**BEFORE THE WAITANGI TRIBUNAL**
**TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGI**

**WAI 2575**
**WAI 3421**

**IN THE MATTER** of the Treaty of Waitangi Act 1975

**AND**

**IN THE MATTER** of the Health Services and Outcomes Kaupapa Inquiry

**AND**

**IN THE MATTER** of a claim to the Waitangi Tribunal by **FIONA WIREMU**, **AMOHAERE TANGITU**, **HIRIA HAPE, KATARAINA MONIKA, DYLAN STEWART** and **TAMARANGI HARAWIRA** as trustees, and on behalf of, Te Puna Ora o Mataatua and its Maaori clients (past, present and future)

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# CLOSING SUBMISSIONS IN THE TE AKA WHAI ORA PRIORITY INQUIRY ON BEHALF OF TE PUNA ORA O MATAATUA

**14 OCTOBER 2024**

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**TEENAA, E TE TARAIPIUNARA:**

## OVERVIEW AND SUMMARY

In my time in the health sector, what Maaori have been asking for is a specialised entity that is solely focused on outcomes for Maaori through an operating model that devolves both funding and authority to iwi and Maaori health providers. Rangatiratanga requires form and function to improve Maaori health outcomes and address systematic bias and inequalities. Te Aka Whai Ora represented this model. Disestablishing form, while retaining function, is unacceptable. Function alone has historically failed Maaori.[1]

Dr Chris Tooley

1. These closing submissions are filed on behalf of the trustees of Te Puna Ora o Mataatua (**Te Puna Ora**), the claimants to Wai 3421 in the priority hearing regarding the disestablishment of Te Aka Whai Ora / the Maaori Health Authority as part of the Health Services and Outcomes Kaupapa Inquiry.

[1] Wai 2575, #M13, Brief of Evidence of Dr Christopher Wiremu Roy Tooley (20 February 2024) at [9].

2. Dr Chris Tooley's evidence filed for Te Puna Ora provides details about Te Puna Ora and its operations.[2] That is not repeated in these legal submissions other than to confirm that Te Puna Ora is the regional Maaori Health Provider for Eastern Bay of Plenty and the largest regional Health Provider across the Bay of Plenty.[3]

**Summary of Te Puna Ora's position**

3. Te Puna Ora submits that the Crown had already breached both the duty of good faith and the corresponding obligation to consult, as well as the principle of good government at the time it introduced the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill (the **Disestablishment Bill**). Those breaches arose from the prioritisation of political commitments in coalition agreements and haste ahead of informed engagement with Maaori and the usual policy processes. Nothing the Crown has done since the introduction and passage of the Disestablishment Bill has indicated that it will work to prioritise Maaori health needs as they ought to, resulting in a breach of the principle of equity. Te Puna Ora seeks findings that the Crown's actions have been in wilful breach of Te Tiriti and will result in greater disparity in health outcomes for Maaori.

**Evidence filed by Te Puna Ora**

4. Te Puna Ora filed two briefs of evidence from Dr Chris Tooley. Dr Tooley was a Board member of the interim Maaori Health Authority and is the current Chief Executive of Te Puna Ora.

5. Dr Tooley's 20 February 2024 evidence:[4]

   (a) Sets out the context of the health sector reforms and the proposed disestablishment from the perspective of a rural Maaori health service provider.

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2 Wai 2575, #M13, at [11]-[26].
3 Wai 2575, #M13 at [11] and [14].
4 Wai 2575, #M13.

(b) Steps through the whakapapa of the Maaori Health Authority as a tool for Maaori health reform, the impact Te Aka Whai Ora had for Maaori health service providers, and the template it ought to have provided for future reform.

(c) Confirms that no consultation was undertaken with Te Puna Ora.

(d) Sets out the recommendations Te Puna Ora was seeking from the Tribunal in February 2024 and before disestablishment had substantively progressed.

6. Dr Tooley's 27 February 2024 evidence:[5]

(a) Replies to the Crown evidence filed on 23 February 2024.

(b) Notes that the Crown evidence does little more than step through the legislative levers left in the Pae Ora Act 2022 following the repeal of the Maaori Health Authority section.

(c) Explains that Te Aka Whai Ora was intended to sit within a suite of measures to address health equity and that consideration has not been given to how those that remain would be able to operate effectively alone. No consideration has been given to operation of the system without Te Aka Whai Ora before proposing to remove it.

(d) Corrects the Crown's misunderstanding of the claimants' position – it is not that the claimants consider that Te Aka Whai Ora was the only means to achieve tino rangatiratanga through the health system, but that it was an essential part of distinct and complementary measures.

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5 Wai 2575, #M38.

## Procedural history

7. On 8 December 2023, Roimata Smail Ltd on behalf of Lady Tureiti Moxon and Janice Kuka, filed a statement of claim and an application for urgent hearing with the Tribunal concerning the Crown's intention to disestablish Te Aka Whai Ora, as outlined in the National Party's 100-day plan released on 29 November 2023.[6]

8. The claim was registered by the Deputy Chairperson on 11 December 2023 and referred to the panel for Wai 2575, the Health Services and Outcomes Kaupapa Inquiry, for a determination on urgency.[7]

9. On 18 December 2023, the Crown filed its response opposing urgency, submitting:

    (a) The operation of the Maaori Health Authority was not the only way to improve health outcomes for Maaori and, in the present administration's view, there are more effective ways to do so.

    (b) The intention to promote legislation to disestablish the Maaori Health Authority was not the product of a policy process that officials had undertaken.

    (c) The decision to disestablish had been made by the Government at the political level following political parties campaigning on this issue and as a result of the coalition agreements the National Party had entered into with ACT New Zealand and New Zealand First.

    (d) There had not been a consultation process with the Treaty partner leading up to the decision.

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6 Wai 3307, #1.1.1, #1.1.1(a), #3.1.1 & #3.1.1(a).
7 Wai 3307, #2.5.1 & #2.1.1.

10. On 17 January 2024, the Cabinet 100-Day Plan Committee agreed to disestablish Te Aka Whai Ora and noted that formal disestablishment should occur on 30 June 2024.

11. On 19 January 2024, the Tribunal determined that the urgency criteria had been met but adjourned its final decision pending further information from the Crown.[8]

12. On 23 January 2024, Cabinet confirmed the decision of the Cabinet 100-Day Plan Committee on the disestablishment of Te Aka Whai Ora.

13. On 31 January 2024, the Crown filed that further information, as directed. That Crown memorandum confirmed:

    (a) A bill to disestablish Te Aka Whai Ora was planned for tabling in the House no later than 8 March 2024 and it was expected that Te Aka Whai Ora would be formally disestablished by 30 June 2024.

    (b) Cabinet had not finally determined the detail for the disestablishment legislation, including the date, at the time of filing.

    (c) It was premature for the Crown to articulate the full detail of the Coalition Government's proposed alternative plans for Maaori health and the extent to which they are Treaty compliant when these details have not yet been worked through by Cabinet.

    (d) No consultation was planned as part of the decision to legislate, although the Crown contended that the Minister of Health undertook engagement with Maaori when he was the opposition Health Spokesperson.

14. Following further claimant and interested party responses to the Crown, urgency was granted on 16 February 2024.[9] That decision also noted that the non-interference principle did not

[8] Wai 3307, #2.5.3.
[9] Wai 3307, #2.5.6.

prevent the Tribunal inquiring into policy that has informed development of legislation and that the Tribunal has jurisdiction up until a bill is introduced to the House.

15. On 22 February, the Crown filed a memorandum indicating that the introduction of the Disestablishment Bill "could occur as early as 27 February 2024".[10]

16. Counsel for Wai 3307 filed a memorandum shortly after, responding to the Crown memorandum and noting the likely impact on the Tribunal's jurisdiction and ability to hold the scheduled hearing.[11] Counsel sought for the Tribunal to determine the inquiry on the papers before 27 February to pre-empt any loss of jurisdiction.

17. The Tribunal responded to the Crown and Claimant counsel memoranda on 23 February.[12] That memorandum-directions:

    (a) acknowledged claimant concerns;

    (b) noted the issues arising from late Crown notice of the Disestablishment Bill's introduction;

    (c) expressed concern about the Tribunal's ability to inquire properly on a further truncated timeline; and

    (d) suggested Crown consider deferring the introduction of the Disestablishment Bill.

18. On Tuesday 27 February 2024, the Crown filed a memorandum with the Tribunal that confirmed:[13]

    (a) the Crown did not intend to defer the introduction of the Disestablishment Bill until the week ending 8 March 2024; and

10 Wai 3307, #3.2.968.
11 Wai 3307, #3.2.969.
12 Wai 2575, #2.6.160.
13 Wai 2575, #3.2.971.

(b) that the Disestablishment Bill was intended to be introduced that day (Tuesday 27 February 2024).

19. Also on 27 February, the Tribunal noted the Disestablishment Bill had been introduced and its jurisdiction was, therefore, suspended.[14]

20. Later that evening on 27 February 2024, Crown counsel filed another memorandum confirming that the Disestablishment Bill had been introduced in the House on that date under urgency.[15]

21. On 27 February 2024, the Disestablishment Bill was introduced to the House under urgency.

22. Following the introduction of the Disestablishment Bill, the Tribunal thereafter lost jurisdiction to inquire pursuant to section 6(6) of the Treaty of Waitangi Act 1975.

23. Before introduction of the Disestablishment Bill, the Minister did not:

(a) engage with iwi/hapuu or Tiriti partners;

(b) engage with the Claimants;

(c) engage with any other Maaori health service providers or stakeholders; or

(d) undertake public consultation.

24. The Disestablishment Bill:

(a) passed through all stages in the House under urgency;

(b) was not referred to Select Committee;

(c) had its third reading on 28 February 2024, when the 27 February sitting of the House resumed; and

14 Wai 2575, #2.6.163.
15 Wai 2575, #3.2.973.

(d) received the Royal assent on 5 March 2024.

25. On 5 March 2024, the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 (the **Amendment Act**) was enacted.

26. The Amendment Act came into force on 30 June 2024 at which time Te Aka Whai Ora was formally disestablished.

27. As the Crown had indicated, steps were taken in advance of formal disestablishment to effectively disestablish Te Aka Whai Ora.

## SCOPE OF INQUIRY

28. In considering the scope of these submissions, Te Puna Ora intends to ensure that the Tribunal has the necessary context to substantively determine whether the disestablishment of Te Aka Whai Ora is in breach of the principles of the Treaty of Waitangi. This is not simply a matter of process or (lack of) consultation; there are substantive issues about Maaori health inequity and the whakapapa of Te Aka Whai Ora that are relevant to answering the question as to breach. The brief of evidence of Dr Chris Tooley, who was a member of the interim Maaori Health Authority, provides some of this substantive context.

29. Counsel notes that submissions filed by claimants when the matter was proceeding under urgency also draw this distinction between substantive and procedural elements of the Crown's proposal, and the need to engage with both in the context of determining whether there is a breach of the principles.[16]

## PREJUDICE SUFFERED BY TE PUNA ORA

30. Te Puna Ora has been and continues to be prejudiced by both the process followed to disestablish Te Aka Whai Ora and by

[16] Wai 2575, #3.3.95 at [20]-[25].

the disestablishment of Te Aka Whai Ora effected by the Amendment Act.

31. The process leading to disestablishment:

    (a) was made without consultation with Te Tiriti o Waitangi partners;

    (b) was made without consultation with Te Puna Ora;

    (c) did not have the benefit of a policy process;

    (d) did not allow for public consultation;

    (e) was inconsistent with Te Tiriti o Waitangi and its principles;

    (f) did not consider how Te Tiriti o Waitangi principles could be provided for in the health system; and

    (g) denied Te Puna Ora the right to participate.

32. The Amendment Act:

    (a) disestablished Te Aka Whai Ora in spite of the facts feeding into its establishment;

    (b) removed avenues for rangatiratanga in health services;

    (c) reduced opportunities for Maaori to have input into the provision of health services for Maaori; and

    (d) failed to provide an alternative to Te Aka Whai Ora in the health system.

33. Te Puna Ora has been placed back into the position it was in before this Tribunal made its recommendations and findings in the *Hauora* Report:

    (a) Its clients suffer the prejudice of an inequitable system that fails to meet Maaori health needs.

(b) It is faced with not only that same system, but one further constrained by public service funding cuts and led by an Executive Government that has shown itself willing to intentionally breach its obligations under Te Tiriti.

## CROWN BREACHES OF TE TIRITI O WAITANGI

34. Te Puna Ora submits that Treaty principles for primary health that the Tribunal set out in the Hauora Stage One Report are equally applicable here namely:[17]

(a) The guarantee of tino rangatiratanga, which provides for Maaori self determination and mana Motuhake in the design, delivery, and monitoring of primary health care.

(b) The principle of equity, which requires the Crown to commit to achieving equitable health outcomes for Maaori.

(c) The principle of active protection, which requires the Crown to act, to the fullest extent practicable, to achieve equitable health outcomes for Maaori. This includes ensuring that it, its agents, and its Treaty partner are well-informed on the extent, and nature, of both Maaori health outcomes and efforts to achieve Maaori health equity.

(d) The principle of options, which requires the Crown to provide for and properly resource kaupapa Maaori primary health services. Furthermore, the Crown is obliged to ensure that all primary health care services are provided in a culturally appropriate way that recognises and supports the expression of hauora Maaori models of care.

(e) The principle of partnership, which requires the Crown and Maaori to work in partnership in the governance, design, delivery, and monitoring of primary health services. Maaori must be codesigners, with the Crown, of the primary health system for Maaori.

35. The principles of good faith and good government are also relevant to the Tribunal's analysis here.

[17] Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2021) at 9.3.1, p 163.

**The Crown has acted in bad faith and in breach of the principles of tino rangatiratanga and active protection**

36. The disestablishment of Te Aka Whai Ora is a breach of Te Tiriti o Waitangi and its principles as the Crown has, in breach of the principle of partnership:

    (a) failed to act reasonably and in the utmost good faith in the act of disestablishment; and

    (b) failed to recognise that Maaori have a right under Te Tiriti to choose how they organise themselves, and how or through what organisations they express their tino rangatiratanga.

37. In the process of disestablishment, the Crown did not:

    (a) consult with Te Tiriti o Waitangi partners;

    (b) consult with Te Puna Ora;

    (c) have the benefit of a policy process;

    (d) allow for a policy process to occur;

    (e) allow for public consultation through Executive or Parliamentary processes;

    (f) consider whether it was acting consistently with Te Tiriti o Waitangi and its principles;

    (g) consider how Te Tiriti o Waitangi principles could be provided for in the health system; and

    (h) allow claimants to this inquiry the right to participate in a policy process, the legislative process, or any parliamentary process.

38. In determining to disestablish the Maaori Health Authority in the way in which it has, the Crown acted in bad faith and breached an obligation to consult with Maaori.

39. The Crown had determined it would disestablish Te Aka Whai Ora and was intent on pursuing that goal. To that end, the Crown's view appeared to be that it did not need to engage with a policy process nor conduct consultation with providers, iwi and hapuu as it did not intend to change tack under any circumstances. The Tribunal can infer as much from the approach taken by the Crown to the earlier urgent inquiry: the Crown knew there was significant opposition to its proposal, it knew that an urgent inquiry was underway, it knew that a hearing was scheduled, it had received a request from the Presiding Officer to consider delaying introduction of the legislation; and the Crown introduced the Disestablishment Bill regardless. That Disestablishment Bill was progressed through every stage in the House under urgency, it was not referred to select committee and public submissions were not invited. The Disestablishment Bill was enacted on 5 March 2024, a week after it was first introduced to the House. It did not come into force until 30 June 2024.

40. In considering whether the Crown acted in good faith here, despite being now almost 40 years old, the seminal *Lands* judgment continues to be of assistance:

    (a) Richardson J espoused:

        (i) "No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion."[18]

        (ii) "What is involved in the application of that fundamental good faith principle of the Treaty

[18] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (**Lands**) at 682 per Richardson J.

must depend upon the circumstances of the case."[19]

(b) Cooke P, as he then was, remarked: "[I]n this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty".[20]

41. This orthodox understanding of the requirement for good faith dealing between the Crown and Maaori cannot be lost on the Crown given the Cabinet Manual also notes the obligation: [21]

> Treaty principles are primarily concerned with the way in which the Crown and Maaori behave in their interactions with one another. The Courts and the Waitangi Tribunal have emphasised the need for recognition and respect in the Treaty partnership and stress the parties' shared obligation to act reasonably, honourably, and in good faith towards each other.

42. The Crown knowingly and intentionally promoted the disestablishment of Te Aka Whai Ora without recourse to Maaori views. It has already acknowledged that it did so to this Tribunal and sought to protect that decision from the scrutiny of this Tribunal by cloaking it in the political:

(a) "The intention to promote legislation to disestablish the Maaori Health Authority is not the product of a policy process that officials have undertaken. Rather, the decision has been made by the Government at the political level following political parties campaigning on this issue ahead of the recent General Election and as a result of the coalition the National Party has entered into with ACT New Zealand and the New Zealand First Party. It is acknowledged that there has

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19 Ibid.
20 *Lands* at 664 per Cooke P.
21 Cabinet Manual, p 155

not been a consultation process with the Treaty partner leading up to the decision."[22]

(b) "On a conventional assessment of impact and importance, the Crown deciding to make this decision without consultation can be expected to result in a finding by the Tribunal that Treaty principles have been breached and that prejudice has resulted."[23]

(c) "The Crown is well-informed about the poor health outcomes that Maaori as a population group experience and it accepts that there is need to address those poor outcomes. However, in doing so the Crown is able to choose from a range of Treaty-consistent options, provided it does so reasonably and in good faith. The operation of the Maaori Health Authority is not the only way to improve health outcomes for Maaori and, in the present administration's view, there are more effective ways to do so."[24]

43. To take decisions which affect only Maaori interests in the Health sector without an informed policy process and without engagement with Maaori is contrary to the very foundational directives of the Waitangi Tribunal on partnership. Since the interrupted urgent inquiry into this matter, a number of other Tribunal urgent inquiries have reported on matters arising from coalition agreement commitments that conflict with the Crown's obligations under Te Tiriti o Waitangi:

> The obligation to consult, in turn, is connected to the Crown's partnership obligations to act reasonably and with the utmost good faith. As the Offender Assessment Policies Tribunal (2005) noted, 'one element of the Crown's obligations is that it must make informed decisions. Where Crown policies affect Maaori, a vital element of the partnership relationship is the Crown's duty to consult with Maaori'. In The Preliminary Report on the Haane Manahi Victoria Cross Claim (2005), the Tribunal stated : 'In other words, the Crown could not act unilaterally on matters of importance to its Maaori Treaty partner'. In Napier Hospital,

22 Wai 3307, #3.1.28 at [14].
23 Wai 3307, #3.1.39 at [12].
24 Wai 3307, #3.1.28 at [13].

> the Tribunal found that the significance of the decision to Maaori may mean consultation is required even if the Crown believes it already holds sufficient information. In some cases, particularly where the issue is significant to Maaori or goes to the heart of the Treaty/te Tiriti relationship, the Tribunal has found the Crown may be obliged to go further than consultation and obtain the consent of Maaori.[25]
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> …
>
> If the Crown wishes to make a fundamental change of this nature it should start by having direct good faith dialogue with the parties to these agreements. To simply tell those parties what is going to happen and invite them to make submissions to a select committee, is to dishonour the very basis of the agreement itself.[26]
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> …
>
> We found that the Crown breached the principle of partnership in various ways. First, by failing to consult with Māori during the development of the proposed amendments. Secondly, by only offering to consult with Māori after decisions were made. Lastly, by reducing that limited offer of consultation even further to suit its own deadline to amend the Act before the end of the year. Te takutai moana is a significant taonga and changes to its legislative regime requires the Crown to demonstrate the highest standard of consultation, which it failed to meet at every step of the policy development process, despite the advice from officials.[27]

44. The proposal to disestablish Te Aka Whai Ora falls into the "major issue" category, as envisaged by the Court of Appeal in the *Forests* judgment.[28] It cannot credibly be argued to the contrary. Indeed, the Crown seems to have all but conceded that point when it acknowledged that consultation had not been undertaken and that "can be expected to result in a finding by the Tribunal that Treaty principles have been breached and that prejudice has resulted."[29] At this stage, the Crown has committed only to determining how it will engage

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25 Waitangi Tribunal, *Ngaa Maataapono – The Principles: The Interim Report of the Tomokia Ngaa Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on The Crown's Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024) at 3.4.3 p 75-76 (footnotes omitted).

26 Waitangi Tribunal, *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wai 3350, 2024), at p 29–30.

27 Waitangi Tribunal *The Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at 5.2, p 67.

28 *New Zealand Maaori Council v Attorney-General* [1989] 2 NZLR 142 at 152.

29 Wai 3307, #3.1.39 at [12].

with Maaori before taking any further decisions on a restructured health system.[30]

45. The wider context must also be kept in mind. It was not simply that the Crown neglected to engage with Maaori before taking decisions. It also failed to fairly signal that the introduction of the Disestablishment Bill was imminent. That Bill was introduced in the knowledge that it would disrupt the jurisdiction of the Waitangi Tribunal, the only space where the Crown could be considered to be entering into dialogue with Maaori on the issue. The Disestablishment Bill was also progressed under urgency through the House within the space of a single sitting week so that Parliamentary scrutiny was severely curtailed and public submission omitted altogether. It was passed well in advance of its actual commencement date meaning the Disestablishment Bill was sitting on the books for several months, essentially inactive. Taking these actions together, the Tribunal could reasonably infer that the Crown deliberately excluded Maaori voices from the process of disestablishment.

46. The Tribunal and the parties are familiar with the origins of Te Aka Whai Ora, arising from the recommendations made by the Tribunal in its *Hauora* report and the negotiations entered into by the parties thereafter.[31] The Crown, too, is familiar with this context. In its interim recommendations, the Tribunal noted:[32]

> Both claimant groups have said that the Crown has led and controlled the design, structure, and resourcing of the primary health system. This system has not addressed Maaori health inequities in a Treaty-compliant way, and this failure is in part why Maaori health inequities have persisted. In response, the claimants seek recommendations from the Tribunal that an independent Maaori health authority be established.

47. The Tribunal made an interim recommendation that "the Crown commit to exploring the concept of a stand-alone

30 Wai 3307, #3.1.28 at [16].
31 Waitangi Tribunal *Hauora* (Wai 2575, 2021).
32 Waitangi Tribunal *Hauora* (Wai 2575, 2021) at 9.4, p 164.

Maaori primary health authority."[33] By the time the Tribunal was making its final recommendations, the Crown had committed to establishing a Maaori Health Authority.[34]

48. In his evidence, Dr Tooley reminds us that the history of the establishment of an independent Maaori health authority is long and has been led by Maaori voices:[35]

> On 19 March 2024, around the time the Government proposes to introduce its legislation to disestablish Te Aka Whai Ora, it will be the fortieth anniversary of Hui Whakaoranga held in 1984 at Hoani Waititi marae. It cannot be overemphasised that 40 years of discourse from pre-eminent voices on Maaori health lead into the establishment of Te Aka Whai Ora. Its proposed disestablishment appears to be being undertaken without consulting even one single Maaori voice.

49. But in spite of that long history and in plain knowledge of the origin of Te Aka Whai Ora, the Crown excluded timely comment on proposed disestablishment from the body that recommended establishment of a Maaori Health Authority. It also spent some short months removing a vehicle for Maaori health equity that was the result of a decades-long process of establishment.

50. On this basis, it is plain that the Crown has acted in bad faith and inconsistently with the principle of active protection and tino rangatiratanga (applying the principles from the *Hauora* Report). The Crown has accepted that the intention to disestablish Te Aka Whai Ora is purely political and the ensuing time has proved that it had not considered any alternative plans for Maaori for immediate implementation.

**The disestablishment was inequitable and removed an important lever for equity**

51. Claimant witnesses spoke to some of the actions taken by Te Aka Whai Ora and the consequent changes they have seen in

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33 Waitangi Tribunal *Hauora* (Wai 2575, 2021) at 9.4, p 165.
34 Waitangi Tribunal *Hauora* (Wai 2575, 2021) at 10.2.2, p 176.
35 Wai 2575, #M13 at [47].

the operation of primary health because of that. That included:

(a) receiving data to enable tailored work approaches;[36]

(b) working alongside Te Whatu Ora to make legislative and policy mechanism decisions;[37]

(c) working alongside Te Whatu Ora to deliver the New Zealand Health Workforce Plan;[38]

(d) supporting changes to capitation funding to make it more equitable;[39]

(e) delivering direct commissioning funding, particularly for maternity and early years services;[40] and

(f) production of reports and strategies on matters of Maaori health;[41]

52. Dr Tooley emphasised:[42]

> Te Aka Whai Ora has been the most tangible step for rangatiratanga in the health sector that I have seen. It is not one of many models to achieving Maaori health goals, but a culmination of all the models imagined by Maaori health pioneers and proposed by Maaori service providers.

53. It is not the case that Te Puna Ora considers that Te Aka Whai Ora was the only means by which to achieve tino rangatiratanga and equity for Maaori in the health system. But the importance of the role it was meant to play cannot be overstated.[43]

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36 Wai 2575, #M13 at [35].
37 Wai 2575, #M13 at [35].
38 Wai 2575, #M23 at [38].
39 Wai 2575, #M23 at [39].
40 Wai 2575, #M23 at [40].
41 Wai 2575, #M27 at [23].
42 Wai 2575, #M13 at [48]. We note that at the time this evidence was filed, the word 'mana motuhake' was used in place of rangatiratanga. Dr Tooley's evidence was filed in the time sensitive context of the urgent hearing in February 2024. Since that time, Dr Tooley has had time to consider his evidence further and prefers the use of 'rangatiratanga' to better convey his view.
43 *See* Wai 2575, #M24 at [25], #M38 at [6]-[9], #M27 at [21]-[22], #M23 at [45].

54. Consistency with tino rangatiratanga as set out in Article 2 requires Maaori to be able to lead and design the means of addressing Maaori health inequities. The evidence shows that Te Aka Whai Ora provided a clear and valuable platform for Maaori voices in the design of services that delivered to Maaori. Te Aka Whai Ora in itself was dreamed by Maaori and was a delivery of that design of meeting Maaori health needs.

55. Importantly, Te Aka Whai Ora was established at a time when multiple reviews had found that Maaori continued to experience inequitable health outcomes on the bare statistics.[44] A new approach was needed for Maaori and for the health system at large.

56. Te Puna Ora's submission is that consistency with the principle of equity, as set out in Article 3 of Te Tiriti, can only be established by data or other information showing equitable health outcomes have been attained as between Maaori and non-Maaori. With such a vast distance between Maaori and non-Maaori health statistics, this will need diligent and focused effort. It will also need strong advocacy inside the system and outside the system

57. The establishment of Iwi Maaori Partnership Boards (**IMPB**s) gave strength to Maaori voices from outside the health system and ensured those voices would have a more direct line of communication. That voice is essentiall to achieving tino rangatiratanga in the health system. However, equity of outcomes cannot be achieved by advocacy from outside the system alone. Te Aka Whai Ora provided the Maaori ear and Maaori voice inside the system. It could take what IMPBs and communities were saying and understand why it was being said.

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44 *See* Health and Disability System Review - Interim Report (2019) at p 40; Health and Disability System Review – Final Report (2020), Executive Summary, at 4-6; Waitangi Tribunal *Hauora* (Wai 2575, 2019) from p 18 and 161-163.

58. As such, Te Aka Whai Ora was a vehicle for tino rangatiratanga, autonomy, and Maaori decision-making power in relation to Maaori health which the principle of active protection obliges the Crown to defend. Having an equal voice to Te Whatu Ora was a character of the true partnership and essential to equitable treatment. The power to commission services without the dilution and diminishment of mainstream bureaucracy was what gave Te Aka Whai Ora such value.[45]

59. The principle of active protection requires the Crown to make available to Maaori, as citizens, health services that reasonably and adequately attempt to close inequitable gaps in health outcomes with non-Maaori. The Tiriti relationship requires the Crown to positively promote equity.[46] The Tribunal explained the relationship between these principles in its *Hauora* report:[47]

> In this way, the principle of equity is closely linked to the principle of active protection. Alongside the active protection of tino rangatiratanga is the Crown's obligation, when exercising its kaawanatanga, to protect actively the rights and interests of Maaori as citizens. At its core, the principle of equity broadly guarantees freedom from discrimination, whether this discrimination is conscious or unconscious. Like active protection, for the Crown to satisfy its obligations under equity, it must not only reasonably ensure Maaori do not suffer inequity but also actively inform itself of the occurrence of inequity. Thus, as signalled in section 3.3, the Crown is obliged by the principle of active protection to provide health services that Maaori need, in order to pursue actively the achievement of equitable outcomes for Maaori. In turn, the principles of active protection and equity also mean these services must not only treat their patients equitably but be equitably accessible and equitably funded.

60. The Tribunal went on to say that operating consistently with these principles will "require the Crown to make every reasonable effort to eliminate barriers to services that may contribute to inequitable health outcomes."[48]

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45 Wai 2575, #M23 at [45].
46 Waitangi Tribunal *Hauora* (Wai 2575, 2019) at 3.4, p 33.
47 Waitangi Tribunal *Hauora* (Wai 2575, 2019) at 3.4, p 34.
48 Waitangi Tribunal *Hauora* (Wai 2575, 2019) at 3.4, p 35.

61. In disestablishing Te Aka Whai Ora, the Crown breached the principle of equity by undoing its previous efforts at eliminating barriers to equitable outcomes. It also removed the means by which Maaori could advocate for and enable equitable delivery of healthcare.

**The policy and legislative processes taken breach the principles of good government and options**

62. Urgent reports produced by the Waitangi Tribunal in 2024 have considered Crown actions taken without the expected policy process or in spite of contrary advice. These have in common that they arise from commitments made in the Coalition Agreements between the political parties forming the Government.[49]

63. The Tribunal in the Takutai Moana Act 2011 Urgent Inquiry adopted the summary of the Tribunal in *Tomokia Ngaa Tatau o Maatangireia* on the principle of good government: [50]

> The Treaty / te Tiriti principle of good government or 'good governance' applies to the Crown's exercise of kaawanatanga when proposing legislation that affects Maaori interests. Deriving from article 3 of the Treaty / te Tiriti, this principle 'requires the Crown to keep its own laws' and 'holds the Crown wholly responsible for complying with its own laws, rules and standards'. The Whanganui Land Tribunal (2015) has observed that the Crown's actions cannot be truly consistent with good government unless they are also just and fair. The Tribunal stated that the 'language and spirit of the Treaty were imbued with the ideas of justice and fairness', as seen in the words of the Treaty's preamble…

64. The comment of the Wai 262 Tribunal is also useful: [51]

> The Crown was granted kaawanatanga in article 1 of the Treaty. This is generally translated in the case law as the right to govern. It is unarguable that the right to govern should be exercised wisely so as to produce well-designed

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49 *See The Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report*; *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report*; *Ngaa Maataapono*.

50 Waitangi Tribunal, *Ngaa Maataapono* (Wai 3300, 2024) at p 74; see also Waitangi Tribunal *The Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at 2.2.4.

51 Waitangi Tribunal, *Ko Aotearoa Teenei: A Report into Claims concerning New Zealand Law and Policy Affecting Maaori Culture and Identity, Te Taumata Tuatahi* (Wai 262, 2011), at p 163.

> policy which is implemented efficiently to minimise the cost to the taxpayer. That is an obligation owed by every government in the world, whatever the source of its right to govern. But here there is a greater dimension : a taonga of the utmost importance is at issue. In this Treaty context, the State owes Maaori two kaawanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation programmes that are focused and highly functional. Te reo Maaori deserves the best policies and programmes the Crown can devise.

65. We have set out above that the Crown deliberately took a process that excluded Maaori participation in a decision that so plainly affected Maaori.

66. The Crown has acted unreasonably and unfairly, and in breach of Te Tiriti o Waitangi and its principles in adopting a process to disestablish Te Aka Whai Ora that:

    (a) failed to take into account the views of Maaori as Tiriti partners:

        (i) in advance of making the decision to disestablish; and

        (ii) following the decision to disestablish:

    (b) excluded consultation with the Claimants or persons or groups who would be affected, or otherwise had an interest;

    (c) prevented the Waitangi Tribunal from inquiring into the process and the rationale to disestablish;

    (d) was opaque and expedited; and

    (e) excluded participation of the Claimants and other interested persons.

67. As well as a breach of good faith, the Crown in doing so has acted in breach of the principle of good government and the principle of options. When taking decisions affecting the people of New Zealand, Te Puna Ora expects the Crown to act carefully and deliberately. When taking decisions that affect Maaori and engage the Crown's obligations as a Tiriti partner,

> Te Puna Ora expects the Crown to take advice and seek informed consultation with Maaori. This is a standard of good governing that the Crown took on when signing on to kaawanatanga under Te Tiriti. It is acknowledged by the Crown in the Cabinet Manual that "Ministers are responsible for deciding 'both the direction of and the priorities for the agencies for which they hold portfolio responsibilities', however they have a 'duty to give fair consideration and due weight to free and frank advice provided by the public service'. This duty includes advice regarding Treaty/te Tiriti implications."[52]

68. Failure to adhere to due process should invite scrutiny but consistent refusal to follow due process for matters affecting Maaori alone should invite reproach.

69. The Crown had set a goal for itself when determining to proceed with the coalition agreements as policy.[53] It had decided to adopt the Health Minister's intent to disestablish Te Aka Whai Ora, formed when he was an opposition MP. It had also decided to do that within an arbitrary 100-day time frame. It was relentless in pursuing that goal – placing achievement of it ahead of all other obligations, including the principle of good government and its obligations to its Tiriti partners.

## CONCLUSION

Te Aka Whai Ora was the result of long fought for change – an idea that was first posited many decades ago. The journey to its establishment included participation in inquiries and reviews, consultation with stakeholders and experts, policy consideration and weighing of options. Its proposed disestablishment, if achieved, will be the result of a single political decision informed by a single philosophical viewpoint.[54]

Dr Chris Tooley

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52 Waitangi Tribunal, *Ngaa Maataapono* (Wai 3300, 2024) at 2.5.2, p 41, citing Cabinet Manual, at p 42.

53 *See* Waitangi Tribunal, *Ngaa Maataapono* (Wai 3300, 2024) at 2.5.4.

54 Wai 2575, #M13 at [46].

70. The Crown, in disestablishing Te Aka Whai Ora, has breached the principles of Te Tiriti o Waitangi through the process it followed and the substance of its actions; the Crown had already breached both the duty of good faith and the corresponding obligation to consult, as well as the principle of good government at the time it introduced the Disestablishment Bill. Those breaches arose from the prioritisation of "a single political decision informed by a single philosophical viewpoint"[55] ahead of informed engagement with Maaori and the usual policy processes.

71. The Crown's actions since the introduction of the Disestablishment Bill, or its passage through Parliament, do not indicate that it will work to prioritise Maaori health needs as they ought to, resulting in a breach of the principle of equity.

**Findings and recommendations sought**

72. In February 2024, at the time it filed its opening submissions in the urgent inquiry, the findings Te Puna Ora sought were in the following terms:

    (a) Primarily, Te Puna Ora seeks a recommendation that the Crown ought **not** disestablish Te Aka Whai Ora (in light of the already substantiated breaches of the principles of Te Tiriti and the further potential breaches).[56]

    (b) If the Tribunal is not minded to make this recommendation, Te Puna Ora seeks a recommendation that the Crown pause its current

55 Wai 2575, #M13, at [46].
56 Wai 2575, #M13 at [50](f).

work programme to disestablish Te Aka Whai Ora to undertake:[57]

(i) consultation with Maaori with an open mind (including being open to not disestablishing the Maaori Health Authority); and

(ii) a proper policy process to determine whether disestablishing Te Aka Whai Ora will meet the Government's objectives with respect to Maaori Health outcomes.

(c) Te Puna Ora also seeks the following recommendations:[58]

(i) any disestablishment of Te Aka Whai Ora would be a breach of the principles of Te Tiriti;

(ii) failure to consult with Maaori before proposing to disestablish Te Aka Whai Ora was a breach of the principles of Te Tiriti;

(iii) failure to consult with Maaori before disestablishing Te Aka Whai Ora is a breach of the principles of Te Tiriti;

(iv) failure to undertake a critical review of the operation of Te Aka Whai Ora and instead proposing to disestablish Te Aka Whai Ora as a political decision was a breach of the principles of Te Tiriti; and

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57 As the Tribunal recommended in the context of the Mixed Ownership Model context (acknowledging the different context as between the State Owned Enterprises Act 1986 and the current context); Wai 2358 *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* at 3.9.4. The Government did undertake further consultation following the Tribunal's urgent report and the Supreme Court noted this in its ultimate judgment on the matter determining that "there is nothing in the consultation point that is not resolved with the substantive issue of whether the sale of shares was consistent with the principles of the Treaty" *New Zealand Maori Council v Attorney-General* [2013] 3 NZLR 31 at [87].

58 Wai 2575, #M13 at [50].

(v) failure to propose any substantial alternative to meeting Maaori health equity needs once Te Aka Whai Ora is disestablished is a breach of the principles of Te Tiriti.

73. Since that time, the Disestablishment Bill has been introduced, passed, and enacted. That legislation commenced and formally disestablished Te Aka Whai Ora, although the practical disestablishment had already occurred. Te Puna Ora's optimism for a negotiated outcome was misplaced. Naturally, the findings and recommendations Te Puna Ora now seeks differ.

74. Primarily, Te Puna Ora seeks a finding that the Crown was in breach of Te Tiriti o Waitangi and its principles when it:

(a) undertook the process that led to the disestablishment of Te Aka Whai Ora; and

(b) disestablished Te Aka Whai Ora.

75. In particular, Te Puna Ora seeks findings that the:

(a) failure to consult with Maaori before proposing to disestablish Te Aka Whai Ora was a breach of the principles of Te Tiriti;

(b) failure to consult with Maaori before disestablishing Te Aka Whai Ora was a breach of the principles of Te Tiriti;

(c) failure to undertake a critical review of the operation of Te Aka Whai Ora and instead proposing to disestablish Te Aka Whai Ora as a political decision was a breach of the principles of Te Tiriti; and

(d) failure to propose any substantial alternative to Te Aka Whai Ora for meeting Maaori health equity needs is a continuing breach of the principles of Te Tiriti.

76. The recommendations Te Puna Ora now seeks are:

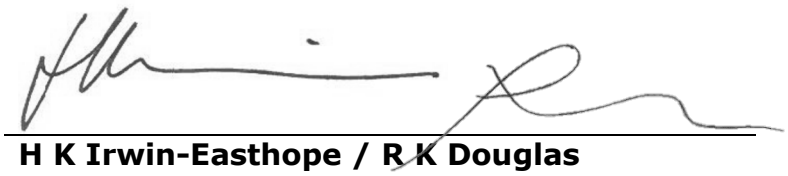
(a) that the Crown consider an alternative statutory form and function model for delivery of independent Maaori health advice and commissioning to replace Te Aka Whai Ora;

(b) that the Crown enter into good faith dialogue with the claimants on resourcing independent Maaori health advice and commissioning;

(c) that the Crown enter into good faith engagement with the claimants on effective and substantive investment in Maaori health equity; and

(d) that the Crown urgently prioritise its alternative plans for Maaori health and allow for consultation and engagement with the claimants.

**DATED** this 14th day of October 2024



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