HAUTUPUA

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Te Aka Whai Ora
(Maaori Health Authority)
Priority Report

Part 1

PRE-PUBLICATION VERSION

WAI 2575

WAITANGI TRIBUNAL REPORT 2024

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PREFACE

This is a pre-publication version of part 1 of the Waitangi Tribunal's *Hautupua: Te Aka Whai Ora (Maaori Health Authority) Priority Report*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Additional illustrative material may be inserted. However, the Tribunal's findings and recommendations will not change with the publication of this report.

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Ka hokaa a Toroa aa-uta! Ka hookaa a Toroa aa-tai!
He rere ko Koowhitiwhiti – he tau ko Koowanawana!
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Teenaa te whaituaa nui o te Ao e hurihuri nei.
Ka puu te taha waananga – he aapiti nuku; he aapiti rangi;
He whakaotinga aroha ki a raatou kua takoto i te hau o marangai
Kua ea te whakangaua ki te pae whakaeke o Rehua
Ka tauwehe te Poo – ka Poo
Poo, – ka Ao,
Ao – ka awatea!

The albatross is a sea-faring bird coming to land only to roost and procreate. The sites they soar over and where they settled were of moment to our tupuna in their navigating the vast expanses of Te Moana-nui-a-Kiwa; and for us today as we navigate the treasures we have inherited from them and the challenges we face in today's ever-changing world.

The Honourable Dr Shane Reti
Minister of Health

The Honourable Tama Potaka
Minister for Maaori Development
Minister for Maaori Crown Relations: Te Arawhiti

The Honourable Judith Collins KC
Attorney-General

The Honourable Matt Doocey
Associate Minister for Health

The Honourable David Seymour
Associate Minister for Health

The Honourable Casey Costello
Associate Minister for Health

Parliament Buildings
WELLINGTON

28 November 2024

E ngaa Minita teenaa koutou

We enclose our report *Hautupua: Te Aka Whai Ora (Maaori Health Authority) Priority Report, Part 1*. It addresses claims concerning the process that the Crown followed to disestablish Te Aka Whai Ora, as well as the impacts of that decision. It is the first part of a priority inquiry. The second part will inquire into the Crown's alternative plans for Maaori health.

Introduction

Following the general election, in October 2023, the new coalition Government set to work implementing its coalition commitments and 100

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MINISTRY OF JUSTICE
Tāhū o te Ture

Day Action Plan, which included disestablishing Te Aka Whai Ora. On 27 February 2024, the Crown introduced the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill ('Disestablishment Bill') – just two days before our scheduled urgent hearing on this issue was set to commence. That same day, the House of Representatives passed a motion to pass the Disestablishment Bill under urgency, which would thereby disestablish Te Aka Whai Ora. Our urgent hearing was consequently vacated. On 5 March 2024, the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 received Royal Assent and passed into law.*

In May 2024, we granted a priority inquiry into the process taken by the Crown to disestablish Te Aka Whai Ora. This inquiry was granted priority given the continuing significance of this issue to Maaori and the Crown's obligations to address Maaori health inequities. Te Aka Whai Ora was established, in part, in response to our *Hauora* (2019) report, which focused on structural issues within the health and disability system related to long-standing claims. Its disestablishment after a short time period was therefore consistent with the pre-existing inquiry priorities.†

Findings

After assessing the evidence presented from parties, we have found breaches of te Tiriti/the Treaty principles of tino rangatiratanga, good government, partnership – including the duties of consultation and acting reasonably and in good faith – active protection and redress.

The policy process the Crown followed to disestablish Te Aka Whai Ora was a departure from conventional and responsible policymaking in several concerning ways.

The principles of te Tiriti/the Treaty require the Crown to observe a high standard of consultation – and to make policy decisions that will impact on Maaori, with Maaori. However, we found that the Crown has not met this standard. The Crown did not act in good faith when disestablishing Te Aka Whai Ora as it did not consult or engage with Maaori. The Crown decided, without consultation with its Tiriti/Treaty partner and without substantive advice from officials, that Te Aka Whai Ora was not required, despite knowledge of grave Maaori health inequities. Without consultation and robust advice, the Crown was ill-informed of the effects that disestablishing Te Aka Whai Ora would have

* Memorandum 2.6.166, p 3.
† Memorandum 2.6.171, p 5.

on Maaori communities in breach of te Tiriti/the Treaty principle of partnership.

The Crown breached the principle of good government by failing to follow its own process for the development and implementation of legislative reform, such as the provision of a regulatory impact statement (RIS), despite Treasury's advice to do so. Having a robust and evidence-based approach is widely recognised as best practice in the Government's own publications, including the *Cabinet Manual* and Treasury guidelines. However, the Crown chose to exempt itself from the requirement to provide a RIS from its 100 Day Action Plan commitments that required a legislative repeal, including the disestablishment of Te Aka Whai Ora. The Crown further breached the principle of good government by failing to take account of its Tiriti/Treaty obligations and modifying its electoral pledges in the 100 Day Action Plan in light of them.

The Crown also failed to discharge its duty of active protection to Maaori and breached the principle of tino rangatiratanga and the right of Maaori to self-determine what is best for them and hauora Maaori. The Crown decided, without input from its Tiriti/Treaty partner, to disestablish Te Aka Whai Ora. Our analysis indicates that Maaori did not agree with this decision. Instead, the Crown implemented its own agenda – one that was based on political ideology, rather than evidence, and one that fell well short of a Tiriti/Treaty consistent process.

The impacts of the Crown's decision on Maaori also reveal the Crown's failure to act in a Tiriti/Treaty compliant way. The Pae Ora Act 2022 had implemented a carefully calibrated system for the equitable delivery of health care and services in Aotearoa New Zealand, cognisant of the Crown's Tiriti/Treaty obligations. Te Aka Whai Ora was an integral part of this system, designed with extensive involvement of Maaori and consistent with te Tiriti/the Treaty partnership. While the remaining sections of the Pae Ora Act contain various provisions that confirm hauora Maaori as an important aspect of the health and disability system, we are not convinced that, collectively, those provisions provide for the exercise by Maaori of tino rangatiratanga. We will consider this further in part 2 of this inquiry.

By failing to provide any alternative plan for Maaori health, we find the Crown's decision to disestablish Te Aka Whai Ora is a breach of the principles of partnership and good government. The Crown had the option to leave Te Aka Whai Ora in place until a replacement plan was ready to be implemented. Instead, the Crown chose to make its decision in haste, representing a lost opportunity to properly evaluate the strengths and weaknesses of Te Aka Whai Ora in determining whether alternative

mechanisms would better discharge the Crown's Tiriti/Treaty obligations in relation to hauora Maaori.

Te Aka Whai Ora was previously established by the Crown to provide redress for the long-standing failure by the Crown to reflect tino rangatiratanga in our health system. The Crown's unilateral decision to remove Te Aka Whai Ora has effectively taken that redress away. We find this to be a prima facie breach of te Tiriti/the Treaty principle of redress.

We find that Maaori have and will continue to suffer prejudice as a result of these breaches as:

- Maaori have not been given the opportunity to engage as Tiriti/Treaty partners in the decision to disestablish Te Aka Whai Ora – the decision was made unilaterally by the Crown, without any Maaori input;
- the Crown failed to conduct a robust policy process and did not follow its own regulatory impact analysis guidelines for developing robust policy when making the decision to disestablish Te Aka Whai Ora;
- Te Aka Whai Ora – a well-researched initiative that was co-designed with Maaori, and, widely supported by Maaori – is no longer in place; and
- Maaori have not been informed of the Crown's replacement for Te Aka Whai Ora, creating uncertainty in addressing longstanding and well-documented Maaori health inequities.

Recommendations

We are conscious that the Crown has indicated it intends to announce its alternative plans for hauora Maaori in December 2024. We embarked on this inquiry knowing that time was short for us to provide practical recommendations to the Crown in the event we found their conduct failed to live up to their obligations under te Tiriti/the Treaty. We, therefore, make the following three recommendations:

- First, we recommend the Crown commit to revisiting the option of a stand-alone Maaori health authority;
- Secondly, we recommend that the Crown consult extensively with Maaori in the development of any alternative plans; and
- Finally, we recommend that the Crown always undertake proper regulatory impact analysis in matters that affect Maaori health.

The process followed by the Crown to disestablish Te Aka Whai Ora breached Tiriti/Treaty principles. The fact that Te Aka Whai Ora has been disestablished before the replacement plans are in place is also a Tiriti/

Treaty breach. These breaches have impacted negatively on the Maaori–Crown relationship. In developing the replacement plans, the Crown has an opportunity to go some way to restoring that relationship and the honour of the Crown. Our recommendations are aimed at assisting the Crown in that endeavour.

Naaku noa naa

Judge Damian Stone
Presiding Officer

ABBREVIATIONS

ACT	Association of Consumers and Taxpayers
doc	document
HMAC	Hauora Maaori Advisory Committee
KC	King's Counsel
ltd	limited
MEAG	Maaori expert advisory group
memo	memorandum
MHA	Maaori Health Authority – Te Aka Whai Ora
NZCA	*New Zealand Court of Appeal*
NZPD	*New Zealand Parliamentary Debates*
p, pp	page, pages
para	paragraph
PHO	primary health organisation
RIS	regulatory impact statement
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 2575 record of inquiry, a select index to which is reproduced in appendix II. A full copy of the index to the record is available on request from the Waitangi Tribunal. All URLs were current at the time of release.

CHAPTER 1

INTRODUCTION

This report addresses claims submitted to the Waitangi Tribunal first, under urgency, and secondly, under priority regarding the Crown's disestablishment of Te Aka Whai Ora – The Maaori Health Authority (Te Aka Whai Ora) in February 2024.[1]

Established under the previous Government, Te Aka Whai Ora was a response to both the Tribunal's *Hauora* report (2019) and a government review of the health and disbility system that also reported in 2019 (with a final report issued in 2020). Both our *Hauora* report and what became known as the Simpson Report recommended the creation of a separate Maaori health authority to address significant and long-standing Maaori health inequities.

Early in 2021, the then Government announced its decision to commence reforms of the health system, including the establishment of an autonomous Maaori Health Authority.[2] Te Aka Whai Ora was formally established on 1 July 2022 under section 17 of the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act).[3] From its inception, Te Aka Whai Ora undertook work to improve Maaori health, including the joint preparation of the Hauora Maaori Strategy.[4] At the time, the opposition parties, the New Zealand National Party (National) and ACT New Zealand (ACT), opposed its creation.

Since it became operational in 2022, Te Aka Whai Ora provided Maaori a form of self-governance within the health and disability sector and was widely seen as an innovative mechanism for Maaori to participate directly in decision-making about Maaori health. Although it was part of the wider public health and disability system established and funded by the Crown, it was seen as a means of expressing tino rangatiratanga and was a practical measure to give effect to the 'by Maaori, for Maaori' vision at the structural level.

1. Throughout this report, double vowels have been used, as has been done in memoranda and filings from the parties in the Health Services and Outcomes Kaupapa Inquiry (Wai 2575), for accessibility purposes. This means that in some instances quotations have been changed to a double vowel, when the quote itself might have used tohutoo.

2. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), p 172.

3. Memorandum 3.2.930, p 2; claim 1.1.50, pp 4, 6.

4. Memorandum 3.2.930, p 2.

On the basis of the results of the 2023 general election, National entered into coalition agreements to form a government with both ACT and New Zealand First in which they outlined a priority to '[a]bolish the Maaori Health Authority'.[5]

Once in government in November 2023, the new Minister of Health, Dr Shane Reti, initiated policy work to give effect to this commitment as part of the new Government's 100 Day Action Plan, which was to be implemented by 8 March 2024. In February 2024, Cabinet decided in favour of disestablishing Te Aka Whai Ora.[6]

Within days of the Government's announcement in late 2023, we received an urgent claim from Lady Tureiti Moxon and Janice Kuka alleging that the Crown had breached the principles of te Tiriti o Waitangi/the Treaty of Waitangi (te Tiriti/the Treaty) in initiating the disestablishment.[7] We initially granted urgency to this claim and others on 19 January 2024 on the basis of lack of consultation and lack of any alternative plans for Maaori health. We organised a two-day hearing into the disestablishment on 29 February and 1 March 2024 to ensure the claims could be heard and reported on prior to the 8 March deadline.

On 22 February, after parties had filed their submissions, the Crown announced it could introduce its Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill ('Disestablishment Bill') to Parliament as early as 27 February 2024. Once a Bill is introduced, the Tribunal's jurisdiction to inquire into it is removed. The Crown did, as indicated, introduce the Disestablishment Bill on 27 February and, on 5 March, the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 ('Pae Ora Amendment Act') was passed under urgency. These actions were seen as controversial by both Maaori and medical professionals. The disestablishment of Te Aka Whai Ora came into effect on 30 June 2024.[8]

Once the legislation passed, the Tribunal's jurisdiction to inquire into the Crown's actions concerning the disestablishment was restored. The claimants applied again for an urgent inquiry into this issue, emphasising the Crown's breaches of te Tiriti/Treaty principles in making its decision and the lack of an alternative plan to address Maaori health inequities. Given the significance of the issues, the Tribunal decided to inquire into and report on the disestablishment together with the Crown's alternative plans for Maaori health as a priority phase of the Health Services and Outcomes Kaupapa Inquiry.

As the claimants' desire for the Tribunal's findings on the disestablishment itself still remained urgent, the Tribunal agreed to report on the priority inquiry in two stages. The first stage, which is the subject of this report, concerns the process to distestablish Te Aka Whai Ora and its impacts only. We provide this report to the

5. Document 6.2.11, p 8; doc 6.2.23, p 8.

6. Memorandum 3.2.971, p 1.

7. Throughout, we refer in the first instance to te Tiriti o Waitangi/the Treaty of Waitangi in its full form and te Tiriti/the Treaty in its shortened form. We cite te Tiriti first as this is the text that most rangatira signed and understood.

8. Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill 26—1 (2024), Government Bill – New Zealand Legislation.

parties in the hope that it will influence the Crown to ensure its alternative plans for Maaori health – expected to be announced in December 2024 – are consistent with te Tiriti/the Treaty and its principles. Given the limited time before these announcements are to be made – and the fact we had already been provided with evidence from the parties before our jurisdiction was removed – we decided to hear this part of the inquiry on the papers. Once the Crown's alternative plans for Maaori health have been announced, we intend to hold hearings and inquire into them as soon as practicable.

1.1 What is at Issue?

Claimants argue that the Crown's actions regarding the disestablishment of Te Aka Whai Ora and its impact on Maaori are in breach of te Tiriti/the Treaty and the Crown's obligations to act in good faith and to uphold the principles of tino rangatiratanga, good government, partnership, active protection, and equity.[9] Furthermore, they say that Maaori have been and continue to be prejudiced by the process the Crown followed to disestablish Te Aka Whai Ora and by the disestablishment of Te Aka Whai Ora.[10]

1.2 Background to our Priority Inquiry

This section provides the procedural background to this priority inquiry. First, we begin by outlining the commencement of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575), the broader inquiry under which the disestablishment of Te Aka Whai Ora priority inquiry sits. We then provide a brief summary of the establishment of Te Aka Whai Ora. Finally, we outline procedural steps taken for this inquiry.

1.2.1 The Health Services and Outcomes Kaupapa Inquiry (Wai 2575)

In April 2015, the Waitangi Tribunal announced its kaupapa inquiry programme, which provides a pathway to hear nationally significant claims that affect Maaori as a whole or a section of Maaori in similar ways.[11]

On 30 November 2016, the Tribunal's then Chairperson, Chief Judge Wilson Isaac signalled the commencement of the Health Services and Outcomes Kaupapa Inquiry ('the health inquiry'). In these same directions, Judge Stephen Clark was appointed the Presiding Officer.[12]

9. Submission 3.3.139, p 2; submission 3.3.140, p 1; submission 3.3.141, pp 2–3, 5; submission 3.3.142, pp 15–16; submission 3.3.143, p 6; submission 3.3.144, pp 3–4; submission 3.3.148, pp 4–6; submission 3.3.149, p 5; submission 3.3.150, p 9.

10. Submission 3.3.139, pp 8–9; submission 3.3.140, p 1; submission 3.3.141, pp 46–47; submission 3.3.142, pp 15–16; submission 3.3.143, p 3; submission 3.3.144, p 4; submission 3.3.148, p 21; submission 3.3.149, pp 32–33; submission 3.3.150, pp 18–19.

11. Chief Judge Wilson Isaac, memorandum, 1 April 2015, para 11.

12. Memorandum 2.6.151, p 2.

On 15 March 2017, Chief Judge Isaac appointed Dr Angela Ballara, Miriama Evans, Associate Professor Tom Roa (now Professor), and Tania Simpson to the Health Services and Outcomes panel. Ms Evans resigned from office in September 2017, and Professor Linda Tuhiwai Smith was appointed as a replacement panel member.[13] Dr Ballara passed away in 2021. Professor Susy Frankel was appointed as a replacement panel member in August 2023.[14]

Judge Clark resigned from his position as Presiding Officer of the Health Services and Outcomes Kaupapa Inquiry in July 2020 to take up a position in the District Court.[15] Chief Judge Isaac appointed Judge Damian Stone as the replacement Presiding Officer.[16]

The health inquiry was organised into three thematic stages: stage 1 inquired into aspects of primary care;[17] the second and current stage covers three priority areas encompassing Maaori with disabilities, mental health issues (including suicide and self-harm), and issues of alcohol, tobacco and substance abuse;[18] and the third stage will focus on the remaining themes of national significance, including eligible historical claims.[19] In November 2021, the Tribunal for the health inquiry decided to hear claims concerning the Crown's response to the COVID-19 pandemic (the COVID-19 Priority Inquiry). This hearing took place in December 2021. On 20 December 2021, the Tribunal released *Haumaru: The COVID-19 Priority Report* in pre-publication form.[20]

1.2.2 Stage 1 of the health inquiry and the establishment of Te Aka Whai Ora

In 2017, we decided to hear the Maaori Primary Health Organisations and Providers (Wai 1315) and National Hauora Coalition (Wai 2687) claims regarding the primary healthcare system as stage 1 of the health inquiry.[21] On 1 July 2019, we released *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*. We made several interim recommendations for improving the equity of Maaori health outcomes and ensuring Tiriti/Treaty compliance of the primary healthcare system. These included a recommendation that the Crown and representatives of the Wai 1315 and Wai 2687 claimants explore the possibility of a establishing a stand-alone Maaori health authority. We asked parties to update the Tribunal with progress by 20 January 2020 and reserved its right to review the interim recommendations.[22]

13. Waitangi Tribunal, *Hauora*, p 4.
14. Memorandum 2.6.138, p 2.
15. The Honourable David Parker, 'District Court Judge Appointed', press release, 13 July 2020, https://tinyurl.com/bdh7yvpw.
16. Memorandum 2.6.32.
17. Waitangi Tribunal, *Hauora*, p 5.
18. Memorandum 2.5.29, p 1.
19. Waitangi Tribunal, *Hauora*, p 5.
20. Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2021).
21. Memorandum 2.5.17, p 3.
22. Waitangi Tribunal, *Hauora*, p 166.

In the period following the release of our stage 1 report, several reviews of the health system took place with the Crown issuing its response to these.[23] In March 2020 the final report from the Health and Disability System Review – an independent review tasked with identifying opportunities to improve the overall structure of the health and disability system – was released. This, we reported, was 'a significant step towards addressing systematic failures' (discussed further in section 3.3.1).[24] The report provided a detailed analysis of the existing health system and the critical need for 'legislative, governance, and structural changes to create a cohesive and equitable health system for the future'.[25] The Government issued its response, agreeing there was a need to address existing inequities.[26] The Ministry of Health also released two action plans during 2020 – the Initial COVID-19 Maaori Response Action Plan and Whakamaua: Maaori Health Action Plan, 2020–25. Both of these plans emphasised how crucial it was for the Crown to meet its te Tiriti/Treaty obligations 'if the persistent health inequalities experienced by Maaori were to be addressed'.[27]

As noted above, in April 2021, the Government announced its decision to establish a Maaori Health Authority.[28] The objectives and functions of the Maaori Health Authority were set out in sections 18 and 19 of the Pae Ora Act, respectively. Broadly, these included systems for developing, monitoring, planning, implementing, and improving service delivery for Maaori at all levels of the health sector. The objectives also included commissioning kaupapa Maaori services, collaborating with relevant entities to improve the capability of those working in hauora Maaori, and provisions for research relating to health.[29]

In our final iteration of our stage 1 *Hauora* report, released on 19 October 2021, we confirmed our interim recommendation to establish a Maaori Health Authority (the findings and recommendations of our *Hauora* report relating to the Maaori Health Authority are outlined in more detail in section 3.2.2 of this report).[30]

1.2.3 Application for urgency

After the general election in October 2023, the incoming coalition Government announced its intention to disestablish Te Aka Whai Ora. On 8 December 2023, Ms Kuka and Lady Moxon filed an urgent claim regarding the Crown's proposed disestablishment of Te Aka Whai Ora, as outlined in the new coalition Government's 100 Day Action Plan (also referred to as its 100-day plan).[31]

23. Ibid, p 172.
24. Ibid.
25. Ibid.
26. Ibid, p 173.
27. Ibid.
28. Ibid, p 172.
29. Memorandum 3.2.930, p 2.
30. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, 2nd ed (Lower Hutt: Legislation Direct, 2023), p 183.
31. Claim 1.1.50, p 1; memo 3.2.901, p 3; doc M3, pp 1–3.

The claimants stated that Maaori Primary Health Organisations, Maaori Providers with General Practitioner clinics, Maaori cared for by those organisations, as well as Maaori more generally, were likely to be prejudicially affected by the policy proposed by the Crown in a variety of ways. These included, among other things, the removal of a Maaori body with the specific objectives to ensure that planning and service delivery respond to their needs and to 'design, deliver and arrange services to achieve the best possible health outcomes for them'. Further, they argued that disestablishing Te Aka Whai Ora was inconsistent with te Tiriti/the Treaty principles.[32]

The applicants sought an urgent inquiry on the grounds that the Tribunal had a very short period to inquire into the matter due to the coalition Government's intention to introduce legislation disestablishing Te Aka Whai Ora as part of its 100 Day Action Plan.[33]

1.2.4 Tribunal decision to grant urgency

On 11 December 2023, the Tribunal's Deputy Chairperson, Judge Sarah Reeves, issued a memorandum noting that the Tribunal had received an application for an urgent inquiry into the disestablishment of Te Aka Whai Ora. She referred the urgent application to Judge Damian Stone as presiding officer of the Te Aka Whai Ora (Maaori Health Authority) Urgent Inquiry panel.[34] Judge Reeves stated that the health inquiry panel was best placed to consider the application of urgency as it had recently released its COVID-19 report and was now well into the inquiry of the Crown's treatment of Maaori with disabilities.

On 12 December 2023, Judge Stone directed the Crown and any interested parties to respond to the Te Aka Whai Ora urgent application.[35] On 18 December the Crown issued a response opposing the application.[36] The Tribunal received 29 requests to participate as interested parties and on 19 January all were granted interested party status.[37]

On 19 January 2024, Judge Stone confirmed the grounds for urgency had been made out. However, he noted 'the implications of the disestablishment of Te Aka Whai Ora should be properly ascertained and evaluated by reference to the coalition government's alternative plans'. Accordingly, the final decision about the application for an urgent hearing was adjourned, and he directed the Crown to file a memorandum with further information on its proposal to disestablish Te Aka Whai Ora.[38]

32. Claim 1.1.50, pp 1, 9–10.
33. Claim 1.1.50(a), p 1.
34. Memorandum 2.6.151, p 2.
35. Wai 3307 ROI, memo 2.5.2, p 2.
36. Memorandum 3.2.930, p 4.
37. Wai 3307 ROI, memo 2.5.3, p 2. For a full list of interested parties, see Wai 3307 ROI, memo 2.5.3(a).
38. Wai 3307 ROI, memo 2.5.3, pp 8–9.

On 31 January 2024, the Crown issued a memorandum outlining its plans for disestablishment.[39] In it, the Crown outlined its plans to introduce a Bill for the proposed disestablishment to the House of Representatives 'no later than 8 March.'[40] The Crown submitted that, if Parliament passed the Bill, it was expected Te Aka Whai Ora would be formally disestablished by 30 June 2024 'although practical achievement of much of this might occur much earlier using existing mechanisms.'[41] The Crown stated that Cabinet intended to continue aligning the introduction of Bills with the coalition Government's 100 Day Action Plan.

Furthermore, the Crown affirmed that 'no formal consultation was planned or occurred by [*sic*] the Crown before Cabinet confirmed the decision to disestablish Te Aka Whai Ora.'[42] The Crown said the 'Pae Ora Healthy Futures Act 2022 will continue to promote the exercise of tino rangatiratanga by hapuu and iwi towards achieving health equity for Maaori'.[43] The Crown also stated at this point that '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'. The Crown then stated:

> However, it is important for the Tribunal to note that the now Minister of Health in his previous role as the Health Spokesperson of the Opposition has undertaken engagement with Maaori over the past two years. This engagement has informed the action the Coalition Government is now taking.[44]

The Crown noted that work would be undertaken concerning the Pae Ora Act and the legislative engagement process. Overall, Crown counsel opposed an urgent inquiry stating that an evaluation of this 'work' against Treaty principles should not occur in the context of a narrow urgent inquiry.[45]

On 16 February 2024, the Tribunal confirmed it would hold an urgent hearing into the disestablishment of Te Aka Whai Ora. This was scheduled for 29 February and 1 March 2024.[46]

The same day, the Tribunal acknowledged the Crown had raised the non-interference/comity principle, which holds that 'courts should not allow their processes to inhibit the free functioning of other branches like Parliament'. The Crown argued that the Tribunal should 'await the conclusion of the legislative process before deciding whether an urgent inquiry is warranted'. The applicants disagreed, submitting that the non-interference principle applied to the Courts, but not the Tribunal. While the Tribunal acknowledged the principle, it considered 'the applicants' argument to be correct'. The Tribunal stated: 'We are therefore not

39. Memorandum 3.2.940, p 1.
40. Ibid.
41. Ibid.
42. Ibid, p 3.
43. Ibid, p 1.
44. Ibid, p 3.
45. Ibid, pp 4, 5.
46. Memorandum 2.6.162, p 4.

prevented from continuing to exercise our jurisdiction here.'[47] We discuss this further in section 2.2.1.

1.2.5 The disestablishment of Te Aka Whai Ora

On Thursday 22 February 2024, Crown counsel issued a memorandum stating that the Crown intended to introduce a Bill to disestablish Te Aka Whai Ora 'as early as 27 February 2024'.[48] Claimant counsel responded that they were 'particularly concerned at the Crown's approach', whereby the Crown memorandum was filed four working days after the Tribunal had granted urgency and the week before the scheduled urgent hearing.[49] Claimant counsel noted that the Crown had previously indicated its intention to introduce a Bill 'no later than 8 March 2024'.[50] Claimant counsel further noted '[t]he Tribunal continues to have jurisdiction to inquire up until the Bill is introduced.' If the Bill was introduced, counsel said, 'on the Crown's indicated date, the Tribunal will have continuing jurisdiction for two (2) more working days'.[51] Counsel asked that the Tribunal continue with its urgent inquiry until it no longer had jurisdiction.[52]

On 23 February, Judge Stone issued a memorandum stating that the coalition Government's 100 Day Action Plan ended on 8 March 2024 and it was unclear why the Government would introduce a Bill prior to this date 'given the Tribunal is now embarking on an inquiry into the policy behind it, and has truncated its normal process to ensure that the government will have the benefit of our recommendations within the timeframe of [its] 100-Day Plan'. He outlined that the Tribunal was 'committed to maintaining due process in evaluating the evidence before it in making its findings and recommendations' and would, therefore, proceed with an urgent hearing.[53] Judge Stone noted that 'any further effort to truncate the hearing process in order to release a final decision by 27 February 2024 would risk the inquiry's ability to conduct a reasonable and just hearing process'. He further noted that, if the Bill was introduced prior to the completion of the urgent hearing, the Tribunal would regain jurisdiction to complete its inquiry once the Bill passed into law.[54]

On 27 February 2024, Crown counsel issued a memorandum stating that the Crown 'does not intend to defer the introduction of the Te Aka Whai Ora Disestablishment Bill until the week ending 8 March 2024'. As stated in the Prime Minister's post-Cabinet briefing, 'introduction of the Te Aka Whai Ora Disestablishment Bill' was intended to occur that day.[55] Later that day, Crown counsel updated the Tribunal that the House of Representatives had passed

47. Memorandum 2.6.162, p 3.
48. Memorandum 3.2.968. p 1.
49. Memorandum 3.2.969, p 1.
50. Memorandum 3.2.968, p 1; see also memo 3.2.940, p 2.
51. Memorandum 3.2.969, p 1.
52. Ibid, pp 1–2.
53. Memorandum 2.6.160, p 3.
54. Ibid.
55. Memorandum 3.2.971, p 1.

a motion to introduce the Pae Ora (Disestablishment of the Maaori Health Authority) Amendment Bill under urgency. This Bill would disestablish Te Aka Whai Ora.[56]

That day, claimant counsel also submitted a memorandum, noting that the repeal Bill had been introduced and Minister Chris Bishop had moved that it be passed through all three stages under urgency by the end of the day. Counsel argued that, if the Bill passed through all three readings, it would no longer be before the House of Representatives and 'section 6(6) of the Treaty of Waitangi Act 1975 will no longer apply'. Counsel once again asked that the Tribunal continue with its urgent hearing as planned 'given the fact that two days have already been set down to hear this claim'.[57]

On 27 February, after the repeal Bill had been introduced and the Tribunal received the associated submissions by Crown and claimant counsel, Judge Stone announced that the urgent hearing was vacated.[58] On 5 March 2024, The Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 received Royal Assent and passed into law.[59]

On 7 March, Judge Stone invited claimants to file submissions addressing whether to grant a priority inquiry, the scope of any inquiry, and how the inquiry would be accommodated within the health inquiry programme.[60] The Tribunal received several submissions about the approach a priority inquiry should take with most claimants supporting a priority inquiry on the papers.[61] The Crown opposed both an urgent inquiry and a priority inquiry, stating that neither one was warranted.[62]

1.2.6 Decision to grant priority

The Tribunal granted priority to this inquiry given the continuing significance of this issue to Maaori and the Crown's obligations to address Maaori health inequities. In granting priority on 8 May, Judge Stone noted that Te Aka Whai Ora was established in part in response to the *Hauora* report, which focused on structural issues within the health and disability system related to long-standing claims. Its disestablishment after a short time period therefore raised issues within the pre-existing inquiry priorities.[63]

Judge Stone outlined the scope of the inquiry, noting that it would 'examine both the processes and steps taken by the Crown to disestablish Te Aka Whai Ora, as well as the Crown's proposed alternative plans to address Maaori health outcomes following its disestablishment'.[64] He directed the Crown to provide

56. Memorandum 3.2.973, p 1.
57. Memorandum 3.2.972, p 1.
58. Memorandum 2.6.163, p 3.
59. Memorandum 2.6.166, p 3.
60. Ibid, p 5.
61. Memorandum 3.2.1024, pp 3–4; memo 3.2.1027, p [3]; memo 3.2.1028, p [3].
62. Memorandum 3.2.1010, p 2.
63. Memorandum 2.6.171, p 5.
64. Ibid.

timeframes relating to when 'Cabinet decisions and the introduction of relevant legislation will likely be finalised' by Monday 27 May 2024.[65]

The following week Judge Stone confirmed the hearing into the disestablishment of Te Aka Whai Ora would be held in the week of 7 October 2024.[66] He directed Crown counsel to provide an update on Crown timeframes by 21 June 2024.[67]

The Crown responded on 21 June, submitting that its 'broader plans will require a law reform process, and the timeframes for decisions have not been finalised'. The Crown also submitted that its 'vision and plans . . . may not be available to claimants and interested parties before filing their evidence and submissions'.[68]

1.2.7 Decision to report on the disestablishment of Te Aka Whai Ora as a stand-alone issue

On 13 August 2024, Crown counsel issued a memorandum outlining its alternative plans to address Maaori health.[69] They stated that Cabinet had agreed 'to progress the Minister of Health's vision and plans for Maaori health over the next 12 months following the disestablishment of the Maaori Health Authority'.[70] In their memorandum, counsel noted that the Cabinet paper identified that following targeted engagement with health entities the Minister intended to report back to Cabinet 'by December 2024 with a refreshed Maaori health strategy'.[71] In light of this information, Judge Stone informed parties on 15 August 2024 that evidence and opening submissions for the priority hearing were deferred until further notice.[72]

On 21 August 2024, Judge Stone announced that the Cabinet paper did not provide 'substantive information necessary to proceed to hearing' in October 2024. For this reason, the priority hearing scheduled for October was deferred until the Crown could provide more information about its alternative plans.[73] Judge Stone raised the possibility of reporting separately on the claims concerning the disestablishment of Te Aka Whai Ora and noted that, '[i]n the circumstances, the Tribunal would be open to issuing a report on disestablishment issues on the papers.' He invited parties to file submissions by 3 September 2024 on whether the disestablishment of Te Aka Whai Ora should be reported on as a stand-alone issue.[74]

On 23 August 2024, Crown counsel proactively released documents on the disestablishment of Te Aka Whai Ora.[75] Following this, the Tribunal received several

65. Memorandum 2.6.171, p 6.
66. Memorandum 2.6.173, p 2.
67. Ibid, p 3.
68. Memorandum 3.2.1067, p 1.
69. Memorandum 3.2.1094, p 1.
70. Ibid.
71. Ibid; doc M40, pp 2–3.
72. Memorandum 2.6.183, p 3.
73. Ibid.
74. Ibid, p 4.
75. See memo 3.2.1115; doc M40.

submissions from parties about whether disestablishment issues should be heard and reported on as a separate stand-alone issue on the papers.[76]

On 1 October 2024, after considering submissions from counsel, the Tribunal confirmed that it would 'proceed to inquire into and report on the processes and steps the Crown has taken in the disestablishment of Te Aka Whai Ora as a standalone and separate issue'. The Tribunal sought to ensure the Crown has the benefit of its findings and any possible recommendations and to inform the development of its alternative plans at the earliest opportunity. The Tribunal confirmed that its inquiry into the disestablishment of Te Aka Whai Ora would be conducted on the papers and the evidence and submissions would not be subject to a hearing nor to a process for written questions and answers.[77]

1.3 Parties to this Inquiry

On 1 July 2024, Judge Stone issued a preliminary list of claims relating to the disestablishment of Te Aka Whai Ora. The list included claims that had 'submitted a statement of claim or an amended statement of claim relating to the disestablishment of Te Aka Whai Ora and Te Aka Whai Ora more generally'.[78] Judge Stone issued an updated list of claims on 15 October 2024, comprising 56 claims (this list can be found in appendix I).[79]

1.4 Issues for Determination

Given our decision to inquire into the disestablishment in two parts, this report analyses and makes findings and recommendations concerning 'the processes and steps the Crown has taken in the disestablishment of Te Aka Whai Ora as a standalone and separate issue' only.[80] In doing so, we assess the question: Was the Crown's disestablishment of Te Aka Whai Ora te Tiriti/Treaty-compliant?[81]

We have identified two issues for determination arising from this overarching question concerning the process and impacts of the decision:

- Was the Crown's process disestablishing Te Aka Whai Ora Tiriti/Treaty compliant, and
- Is disestabishing Te Aka Whai Ora Tiriti/Treaty compliant?

1.5 The Structure of the Report

In chapter 2, we set out the Treaty principles that apply in this inquiry, taking into account relevant Tribunal jurisprudence.

76. Memoranda 3.2.1128, 3.2.1133, 3.2.1133(a), 3.2.1132, 3.2.1130, 3.2.1131, 3.2.1134, 3.2.1136, 3.2.1135, 3.2.1137, 3.2.1138, 3.2.1139.
77. Memorandum 2.6.191, pp 7–8.
78. Memorandum 2.6.177, p 2; memo 2.6.177(b), p 1.
79. For a confirmed list of claims, see memo 2.6.192(a), pp [1]–[6].
80. Memorandum 2.6.191, pp 7–9.
81. Memorandum 2.6.166, p 2.

In chapter 3, we summarise the *Hauora* report findings and recommendations relating to the establishment of Te Aka Whai Ora; set out the Pae Ora Act and its provisions relating to Te Aka Whai Ora; outline the coalition Government's commitments; and outline the process the Crown has followed to disestablish Te Aka Whai Ora.

In chapter 4, we analyse the Tiriti/Treaty compliance of the policy development process and the decision to disestablish Te Aka Whai Ora, discussing the impacts the disestablishment has had for Maaori. We also outline any relevant prejudice.

Finally, in chapter 5 we provide a summary of our findings and make our recommendations.

CHAPTER 2

WHAT TREATY PRINCIPLES ARE MOST RELEVANT TO THIS INQUIRY?

2.1 Introduction

In this chapter, we briefly set out the Waitangi Tribunal's jurisdiction to hear these claims, including the issues of comity and parliamentary privilege. We then outline the parties' positions on which Treaty principles apply in this inquiry. Having regard to the parties' positions, we set out the Treaty principles and standards we consider most relevant to this inquiry. We draw on prior discussion of these principles established in our previous reports *Hauora* (2019) and *Haumaru: The COVID-19 Priority Report* (2023), as well as the analysis in other Tribunal reports, particularly the more recent *Ngaa Maataapono* (2024) report.

2.2 Jurisdiction

The Treaty of Waitangi Act 1975 established the Waitangi Tribunal and confers its jurisdiction. Section 6 of the Act provides that any Maaori may make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, or practice of the Crown that is inconsistent with the principles of te Tiriti/the Treaty. If the Tribunal finds that a claim is well founded, it may, having regard to all the circumstances of the case, make recommendations to the Crown to compensate for, or remove the prejudice of, the breach or to prevent others from being similarly affected in the future.

2.2.1 Comity

The Crown first raised the issue of comity, and the potential restriction on our ability to inquire into the claims related to the disestablishment of Te Aka Whai Ora, in their memorandum of 31 January 2024.[1] At that stage, the Crown argued that it would be inappropriate for us to inquire into this issue because of the principle of comity, or the 'non-interference principle'. Comity restrains the branches of government from interfering with each other's respective functioning. This means the judiciary is restrained from acting in a way that would frustrate the powers of the House of Representatives to enact legislation. Because the Crown was then planning to introduce legislation to disestablish Te Aka Whai Ora, the Crown argued that the principles of comity ought to restrain the Tribunal from inquiring into the issue.

1. Memorandum 3.2.940, p 3.

Despite this argument, on 16 February 2024, we set out our decision to grant urgency, noting that the principle of comity did not apply in this context and that we had jurisdiction to hear any claims up until the point where a Bill was introduced to the House of Representatives.[2] However, as noted in chapter 1, this urgent inquiry did not progress to a hearing as the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill was introduced into the House of Representatives two days before the hearing was scheduled to commence.

Questions of how comity may limit the Waitangi Tribunal most recently arose in the Wai 3350 inquiry in response to the Tribunal issuing a summons to the Minister for Children to give evidence on the proposed repeal of section 7AA of the Oranga Tamariki Act 1989. Those questions were answered by the Court of Appeal when it released its decision in *Skerret-White v Minister for Children* on 13 May 2024. Justices Cooper, French, and Cooke confirmed that the principle of comity applies, typically, between the judicial and legislative branches of government, which is in a different context to that in which the Tribunal operates, especially as the Tribunal cannot be easily located in the judicial branch.[3] The Court emphasised the Tribunal's unique place in Aotearoa New Zealand's legal and constitutional framework, and did not accept that comity necessarily operated to 'limit the power of the Tribunal'.

Further, the Tribunal fulfils a statutory duty to inquire, and the powers of the Tribunal make it 'inherently unlikely' that the Tribunal could limit the freedom of proceedings in Parliament. This is particularly because, when carrying out its powers to inquire and recommend pursuant to the Treaty of Waitangi Act, the Tribunal is 'doing as Parliament directed'.[4] The Court of Appeal also observed that section 6(6) of the Treaty of Waitangi Act may be seen as how the principle of comity applies in this setting, as it identifies when the Tribunal's jurisdiction is limited by the proceedings of the Government.[5]

In any event, because the legislative amendments disestablishing Te Aka Whai Ora were passed with urgency on 27 February 2024, and it was formally disestablished on 30 June 2024, the Tribunal was not required to address issues of comity raised. Once the Disestablishment Bill was passed into law, the alleged concerns of comity were no longer relevant.

2.2.2 Proceedings in Parliament

In its closing submissions (outlined in section 2.2.3 below), the Crown raised a further jurisdictional issue, this time in relation to the Parliamentary Privilege Act 2014. After observing that some claimants had questioned the Crown's motives in introducing the Disestablishment Bill two days prior to our scheduled urgent hearing on 29 February 2024, Crown counsel argued that, as this decision was

2. Memorandum 2.6.162, p 3.
3. *Skerret-White v Minister for Children* [2024] NZCA 160 at para 2(d).
4. Ibid at para 110.
5. Ibid at para 2.

not part of 'proceedings in Parliament',[6] that decision may not be impeached or questioned in this inquiry. Accordingly, in inquiring into the claims before us, the Crown stated that we may not question any motive, intention, or attribute bad faith to, or draw any inference or conclusion from, matters that are within the ambit of proceedings in Parliament.[7]

As noted above in relation to the issue of comity, the Court of Appeal has recently observed that the combination of our unique statutory duty to inquire into the claims before us and our power only to make recommendations in this context mean it is inherently unlikely that our actions could limit 'freedom of speech and debates or proceedings in Parliament when seeking information for the purposes of inquiry'.[8] We doubt, therefore, that the Parliamentary Privilege Act would prevent the Tribunal from fulfilling its broad and unique statutory duty to determine whether any actions of the Crown, including a decision of the Executive to introduce legislation into the House of Representatives, are inconsistent with Tiriti/Treaty principles.

We are mindful that the Court of Appeal has observed that important issues concerning the relationships between the branches of government 'cannot be properly considered without close regard to the context in which they arise'.[9] We are also mindful that we have not heard from the parties directly on this issue (our report is issued on the papers filed and no oral submissions have been presented to us). As a result, we have not been able to test where the bounds of our jurisdiction may lie at the interface between our statutory duties and proceedings of Parliament in the context of the disestablishment of Te Aka Whai Ora. Accordingly, we refrain in this report from making any findings or recommendations regarding the timing of the introduction into the House of Representatives of the Disestablishment Bill.

2.3 Parties' Positions on Relevant Treaty Principles

2.3.1 Claimant and interested party submissions

When setting out relevant Tiriti/Treaty principles, claimants Ms Kuka and Lady Moxon relied on their opening submissions from the urgent inquiry.[10] These were set out prior to the disestablishment of Te Aka Whai Ora.

In their opening submissions from 20 February 2024, Ms Kuka and Lady Moxon stated that any decision to disestablish Te Aka Whai Ora should be made by Maaori, not by the Crown. They stated 'health' was 'fundamental to the right of Maaori to self determine their own lives, guaranteed under the principle of tino rangatiratanga'. It was, therefore, for Maaori to decide whether to strengthen, or disestablish, Te Aka Whai Ora. Consequently, claimants argued, the Crown's

6. Parliamentary Privilege Act 2014, s 10(2)(a)–(e) lists 'matters' which fall within the definition of 'proceedings in Parliament'.
7. Submission 3.3.155, p 18.
8. *Skerret-White v Minister for Children* [2024] NZCA 160 at para 110.
9. Ibid at para 79.
10. Submission 3.3.95(a), p 1.

decision to disestablish Te Aka Whai Ora breached the principle of kaawanatanga and the ability to exercise tino rangatiratanga.[11]

Ms Kuka and Lady Moxon submitted that, in making its decision 'unilaterally', the Crown breached the principle of partnership as it acted 'as if it has a superior authority when in fact the authority of Maaori over their sphere is equal to the authority of the Crown over its sphere'.[12] Disestablishing Te Aka Whai Ora, claimants said, was prejudicial to Maaori – a prejudice that can be measured in 'early death, suffering and enduring racism and discrimination'.[13]

Ms Kuka and Lady Moxon endorsed our *Hauora* report findings, saying that Te Aka Whai Ora was the closest Aotearoa New Zealand had come to a tino rangatiratanga-compliant model.[14] They said our recommendation for a Maaori Health Authority was made because the system did not give effect to tino rangatiratanga. Ms Kuka and Lady Moxon outlined what they considered to be the significant features of Te Aka Whai Ora: it had equal status with Te Whatu Ora (Health NZ), with shared decision-making on matters, such as the New Zealand Health Plan; it enabled specific funding for Maaori health models; it had specific monitoring functions in place for the performance of Maaori health; it provided research on Maaori health; and it informed Maaori about the health system's performance.[15]

Claimants further submitted that Te Aka Whai Ora was the Crown's central response to the findings and recommendations in our *Hauora* report.[16] They argued that, since the disestablishment of Te Aka Whai Ora on 30 June 2024, aside from reimbursing claimants for the cost of commissioning an independent report prepared by the Sapere Group on historical underfunding of Maaori health providers, the Crown had not implemented any of our other recommendations.[17]

Interested parties to this inquiry submitted that the process followed by the Crown, and the subsequent decision to disestablish Te Aka Whai Ora, breached the principle of good government. They noted that when the Crown makes decisions that affect Maaori, it is expected that the Crown seeks advice from, and undertakes informed consultation with, Maaori.[18]

2.3.2 Crown submissions

The Crown set out relevant Tiriti/Treaty principles, drawing from our *Hauora* report, stating that the principles 'reflect the spirit and intent with which the parties treated with each other in 1840'.[19] For completeness, these principles were: (a)

11. Submission 3.3.95, p 12.
12. Ibid, p 13.
13. Ibid, p 15.
14. Ibid, p 10.
15. Ibid, p 11.
16. Submission 3.3.95(a), p 4.
17. Ibid.
18. Submission 3.3.139, p 22.
19. Submission 3.3.155, pp 5–6.

the guarantee of tino rangatiratanga, (b) equity, (c) active protection, (d) options, and (e) partnership.[20]

The Crown submitted that its obligations under te Tiriti/the Treaty are not 'absolute or unqualified', and that the measure was reasonable in the circumstances.[21] It contended that what is considered reasonable depends on the context of the decision, including the economic circumstances and the subject matter at issue.[22] The Crown referred to the *Maaori Electoral Option Report* (1994), which stated that the Crown is not required to go beyond what is reasonable in the circumstances when carrying out its obligations.[23]

The Crown argued that to meet the obligation to act reasonably and in good faith, it must be sufficiently informed when making decisions that affect Maaori. It also accepted the position enunciated in the *Oranga Tamariki (Section 7AA)* report – that the Executive is responsible for meeting the Crown's obligations to Maaori under te Tiriti/the Treaty.[24]

2.4 The Treaty Principles we Consider Relevant to this Inquiry

This section identifies Tiriti/Treaty principles we think are most relevant to this priority inquiry. We have mainly considered the principles identified in the *Hauora* report, as well as what previous Tribunal reports have said, particularly the more recent *Ngaa Maataapono* report. We use this Tribunal jurisprudence and what parties have submitted on the relevant Tiriti/Treaty principles to inform our approach to applying te Tiriti/the Treaty to the claim issues in this inquiry.

We consider the following Tiriti/Treaty principles as most applicable to the claims before us:

- the principle of tino rangatiratanga;
- the principles of kaawanatanga and good government;
- the principle of partnership;
- the principle of active protection; and
- the principle of equity.

2.4.1 The principle of tino rangatiratanga

Tino rangatiratanga means autonomy and self-government to the fullest extent possible.[25] The importance of te Tiriti/the Treaty guarantee of tino rangatiratanga

20. Ibid, pp 5–6; see also Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, 2nd ed (Lower Hutt: Legislation Direct, 2023), pp 163–164.

21. Submission 3.3.155, p 6.

22. Ibid, p 7.

23. Ibid, p 6; see also Waitangi Tribunal, *Maaori Electoral Option Report* (Wellington: Brooker's Ltd, 1994), p 37.

24. Submission 3.3.155, p 7; see also Waitangi Tribunal, *Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 28.

25. Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report* (Lower Hutt: Legislation Direct, 2023), p 41.

was described recently by the Tribunal in its report on the Crown's Treaty Principles Bill and Treaty Clause Review Policies as follows:

> [T]he Crown's guarantee of tino rangatiratanga in exchange for the granting of an authority to exercise kaawanatanga created two spheres of authority. Where there is an overlap or intrusion into the rangatiratanga sphere contemplated by Crown action or policies, open dialogue and engagement with Maaori is required. This constitutional positioning of the Treaty/te Tiriti Maaori–Crown relationship means that the Crown is required to engage with Maaori on such important policies and to recognise and give effect to the guarantee of tino rangatiratanga in statute law. That is what the principle of rangatiratanga requires and what the Treaty clauses have sought to do in legislation, albeit with varying success. In the words of the Central North Island Tribunal, that is because Maaori authority 'carried with it the right to manage their own policy, resources, and affairs within the minimum parameters necessary for the proper operation of the State'.[26]

As we stated in *Hauora*, te Tiriti/the Treaty's guarantee of tino rangatiratanga provides for Maaori self-determination and mana motuhake in the design, delivery, and monitoring of health care.[27] Maaori are guaranteed tino rangatiratanga rights in respect of hauora Maaori, which encompasses Maaori organisations and their models of care, and Maaori people who need to access their services.[28]

The Crown is obliged to actively protect tino rangatiratanga. In the modern context, te Tiriti's/the Treaty's guarantee of tino rangatiratanga affords Maaori – through iwi, hapuu, or other organisations of their choice – the right to decision-making power over their affairs.[29] The right for Maaori to exercise tino rangatiratanga over their affairs extends to participating in the decision-making process concerning whether or not to disestablish Te Aka Whai Ora.

However, the guarantee of tino rangatiratanga is not absolute and unqualified. In *Hauora*, we found that, while the Crown must uphold tino rangatiratanga, it is not required to go beyond what is reasonable in the context.[30]

While limited in that it was not a fully independent Maaori health authority, Te Aka Whai Ora was nonetheless seen by many as a positive step towards self-governance in the health and disability sector. It ensured Maaori participation in decision-making in matters affecting their health and sought to embed a 'by Maaori, for Maaori' approach. The right for Maaori to exercise tino rangatiratanga over their affairs extends to participating in the decision-making process concerning whether or not to disestablish Te Aka Whai Ora.

26. Waitangi Tribunal, *Ngaa Maataapono/The Principles: The Interim Report of the Tomokia Ngaa Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on The Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 71.
27. Waitangi Tribunal, *Hauora*, p 163.
28. Ibid, p 160.
29. Ibid, p 30.
30. Ibid.

2.4.2 The principles of kaawanatanga and good government

The principle of kaawanatanga is another core Tiriti/Treaty principle. It is the Crown's right to govern and make laws for the good order and security of the country. Kaawanatanga must be 'exercised in accordance with the principle of good government and in a way that actively protects and does not diminish rangatiratanga'.[31]

The principle of good government has been articulated in several Tribunal reports, most recently in relation to various acts or omissions of the coalition Government that took office following the 2023 general election.[32] The principle encompasses the concept that the Crown must follow its own laws, rules, and standards.[33] It imposes two broad duties on the Crown: to adopt transparent policies forged in the partnership created by te Tiriti/the Treaty and to implement programmes that are focused and highly functional.[34]

The principle of good government is particularly relevant when there are questions about whether reforms proposed by the Crown are 'a legitimate and transparent exercise of its kaawanatanga powers afforded under article 1 of the Treaty'.[35] Drawing on previous Tribunal jurisprudence on the principle of good government, the Tribunal in its *Ngaa Maataapono* report noted that the Crown must produce 'robust well-designed transparent policy forged in partnership' for it to be Tiriti/Treaty consistent.[36] Although *Ngaa Maataapono* focuses on the constitutional status of te Tiriti/the Treaty, these comments apply to Tiriti/Treaty principles generally and the Crown's policy-design process. It is incumbent on the Crown to ensure that all major policy on matters of significance to Maaori are forged in partnership with them. Working in partnership also helps minimise the risk that the constitutional status of te Tiriti/the Treaty and its principles may be 'undermined by poorly designed [and] unjustifiable policies'.[37]

In respect of the establishment of Te Aka Whai Ora, the Crown followed a robust process based on evidence and characterised by a partnership approach. This included extensive consultation, regulatory impact analysis of the policies, and the opportunity for public input at select committee during the legislative process. It is within the Crown's authority to decide to disestablish Te Aka Whai Ora. However, the principle of good government requires that any such decision must follow an equally thorough process as the one taken to establish it.

31. Waitangi Tribunal, *Ngaa Maataapono*, p 71.
32. See, for example, Waitangi Tribunal, *Ngaa Maataapono*, pp 73–74; Waitangi Tribunal, *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), pp 13–14.
33. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Lower Hutt: Legislation Direct, 2015), vol 1, p 158.
34. Waitangi Tribunal, *Ko Aotearoa Teenei: A Report into Claims concerning New Zealand Law and Policy Affecting Maaori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 163.
35. Waitangi Tribunal, *Takutai Moana Act*, p 13.
36. Waitangi Tribunal, *Ngaa Maataapono*, p 74.
37. Ibid.

2.4.3 The principle of partnership

Over the years, the Tribunal has drawn heavily on the landmark Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] (the *Lands* case) to define the relationship between Maaori and the Crown as one of partnership. The *Napier Hospital and Health Services Report* (2001), for example, said that the principle of partnership 'arises from one of the Treaty's basic objectives – to create the framework for two peoples to live together in one country'.[38] This framework established a relationship that was meant to be reciprocal and mutually beneficial.

The Tribunal in its *Te Mana Whatu Ahuru* (2023) report for the Te Rohe Pootae district inquiry similarly stated:

> the Treaty established a partnership where the kaawanatanga or governing power of the Crown was limited by the guarantee of tino rangatiratanga to Maaori. Likewise, the former absolute authority of Maaori encapsulated in the term tino rangatiratanga was limited by the grant of kaawanatanga. Each would operate in their own sphere of influence and negotiate how their chosen institutions would operate where their authorities overlapped.[39]

Despite the power imbalance between Maaori and the Crown, partnership, as noted by te Tiriti/the Treaty, is 'a relationship where one party is not subordinate to the other but where each must respect the other's status and authority in all walks of life', as we confirmed in the *Haumaru* report.[40] This report therefore found that it is 'vital that the design and provision of health and social services are founded in the Treaty partnership, in which the tino rangatiratanga and mana motuhake of Maaori must be fully recognised'.[41]

The *Napier Hospital* report stated that '[p]artnership action . . . will commonly promote joint involvement'.[42] We reiterated this finding in *Haumaru*, further noting that the requirement for the Crown to partner with Maaori in developing and implementing policy is especially relevant where Maaori are expressly seeking an effective role in this process. The requirement is heightened where disparities in outcomes exist.[43]

In *Hauora*, we found that:

> co-governance, particularly in social service design and delivery, is not only an essential part of upholding the Treaty relationship but also essential to the improvement of Maaori socio-economic status. The Crown should be making policy decisions with a

38. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 48.

39. Waitangi Tribunal. *Te Mana Whatu Ahuru: Report on Te Rohe Pootae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 1, pp xlv–xlvi.

40. Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998), p xxvi; Waitangi Tribunal, *Hauora*, p 28.

41. Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report*, p 42.

42. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 58.

43. Waitangi Tribunal, *Haumaru*, p 42.

view to fulfilling this Treaty obligation under the principle of partnership and to recognise tino rangatiratanga.[44]

Certain obligations arise from the principle of partnership that apply to both partners. These obligations include the duties to act towards each other reasonably and in good faith. The Crown, moreover, has a duty to consult with Maaori in order to make decisions informed by the views and preferences. Recognising the unequal relationship between te Tiriti/the Treaty partners, the Tribunal in *Ko Aotearoa Teenei* (2011) found that acting in good faith meant a willingness to share resources:

> On the Crown's part there must be a willingness to share a substantial measure of responsibility and control with its Treaty partner. In essence, the Crown must share enough control so that Maaori own the vision, while at the same time ensuring its own logistical and financial support, and also research expertise, remain central to the effort.[45]

To act reasonably and in good faith, te Tiriti/the Treaty partnership requires the Crown to be sufficiently informed through appropriate consultation with Maaori. Indeed, te Tiriti/the Treaty partnership calls for extensive consultation and co-operation on truly major issues. The purpose of such consultation is to fully understand the impact of proposed legislation, policies, actions, or omissions on Maaori rights and interests.

In some cases, consultation may not be enough. Instead, joint decision-making by both Tiriti/Treaty partners may be required. In its *Ngaa Maataapono* report, the Tribunal stated:

> In some cases, particularly where the issue is significant to Maaori or goes to the heart of the Treaty/te Tiriti relationship, the Tribunal has found the Crown may be obliged to go further than consultation and obtain the consent of Maaori. The Indigenous Flora and Fauna Tribunal in its *Ko Aotearoa Teenei* report (2011), for example, noted that there is no 'one size fits all' approach to consultation, and indicated there could be 'occasions in which the Maaori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent'. The Te Raki stage 2 Tribunal similarly found that the Treaty/te Tiriti obliges the Crown to go beyond consultation and negotiate through 'discussion and agreement'.[46]

The principle of redress also derives from the principle of partnership as well as the Crown's obligations to act reasonably and in good faith and to actively protect Maaori rights and interests. This principle is not only the foundation of the

44. Waitangi Tribunal, *Hauora*, p 165.
45. Waitangi Tribunal, *Ko Aotearoa Teenei*, pp 161, 163.
46. Waitangi Tribunal, *Ngaa Maataapono*, p 76.

process for the settlement of historical Treaty claims but also for providing restitution for contemporary breaches. The Tribunal described the principle of redress in its *Report on the Crown's Foreshore and Seabed Policy* (2004) in this way:

> Where the Crown has acted in breach of the principles of the Treaty, and Maori have suffered prejudice as a result, we consider that the Crown has a clear duty to set matters right. This is the principle of redress, where the Crown is required to act so as to 'restore the honour and integrity of the Crown and the mana and status of Maori'.[47]

In the stage 1 health inquiry, the claimants sought redress from the Crown for the lack of support and underfunding for Maaori health organisations and providers, including the lack of recognition of tino rangatiratanga.[48] The establishment of Te Aka Whai Ora under the previous government can be seen as a form of the redress sought by the claimants. Agreed between te Tiriti/the Treaty partners, it was a response to the breaches identified and a fulfillment of one of the key recommendations made in our *Hauora* report.

The process to establish Te Aka Whai Ora was characterised by a partnership approach, involving extensive consultation between the Tiriti/Treaty partners and a robust policy development process informed by both our report and the Simpson Report. It demonstrated a commitment by the Crown to not only address Maaori health inequities but also to embed a 'by Maaori, for Maaori' approach within the health and disability system. It therefore follows that the process to disestablish Te Aka Whai Ora should also follow a partnership approach with, at the very least, the decision to do so made via consultation between te Tiriti/the Treaty partners.

2.4.4 The principle of active protection

Active protection places proactive responsibilities on the Crown. Its obligation to protect Maaori interests is not a passive one: failure to protect Maaori interests is as much a breach of te Tiriti/the Treaty and its principles as a positive act that removes rights. In its *Te Tau Ihu o te Waka o Maui* (2007) report, the Tribunal stated that '[a]ctive protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.'[49] Otherwise, active protection can have 'paternalistic implications', reflecting the power imbalance between te Tiriti/the Treaty partners.[50] Indeed, the Paparahi o Te Raki Tribunal considered in its *Tino Rangatiratanga me te Kaawanatanga* (2022) report that 'the active protection of tino rangatiratanga is not a Crown duty arising from its sovereign

47. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 134–135.

48. Waitangi Tribunal, *Hauora*, p 8.

49. Waitangi Tribunal, *Te Tau Ihu o te Waka o Maui: Report on the Northern South Island Claims*, 3 vols (Wellington: Legislation Direct, 2007), vol 1, p 4.

50. Waitangi Tribunal, *Tino Rangatiratanga me te Kaawanatanga*, 3 vols (Lower Hutt: Legislation Direct, 2023), vol 1, pp 66, 70–71.

authority, rather it is an obligation on its part to help restore balance to a relationship that became unbalanced'.[51]

As most recently outlined in *Ngaa Maataapono*, active protection applies to all rights and interests guaranteed to Maaori in te Tiriti/the Treaty, to tangible and intangible properties, and across all statutory regimes and fields of Crown policy today.[52] The obligation to actively protect Maaori interests is heightened by 'past historical wrongs done by the Crown and any prejudice that has affected subsequent generations'.[53] As the Tribunal's *Tuu Mai Te Rangi!* (2017) report outlined, 'the Treaty principles of equity and active protection are two sides of the same coin'.[54] Current health inequities between Maaori and non-Maaori therefore heighten the Crown's obligation to actively protect Maaori interests, demanding that balance be restored.[55] In our *Hauora* report, we set this out in respect of health:

> The principle of active protection . . . requires the Crown to act, to the fullest extent practicable, to achieve equitable health outcomes for Maaori. This includes ensuring that it, its agents, and its Treaty partner are well-informed on the extent, and nature, of both Maaori health outcomes and efforts to achieve Maaori health equity.[56]

The Tribunal, in its *Whaia te Mana Motuhake* (2015) report, for example, stated that the principle of active protection extended to protection of the Maaori right to exercise tino rangatiratanga.[57] However, the panel inquiring into the proposed reform of Te Ture Whenua Maaori Act 1993 in 2016 found that a balancing act was required between Maaori exercising tino rangatiratanga and the Crown's responsibilities to consider factors such as 'affordability, practicability, effectiveness, [and] accountabilities'. In making this finding, however, the panel cautioned that such issues could 'only be resolved by dialogue between the Treaty partners, each acting reasonably, cooperatively, and in good faith'. What mattered, they concluded, was that 'the form of protection chosen be effective, and that it have general support from Maaori'.[58]

Te Aka Whai Ora was established with the explicit aim of addressing Maaori health inequities. Funded by the Crown, it was a means by which the Crown could not only actively protect Maaori but also their tino rangatiratanga by providing a mechanism through which they could exercise decision-making authority in

51. Ibid, p 66.
52. Waitangi Tribunal, *Ngaa Maataapono*, p 77.
53. Waitangi Tribunal, *Tuu Mai Te Rangi! Report on the Crown and Disproportionate Offending Rates* (Lower Hutt: Legislation Direct, 2017), p 22.
54. Ibid, p 60.
55. Ibid.
56. Waitangi Tribunal, *Hauora*, p 163.
57. Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Maaori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), p 30.
58. Waitangi Tribunal, *He Kura Whenua ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Maaori Act 1993 Claim* (Lower Hutt: Legislation Direct, 2016), pp 158, 209.

respect of their health. The process and decision to disestablish Te Aka Whai Ora should similarly keep the Crown's duty of active protection toward Maaori in view, centering policy options that are likely to reduce Maaori health inequities and enable Maaori participation in decision-making in matters that affect their health.

2.4.5 The principle of equity

Deriving from article 3 of te Tiriti/the Treaty, the principle of equity has been described as the Crown's obligation to act fairly between Maaori and non-Maaori. However, as the Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005) report noted, equity does not necessarily mean 'treating all groups exactly the same, where they have different populations, interests, leadership structures, and preferences'.[59] As we noted in the previous section, the principles of equity and active protection are 'two sides of the same coin'. The presence of inequities gives rise to a positive and proactive duty on the Crown to address them.[60] More specifically in the context of hauora Maaori, the principle of equity requires the Crown to commit to achieving equitable health outcomes for Maaori.[61] To satisfy its obligations under this principle, the Crown must both ensure Maaori do not suffer inequities, and also actively inform itself of the occurrence of any inequities.[62]

In *Hauora*, we found that the Crown must provide health services that are designed to close inequitable gaps in health outcomes.[63] To this end, the Crown is required to focus specific attention on inequities experienced by Maaori, and keep itself informed of all relevant factors affecting Maaori needs.[64] The Crown must be well informed about the extent and nature of Maaori health outcomes and about efforts to achieve Maaori health equity. The Crown must also ensure its Tiriti/Treaty partner remains informed of and involved in this work.[65] If need be, the Crown must provide additional resources to address the causes of inequities, and implement other positive steps towards addressing them. This is particularly urgent when Maaori interests and rights derived from te Tiriti/the Treaty are under grave threat.[66]

In its *Whaia te Mana Motuhake* (2015) report, the Tribunal commented on the link between te Tiriti/the Treaty's guarantee of tino rangatiratanga in article 2 and the principle of equity:

> Coupled with the guarantee of Maaori tino rangatiratanga, article 3 guarantees to Maaori the right of political representation and self-determination through their

59. Waitangi Tribunal, *Te Arawa Mandate Report: Te Wahanga Tuarua* (Lower Hutt: Legislation Direct, 2005), p 73.
60. Waitangi Tribunal, *Tuu Mai Te Rangi!*, p 62.
61. Waitangi Tribunal, *Hauora*, p 163.
62. Ibid, p 34.
63. Ibid, p 31.
64. Ibid, p 32.
65. Ibid, p 163.
66. Ibid, p 32.

> own forms of self-government. This means that a Maaori system of self-government should be appropriately and equitably funded in comparison to similar institutions.[67]

Te Aka Whai Ora, as a form of self-governance within the health sector, demonstrates this link. It was seen as an expression of tino rangatiratanga, albeit a limited one, and one specifically set up to address health inequities for Maaori, giving effect to the vision of 'by Maaori for Maaori' at the structural level as well as the level of service provision.

67. Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 31–32.

CHAPTER 3

WHAT PROCESS DID THE COALITION GOVERNMENT FOLLOW WHEN DISESTABLISHING TE AKA WHAI ORA?

3.1 Introduction

This chapter provides an overview of the policy process the coalition Government followed when it disestablished Te Aka Whai Ora on 27 February 2024. First, we provide a summary of our findings and recommendations in the *Hauora* report relating to the establishment of an independent Maaori health authority. We then summarise the Pae Ora (Healthy Futures) Act 2022, including the functions and objectives of the Maaori Health Authority (which took the name Te Aka Whai Ora), and the subsequent establishment of Te Aka Whai Ora by this Act in July 2022.[1] Next, we outline the current coalition Government's commitments as set out in its November 2023 coalition agreements and 100 Day Action Plan, as well as its impact analysis commitments. Finally, we set out the key steps in the policy process that led to the disestablishment of Te Aka Whai Ora.

3.2 The *Hauora* Report and the Establishment of Te Aka Whai Ora

As noted in chapter 1, in July 2019 we released our *Hauora* report. The report made several key findings and recommendations relating to the establishment of a Maaori health authority. These are outlined below.

3.2.1 The *Hauora* report's key findings

In our *Hauora* (2019) report, we found that the persistence of Maaori health inequities confirmed that, while the provisions in the New Zealand Public Health and Disability Act 2000 (Public Health and Disability Act) were 'promising', they 'were not imperative or clear enough to manifest the urgency required of the primary health care sector to pursue health equity for Maaori'.[2] We said the Crown was responsible for the performance of the health sector, including ensuring it was compliant with Tiriti/Treaty obligations. We acknowledged the Crown had a responsibility to 'set clear expectations and requirements' about the direction and performance of the primary health sector and to ensure these requirements met te Tiriti/the Treaty obligations. However, neither the Public Health and Disability Act, nor the framework for primary care's interpretation of this legislation and te

1. Claim 1.1.50, p 6.
2. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*, 2nd ed (Lower Hutt: Legislation Direct, 2023), p 96.

Tiriti/the Treaty, met this standard. We said that, in our view, it 'should not be controversial to include an express stand-alone commitment to achieving equity of health outcomes for Maaori; after all, that is what the ultimate purpose of a just health system in New Zealand should be'.[3]

We further found that Maaori representation on district health boards did not afford them 'Treaty-consistent control of decision-making' with regard to the design and delivery of healthcare.[4]

In terms of funding arrangements, we reported that for primary health care these were likely inadequate and disadvantaged patients, including Maaori.[5] We said that the Crown had 'broadly allowed variability of establishment funding for primary health organisations', with no recognition of the needs of the populations they served. This variability then disadvantaged many Maaori organisations that sought to become Maaori primary health organisations. We concluded that the Crown's failure to implement a system that allocated establishment funding was a breach of te Tiriti/the Treaty principles of partnership, options, active protection, and equity.[6]

Importantly, our *Hauora* report stated that the Crown had not designed the primary health care framework in partnership with Maaori. We expressed concern that Maaori were very rarely reflected throughout the health system, saying this could be evidence of further Crown omissions. We noted that the disestablishment in 2016 of Te Kete Hauora – an advisory unit within the Ministry that focused specifically on Maaori health – and the Crown's failure to replace it, was a breach of the Tiriti/Treaty principles of equity and active protection. To be Tiriti/Treaty-compliant, we said that the Crown needed to support models of health care that were culturally appropriate for Maaori.[7]

3.2.2 The *Hauora* report's key recommendations

In our *Hauora* report, we also outlined claimants' concerns about the primary health system. They said the Crown led and controlled the primary health system, and this system had not addressed Maaori health inequities in a Tiriti/Treaty-compliant way. Claimants said this was, in part, why Maaori health inequalities persisted. They sought recommendations from the Tribunal for the establishment of an independent Maaori health authority.[8] These recommendations reflected the need for recognition of tino rangatiratanga and mana motuhake in the 'design, delivery, resourcing, and control of Maaori primary health'.[9]

In our summation, we said:

3. Waitangi Tribunal, *Hauora*, p 96.
4. Ibid, p 97.
5. Ibid, p 116.
6. Ibid.
7. Ibid, pp 143–144, 160.
8. Ibid, p 164.
9. Ibid, p 165.

> We observe that the demand for structures and services that are 'by Maaori, for Maaori' 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.[10]

While acknowledging that the Ministry of Health was 'the steward of the New Zealand health system', we said the Ministry 'must do better' in terms of meeting its Tiriti/Treaty obligations to Maaori.[11]

We made two time-bound interim recommendations. One of these was a commitment from the Crown to explore a stand-alone Maaori primary health authority. This was an interim finding as evidence had not been heard from several organisations and providers delivering primary health services to Maaori.[12] Two claimant groups sought a recommendation for an Alaskan model of indigenous health – 'a NUKA-based model or an independent Maaori health authority' – as this would have a much wider scope than primary health, covering secondary and tertiary health care.[13] We did not go this far, as the claims for this stage of the inquiry were focused on the legislative and policy framework of the Aotearoa New Zealand primary health care system.[14] However, we recommended that the Crown, and representatives of two claimant groups, should design a draft terms of reference to explore a stand-alone Maaori health authority.[15]

As part of our time-bound recommendations, we asked the claimants and the Crown to provide us with updates on the implementation of those recommendations. Between the date of our *Hauora* report in July 2019 and 2021, we received regular updates from these parties. The general tenor of these updates in terms of our recommendation – for the parties to explore the establishment of a stand-alone Maaori primary health authority – was promising, in that the parties had agreed to establish such an authority and work was underway to finalise the associated details. We were encouraged by these updates, so we extended the timeframes associated with our time-bound recommendations to allow that work to continue.

Eventually, we were satisfied that sufficient progress on our interim recommendations had been made to enable us to issue our final report. Thus, on 19 October 2021, we released our final *Hauora* report, confirming our recommendation for a Maaori Health Authority. In it, we recommended that the authority should report

10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid, pp 164–165. The NUKA model had three key aspects that were fundamental to successful implementation: 'Empowering legislation, in particular the Indian Self Determination and Education Assistance Act 1975; [a] relationship between the tribes as a consensus based collective and the State; and [d]esignated funding for the provision of healthcare services for indigenous peoples': memo 3.2.9, p 1.
14. Waitangi Tribunal, *Hauora*, pp 165–166.
15. Ibid, p 166.

to the Minister of Health and should be funded through the Ministry of Health.[16] We recognised that the Crown's intention, at that time, was for the Maaori Health Authority and Health NZ to become permanent under the Pae Ora Act, which would come into force on 1 July 2022.[17] This, we said, was a 'significant, positive development towards both the provision of equitable health care and the realisation of the Treaty partnership and its obligations'. Furthermore, we found that the Crown had satisfied the terms of the time-bound interim recommendation.[18]

We also acknowledged that the formal relationships between the Maaori Health Authority, the Ministry of Health, and Health NZ offered 'real potential'. It appeared the authority would be given a meaningful mandate over key functions that would 'dictate how health care policies and services are designed, planned, and delivered, in relation to both Maaori-owned and other providers of care'. Yet, we remained concerned about the lack of clarity around which Tiriti/Treaty partner would wield the mandate. Throughout the inquiry, claimants stressed the need for the Maaori Health Authority to be controlled by Maaori, for Maaori, for it to be effective. As we noted, however, the information released by the Crown simply highlighted that it remained unknown what governance arrangements would be in place to ensure the authority's accountability was to Maaori.[19]

We clearly stated then that the formalisation of the Maaori Health Authority's inter-agency relationships were essential for realising the Tiriti/Treaty partnership. To ensure that the relationships and joint sign-off arrangements endured, we recommended that these be codified in statute.[20]

3.3 Pae Ora (Healthy Futures) Act 2022

As noted in chapter 1, the Pae Ora Act formally came into effect on 1 July 2022. It heralded a step-change in the delivery of health services in Aotearoa New Zealand. Relevantly, it established the Maaori Health Authority. We will turn shortly to the lengthy process that led to the enactment of this significant piece of legislative health reform. At this stage, we set out the key aspects of the Pae Ora Act that are relevant to our inquiry.

The objectives and functions of the Maaori Health Authority were set out in sections 18 and 19 of the Pae Ora Act, respectively. These included:

- jointly developing and implementing a New Zealand Health Plan with Health New Zealand;
- improving service delivery and outcomes for Maaori at all levels of the health sector;

16. Waitangi Tribunal, *Hauora*, p177.
17. Ibid.
18. Ibid, p178.
19. Ibid, p179.
20. Ibid, p180.

- commissioning kaupapa Maaori services and other services developed for Maaori in accordance with the New Zealand Health Plan;
- providing policy and strategy advice to the Minister on matters relevant to Hauora Maaori;
- monitoring, in cooperation with the Ministry and Te Puni Kokiri, the performance of the publicly funded health sector in relation to hauora Maaori;
- collaborating with relevant entities for the purpose of improving the capability and capacity of the health workforce in relation to hauora Maaori; and
- undertaking and supporting research relating to health.[21]

Section 6 of the Pae Ora Act sets out provisions relating to compliance with te Tiriti/the Treaty. It states that for the Crown to give effect to te Tiriti/the Treaty, the Act requires 'the Minister, the Ministry, and all health entities to be guided by the health sector principles, which, among other things, are aimed at improving the health sector for Maaori and improving hauora Maaori outcomes'. The Act also requires that the board of Health NZ 'collectively has knowledge of, and experience and expertise in relation to, te Tiriti o Waitangi (the Treaty of Waitangi) and tikanga Maaori'. The board must maintain systems and processes that ensure Health NZ has 'the capacity and capability to understand te Tiriti o Waitangi'.

Under the Pae Ora Act, to give effect to te Tiriti/the Treaty, the Minister is required to establish a permanent committee to advise the Minister – the Hauora Maaori Advisory Committee. The advisory committee comprises eight members, who are appointed after consulting the Minister for Maaori Development. Its main function includes advising the Minister on 'any matter relating to Hauora Maaori that the Minister requests'.[22] Section 6 also requires Health NZ to have systems in place for engaging with Maaori and having systems that enable that engagement to inform its performance.

Other sections of the Pae Ora Act provide guiding principles and processes for the development and implementation of health strategies.[23] Section 7 provides guiding principles for the health sector that were informed by te Tiriti/the Treaty as articulated in *Hauora*. Furthermore, sections 41 and 49 include the 'process for making health strategy' and the '[r]eview and progress of health strategy', respectively. As Crown witness John Whaanga noted, the Hauora Maaori Strategy (Pae Tuu) was developed under the Pae Ora Act and includes 'a guiding framework by which health entities will uphold Te Tiriti and achieve Maaori health equity'.

From its inception, according to the claimants, Te Aka Whai Ora had 'begun to perform some of its functions, including jointly preparing the interim New Zealand Health Plan 2022 and the Hauora Maaori Strategy'.[24] It had taken over the Crown's responsibility for existing contracts with Maaori Primary Health Organisations (PHOs) and Maaori Providers and had begun to offer new contracts

21. Memorandum 3.2.930, p 2.
22. The Pae Ora (Healthy Futures) Act 2022, s 89.
23. Document M34 (John Whaanga), pp 1–2.
24. Claim 1.1.50, p 6.

for primary health outcomes and services. Claimants said that these changes had the potential to 'reduce the disproportionate burden of auditing carried by Maaori PHOs and Maaori Providers', with further potential to 'improve standards of health and lengthen lives for more Maaori'.[25] The new contracts created for PHOs and Maaori Providers also had the potential to be:

- better targeted to improve Maaori health;
- better targeted for what Maaori PHOs and Maaori Providers offer that is different to non-Maaori organisations;
- less burdensome for Maaori PHOs and Maaori Providers in terms of auditing.[26]

3.4 The Process Leading to the Establishment of Te Aka Whai Ora, 2018–22

Returning to the general process that led to the enactment of the Pae Ora Act and the establishment of Te Aka Whai Ora, it began as early as 2018, when the then Government announced a comprehensive review of Aotearoa New Zealand's health and disability system.[27] An expert panel was appointed to undertake the review, chaired by Heather Simpson.[28] A Maaori expert advisory group (MEAG) was established in December 2018 to 'support the Review and to help ensure that the advice it provides appropriately incorporates te Ao Maaori, including hauora (health and wellbeing) and maatauranga Maaori (knowledge) in order to improve Maaori health outcomes, equity, and wellbeing'. Sharon Shea chaired the MEAG.[29] The expert panel and the MEAG began the work in earnest in August 2018.[30]

The health and disability review commenced during stage 1 of our health inquiry. As noted, we released our stage 1 *Hauora* report on 1 July 2019. We summarised this report earlier in this chapter, including our interim recommendation towards the establishment of a stand-alone Maaori primary health authority.

Soon after we issued our report, on 3 September 2019, the Health and Disability Review panel issued an interim report. Relevantly, it noted the role of te Tiriti/the Treaty in the health and disability system:

> Te Tiriti o Waitangi/the Treaty of Waitangi must be fully incorporated to provide a framework for meaningful and substantive relationships between iwi, Maaori and the Crown. This will provide a positive flow on effect linked to leadership, governance

25. Claim 1.1.50, pp 6–7.
26. Ibid, p 7.
27. The Honourable Dr David Clark, 'Details of Major Health Review Finalised', press release, 8 August 2018, https://tinyurl.com/bdd8shzs.
28. Expert review panel members included Heather Simpson, Shelley Campbell, Professor Peter Crampton, Dr Lloyd McCann, Dr Margaret Southwick, Dr Winfield Bennett, and Sir Brian Roche: Clark, 'Details of Major Health Review Finalised'.
29. The MEAG members included Sharon Shea (Chair), Dr Terryann Clark, Takutai Moana Natasha Kemp, Dr Dale Bramley, Linda Ngata, and Associate Professor Sue Crengle: doc 6.2.18, p 11.
30. Document 6.2.19, p [2].

and decision making, and assist in strengthening Maaori provider, workforce and service development.[31]

The final report on the review of the health and disability system was published in March 2020. It has become colloquially known as the Simpson Report, named after the chairperson of the expert panel that produced it. The report recommended sweeping changes to the health and disability system. Chapter 3 of the Simpson Report is devoted entirely to hauora Maaori. One major change the Simpson Report heralded was to 'achieve rangatiratanga in the health and disability system.'[32] This was to be guided by several factors, including '[a] recognition that the principles of te Tiriti must be fully incorporated in how the health and disability system works if it is ever to serve Maaori well', a recognition that the system had failed Maaori, and an acceptance that 'remedying decades of underperformance by the health and disability system will require changes'.[33]

Of particular relevance to us is the recommendation in the Simpson Report to establish a separate Maaori health authority. The report said:

> The Review's recommendations aim to enhance rangatiratanga and mana motuhake opportunities within the health and disability system. Achieving this includes the formation and operation of an independent Maaori Health Authority, changes to governance arrangements, and ensuring that equitable funding allocations and expenditure properly reflect the higher needs of Maaori communities.[34]

The Crown took time to digest the Simpson Report, responding to it some nine months later, in April 2021.[35] The response was both consistent with the policy rationale articulated in the Simpson Report and categorical in relation to hauora Maaori. The broader aim of the Crown's response to the Simpson Report was to 'strengthen our health system into a *single nationwide health service* which provides consistent, high-quality health services for everyone, particularly groups who have been traditionally underserved' (emphasis in original).[36] To make that possible, the Crown confirmed that it needed 'structures which ensure government is both closer to communities, and more nationally connected'. To achieve that outcome, a number of measures were proposed, including the creation of '*a new Maaori Health Authority* to ensure our health system delivers improved outcomes for Maaori, and to directly commission tailored health services for Maaori' (emphasis in original).[37]

In terms of Maaori health, the Crown's response recognised that the health and disability system had failed Maaori, seemingly drawing on the associated

31. Document 6.2.20, p 6.
32. Document 6.2.18, p 26.
33. Ibid.
34. Ibid.
35. Document 6.2.17, p 1.
36. Ibid.
37. Ibid.

findings from our *Hauora* report.[38] To address this failure, the Crown proposed the establishment of a Maaori health authority, the strengthening of Iwi-Maaori Partnership Boards, and much stronger expectations on all health agencies and care providers to deliver better care for Maaori and other vulnerable groups who had not historically received equitable care or outcomes. The intended outcomes were 'more deliberate investment in equity of access and outcomes for Maaori, increased accountability, and a much greater role for iwi and Maaori in shaping service design and provision for Maaori communities'.[39] Ultimately, the Crown's response to the Simpson Report was based in Tiriti/Treaty principles as articulated in our *Hauora* report. Indeed, the Crown expressly acknowledged at the time that these reforms 'aim to strengthen rangatiratanga Maaori over hauora Maaori, empower Maaori to shape care provision, and give real effect to Te Tiriti o Waitangi'.[40]

The Crown's response to the Simpson Report was then reflected in legislation, in the form of the Pae Ora (Healthy Futures) Bill. The Bill was introduced into the House of Representatives on 20 October 2021. It received its first reading on 27 October 2021 and was referred to the Pae Ora Legislation Committee.[41] Public submissions on the Bill closed on 9 December 2021. The opportunity to make submissions on the Bill was taken up with some alacrity. In the end, the committee received 4,665 submissions on the Bill. In its report back to Parliament, the committee (by majority) endorsed the establishment of Te Aka Whai Ora.[42] The Pae Ora Legislation Committee report recorded that the committee members representing National and ACT opposed the Bill, including the establishment of Te Aka Whai Ora.[43]

The Bill received its third reading on 7 June 2022.[44] The Minister of Health at the time, the Honourable Andrew Little, made the following statement in the House:

> The third principle requires the system to provide Maaori with the opportunity to make decisions that are important to them. That's nothing less than the commitment that was made by the British Crown under Te Tiriti o Waitangi. It's nothing less than the obligation that the Crown owes to Maaori under the Treaty, and that's what this legislation will deliver. It will allow Maaori to make their decisions to exercise their rangatiratanga on this very important matter of the health of their people, and we saw it amply demonstrated in the COVID-19 vaccination campaign, where we handed over

38. We recommended that the Crown acknowledge the overall failure of the legislative and policy framework of the New Zealand primary health care system to improve Maaori health outcomes since the commencement of the New Zealand Public Health and Disability Act 2000.

39. Document 6.2.17, p 7.

40. Ibid.

41. 'Pae Ora (Healthy Futures) Bill – First Reading', New Zealand Parliament, 27 October 2021, https://tinyurl.com/3bvtjk5a.

42. Document 6.2.21, p 28.

43. Ibid, pp 25–27.

44. New Zealand Parliament, Pae Ora (Healthy Futures) Bill – First Reading Summary, no date.

> leadership and responsibility to Maaori. They took it and they made the difference in the health of their people. Let Maaori lead when it comes to health, and this legislation will allow them to do that.[45]

Support in the House for the Bill was not universal. Dr Shane Reti, as opposition spokesperson for health, said at the third reading of the Bill that National did not support a separate Maaori health authority.[46] The then National leader, Judith Collins, also made statements opposing the Maaori health authority, calling it 'racist separatism'.[47] ACT leader David Seymour said at the party's annual conference in relation to the Maaori health authority, '[w]e need more effective and efficient services, but creating two parallel health care systems means the exact opposite. The Maaori Health Authority should simply be removed with legislation introduced and passed first reading in the first 100 days.'[48]

3.5 The Coalition Government's Commitments, 2023

The following section outlines the incoming coalition Government's commitments following the 2023 general election, as set out in the coalition agreements and the 100 Day Action Plan. Given that many of these commitments involved policy and legislative reform, the Government's own guidelines to ensure robust policy processes become increasingly relevant. This policy process includes impact analysis for proposed regulatory changes, such as those made to disestablish Te Aka Whai Ora. As those requirements are pertinent to this inquiry, we detail them below.

3.5.1 The coalition agreements and the coalition Government's 100 Day Action Plan

Following the general election on 14 October 2023, National entered into coalition agreements with ACT and the New Zealand First Party (New Zealand First). When the coalition agreement between National and New Zealand First was released on 24 November 2023, it confirmed plans to '[a]bolish the Maaori Health Authority'.[49] This was the extent of the policy commitment as noted in the agreement. The National and ACT coalition agreement, released on the same date, included a commitment to disestablish the Maaori Health Authority under the heading 'Delivering Better Public Services'.[50] Cabinet endorsed the two coalition

45. New Zealand Parliament, Pae Ora (Healthy Futures) Bill – Third Reading, 7 June 2022, 760 NZPD, at [10160].

46. New Zealand Parliament, Pae Ora (Healthy Futures) Bill – Third Reading, 7 June 2022, 760 NZPD, at [10163].

47. 'Collins Says her Party Won't Stand for "Racist Separatism" New Zealand', Radio New Zealand, last modified 28 April 2021, https://tinyurl.com/bdhh3het.

48. David Seymour, 'Speech: David Seymour's Address to the 2022 ACT Annual Conference', press release, 3 August 2022, https://tinyurl.com/2yazbxxy.

49. Document 6.2.11, p 8.

50. Document 6.2.23, p 8.

agreements on 28 November 2023, once the new Government had been sworn in, as the basis on which the coalition Government would operate.[51]

The coalition Government's 100 Day Action Plan was announced on 29 November 2023 and outlined its intention to '[i]ntroduc[e] legislation to disestablish the Maaori Health Authority'.[52] Part of this commitment involved the establishment of a 100-Day Plan Committee 'to take decisions and track progress against our commitments'.[53] The announcement of the 100 Day Action Plan followed a Cabinet meeting held on 29 November 2023, at which the Office of the Prime Minister presented a paper on the 100 Day Action Plan. In that paper, the Prime Minister sought Cabinet approval to exempt the commitments set out in the plan from some of the usual policy development requirements, including in relation to Regulatory Impact Statements (RIS). We turn now to consider what the requirements for a RIS are and situations when exemptions may apply.

3.5.2 The Government's obligations for regulatory impact analysis

The *Cabinet Manual 2023* sets out the need for a RIS. It states that '[d]epartments are required to undertake impact analysis for any policy initiative that includes consideration of regulatory options (that is, options that will ultimately require creating, amending, or repealing Acts or secondary legislation)'.[54] It further states that, 'Unless an exemption applies, any policy proposals taken to Cabinet for approval that include a regulatory option must be accompanied by an impact statement, even if the regulatory option is not what is finally proposed.'[55]

The *Cabinet Manual* stipulates that, if an impact analysis requirement

> will, or may, apply to a policy proposal, an agency must contact the Regulatory Impact Analysis Team at the Treasury to confirm this and to determine what type of impact statement will be required and who will need to review it before it is submitted to Cabinet'.[56]

Treasury has stated in its guide to impact analysis that the purpose of a RIS is to improve the quality of policy by ensuring policy proposals are subject to robust, careful analysis and that they contribute to the 'transparency and accountability of government'. The guide also notes that these are a 'formal requirement' for proposals taken to Cabinet.[57] A Cabinet Office Circular from 26 June 2020 indicates that these requirements apply to all proposals, unless an exemption applies. It

51. Document 6.2.10, p 1.
52. The Right Honourable Christopher Luxon, 'Coalition Government Unveils 100-Day Plan', press release, 29 November 2023, https://tinyurl.com/yc78sn46.
53. Document M48, p 92.
54. Document 6.2.13, p 88.
55. Ibid.
56. Document 6.2.13, p 111.
57. Document 6.2.14, p 4.

further notes, that this analysis should be completed before the Cabinet paper is drafted.[58]

Importantly, exemptions for providing a RIS are outlined, and granted, by Treasury and are grouped under three categories: technical or case-specific, minor impacts, and discretionary. Under technical or case-specific, Treasury states, along with seven other exemptions, that a RIS is not required where a government regulatory proposal 'would repeal or remove redundant legislative provisions'.[59] Cabinet also sets out the process for an exemption in its office circular. Every Cabinet or Cabinet committee paper must include a section titled 'Impact Analysis', and if an exemption applies, 'this section must contain a statement from the Treasury confirming that the proposal, or aspects of it, is exempt from the requirement to provide a Regulatory Impact Statement and, if relevant, any conditions of the exemption.'[60]

However, if an exemption does not apply, the section must provide:

- a statement by the responsible agency that the Impact Analysis Requirements apply and, therefore, a Regulatory Impact Statement is required and is attached to the Cabinet paper; and
- a statement by the Quality Assurance assessors providing an independent assessment of the overall quality of the Regulatory Impact Statement.[61]

A Cabinet committee paper has inadequate impact analysis if it does not include a RIS and Treasury has not exempted the policy proposal or paper from the impact analysis requirements; or the accompanying RIS has not been quality assured or does not meet the quality assurance criteria. The Chairs of Cabinet committees can exercise discretion as to whether papers containing government proposals with inadequate impact analysis are considered.[62]

Cabinet received Treasury advice relating to the 100 Day Action Plan and its regulatory commitments on 29 November 2023. That advice said:

> We do not recommend completely suspending the [impact statement] requirements so agencies can provide Ministers with the best advice possible and continue to meet New Zealand's international obligations. However, we recommend suspending the requirement for formal quality assurance of Regulatory Impact Statements for 100 Day Action Plan proposals and requiring post-implementation reviews for all proposals one year after the relevant legislation is enacted (unless waived by the Treasury).

58. Document 6.2.15, p 3.
59. Document 6.2.14, p 11.
60. Document 6.2.15, p 9.
61. Ibid.
62. Ibid.

> This approach enables a streamlining of the requirements to enable the delivery of 100 Day Action Plan proposals, while ensuring we continue to meet New Zealand's international obligations and assess regulatory quality in these areas. We understand this approach to impact analysis is reflected in the Prime Minister's 100 Day Action Plan Cabinet paper.[63]

Importantly, the report also stated that 'the urgency of a policy proposal is not in itself sufficient grounds for an exemption.'[64]

The paper presented by the Prime Minister to Cabinet on 27 November stated that, as the commitments in the 100 Day Action Plan had been 'well canvassed' with the public as part of the general election process, the usual impact statement process was not necessary, particularly in relation to circumstances where the Crown was 'simply repealing legislation.'[65] This would include legislation to repeal the necessary parts of the Pae Ora Act to disestablish Te Aka Whai Ora. That same day, Cabinet agreed 'to streamline the process for 100-Day Plan initiatives with Regulatory Impact Statements' by exempting them from normal quality assurance processes, including providing a RIS when the Government is repealing legislation and not seeking approval for new policy.[66]

Cabinet decided to suspend the requirement for a RIS on 22 February 2024 when the Cabinet Legislation Committee approved the introduction into the House of Representatives of the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill ('Disestablishment Bill'). The Cabinet paper supporting this decision referred to its previous decision made on 29 November (outlined in section 3.4.1), which stated that a RIS was not required: 'Cabinet has suspended the requirement for Regulatory Impacts Statements for decisions relating to 100 Day Plan proposals (taken within the 100 Days) which solely involve the repeal of legislation.'[67]

3.6 The Policy Development Process regarding the Disestablishment of Te Aka Whai Ora

This section details the policy development process the coalition Government followed regarding the disestablishment of Te Aka Whai Ora. First, we outline the initial advice Minister Reti received from the Ministry of Health. We then set out Cabinet's key decisions leading up to the disestablishment of Te Aka Whai Ora. Next, we briefly summarise a meeting Minister Reti attended with the Hauora Maaori Advisory Committee. Finally, we outline the briefing Minister Reti received from the Ministry of Health following the disestablishment of Te Aka Whai Ora.

63. Document 6.2.16, p 2.
64. Ibid, p 6.
65. Document M48, p 93.
66. Ibid, p 95.
67. Document M35(a), p 13.

3.6.1 Advice from the Ministry of Health to the Minister of Health

In November 2023,[68] the incoming Minister of Health, the Honourable Dr Shane Reti, received his first briefing from Dr Diana Sarfati, the Director-General of Health at the Ministry of Health.

The briefing paper provided the incoming Minister with an overview of the current health of New Zealanders and outlined some key opportunities, issues, and challenges to improve health outcomes.[69] It outlined immediate work underway to progress the coalition Government's 100 Day Action Plan and other coalition commitments. The priorities included:

- setting new health targets – including for wait times, immunisation rates and cancer treatment;
- introducing legislation to disestablish the Maaori Health Authority;
- developing a programme of work towards a third medical school at the University of Waikato, including cost-benefit analysis;
- extending breast cancer screening; and
- improving hospital emergency department security.[70]

The Ministry offered its support to the incoming Minister and his commitment to disestablish Te Aka Whai Ora, confirming this would be achieved through an amendment to the Pae Ora Act. The timing for the legislation would be informed by the scope of the changes.[71] Further advice noted that the Ministry's advice would seek [the Minister's] 'direction on potential approaches' and that it would put forward other decisions such as 'which of the existing functions of the [Maaori Health Authority] should be retained within the health system.'[72] The Ministry confirmed it could 'provide advice to confirm policy decisions on disestablishing [Maaori Health Authority] and any flow-on changes to other health agencies and entities' roles and functions at pace.'[73] The Ministry also briefed the Minister about potential health system changes – outside of the coalition Government's 100-day commitment to disestablish Te Aka Whai Ora – that would align with his objectives. It said these changes might include:

- how the system design supports devolved decision-making and engagement with communities across national, regional, and local levels
- ensuring that multi-year direction-setting and funding approaches are consistent with the Government's priorities and provide the basis for more effective planning and accountability
- how other functions such as monitoring, innovation and information management are delivered across multiple organisations to deliver services most effectively

68. The document is undated and states that it was published in November 2023.
69. Document M35(a), p 19.
70. Ibid, p 21.
71. Ibid, p 28.
72. Document M48, p 10.
73. Ibid.

- how ministers wish to retain oversight of progress with improving functions and delivery of key priorities.
- any further changes to health entities, such as the Pharmaceutical Management Agency (Pharmac).[74]

The briefing included a table that set out to the Minister what the officials planned to provide advice on in relation to the 100 Day Action Plan and key coalition commitments.[75] It also had an appendix relating to upcoming 'decisions needed by the end of 2023' relating to 'standard government processes, not policy priorities'. The Appendix does not specifically mention the disestablishment of Te Aka Whai Ora. It does, however state that a decision is needed on 'legislative priorities for health and mental health portfolios – to inform the Government's legislative priorities'.[76]

The briefing acknowledged the existence of health disparities for Maaori and, further, that health services still did not meet the needs of many Maaori. The briefing said:

> Maaori have some of the poorest health outcomes compared with other groups. There are significant differences in a range of health indicators for Maaori. These differences persist even when other factors like socioeconomic status, living in rural communities or gender are factored in.[77]

As an example, the briefing noted that, in the three-year period ending 2021–22, life expectancy for Maaori was seven years fewer than for non-Maaori.[78]

In the briefing paper, the Ministry acknowledged that it continued to implement major structural changes to the health system since the Pae Ora Act came into effect on 1 July 2022. These structural foundations were intended to 'achieve a more effective distribution of functions and responsibilities across the system, and to address the significant variation, regional delivery inequity and financial deficits experienced under the previous model'.[79] Part of the advice involved setting out some of the changes expected in the health system as a result of the Pae Ora Act:

- To improve Maaori health and uphold Te Tiriti in the delivery of healthcare, by partnering with Maaori as appropriate (as set out in *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*)
- To consolidate national planning to reduce duplication and waste across multiple organisations. . . .

74. Document M48, p 10.
75. Ibid, p 14.
76. Ibid, pp 15, 35.
77. Document M35(a), p 39.
78. Ibid.
79. Ibid, p 41.

- To devolve most commissioning to the regional level, to bring decisions on service design closer to communities, with greater scope for innovation and tailoring, and to partner with other regional public services. . . .
- To deliver services locally, based on the aspirations and priorities of communities themselves.[80]

The briefing noted that, while funding was often highlighted as a significant way to achieve health system objectives, the Ministry's policy, legislative, and regulatory roles could be used to implement coalition commitments.[81]

A second briefing paper from Ministry of Health officials to the incoming Government provided an overview of funding arrangements and health spending, and noted that Te Aka Whai Ora had a budget of approximately $656 million in the 2023–2024 budget – $411 million of this was allocated to services provided through Maaori health providers.[82]

3.6.2 Cabinet decision-making leading to the disestablishment of Te Aka Whai Ora

On 20 December 2023, the Cabinet 100-Day Plan Committee considered the disestablishment of Te Aka Whai Ora and the Minister's intention to distribute a Cabinet paper for consultation the following month relating to this matter.[83]

On 17 January 2024, Minister Reti circulated the Cabinet paper, 'Disestablishment of the Maaori Health Authority'.[84] The main focus of the paper was to outline his 'approach' and 'commitment' to the coalition Government's 100 Day Action Plan and how he was going to disestablish Te Aka Whai Ora and redistribute its functions within the public health system. The Minister stated, 'Cabinet directed me to report back in mid-January with legislative options'.[85]

The Cabinet paper stated that 'joint decision-making provisions will be repealed, in keeping with our commitments relating to co-governance'. This proposed repeal meant 'there will not be co-commissioning of health services, nor will plans require agreement from multiple parties'.[86] It then noted that '[o]ther functions will continue', including kaupapa Maaori services. These services would, however, become a responsibility of Health NZ.[87]

The Minister confirmed that 'to meet [the coalition Government's] commitment to introduce legislation within 100 days of taking office, we must introduce legislation by 8 March 2024'.[88] In order to give the Ministry of Health and Parliamentary Counsel time to develop appropriate legislation, Minister Reti proposed that it be

80. Ibid.
81. Ibid, p 50.
82. Ibid, p 74.
83. Ibid, p 2.
84. Ibid, p 7.
85. Ibid.
86. Ibid.
87. Ibid.
88. Ibid, p 13.

introduced in late February.[89] While the legislation was going through the House, functions and staff from Te Aka Whai Ora could be transferred between health agencies. The Minister noted that '[w]ork on planning transfers is underway, with the Maaori Health Authority well engaged with Health New Zealand and the Ministry of Health.'[90] The Cabinet paper also confirmed that Te Aka Whai Ora would formally be disestablished on 30 June 2024. This would coincide with the end of the financial year.[91]

The Cabinet paper stated that '[t]he government has committed to improving outcomes for all New Zealanders, while leading a unified and confident country.' The next paragraph then summarised the Minister's overall direction for the health system – the first point being 'a "one-system" approach that works for the whole population.'[92]

From this, he then turned to a discussion about Maaori health, with the title 'Maaori have poorer health outcomes and poorer experience of services'.[93] The Cabinet paper acknowledged that health services were often not designed or delivered in a way that worked for Maaori.[94] It further noted that improving Maaori health outcomes remained a priority for the coalition Government and the publicly funded health sector. This could be achieved, the Minister suggested, by 'improving outcomes, and creating more accountability for that improvement, rather than through additional national-level advisory bodies'.[95]

When discussing the Crown's obligations to engage with Maaori to improve health outcomes, the Cabinet paper drew attention to the claims lodged with us, and stated that these said 'the disestablishment of the Maaori Health Authority constitutes a Treaty breach'. It then summarised the findings of the Tribunal in its *Hauora* stage 1 inquiry, noting that the Crown 'accepted the view of the Tribunal and incorporated its articulation of Treaty principles into the Maaori Health Strategy, and into the health sector principles', by way of the Pae Ora Act. As the specific functions and roles of the authority were established under the Pae Ora Act, the Minister stated that '[t]his will need to be addressed with further legislation to align with the coalition agreement.'[96] Despite the Crown's acknowledgement of its Tiriti/Treaty obligations, aligning with the coalition agreement meant amending the Pae Ora Act to disestablish Te Aka Whai Ora. However, in doing so, the Crown retained section 6 of the Pae Ora Act, which set out its other Tiriti/Treaty obligations.

The Cabinet paper outlined the Minister's plans for relocating statutory functions.[97] The Cabinet paper claimed that disestablishing Te Aka Whai Ora, and its

89. Document M35(a), pp 7, 13.
90. Ibid, pp 7–8.
91. Ibid, p 12.
92. Ibid, p 8.
93. Ibid.
94. Ibid.
95. Ibid.
96. Ibid, p 10.
97. Ibid, pp 9–11.

functions under the Pae Ora Act, would remove a 'third national bureaucracy'. This meant 'a dedicated focus on the functions can be matched with robust accountability for outcomes closer to home and closer to the hapuu'.[98] Structural reform, it stated, would include the disestablishment of District Health Boards and centralised decision-making.[99] Statutory functions of Te Aka Whai Ora would also be reallocated to the Ministry of Health such as policy and strategy, and monitoring and public reporting.[100]

In the Minister's view, the Maaori Health Authority 'was one component of a wider system of change'. He again drew on the notion of all New Zealanders, stating that 'addressing disparities in Maaori health outcomes in the context of improving health outcomes for all New Zealanders through increased health system responsiveness and accountability remain enduring aims'. The Cabinet paper then stated that it was expected that partnership with Maaori would continue to occur, with health agencies engaging and working with Maaori 'in exercising functions nationally and locally'.[101] Of note, the Minister stated that Iwi-Maaori Partnership Boards would continue to have a role in determining local priorities for the health system as they 'remain relevant to ensure planning and commissioning decisions respond to local need and circumstances'.[102] Furthermore, although the Hauora Maaori Advisory Committee would 'no longer be required to advise on the Maaori Health Authority', it would 'remain valuable'.[103]

On the same day, the Cabinet 100-Day Plan Committee considered the Cabinet paper presented by Minister Reti, with a view to issuing drafting instructions to the Parliamentary Counsel Office.[104] At that sitting, the committee recognised that 'legislation must be introduced by 8 March 2024 to meet the 100-Day plan commitment'. The committee did not, however, make note of the Minister's intention to introduce legislation in late February – as stated in the Cabinet paper.[105] The Cabinet 100-Day Plan Committee then '*agreed* to disestablish the Maaori Health Authority and redistribute its functions within the publicly funded health system' (emphasis in original).[106] A few days later, on 23 January 2024, Cabinet confirmed the disestablishment of Te Aka Whai Ora.[107]

On 22 February 2024, the Cabinet Legislation Committee considered a paper prepared by Minister Reti, 'Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill: Approval for Introduction'.[108] The paper noted that a Bill to amend the Pae Ora Act was required to give effect to the policy decision

98. Ibid, p 9.
99. Ibid.
100. Ibid, pp 9, 11.
101. Ibid, p 10.
102. Ibid, p 11.
103. Ibid, p 12.
104. Ibid, p 5.
105. Ibid, pp 4, 15.
106. Ibid, p 4.
107. Ibid, p 3.
108. Document 6.2.22, p [2]; doc 6.2.22(a).

to disestablish Te Aka Whai Ora.[109] The Disestablishment Bill also made changes to remove joint decision-making provisions, to clarify Iwi-Maaori Partnership Boards functions, and to adjust the role of the Hauora Maaori Advisory Committee.[110] The Disestablishment Bill contained transition provisions to make Health NZ the successor agency on disestablishment. The actual transfer of assets, liabilities and employees would be managed by Order in Council.[111] The Cabinet Legislation Committee recognised the Crown's commitment to 'continue to meet its Treaty obligations', stating that '[t]he Bill does not affect other mechanisms in the Pae Ora Act that are intended to give effect to the Crown's Treaty of Waitangi commitments.'[112] The committee agreed that the Disestablishment Bill be progressed through urgency and enacted by 30 June 2024.[113] The Cabinet paper claimed that a RIS was not required: 'Cabinet suspended the requirement for regulatory impacts statements for decisions relating to 100 Day Plan proposals which solely involve the repeal of legislation.'[114] This decision is in line with the Cabinet decision made to exempt 100 Day Action Plans from regulatory impact analysis, as discussed above in section 3.4.2.

On 26 February 2024, Cabinet met to discuss the Cabinet paper and the approval of the Disestablishment Bill for introduction, subject to final Cabinet approval. At this meeting, Cabinet approved the Disestablishment Bill.[115]

3.6.3 Meeting between the Hauora Maaori Advisory Committee and Minister Reti

As noted above, the Hauora Maaori Advisory Committee was established under the Pae Ora Act in July 2022. On 9 February 2023, in an aide memoire, Bernard Te Paa, the Acting Deputy Director-General of Maaori Health, invited Minister Reti to speak at the Hauora Maaori Advisory Committee hui on Monday 12 February 2024. The committee met monthly to discuss issues relating to the performance of Te Aka Whai Ora, its legislative functions, and other issues impacting Maaori health.[116] The aide memoire acknowledged that the Hauora Maaori Advisory Committee was 'an important element of the accountability settings of the Maaori Health Authority' as it ensured that a 'Maaori voice and perspective is involved in the exercise of ministerial powers and decision-making'. The purpose of the meeting, according to the aide memoire was, among other things, 'to discuss issues related to the performance of the Maaori Health Authority – Te Aka Whai Ora (MHA)'.[117]

The aide memoire to Minister Reti included possible agenda items and

109. Document 6.2.22(a), p 1.
110. Ibid.
111. Ibid.
112. Ibid.
113. Document 6.2.22, p [2].
114. Document 6.2.22(a), p 2.
115. Document 6.2.22, p [2].
116. Document M40, p 21.
117. Ibid.

talking points for the upcoming hui.[118] The talking points included direction to the Minister on Maaori health with a focus on Iwi-Maaori Partnership Boards and the Hauora Maaori Advisory Committee, and no mention of the decision to disestablish Te Aka Whai Ora.[119]

3.6.4 Briefing from Maaori Health, the Ministry of Health, to Minister Reti following the disestablishment of Te Aka Whai Ora

After the Cabinet 100-Day Plan Committee agreed to disestablish Te Aka Whai Ora on 17 January 2024,[120] Minister Reti received two briefing papers on Maaori Health from the Ministry of Health. These papers predominantly focused on the Minister's plans and visions relating to Maaori health, which will be the focus of our next and final report on these issues. Despite the fact that Te Aka Whai Ora was actively being disestablished during this time period, there is very little further reference made to it aside from noting that it was progressing.[121]

On 30 June 2024, the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 formally came into effect, thus repealing the sections of the Pae Ora Act relating to the Maaori Health Authority.[122] From that date, Te Aka Whai Ora was no longer in operation. Importantly, the sections of the Pae Ora Act relating to the health sector's Tiriti/Treaty obligations, outlined in section 3.3, remain.

Following this, on 12 August 2024, Minister Reti released a Cabinet paper, providing an interim update to the Cabinet Social Outcomes Committee.[123] While most of the Cabinet paper was concerned with the Minister's vision and plans for Maaori health, the Cabinet paper acknowledged that two processes were underway 'seeking a review of the decision to disestablish the Maaori Health Authority and requesting further information on the Crown's alternative plan for improving Maaori health outcomes'.[124] It then referred to a claim before the Waitangi Tribunal relating to the disestablishment of Te Aka Whai Ora.[125]

Having outlined the key policy documents and Cabinet material informing the disestablishment of Te Aka Whai Ora in this chapter, we turn now in the next chapter to analyse whether or not the disestablishment was Tiriti/Treaty-compliant. We focus on two specific issues to make our assessment: the process leading up to and including the decision to disestablish Te Aka Whai Ora and the impacts of that decision. We then make our findings on whether the Crown breached te Tiriti/the Treaty and its principles, identify the prejudice experienced by Maaori.

118. Ibid, p 22.
119. Ibid, pp 29–31; doc M48, pp 88–90.
120. Document M40, p 3.
121. Ibid, pp 40, 44, 47, 49.
122. Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill 26–1 (2024), Government Bill – New Zealand Legislation.
123. Document M40, pp 1–2.
124. Ibid, pp 3–4.
125. Ibid, p 3.

CHAPTER 4

WAS THE CROWN'S DISESTABLISHMENT OF TE AKA WHAI ORA TIRITI / TREATY-COMPLIANT?

4.1 Introduction

In this chapter, we address whether the Crown's disestablishment of Te Aka Whai Ora was Tiriti / Treaty compliant. First, we assess whether the policy process the Crown followed to disestablish Te Aka Whai Ora was Tiriti / Treaty compliant. Secondly, we assess whether the disestablishment of Te Aka Whai Ora breaches te Tiriti / the Treaty and its principles. Finally, we outline any prejudice to Maaori. We start by briefly summarising the submissions of the claimants, interested parties, and the Crown on these issues.

4.2 Parties' Positions on the Issues

This section sets out the positions of the parties to this inquiry on the issues beginning with claimant submissions and followed by the Crown and interested parties.

Before outlining those positions, we note that, in its closing submissions and in a further memorandum of 14 November 2024, the Crown stated that it had intended to file further evidence in respect of the parties' claims.[1] In our view, the Crown was given the opportunity to file evidence when the claims were initially granted urgency and took that opportunity. It could, furthermore, have filed further evidence at any stage and, in fact, did so concerning the Crown's alternative plans. As we focus only on the disestablishment of Te Aka Whai Ora in this report, the evidence suggests that decision was made before the coalition Government took office, because it was set out in the coalition agreements on which the coalition Government was based (see our discussion in section 4.4. below). Accordingly, it is difficult to see how the Crown could have filed any further evidence that is relevant to that limited issue.

Part 2 of our priority inquiry will assess the Crown's alternative plans for Maaori health. This will likely require an assessment of the Crown's new 'broad vision for the health system' and the extent to which the Crown has engaged with Maaori on that vision. It will also likely require an assessment of the inner workings of the various levers within the health system and how they work together in terms of Maaori–Crown engagement and Tiriti / Treaty obligations. We consider that evidence of this nature can be filed in part 2 of our inquiry.

1. Document 3.3.155, 2; memo 3.2.1216, p 5.

4.2.1 Claimant submissions

In their opening submissions, claimants Ms Kuka and Lady Moxon observed that the Crown intended to disestablish Te Aka Whai Ora by mid-2024 in the form of legislation, which would be introduced by 8 March 2024.[2] They submitted the Crown had no alternative plan. Further, they submitted that, if Te Aka Whai Ora were disestablished and there were nothing to replace it, 'its disestablishment alone can be assessed against Te Tiriti'.[3] Te Aka Whai Ora, they argued, was the main mechanism within the Pae Ora Act to achieve Tiriti/Treaty compliance. Therefore, they submitted that disestablishing Te Aka Whai Ora is a breach of te Tiriti/the Treaty.[4]

All claimants and interested parties strongly agreed that the Crown's decision to disestablish Te Aka Whai Ora was not a decision the Crown should have made without its Tiriti/Treaty partner.[5] Ms Kuka and Lady Moxon argued that the Crown had no policy process for disestablishing Te Aka Whai Ora and instead the decision was a political one, following the general election. Furthermore, they stated there was no consultation between the Crown and its Tiriti/Treaty partner. The trustees of Te Puna Ora a Mataatua (Te Puna Ora) – the regional Maaori Health Provider for Eastern Bay of Plenty – agreed that the Crown acting alone in its decision-making meant it had not acted in good faith and breached its obligation to consult with Maaori.[6] They said the Crown had an option to pause its intended course and undertake a robust process.[7]

Te Puna Ora further submitted that the Crown had already breached the principle of good government, and the duties of good faith and consultation, at the time the Disestablishment Bill was introduced to the House.[8] These breaches arose from the privileging of political commitments in the respective coalition agreements over Tiriti/Treaty obligations to consult with Maaori, as well as not following usual policy processes.[9]

Other interested parties raised in their joint closing submissions that the Crown breached the principle of partnership by not meaningfully consulting with Maaori on the proposed disestablishment of Te Aka Whai Ora.[10] Claimants and interested parties highlighted that the Crown conceded in its opening submissions that no formal consultation occurred, or was planned, when Cabinet decided to advance the legislation to disestablish Te Aka Whai Ora.[11] Claimants and interested parties refuted the position of Cabinet that the matter had been 'well-canvassed' in

2. Submission 3.3.95, p 9.
3. Ibid.
4. Ibid, p 15; submission 3.3.97, pp 3, 7; submission 3.3.96, p 2; submission 3.3.99, p 1.
5. Submission 3.3.95, pp 9–10; submission 3.3.97, pp 1–2; submission 3.3.100, p 1.
6. Submission 3.3.139, p 25.
7. Ibid, p 5.
8. Ibid, p 2.
9. Ibid.
10. Submission 3.3.141, pp 11–12.
11. Ibid, p 14.

the lead-up to the 2023 general election.[12] They stated that transparency around intention within an election campaign was not a substitute for consultation once in Government, nor did electoral transparency temper the objectionable nature of the proposal.[13]

Ms Kuka and Lady Moxon submitted that, because of the lack of consultation, the Crown had already acknowledged it was likely the Tribunal would find that Tiriti/Treaty principles had been breached and prejudice resulted.[14]

4.2.2 Crown submissions

The Crown submitted that, while it had not undertaken a formal consultation process with Maaori, it was well-informed on Maaori health outcomes and existing health disparities when deciding to disestablish Te Aka Whai Ora.[15] To make this decision, the Crown relied on health data collected and reported by public health agencies and Statistics NZ, and our *Hauora* report.[16] The Crown's submissions focused on Minister Reti's acknowledgement of the health outcomes of Maaori and the role of the communities' expertise in Maaori health, as well as the continued importance of Iwi–Maaori Partnership Boards.[17] It also stressed that the disestablishment of Te Aka Whai Ora did not mean the abolition of the statutory functions that Te Aka Whai Ora performed. Rather, these functions were to be redistributed to the Ministry of Health and Health NZ.[18]

The Crown referred to the legislative and policy settings under which the Crown made the decision to disestablish Te Aka Whai Ora, in particular the sections of the Pae Ora Act that set out the purpose of the Act and give effect to Tiriti/Treaty principles.[19] The Crown also contended that the decision to disestablish Te Aka Whai Ora was made in the knowledge that the Crown has upheld the principles of te Tiriti/the Treaty in key health sector frameworks, strategies, and plans, including the Ministry's Te Tiriti o Waitangi framework, the Whakamaua: Maaori Health Action Plan 2020–2024, Pae Tuu: Hauora Maaori Strategy, and the Ngaa Paerewa Health and Disability Service Standards.[20]

The Crown highlighted the Minister of Health's extensive knowledge of the public health system as a former medical practitioner and his experience as the opposition spokesperson for health.[21] It argued that Minister Reti had organised a range of meetings with key stakeholders since his appointment to the health

12. Document 6.2.12, p [3].
13. Submission 3.3.141, p 16.
14. Submission 3.3.95, pp 9–10.
15. Submission 3.3.155, pp 8–9.
16. Ibid, p 9.
17. Ibid, pp 10–12.
18. Ibid, p 11.
19. Ibid, pp 12–13.
20. Ibid, pp 13–14.
21. Ibid, p 14.

ministerial portfolio, including a meeting with Iwi–Maaori Partnership Boards on 6 December 2023, as well as routinely taking advice from senior Ministry officials.[22]

In response to claimant and interest parties' submissions, the Crown stated that some roles and functions did not transfer to other areas of the health system on the disestablishment of Te Aka Whai Ora as they no longer applied from a practical perspective.[23] Other functions were repealed, rather than transferred, as the Ministry and Health NZ were already required to do them.[24] The Crown contended that the fact most of the functions of Te Aka Whai Ora were transferred rather than disestablished wholly is a relevant factor in assessing the Crown's process.[25] The Crown maintained that the transfer of most functions demonstrated it did not suspend or waive its Tiriti/Treaty obligations.[26]

The Crown also responded to claimant and interested parties' submissions on the absence of consultation by the Crown with Maaori. Clarifying its earlier memorandum of 31 January 2024, the Crown stated in its closing submissions that 'the Crown has not conceded that it has acted inconsistently with Treaty principles by not undertaking a formal process of consultation with Maaori'.[27] The Crown argued that when it made the decision to disestablish Te Aka Whai Ora, it was well-informed of the disparities in health outcomes that Maaori experience and of the need to address them.[28] The Crown further argued that it was open to the Crown to choose from a range of Tiriti/Treaty-consistent options.[29]

4.3 Tiriti/Treaty Analysis and Findings on the Issues

Our Tiriti/Treaty analysis looks at both process and impacts. We start first with the process to establish Te Aka Whai Ora in 2022, which was summarised in section 3.3.1. Next, we analyse the process that led to the formation of the coalition Government following the 2023 general election and its decision to disestablish Te Aka Whai Ora. In this context, we address the argument put forward by the claimants that the commitments reflected in these coalition arrangements were prioritised over Tiriti/Treaty principles. We then assess any consultative steps taken by the Crown to disestablish Te Aka Whai Ora. Following this, we assess the process against the Crown's own guidelines that govern significant policy decisions of this nature.

We then analyse the impacts of the disestablishment of Te Aka Whai Ora against Tiriti/Treaty principles. Our ability to fully analyse these impacts is partially constrained. As Crown counsel submitted, we agree it is not possible to fully

22. Submission 3.3.155, pp 14–15.
23. Ibid, p 16.
24. Ibid.
25. Ibid, pp 16–17.
26. Ibid, p 17.
27. Ibid.
28. Ibid, pp 17–18.
29. Ibid, p 18.

assess these impacts until we know what strategies and policies will be implemented by the Crown in place of an independent Maaori health authority to give full effect to the principles of te Tiriti/the Treaty in the health and disability sector. We plan to report our finding on these alternative strategies and policies once they are known. In the meantime, we consider whether the disestablishment of Te Aka Whai Ora breaches Tiriti/Treaty principles, irrespective of the alternative strategies and policies that may be implemented moving forward.

In respect of all the issues addressed in this chapter, we make findings on whether the Crown has breached Tiriti/Treaty principles. Finally, we assess whether prejudice to Maaori arises from any breaches found.

4.4 Was the Crown's Process for Disestablishing Te Aka Whai Ora Tiriti/Treaty Compliant?

In this section, we assess whether the process followed by the Crown to disestablish Te Aka Whai Ora was Tiriti/Treaty compliant. As context, we start by looking at the process to establish Te Aka Whai Ora. We then look at the process followed by the Crown to decide to disestablish it. We focus on three aspects. First, we look at how that decision was made in the context of the formation of a new government following the 2023 general election. Secondly, we assess the degree of consultation between the Crown and Maaori leading up to that decision. Finally, we assess the Crown's process against its own guidelines for legislative reform of this nature.

4.4.1 The establishment of Te Aka Whai Ora

The process for establishing Te Aka Whai Ora is not within the scope of our inquiry and, as such, we received little evidence relating to this. We did, however, receive regular updates from the claimants and the Crown on the establishment of Te Aka Whai Ora during our stage 1 inquiry. Because that process is relevant background to, and informs our assessment of, the disestablishment process, we provide a high level summary of it here.[30] It is clear from those updates that Te Aka Whai Ora was not the product of mere consultation between the Crown and Maaori, but involved extensive dialogue and interaction between te Tiriti/the Treaty partners.

The extent of consultation, including with Maaori, over the establishment of Te Aka Whai Ora is also a matter of public record. As we explained in section 3.3.1, the process to establish Te Aka Whai Ora spanned many years. Two major workstreams informed that process: our stage 1 inquiry, leading to the *Hauora* report in June 2019, and the significant work that led to the Simpson Report in June 2020. Almost two years later to the day, the Pae Ora Act was passed, heralding a major change in our health and disability system. Maaori were actively engaged in this process. So, too, were the public. At multiple stages there were opportunities for

30. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2023), pp 171–192.

the public, including Maaori, to provide input and feedback. By way of example, and relevant to te Tiriti/the Treaty principle of good government, the Pae Ora (Heathy Futures) Bill followed the usual Parliamentary process of being referred to a select committee – the Pae Ora Legislation Committee, as detailed in section 3.3.1.[31] This committee was set up specifically to consider this major piece of legislative reform. Most importantly for our inquiry, the process to establish Te Aka Whai Ora involved engagement and dialogue between te Tiriti/the Treaty partners. The Bill was passed in 2022, four years after the comprehensive review of the health and disability system commenced. Our inescapable conclusion is that the development and establishment of Te Aka Whai Ora was both well-informed and well-considered. In *Hauora*, we observed that the form and function of the proposed Maaori health authority seemed to 'address our findings and recommendations, especially our concern that the existing health system did not reflect the Treaty partnership or properly give effect to tino rangatiratanga'.[32]

In light of the extensive background work to establish Te Aka Whai Ora and consistent with the findings in our *Hauora* report, our high-level assessment is that Te Aka Whai Ora was the product of Tiriti/Treaty partnership in action, representating initial and important steps towards the recognition of tino rangatiratanga in the health and disability system.

4.4.2 The coalition agreements and the 100 Day Action Plan

The next general election following the establishment of Te Aka Whai Ora was held on 14 October 2023. A period of coalition negotiations followed. Coalition agreements were finalised on 24 November 2023 and political parties to those agreements – National, New Zealand First, and ACT – then formed a coalition Government, which was sworn in on 27 November 2023. Both coalition agreements – between National and ACT and between National and New Zealand First – included a pledge to disestablish or '[a]bolish' Te Aka Whai Ora.[33] Perhaps unsurprisingly, National and ACT had originally opposed the establishment of a Maaori health authority when the Pae Ora Act was passed just over a year earlier.

On 29 November 2023, the coalition Government announced its plan for its first 100 days in power. Relevantly, and as outlined in section 3.4.1, the 100 Day Action Plan indicated the Government intended to introduce legislation to disestablish Te Aka Whai Ora.[34]

The short point here is that the Government's decision to disestablish Te Aka Whai Ora was made extraordinarily quickly. The coalition Government was formed on 27 November 2023. A day later, Cabinet endorsed the coalition agreements on which the Government was based. The following day the coalition Government announced the disestablishment of Te Aka Whai Ora as part of its

31. Hansard, 'Pae Ora (Healthy Futures) Bill – First Reading', 27 October 2021, Pae Ora (Healthy Futures) Bill — First Reading – New Zealand Parliament.
32. Waitangi Tribunal, *Hauora*, p 178.
33. Document 6.2.11, p [8].
34. Document 6.2.12 p [4].

100 Day Action Plan. This major policy decision, which impacts significantly on hauora Maaori, was made in just two days and without any consultation with Maaori.

Crown counsel sought to persuade us that the decision to disestablish Te Aka Whai Ora was reasonable in the circumstances, for three primary reasons. First, while acknowledging that the decision was 'not the product of a conventional policy process led by officials', Crown counsel argued that the decision was a political one, on which the coalition parties expressly campaigned during the 2023 general election and therefore had a mandate to implement.[35] Secondly, despite the lack of consultation leading to the decision, the Crown was not ill-informed on the matter.[36] Finally, Minister Reti, as a former medical practitioner who was the opposition spokesperson for Health before the 2023 general election, had 'direct and extensive knowledge of the public health system'.[37] We deal with the lack of consultation and the Minister of Health's claimed expertise in this area in the following section 4.4.3. Next, we focus on the political nature of the decision to disestablish Te Aka Whai Ora.

The Oranga Tamariki Tribunal also grappled with a Crown decision to quickly implement a political decision reflected in a government coalition agreement – in that case, the decision to repeal section 7AA of the Oranga Tamariki Act 1989. Crown counsel confirmed in closing submissions for this priority inquiry that the Crown accepts a key proposition made by the Oranga Tamariki Tribunal that, once sworn in, 'the executive are responsible for meeting the Crown's obligations to Maaori under the Treaty of Waitangi'.[38] To understand the totality of that proposition, it is useful to set out in full what that Tribunal said:

> A key problem we see with the government's decision to repeal section 7AA is that it has come about without proper regard to its obligations to Maaori under the Treaty of Waitangi. The evidence suggests this is due to a belief or assumption on the part of the government that the coalition agreements that lead to its formation override or take precedence over the Crown's obligations under the Treaty of Waitangi.
>
> It is not for us to comment on the coalition agreement between the National party and the ACT party but, once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Maaori under the Treaty of Waitangi. It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms. The obligation is to honour the Treaty and act in good faith towards the Treaty partner.[39]

35. Submission 3.3.155, pp 7–8.
36. Ibid, pp 8–9.
37. Ibid, p 14.
38. Ibid, p 7.
39. Waitangi Tribunal, *The Oranga Tamariki* (*Section 7AA*) *Urgent Inquiry Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 13.

We accept Crown counsel's characterisation of the decision to disestablish Te Aka Whai Ora as political. It clearly was. As counsel rightly acknowledged, it was not the product of a conventional policy process.[40] A decision based on politics must still, however, be Tiriti/Treaty compliant. As noted in the Tribunal's *Oranga Tamariki (Section 7AA)* report, once the coalition parties were sworn in as the new Government, they, through the Executive, became responsible for meeting the Crown's Tiriti/Treaty obligations. In this way, the decision to disestablish Te Aka Whai Ora, like any political decision, is not exempt from Tiriti/Treaty compliance. Because the Crown failed to reassess election promises to disestablish Te Aka Whai Ora in light of its Tiriti/Treaty obligations, we find that the Crown breached the principle of good government.

4.4.3 Consultation with Maaori

A fundamental duty arising out of te Tiriti/the Treaty partnership is for the Crown to be sufficiently informed through appropriate consultation with Maaori. This duty appears to have been at the forefront in the establishment of Te Aka Whai Ora. There, the Crown engaged actively with Maaori, including the stage 1 claimants, to identify and confirm the most appropriate structural response to the systemic failures of the then existing health and disabilities framework to reflect Tiriti/Treaty principles and address the depth of health inequity suffered by Maaori. As a result, the idea of an independent Maaori health authority was developed. The decision to establish such an authority involved both Tiriti/Treaty partners.

Once the form of the structural response was agreed, the Tiriti/Treaty partners then seemingly co-designed its function. We acknowledged in our *Hauora* report that the stage 1 claimants' expectations of the design process with the Crown were not always met.[41] We also did not inquire into the establishment of the Maaori health authority then proposed, in terms of either process or impacts, so we cannot be categorical about the details of that co-design process.[42] Yet, it is clear the establishment of Te Aka Whai Ora was a joint effort by te Tiriti/the Treaty partners.

Importantly, this contrasts starkly with the process followed to disestablish Te Aka Whai Ora where there was no Crown consultation with Maaori.[43] Nor could there have been. As noted above, this decision was made in the two days between the formation of the new Government and the announcement of the 100 Day Action Plan. There was simply no chance to consult on it.

Crown counsel argued that, despite the lack of consultation, the decision to disestablish Te Aka Whai Ora was not 'uninformed or made in a vacuum.'[44] Specifically, the Crown was aware that 'Maaori as a population group experience

40. Submission 3.3.155, pp, 7–8.
41. Waitangi Tribunal, *Hauora*, p 174.
42. Ibid, p 178.
43. Submission 3.3.155, p 8.
44. Ibid.

significant health disparities and that health outcomes for Maaori need to improve'. The Crown was also mindful of the 'legislative and policy settings for the public health system that reinforce the need to improve health outcomes for Maaori', and knew there were 'strong Maaori voices calling for the retention of the Maaori Health Authority as an institution'.[45] We accept the general proposition that the Crown decision here was not made in a vacuum, but none of the claimants argued that point. Claimants argued that the Crown did not consult with Maaori when it should have.[46] Indeed, the factors raised by Crown counsel as context for the Crown's decision (that there are health disparities and that there was a need to improve health outcomes for Maaori) are not exceptional – anyone with an understanding of the health system would know this. It was incumbent on the Crown to base its decision on factors, for example, the actual effectiveness of Te Aka Whai Ora, that were more focused on the nature, purpose, and effect of a Maaori health authority. It should have consulted with Maaori on those points.

The Crown's duty to be sufficiently informed on Maaori issues cannot be overstated. This duty is magnified when making major decisions. There are very few decisions as major as how our health system should respond to grave Maaori health inequities. At the very least, the decision to disestablish Te Aka Whai Ora required consultation with Maaori. Indeed, a Tiriti/Treaty compliant process would have followed a similar approach to that taken in the establishment of Te Aka Whai Ora – a process involving both te Tiriti/the Treaty partners. The Crown's approach to the disestablishment of Te Aka Whai Ora falls well short. No consultation took place. Instead, it was a unilateral decision made by the Crown.

Crown counsel's argument – that Minister Reti had direct and extensive knowledge of the health system and had discussions with Maaori as an opposition Member of Parliament – is concerning. First, it is not clear why this argument was pursued, as Crown counsel did not explain in closing submissions what this meant (if it was true) for the Crown's decision-making process. The argument seems to suggest that, as a former medical practitioner who has talked to Maaori while not in government, he did not need to consult with Maaori once he became part of the Government.[47] If this is the Crown's argument, it is flawed. As the Crown's representative, the Minister and his officials should have consulted with Maaori.

The process adopted by the Crown to disestablish Te Aka Whai Ora is another instance since October 2023 of the Crown having 'reckless disregard for the Maaori–Crown relationship'.[48] The Crown decided, by itself and without proper consultation with its Tiriti/Treaty partner, that Te Aka Whai Ora was not required. The evidence clearly indicates that Maaori thought otherwise. Yet the Crown ignored them and proceeded to implement its own agenda. Here, the Crown acted

45. Ibid, pp 8–9.

46. Submission 3.3.95, pp 9–10; submission 3.3.97, pp 1–2; submission 3.3.100, p 1.

47. Submission 3.3.155, pp 14–15.

48. Waitangi Tribunal, *Ngaa Maataapono/The Principles: The Interim Report of the Tomokia Ngaa Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 186.

as if it thought it knew more about hauora Maaori than Maaori themselves. As we said in our *Hauora* report, 'tino rangatiratanga means nothing less than Maaori having decision-making power over their affairs, including hauora Maaori'.[49] Because the Crown made the decision to disestablish Te Aka Whai Ora without consulting Maaori, and in the face of significant objection from Maaori, it did not recognise and respect tino rangatiratanga. We find this was a breach of the principle of tino rangatiratanga.

Because there was no consultation, the Crown was ill-informed of the effects of disestablishing Te Aka Whai Ora on Maaori communities. The Crown also did not appear to request or receive any substantive advice from officials on how the disestablishment of Te Aka Whai Ora would affect Maaori. As we have said, that decision was made as part of the coalition Government's negotiations and before the Government was formed. As a result, official advice to the Government after it was formed (to the extent there was any on this issue) was focused on how best to give effect to the commitments set out in the coalition agreements, rather than their impacts on Maaori.[50] The duty to consult derives from te Tiriti/the Treaty principle of partnership, and this duty is heightened when Maaori are both affected by disparities and are actively seeking an effective role in the process. Because Maaori health inequities are well-known – and acknowledged by the Crown in this inquiry – and Te Aka Whai Ora was the product of a consultative process, the Crown had a duty to consult with Maaori on the decision to disestablish Te Aka Whai Ora. Because the Crown did not comply with that duty, we find that it breached the principle of partnership, through failing in any way to consult with its Tiriti/Treaty partner on this decision.

Moreover, in the absence of consultation and official advice on the impacts of the disestablishment of Te Aka Whai Ora on Maaori it is difficult to understand how the Crown can say that it is actively protecting Maaori. Rather, the Crown's decision here failed to actively protect Maaori because the decision did not recognise and respect tino rangatiratanga. In this way, the Crown failed to actively protect and preserve Maaori rights to self-determine what is best for them and for hauora Maaori. We therefore find that the Crown breached the principle of active protection.

4.4.4 The Crown's own process guidelines

As detailed in section 3.4.2, the Crown has its own guidelines that regulate the development of government policy. These guidelines are found in various Crown documents, including the *Cabinet Manual*, Treasury's 'Guide to Cabinet's Impact Analysis Requirements' and the Cabinet Office circular entitled 'Impact Analysis Requirements'.[51] Generally, these guidelines establish a framework to encourage 'systematic and evidence-informed' approaches to policy development.[52] A key

49. Waitangi Tribunal, *Hauora*, p 178.
50. Document M35(a), pp 19, 21, 28, 41.
51. Document 6.2.13, p 88; doc 6.2.14, p 11; doc 6.2.15, p 3.
52. Document 6.2.14, p 1.

requirement of these guidelines is that policy proposals submitted to Cabinet or ministerial groups that include regulatory options or proposals must be accompanied by a RIS – a summary of all policy work. While we will not go into these guidelines again in detail, they are worth highlighting briefly.

The *Cabinet Manual* sets out the need for a RIS, noting that '[u]nless an exemption applies, all policy proposals submitted to Cabinet or ministerial groups that include regulatory options or proposals (that is, options that would ultimately create, amend, *or repeal primary or secondary legislation*) must be accompanied by an impact statement' (emphasis added).[53] The manual further states that the RIS 'is intended to ensure that Cabinet has the best available information on the nature and extent of a policy problem, policy options, and risks and impacts'.[54] Treasury also outlined in its guide to impact analysis that the purpose of a RIS is to ensure that policy proposals contribute to 'transparency and accountability of government'.[55] Similarly, a Cabinet circular from June 2020 states that the RIS is needed for systematic and evidence-based policy development.[56]

The circular also sets out the process that must be followed when seeking an exemption.[57] Importantly, it states that, 'If an exemption applies, this section must contain a statement from the Treasury confirming that the proposal, or aspects of it, is exempt from the requirement to provide a Regulatory Impact Statement and, if relevant, any conditions of the exemption.'[58]

In the *Oranga Tamariki (Section 7AA)* report, the Tribunal made the following observations about the importance of these statements:

> A Regulatory Impact Statement (RIS) on the proposed repeal of section 7AA prepared by Oranga Tamariki staff accompanied the 19 March Cabinet paper. Unlike the Cabinet paper, which reflects the Minister's policy, intention, and voice, the RIS is an opportunity for officials to provide independent analysis and free and frank advice to Cabinet.[59]

On 29 November, Cabinet received Treasury advice relating to the 100 Day Action Plan. That advice included the recommendation not to completely suspend the impact statement requirements 'so agencies can provide Ministers with the best advice possible and continue to meet New Zealand's international obligations'. It did, however, include the advice to suspend the quality assurance process for RISs for the 100 Day Action Plan.[60]

That same day, the Prime Minister presented a paper to Cabinet seeking its approval to exempt not only the quality assurance process, but also the RIS

53. Document 6.2.13, p 110.
54. Ibid.
55. Document 6.2.14, p 4.
56. Document 6.2.15, p 2.
57. Ibid, pp 3–4.
58. Ibid, p 9.
59. Waitangi Tribunal, *The Oranga Tamariki (Section 7AA) Urgent Inquiry Report*, p 9.
60. Document 6.2.12, p [2].

requirement itself for aspects of the 100 Day Action Plan.[61] The Cabinet paper claimed the 100 Day Action Plan was 'well canvassed' and, despite Treasury's advice on the matter, noted that the usual impact statement process was not necessary, particularly when the Crown was 'simply repealing legislation'.[62] Cabinet then agreed 'to streamline the process for 100-Day Plan initiatives with Regulatory Impact Statements'. They departed from official advice by '[e]xempting them from the normal QA process' and '[e]xempting them from providing RISs' when the Government is 'repealing legislation and not seeking approval for new policy'.[63]

On 22 February 2024, the Cabinet Legislation Committee sought Cabinet approval for the introduction of the Disestablishment Bill.[64] It stated that RISs were not required for the introduction of the Bill, as 'Cabinet suspended the requirement for regulatory impacts statements for decisions relating to 100 Day Plan proposals which solely involve the repeal of legislation.'[65] That day, Cabinet approved the introduction of the Disestablishment Bill into the House of Representatives.

In the *Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report* (2024), the Tribunal observed that Cabinet's decision to amend the Marine and Coastal Area (Takutai Moana) Act 2011 in the absence of a RIS meant that important regulatory policy and legislative change was made without advice from officials. That Tribunal noted:

> Cabinet therefore approved the Minister's proposed amendments on the basis of his personal views without seeing 'free and frank' advice from officials, at least in the form of a regulatory impact statement. As Ms Marsh's aide memoire indicated, the Minister's own haste to amend the Act resulted in the normal policy development process not being followed. This is all the more serious in an instance where officials have expressed clearly divergent views to the policy under consideration.[66]

Despite the important policy and legislative function performed by RISs, and the recognised importance of seeking free and frank advice from officials on policy reform through the preparation of RISs, the Crown dispensed with this requirement for the disestablishment of Te Aka Whai Ora. This was contrary to advice from Treasury. Moreover, it was arbitrary. Cabinet granted to itself a blanket exemption from the requirement to produce RISs for the repeal of legislation to give effect to the 100 Day Action Plan. The exemption applied irrespective of the context of the proposed repeal or the associated subject matter. This is relevant because, as we explain below, the Pae Ora Act established a carefully calibrated health and disability system involving inter-related and inter-reliant entities. Removing one of these entities had the real potential to detrimentally disrupt

61. Document 6.2.12, p [3].
62. Ibid.
63. Ibid, pp [3], [5].
64. Document 6.2.22, p [2].
65. Document 6.2.22(a), p 2.
66. Waitangi Tribunal, *The Takutai Moana Act 2011 Urgent Inquiry Stage 1 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 49.

this system, thereby creating unintended regulatory impacts. This risk is exactly why the Crown's own guidelines specify that RISs are required.

Most relevant to our analysis, the exemption from producing a RIS also applied irrespective of whether Tiriti/Treaty obligations were engaged. In this way, it was arbitrary because there was no assessment as to whether any of the legislative repeals signalled in the 100 Day Action Plan raised Tiriti/Treaty issues. The exemption meant that Cabinet did not receive free and frank advice on the impacts of legislative repeals on the Crown's Tiriti/Treaty duties. It was not only a case of the Crown failing to follow a Tiriti/Treaty-compliant process, it did not even follow its own constitutionally centred and democratically designed process for policy reform. The decision to disestablish Te Aka Whai Ora in the absence of proper policy analysis and free and frank advice from officials was therefore contrary to the principle of good government. Accordingly, we find that, in failing to follow its own policy development guidelines in deciding to disestablish Te Aka Whai Ora, the Crown breached the principle of good government.

4.4.5 Tribunal findings on the Crown's process

In summary, we find that, in disestablishing Te Aka Whai Ora, the Crown, through its process:

- failed, once the coalition Government was formed and sworn in, to take account of its Tiriti/Treaty obligations as the Crown and modify its electoral pledges in the 100 Day Action Plan in light of them, in breach of the principle of good government;
- failed to recognise and respect tino rangatiratanga by deciding to disestablish Te Aka Whai Ora without consulting Maaori, and in the face of significant objection from Maaori, thereby breaching the principle of tino rangatiratanga;
- failed to discharge its duty to consult and be sufficiently informed, thereby breaching te Tiriti/the Treaty principle of partnership;
- failed to discharge its duty of active protection to Maaori, by failing to recognise and respect tino rangatiratanga and the right of Maaori to self-determine what is best for them for hauora Maaori; and
- failed to follow its own processes for the development and implementation of legislative reform, thus further breaching te Tiriti/the Treaty principle of good government.

4.5 Is Disestablishing Te Aka Whai Ora Tiriti/Treaty-Compliant?

4.5.1 Introduction

Te Aka Whai Ora has been disestablished but, at the date of this report, the replacement arrangements are not fully known. We have signalled our intention to review and report on these replacement arrangements in due course.[67] At this point in time, however, we ask ourselves whether the disestablishment of Te Aka Whai

67. Memorandum 2.6.191, p 9.

Ora is, itself, a breach of te Tiriti/the Treaty principles. We have already found in the previous section that the process to disestablish Te Aka Whai Ora breached te Tiriti/the Treaty and its principles. In this section, we consider whether the impacts of that process are Tiriti/Treaty compliant or not.

To answer this question, we address the Crown's position that, despite the disestablishment of Te Aka Whai Ora, the Pae Ora Act remains Tiriti/Treaty compliant. We then address the notion of 'race-based' policy, an important undercurrent to the matters before us.

4.5.2 Impact on the Pae Ora Act

Crown counsel sought to persuade us that the remaining aspects of the Pae Ora Act would ensure that the health system would respond appropriately to Maaori health needs in a Tiriti/Treaty compliant way.

The Crown's position appears internally inconsistent. On one hand, the Crown says the remaining provisions of the Pae Ora Act ensure that Tiriti/Treaty principles will continue to be upheld. Indeed, this was precisely the Minister's view when Cabinet approved the Disestablishment Bill. On the other hand, the Crown accepts that more is required – which is why it has said it plans to develop alternative mechanisms to fill the void left by Te Aka Whai Ora. We consider that the Crown's decision to develop alternative mechanisms is an acknowledgement that more is needed, which undermines the argument that the remaining aspects of the Pae Ora Act are enough. Clearly, they are not.

What is also clear is that the Pae Ora Act implemented a carefully calibrated system for the equitable delivery of health care and services in Aotearoa New Zealand, with a close eye on the Crown's Tiriti/Treaty obligations in this space. Te Aka Whai Ora was a fundamental pillar of this system. In considering the structure of the system as proposed in 2022, we said:

> Based on the information available to us, we think the formal relationships the Maaori Health Authority will have with the Ministry of Health and with Health NZ offer real potential. Beyond Maaori health experts simply being consulted or 'having input' into key decisions, the proposed model appears to give the Maaori Health Authority a meaningful mandate over the key functions that will dictate how health care policies and services are designed, planned, and delivered, in relation to both Maaori-owned and other providers of care.[68]

In our assessment, Te Aka Whai Ora was not developed as an 'add-on', capable of being attached and detached from a broader system at a whim. Instead, it was an integral element of a comprehensive whole and the linchpin for hauora Maaori. The Pae Ora Act was not designed to stand independently of the Maaori health authority. Removing that pillar of the system risked undermining the system as a whole.

68. Waitangi Tribunal, *Hauora*, p179.

Further, in considering whether the remaining aspects of the Pae Ora Act ensured that the health and disability system remained Tiriti/Treaty compliant, Cabinet appears to have acted solely on the advice of the Minister of Health. In his 22 February 2024 paper to the Cabinet Legislation Committee, the Minister stated that:

> The Crown considers it will continue to meet its Treaty obligations. The [Disestablishment] Bill does not affect other mechanisms in the Pae Ora Act that are intended to give effect to the Crown's Treaty of Waitangi commitments. The health sector principles will remain unchanged, and the accountability documents will continue to outline how entities intend to improve Maaori health outcomes, for example. The Tribunal may make recommendations to the Crown following the outcome of any proceedings. I will keep Cabinet informed as appropriate, but do not anticipate significant changes to the proposed legislation.[69]

Later in that paper, and as part of the assessment of compliance with various legal requirements (including the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, the Privacy Act 2000 and international standards and obligations), the Minister, after noting that urgent claims had been made to us about the disestablishment of Te Aka Whai Ora, stated 'I am satisfied that the principles of the Treaty of Waitangi will continue to be upheld'.[70] Because the Crown has not filed evidence to suggest otherwise, Minister Reti appears to have made this statement in the absence of any 'free and frank' advice from his officials. We acknowledge Minister Reti's considerable experience as a Maaori medical practitioner. However, such experience is not a substitute for following a robust and Tiriti/Treaty compliant policy process, based on evidence and full engagement with the Crown's Tiriti/Treaty partner.

The Crown also chose to disestablish Te Aka Whai Ora before an alternative to it was in place. The legislation repealing Te Aka Whai Ora was passed in February and the entity was disestablished at the end of June. The Crown has told us that an announcement about a replacement plan is likely to come in December 2024. We do not know when that plan will be implemented, and can only speculate that it is likely to be well into 2025. We are left to ponder why the Crown did not leave Te Aka Whai Ora in place until its alternative plans were ready to be implemented, thereby ensuring some continuity of focus on addressing Maaori health inequities. Instead, considerable uncertainty is likely to have been caused by the removal of an important linchpin in a carefully calibrated system. Such haste further represents a lost opportunity to properly evaluate the strengths and weaknesses of Te Aka Whai Ora in determining any alternative plans. Moreover, it is unlikely to have had a positive impact on Maaori health equity in the interim and much more likely to have a detrimental impact.

69. Document 6.2.22(a), pp 1–2.
70. Ibid, p 2.

To conclude, Te Aka Whai Ora was an integral part of the reforms ushered in through the Pae Ora Act and the linchpin for hauora Maaori. It was the primary mechanism through which tino rangatiratanga in the health system was to be implemented. Its disestablishment undermines the remaining provisions of the Pae Ora Act, such that we are not convinced that the Act continues to provide for tino rangatiratanga, or that it remains Tiriti/Treaty compliant. We will need to review those provisions in detail in light of the alternative plans to determine, on the whole, whether the Crown's new approach to hauora Maaori is Tiriti/Treaty consistent. We will do this in our part 2 report.

4.5.3 Is the Crown's decision to disestablish Te Aka Whai Ora Tiriti/Treaty-compliant?

In our *Hauora* report, we made an interim recommendation that the Crown commit to exploring the concept of a stand-alone Maaori primary health authority. This structural reform was recommended primarily to recognise and give effect to tino rangatiratanga and te Tiriti/the Treaty principle of partnership.

We finalised our interim recommendation in 2021. After reviewing the details of a proposed Maaori health authority (which was to become Te Aka Whai Ora), which we received then from the stage 1 claimants and the Crown, we concluded:

> In our view, [Te Aka Whai Ora's] proposed form and functions, and its intended role as an agent of tino rangatiratanga, seem to reflect the aspirations of the stage one claimants. They appear to address our findings and recommendations, especially our concern that the existing health system did not reflect the Treaty partnership or properly give effect to tino rangatiratanga. To reiterate one of the core themes of our report, tino rangatiratanga means nothing less than Maaori having decision-making power over their affairs, including hauora Maaori. Tino rangatiratanga means autonomy in the fullest sense possible. When the Crown says it is partnering with Maaori and giving effect to tino rangatiratanga, the Crown is required to protect actively Maaori authority in respect of their own affairs.[71]

The claimant evidence in our inquiry universally indicates that Te Aka Whai Ora, although not perfect, represented the strongest expression of tino rangatiratanga within the health system, ever.[72] Its establishment heralded a new way of ensuring the Maaori voice was heard and acted on. It promised to give practical effect to the notion that Maaori health services should be 'by Maaori, for Maaori'. Although the efficacy of the operations of Te Aka Whai Ora are beyond the scope of this urgent inquiry, the claimant evidence suggests that it was working.

The decision to disestablish Te Aka Whai Ora must be assessed against this context. The establishment of Te Aka Whai Ora was the result of years of policy work, expert and independent reports (including our *Hauora* report), and evidence-based analysis. Yet the decision to disestablish Te Aka Whai Ora was clearly not

71. Waitangi Tribunal, *Hauora*, p178.
72. Submission 3.3.95, p15; submission 3.3.97, p7; submission 3.3.97, p3; submission 3.3.99, p1.

evidence-based or the outcome of a robust policy process. The Crown did not argue that Te Aka Whai Ora was not working as intended or that research had indicated there was a better way. In fact, the decision was not based on a detailed understanding of a better model – the Crown acknowledges that it made the decision to disestablish Te Aka Whai Ora without knowing in detail what to do instead.

The Crown disestablished Te Aka Whai Ora without having a well-considered, properly consulted and Tiriti/Treaty compliant alternative in place. Quite apart from the obvious observation – that the Crown can say there is a better way, without knowing that a better way exists – it seems clear that the Crown is now deciding what that better way is after the event. We ask, what was the rush? None of the evidence provided by the Crown, nor their submissions, explains this. We find the Crown's decision to disestablish Te Aka Whai Ora, in the absence of any clear alternative plan, is a breach of te Tiriti/the Treaty principles of partnership and good government

We have already found that the process followed by the Crown in deciding unilaterally to disestablish Te Aka Whai Ora breached te Tiriti/the Treaty principles of partnership and good government and that repealing sections of the Pae Ora Act meant the Act no longer provided for tino rangatiratanga. The decision also breached Tiriti/Treaty principles, because it took away what was a negotiated attempt between te Tiriti/the Treaty partners to structurally embed tino rangatiratanga into the health system. We initially recommended the establishment of a Maaori health authority because we believed it would go some way towards addressing historical Tiriti/Treaty failings of the health system and would help reflect te Tiriti/the Treaty partnership and uphold tino rangatiratanga. That such an entity was in fact established shows that te Tiriti/the Treaty partners both agreed with our recommendation and shared an expectation that Te Aka Whai Ora would help transform the health system to become more Tiriti/Treaty-compliant. It follows that the disestablishment of a tino rangatiratanga mechanism is, on its face, a Tiriti/Treaty breach. This breach is exacerbated if, as in the case here, there is no alternative tino rangatiratanga mechanism proposed. Both of those things happened here. We therefore find that the disestablishment of Te Aka Whai Ora, which itself was a tino rangatiratanga mechansim, is a breach of the principle of tino rangatiratanga.

A related point is that a stand-alone Maaori health authority can be seen as redress for the long-standing failure by the Crown to reflect tino rangatiratanga in our health system. The Crown agreed to provide this redress in 2022, in the form of Te Aka Whai Ora. Based on the claimants' assessment that Te Aka Whai Ora constituted the closest thing to tino rangatiratanga within the health system, ever, it can be said that the Crown discharged its Tiriti/Treaty duty to provide redress when needed. It follows, then, that a decision to renege on that redress is, prima facie, a breach of te Tiriti/the Treaty principle of redress. We say prima facie, because we do not yet know what the Crown will replace Te Aka Whai Ora with.

The decision to disestablish Te Aka Whai Ora without a detailed alternative plan in place to address the acknowledged Maaori health inequities would also seem to

be contrary to te Tiriti/the Treaty principle of equity. At the very least, the period of uncertainty between the start of the disestablishment of Te Aka Whai Ora until the time that the alternative plans are implemented represents a lost opportunity to focus on Maaori health inequities. Instead, the focus during that period has no doubt been on further systemic changes. However, we do not have sufficient information at this stage to determine whether the Crown has breached te Tiriti/the Treaty principle of equity. We will consider that issue once the Crown has made its alternative plans for hauora Maaori known.

4.5.4 Tribunal findings on the Crown's decision

We find that:

- while the Pae Ora Act contains various provisions that confirm hauora Maaori as an important aspect of the health and disability system, collectively those provisions do not provide for the exercise by Maaori of tino rangatiratanga;
- the Crown's decision to disestablish Te Aka Whai Ora, in the absence of any clear alternative plan, is a breach of the Tiriti/Treaty partnership principle and the principle of good government;
- the disestablishment of a tino rangatiratanga mechanism, such as Te Aka Whai Ora, is a breach of the principle of tino rangatiratanga;
- because Te Aka Whai Ora was established to provide redress for past breaches of te Tiriti/the Treaty, the unilateral decision by the Crown to take it away is a prima facie breach of te Tiriti/the Treaty principle of redress; and
- the Crown's failure to put an alternative plan in place to address Maaori health inequities before disestablishing Te Aka Whai Ora further represents a lost opportunity to make progress towards Maaori health equity while such plans are still being developed and implemented. We, however, reserve any findings in respect of the principle of equity until the Crown has revealed its alternative plans and we have had an opportunity to more fully consider them.

4.5.5 'Race-based' policies

Some of the claimants argued that the Crown's unilateral decision to disestablish Te Aka Whai Ora was not based on efficiency or efficacy, but instead reflected the current Government's aversion to 'race-based' policy. Although Crown counsel did not justify the disestablishment of Te Aka Whai Ora on these grounds, given the political sentiments the parties comprising the coalition Government expressed during the 2023 election campaign, we do not discount these grounds as part of the Crown's rationale for taking this step. Former National party leader at the time the Pae Ora Act was passed Judith Collins calling a Maaori health authority 'racist separatism', is one example of many.[73]

We remind ourselves of our observations in our *Haumaru* report:

73. 'Collins Says her Party Won't Stand for "Racist Separatism" New Zealand', Radio New Zealand, last modified 28 April 2021, https://tinyurl.com/bdhh3het.

> The Crown has a Treaty duty to adopt rational, scientific, equitable policy choices for Maaori. It has a moral and ethical duty to defend them against unreasonable public backlash. It cannot simply find ways of avoiding these duties by coming up with less equitable alternatives; it *must* make those choices that sustain Maaori well-being, and then explain and defend them as long and as vocally as is required. Failing to perform these duties for the sake of political convenience does not reflect the Treaty partnership and, in fact, threatens the fundamental basis for it. [Emphasis in original.][74]

These observations remain pertinent here – Tiriti/Treaty duties must be honoured in spite of political ideology. The Crown cannot avoid its Tiriti/Treaty obligations at will. Nor can it justify such avoidance because of a political mandate. Te Tiriti/the Treaty principles apply to the Crown and its functions, whoever is exercising them and however they came to power.

Moreover, it is no justification to dismantle Tiriti/Treaty-based structures and policy because they are perceived to be based on race. In truth, te Tiriti/the Treaty was entered into between two polities: the British Crown (through Her Majesty the Queen of England represented by Captain William Hobson) and Maaori (through the various Maaori chiefs as the sole sovereigns over their respective territories). The rights and obligations expressed in te Tiriti/the Treaty flow from solemn agreements between sovereign nations. Policies that seek to give effect to these solemn agreements are based on Aotearoa New Zealand's constitutional framework. They can be described in many ways: they are Tiriti-based, Treaty-based, rights-based, even constitution-based. But they are not simply race-based. Indeed, any Tiriti/Treaty narrative that is framed entirely on race misses the whole point and is potentially destructive to the Maaori–Crown partnership.

4.6 Prejudice to Maaori

In our decision to grant these claims urgency, we said:

> [T]he policy announcement by the coalition Government to disestablish Te Aka Whai Ora before an alternative model is developed is problematic. Crown counsel argues that "there are more effective ways" to improve health outcomes for Maaori, yet concedes that the coalition Government is not in a position to articulate how. In general terms, it is difficult to understand how the coalition Government can be sure that there is a more effective way to improve health outcomes for Maaori without knowing what that way is. In Treaty terms, the disestablishment of a tino rangatiratanga-compliant model for something unknown is, on its face, prejudicial. [Emphasis in original.][75]

74. Waitangi Tribunal, *Haumaru: The COVID-19 Priority Report* (Lower Hutt: Legislation Direct, 2023), p 108.

75. Wai 3307 ROI, memo 2.5.3, p 8.

Te Aka Whai Ora, and the principal idea of a separate and independent Maaori health authority, are obsolete for now. Prejudice arises in relation to both process and impacts. Prejudice in respect of process arises because of the complete lack of consulation with Maaori over the disestablishment of Te Aka Whai Ora. That decision was made unilaterally by the Crown, without Maaori input. That the Maaori voice was not even sought, let alone heard and respected, is prejudical in itself. It sends the signal that the Crown believes that Maaori deserve no say over such an important aspect of hauora Maaori.

The process was also prejudicial because the Crown did not follow its own guidelines in making the decision to disestablish Te Aka Whai Ora. From a pure policy lens, this was poor policy development. Good policy-making is informed by consultation with Maaori and advice from officials. Both were lacking here. This was deliberate. It meant that Maaori had no say over the disestablishment of the hauora model that they supported, no doubt because it was the most Tiriti/Treaty-compliant health model ever implemented in Aotearoa New Zealand. It also meant that the Crown was not fully informed of the wider impacts on the health and disabilty system at large. Had the Crown followed its own guidelines, Maaori would have been involved extensively and the Crown would have been informed of all regulatory impacts. That was not the case here. Consequently, this is prejudical to the claimants and to Maaori generally.

Prejudice arises because the well-researched and co-designed concept of an independent Maaori health authority, which was widely supported among Maaori, is now off the table. This prejudice is exacerbated because Maaori do not know what is proposed instead to address longstanding and well-documented Maaori health inequities. There has been, and will continue to be, a period with no clearly articulated replacement plan.

It must also be acknowledged that, although the Disestablishment Bill was enacted on 5 March 2024, the Crown has still not finalised or implemented fully its replacement plans. This creates a period of uncertainty. It also constitutes a delay in dealing with the recognised and ongoing health inequities for Maaori. This delay is prejudicial to Maaori and hauora Maaori.

Our *Hauora* report sets out the high-level process that was followed to finalise our interim recommendation for the Crown and Maaori to explore the establishment of a separate Maaori health authority. We concluded then that the establishment of a Maaori health authority was a 'significant, positive development towards both the provision of equitable health care and the realisation of the Treaty partnership and its obligations'.[76] Although we did not inquire into the process leading to its establishment, it is evident that the development of Te Aka Whai Ora was the outcome of an evidence-informed and carefully calibrated process undertaken over a lengthy period. Much work was done over many years to set it up. Very little effort was expended on the decision to pull it down. If any effort at all was expended on that decision, the Crown did not produce evidence of it in our inquiry. Instead, the decision to disestablish Te Aka Whai Ora was political, and

76. Waitangi Tribunal, *Hauora*, p178.

appears to be based on ideology rather than evidence, sentiment rather than fact, and rhetoric rather than reality. It certainly was not based on any understanding of te Tiriti/the Treaty partnership.

Te Aka Whai Ora was a cornerstone of the new and improved health system implemented through the Pae Ora Act and the linchpin for improving Maaori health outcomes. All the other mechanisms in the Pae Ora Act, such as section 6 (te Tiriti o Waitangi/the Treaty of Waitangi section), section 7 (the health principles) and sections 41 and 49, that assist in that endeavour are undermined if the linchpin is removed. Without that linchpin, the spinning wheel of the health system, as it relates to improving Maaori health outcomes, risks falling off its axle.

However, until the replacement plans are made known and we are informed of what has happened since disestablishment we cannot be sure of the full nature and extent of any prejudice arising from the disestablishment of Te Aka Whai Ora. The Crown assures us that there is a better way, but it is not able to articulate that way yet. Whether those plans are better for hauora Maaori than the existence of a separate and independent Maaori health authority cannot be assessed at this stage. We plan to undertake that assessment once the replacement plans are finalised.

CHAPTER 5

SUMMARY OF FINDINGS AND RECOMMENDATIONS

5.1 Introduction

In this chapter, we summarise our findings and present our recommendations.

5.2 Summary of Findings

Following the general election in October 2023, the new coalition Government set to work implementing its coalition commitments and 100 Day Action Plan. This included disestablishing Te Aka Whai Ora. Several months later, on 27 February 2024, the Crown introduced the Disestablishment Bill – just two days before our hearing for our earlier urgent inquiry on this issue was set to commence. That same day, the House of Representatives passed a motion to pass the Disestablishment Bill under urgency, which would thereby disestablish Te Aka Whai Ora. The Crown made this announcement without providing any information about what its alternative plans were. The urgent hearing was consequently vacated.

In May 2024, we granted a priority inquiry into the processes and steps taken by the Crown to disestablish Te Aka Whai Ora. The following month we set a hearing timetable for October 2024, but on 13 August the Crown issued a memorandum indicating it intended to report back to Cabinet in December 2024 with a new Maaori health strategy. We deferred the hearing and, after receiving submissions from parties on the possibility of reporting on the disestablishment of Te Aka Whai Ora as a stand-alone issue, we confirmed our decision to do so. The inquiry would be conducted in two parts. The first has been conducted on the papers and concerns the process and decision to disestablish Te Aka Whai Ora and how it impacts Maaori. The second part will inquire into the Crown's alternative plans for Maaori health and we will report on this as soon as practicable.

In this report, we made findings on the process the Crown followed to disestablish Te Aka Whai Ora as well as on the impacts of that decision. In the first instance, we found the Crown failed to take important steps in the development and implementation of the policy process that amount to breaches of te Tiriti/the Treaty. The failure to act in a Tiriti/Treaty compliant way in making and implementing that decision had prejudicial impacts on Maaori.

We found the Crown did not act in good faith when disestablishing Te Aka Whai Ora as it did not consult or engage with Maaori at all. Once the coalition Government was formed and sworn in, the Crown breached the principle of good government by failing to take account of its Tiriti/Treaty obligations and

modifying its electoral pledges in the 100 Day Action Plan in light of them. It also breached the principle of good government by failing to follow its own processes for the development and implementation of legislative reform, such as the provision of a regulatory impact statement, despite Treasury's advice to do so. Instead, the Crown chose to exempt itself from the requirement to provide a regulatory impact statement at all from any of its 100 Day Action Plan commitments that required a legislative repeal, including the disestablishment of Te Aka Whai Ora.

By failing to discharge its duty to consult and be sufficiently informed, we found the Crown breached te Tiriti/the Treaty principle of partnership. The Crown decided, without consultation with its Tiriti/Treaty partner and without substantive advice from officials, that Te Aka Whai Ora was not required, despite knowledge of the existence of grave Maaori health inequities. Without consultation and robust advice, the Crown was ill-informed of the effects that disestablishing Te Aka Whai Ora would have on Maaori communities.

The Crown also failed to discharge its duty of active protection to Maaori and breached the principle of tino rangatiratanga and the right of Maaori to self-determine what is best for them and for hauora Maaori. The Crown decided, without input from its Tiriti/Treaty partner, to disestablish Te Aka Whai Ora. As we have shown, the evidence indicates that Maaori did not agree with this decision. Instead, the Crown showed 'reckless disregard for the Crown–Maaori relationship',[1] and continued to implement its own agenda – one that was based on political ideology, rather than evidence, and one that fell well short of a Tiriti/Treaty consistent process.

We made findings regarding te Tiriti/the Treaty compliance of the Crown's decision to disestablish Te Aka Whai Ora and its subsequent impact on Maaori. We found that the Crown breached the principle of tino rangatiratanga in its decision to disestablish Te Aka Whai Ora. The Pae Ora Act implemented a carefully calibrated system for the equitable delivery of health care and services in Aotearoa New Zealand, cognisant of the Crown's Tiriti/Treaty obligations. Te Aka Whai Ora was not an 'add-on' to this system. Rather, it was an integral part of a comprehensive whole that was designed with extensive involvement of Maaori consistent with te Tiriti/the Treaty partnership. While the remaining sections of the Pae Ora Act contain various provisions that confirm hauora Maaori as an important aspect of the health and disability system, we are not convinced that, collectively, those provisions provide for the exercise by Maaori of tino rangatiratanga. Once we know the entirety of the Crown's alternative plans for hauora Maaori these provisions will be relevant to our analysis of those alternative plans.

In the absence of any alternative plan for Maaori health, we found that the Crown's decision to disestablish Te Aka Whai Ora is a breach of the principles of partnership and good government. The Crown had the option to leave Te Aka

1. Waitangi Tribunal, *Ngaa Maataapono/The Principles: The Interim Report of the Tomokia Ngaa Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on The Crown's Treaty Principles Bill and Treaty Clause Review Policies – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p186.

Whai Ora in place until a replacement plan was ready to be implemented. Instead, the Crown chose to make its decision in haste, representing a lost opportunity to properly evaluate the strengths and weaknesses of Te Aka Whai Ora in determining whether alternative mechanisms would better discharge the Crown's Tiriti/Treaty obligations in relation to hauora Maaori.

As we have shown, Te Aka Whai Ora was previously established by the Crown to provide redress for the long-standing failure by the Crown to reflect tino rangatiratanga in our health system and to subsequently improve health outcomes for Maaori. The Crown's unilateral decision to remove Te Aka Whai Ora effectively took that redress away. We found this to be a prima facie breach of te Tiriti/the Treaty principle of redress.

We also found that Maaori have and will continue to suffer prejudice as a result of these breaches as:

- Maaori have not been given the opportunity to engage as Tiriti/Treaty partners in the decision to disestablish Te Aka Whai Ora – the decision was made unilaterally by the Crown, without any Maaori input;
- the Crown failed to conduct a robust policy process and did not follow its own regulatory impact analysis guidelines for developing robust policy when making the decision to disestablish Te Aka Whai Ora;
- Te Aka Whai Ora – a well-researched initiative that was co-designed with Maaori and was widely supported by Maaori – is no longer in place; and
- Maaori have not been informed of the Crown's replacement for Te Aka Whai Ora, creating uncertainty around what will address longstanding and well-documented Maaori health inequities.

5.3 Recommendations

We turn now to our recommendations, conscious that the Crown has indicated it intends to announce its alternative plans for hauora Maaori in December 2024. We embarked on this inquiry knowing that time was short for us to provide practical recommendations to the Crown in the event we found their conduct failed to live up to their obligations under te Tiriti/the Treaty. With this in mind, we make three recommendations.

First, we recommend the Crown commit to revisiting the option of a standalone Maaori health authority. While the landscape has changed dramatically since our recommendation in *Hauora* for a Maaori health authority was first made – and a separate Maaori Health Authority has been stood up and stood down in that period – the rationale for that recommendation has not changed. That recommendation was made in recognition of the dire status of hauora Maaori and the potential for improvement through a Tiriti/Treaty compliant health system. These points remain valid.

No new evidence has been put forward by the Crown to contradict this initial rationale. The decision to get rid of Te Aka Whai Ora appears to be based purely on political ideology, which does not change the underlying rationale. Moreover, the political ideology itself is Tiriti/Treaty inconsistent. Because te Tiriti/the

Treaty and tino rangatiratanga call for a separate and independent Maaori voice on Maaori health and the delivery of health services in a culturally appropriate way (by Maaori, for Maaori), any political ideology that denies or refutes that position, as a matter of principle, is Tiriti/Treaty inconsistent.

Secondly, we recommend that the Crown consult extensively with Maaori in the development of any alternative plans. Te Aka Whai Ora enjoyed broad support from Maaori. The alternative plans must similarly have broad support from Maaori. We acknowledge that obtaining that support may take time and there may be a degree of uncertainty (and opportunity cost) in the meantime. That is the unfortunate but forseeable consequence of disestablishing Te Aka Whai Ora before alternative plans were in place. It is better to take the time now to get the alternative plans right. The Crown must also approach that consultation in good faith and with an open mind. If, during consultation, Maaori say they want a separate Maaori health authority, the Crown would need a compelling reason to not agree to that.

Finally, we recommend that the Crown always undertake proper regulatory impact analysis in matters that affect Maaori health. It is beyond doubt that Maaori suffer grave health inequities. Every Crown act or omission that potentially impacts on these inequities must be taken (or omitted) with a clear understanding of the impacts. Otherwise, the Crown risks exacerbating these inequities, rather than addressing them. The Crown's own rules regarding policy development are designed to ensure decisions are based on evidence following robust analysis so as to avoid forseeable consequences. This process must surely apply in relation to Maaori health inequities. The risks and consequences of getting it wrong in this area are life-threatening.

Dated at Wellington this 28th day of November 2024

Kaiwhakawaa Damian Stone, presiding officer

Professor Susy Frankel FRSNZ, member

Professor Tom Roa, member

Tania Te Rangingangana Simpson ONZM, member

Professor Linda Tuhiwai Smith CNZM, member

THE SEAL OF THE WAITANGI TRIBUNAL

APPENDIX I

LIST OF CLAIMS

Wai#	Claim name
682	The Ngaati Hine Lands, Forests and Resources claim
762	The Waimiha River Eel Fisheries (King Country) claim
861	The Tai Tokerau District Maaori Council claim
1194	The Taumanu Land claim
1212	The Nga Uri o Tokotoru o Manawakotokoto Lands and Resouces claim
1464	Te Kapotai and Ngaati Pare Hapuu claim
1477	The Emma Gibbs Smith and Whaanau (Bay of Islands) claim
1531	The Land Alienation and Wards of the State (Harris) claim
1546	The Waikare Inlet claim
2003	The Ngaati Korokoro, Ngaati Wharara and Te Pouaka (Turner and Others) Resource Management claim
2206	The Ngaa Wahapuu o Mahurangi–Ngaati Whaatua/Ngaapuhi claim
2217	The Children of Te Taitokerau (Broughton) claim
2377	The Ngaati Pakahi (Aldridge) claim
2382	The Tahawai (Aldridge) claim
2494	The Racism Against Maaori claim
2619	The Maaori Disabled claim
2644	The Maaori Health (New Zealand Maaori Council) claim
2671	The Mental Health Services (Stevens) claim
2713	The Maaori Nurses claim
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3.2.1139 J Mason (Wai 1307, Wai 2850, Wai 120, Wai 179, Wai 2849, Wai 1940), memorandum of counsel seeking extension to file briefs of evidence, 17 September 2024

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3.3.95 R Smail and S Cassidy (Wai 3307), opening submissions for Te Aka Whai Ora Urgent claim, 20 Feburary 2024
(a) R Smail and S Cassidy, update to opening submissions, 3 September 2024

3.3.97 Dr S-M Downs and C Terei-Tipene (Wai 682), opening submissions on behalf of Wai 682, 20 February 2024

3.3.99 K Dixon, A Chesnutt, and M Dodkin (Wai 2003), opening submissions on behalf of Wai 2003, 20 Feburary 2024

3.3.100 Aarama Ngaapoo (Wai 3216), opening submissions on behalf of Wai 3216, 21 February 2024

3.3.139 H Irwin-Easthope and R Douglas (Wai 3421), closing submissions for Wai 3421, 14 October 2024

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3.3.155 Geoff Melvin and T Garimella (Crown), closing submissions on behalf of the Crown, 29 October 2024

6 Other Papers in Proceedings

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6.2.10 Cabinet Office Circular, "National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements" (25 March 2024) CO (24) 2 20 November 2024

6.2.11 New Zealand House of Representatives, "Coalition Agreement: New Zealand National Party and New Zealand First" (24 November 2023), 20 November 2024

6.2.12 Department of the Prime Minister and Cabinet, "Proactive Release: 100-Day Plan (CAB-23-SUB-0468) (22 March 2024), 20 November 2024

6.2.13 Cabinet Office – Department of the Prime Minister and Cabinet, Cabinet Manual 2023 (2023), 20 November 2024

6.2.14 The Treasury, "Guide to Cabinet's Impact Analysis Requirements" (June 2020), 20 November 2024

6.2.15 Cabinet Office Circular, "Impact Analysis Requirements" (26 June 2020) CO (20) 2, 20 November 2024

6.2.16 The Treasury, "100 Day Action Plan regulatory commitments: Cabinet's impact analysis requirements and New Zealand's international good regulatory practice obligations" (29 November 2023) T2023/1898 (Obtained under Official Information Act 1982 Request to the Treasury), 20 November 2024

6.2.17 Department of the Prime Minister and Cabinet, "Our health and disability system: Building a stronger health and disability system that delivers for all New Zealanders" (April 2021), 20 November 2024

6.2.18 New Zealand Health and Disability System Review, "Final Report – Puurongo whakamutunga" (March 2020), 20 November 2024

6.2.19 New Zealand Health and Disability System Review, "Final Terms of Reference – Review of New Zealand Health and Disability System" (8 August 2018), 20 November 2024

6.2.20 New Zealand Health and Disability System Review, "Interim Report – Puurongo moo teenei Waa" (August 2019), 20 November 2024

6.2.21 Pae Ora Legislation Committee, "Report – Pae Ora (Healthy Futures) Bill" (14 April 2022), 20 November 2024

6.2.22 Cabinet Legislation Committee – Minute of Decision, "Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill: Approval for Introduction" (LEG-24-MIN-0007), 20 November 2024

6.2.23 New Zealand House of Representatives, "Coalition Agreement: New Zealand National Party & ACT New Zealand", 25 Nov 24

6.2.22
(a) Office of the Minister of Health, "Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill: Approval for Introduction", 25 Nov 24

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M3 Index and annexures to the memorandum of counsel regarding urgency application, 8 December 2023 (Also recorded as Wai 3307, #A3) (Filed by R Smail and S Cassidy)

M34 J Whaanga (Crown), Brief of evidence of John Whaanga – Deputy Director-General for Maaori Health, the Ministry of Health, 23 February 2024 (filed by Geoff Melvin, on behalf of the Crown)

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(a) Index and annexures to the joint brief of evidence of Lady Tureiti Haromi Moxon and Janice Kuka, 15 March 2024

M40 Crown Bundle of additional documents, 23 August 2024 (filed by C Linkhorn, on behalf of the Crown)

M48 Index and appendices of the Crown memorandum regarding unredacted documents sought by the Tribunal, 15 November 2024

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(a) List of interested parties to the urgency application, 19 January 2024