

**I TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**

**WAI 2575**

**IN THE WAITANGI TRIBUNAL**

**KEI RARO I TE MANA O**

te ture o te Tiriti o Waitangi 1975

**IN THE MATTER OF**

the Treaty of Waitangi Act 1975

**ME**

**AND**

**I TE TAKE O**

te pakirehua Wai 2575 mō ngā kerēme e pā ana ki te Health Services me Outcomes

**IN THE MATTER OF**

the Health Services and Outcomes  
Kaupapa Inquiry (Wai 2575)

**ME**

**AND**

**I TE TAKE O**

te whakārotau whakahaerenga mō ngā kerēme e pā ana ki te Te Aka Whai Ora disestablishment

**IN THE MATTER OF**

the Priority Hearing into the claims relating to Te Aka Whai Ora disestablishment

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**JOINT CLOSING SUBMISSIONS OF THE PRIORITY HEARING INTO THE  
DISESTABLISHMENT OF TE AKA WHAI ORA (PROCEDURAL ELEMENTS)**

**Dated: 14 October 2024**

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Waitangi Tribunal

**14 Oct 24**

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## **MAY IT PLEASE THE TRIBUNAL**

1. These joint closing submissions are made on behalf of the following Claimants:
  - a. Evelyn Kereopa, on behalf of herself, the Kereopa whānau and members of Te Ihingārangi, Wai 762.
  - b. Richard John Nathan on behalf of the Mangakāhia Hapū claims collective, Wai 861.
  - c. Esme Warati Sherwin, on behalf of herself, the late Emma Gibbs-Smith, and her whānau as members of Nga Whānau o Waitangi Horotutu me Taputaputa o Pahi, Ngāti Kawa, Ngāti Rāhiri, and Ngare Raumati, Wai 1477.
  - d. Te Enga Harris and Lee Harris, on behalf of themselves, and the Harris whānau, Wai 1531.
  - e. April Grace on behalf of herself, the late Charlene Walker-Grace, her whānau, Ngā Wahapū o Te Rarawa o Kohai Settlement, and Te Hokingamai e te iwi o Ngāti Whātua Ngāpuhi nui tonu and members of Otangarei Marae, Wai 2206.
  - f. Violet Nathan and Maringi Te Aroha Kalva Emily Pia Broughton on behalf of themselves and their whānau, Wai 2217.
  - g. Bryce Aldridge, Mark Renata Smith and Russell Owen-Smith on behalf of Ngāti Pakahi, Wai 2377.
  - h. Jane Stevens on behalf of the late Nicholas Tairoa Macpherson Stevens, her whānau, Ngai Tahu and all Māori suffering from mental illness, Wai 2671.
  - i. Susan Taylor on behalf of the late Georgia-May Morgan MacBeath, her whānau and all Māori suffering from mental illness, Wai 2729.
  - j. John Kearns and Maeva Kearns, on behalf of the Kearns whānau, Wai 2747.

- k. Michael John Williams and Jessica Williams, on behalf of themselves, their whānau and members of Ngaitūpango, Wai 2776.
- l. Kahura Watene, on behalf of himself and the Watene whānau, Wai 2778.
- m. Tasilofa Huirama on behalf of the late Ziporah Grace Huirama, her whānau, as members of Ngāti Ueoneone and Ngāti Tautahi of Ngapuhi, Wai 2890.
- n. Malcolm Kingi, on behalf of himself and Ngāi Tahu ō Mōhaka Waikare, Wai 2894; and
- o. Stephanie August on behalf of the late Robert Charles William James Farrar, and her whānau, and all Māori rangatahi suffering from mental illness, Wai 3096.

**(“Claimants”)**

- 2. These joint closing submissions are also filed on behalf of the following Interested Parties:
  - a. Robert Gabel, on behalf of Ngāti Tara, Wai 1886.
  - b. Jasmine Cotter-Williams, on behalf of herself and her whānau, Wai 2063; and
  - c. Violet Walker on behalf of herself, the late Nuki Aldridge, her whānau and members of Ngāti Uru and Te Tahawai hapū, Wai 2382.

**(“Interested Parties”)**

**EXECUTIVE SUMMARY**

- 3. These joint submissions are filed on behalf of the Claimants and Interested Parties and address the issues in relation to the disestablishment process of Te Aka Whai Ora (“**procedural issues**”). The issues raised by the Claimants and Interested Parties are set below and, in our view, describe a wilful disregard of

its Te Tiriti o Waitangi (“**te Tiriti**”) obligation to consult with the Claimants, Interested Parties, and with Māori in respect to the proposed disestablishment of Te Aka Whai Ora (the Māori Health Authority) and consequently, an overt indifference to good faith duties by the Crown. In respect of the procedural issues, these closing submissions will deal with the following concerns:

- a. That the decision to disestablish was *ultra vires* and has had a serious impact on the tino rangatiratanga of the Claimants and Interested Parties.
- b. Lack of consultation and meaningful engagement with the Claimants, Interested Parties and Māori in the decision to disestablish.
- c. Bad faith dealings, in that Te Aka Whai Ora was disestablished due to politically based decision-making instead of on the basis of evidence. Within this, the:
  - i. insufficient time afforded to Te Aka Whai Ora to establish itself, and the cost implications of doing so.
  - ii. use of urgency.
  - iii. lack of a regulatory impact statement (“**RIS**”) or undertake an analysis of the likely harm or prejudice that might accrue to Māori as a result of the decision.
  - iv. failure to provide a viable alternative before disestablishment; and the
  - v. failure to engage with Waitangi Tribunal (“**Tribunal**”) processes.

#### **OVERVIEW OF CLAIMS**

4. By way of overview, the Claimants and Interested Parties position in relation to the procedural issues, is that Te Aka Whai Ora represented an embodiment of

tino rangatiratanga on behalf of all Māori<sup>1</sup> and that in disestablishing Te Aka Whai Ora, the Crown has acted outside of its te Tiriti authority, and denied Māori the right to exercise tino rangatiratanga over health services.<sup>2</sup> The Claimants and Interested Parties further claim that by failing to consult with Māori, and rejecting the processes that were available, the Crown acted in bad faith by:

- a. deciding to disestablish Te Aka Whai Ora with no evidential basis to do so.<sup>3</sup>
- b. passing the Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill under urgency;<sup>4</sup> and
- c. failing to be open and transparent with the Claimants, Interested Parties and Māori as evidenced by its refusal to refer the Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill to the Tribunal for review.

## **CLAIMANT AND INTERESTED PARTY EVIDENCE**

5. Evidence was filed on behalf of Ms Jane Stevens (“**Ms Stevens**”) on 20 February 2024.<sup>5</sup> Ms Stevens’ evidence was provided prior to the disestablishment of Te Aka Whai Ora and focuses on the prejudice of a potential disestablishment on Māori, specifically in terms of the provision of mental health services to rangatahi Māori.
6. Evidence was prepared on behalf of the remaining Claimants and Interested Parties in relation to the Priority Hearing set down from 7 October 2024. Due to the vacated filing for both evidence and opening submissions, the evidence of the Claimants and Interested Parties has not been filed with the Tribunal. The Claimants and Interested Parties accept the decision of the Tribunal to not allow

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<sup>1</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [12].

<sup>2</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [18].

<sup>3</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [38].

<sup>4</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [38].

<sup>5</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22.

further evidence to be filed in relation to the procedural issues but can indicate that further evidence for the Claimants and Interested Parties will be filed in respect of the issues that will be heard in the substantive hearing, that is to be set down in 2025. Accordingly, these submissions reflect the concerns of the Claimants and Interested Parties, by way of reference to the first three causes of action within the Joint Amended Statement of Claim.

## **TREATY PRINCIPLES**

7. Within these joint closing submissions, the Claimants and Interested Parties refer to te Tiriti principles of partnership, tino rangatiratanga, and good governance. Also raised in relevance to the procedural issues, are the treaty duties of good faith, and consultation. Each submission will refer to the relevant te Tiriti principles.

## **ISSUE ONE: CROWN DENIAL OF TINO RANGATIRATANGA IN THE DECISION TO DISESTABLISH TE AKA WHAI ORA**

### **Introduction**

8. These submissions will address the issue that the Crown has, in disestablishing Te Aka Whai Ora, denied Māori the right to exercise tino rangatiratanga over health services.<sup>6</sup> In this regard, we note that further submissions will be made on the impact of the alternative plans of the Crown on tino rangatiratanga in due course. To the extent that is possible, these submissions address the impact of the decision to disestablish Te Aka Whai Ora.

### **Waitangi Tribunal Jurisprudence**

9. We first set out relevant Tribunal jurisprudence and obligations on the Crown as it relates to the loss of tino rangatiratanga over hauora Māori policy development, and in this regard, we refer to the Treaty principle of rangatiratanga.

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<sup>6</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [18].



## *Rangatiratanga*

10. The Treaty principle of rangatiratanga involves a Crown guarantee for Māori to exercise authority and decision-making over their taonga and affairs to the fullest extent possible.<sup>7</sup> This is context-specific<sup>8</sup> in a manner that aligns with tikanga.<sup>9</sup> Rangatiratanga itself is a taonga.<sup>10</sup> It follows that the Crown must enable Māori to connect to, be accountable to, and be supported by their communities.<sup>11</sup> Rangatiratanga should be premised not on the iwi, but on the hapū,<sup>12</sup> which is where “political and constitutional power prior to 1840 rested”,<sup>13</sup> and where decisions that most directly impacted lives were made.<sup>14</sup> Rangatiratanga tempers the Crown’s Kāwanatanga right to change its policies and resource allocations<sup>15</sup> and guarantees Māori the right to choose how or through which organisations they express their tino rangatiratanga.<sup>16</sup>

## **Te Aka Whai Ora: An Embodiment of Tino Rangatiratanga**

11. The Claimants and Interested Parties state that Te Aka Whai Ora represented an embodiment of tino rangatiratanga on behalf of all Māori.<sup>17</sup> This is supported by evidence in this proceeding that Te Aka Whai Ora:<sup>18</sup>

...was an outward and visible sign that the Crown was prepared to recognise Te Aka Whai Ora as a partner under Te Tiriti o Waitangi.

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<sup>7</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 41.

<sup>8</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 41–42.

<sup>9</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 28.

<sup>10</sup> Matike Mai Aotearoa, *He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 112.

<sup>11</sup> Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wai 414, 1998), at xxv.

<sup>12</sup> A Ballara, *Iwi: The Dynamics of Māori Tribal Organisation from c. 1769 to c. 1945* (Victoria University Press, Wellington, 1998) at 30.

<sup>13</sup> Moana Jackson, *Interview with Moana Jackson* (interview, He Tohu, 2016) accessed at <<https://natlib.govt.nz/he-tohu/korero/interview-with-moana-jackson>>.

<sup>14</sup> Matike Mai Aotearoa, *He Whakaaro Here Whakaumu Mo Aotearoa: The Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation* (January 2016) at 35.

<sup>15</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 249.

<sup>16</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 28.

<sup>17</sup> *Joint Amended Statement of Claim for Wai 762, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096* dated 23 July 2024, at [12].

<sup>18</sup> Lady T H Moxon, Brief of Evidence of Lady Tureiti Haromi Moxon dated 20 February 2024, Wai 2575, #M1 at [15].

Furthermore, it was established to bring about transformational change and create a more equitable health system for Maaori.

Further, that:<sup>19</sup>

The establishment of Te Aka Whai Ora is the Crown's acknowledgement of the need to do things differently to deliver healthcare, and to honour the centrality of the principles of Te Tiriti o Waitangi-Tino Rangatiratanga, Partnership, Active Protection, Equity, and Options to realise this change.

12. Pita Tipene provided evidence from the perspective of the Ngāti Hine Trust Board who were involved in actively advocating for the establishment of a Māori Health Authority that:<sup>20</sup>

We proffered to them [Peeni Henare, Andrew Little and Willie Jackson, among other Ministers] that a Maaori Health Authority needed to be established in line with our Tiriti o Waitangi partnership of Kaawanatanga and Rangatiratanga working together and upholding our rights, responsibilities and obligations. We explained that we had an obligation to our own people and that we could deliver health outcomes more effectively and efficiently than mainstream health because we lived in our communities, we understood their needs, could relate more reliably to our people and ultimately could achieve more improved health outcomes.

...Those were the very arguments that we put on the table, and eventually Te Aka Whai Ora came in to being based on that reasoning that under te Tiriti o Waitangi and Rangatiratanga we had the right and the responsibility to provide for the needs of our people.

13. The need for a separate and autonomous solution to the severity of the health inequity faced by Māori is well-established and well-known. We acknowledge that there has been decades of advocacy on a Māori health authority by the health sector which we traverse later in these submissions. At this juncture, we

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<sup>19</sup> Dr E Curtis, Affidavit of Elana Curtis dated 20 February 2024, Wai 2575, #M27 at [21].

<sup>20</sup> P Tipene, *Korero Taunaki o Pita Tipene* dated 18 December 2023, Wai 2575, #M5 at [5] to [6].

refer to evidence in the Wai 2575 Stage One (Hauora) Inquiry which stated that even prior to the present health system being established, Māori already had “poorer health status than other New Zealanders and . . . should have been using primary care services more than other populations.”<sup>21</sup> In addition, Professor Crampton, told the Tribunal “that New Zealand has long experienced ‘significant and enduring health inequities in relation to both ethnicity and socioeconomic deprivation. The most consistent and compelling ethnic inequities are between Māori and non-Maori’.”<sup>22</sup> It was accepted by the parties that Māori health inequities are not only caused by health issues, but by a wide range of social determinants. Further, health inequity was accepted as being influenced by the cumulative effects of colonisation.<sup>23</sup> In response to the overwhelming evidence of the monolithic approach of Crown agencies to Māori health, the Tribunal stated that:<sup>24</sup>

The failure to address negative social determinants, then, can be considered a form of institutional racism. Institutional racism was defined by witnesses in our inquiry as ‘inaction in the face of need’. This inaction can be conscious or unconscious; it can manifest through the deliberate actions of individuals or result simply from ‘the routine administration of public institutions that produce inequitable social outcomes’.

The Tribunal also made an interim recommendation in response to the call for a separate and autonomous Māori Health Authority that “the Crown commit to exploring the concept of a stand-alone Māori primary health authority.”<sup>25</sup> Despite

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<sup>21</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 18.

<sup>22</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 18.

<sup>23</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 20.

<sup>24</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 21.

<sup>25</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 165.

the Tribunal only formally recommending the exploration of the concept, the Tribunal observed that:<sup>26</sup>

...the demand for structures and services that are ‘by Māori, for Māori’ across all sectors of social service design and delivery is a current and future reality that successive governments of the day will face. That demand will not diminish; it will only increase in the years to come. The Tribunal has made clear in its previous reports that co-governance, particularly in social service design and delivery, is an essential part not only of upholding the Treaty relationship, but also essential to the improvement of Māori socio-economic status. The Crown should be making policy decisions with a view to fulfilling this Treaty obligation under the principle of partnership, and to recognise tino rangatiratanga.

14. Within these proceedings, evidence has supported the view that Te Aka Whai Ora was “close to what an expression of tino rangatiratanga might look like today.”<sup>27</sup>
15. The Claimants and Interested Parties state that, in disestablishing Te Aka Whai Ora, the Crown has presumed, wrongly, that it has the ability to make decisions for tāngata whenua. It has stepped beyond kāwanatanga to diminish the rights affirmed by te Tiriti. The Crown has forgotten that it is bound by te Tiriti, and the guarantee that Māori continue to exercise authority and decision-making over their taonga and affairs to the fullest extent possible.<sup>28</sup> Its duty to enable Māori to connect to, be accountable to, and be supported by their communities<sup>29</sup> has been ignored. Further, given that rangatiratanga tempers the Crown’s kāwanatanga right to change its policies and resource allocations<sup>30</sup> and guarantees Māori the right to choose how or through which organisations they

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<sup>26</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 165.

<sup>27</sup> W Shortland, *Korero Taunaki o Waihoroi Shortland* dated 20 February 2024, Wai 2575, #M14 at [9].

<sup>28</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 41.

<sup>29</sup> Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wai 414, 1998), at xxv.

<sup>30</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 249.

express their tino rangatiratanga,<sup>31</sup> the Crown was in breach of Te Tiriti when it made a unilateral decision to disestablish Te Aka Whai Ora.

16. We cannot underscore the level of harm caused to the Claimants and Interested Parties in the wake of this decision. The act (of disestablishing Te Aka Whai Ora) is in the Claimants and Interested Parties' view, *ultra vires*. The unilateral approach of the Crown has diminished the mana of the Claimants and Interested Parties and has seriously damaged the treaty relationship. Furthermore, the disestablishment of Te Aka Whai Ora has the potential to create irreparable harm to hauora Māori.
17. In respect of the decision to disestablish, the Claimants and Interested Parties reiterate the evidence of Waihoroi Shortland that:<sup>32</sup>

The current Government has not taken the relationship under te Tiriti into account when they have made decisions. It is manipulating te Tiriti; doctoring te Tiriti so it is more in line with their thinking. The Government is using the powers of kawanatanga to undermine the agreement that Maaori set in place 180 years ago.

...By this Government's decision to end Te Aka Whai Ora, Maaori have lost confidence in kaawanatanga. Kaawanatanga and rangatiratanga are out of balance, there is no room for either notion to coexist as equitable partners or authorities under the current Government.

18. In conclusion, then, in its unilateral decision to disestablish Te Aka Whai Ora, the Crown denied Māori the right to exercise tino rangatiratanga over health services<sup>33</sup> and has ignored its own duties under te Tiriti. In this way, the Crown has breached the principle of tino rangatiratanga and caused serious harm to the treaty relationship.

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<sup>31</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 28.

<sup>32</sup> W Shortland, *Korero Taunaki o Waihoroi Shortland* dated 20 February 2024, Wai 2575, #M14 at [7] to [8].

<sup>33</sup> *Joint Amended Statement of Claim for Wai 762, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096* dated 23 July 2024, at [18].

## ISSUE TWO: DUTY TO CONSULT AND MEANINGFULLY ENGAGE WITH MĀORI

### Introduction

19. This submission will address whether the Crown adequately consulted with Māori in its decision to disestablish Te Aka Whai Ora. By way of overview, the position of the Claimants and Interested Parties is that the Crown disregarded its te Tiriti obligations in its efforts to disestablish Te Aka Whai Ora by failing to:
- a. consult with Māori in relation to the proposal to disestablish Te Aka Whai Ora.<sup>34</sup>
  - b. consult with Māori in the development of alternative plans during the process of disestablishment.<sup>35</sup>
  - c. directly advise Māori when the legislation was passed; and
  - d. follow Cabinet Manual policy in relation to consultation.

### Waitangi Tribunal Jurisprudence

#### *Partnership*

20. The Crown and Māori must work in partnership as co-designers of the governance, delivery, and monitoring of the health system and health services which Māori may access, in a manner that fully recognises their tino rangatiratanga.<sup>36</sup> Co-design is more than Māori consultation on a Crown design, and likely includes Māori involvement in both policy design and implementation.<sup>37</sup> Consultation is sometimes the very least of the Crown's Treaty duty.<sup>38</sup> Where Māori will be the consumers of a Crown system and their

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<sup>34</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [23.a].

<sup>35</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [23.d].

<sup>36</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 42.

<sup>37</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 141.

<sup>38</sup> Waitangi Tribunal, *Report on Whakatika ki Runga, a Mini-Inquiry Commencing Te Rau o te Tika: The Justice System Inquiry* (Wai 3060, 2023), at 23.

buy-in is critical, it is crucial for the Crown to involve Māori at an early conceptual stage, rather than consultation at the end.

### *Consultation*

21. Consultation is a duty pursuant to expressing Treaty principles of partnership and active protection.<sup>39</sup> The duty to consult is central to good faith partnership.<sup>40</sup> The Crown must seriously account for Māori views, which requires being prepared to alter its original proposals, for that engagement to constitute Treaty-compliant consultation.<sup>41</sup> The Crown is particularly required to consult Māori about major changes in the status of a health service institution that is important to a sizeable community,<sup>42</sup> and on proposals to substantially change the range or location of health services.<sup>43</sup>

### *Good Governance*

22. The principle of good governance requires the Crown to abide by its own laws<sup>44</sup> and not act outside them.<sup>45</sup> This extends to ensuring the full implementation of the Crown's laws, policies, and strategies.<sup>46</sup> For Crown actions to constitute good government, they must be just and fair,<sup>47</sup> following legal, international human rights, and Treaty norms.<sup>48</sup> Good government is also underpinned by non-discrimination,<sup>49</sup> and is another term for the rule of law.<sup>50</sup> In this respect, ad hoc Crown practices that are uncompliant with Crown policies and the Treaty,

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<sup>39</sup> Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wai 27, 1992), at 237; Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 66-67.

<sup>40</sup> Waitangi Tribunal, *The Māori Wards and Constituencies Urgent Inquiry Report* (Wai 3365, 2024), at 18.

<sup>41</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.

<sup>42</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 68.

<sup>43</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 241.

<sup>44</sup> Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2024), at 106.

<sup>45</sup> Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008), vol 2, at 429.

<sup>46</sup> Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2024), at 106.

<sup>47</sup> Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023), at 15.

<sup>48</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at xiii.

<sup>49</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at xiv.

<sup>50</sup> Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023), at 15.

and “an absence of robust, well-documented policies and processes” breach good government.<sup>51</sup>

### *Good Faith*

23. Te Tiriti established a relationship akin to a partnership and imposed on both Treaty partners an obligation ‘to act towards each other reasonably and with the utmost good faith’.<sup>52</sup> Due to power imbalance in the relationship, it is the Crown’s responsibility under te Tiriti to ensure Māori are not disadvantaged in that relationship;<sup>53</sup> In this regard, the Crown must act openly and honestly.<sup>54</sup> In decision-making, the Crown must be fully informed. The Crown must be aware of all relevant facts and law to say it has had proper regard to the impact of the principles of te Tiriti on the said decision.<sup>55</sup> Merely presenting an option to Māori when, in fact, the decision has already been made is inconsistent with the duty of good faith.<sup>56</sup> The proper approach to decision-making is that the Crown must establish whether there are Treaty implications and, if there are, it must have sufficient information to act consistently with Treaty principles.<sup>57</sup> Due to these special obligations, the Crown must also consult with Māori, even if it believes that it has sufficient information to make the decision.<sup>58</sup>

### **Did the Crown Adequately Consult with Māori?**

24. The duty to consult requires the Crown to do more than merely inform or explain to Māori a proposed action.<sup>59</sup> In this regard, the Crown has acknowledged that:<sup>60</sup>

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<sup>51</sup> Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 32.

<sup>52</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at [27].

<sup>53</sup> Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023), at 28.

<sup>54</sup> Waitangi Tribunal, *He Whiritauonoka the Whanganui Land Report* (Wai 903, 2015), at 156.

<sup>55</sup> *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 683.

<sup>56</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at XXXIII.

<sup>57</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 68.

<sup>58</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 68.

<sup>59</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 70.

<sup>60</sup> G Melvin, *Memorandum of Counsel for the Crown in response to Tribunal Directions dated 19 January 2024* dated 31 January 2024, Wai 3307, #3.1.39, at [12].



...procedurally, no formal consultation was planned or occurred by the Crown before Cabinet confirmed the decision to disestablish Te Aka Whai Ora.

25. Turning to its te Tiriti obligations, the Crown owes a specific duty to consult with the Claimants, the Interested Parties and more broadly, with Māori about major changes to the status of a health service institution that is important to a sizeable community,<sup>61</sup> and on proposals to substantially change the range or location of health services.<sup>62</sup> In making the above acknowledgement, the Crown conceded that it did not consult with Māori in respect of the Cabinet decision to disestablish of Te Aka Whai Ora.
26. Notwithstanding this acknowledgment that no formal consultation was planned or occurred in relation to the decision by Cabinet to disestablish Te Aka Whai Ora, the Crown did not implement a plan of engagement during the process of its disestablishment. Importantly, the Crown has acknowledged that:<sup>63</sup>

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.** [emphasis added]

27. The Crown filed this above concession with the Tribunal on 31 January 2024. The legislation to disestablish Te Aka Whai Ora, was introduced to the house on 27 February 2024, and the legislation passed on 28 February 2024.<sup>64</sup> Between the Crown's written concession that the lack of consultation was a breach of te Tiriti principles and introducing the legislation to the house, the Crown undertook no consultation.
28. On balance, the Crown did not engage with Māori before the legislation to disestablish Te Aka Whai Ora was introduced to the house, and passed under

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<sup>61</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 68.

<sup>62</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 241.

<sup>63</sup> G Melvin, *Memorandum of Counsel for the Crown in response to Tribunal Directions dated 19 January 2024* dated 31 January 2024, Wai 3307, #3.1.39, at [12].

<sup>64</sup> New Zealand Parliament (Hansard), 27 February 2024 773 NZPD 1528.

urgency, despite there being time available to do so after the Crown's recognition of its failure to consult in the development of the legislation would amount to a breach of te Tiriti and result in prejudice. There was also no consultation in respect of the decision to utilise urgency in this setting.

### *Relevant Crown Policy*

29. In addition to the te Tiriti obligation to consult, the Cabinet Manual highlights the requirement for public consultation and, more specifically, with Māori, at section 5.22 whereby it is stated that:<sup>65</sup>

A critical consideration in developing workable and effective policy is assessing the need for, and the timing of, engagement with Māori (including relevant iwi, hapū, and whānau), the public, and relevant stakeholder groups.

### *No Meaningful Engagement with Māori*

30. Claimants and parties in this proceeding have indicated that they did not receive panui when the Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill was passed on 28 February 2024. This is supported by Mr Geoff Milner, who said that they were “informed of this Government’s decision to disestablish Te Aka Whai Ora like everyone else – we read it in the news.”<sup>66</sup>
31. In the affidavit of Lady Tureiti Moxon, she emphasised that despite it already being well established that those with the greatest needs in health, are Māori, the Crown decided to disestablish Te Aka Whai Ora without any consultation with Māori.<sup>67</sup> Mr Pita Tipene termed it as a “tyranny of democracy” and as being imposed with “absolutely no engagement or consultation”. Ms Nora Rameka’s evidence described the failure to consult with Māori as “deeply disappointing” and, as not being consistent with “good faith and partnership”.<sup>68</sup> Further, Ms Sheree George said that:<sup>69</sup>

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<sup>65</sup> Cabinet Office *Cabinet Manual 2023* at [5.22].

<sup>66</sup> G Milner, *Kōrero Taunaki o Geoff Miller* dated 20 February 2024, Wai 2575, #M15, at [2].

<sup>67</sup> T Moxon, *Affidavit of Lady Tureiti Haromi Moxon* dated 8 December 2023, Wai 3307, #A1, at [19].

<sup>68</sup> N Rameka, *Brief of Evidence of Nora Rameka* dated 21 February 2024, Wai 2575, #M30, at [10].

<sup>69</sup> S George, *Summary of Brief of Evidence of Sheree George* dated 21 February 2024, Wai 2575, #M31(b), at [14].

There is no evidence of engagement with Ngaati Reehia, or to show that the Maaori views or voices support the decision now being made by the Government. Nor is there any evidential data and information to support their decision

Overt public dissatisfaction was made clear in both the media, and in the Wai 3307 Te Aka Whai Ora (Māori Health Authority) Urgent Claim proceedings in terms of both the indication to disestablish Te Aka Whai Ora, and the process of doing so.<sup>70</sup> Despite this, the Crown took no steps to respond to the concerns through either meaningful consultation or, a change to their decision to disestablish Te Aka Whai Ora. These actions and omissions conflict with its obligation to seriously account for Māori views, which requires being prepared to alter its original proposals, for that engagement to constitute Treaty-compliant consultation.<sup>71</sup> It follows that the Crown did not follow its own rules on consultation. In this way, the Crown's actions breach its te Tiriti duty to consult (with reference to the Cabinet decision to disestablish). The Crown's failure to meet Cabinet Manual requirements, signals a further te Tiriti breach, that of the duty of good governance. This is because ad hoc Crown practices that lack compliance with Crown policies and te Tiriti are in breach of the te Tiriti principle of good government.<sup>72</sup>

32. The Crown's argument that the use of urgency and suspension of RIS was appropriate because of their clear intention during campaigning, which is further discussed below, ignores the need to consult. Being transparent about intentions within an election campaign, is not a substitute for engagement or consultation once in government, despite being voted into Parliament. Nor did it temper how objectionable the proposal was.<sup>73</sup> This sits outside the realm of kawanatanga duties, as not all of Aotearoa voted for the government in place. Such a position incorrectly presumes that all those who did vote for the

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<sup>70</sup> Te Ao Māori, *Iwi concerns over plans to disestablish Māori Health Authority before tribunal hearing* (Radio New Zealand, 24 February 2024).

<sup>71</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.

<sup>72</sup> Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019), at 32.

<sup>73</sup> Gabrielle Baker, *Te Aka Whai Ora deserved so much more than its rushed death* (The Spinoff, 29 February 2024).

government, agree with all of their policies and decision-making. Issues of mandate are discussed below at paragraphs 56 to 58.

33. Where Treaty obligations are engaged, the Crown must separately and specifically consult with Māori, outside of open public consultation.<sup>74</sup> In the context of Hauora Māori, the obligation to partner with Māori is heightened, due to the known inequities of health outcomes for Māori.<sup>75</sup> It follows that even if the Crown did believe that open campaigning on this issue could be used in place of consultation with the general public, when considering that Te Aka Whai Ora was in place to specifically address health inequities for Māori<sup>76</sup> caused by the transitional effects of colonisation,<sup>77</sup> an additional level of engagement with Māori was required.<sup>78</sup>

### **ISSUE THREE: BAD FAITH IN DISESTABLISHING TE AKA WHAI ORA**

#### **Introduction**

34. This submission will address the approach taken by the Crown in its decision to disestablish Te Aka Whai Ora, and whether the Crown has breached te Tiriti by virtue of the processes taken to disestablish Te Aka Whai Ora. By way of overview, the position of the Claimants and Interested Parties is that the Crown disregarded its te Tiriti obligations in its efforts to disestablish Te Aka Whai Ora and acted in bad faith by:
- a. failing to recognise the whakapapa of Te Aka Whai Ora being a result of decades of work by experts in the sector, Select Committee reports, 1984 Hui Whakaoranga, recommendations by the Hauora Tribunal, as well as analysis by advisors within Te Puni Kōkiri (“**TPK**”), meaning that it was not purely a Labour-led initiative of the previous government to be discarded.

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<sup>74</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 72.

<sup>44</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 42.

<sup>76</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [7].

<sup>77</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [9].

<sup>78</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 42.

- b. failing to undertake evidence-based analysis of the Māori Health Authority or alternative approaches required to continue to address hauora inequities faced by Māori, and the likely prejudice that would befall Māori should Te Aka Whai Ora be prematurely disestablishing before making the decision to disestablish it.<sup>79</sup>
- c. deciding to disestablish Te Aka Whai Ora purely on the basis of election campaign promises<sup>80</sup> on the basis of a tenuous mandate.
- d. failing to refer the disestablishment bill to the Tribunal under section 8(2)(a) of the Treaty of Waitangi Act 1975.<sup>81</sup>
- e. removing the requirement for a RIS; and
- f. failing to allow Te Aka Whai Ora adequate time to establish itself and consequently, causing negative cost implications.

### **Waitangi Tribunal Jurisprudence**

35. Before we provide our substantive submissions, we set out relevant Tribunal jurisprudence and obligations on the Crown as it relates to decision-making, co-design and partnership with Māori in reference to hauora Māori policy development. In this regard, we refer to the Treaty principles of rangatiratanga, partnership, good governance and good faith below.

#### *Rangatiratanga*

36. The Claimants and Interested Parties repeat paragraph 10.

#### *Partnership*

37. The Claimants and Interested Parties repeat paragraph 20.

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<sup>79</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [38(b)].

<sup>80</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [38(f)]; *Wai 2575*, 3.2.930 at [14].

<sup>81</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [39].

### *Good Governance*

38. The Claimants and Interested Parties repeat paragraph 22.

### *Good Faith*

39. The Claimants and Interested Parties repeat paragraph 23.

## **The Decision to Disestablish**

### *Te Tiriti Requirements*

40. The Crown's ability to determine legislative and policy direction is subordinate to its te Tiriti obligations. Accordingly, the Crown cannot amend its policies in accordance with its own political agenda without properly considering the likely impact on its treaty partner. Fundamentally, in the context of hauora Māori and we argue in the context of the role of Te Aka Whai Ora (or other similar Māori authorities/entities), the Crown is required to partner with Māori in developing hauora policy.<sup>82</sup> Further, in relation to policy development, there are several specific obligations on the Crown including:

- a. The Crown must be fully informed when making decisions. Further to this, the Crown must be aware of all relevant facts and law to say it has had proper regard to the impact of the principles of te Tiriti on the said decision.<sup>83</sup>
- b. The Crown must establish whether there are Treaty implications and, if there are, it must have sufficient information to act consistently with Treaty principles.<sup>84</sup>
- c. The Crown must not present an option to Māori when, in fact, the decision has been pre-determined;<sup>85</sup> and

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<sup>82</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 42.

<sup>83</sup> *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 683.

<sup>84</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 68.

<sup>85</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at XXXIII.

- d. Māori have the right to choose how or through which organisations they express their tino rangatiratanga<sup>86</sup> and in this regard, in making decisions that impact on the existence and operation of Māori organisations, the Crown was obliged to engage meaningfully with Māori.<sup>87</sup>

*Did the Crown Give Proper Regard to Te Tiriti*

41. The first step, if the Crown intended to give proper regard to te Tiriti, was to ensure it was fully informed (and aware of all relevant facts and law). Within this, the Crown should have established whether there are treaty implications and sought information as to what actions it needed to take in order that it could act consistently with Treaty principles. Arguably, the issue was not whether the Crown had all the facts before it. We contend that it had a substantial amount of research, inquiry recommendations, and analysis from external sources and within government to make a qualified and te Tiriti compliant decision. In this regard, the evidence of Dr Tooley is telling, in that:<sup>88</sup>

While there have been expert reports produced on the value of a Maaori Health Authority, it does not appear any reference has been made to those careful studies, in lieu of consultation with Maaori, in the context of the Government's decision to disestablish the Maaori Health Authority. I note in particular the conference proceeding records of the 1984 Hui Whakaoranga, the Tribunal's own Hauora Report, the 2020 Simpson Report resulting from the health and disability system review, and a myriad of Select Committee reports. Instead, what I understand the new Government (and therefore the Crown) has been fairly transparent about is that there has been minimal / no policy analysis on this decision. It is a political decision that has been made and reflected in the Government's 100-day plan.

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<sup>86</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 28.

<sup>87</sup> Waitangi Tribunal, *Report on Whakatika ki Runga, a Mini-Inquiry Commencing Te Rau o te Tika: The Justice System Inquiry* (Wai 3060, 2023) at 56-57.

<sup>88</sup> Dr C W R Tooley, *Brief of Evidence of Dr Chis Wiremu Roy Tooley dated 20 February 2024*, Wai 2575, #M13 at [44].

42. We refer back to the Te Ara Ahu Whakamua Hui in 1994, where delegates were clear on the need for by Māori, for Māori approaches and in particular, it was acknowledged that “[t]here was considerable support for the establishment of a Māori Health Authority”.<sup>89</sup> The notes of the hui were developed by TPK and it appeared that TPK had, at that time, drafted a plan of action. In this regard, Dr Tooley noted that:<sup>90</sup>

Part of what the current debate about the Maaori Health Authority is missing is a recognition of the whakapapa of the ideas that lead to its establishment. The Maaori Health Authority was not a Labour-led idea; nor was it a Labour party political initiative. It was the culmination of decades of thought leadership and advocacy by Maaori.

43. So, whilst there was no consultation (as set out above) in the disestablishment of Te Aka Whai Ora, there was extensive consultation in its establishment:<sup>91</sup>

Even the Simpson Report which was released in 2020 confirmed the need for the creation of a Maaori Health Authority. Reinforcing once again that a system which does not reflect Maatauranga Maaori or enhance rangatiratanga will not be effective at improving Maaori health and wellbeing. And this report came out of an extensive consultation with a broad cross section of people throughout New Zealand.

44. Accordingly, despite the depth of feeling by Māori, including tāngata whaikaha, tāngata whaiora, Māori health providers, hapū and iwi leaders, Waitangi treaty claimants, as well as an inordinate amount of research, thought leadership and advocacy across several decades that went into the creation of Te Aka Whai Ora, all this was ignored and diminished by the Crown. Instead, the coalition government approached the disestablishment as if it were simply a Labour-led idea to be discarded in its first 100-days of governing.

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<sup>89</sup> L Dyal, S Wauchop, *The Pathway Forward – Directions for Māori Health: Voices of the Hui Te Ara Ahu Whakamua – Māori Health Decade Hui* (Rotorua, 22-25 March 1994), at 3.

<sup>90</sup> Dr C W R Tooley, *Brief of Evidence of Dr Chis Wiremu Roy Tooley dated 20 February 2024*, Wai 2575, #M13 at [33].

<sup>91</sup> J Kuka, *Brief of Evidence of Janice Kuka dated 3 September 2024*, Wai 2575, #M2(c), at [33].



## Limited Operation of Te Aka Whai Ora

45. Also pertinent to the decision to disestablish Te Aka Whai Ora was the consideration of the length of time that Te Aka Whai Ora was operational, and the extent to which work had only begun to reduce inequities. February 2024 provided about eighteen months of operations, and two years upon its actual disestablishment at the close of June 2024. An informed decision would have factored in the time that Te Aka Whai Ora required to establish itself, and not called for unreasonable outcomes to be achieved in that time such as calling for Te Aka Whai Ora to have turned the tide of hauora Māori inequity.

46. Te Aka Whai Ora was reviewed, just nine months after it was established.<sup>92</sup> The coalition government used that report as a means to justify disestablishment.<sup>93</sup> As Lady Tureiti Moxon said:<sup>94</sup>

Predictably, politicians now in government used the review to attack Te Aka Whai Ora, despite the fact that it simply showed that despite the challenges of its early stages, Te Aka Whai Ora was making tangible progress.

47. By way of example, an identified issue was that Te Aka Whai Ora did not use its budget on commissioning<sup>95</sup> and in the parliamentary debate regarding passing the disestablishment legislation, Hon Laura Trask said that “the report also found the authority was tracking behind in its delivery.”<sup>96</sup> Ms Janice Kuka identified that those services were “just a start” and that over time, there would be “more and more” services.<sup>97</sup> Former Chairman of Te Whatu Ora, Rob Campbell identified that:<sup>98</sup>

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<sup>92</sup> Lance Norman, *Lance Norman: The review of Te Aka Whai Ora is flawed on so many levels* (New Zealand Herald, 3 August 2023).

<sup>93</sup> Claudette Hauiti, *Te Aka Whai Ora “suboptimal” says Luxon* (Waatea News: Māori Radio Station, 15 December 2023).

<sup>94</sup> T Moxon, *Brief of Evidence of Lady Tureiti Haromi Moxon* dated 3 September 2024, Wai 2575, #M1(b), at [59].

<sup>95</sup> Glenn McConnell, *Māori health experts say Te Aka Whai Ora hasn't been given a chance to work* (Stuff, 17 August 2023).

<sup>96</sup> New Zealand Parliament (Hansard), 27 February 2024 773 NZPD 1629.

<sup>97</sup> J Kuka, *Affidavit of Janice Kuka* dated 8 December 2023, Wai 3307, #A2(a), at [17].

<sup>98</sup> Rob Campbell, *Rob Campbell: Te Aka Whai Ora report not all bad news for Māori health outcomes* (New Zealand Herald, 5 August 2023).

Much effort has been on establishing governance and management in Te Aka Whai Ora for a very simple reason – they had none to start with. They have spent less on commissioning services etc than they could have – they had to establish proper procedures first (can you imagine if they had not?).

Rob Campbell went on to say that:<sup>99</sup>

Such deficiencies do not justify a conclusion that either the organisation or its initial leadership are not appropriate and should not be further supported. Nor does the report itself make any such suggestion.

48. Due process should have included a true analysis of the report, and adequate resourcing to achieve the measures that were not met. If the government had concerns, it would have been more appropriate to issue ministerial directions to Te Aka Whai Ora, opposed to disestablishing Te Aka Whai Ora without any opportunity to address such concerns.
49. Irrespective of this, Te Aka Whai Ora was not given the time to increase capability, and Te Aka Whai Ora released an Action Plan in response to the Hauora Māori Advisory Committee Report in August 2023, which included the progress against Cabinet expectations, commitments, and priorities.<sup>100</sup> Considering the two hundred years of harm to Māori Hauora under colonisation,<sup>101</sup> Te Aka Whai Ora required much more than the time afforded to undo the harm caused. The Crown must enable Māori a genuine choice between Māori or non-Māori health providers and must equitably protect all these pathways.<sup>102</sup> This requires the Crown to provide for and resource kaupapa Māori services in a culturally appropriate way, supporting the expression of tikanga.<sup>103</sup> It is appropriate to consider time to establish as a relevant resource,

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<sup>99</sup> Rob Campbell, *Rob Campbell: Te Aka Whai Ora report not all bad news for Māori health outcomes* (New Zealand Herald, 5 August 2023).

<sup>100</sup> T Moxon, *Brief of Evidence of Lady Tureiti Haromi Moxon* dated 3 September 2024, Wai 2575, #M1(b), at [58].

<sup>101</sup> Expert Reactions, *Māori Health Authority to be disestablished – Expert Reaction* dated 27 February 2024, accessed at <<https://www.sciencemediacentre.co.nz/2024/02/27/maori-health-authority-to-be-disestablished-expert-reaction/>>.

<sup>102</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 35.

<sup>103</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 44.

in these circumstances. It is therefore both a te Tiriti compliance issue and, a procedural flaw, to move to disestablish a Crown entity pre-emptively, and without providing it an opportunity to meet specific KPIs.

### Politically Based Decision-Making

50. This leads to the fact that there has, in fact, been little rationale provided for the disestablishment of Te Aka Whai Ora. Rather, as recognised in the then Pae Ora (Disestablishment of Māori Authority) Amendment Bill 2024, the disestablishment was a politically based decision, implemented to give effect to the coalition government's 100-day plan.<sup>104</sup>
51. The Hon Shane Reti stated that “plans to scrap the body were included in each coalition partners manifesto and were campaigned on extensively”.<sup>105</sup> Mr Pita Tipene referred the National Party's campaigning on the disestablishment under “the tyranny of democracy”.<sup>106</sup> Dr Christopher Tooley's perspective was that the disestablishment was “the result of a single political decision informed by a single philosophical viewpoint.”<sup>107</sup> In a memorandum of counsel filed by counsel for the Crown, the decision being a political one, opposed to one based on policy or evidence was emphasised where they said:<sup>108</sup>

The intention to promote legislation to disestablish the Māori 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. [Emphasis added]

52. Furthering the concern regarding a lack of evidence-based decision-making, the Crown did not provide detailed information in respect to how it will address the

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<sup>104</sup> Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill 2024 (26-1) (explanatory note), at 1.

<sup>105</sup> Tuwhenuaroa Natanahira, *Bill scrapping Māori Health Authority to be tabled next week* (Radio New Zealand, 24 February 2024).

<sup>106</sup> P Tipene, *Kōrero Taunaki o Pita Tipene* dated 18 December 2023, Wai 3307, #A5, at [9].

<sup>107</sup> Dr C W R Tooley, *Brief of Evidence of Dr Christopher Wiremu Roy Tooley on behalf of Te Puna Ora o Mataatua* dated 20 February 2024, Wai 2575, #M13, at [46].

<sup>108</sup> G Melvin, *Memorandum of Counsel for the Crown in response to application for urgent inquiry* dated 18 December 2023, Wai 3307, #3.1.28, at [14].

well-established health inequities faced by Māori.<sup>109</sup> Ultimately, the data reflected a need for Te Aka Whai Ora due to severe health inequities, and the decision to disestablish Te Aka Whai Ora was made without reverence to that data. Ms Janica Kuka and Lady Tureiti Moxon poignantly identified that the three political parties in government, all opposed Te Aka Whai Ora from the very start.<sup>110</sup> They also identified the lack of evidence for their opposition:<sup>111</sup>

They opposed it without evidence, in the face of the *Hauora* Report and the national review led by Heather Simpson, and widespread support from Maaori, clinicians and researchers. There was no engagement with Maaori, no process, and no good reason for its disestablishment – it was decided on the same day it was announced.

53. No evidence has been provided by the Crown in Tribunal proceedings or otherwise, in respect of providing any evidential basis for the disestablishment. This emphasises that the decision to disestablish Te Aka Whai Ora, was not made for the betterment of Māori health and based on evidence, but rather, for political gain. Māori health issues continue to be used, in political manoeuvring, opposed to for equity-based solutions. Mr Pita Tipene described the decision as being “based on political outlook and political ideology”.<sup>112</sup> Ms Janice Kuka emphasises this in her evidence:<sup>113</sup>

The decision to abolish Te Aka Whai Ora was politically motivated and decided immediately Te Aka Whai Ora was set up. The complaints surrounding Te Aka Whai Ora did not stack up under scrutiny. It did not stand a chance to survive post elections despite all the evidence supporting a stand-alone Maaori Health Authority would benefit both Maaori and the general population. Even the Simpson Report which was released in 2020 confirmed the need for

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<sup>109</sup> Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019), at 24.

<sup>110</sup> J Kuka, T Moxon, *Joint Brief of Evidence of Ms Janice Kuka and Lady Tureiti Moxon* dated 3 September 2024, Wai 2575, #M35(b), at [4].

<sup>111</sup> J Kuka, T Moxon, *Joint Brief of Evidence of Ms Janice Kuka and Lady Tureiti Moxon* dated 3 September 2024, Wai 2575, #M35(b), at [4].

<sup>112</sup> P Tipene, *Kōrero taunaki o Pita Tipene* dated 18 December 2023, Wai 3307, #A5, at [10].

<sup>113</sup> J Kuka, *Brief of Evidence of Janice Kuka* dated 3 September 2024, Wai 2575, #M2(c) at [33].

the creation of a Maaori Health Authority. Reinforcing once again that a system which does not reflect Maatauranga Maaori or enhance rangatiratanga will not be effective at improving Maaori health and wellbeing. And this report came out of an extensive consultation with a broad cross section of people throughout New Zealand.

54. This issue was also raised in the House during the parliamentary debate, by Hon Chloe Swarbrick in relation to the Smokefree Amendment Act, where she identified that the decision was made, purely because it was in the coalition agreement:<sup>114</sup>

what we have is, effectively, a Government saying that the reason that they are doing something—under urgency, no less, and, therefore, bypassing typical parliamentary and public scrutiny—is because it is in the coalition agreement. Why is it in the coalition agreement? Well, because it's in the coalition agreement. But why is it in the coalition agreement? Because it's in the coalition agreement. That is, as I alluded to before, known as, logically, a tautology. Effectively, what the Government's saying is the reason that this is here is, "Cos we said so."

55. Te Aka Whai Ora worked with Māori to co-design health plans and strategies that guided decision-making and services.<sup>115</sup> The disestablishment of Te Aka Whai Ora represented a significant shift in the health system. When considering that the Crown and Māori must work in partnership as co-designers of the governance, delivery, and monitoring of the health system and health services which Māori may access, in a manner that fully recognises their tino rangatiratanga,<sup>116</sup> the failure to work in partnership with Māori in relation to the health system is a breach of the Crown's duties. It is clear that the re-design of the health system to exclude Te Aka Whai Ora was not done in partnership with Māori, and was based on election campaigning, despite the direct implications

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<sup>114</sup> New Zealand Parliament (Hansard), 27 February 2024 773 NZPD 1701.

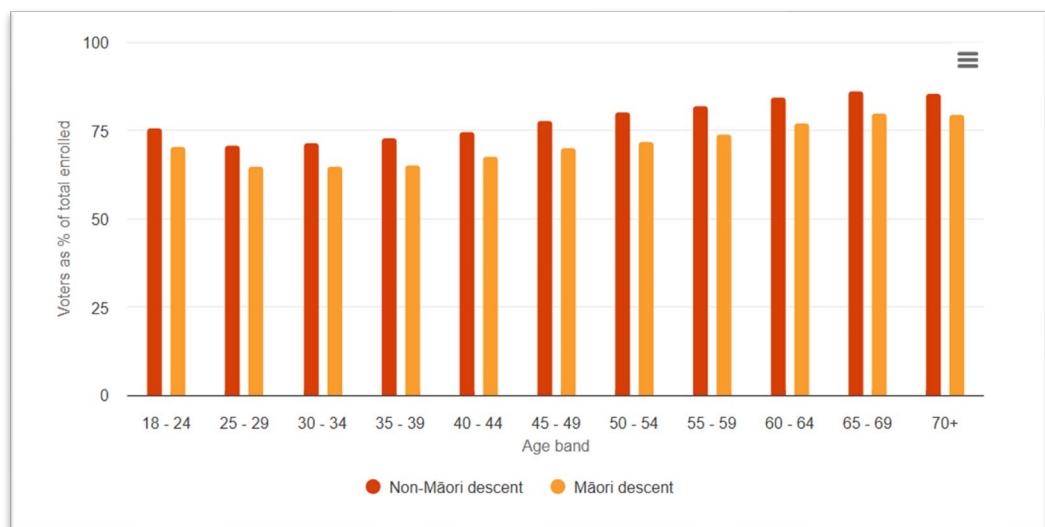
<sup>115</sup> T Moxon, *Affidavit of Lady Tureiti Haromi Moxon* dated 8 December 2023, Wai 3307, #A1, at [7].

<sup>116</sup> Waitangi Tribunal, *Haumarū: The COVID-19 Priority Report* (Wai 2575, 2023), at 42.

that that would have on Māori. Further to this approach, Mr Pita Tipene raised the issue of political mandate in his evidence:<sup>117</sup>

They see their polit[i]cal mandate handed through the Coalition Government and a majority of seats strung together by three parties as more than sufficient to bull doze over everyone, particularly Maaori...

56. When considering the issue of political mandate, it is prudent to consider the statistics in relation to who voted. According to the Electoral Commission, 77.5 percent of enrolled voters had their say; meaning that 22.5 percent did not vote.<sup>118</sup> Furthermore, for every single age demographic, voter turnout for enrolled voters was lower for Māori than non-Māori as demonstrated in the below figure:<sup>119</sup>



57. The lower voter turnout rates for Māori could indicate that the coalition government does not necessarily reflect Māori views, on a proportional rate in comparison to non-Māori. Even if voter turnout for Māori was on par with non-Māori, as iterated at paragraph 64, electors do not vote on specific legislation or policies. In this way, we submit that democratic process is no replacement for

<sup>117</sup> P Tipene, *Kōrero Taunaki o Pita Tipene* dated 18 December 2023, Wai 3307, #A5, at [13].

<sup>118</sup> Electoral Commission, *2023 General Election | Voter turnout statistics* dated 2023, accessed at <<https://elections.nz/democracy-in-nz/historical-events/2023-general-election/voter-turnout-statistics/?electorate=All+Electoralates&descent=descent>>.

<sup>119</sup> Electoral Commission, *2023 General Election | Voter turnout statistics* dated 2023, accessed at <<https://elections.nz/democracy-in-nz/historical-events/2023-general-election/voter-turnout-statistics/?electorate=All+Electoralates&descent=descent>>.

the Crown's obligation to consult with Māori. Te Tiriti underpins the constitutional landscape in Aotearoa and is not surpassed by parliamentary processes.

58. Another consideration is who voted for the coalition government, being New Zealand First (“**NZ First**”), Act New Zealand (“**ACT**”) and the National Party (“**National**”). A tripartite arrangement was required to form a government. NZ First, Act, and National received 6.08 percent, 8.64 percent and, 38.06 percent respectively.<sup>120</sup> Analysis of voter turnout and the election results found that on the whole, Māori voters supported Labour, the Greens and te Pāti Māori.<sup>121</sup> On this basis, it is estimated that 61 percent of Māori do not support the coalition government.<sup>122</sup> In this way, it cannot be said that the coalition government adequately reflects the wishes of Māori as a whole, ergo it does not possess the necessary mandate to make decisions on Māori healthcare, without te Tiriti compliant consultation. Further, the fact that the coalition government together obtained a majority in Parliament does not negate the need for due process nor the need to adhere to te Tiriti obligations.

#### The Lack of Regulatory Impact Statements

59. It is notable that Regulatory Impact Statements were prepared in the effort to establish the organisational structure of Te Aka Whai Ora. This in turn highlighted numerous reviews which set out the evidential basis in support of the Authority. The establishment RIS referred to the Health and Disability System Review, the Tribunal's Health Services and Outcomes Inquiry (Wai 2575) and “several reviews over past decades”.<sup>123</sup> Further, as referenced above, for Te Aka Whai Ora to be established, it took years of advocacy, a government inquiry, several reports and a Tribunal Inquiry. However, all it took to disestablish and demolish this work was an election promise. The duality of the difficulty to have Te Aka Whai Ora established, and the ease in which it was disestablished emphasises the imbalance of power between the Crown and

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<sup>120</sup> Electoral Commission, *Official results for the general election* dated 3 November 2023, accessed at <<https://elections.nz/media-and-news/2023/official-results-for-the-2023-general-election/>>.

<sup>121</sup> Glenn McConnell I, *Who in Parliament has the mandate to represent Māori* (Stuff, 13 December 2023).

<sup>122</sup> Glenn McConnell, *Who in Parliament has the mandate to represent Māori* (Stuff, 13 December 2023).

<sup>123</sup> Department of the Prime Minister and Cabinet (Health Transition Unit), *Regulatory Impact Statement: Decision on the organisational form of Maori Health Authority* dated 2 September 2021, accessed at <<https://www.dpmc.govt.nz/sites/default/files/2021-10/ria-dpmc-mha-sep21.pdf>>, at 5.

Māori. This is why under the duty of good faith; it is the Crown's responsibility to ensure Māori are not disadvantaged in that relationship.<sup>124</sup>

60. RIS provide “a high-level summary of the problem being addressed, the options and their associated costs and benefits, the consultation undertaken, and the proposed arrangements for implementation and review”.<sup>125</sup> Further, RIS are published to ensure open and transparent regulatory processes<sup>126</sup> and encourage systematic and evidence-informed approach to policy development.<sup>127</sup>
61. As discussed above, the Crown has been clear that their decision to disestablish Te Aka Whai Ora was not a policy-based decision, and rather, it was political.
62. The nature of RIS indicates that legislation development (and any legislative amendments) should be evidence informed. It is submitted that a RIS was excluded from the legislative process in these circumstances, as there can be no evidence adduced to justify the disestablishment of Te Aka Whai Ora, and that the politically based rationale for legislation development goes outside of the bounds of the normal purpose for legislation. The Crown itself recognises that:<sup>128</sup>

good policy advice is underpinned by good evidence. This means that the advice is informed by up-to-date data, contextual and other knowledge, people's experiences and research from New Zealand and overseas.

63. Cabinet suspended the requirement for RIS for decisions relating to 100 Day Plan proposals which solely involve the repeal of legislation.<sup>129</sup> Concerningly,

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<sup>124</sup> Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023), at 28.

<sup>125</sup> The Treasury New Zealand, *Regulatory Impact Statements* dated 9 July 2024, accessed at <<https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments>>.

<sup>126</sup> The Treasury New Zealand, *Regulatory Impact Statements* dated 9 July 2024, accessed at <<https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments>>.

<sup>127</sup> The Treasury New Zealand, *Impact Analysis Requirements for Regulatory Proposals* dated 17 May 2024, accessed at <<https://www.treasury.govt.nz/information-and-services/regulation/impact-analysis-requirements-regulatory-proposals>>.

<sup>128</sup> Department of the Prime Minister and Cabinet, *Evidence and evaluation* dated 13 February 2024, accessed at <<https://www.dPMC.govt.nz/our-programmes/policy-project/policy-advice-themes/evidence-and-evaluation>>.

<sup>129</sup> Cabinet Minute “100-Day Plan” (29 November 2023) CAB-23-MIN-0468 at [7].



since May 2024, RIS have been completed by the new Ministry of Regulations.<sup>130</sup> The Ministry of Regulations was an election point for the Act Party, and on their website, their rationale for such a ministry is that “if ACT has its way, future Governments aren’t going to be able to get away with making knee-jerk, populist laws to scratch political itches”.<sup>131</sup> However, by its own admission, the removal of Te Aka Whai Ora was to ‘scratch political itches’ and hastened in a knee-jerk manner through urgency and, without a RIS. It appears to the Crown; hasty legislation is acceptable when it removes assistance to Māori. This gives rise to a concern that the Crown is able to push legislation through Parliament without due process or concern for the implications of its actions.

64. In reference to the, then, Land Transport (Clean Vehicle Discount Scheme Repeal) Amendment Bill (now Act),<sup>132</sup> Hon Rachel Brooking noted that there was no RIS, and Hon David Seymour’s response, was that it had “gone through an election”. Hon Rachel Brooking surmises the issues with this, in that she identified that:<sup>133</sup>

Electors do not vote on the word-for-word of laws, and that is why we have the very good public process, which I thought Mr Seymour was a fan of, that we could go through and have a proper process through select committees.

65. Rt Hon Christopher Luxon’s rationale for suspending RIS for the repeal of legislation under their 100-day plan was that they “don’t think they’ll add value” and was also linked to their election promises.<sup>134</sup> This was made clear when he said, “we went to an election, we had a campaign, we made very clear what we

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<sup>130</sup> The Treasury, *Regulatory Impact Statements* dated 9 July 2024, accessed at <<https://www.treasury.govt.nz/publications/legislation/regulatory-impact-assessments>>.

<sup>131</sup> ACT New Zealand, *Policing Red Tape and Regulation* dated 2023, accessed at <<https://www.act.org.nz/red-tape-and-regulation>>.

<sup>132</sup> New Zealand Parliament (Hansard), 19 December 2023 772 NZPD 613.

<sup>133</sup> New Zealand Parliament (Hansard), 19 December 2023 772 NZPD 613.

<sup>134</sup> New Zealand Parliament (Hansard), 12 December 2023 772 NZPD 499.

were going to do, and we're going to do it.”<sup>135</sup> Rt Hon Christopher Luxon, went on to say:<sup>136</sup>

when we went to the election with really good clarity about the policies **we're going to repeal and the dumb legislation** from the previous Government that we're repealing—we're going to move forward with great speed... [emphasis added]

66. Rt Hon Christopher Luxon’s comments in relation to repealing “dumb legislation” includes the disestablishment of Te Aka Whai Ora, as it was repealed under their 100-day plan and, without a RIS. The coalition governments attitude towards Te Aka Whai Ora is deeply painful for the Claimants and Interested Parties, because, as Lady Moxon stated, Te Aka Whai Ora:<sup>137</sup>

was an outward and visible sign that the Crown was prepared to recognise Te Aka Whai Ora as a partner under Te Tiriti o Waitangi. Furthermore, it was established to bring about transformational change and create a more equitable health system for Maaori.

67. The process and rationale for excluding RIS is an issue of good governance, as for Crown actions to constitute good government, they must be just and fair,<sup>138</sup> following legal, international human rights, and Treaty norms.<sup>139</sup> The Crown passed the legislation to disestablish Te Aka Whai Ora in a manner that is contrary to the normal principles of law-making, and as such, have opted to legislate their way out of the accountability by suspending RIS.
68. Although the alternative plans will be analysed at a later stage, it is pertinent to note, that no alternative plans were provided to the public or, Māori during the process of the disestablishment. The procedural issues are exacerbated as there could be no detailed analysis without the provision of alternative plans.

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<sup>135</sup> New Zealand Parliament (Hansard), 12 December 2023 772 NZPD 499.

<sup>136</sup> New Zealand Parliament (Hansard), 12 December 2023 772 NZPD 499.

<sup>137</sup> Lady T H Moxon, Brief of Evidence of Lady Tureiti Haromi Moxon dated 20 February 2024, Wai 2575, #M1 at [15].

<sup>138</sup> Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023), at 15.

<sup>139</sup> Waitangi Tribunal, *Report on the Crown’s Foreshore and Seabed Policy* (Wai 1071, 2004), at xiii.

69. For there to have been any meaningful engagement or informed consultation, alternative plans would need to have been provided and analysed in a RIS and, by those consulted with. Alternative plans should have been developed in partnership with Māori and put in place prior to the disestablishment alongside a plan to transition from Te Aka Whai Ora to the new approach or entity. The result is that whilst the news of the disestablishment would always have invoked concern, without an alternative, fear for the current status of, and the future of Māori healthcare was and remains heightened. Lady Moxon’s concerns are apt in that: <sup>140</sup>

If Te Aka Whai Ora goes, most of the Crown's commitment to Te Tiriti in the Act is removed. The Te Aka Whai Ora seems to carry the responsibility of the entire health system for engagement with Maaori, monitoring the system and reporting to Maaori. If it goes, the Crown seems no longer to be accountable to Maaori and all that is left of a Maaori voice to advocate for ourselves is locally through iwi-Maaori partnership boards, and as an advisory to the Minister through the Hauora Maaori Advisory Committee.

70. It is fundamentally unjust that the Crown position was that there was insufficient information for the Tribunal to inquire into to assess the alternative plans for Māori healthcare, yet it was comfortable to disestablish Te Aka Whai Ora, with the same information. This highlights the government’s willingness to leave Māori without adequate and specialised healthcare. Suspending RIS is a critical departure from normal law making, that meant that the disestablishment of Te Aka Whai Ora did not get the “traditional level of regulatory scrutiny”<sup>141</sup> required to ensure legislation is not going to damaging consequences. Suspending RIS in this scenario is a breach of good government and is prejudicial to Māori but limiting the knowledge and available data on the consequences of disestablishment.

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<sup>140</sup> Lady T H Moxon, Brief of Evidence of Lady Tureiti Haromi Moxon dated 20 February 2024, Wai 2575, #M1 at [30].

<sup>141</sup> Thomas Coughlan, *Government rocked by second leak in five days, ministers suspend analysis of repeal proposals* (New Zealand Herald, 8 December 2023).

## Use of Urgency

71. The Tribunal has characterised good government as part of the Treaty's reciprocal exchange,<sup>142</sup> and as expressing the Crown's fiduciary duty to Māori, where the Crown must correct adverse impacts of colonisation on Māori with affirmative action.<sup>143</sup> For Crown actions to constitute good government, they must be just and fair,<sup>144</sup> following legal, international human rights, and Treaty norms.<sup>145</sup>
72. Urgency measures allow parliament to pass legislation in a swifter way, foregoing certain parliamentary procedures. The most radical and democratically problematical use of urgency is when it eliminates the select committee stage,<sup>146</sup> as the Crown did with the disestablishment of Te Aka Whai Ora.<sup>147</sup> The select committee process is where the public has their voice heard, which would have been a particularly crucial process, as the Crown failed to undergo specific consultation with Māori. Foregoing the select committee process is "the most constitutionally fraught aspect of urgency".<sup>148</sup> The view of Te Kāhui Tika Tangata is that forgoing the select committee process should "reserved for exceptional situations" and that "there is no compelling need for urgency here."<sup>149</sup>
73. The use of urgency law making powers, in respect of legislation that directly impacts Māori, goes outside of the ambit of good governance, as it ignores the Crown's responsibility to engage with their te Tiriti partner, and removed the select committee process, which cannot be said to be just and fair or within Treaty norms. The use of urgency by the coalition government, surpasses the

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<sup>142</sup> Waitangi Tribunal, *Maori Development Corporation Report* (Wai 350, 1993), at 31-32.

<sup>143</sup> Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Wai 2750, 2023), at 96.

<sup>144</sup> Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023), at 15.

<sup>145</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at xiii.

<sup>146</sup> C Geiringer, P Higbee et al. *What's the Hurry? Urgency in the New Zealand Legislative Process 1987- 2010* (Victoria University Press, Wellington, 2011) at 67.

<sup>147</sup> New Zealand Parliament (Hansard), 27 February 2024 773 NZPD 1522-1523.

<sup>148</sup> Phil Smith, *Parliament: Why so much urgency?* (Radio New Zealand, 3 March 2024).

<sup>149</sup> Te Kāhui Tika Tangata: Human Rights Commission, *Loss of Māori Health Authority out of step with te Tiriti and human rights* dated 29 February 2024, accessed at <<https://tikatangata.org.nz/news/government-out-of-step-with-erasure-of-maori-health-authority>>.

manner in which urgency passing abilities have been used in the past, and has utilised urgency more than any other government.<sup>150</sup>

74. Te Aka Whai Ora was disestablished under urgency, in under 24-hours.<sup>151</sup> Utilising urgency to disestablish the avenue to address inequitable health outcomes for Māori caused by colonisation, is in direct contradiction with the Crown's obligation to correct the adverse impacts of colonisation.
75. The removal of Te Aka Whai Ora was not a singular decision and was one element of sweeping legislation targeted against Māori. Whilst the scope of this inquiry is limited to the procedural issues of the disestablishment of Te Aka Whai Ora, it is prudent to consider the wider landscape of decision-making by the current government. For example, amendments (or intended amendments) to legislation in relation to Māori Wards, Smokefree Amendment Act, Section 7AA of the Oranga Tamariki Act, the Marine and Coastal Area Act, and the introduction of the Treaty Principles Bill, all directly prejudice Māori. The proposed Treaty Principles Bill was described by the Tribunal as "little more than a politically motivated attack on perceived 'Māori privilege' without any consideration of the Crown's constitutional and Treaty/ te Tiriti obligations to Māori".<sup>152</sup> Based on the abovementioned legislative action, it can be surmised that the disestablishment of Te Aka Whai Ora is an act of discrimination against Māori. Ms Tania King described that the policies of the coalition government "are a reinforcement of white supremacy and western values."<sup>153</sup> This is an important distinction, because the duty of good government is underpinned by non-discrimination,<sup>154</sup> and is another term for the rule of law.<sup>155</sup>
76. The prejudice is two-fold as the Crown failed to consult with Māori in the development of the bill, but then also removed the ability for due process in the

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<sup>150</sup> Marc Daalder, *Govt sets record for laws passed under urgency in first 100 days* (Newsroom, 8 March 2024).

<sup>151</sup> Gabrielle Baker, *Te Aka Whai Ora deserved so much more than its rushed death* (The Spinoff, 29 February 2024).

<sup>152</sup> Waitangi Tribunal, *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024), at 134.

<sup>153</sup> T Kingi, *Brief of Evidence of Tania Kingi* dated 20 February 2024, Wat 3307, #A4(a), at [12].

<sup>154</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004), at xiv.

<sup>155</sup> Waitangi Tribunal, *The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry Stage 2 Report* (Wai 2660, 2023), at 15.

passing of the bill with the exclusion of the select committee and use of urgency proceedings.

77. Urgency is widely accepted to have the purpose of addressing emergencies, correcting errors, responding to unforeseen events, to ensure certainty for financial markets, and urgency driven by an external deadline.<sup>156</sup> The government's over-optimism in terms of what they can deliver, and relying on urgency to deliver them, has been used in the past as a justification for urgency.<sup>157</sup> In these circumstances, it appears that urgency has been utilised to deliver an election promise that could only be met within 100-days, by using urgency, which is a known tactical move by the previous National-led government.
78. Whilst urgency can legally be used for a range of tactical reasons, "including to send messages to voters that their governments are effective and responsive to their wishes,"<sup>158</sup> doing so with Māori healthcare, is an unacceptable use of urgency, considering the special obligations that the Crown has to Māori and, the inequities of Māori health outcomes.
79. As a rationale for the use of urgency, the coalition government has argued that they politically campaigned on the disestablishment of Te Aka Whai Ora. This reason is technically legal, as the parliamentary rules only require that the Minister "inform the House with some particularity of the circumstances that warrant the claim for urgency."<sup>159</sup> In this way, there is no threshold test to ensure the argument is compelling. Therefore, whilst the use of urgency in respect of the disestablishment of Te Aka Whai Ora is legal, it should not be assumed that the way that the parliamentary rules have been used are te Tiriti compliant. The view of Te Kahui Tika Tangata was that "there is no compelling need for urgency

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<sup>156</sup> C Geiringer, P Higbee et al. *What's the Hurry? Urgency in the New Zealand Legislative Process 1987- 2010* (Victoria University Press, Wellington, 2011) at 48-53.

<sup>157</sup> C Geiringer, P Higbee et al. *What's the Hurry? Urgency in the New Zealand Legislative Process 1987- 2010* (Victoria University Press, Wellington, 2011) at 54.

<sup>158</sup> C Geiringer, P Higbee et al. *What's the Hurry? Urgency in the New Zealand Legislative Process 1987- 2010* (Victoria University Press, Wellington, 2011) at 65.

<sup>159</sup> Standing Orders of the House of Representatives 2023, SO 57(3).

here. Its use in this case is particularly concerning given the claims before the Waitangi Tribunal”.<sup>160</sup>

80. The prejudice caused by the use of urgency to avoid public feedback in the select committee process is heightened in these circumstances as it is a matter that directly impacts Māori and, there was no direct consultation with Māori.

#### Failure to Engage Meaningfully with the Tribunal

81. Throughout the process to reach urgency, the Crown delayed in providing the information requested of them by Claimants and, the Tribunal, including in terms of the alternative plans for Māori health. The Crown provided the alternative plans on 12 August 2024,<sup>161</sup> just one week before evidence and opening submissions were due to be filed with the Tribunal.<sup>162</sup> The initial deadline to provide the alternative plans, was 21 June 2024.<sup>163</sup> This lack of engagement was noted by Ms Janice Kuka when she said “the Tribunal has asked for information from the Crown multiple times about its alternative to Te Aka Whai Ora which it has not provided.”<sup>164</sup>
82. The Crown has rallied against Tribunal inquiry, at every step.
83. Looking to the previous Wai 3307 Urgent Inquiry, its timetable was designed based on the timeframe provided by the Crown, to introduce the legislation by 8 March 2024. Despite this, the Crown introduced the legislation to disestablish Te Aka Whai Ora two days before the Urgent Hearing was set to begin. Instead of following their indicated timeframe in a way that allowed the Wai 3307 hearing to commence, the Crown proceeded in a manner that stopped any potential engagement with the Claimants, Interested Parties, the Tribunal and with Māori. At this point, the Crown still did not provide any assurances to Māori by providing

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<sup>160</sup> Te Kāhui Tika Tangata: Human Rights Commission, *Loss of Māori Health Authority out of step with te Tiriti and human rights* dated 29 February 2024, accessed at <<https://tikatangata.org.nz/news/government-out-of-step-with-erasure-of-maori-health-authority>>.

<sup>161</sup> C Linkhorn, *Memorandum of counsel for the Crown regarding an update on alternative plans to Te Aka Whai Ora disestablishment* dated 13 Aug 24, Wai 2575, #3.2.1094.

<sup>162</sup> Waitangi Tribunal, *Memorandum-Directions of Judge D Stone Regarding Timetabling for Priority Inquiry into Disestablishment of Te Aka Whai Ora* dated 4 June 2024, Wai 2575, #2.6.173(a), at 1.

<sup>163</sup> Waitangi Tribunal, *Memorandum-Directions of Judge D Stone Regarding Timetabling for Priority Inquiry into Disestablishment of Te Aka Whai Ora* dated 4 June 2024, Wai 2575, #2.6.173(a), at 1.

<sup>164</sup> J Kuka, *Brief of Evidence of Janice Kuka* dated 3 September 2024, Wai 2575, #M2(c), at [26].

detailed alternative plans. Hon Willow-Jean Prime asked during the parliamentary debate to pass the legislation, if it was rushed under urgency, without a RIS or consultation (despite the numerous consultations to establish Te Aka Whai Ora) even though it would only come into effect as of 30 June 2024, because of the Tribunal hearing that was to commence the next day.<sup>165</sup> The question was not answered.

84. Disregarding the resources and efforts of Claimants, Interested Parties and the Tribunal, the Rt Hon Christopher Luxon simply said that they were “doing what we said we’d do” and that the Tribunal would “continue to look at it in the way that it wants to look at it”.<sup>166</sup> The Hon Shane Reti also emphasised that “after the legislation comes into effect, the Waitangi Tribunal will again have jurisdiction to consider a claim.”<sup>167</sup> The government’s commentary highlights a lack of genuine engagement with the Tribunal, and a position that irrespective of the evidence from Claimants, or Tribunal findings and recommendations, the planned disestablishment would progress. This is counter to the duty of consultation and the principle of partnership which obliges the Crown to take account of Māori views on a matter, part of which requires the Crown to be prepared to alter its original proposal.<sup>168</sup>
85. Further, the Claimants and Interested Parties in Wai 3307, were not personally advised by the Crown of this decision. Rather, they found out that the disestablishment Bill had been introduced to the house either through the media, or legal representation. The blatant disregard for the resources of the Tribunal and those involved in the Wai 3307 proceeding, indicates bad faith dealings with Māori given that the Bill was introduced less than two days prior to the planned commencement of the hearing.
86. Under section 8(2)(a) of the Treaty of Waitangi Act 1975, a Bill can be referred to the Tribunal by resolution of the House. If this occurs, the Tribunal is required

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<sup>165</sup> New Zealand Parliament (Hansard), 27 February 2024 733 NZPD at 1616.

<sup>166</sup> 1 News Reporters, *Axing Māori Health Authority before hearing ‘disrespectful’- expert* (1 News, 27 February 2024).

<sup>167</sup> 1 News Reporters, *Axing Māori Health Authority before hearing ‘disrespectful’- expert* (1 News, 27 February 2024).

<sup>168</sup> Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wai 692, 2001), at 71.



to examine the proposed legislation and report on whether, in its opinion, the provisions of the proposed legislation are contrary to the principles of the Treaty.

87. A proposal to refer the disestablishment bill to the Tribunal was not put forward to the House of Representatives. If there was a referral, this would have provided the opportunity for the Crown to have the Tribunal examine the proposed disestablishment, similar to engagement with the Wai 3307 Urgent Inquiry. As we have set out above, the Crown refused to meaningfully engage with Tribunal processes relating to the disestablishment of Te Aka Whai Ora, among other things. Engagement with the Tribunal would have signalled an intention towards actions that comply with te Tiriti obligations. We infer from the lack of engagement by the Crown that the Crown knew its te Tiriti obligations were in breach, as indicated by their concession of the failure to consult with Māori, but in addition, the Crown did not intend to make things right. In essence, the coalition government intended to continue abrogating the principles of the Treaty and from its perspective, engagement with the Tribunal was futile.

#### Prejudicial Impact of Decision

88. A final aspect of informed decision-making is to examine the potential risks of harm that might arise as a result of the proposed decision to disestablish Te Aka Whai Ora. It does appear that the Government dismissed any concerns of likely prejudice that would be accrued to tāngata whaikaha Māori, tāngata whaiora Māori, Māori health providers, primary health organisations, hapū and iwi Māori, and to the Māori population. This, despite, there being a substantial amount of prejudice evidence filed within the Wai 3307 Urgent Inquiry, and more recently in reference to the Priority Hearing into the Disestablishment of Te Aka Whai Ora highlighting the likely and actual prejudice and harm that would befall Māori on disestablishment. The evidence of Ms Stevens, the named claimant for the Wai 2671 claim is one such example of the real concern that:<sup>169</sup>

...if Te Aka Whai Ora is disestablished, much-needed support services for taangata whaiora Maaori, taangata maatau aa-wheako

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<sup>169</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22 at [6].

and rangatahi Maaori struggling with mental health (“taangata whaiora Maaori”) will be severely affected.

Ms Stevens further stated that the proposed decision had the potential to:<sup>170</sup>

to send taangata whaiora Maaori spiralling backwards to where we were several decades ago, when we were unable to access much-needed tikanga-based, te ao Maaori focused mental health care and support.

89. The concerns of Ms Steven’s are real and sustained. She spoke of the mamae that her whānau have experienced as a result of the early death of her late son, Nicholas Taiaroa Macpherson Stevens, and the direct impact of the lack of kaupapa Māori services available to him had:<sup>171</sup>

During Nicky’s time at Henry Bennett, he was treated by staff who had no knowledge of tikanga Maaori or of a te ao Maaori worldview. We believe that tikanga-based, Maaori-focused treatment would have helped Nicky immensely.

I am conscious that several decades ago, we, Maaori, were unable to exercise our tino rangatiratanga in respect of the types of mental healthcare services and supports we wanted. We were subject to the direction and policies dictated by eurocentric psychiatric approaches supported by the Crown and PHARMAC.

Indigenous approaches were an anathema and even the notion of Kaupapa Maaori Services were seen as less competent than eurocentric psychiatric approaches to mental health diagnosis and treatment.

90. In particular, Ms Stevens spoke of her concern that the proposed disestablishment would “limit accessibility of Maaori models of care to taangata whaiora Maaori and access to tikanga-based, te ao Maaori focused support and

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<sup>170</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22 at [7].

<sup>171</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22 at [12] to [14].

care and appropriate rongoaa Maaori treatment in the mental health space”<sup>172</sup> and that, ultimately: <sup>173</sup>

...this decision by the Crown will ultimately mean that our efforts to prevent premature death by suicide of our rangatahi Maaori will be of little use and other whaanau will ultimately be faced with the loss of their tamariki, as we did.

91. Ms Stevens’ concerns have been shared by claimants and interested parties in these proceedings as they relate to other spheres in the health system. Dr Elana Taipapaki Curtis gave evidence that disestablishment would “undermine the health and wellbeing of te iwi Māori”.<sup>174</sup> She went on to say that:<sup>175</sup>

Te Aka Whai Ora (if funded and supported appropriately over a reasonable period of time) is key for the Government to provide for a Treaty compliant mechanism to address these Treaty breaches and is required to achieve Māori health gain and eliminate Māori health inequities. Removing Te Aka Whai Ora is therefore a Treaty of Waitangi breach in my expert opinion.

92. Ms Kerri Nuku, for Wai 2713, provided a statement from Tōpūtanga Tapuhi Kaitiaki o Aotearoa, NZNO, that Te Aka Whai Ora was seeking to remedy the preference for importing international nurses rather than developing a Māori workforce. In this respect, the “disestablishment of Te Aka Whai Ora will set back this needed corrective and demonstrates that this policy of ethnic cleaning of our health sector is a return to a one size fits all approach that has failed Māori for over 180 years. It will fail again.”<sup>176</sup> Similarly, Mr Geoff Milner stated that:<sup>177</sup>

We worry about what is next because we have evolved under Te Aka Whai Ora. An organisation that is kaupapa Maaori driven. By Maaori

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<sup>172</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22 at [17].

<sup>173</sup> J Stevens, *Brief of Evidence of Jane Elizabeth Stevens dated 20 February 2024*, Wai 2575, #M22 at [20].

<sup>174</sup> Dr E T Curtis, *Brief of Evidence of Dr Elana Taipapaki Curtis dated 20 February 2024*, Wai 2575, #M27 at [25].

<sup>175</sup> Dr E T Curtis, *Brief of Evidence of Dr Elana Taipapaki Curtis dated 20 February 2024*, Wai 2575, #M27 at [27].

<sup>176</sup> K Nuku, *Affidavit of Kerri Nuku dated 20 February 2024*, Wai 2575, #M26; K Nuku, *Appendix A – Statement from Tōpūtanga Tapuhi Kaitiaki o Aotearoa on Disestablishment of Te Aka Whai Ora*, Wai 2575, #M26(a) at 2.

<sup>177</sup> G Milner, *Kōrero Taunaki o Geoff Miller dated 20 February 2024*, Wai 2575, #M15, at [16] to [17].

for Maaori, but for everyone. We were building better relationships with the Crown and tracking towards realising better outcomes for Maaori.

It feels like the disestablishment of Te Aka Whai Ora is a step backwards. Back towards being dictated to, back towards poor decisions, and back towards a model that does not serve Maaori.

93. In respect of the potential impact of this decision on the treaty relationship, Mr Geoff Milner stated that:<sup>178</sup>

We have not seen partnership, good faith, korero or involvement in the Government's decision to disestablish Te Aka Whai Ora. This suggests that the treaty relationship is not something the Government prioritised or valued when making its decision to dismantle the organisation within 100-days of coming into power.

94. Ms Rowena Tana stated that they do not know what is coming, what the alternatives are, and as such, they (the Ngāti Hine Health Trust) cannot plan. She stated emphatically that “[w]e very much feel undermined, disrespected, ignored, and devalued.”<sup>179</sup> For taangata whaikaha, Dr Huhana Hickey stated that:<sup>180</sup>

In my view, Maaori disabled were slowly building trust with Te Aka Whai Ora. Through work such as organisations like Te Ao Maarama Aotearoa led by Dr Tristram Ingham (who was a witness for this claim in the Disabilities Phase), Te Aka Whai Ora was steadily integrating Maaori disabled voices within its structures. While it's still early to assess the impact, the initial signs are encouraging. Our Maaori disabled rangatira were working with Te Aka Whai Ora to develop improved access and understanding of the needs of Maaori disabled. Maaori disabled voices were slowly but surely being heard; capacity was being built to address our needs alongside Maaori non-disabled needs at marae hauora services.

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<sup>178</sup> G Milner, *Kōrero Taunaki o Geoff Miller* dated 20 February 2024, Wai 2575, #M15, at [15].

<sup>179</sup> R Tana, *Kōrero Taunaki o Rowena Tana* dated 20 February 2024, Wai 2575, #M16 at [9].

<sup>180</sup> Dr H Hickey, *Brief of Evidence of Dr Huhana Hickey* dated 20 February 2024, Wai 2575, #M18 at [11] to [12].

Te Aka Whai Ora's potential lies in its continued effort to involve Maaori disabled voices more prominently in the health discourse. Its disestablishment therefore takes away the opportunity for Maaori disabled to rebuild those relationships from scratch with primary health providers and to work towards a system that is enabling rather disabling. We lose our opportunity to gain equity in the health system that we desperately need.

95. Notably, Ms Kerri Nuku referred to the high institutional knowledge bank that Te Aka Whai Ora retained because:<sup>181</sup>

...many of the Maaori staff who had advocated for us within the DHB were now at Te Aka Whai Ora. We knew as PHOs, and Providers that Te Aka Whai Ora was under pressure as they were understaffed and struggling to fill these new roles. However, despite this undercapacity they were now better positioned structurally and strategically to have an oversight of Maaori health. In their new role of commissioning, they could begin to identify and address inequities and barriers within the system and seek new operating models that could give better results and outcomes for Maaori. There was truly an air of optimism that for the first time in a long time we believed that together we could harness our efforts more effectively. Te Aka Whai Ora was just getting started and already had made a significant positive impact on us.

96. In addition to the loss of institutional knowledge, development of kaupapa Māori services and a focus on improving the Māori workforce, there are cost implications of disestablishing Te Aka Whai Ora. It is a concern that in the current climate of a drive for cost cutting across the public sector, the loss of pūtea that has been invested into the establishment and operation of Te Aka Whai Ora, its staff, and its infrastructure was not an important consideration. So, what we see instead of a warranted concern for the loss of investment, or efforts to retain some of the investment in hauora Māori by adapting the approach of Te Aka Whai Ora to health matters, "it seems like the Government are just

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<sup>181</sup> K Nuku, *Supplementary Brief of Evidence of Janice Kuka dated 3 September 2024*, Wai 2575, #M2(c) at [7].

implementing strategies carte blanche without assessing whether those strategies are effective or need modification.”<sup>182</sup>

### *Displacement of Te Aka Whai Ora Funding*

97. Claimants and Interested Parties in this priority hearing have raised concerns regarding the redirection of funding from Te Aka Whai Ora. Part of the process for disestablishment, should have included a clear and transparent plan for the allocated Te Aka Whai Ora funding, and personnel.

98. No evidence has been provided, to indicate that funding allocated to Te Aka Whai Ora, will be wholly redirected to Māori health inequalities. The disestablishment of Te Aka Whai Ora, will save the Crown \$35.5 million, and it has been reported that those frontline services will not be delivered by and with increased funding for Te Whatu Ora.<sup>183</sup> In a statement by the Hon. Dr Reti, the budget savings to disestablish Te Aka Whai Ora were mentioned:<sup>184</sup>

We are committed to finding more efficient ways to work together to deliver those solutions, as well as savings which can go back into better health outcomes.

99. As a part of Te Aka Whai Ora’s 2022 budget, they were allocated \$71.6 million dollars in commissioning of services.<sup>185</sup> Te Aka Whai Ora was not afforded the requisite time, to ensure that they could build the capacity to allocate their funds into the commissioning of kaupapa Māori solutions.

100. The 2024 budget shows limited Māori specific plans,<sup>186</sup> and government rhetoric has consistently emphasised their distaste towards services targeted for Māori. This has been seen in the removal of consideration for ethnicity in health

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<sup>182</sup> G Milner, *Kōrero Taunaki o Geoff Miller* dated 20 February 2024, Wai 2575, #M15, at [4].

<sup>183</sup> Pokere Paiwai, *So, what’s in the Budget for Māori* (Radio New Zealand, 31 May 2024).

<sup>184</sup> Dr Shane Reti, Minister for Health, *Reshaping the health system to bring Māori health closer to home* (New Zealand Government Press Release, 27 February 2024).

<sup>185</sup> Te Whatu Ora, *Te Aka Whai Ora announces \$71.6 million funding package to support Māori providers, invest in te ao Māori solutions Māori* dated 17 November 2022, accessed at <<https://www.tewhatauora.govt.nz/corporate-information/news-and-updates/te-aka-whai-ora-announces-71-6-million-funding-package-to-support-maori-providers-invest-in-te-ao-maori-solutions-maori>>.

<sup>186</sup> Pokere Paiwai, *So, what’s in the Budget for Māori* (Radio New Zealand, 31 May 2024).

tools,<sup>187</sup> and the direction that PHARMAC should not consider the Treaty of Waitangi.<sup>188</sup> It therefore raises the concern, that the funding that was allocated, and needed, to address Māori health inequities, will now be funnelled back into the mainstream health service for the mainstream population, and not for Māori.

101. Te Whatu Ora is facing a deficit in funding, which the Crown has said is due to “mismanaged health reforms, which resulted in an overly centralised operating model, limited oversight of financial and non-financial performance, and fragmented administrative data systems which were unable to identify risks until it was too late.”<sup>189</sup> The overall deficit faced by the health system raises the concern that Te Aka Whai Ora funding, will be utilised to mitigate this shortfall for the mainstream, rather than directly benefitting Māori. Further, it was reported that the disestablishment of Te Aka Whai Ora will save the government \$35.5 million with an increase in funding for Te Whatu Ora.<sup>190</sup> Thus indicating that of the funding for Te Aka Whai Ora is partially being moved into the general funding pool for Te Whatu Ora, and, partially used as a cost saving measure. This is of particular concern because of the well-established health inequities Māori face, which is accepted by the Crown.<sup>191</sup>
102. The Crown’s acknowledgement of the health inequities for Māori, followed by the removal of the system established to address that inequity, without any meaningful funding still targeted to Māori health, represents the bad faith towards Māori.

#### *The Loss of the Investment in Te Aka Whai Ora*

103. A large part of Te Aka Whai Ora’s time was used to establish itself in terms of its structure, and resourcing. It is understood that “many former Te Aka Whai Ora

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<sup>187</sup> Jo Moir, *Health NZ drops tool that factored in ethnicity for waitlists, despite review findings* (Radio New Zealand, 1 August 2024).

<sup>188</sup> Radio New Zealand, *Pharmac and Te Tiriti: Changes labelled 'performative', some question relevance* (Radio New Zealand, 17 July 2024).

<sup>189</sup> Thomas Coughlan, *Beehive assumes close control of Health NZ, Labour blames Budget underfunding* (New Zealand Herald, 22 July 2024).

<sup>190</sup> Pokere Paiwai, *So, what's in the Budget for Māori* (Radio New Zealand, 31 May 2024).

<sup>191</sup> G Melvin, *Memorandum of Counsel for the Crown in response to application for urgent inquiry* dated 18 December 2023, Wai 3307, #3.1.28, at [13].

staff are understood to have returned to the community health sector.”<sup>192</sup> However, the Hon Shane Reti confirmed that not all positions from Te Aka Whai Ora would transfer to Te Whatu Ora:<sup>193</sup>

...[not] simply a rehoming of the Māori Health Authority within Health New Zealand and the Ministry of Health.

There will be less funded positions transferred across from unfilled positions especially. These are being covered to date by expensive consultants.

104. Ms Janice Kuka and Lady Tureiti Moxon’s joint evidence highlighted that Te Aka Whai Ora employed 280 kaimahi, and the Hauora Māori services team, reduced to 238 kaimahi.<sup>194</sup> This raises concern in relation to the reduced capabilities of Māori services.
105. Although some services have been commissioned by Te Aka Whai Ora, largely, their funding in the first stages of establishment was used on setting up its structures. As Te Aka Whai Ora has now been disestablished, the funding used to establish itself, has not been utilised in a way that is beneficial on a cost basis. The issues in relation to Te Aka Whai Ora should not be centred around wasted expenditure, or the cost of not providing equitable healthcare to Māori. However, it should be noted, that resourcing is a key barrier to Māori receiving adequate and culturally appropriate healthcare. This is particularly notable, as it the cost of inequitable healthcare has been assessed:<sup>195</sup>

Sapere also estimated that funding primary health care in a Treaty compliant way for the whole Maaori population, would cost between \$891 million and \$1.06 billion a year and the cost of not providing an equitable health service to Maaori is estimated to be \$5 billion a year.

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<sup>192</sup> Moana Ellis, *How Māori health providers are getting on after the end of Te Aka Whai Ora Māori Health Authority* (Whanganui Chronicle, 7 July 2024).

<sup>193</sup> Ella Stewart, *How the coalition plans to replace the quickly scrapped Māori Health Authority* (Radio New Zealand, 18 April 2024).

<sup>194</sup> J Kuka, T Moxon, *Joint Brief of Evidence of Ms Janice Kuka and Lady Tureiti Moxon* dated 3 September 2024, Wai 2575, #M35(b), at [26].

<sup>195</sup> *Statement of Claim for Wai 3307* dated 8 December 2023, Wai 3307, #1.1.1, at [24].



106. The RIS used to determine the organisational structure of Te Aka Whai Ora identified that analysis yielded benefits of \$297 and \$362 million in comparison to organisational costs of \$282 million.<sup>196</sup> It follows that if Te Aka Whai Ora was afforded the time to fully establish itself, it would have been a fiscally beneficial for the government. Again, we reiterate that a cost / benefit analysis does not represent why Te Aka Whai Ora should be in place but is relevant to the governments arguments in relation to cost savings by disestablishing Te Aka Whai Ora. Further, by allowing government funding to be used in a fiscally irresponsible manner (due to the disestablishment), and without input from Māori, the principle of good governance and rangatiratanga are compromised.

## PREJUDICE

107. As a result of the above actions and omissions of the Crown, the Claimants and the Interested Parties have and continue to suffer the following prejudice:

- a. Serious harm to the treaty relationship.<sup>197</sup>
- b. Harm and a loss of mana through the Crown's failure to engage with the Claimants and the Interested Parties, and Māori in reference to the disestablishment of Te Aka Whai Ora, and the creation of any alternative entity.<sup>198</sup>
- c. Greater exposure to health inequity, loss of much-needed health services and supports, and a loss of development of kaupapa Māori services, and the Māori workforce;<sup>199</sup> and

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<sup>196</sup> Department of the Prime Minister and Cabinet (Health Transition Unit), *Regulatory Impact Statement: Decision on the organisational form of Maori Health Authority* dated 2 September 2021, accessed at <<https://www.dPMC.govt.nz/sites/default/files/2021-10/ria-dPMC-mha-sep21.pdf>>, at 2.

<sup>197</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [60.b].

<sup>198</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [36.b].

<sup>199</sup> *Joint Amended Statement of Claim for Wai 762*, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [60.c].

- d. No longer have an entity that is acting in their best interests and on their behalf.<sup>200</sup>

## CONCLUSION

108. The Crown decision to disestablish Te Aka Whai Ora was *ultra vires*, and the unilateral nature of the decision has seriously damaged the treaty relationship because the Crown stepped beyond kawanatanga role and undermined tino rangatiratanga.
109. As accepted by the Crown, Te Aka Whai Ora was disestablished under urgency, based on political campaigning, and without consultation. Consultation is sometimes the very least of the Crown's Treaty duty.<sup>201</sup> Yet, the Crown chose to omit consultation with full knowledge of their obligations to Māori as their treaty partner, and thus have not acted in good faith towards Māori. Māori were not informed on the decision to disestablish Te Aka Whai Ora.
110. The disestablishment of Te Aka Whai Ora without a viable alternative to address the inequities of health outcomes for Māori further demonstrates the lack of intention to act in good faith towards Māori. By disestablishing Te Aka Whai Ora under urgency without a select committee process or RIS, the Crown excluded the ability for meaningful engagement on a public level. This is particularly concerning, when considering that the Crown did not consult with Māori directly, despite the duty to do so. The emphasis on politically based decision-making opposed to evidence based decision-making, is particularly problematic when considering the inequitable health outcomes for Māori, cost implications of the decision, the lack of mandate, refusal to engage with the Tribunal on its decision, and the failure of the Crown to evaluate possible harm to Māori as a result of the decision. Further process issues include the lack of transparency around the alternative plans for Māori healthcare, including where funding would be

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<sup>200</sup> *Joint Amended Statement of Claim for Wai 762, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096* dated 23 July 2024, at [60.d].

<sup>201</sup> Waitangi Tribunal, *Report on Whakatika ki Runga, a Mini-Inquiry Commencing Te Rau o te Tika: The Justice System Inquiry* (Wai 3060, 2023) at 23.

reallocated, and the failure to provide Te Aka Whai Ora adequate time to establish itself.

111. In conclusion, the disestablishment of Te Aka Whai Ora, on its face, provides no benefit to hauora Māori, despite the recognition that the health system continues to deliver poorly for Māori.<sup>202</sup> The Claimants and Interested Parties are therefore concerned that the Crown has used their parliamentary power to avoid scrutiny by:

- a. The use of urgency to pass the repealing legislation swiftly.
- b. No consultation with Māori healthcare providers, or Māori that may use Te Aka Whai Ora.
- c. No RIS, which would force the Crown to articulate the benefits and risks of disestablishment.
- d. The introduction of the bill directly prior to the Wai 3307 Urgent Hearing, forcing its foreclosure; and
- e. Filing a tranche of documents on 12 August, five working days before Counsel submissions and Claimant/Interested Party evidence was due to be filed.<sup>203</sup>

112. Overall, we submit that the Crown has failed Māori by way of allowing hauora Māori to be a victim of political positioning. In doing so, the Crown has breached their te Tiriti obligations and has acted in bad faith by failing to adhere to a fair process in the disestablishment of Te Aka Whai Ora.

## **RECOMMENDATIONS SOUGHT**

113. Previous Tribunals have stated that where the Crown has acted in breach of the principles of the Treaty, and Māori have suffered prejudice as a result, the Crown

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<sup>202</sup> Manatū Hauora, *Disestablishment of the Māori Health Authority - Next Steps on Māori Health* dated 12 August 2024, accessed at <[https://www.health.govt.nz/system/files/documents/information-release/disestablishment\\_of\\_the\\_mha\\_next\\_steps\\_hauora\\_maori\\_bundle\\_120824\\_black\\_box\\_1.pdf](https://www.health.govt.nz/system/files/documents/information-release/disestablishment_of_the_mha_next_steps_hauora_maori_bundle_120824_black_box_1.pdf)> at 10.

<sup>203</sup> C Linkhorn, *Memorandum of counsel for the Crown regarding an update on alternative plans to Te Aka Whai Ora disestablishment* dated 13 Aug 24, Wai 2575, #3.2.1094.

has a clear duty to set matters right.<sup>204</sup> This principle of redress requires the Crown to act so as to restore the honour and integrity of the Crown and the mana and status of Māori.<sup>205</sup> It follows that the Crown is obligated to set matters right in terms of how Te Aka Whai Ora was disestablished.

114. With the exclusion of Wai 1531, the Claimants and Interested Parties seek a sincere and public apology from the Crown for its actions in failing to adhere to te Tiriti principles<sup>206</sup> and, for the prejudice caused.
115. The Claimants and Interested Parties seek findings that the Crown breached the following principles of te Tiriti:
  - a. Tino rangatiratanga by disestablishing Te Aka Whai Ora unilaterally and without due regard to the tino rangatiratanga of the Claimants, Interested Parties and Māori.
  - b. Partnership, whereby the Crown has failed to partner with Māori in the decision-making process of disestablishing Te Aka Whai Ora, and the co-design of any alternative.
  - c. Duty of consultation by failing to consult with Māori in relation to the decision to disestablish Te Aka Whai Ora.
  - d. Duty to act in good faith in that the Crown consistently acted in bad faith towards Māori by making politically based decisions that harm Māori, opposed to evidence-based decisions, including by suspending RIS; and
  - e. Good Government, in that the Crown failed to follow its consultation requirements and abused its ability to use urgency.

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<sup>204</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), at 134–135.

<sup>205</sup> Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), at 134–135.

<sup>206</sup> *Joint Amended Statement of Claim for Wai 762, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096* dated 23 July 2024, at [37.b].

116. The Claimants and Interested Parties seek recommendations that the Crown:

- a. Consult directly with hapū and te iwi Māori in relation to its alternative plans, and further, that the Crown consult with the Claimants and Interested Parties on a consultation model to ensure that all relevant stakeholders are consulted.
- b. Commission research into a cost-benefit analysis of a by-Māori-for-Māori approach.
- c. Reinstate RIS for all legislative and policy amendments for matters relating to hauora Māori.
- d. Create (or recreate) a separate and autonomous entity to lead the commissioning and delivery of health services to Māori;<sup>207</sup> and
- e. Any other such recommendation that the Tribunal should consider appropriate.

**DATED at TĀMAKI MAKAURAU this 14<sup>th</sup> day of October 2024**



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S J Roughton / C R Smith  
Counsel Acting

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<sup>207</sup> *Joint Amended Statement of Claim for Wai 762, 861, 1477, 1531, 1886, 2063, 2206, 2217, 2377, 2382, 2671, 2729, 2747, 2776, 2778, 2890, 2894, and 3096 dated 23 July 2024, at [37.c].*