

I TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGI
IN THE WAITANGI TRIBUNAL

Wai 2575
Wai 2619

In the Matter of the Treaty of Waitangi Act 1975

And

In the Matter of the Health Services and Outcomes
Kaupapa Inquiry (Wai 2575)

And

In the Matter of a claim by Dr Huhana Hickey on behalf
of herself and other Maaori Disabled (Wai
2619)

Closing Submissions on behalf of Wai 2619

Dated 14 October 2024

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**TEENAA E TE TARAIPUUNERA
MAY IT PLEASE THE TRIBUNAL**

1. These Closing Submissions are filed on behalf of Wai 2619, a claim by Dr Huhana Hickey on behalf of herself and other Maaori Disabled (**Claimant**), and in relation to the priority inquiry into the disestablishment of Te Aka Whai Ora (**Priority Inquiry**), specifically on the issue of the processes and steps the Crown has taken in the disestablishment of Te Aka Whai Ora / the Maaori Health Authority (**Disestablishment Issue**).
2. The Claimant has sought full party status to the Priority Inquiry,¹ advocating for the rights of whaanau hauaa Maaori / Maaori disabled (henceforth **Whaanau Hauaa Maaori**)² across all government sectors but also specifically within the health and disability system.
3. At the outset, the Claimant generally endorses and supports the submissions made by the Lead Claimant of this Priority Inquiry in so far as it is applicable to Whaanau Hauaa Maaori. The intention of these submissions is to support and supplement those submissions of the Lead Claimant and their counsel.
4. Our submissions focus on the proactive release of Cabinet and briefing material regarding the disestablishment of Te Aka Whai Ora the Maaori Health Authority (henceforth referred to as **Te Aka Whai Ora**), published on 27 February 2024 by the Ministry of Health (**MHA Disestablishment Documents**),³ and our analysis on the material available to Minister Reti, and therefore the Crown, throughout the whole process, with a particular focus also on impacts on Whaanau Hauaa Maaori.
5. These Closing Submissions are structured as follows:

¹ An amended Statement of Claim was filed on 22 July 2024, accompanied by a memorandum of counsel seeking leave for Wai 2619 to participate as a full party to the Priority Inquiry. At the time of filing these Closing Submissions, it is still in the process of being registered.

² We use the term Whaanau Hauaa Maaori to describe Maaori with lived experience of disability in these Closing Submissions as this is the Claimant's preferred terminology. We acknowledge that there are many terms that other Maaori disabled use to identify themselves.

³ Can also be found at Ministry of Health *Cabinet and briefing material: Disestablishment of the Maaori Health Authority* (information release, 27 February 2024), accessed at: <https://www.health.govt.nz/information-releases/cabinet-and-briefing-material-disestablishment-of-the-maori-health-authority>.

- a. Te Tiriti and its Principles Relevant to the Disestablishment Issue;
 - b. Disestablishment of Te Aka Whai Ora is Clearly a Breach of te Tiriti and its Principles;
 - c. Maaori Disabled Have Experienced and Continue to Experience Prejudice; and
 - d. Findings and Recommendations Sought.
6. Counsel further rely on the Closing Submissions on behalf of Wai 2619 filed in relation to the Maaori with lived experience of disabilities phase,⁴ with regard to the experiences of Whaanau Hauaa Maaori within the wider health and disability system, as contextual information for these Closing Submissions. In our submission, the overall situation for Whaanau Hauaa Maaori was already extremely unsatisfactory and in breach of te Tiriti before the establishment of Te Aka Whai Ora, and those submissions made that argument. Now Whaanau Hauaa Maaori are having to face the Crown's immediate and unilateral obliteration of Te Aka Whai Ora, without consultation with them, although it was supposed to be, in part, a remedy for the numerous problems previously identified – leaving them worse off than they were previously, since no alternative has even been mooted, let alone consulted or implemented. The identification and discussion of those previous issues therefore remains germane to this new situation and developing crisis of the Crown's re-making.
7. We also refer to the following documents filed on behalf of Wai 2619 for the Priority Inquiry:
- a. Opening Submissions on behalf of Wai 2619 for the Priority Inquiry, (Wai 2575, #3.3.098), dated 20 February 2024; and
 - b. Brief of Evidence of Dr Huhana Hickey (Wai 2575, #M18), dated 20 February 2024.

^B Wai 2575, #3.3.120.

Te Tiriti and its Principles Relevant to the Disestablishment Issue

8. Counsel and the Claimant rely on the articles of te Tiriti o Waitangi (**te Tiriti**) and the following principles:
 - a. Te Maataapono o te Tino Rangatiratanga;
 - b. Te Maataapono o te Kaawanatanga;
 - c. Te Maataapono o te Kaawanatanga Tootika / the Principle of Good Government;
 - d. Te Maataapono o te Houruatanga / the Principle of Partnership
 - e. Te Maataapono o te Whakamarumarutia / the Principle of Active Protection; and
 - f. Te Maataapono o te Mana Taurite / the Principle of Equity.
9. We also submit that there are various Crown duties that arise from the abovenamed principles that are applicable to the Disestablishment Issue:
 - a. Duty to act reasonably;
 - b. Duty to act honourably;
 - c. Duty to act in good faith;
 - d. Duty to engage; and
 - e. Duty to make informed decisions.
10. Counsel stress that while these duties may fall out te Tiriti, these are duties that relate to the practice of good government more generally and how a government of Aotearoa New Zealand would be expected to act under our existing constitutional conventions and the rule of law. We submit this particularly because the disestablishment of Te Aka Whai Ora was a political commitment born out of the National-ACT and National-New Zealand First Coalition Agreements, rushed through the House of Representatives under

“urgency”,⁵ simply because it was one of the commitments on a list within the Coalition Government’s first 100-Day Action Plan.⁶

11. The political commitment, leading to the political process, was therefore generated not by objective external need, but by the present Government’s own internal political processes. It was then given urgency solely by the Government’s own internal management of its self-created issue. No attempt was made to deal with the issues Te Aka Whai Ora was created to address, leaving these issues still hanging for Whaanau Hauaa Maaori, and, as already submitted, leaves Whaanau Hauaa Maaori worse off.⁷ Nor was there any attempt to work things through with the affected groups, including Whaanau Hauaa Maaori in the manner of a proper policy development, in order, for example, to fine tune Te Aka Whai Ora or enable it to better achieve the goals for which it had been created.
12. For these Closing Submissions, we rely on the Tribunal’s articulation of the principles of te Tiriti in *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Hauora Report)*,⁸ and *Haumarū: the COVID-19 Priority Report (Haumarū Report)*,⁹ in relation to the health system. We further rely on the Tribunal’s interpretation of te Tiriti and its principles in the *Ngāa Maataapono: The Interim Report of the Tomokia Ngāa Tatau o Matangireia – the Constitutional Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies (Ngāa Maataapono Report)*,¹⁰ particularly in respect of the constitutional processes followed in the disestablishment of Te Aka Whai Ora.
13. We do not expand much further on these well-established principles, except

⁵ (27 February 2024) 773 NZPD 1523.

⁶ Rt Hon Christopher Luxon “Coalition Government unveils 100-day plan” (press release, 29 November 2023), accessed at <<https://www.beehive.govt.nz/release/coalition-government-unveils-100-day-plan>>.

⁷ Wai 2575, #M18.

⁸ Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023).

⁹ Waitangi Tribunal *Haumarū: the COVID-19 Priority Report* (Wai 2575, 2021).

¹⁰ Waitangi Tribunal *Ngāa Maataapono: The Interim Report of the Tomokia Ngāa Tatau o Matangireia – the Constitutional Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024).

to emphasise how these principles also apply to Whaanau Hauaa Maaori:

- a. Whaanau Hauaa Maaori have their own inherent tino rangatiratanga and the right to manage their own affairs in accordance with tikanga;
- b. The Crown's exercise of kaawanatanga must not diminish Maaori tino rangatiratanga, including the tino rangatiratanga of Whaanau Hauaa Maaori;
- c. Given that Whaanau Hauaa Maaori are one of the most vulnerable population groups in Aotearoa New Zealand, the principle of good government requires a high level of transparency and effective policy responses specific to their needs, evoking in particular the duty to make informed decisions;
- d. Where Crown kaawanatanga overlaps with Maaori tino rangatiratanga, the Crown must engage and partner with Whaanau Hauaa Maaori *as well as* Maaori in general, in a genuine and meaningful way;
- e. The Crown must actively protect Whaanau Hauaa Maaori tino rangatiratanga over their hauora; and
- f. The Crown's obligations under the principle of equity as related to Whaanau Hauaa Maaori are heightened given the longstanding knowledge of persistent health disparities Whaanau Hauaa Maaori have experienced. To discharge the Crown's obligations under this principle, health equity must be achieved for Whaanau Hauaa Maaori in relation to Maaori non-disabled, disabled non-Maaori, and non-Maaori non-disabled.¹¹

Disestablishment of Te Aka Whai Ora is Clearly a Breach of te Tiriti and its Principles

14. We submit overall that there are three particular Crown acts undertaken in

¹¹ See for example Statistics New Zealand *He Hauaa Maaori: Findings from the 2013 Disability Survey* (Statistics New Zealand, Wellington, June 2015).

the process of disestablishing Te Aka Whai Ora which breach te Tiriti and its principles. These are:

- a. The decision to promote policy to disestablish Te Aka Whai Ora;
 - b. The decision to disestablish Te Aka Whai Ora; and
 - c. The act itself of disestablishing Te Aka Whai Ora.
15. While these three Crown acts all form part of the process of disestablishing Te Aka Whai Ora, we stress that each act, individually and cumulatively, demonstrates a carefully considered, and deliberate, effort to disregard te Tiriti and its principles, and highlights the egregious abuse of constitutional processes by the current Coalition Government.

A Decision Based on the Political Will of Minority Parties

16. Crown Counsel have previously submitted that the decision to promote legislation to disestablish Te Aka Whai Ora was made at a political level and is not a product of a policy process undertaken by officials.¹² Indeed, the genesis of the policy decision, in our submission, is directly attributed to the Coalition Agreements signed on 24 November 2023. Both the National-ACT and National-New Zealand First Coalition Agreements, under the heading “*Delivering Better Public Services*”, states that “to improve the effectiveness, efficiency and responsiveness of public services” the Coalition Government will disestablish/abolish the Maaori Health Authority.¹³
17. On 29 November 2023, this policy decision to disestablish Te Aka Whai Ora was reaffirmed by the Crown when Prime Minister Christopher Luxon issued

¹² Wai 2575, #3.2.930 at [14].

¹³ New Zealand National Party & ACT New Zealand *Coalition Agreement between the National Party and the ACT Party* dated 24 November 2023, at p. 8, accessed at: <https://assets.nationbuilder.com/nationalparty/pages/18466/attachments/original/1700778592/National_ACT_Agreement.pdf?1700778592>; New Zealand National Party and New Zealand First *Coalition Agreement between the National Party and New Zealand First Party* dated 24 November 2023, accessed at: <https://assets.nationbuilder.com/nzfirst/pages/4462/attachments/original/1700784896/National_NZF_Coalition_Agreement_signed_-_24_Nov_2023.pdf?1700784896>. The National-ACT Coalition Agreement uses the term “disestablish”, while the National-NZ First Coalition Agreement uses the term “abolish”.

a media release on the Coalition Government’s plans for its first 100 days.¹⁴ This included “introducing legislation to disestablish the [Maaori] Health Authority”.¹⁵

18. The decision and timeframe having been made solely in-house, work was underway immediately, as described in the MHA Disestablishment Documents.¹⁶ Briefing documents were provided by Ministry of Health officials, shortly after the formation of the Coalition Government, seeking direction from Minister Shane Reti in his capacity as Minister of Health.¹⁷ Included in those documents was a briefing paper seeking his initial views on the future direction of health system structures, noting the commitment to disestablishing the Maaori Health Authority.¹⁸ We submit that these attempts by officials to seek direction on a policy they were already working on, reinforce how little this policy had been generated by a publicly perceived need and was confined to a narrow political agenda.
19. By 27 February 2024, just under two months since the 100-Day Action Plan was announced, the Pae Ora (Disestablishment of the Maaori Health Authority) Amendment Bill (**Bill**) was introduced into the House of Representatives. As shown in the MHA Disestablishment Documents, the compressed timeframe of the 100-Day Action Plan meant that consultation only occurred once, and that was only internally between different government departments.¹⁹ This was yet another “beltway bubble” programme, with no affected party engaged with, least of all Whaanau Hauaa Maaori.
20. It is in this section that we analyse the nuance between the policy decision

¹⁴ “Coalition Government unveils 100-day plan” press release.

¹⁵ “Coalition Government unveils 100-day plan”, press release.

¹⁶ In particular, Ministry of Health “Issues and opportunities for hauora Maaori” (briefing paper, H2023032865, dated 28 November 2023) and Ministry of Health “Advice on disestablishing the Maaori Health Authority” (briefing paper, H2023032885, dated 28 November 2023).

¹⁷ As discussed in “Issues and opportunities for hauora Maaori” and “Advice on disestablishing the Maaori Health Authority”.

¹⁸ “Issues and opportunities for hauora Maaori” at [9]-[11].

¹⁹ Cabinet 100-Day Plan Committee “Disestablishment of the Maaori Health Authority” (Cabinet minute, 100-24-MIN-0001) and associated paper “Disestablishment of the Maaori Health Authority”, at p.8, [45]-[46].

and the decision to disestablish Te Aka Whai Ora. Both decisions, at the time they were made, did not have any input whatsoever from Whaanau Hauaa Maaori specifically, and Maaori generally, for whom Te Aka Whai Ora was designed. We again reiterate the submissions of the Crown that the policy decision was made at a political level. Once the policy decision was in train, there was a two-month window (of their own arbitrarily compressed timeframe) with which the Crown ought to have consulted with Maaori and Whaanau Hauaa Maaori on whether to continue to pursue the policy decision, but the Crown chose not to.

21. Tino rangatiratanga demands that Maaori must be the ones to wield the Maaori Health Authority's mandate, and it is to Maaori that it must be accountable.²⁰ It is their health at stake, no one else's, and, as Whaanau Haaaua Maaori have consistently stated, nothing should be done about them, without them. As expressed by the Tribunal in the *Hauora* Report, Maaori suffered as a result of systemic, inherent and sometimes unconscious bias in their healthcare,²¹ with Whaanau Hauaa Maaori experiencing even further and additional biases within the health system.²² Arising out of the failure to address Maaori health inequities and its persistence, the Maaori Health Authority was designed specifically to look after and prioritise Maaori interests within the primary healthcare system, and the wider health system in general.²³ It was designed with a degree of autonomy and independence from the Crown to ensure that resources were available to pursue better health outcomes for Maaori, including to some extent Whaanau Hauaa Maaori.²⁴ Therefore, if the Crown were genuine in its desire to address Maaori health inequities and Tiriti-compliance, it ought to have, in our submission, acknowledged that Te Aka Whai Ora is in the ambit of Maaori tino rangatiratanga.
22. We therefore submit that these acts are the Crown overstepping its kaawanatanga role and imposing itself in the tino rangatiratanga sphere, in

²⁰ *Hauora* Report, at p. xxii.

²¹ *Hauora* Report at [8.4], pp. 151-155.

²² See Wai 2575, #3.3.120. See also, *Haumarū* Report at pp. 110-112.

²³ *Hauora* Report at [10.2.2], pp. 176-177.

²⁴ *Hauora* Report at [10.2.2], pp. 176-177.

breach of te Tiriti and the principles of tino rangatiratanga, kaawanatanga and partnership.

23. Furthermore, the decision to disestablish and the act of disestablishment, in the face of the call by Maaori and Whaanau Hauaa Maaori across the motu *not* to disestablish Te Aka Whai Ora during the two months when the Crown was promoting the policy,²⁵ is also, in our submission, the Crown overstepping its kaawanatanga role and imposing itself into the tino rangatiratanga sphere, in breach of te Tiriti and the principles of tino rangatiratanga, kaawanatanga and partnership.
24. More crucially, as already noted by the Tribunal, the entity that was Te Aka Whai Ora was a step towards a Tiriti-compliant public health system,²⁶ in response to and with the guidance of the *Hauora* Report. Although it could not be said that the entity and its future work *is* Tiriti-compliant, the fact of the matter is that the potential existed, and relationships were being built.²⁷ Te Aka Whai Ora had not even completed its two-year transitional period,²⁸ which, in itself speaks volumes of the failure of the Crown to appreciate and to address in good faith the long term forecast of achieving health equity for Whaanau Hauaa Maaori specifically and Maaori in general.²⁹
25. Therefore, what the policy decision, and the actual decision to disestablish, as well as the act of disestablishment of, Te Aka Whai Ora symbolises is the blatant disregard of Maaori expressions of tino rangatiratanga in the health system and mana motuhake over their own hauora and healthcare, which as the Tribunal in the *Hauora* Report has already found, has not been

²⁵ Wai 2575, #M18 at [16.a.]. See also (27 February 2024) 773 NZPD, and for example, comments by Hon Dr Ayesha Verrall at p. 1538, Hon Peeni Henare at p. 1543, Huuhana Lyndon at pp. 1544-1545, Hon Willie Jackson at pp. 1551, Hon Dr Duncan Webb at p. 1567, Hana-Rawhiti Maipi-Clarke at p. 1568 discussing the lack of consultation with te iwi Maaori.

²⁶ *Hauora* Report at [10.2.3] at pp. 178-179. This was also acknowledged by the Crown in its opening submissions, Wai 2575, 3.3.109 at [11].

²⁷ Wai 2575, #M18 at [7]-[13].

²⁸ See Health New Zealand “Te Aka Whai Ora quarterly reports” dated 30 September 2024, accessed at <<https://www.tewhatauora.govt.nz/publications/te-aka-whai-ora-quarterly-reports>>. See also, “Advice on disestablishing the Maaori Health Authority” at [14] where officials state that “the current two-year transitional period of change ends in June 2024” referring to the implementation of Pae Ora (Healthy Futures) Act 2022.

²⁹ As discussed in “Issues and opportunities for hauora Maaori” at [1]-[8] and “Advice on disestablishing the Maaori Health Authority” at [1]-[15].

recognised or properly provided for in the primary health care framework.³⁰ Cast in the best possible light, it is the Crown, once again, asserting its paternalistic position that it knows what is best for Maaori, and Whanaau Hauaa Maaori.

26. This, in our submission, is in breach, again, of the principles of tino rangatiratanga, kaawanatanga and partnership. The Crown itself has submitted that “it appreciates Te Aka Whai Ora represents a part of their aspirations for greater expression of tino rangatiratanga in the health system”.³¹ Given this acknowledgement, and in addition to our submissions above, we therefore submit that it is open to the Tribunal to make a finding that the decision to pursue the policy of disestablishment of, the decision to disestablish, and the act of disestablishing Te Aka Whai Ora are in breach of the principles of tino rangatiratanga, kaawanatanga and partnership.

The Decision was Made with No Supporting Evidence and Contrary to Advice

27. The Crown has already accepted that it is well-informed about poor health and outcomes that Maaori experience and accepts that there is a need to address this.³² In our analysis, this fact is also evident in the MHA Disestablishment Documents.³³ We therefore submit on this basis that the Crown is well-aware of its obligations under the principles of active protection and equity in relation to hauora Maaori.
28. We further submit that Minister Reti and the Crown more generally were therefore aware of the implications of disestablishing of Te Aka Whai Ora. We also submit that, because the Ministry officials pre-emptively discussed options for progressing priorities to disestablish Te Aka Whai Ora, Crown officials were not as explicit as they could have been in their advice

³⁰ *Hauora Report* at p. 160.

³¹ See Wai 2575, #3.3.109 at [1].

³² Wai 2575, #3.2.930 at [13].

³³ See “Issues and opportunities for hauora Maaori” at [12]-[17]; “Advice on disestablishing the Maaori Health Authority” at [16]-[29]; and Te Aka Whai Ora “Options for future arrangements for Te Aka Whai Ora | Maaori Health Authority Functions” (briefing paper, MHA33202 dated 1 December 2023) at [3]-[8].

regarding the risks associated with disestablishment.³⁴ However, analysing the MHA Disestablishment Documents, we note that Crown officials in their initial briefings to the Minister:³⁵

- a. Emphasised the role and functions of Te Aka Whai Ora and the history behind its establishment as part of the recent health reforms;
- b. Noted progress to date with regards to the establishment of the new entities and initial operating models and with regard to corresponding/resulting improvement in some health statistics; and
- c. Included some of the risks associated with general further structural changes that would impact the wider health system.

29. We acknowledge that the Ministry of Health and Te Aka Whai Ora also provided advice regarding the future arrangement for the functions of Te Aka Whai Ora. However, we do not go into detail regarding these as we understand these to be the subject of the next stage of the inquiry, focused on alternative options for Maaori health. We simply note at this stage that options regarding transfer of functions were canvassed during the process, but this underscores the absence of advice against disestablishing Te Aka Whai Ora and the decision to do so had been politically pre-determined.

30. What the MHA Disestablishment Documents also indicate, in our submission, is that the decision to disestablish Te Aka Whai Ora was made without any evidence supporting the assertion that Te Aka Whai Ora needed to be disestablished.³⁶ This is in stark contrast to other recent Tribunal urgent inquiries, such as the urgent inquiry into section 7AA of the Oranga Tamariki Act 1989 and the urgent inquiry into Coalition Government

³⁴ “Issues and opportunities for hauora Maaori” at [9]-[11]; “Advice on disestablishing the Maaori Health Authority”; and “Options for future arrangements for Te Aka Whai Ora | Maaori Health Authority Functions”.

³⁵ See “Issues and opportunities for hauora Maaori” at [12]-[21]; “Advice on disestablishing the Maaori Health Authority” at [16]-[32]; and Te Aka Whai Ora “Options for future arrangements for Te Aka Whai Ora | Maaori Health Authority Functions” at [1]-[11].

³⁶ “Issues and opportunities for hauora Maaori” at [11] identified that “progress towards integrating many systems and operating models is slow, but on track” and at [13] that it is “too soon to judge whether the intended outcomes and benefits are being realised”.

changes to Marine and Coastal Area (Takutai Moana) Act 2011, wherein the Tribunal identified that there was, at very least, anecdotal evidence supporting – in the perception of the relevant Ministers – the outcomes sought, regardless of whether such evidence actually existed and justified the pursuit of that outcome.³⁷

31. Lastly, as Cabinet suspended the requirement for regulatory impact statements (**RIS**) for decisions relating to the 100-Day Action Plan proposals that solely relate the repeal of legislation, a RIS was not required, and therefore not prepared, for the disestablishment Bill.³⁸ The Crown therefore could not inform itself of the risks, options, and associated costs and benefits to the claimed problem regarding Te Aka Whai Ora and that required its immediate disestablishment, which it would ordinarily seek with any proposals that require legislative changes.
32. We submit therefore that the Crown has breached te Tiriti, and in particular the principle of good government and the duty to make informed decisions, as described above, without any evidence or any basis other than a party-political agenda as expressed in a coalition agreement.
33. We further submit, however, that there is also a breach of the principles of active protection and equity. The Crown may argue that a finding ti this effect requires an analysis on the alternative options to Maaori health, which is outside the scope of the Disestablishment Issue. However, our submission is that the breach of the principles of active protection and equity arises from the breach of the principles of tino rangatiratanga and kaawanatanga.³⁹ By removing Maaori authority and autonomy (i.e. the exercise of tino rangatiratanga) – or input of any kind – specifically from the policy decision and the actual decision on whether to disestablish Te Aka Whai Ora or not, the Crown cannot be said to be actively protecting Maaori

³⁷ Waitangi Tribunal *The Oranga Tamariki (Section 7AA) Inquiry 10 May 2024 Report* (Wai 3350, 2024) at p. 26 (**OT Section 7AA Report**). Waitangi Tribunal *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (Wai 3400, 2024) at p. 58 (**Takutai Moana Report**).

³⁸ Minister of Health “Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill: Approval for Introduction” (undated) at [9].

³⁹ Waitangi Tribunal *Tino Rangatiratanga me te Kaawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry* (Part 1, Vol 1, Wai 1040, 2023) at pp. 64-67.

tino rangatiratanga and interests.

34. Given the information available at the time the decisions were made, as outlined above, and which heightens the Crown's obligations to Maaori, including Whaanau Haaua Maaori, it cannot be said, we submit, that the Crown has acted "to the fullest extent practicable" when it has excluded the very partner exclusively impacted by the decision, and for whom the Crown has heightened obligations specifically because the decision is in relation to health disparities and health equity.
35. Lastly, the fact that the decision was made without any supporting evidence, with no demonstrable need, and largely contrary to the advice of Crown officials highlights. in our submission, the level of overreach of kaawanatanga asserted by the Crown in making the decision to disestablish Te Aka Whai Ora, in breach of te Tiriti and its principles and in defiance of basic standards of good governance.

No Engagement with Maaori, Let Alone Whaanau Hauaa Maaori at Any Stage

36. As described above in paragraphs [14]-[15], the breaches relating to engagement with Maaori apply to the decision to promote policy to disestablish, the decision itself to disestablish, and actual act of disestablishing Te Aka Whai Ora.
37. Crown counsel acknowledged that "there has been no consultation process with the Treaty partners leading up to the decision to promote policy to disestablish Te Aka Whai Ora".⁴⁰ We therefore submit that it is open to the Tribunal to make a finding that the act of deciding unilaterally to promote a policy to disestablish Te Aka Whai Ora breaches te Tiriti and its principles, in particular the principles of tino rangatiratanga, kaawanatanga, and partnership.
38. Next, the Crown again exercised unilateral decision making as to the decision to disestablish and the act of disestablishment,⁴¹ without including

⁴⁰ Wai 2575, #3.2.930 at [14].

⁴¹ "Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill: Approval for Introduction".

its te Tiriti partner and Whaanau Hauaa Maaori in the decision-making process. As already stated in paragraph [19], consultation only occurred internally between different government agencies within a limited timeframe.⁴² No engagement whatsoever occurred with any Maaori roopuu, and especially not with Whaanau Hauaa Maaori or their mandated representative roopuu.⁴³

39. In submissions responding to the Tribunal, the Crown:⁴⁴

...confirms that, procedurally, no formal consultation was planned or occurred by the Crown before Cabinet confirmed the decision to disestablish Te Aka Whai Ora. 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 the Treaty principles have been breached and that prejudice has resulted.

40. At this stage, we note that under the Crown's own engagement framework,⁴⁵ co-design, not consultation, is the minimum appropriate level of engagement, given the importance of Te Aka Whai Ora as a symbol of partnership and a pathway towards achieving Maaori health equity. Furthermore, because the decision to disestablish Te Aka Whai Ora was part of the 100-Day Action Plan, the Bill was introduced into the House of Representatives and passed under the urgency process,⁴⁶ removing the ability for the general public, but especially Maaori and Whanaau Hauaa Maaori, to scrutinise the Bill and to provide submissions (the minimum amount of input that the Crown has considered as "engagement"⁴⁷) at the Select Committee stage.⁴⁸

41. It further highlights just how egregious the process has been leading up to

⁴² Cabinet 100-Day Plan Committee "Disestablishment of the Maaori Health Authority" (Cabinet minute, 100-24-MIN-0001) and associated paper "Disestablishment of the Maaori Health Authority", at p.8, [45]-[46].

⁴³ Wai 2575, #M18 at [14]-[15].

⁴⁴ Wai 2575, #3.2.940 at [12].

⁴⁵ Te Arawhiti *Crown engagement with Maaori* (undated), accessed at <<https://www.tearawhiti.govt.nz/assets/Tools-and-Resources/Crown-engagement-with-Maori-Framework.pdf>>.

⁴⁶ (27 February 2024) 773 NZPD 1523.

⁴⁷ See for example *OT Section 7AA* Report a pp. 29-30; *Takutai Moana* Report at p. 10; *Nгаа Maataapono* Report at p. 64.

⁴⁸ (27 February 2024) 773 NZPD and for example, the comments of Willow Jean-Prime at 1596, 1615-1616 and Steve Abel at 1608-1609 discussing lack of public consultation.

and including the disestablishment. The Crown has excluded Maaori and Whaanau Hauaa Maaori from contribution at this decision, prevented Maaori and Whaanau Hauaa Maaori from having any input in any low-level engagement that is part of the process and, furthermore, has ignored Maaori and Whaanau Hauaa Maaori voices outside of the process requesting that the Crown reconsider.⁴⁹

42. Regardless, it is our submission that, given that the Crown has conceded regarding the lack of consultation, it is open to the Tribunal to make a finding that the Crown has breached te Tiriti and its principles, particularly the principles of tino rangatiratanga, kaawanatanga, and partnership, although we emphasise the severity of the breaches as shown by the evidence outlined in this subsection above.

Maaori Disabled Have Experienced and Continue to Experience Prejudice

43. We submit that the exclusion of Whaanau Hauaa Maaori, and Maaori in general, from the entire process – from the discussions of the policy to disestablish to the decision to disestablish and the act of disestablishment – is another example of how Whaanau Hauaa Maaori are invisibilised and prejudiced by the Crown.
44. Without suitable concrete alternatives to addressing Maaori health inequities, and Whaanau Hauaa Maaori health inequities, at the time of these submissions, Whaanau Hauaa Maaori continue to be invisibilised, and are highly likely to continue to experience harm,⁵⁰ causing significant and irreversible prejudice to the Claimant, other Whaanau Hauaa Maaori and Maaori in general.

Findings and Recommendations Sought

45. The Claimant supports the findings sought by the Lead Claimants of this

⁴⁹ (27 February 2024) 773 NZPD and for example, the comments of Hana-Rawhiti Maipi-Clarke at 1567-1568, Hon Willow Jean-Prime at 1586-1587, 1596, and 1615-1616, Hon Willie Jackson at 1589-1590, and Steve Abel at 1608-1609 regarding lack of public scrutiny due to the urgency process necessitating consultation with affected groups, like Maaori and Whaanau Hauaa Maaori.

⁵⁰ See #M18 at [16].

Priority Inquiry, and further adds the following:

- a. That the Crown ensure that Whaanau Hauaa Maaori and their mandated representatives and health experts who are Whaanau Hauaa Maaori are resourced and enabled to engage in Maaori health policy development, including and especially in relation to the proposed alternatives to Maaori health in the absence of Te Aka Whai Ora;
- b. That the Crown prioritise its policy development programme addressing Maaori health inequities, including and especially Whaanau Hauaa Maaori health inequities given the current state of the Aotearoa New Zealand health system; and
- c. Any other recommendations that the Tribunal sees fit.

Dated at Wellington this 14th day of October 2024



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