors created conditions that posed and continue to pose serious obstacles to potential and actual claimants to bring the Crown before the Tribunal for breaching its obligations under Te Tiriti o Waitangi.

[11] *Transforming the Legal Aid System,* p. 111 at [484]
[12] Brief of Evidence of Richard Brent Meade, 27th June 2022, Wai 3060, #A34 at [57] and [78(e)]
[13] Jane Kelsey, *Rolling Back the State. Privatisation of Power in Aotearoa New Zealand,* Bridget Williams Books, Wellington, pp. 285-291. Attached as Exhibit "B"

31. I highlight the following factors in particular:

a. An initial period of inaction after the Treaty of Waitangi Act was passed in 1975 was marked by a lack of government commitment, including of resources. The first claimant, Joe Hawke from Ngāti Whātua Ōrākei, represented himself with the assistance of law lecturer David Williams.[14]

b. The Tribunal entered an active phase after Chief Judge Durie became the chair of the Tribunal. This was still under the original 1975 Act. Hearings in the *Motunui-Waitara* (Wai 6), *Manukau Habour* (Wai 8) and *Kaituna River* (Wai 4) claims were held on marae, often without evidence being under oath, in both Te Reo Rangatira and Te Reo Tuarua, and with limited or no representation by lawyers. This was a Kaupapa Māori process that respected tikanga Māori and the mana of the claimants.

c. The Tribunal inquiry on *Te Reo Māori* was the first kaupapa claim and lawyers played a more significant role.[15] However, I understand that they did so largely *pro bono* with minimal resourcing.

d. As the Waitangi Tribunal became more active, starting with the *Motunui-Waitara* Report, the National Government of Prime Minister Muldoon become more exercised over the potential for Tribunal findings and recommendations to cause it problems.

e. Initially, the fourth Labour Government was more supportive. It expanded the jurisdiction and membership of the Waitangi Tribunal through amendment of the Treaty of Waitangi Act in 1985. However, that was not accompanied by a significant increase in resources. Funding for the Tribunal was caught up in a separate process to review legal services. There was therefore a significant

[14] Report of the Waitangi Tribunal on a Claim by J P Hawke and others of Ngāti Whatua Concerning the Fisheries Regulations (Wai 1), Waitangi Tribunal, 1978
[15] Report of the Waitangi Tribunal on the Te Reo Maori Claim (Wai 11), Waitangi Tribunal, 1986

period when the legal opportunities presented to claimants were not accompanied by the resources needed to take those opportunities.

f. This changed in 1987. The stakes for the Crown increased following the *New Zealand Māori Council v Attorney-General* judicial review of the Crown's exercise of powers the State-owned Enterprises (SOE) Act and accompanying Tribunal interventions.

g. Very rapidly, Waitangi Tribunal proceedings became legalistic, adversarial, sterile, bureaucratic and Pakeha-dominated. These developments disempowered the very claimants for whom the Tribunal process was meant to provide justice. Interpretations of the "principles of the Treaty" shifted to reflect those adopted in the common law courts and the Crown began to devise its own self-serving Treaty principles which it applied to all policy.

h. The Waitangi Tribunal became a political football as successive governments sought to rein in the constitutional, policy and fiscal consequences that might arise from its inquiries and the Tribunal began to censor itself.

32. As a consequence of these developments, claimants faced and still face onerous burdens in conducting research into their claims, securing and preparing expert evidence from tohunga, kaumatua and technical advisers, funding their attendance at hearings, and securing the legal representation made necessary by the manner in which the Crown chooses to conduct its cases. Frequently lawyers and experts acted, and still act, at least in part *pro bono* and sometimes entirely at their own expense.

33. In my own experience I have only ever been paid expenses for my evidence in any claim aside from Wai 2522. During that six-year inquiry I was paid at legal aid rates based on projected hours that required prior approval and which never reflected the actual amount of work involved. I believe that Māori expert witnesses have not been paid for their evidence which was crucial to the successful outcome in the Issue 4 hearing of that claim.

Te Whainga i te Tika

34. There cannot be any suggestion that the Crown, and especially the Ministry of Justice, were unaware of their Tiriti o Waitangi obligations on access to justice, including in the Waitangi Tribunal. These had been raised in a number of reports which they had funded.

35. In 1985 the Minister of Justice Geoffrey Palmer invited me to conduct a consultation on access to justice as input to a review on legal services. The Terms of Reference were:

> *"To inquire into, and report on, community needs for access to justice, and specifically for legal services, and measures which can be adopted to meet those needs in a Legal Services Act."*

36. I convened an Advisory Committee on Legal Services that was independent of the government. Its work was conducted primarily through 12 regional coordinators chosen for their wide knowledge of and standing in their communities. There was a strong Māori and Tiriti o Waitangi focus.

37. These coordinators were

    (i) Dickson Chapman, youth worker, Wairarapa/Wellington/Manawatu
    (ii) Edward Te Kohu Douglas, demographer, Waikato/Maniapoto
    (iii) John Hippolite, community officer, Nelson/Marlborough/West Coast
    (iv) Milton te Miringa Hohaia, farmer, Taranaki
    (v) Hana Maxwell, community workers, Te Tai Tokerau
    (vi) David Miller, community education officer, Otago/Southland
    (vii) Sandy Morrison, probation officer, Rotorua/Bay of Plenty
    (viii) Rev James Tahere, Anglican missioner, Canterbury
    (ix) Sam U'Tai, community worker, Maggie Ryland, community worker, Don Hutana, Community Education, Tai Rawhiti

38. The Convenor of the Advisory Group was Piers Davies, a barrister and solicitor, and David Hurley, solicitor, was the Representative of the New Zealand Law Society.

39. The Advisory Group's report *Te Whainga i te Tika: In Search of Justice* was published in 1986.[16] The Introduction explains the context for the recommendations:

> *This report recognises that present legal structures and processes deny many people their right of access to justice. It argues for positive and creative change, where dependency is replaced by self-reliance and self-determination and where Maori are truly recognised as tangata whenua o Aotearoa. It does not claim to provide a blueprint for the future. Rather, it seeks to create a framework which can guide and actively advance the transition from a mono-cultural, disempowering system of law to a bi-cultural, empowering process of justice. It offers the exciting prospect of making equal access to justice a reality.*[17]

40. The consultation process sought input from over a thousand groups and individuals from a wide range of perspectives, and the report includes verbatim extracts from the regional reports and comments. The report records the scepticism of those consulted that anything was going to change as a result:

> *The serious limitations on time and funding, and reliance yet again on unpaid volunteer labour, mean that some people with valuable insights may not have been heard. ... It is important to note that this process has also come at a time when people, especially the Maori community, are cynical about consultations which do no*

[16] Report of the Advisory Committee on Legal Services, *Te Whainga i te Tika. In Search of Justice*, Government Printing Office, Wellington, 1986. Attached as Exhibit "C"
[17] Report of the Advisory Committee on Legal Services, *Te Whainga i te Tika. In Search of Justice,* Government Printing Office, Wellington, 1986, at p.1

yield results. Those involved here have placed their credibility on the line in asking people to have faith that their views will be listened to and acted upon. Without that trust, this report could never have been written. Tribute is paid to all those who have given their time and energy in so many ways to bring it into being.[18]

41. The report identified seven fundamental principles for legal services that should be explicitly embodied in a new Legal Services Act.

    (i) Legal services providing access to justice must actively promote structural change;

    (ii) Legal services must reflect our bi-cultural heritage;

    (iii) Legal services must promote participatory justice;

    (iv) Consumer control over legal services;

    (v) Government has a duty to provide effective legal services as an essential social service.[19]

42. The consultation process identified many barriers to access to justice that are common across the legal system, including the Waitangi Tribunal. These include:

    (i) Access to relevant and understandable information

    (ii) Poverty in Māori communities

    (iii) Costs and access for Māori living in rural areas

    (iv) Cost, access, childcare for Māori women and mothers

    (v) Travel costs

    (vi) Costs of time off work

    (vii) Unfunded contributions and expections that Māori provide voluntary labour.

[18] Report of the Advisory Committee on Legal Services, *Te Whainga i te Tika. In Search of Justice*, Government Printing Office, Wellington, 1986, at pp.1-2

[19] Report of the Advisory Committee on Legal Services, *Te Whainga i te Tika. In Search of Justice*, Government Printing Office, Wellington, 1986, at p. 7

43. Part F of the report specifically addressed Māori legal services.[20] It advocated the establishment of a Rūnanga Tikanga Māori/Māori Lore [sic] Commission to:

(i) assist in transition towards a bi-cultural justice system and implementing Te Tiriti o Waitangi;

(ii) monitor proposed legislation;

(iii) consult and promote law reform on matters directly affecting Māori;

(iv) interpret laws;

(v) monitor legal and judicial services to Māori people;

(vi) promote development of bi-lingual courts; and

(vii) administer the proposed Māori Legal Service.

44. The Report also recommended that:

(i) A Māori Legal Service should be established to provide advice, research, information and education on Māori legal matters, with priority on developing legal self-reliance. It should aim to be largely self-financing, meaning its funding should not be dependent on government processes, and be administered by the Runanga/Commission.

(ii) The present restrictions on civil legal aid should be removed and eligibility extended to groups and representatives for those not wishing to use the Māori Legal Service.

45. At the time there was no legal aid for Waitangi Tribunal proceedings. The Report recommended that access to justice before the Waitangi Tribunal must be significantly improved by:

[20] Report of the Advisory Committee on Legal Services, *Te Whainga i te Tika. In Search of Justice,* Government Printing Office, Wellington, 1986, at pp. 53-57

(i) Government showing a more sincere commitment to redressing grievances under te Tiriti o Waitangi than it had to date, and immediately providing the powers and resources needed to make the Waitangi Tribunal effective;

(ii) Priority should be placed on supporting claimants and non-lawyers as Kai Awhina in researching, preparing and presenting their claims, in preference to use of private lawyers and legal aid. Services provided by kaumatua to the Tribunal should also be recognised through payment of consultancy fees.

46. The report also noted that the Waitangi Tribunal's research unit was only available once a claim was lodged with the Tribunal, and that potential claimants still lacked the resources to research and formulate their claims. A Māori Legal Service was seen as a means of providing that advisory function to supplement the work of the Tribunal's research unit. The recommendation included priority to funding for claimants, or someone of their choice, to carry out the research.

47. *Te Whainga i Te Tika* was written in the context of legislative changes to the powers and membership of the Waitangi Tribunal. The section of the report on the Waitangi Tribunal concluded that:

Failure to fund Waitangi Tribunal hearings places a shameful financial burden on the claimants. We believe there is little point in expanding the powers and scope of the Tribunal if people cannot afford to present their claims. The avenue which promised Maori people some real access to justice is now becoming as remote as the rest of the legal system. For the sake of our whole community we urge government to make a positive, priority commitment to making the Waitangi Tribunal work to redress Maori grievances.

48. The report recommended that Te Rūnanga Tikanga Māori/Māori Lore [sic] Commission set the eligibility criteria for the Māori Legal Service, and for assistance before the Māori Land Court, Planning and Waitangi Tribunal. Māori land should not be counted as an asset when eligibility is assessed.

49. The Rūnanga/Commission should be provided with an initial lump sum grant to invest and draw from in its operations at its discretion. This would ensure autonomy and Māori control over the development of the Rūnanga/Commission, and certainty of income irrespective of fluctuations in government policy and funding. The sum $15 million was seen [in 1986] as a realistic base to operate from, to fund all its operations except for the Māori Legal Service. The Māori Legal Service should be funded independently by the Crown and aim to be largely self-reliant, rather than reliant on the legal aid scheme. This resourcing should be viewed as part recognition that this country has been built largely on the proceeds of Raupatu lands.

50. The Government basically ignored the report.

He Whaipaanga Hou and the Ngā Kaiwhakamarama i Ngā Ture

51. Two years later Moana Jackson's second report *Māori and the Criminal Justice System. He Whaipaanga Hou – a New Perspective* was published.[21] Dr Jackson had been commissioned to write the report by Minister of Justice Geoffrey Palmer. The Preface was written by the Secretary for Justice because, in my understanding, the Minister declined to do so. Nevertheless, the Preface made the Minister's position very clear (emphasis added):

Undoubtedly the most controversial part of the report is its advocacy of an autonomous system for dealing with Maori offences that parallels the existing criminal justice system. This proposal is rested on the status of the

[21] Moana Jackson, *Māori and the Criminal Justice System. He Whaipaanga Hou – a New Perspective,* Department of Justice, Wellington, November 1988. Attached as Exhibit "D".

Maori as tangata whenua and on an interpretation of the word rangatiratanga in the Treaty of Waitangi.

It is not clear from the report what this parallel system might entail in practical terms. But it is a concept that has already raised concerns in the wider community and it is one which the Minister of Justice has specifically rejected. The Minister has made it clear that while he supports the need to make the legal system sensitive to Maori values and needs, ***he believes it is essential that New Zealand retains one legal system in which everyone is equal under the law.***[22]

52. While this report focused on the criminal justice system, its analysis of the Treaty of Waitangi has broader application. Re-establishing the mana of the Treaty in Māori eyes needs

... to be based on three clear precepts – the tangata whenua status of the Maori people, the partnership which the Treaty imposes on them and the Crown, and the idea of biculturalism which grows out of it. These terms in turn need to be clearly understood within a Maori framework which is quite different to the meaning and application they have been given by Pakeha definition.

There is thus a clear link between the idea of tangata whenua status and the Maori perspective of the partnership enshrined in the Treaty. It is only in recent times that Pakeha law has accepted and defined any concept of partnership. However, the Maori community has always seen it as crucial to the Treaty, although its definition varies markedly from that currently espoused by the Pakeha. To the Maori people the partnership of the Treaty developed from the tangata whenua status itself, and from the rangatiratanga or authority which that gave them to establish an equal relationship with the Pakeha. The Treaty was the tangible recognition of

[22] Moana Jackson, *Māori and the Criminal Justice System. He Whaipaanga Hou – a New Perspective*, Department of Justice, Wellington, November 1988, p.3

that relationship, and its terms were the framework within which it was to develop.[23]

53. The specific recommendations included establishing an autonomous Māori Law Commission and regional or iwi based Maori legal services, which would deal with a range of legal matters. A voluntary pilot scheme was already operating in Wellington, drawing inspiration from indigenous law models internationally.

54. The Report said the need for an independent tribally linked legal resource centre and the provision of Māori legal services were two of the most frequently raised positive changes during the consultation. However, Moana Jackson anticipated the Crown's response:

It would be yet another frustrating denial of Maori aspirations if the potential implied in the establishment of a Maori Law Commission and Maori legal services were to be dismissed simply on the oft-repeated monocultural grounds that they were contrary to the ideals of a unitary legal system, or that the concepts involved could be reshaped within the boundaries of existing Pakeha structures.[24]

55. The withdrawal of funding to Ngā Kaiwhakamārama i Ngā Ture/Māori Legal Service in 1999, for seemingly political and ideological reasons, provides further important context to understanding the Crown's hostility to funding independent Māori legal services.

56. In 1999 Ngā Kaiwhakamārama i Ngā Ture/Māori Legal Service was informed by the Legal Services Board that its funding would be cut.[25] No reasons were given. Using the Official Information Act they learned that Justice Minister Doug Graham has written to the Board regarding Moana

[23] Moana Jackson, *Māori and the Criminal Justice System. He Whaipaanga Hou – a New Perspective*, Department of Justice, Wellington, November 1988, p.171
[24] Moana Jackson, *Māori and the Criminal Justice System. He Whaipaanga Hou – a New Perspective*, Department of Justice, Wellington, November 1988, p.221
[25] "Action Alert – Funding cuts for Nga Kaiwahakamarama', 7 September 1999. Attached as Exhibit "E".

Jackson's presence at the occupation of Pakaitore. Negotiations to address concerns raised by the Board proved fruitless and their funding was terminated. The Board still refused to give reasons, but later said it did not believe Ngā Kaiwhakamārama had a mandate and it set about conducting its own national review.

57. I have in my files a letter I wrote to the Legal Services Board on 7 September 1999, which ended as follows:[26]

For the government, via the Legal Services Board or otherwise, to withdraw funding for Ngā Kaiwahakamarama i Nga Ture on the basis that it feels uncomfortable with the legal arguments being raised and the cases being taken, amounts to a fundamental breach of Maori rights of access to justice and the Crown's obligations under the Treaty of Waitangi. It is also a deep affront to any notion of a legal system which is independent and impartial. As such, it will only compound the long-standing sense among many Maori that New Zealand's colonial legal system exists to protect the state and non-Maori interests, and to deny them an effective recourse.

58. The Legal Services Board replied to myself and others on 31 July 2000 recording that Ngā Kaiwhakamarama had gone into "voluntary liquidation".[27] The Board wished to promote a replacement law centre "so that the wider Maori law issues can once again be attended to for the benefit of Maori nationwide" through a "unique assessment and establishment process". This appeared to be a separate exercise from the new legal services legislation. So far as I am aware, a new centre of that kind was never established, although various iwi and urban legal services have come and gone over time.

[26] Professor Jane Kelsey to the Chief Executive, Legal Services Board, 7 September 1999. Attached as Exhibit "F".
[27] D M Smith, Executive Director, Legal Services Board to Coalition of Community Law Centres and others, "Ngā Kaiwhakamarama I Nga Ture – Successor Law Centre", 31 July 2000. Attached as Exhibit "G".

59. It is very clear from the experiences with *Te Whainga i Te Tika, He Whaipaanga Hou*, and Ngā Kaiwhakamārama i Ngā Ture, that the Crown was fully aware of the issues of access to justice for Māori and what Te Tiriti o Waitangi requires to address them in a systemic manner. The Crown deliberately turned its back on them.

Concluding comments

60. It is clear that the Crown has taken no active steps to protect Māori rights under Te Tiriti o Waitangi in relation to access to justice, especially with regard to Waitangi Tribunal inquiries. This breaches all the relevant principles of mana motuhake, active protection and equity identified at the start of this brief.

61. In my opinion, this is not just another breach of the Crown's obligations as a Tiriti partner. The Crown is compounding its breaches relating to specific matters that are, or would be, brought before the Waitangi Tribunal by requiring the claimants themselves to fund the very process that is meant to give them some prospect of justice. If they are unable to do so, the Crown can escape its obligations, which creates an incentive for its to ensure there is no just and equitable access to avenues of redress. In other words, the Crown has a fundamental conflict of interest in depriving Māori of access to justice.

Dated this 1st day of August 2022

Elizabeth Jane Kelsey