IN THE WAITANGI TRIBUNAL
KEI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI 2575
WAI 1176
WAI 1781
WAI 2734
WAI 2736
WAI 3243

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND the Health Services and Outcomes Inquiry

AND a claim by Te Karaka Karaka on behalf of himself, his whanau, the direct descendants of Te Karaka and on behalf of the autonomous hapuu Te Paatu (Wai 1176)

AND a claim by Tracy Hillier and Rita Wordsworth on behalf of themselves and for the benefit of the hapuu of Ngai Tamahaua (Wai 1781)

AND a claim by Karen Smith on behalf of Te Roopu Taurima O Manukau Trust and for the benefit of those persons Te Roopu Taurima O Manukau Trust support (Wai 2734)

AND a claim by Robina Rihari on behalf of Maaori Stroke Survivors and their whaanau (Wai 2736)

AND a claim by Tiaki Grant-Mackie on behalf of her whaanau and hapuu, iwi, whaanau whaanui and whaangai (Wai 3243)

JOINT CLOSING SUBMISSIONS IN REPLY TO THE CROWN

Dated this 5th day of February 2025

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MAY IT PLEASE THE TRIBUNAL:

Introduction

1. These submissions in reply to the Closing Submissions for the Crown dated 11 October 2024 are jointly filed on behalf of:

   (a) Wai 1176, a claim by Te Karaka Karaka on behalf of himself, his whanau, the direct descendants of Te Karaka and on behalf of the autonomous hapuu Te Paatu;

   (b) Wai 1781, a claim by Tracy Hillier and Rita Wordsworth on behalf of themselves and for the benefit of the hapuu of Ngai Tamahaua;

   (c) Wai 2374, a claim by Karen Smith on behalf of Te Roopu Taurima O Manukau Trust and for the benefit of those persons under Te Roopu Taurima O Manukau Trust support;

   (d) Wai 2736, a claim by Robina Rihari on behalf of Maaori Stroke Survivors and their whaanau; and,

   (e) Wai 3243, a claim by Tiaki Grant-Mackie on behalf of her whaanau and hapuu, iwi, whaanau whaanui and whaangai.

   ("**the Claimants**")

2. These reply submissions respond to specific matters raised in the Crown's closing submissions adopting a thematic approach to the issues to avoid repetition. The Claimants continue to rely on the closing submissions already filed.[1] Where a matter is not specifically addressed in either these or the earlier filed submissions it is opposed.

Crown's approach

3. The Crown in this Inquiry has declined to address the evidence and submissions of the Claimants in detail and instead has focussed on system-level matters.[2] As such, the Crown purports to have addressed key themes raised in all claims rather than responding to the claims

[1] Wai 2575, #3.3.126; #3.3.128; #3.3.130; 3.3.134; 3.3.135.
[2] Wai 2575, #3.3.138(a) at [34].

themselves.[3] In addition, a number of claims have been classified 'claims on lived experience' that the Crown has considered but not explicitly mentioned.[4]

4. For example, counsel note the Wai 1176 and Wai 1781 claims have been classified by the Crowns as lived experience claims despite both being hapuu claims.[5] The suggestion by the Crown is that any such claims offer experiential evidence only implying no direct response is required. However, these claims concern the Crowns te Tiriti obligations in respect of hapuu rangatiratanga and the interface of such obligations with the disability system. The Crown decision not to engage with these claims in any meaningful way and attempt to minimise the primary allegations made under those claims[6] cannot have any significant influence on the tribunal's consideration of these claims.

5. The Claimants do not look to the Crown for a response to validate their experiences. The Claimants look to the Crown as a Te Tiriti Partner to engage in genuine dialogue about the Crown's failures to meet the obligations under Te Tiriti so that steps can be taken to resolve those failures.

6. To the extent the Crown has failed to respond to particular evidence filed by Claimants, it is submitted the best evidence must be that of the Claimants. This should be carefully considered when the Tribunal comes to make their final findings and recommendations sought by the Claimants.

Treaty Principles

7. Counsel oppose the Crown's assertion that interpretations of the Treaty Principles are in "constant flux".[7] The Crown cite cross examination of Dr King on this point, however the language used in that exchange was that the Treaty principles "evolve over time".[8] Counsel prefer this framing and

[3] At [38] footnote 28.
[4] Idib, at [6] and footnote 3.
[5] Wai 2575, 1.1.22(a) at [28]; Wai 2575, 1.1.4(c) at [17]
[6] Wai 2575, #3.3.138 at [53]
[7] Wai 2575, #3.3.138(a) at [11].
[8] Wai 2575, #4.1.012 at p 83 line 2.

further submit the Treaty principles are in a state of constant progression, not flux.

8. The Claimants agree with the position advanced by counsel for the Crown in oral submission that "the Tribunal can continue to use [the principles of the Treaty as articulated by this panel of the Tribunal in the *Hauora* report] appropriately in assessing these claims".[9]

Standard of reasonableness

9. The Crown, in reliance upon the judgment of the Privy Council in the *Broadcasting Assets* case and the *Maaori Electoral Option Report*, asserts the relevant standard for assessing the Crown's actions is what is reasonable in the circumstances. [10]

10. The Claimants do not accept the relevant standard for Crown action in this Inquiry is one of reasonability in the prevailing circumstances. The *Broadcasting Assets* case dealt with protection and preservation of a specific taonga, Te Reo Maaori.[11] In contrast, the interests advanced by the Claimants in this Inquiry are much more comprehensive. Fundamentally, the Crown's health and disability system regulates the extent to which taangata whaikaha Maaori are able to participate in their own whaanau, hapuu, iwi, communities and society at large.[12] It regulates their access to Te Reo Maaori and Te Ao Maaori.[13] In this way, it also regulates the access Te Ao Maaori and Te Iwi Maaori have to taangata whaikaha Maaori. There is no single, discrete taonga at stake in this Inquiry.

11. In light of the significant and wide-reaching interests of the claimants in this Inquiry it is counsels' submission that questions of reasonability only become relevant where the Crown has ensured some level of protection

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[9] Waitangi Tribunal "Wai 2575 Health Week 11 Day 5" (6 December 2024) Youtube <https://www.youtube.com/live/SP2P_5xkuKM> ("Hearing 11 Day 5 Livestream") at 09:10:15.
[10] Wai 2575, #3.3.138(a) at [41] – [46]; *New Zealand Maaori Council v Attorney-General* [1994] 1 NZLR 513 (PC) ("*Broadcasting Assets* case"); Waitangi Tribunal, *Maaori Electoral Option Report* (Wellington : Brooker's, 1994).
[11] *Broadcasting Assets* case, above n 7.
[12] For example, see Wai 2575, #3.3.126 at [36]; #3.3.128 at [62] - [69]; 3.3.135 at [34]; #3.3.134 at [31]; #3.3.130 at [33], [63]; #B022 at p 35.
[13] Wai 2575, #3.3.130 at [86] – [90].

and preservation of the interests of taangata whaikaha Maaori. As the Privy Council said, "the obligation of the Crown is constant" but it is the protective steps which the Crown takes which are subject to questions of reasonability.[14]

12. Accordingly, where the Claimants have demonstrated the Crown has made no effort to protect and preserve a particular interest of taangata whaikaha Maaori counsel submit the Crown is necessarily in breach of the principles of the Tiriti. For example, the Crown's system does not ensure access to Te Ao Maaori of any kind for taangata whaikaha Maaori in RIDSAS care outside of areas where Te Roopu Taurima provide support services.[15] There are no protective steps which can be assessed for reasonability.

13. Further, counsel submit the Crown is only capable of reasonable action where it is adequately informed as to the level of unmet need experienced by taangata whaikaha Maaori. The Privy Council acknowledged the Crown's duty to be adequately informed in their judgment, finding "if as is the case with the Maaori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations".[16] This Tribunal in its *Hauora* report confirmed the Crown obligation to remain adequately informed is part of the principle of active protection.[17] The Crown cannot act first then form a view on reasonability post-hoc. The Crown must carefully consider the prevailing circumstances and the state of Maaori interests in deciding the action it should take to fulfil its obligations.

14. Given the significant lack of data held by the Crown on the level of unmet need experienced by taangata whaikaha Maaori and the Crown's failure to adequately partner with taangata whaikaha Maaori, whaanau, kaupapa Maaori providers and Maaori more generally counsel submit the Crown is not and has never been in a position to act reasonably in regard

[14] *Broadcasting Assets* case, above n 7 at 517.
[15] Wai 2575, #3.3.130 at [89] – [90].
[16] *Broadcasting Assets* case, above n 7, at 517.
[17] Waitangi Tribunal, *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt : Legilsation Direct, 2023) ("*Hauora")* at p 32.

to discharging its Tiriti obligations to taangata whaikaha Maaori.[18] Without knowing the level of unmet need the Crown cannot know the degree of action required to address that need, no matter the prevailing circumstances.

15. Even where the Crown has acted to provide a level of protection and preservation for the interests of taangata whaikaha Maaori in its health and disability system, counsel submit the Crown has not acted sufficiently reasonably so as to discharge its Treaty obligations in designing and implementing successive health and disability systems which fail to provide for taangata whaikaha Maaori no matter the prevailing circumstances.[19]

16. Although the Crown has sought to rely on this standard of reasonableness, it has failed to assist the Tribunal in understanding and applying that standard in this Inquiry by failing to set out:

    (a) Any actions the Crown views as reasonable;

    (b) Any actions the Crown views as unreasonable;

    (c) Any standards advanced, recommendations sought and submissions made by the Claimants the Crown believes are unreasonable;

    (d) Any prevailing circumstances the Tribunal ought to account for when assessing Crown action in this Inquiry; and,

    (e) The nature of the interest(s) and/or taonga the Claimants are seeking protection and/or recognition of.

17. Counsel therefore submits any findings of reasonableness will need to considered carefully in light of the above matters.

Positive obligation to act

18. The reasonableness standard is not only a framework for determining the justifiable limits to Crown action in respect of discharging the Crown's

[18] See Wai 2575, #3.3.130 at [41] – [48]; #3.3.135 at [62] – [69].
[19] See Wai 2575, #3.3.126 at [74] – [80]; #.3.130 at [10], [32] – [40].

Tiriti duties, but also for establishing those circumstances in which the Crown is obligated to take positive action to protect a Maaori interest including vigorous action in appropriate circumstances.[20]

19. Even with a lack of data on taangata whaikaha Maaori the Crown acknowledges Maaori are disproportionately more likely to have a lived experience of disability and taangata whaikaha Maaori experience poorer outcomes.[21]

In counsels' submission that acknowledgement alone prima facie requires the Crown to take vigorous action to protect taangata whaikaha Maaori and reduce the inequitably poor outcomes they experience.

20. In some cases that obligation is further heightened where there are examples of historical breaches which have exacerbated the poor outcomes faced. For example, Maaori who were separated from their whaanau and their Maaoritanga during institutionalisation are yet to be reunited with their whaanau and their identity.[22] The lack of cultural competency in the system has led to reduced interaction with the system by Maaori which exacerbates the disproportionately poor health outcomes they experience.[23] The Crown's system has not supported kaupapa Maaori providers to deliver services in all regions for all supports.[24] For decades the system has not been fit for taangata whaikaha Maaori.[25]

Standard of practicality

21. The Crown also asserts a limitation of practicality on its Tiriti obligations.[26] There is no authority cited for this point and again the Crown has failed to make any submissions on how its actions have been practical. It has also

[20] *Broadcasting Assets* case, above n 7 at 517.
[21] Wai 2575, #3.3.138(a) at [49.2] – [49.3].
[22] Wai 2575, #J020 at [59]; #J022 at [43].
[23] Wai 2575, #3.3.130 at [35]; #3.3.126 at [100] – [101].
[24] Wai 2575, #B022 at p 158, 165.
[25] Wai 2575, #3.3.126 at [76]; Wai 2575, #3.3.138(a) at [59]; #L002 at [32]; and Wai 2575, #3.3.130 at [60] – [72].
[26] Wai 2575, #3.3.138(a) at [45].

failed to identify any impracticality in the positions advanced by the Claimants.

22. If anything, the evidence demonstrates the Crown's approach has been wildly impractical. Whaikaha barely got off the ground before the Crown took further decisions to excise it from MSD.[27] Further, the ongoing failure of the Crown to collect robust data on taangata whaikaha Maaori has perpetuated the Crown's trial and error response to system reform wherein the Crown has no basis for any proposed reforms and no real measure of the progress, or lack thereof, of any implemented reforms.[28] That the cost of this approach is passed on to those who rely on the system through the limitation of support provision with little to no advance notice only further demonstrates the degree of impracticality with which the Crown has operated.[29]

23. Counsel therefore reject this limitation of practicality and further submit the Crown has failed to act with any degree of practicality in any case in breach of the principle of good governance.

Social Model of Disability

24. The Crown has not proposed to incorporate a Maaori model of disability into its health and disability system. Instead, the social model is preferred.[30] Counsel submit the Crown is again invisibilising taangata whaikaha Maaori as simply members of the disability community in breach of the principles of partnership, active protection and tino rangatiratanga.

25. The Crown's approach appears to exploitative of tangata whaikaaha maaori vulnerability in that virtually any improvement made to the system will be better than the current state of affairs given the significant historical neglect of tangata whaikaaha. However, not all changes will reflect that tangata whaikaaha Maaori are entitled to a self-determined

[27] At [86], [87.3].
[28] Wai 2575, #4.1.026 at p 101 line 7.
[29] Wai 2575, #3.3.130 at [113] – [115].
[30] Wai 2575, #3.3.138(a) at [3] – [4].

standard of care. In taking this view, Maaori interests will always be guaranteed to slip through the cracks.

26. For example, the Crown has made no argument that the needs of taangata whaikaha Maaori were a factor in Stats NZ's move to an administrative data-first approach.[31] However, because Crown data collection relating to taangata whaikaha Maaori has been such an abject failure in the past, this move by Stats NZ will only improve the quality of data relating to taangata whaikaha Maaori. Generally that may not be a bad thing, but when whaikaha Maaori interests are not the reason for the change in approach, it is easy for their requests to slip through the cracks e.g. where Maaori have requested certain indicators be included in data collection the Crown ignores them.[32]

27. Similarly, the social model of disability is an improvement on the medical model. However, it is not a Maaori model. If the move to the social model has any benefit to Maaori it is only because the medical model imposed by the Crown was more harmful.

28. Counsel submit the Crown's reliance on collateral benefits to taangata whaikaha Maaori to avoid its partnership obligations is a clear failure to act in good faith in breach of the principle of partnership.

Partnership

29. From paragraph [86] of its closing submissions, the Crown discusses the recent decision to transition responsibility for DSS to MSD. Counsel submit the Crown's position on engagement through the course of this transition is also in breach of the principle of partnership.

30. The Crown asserts engagement with the disability community undertaken by the Minister for Disability Issues supported her decisions and her proposal to Cabinet.[33] However, the Crown cites the Minister's *Report back on phase one of the independent review into the sustainability of Disability Support Services administered by the Ministry of Disabled People – Whaikaha* ("**Report Back**") on this point. The Report Back makes

[31] At [190] – [191].
[32] Wai 2575, #3.3.130 at [46].
[33] Wai 2575, #3.3.138(a) at [91].

no such claim, only stating the Minister "engaged with disabled people and stakeholders to seek their perspectives about the current state of DSS, which have been shared with the panel".[34] There is no evidence on the scale or nature of this engagement, much less that the engagement supported the Minister's subsequent actions.

31. Further, there is no evidence that this engagement included engagement with taangata whaikaha Maaori, their whaanau and kaupapa Maaori service providers.

32. The Crown then claims future decisions on managing DSS and considering system transformation will include engagement with taangata whaikaha Maaori and kaupapa Maaori providers, however the Crown cites Mr O'Meara's 24 May 2024 brief on this point.[35] That brief related to changes made to Whaikaha's purchasing rules and prioritising measures for Equipment and Modification Services.[36] This evidence preceded the publication of the Independent Review and does not mention any future engagement in relation to DSS. Accordingly, counsel submit there is no evidence any future engagement will include taangata whaikaha Maaori, their whaanau or kaupapa Maaori service providers.

33. Given there was no engagement with taangata whaikaha Maaori, their whaanau or kaupapa Maaori service providers before decisions were taken to transfer DSS to MSD and pause the roll out of EGL and there is no evidence any future engagement will include those groups, it is counsels' submission the Crown remains in clear breach of the principle of partnership.

34. Other points advanced by the Crown regarding partnership do not rise above the level of summary of the evidence led in this Inquiry and therefore do not address or mitigate the concerns and breaches already advanced by the Claimants.[37]

[34] Wai 2575, #N017(b) at BMS-17, at [20].
[35] Wai 2575, #3.3.138(a) at [91].
[36] Wai 2575, #N007 at [4] – [5].
[37] Wai 2575, #3.3.138(a) at [141] – [143].

New Zealand Disability Strategy 2016 – 2026 (NZDS)

35. At paragraph 102 the Crown states that the NZDS is a "cross-government strategy" guiding how it will meet Aotearoa's commitment to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). However, the NZDS is not legally enforceable, and having a strategy does not equate to compliance with international human rights obligations. It is merely aspirational. We submit that in order for the Crown to truly meet UNCRPD standards it requires tangible legal and policy changes, not just guidance documents. There are also no clear mechanisms contained in the strategy to ensure compliance. Ultimately, the strategy lacks strong enforcement provisions, meaning government agencies can fail to meet their obligations without any consequences or mechanisms of accountability.

36. Furthermore, while the NZDS outlines a broad vision and key outcome areas, the Crown fails to critically assess in its submissions as to whether these objectives are being met. Key concerns for the claimants include:

    (a) Insufficient funding: Without adequate resourcing, many of the strategy's goals remain aspirational rather than actionable.

    (b) Service delivery gaps: Tangata Whaikaha continue to face significant barriers in education, employment, and healthcare, suggesting that the strategy has not been effectively implemented despite being in effect for over 8 years now.

    (c) Lack of independent evaluation: There are no indications from the Crown whether there is a clear, independent review process to assess whether the NZDS has achieved its intended outcomes, again highlighting issues regarding accountability measures for Crown action.

37. At paragraph 104, the Crown states that the NZDS "recognises that many taangata whaikaha Maaori identify as Maaori first" and acknowledges the importance of cultural identity. Counsel submit that the Crown will have the Tribunal believe that it is committed to ensuring Maaori perspectives on disability issues are adequately captured and considered. However,

this statement is merely an acknowledgement and lacks depth and any evidence of concrete action within the strategy. Monitoring and decision making for the NZDS were key issues raised by the claimants,[38] and the Crown's submissions fail to speak to or address those issues.

38. At paragraph 105, the Crown states that responsibilities for implementing the NZDS are "shared amongst relevant government agencies." However, this leads to significant accountability gaps in the Crown's strategy:

    (a) Firstly, there are no clear lines of responsibility. We submit that when accountability is spread across multiple agencies, it becomes unwieldy to track progress or hold any one entity responsible for failures.

    (b) Secondly, there is a lack of consequences for non-compliance. If agencies do not meet their obligations, the Crown has failed to ensure there are penalties or corrective measures in place.

    (c) Finally, there is limited engagement with disabled communities. The strategy does not ensure that disabled people have a direct role in holding agencies accountable, particularly tangata whaikaha Maaori.

39. Counsel submit that in order for the strategy to achieve meaningful outcomes for tangata whaikaha Maaori, the Crown should assign clear leadership responsibility for implementing the NZDS, introduce consequences for non-compliance, and establish a formal a Maaori advisory group to oversee progress. Otherwise, tangata whaikaha Maaori will continue to fall between the gaps.

Kaupapa Maaori

40. Nowhere in the Crown's submissions does it state how it intends to incorporate kaupapa Maaori frameworks through the NZDS. This criticism was also raised by the Wai 2736 claim where whaanau often experienced

[38] Wai 2575, #E1 at [49]; Wai 2575, #3.3.128 at [34]-[41].

cultural insensitivity regarding their Maaori identity.[39] This is especially egregious when you consider that Maaori can feel unsafe within the current mainstream health system.[40] In our submission, the strategy does not sufficiently integrate Maaori-led solutions and fails in this respect.

Funding

41. There is no clarification within the strategy or the Crown's submissions as to specific funding for taangata whaikaha Maaori. Counsel submit that without dedicated funding and initiatives, the strategy risks being tokenistic rather than transformative. If the Crown is committed to reducing disparities for taangata whaikaha Maaori kaupapa, then it must include kaupapa Maaori approaches into the implementation of the NZDS, ensure funding is earmarked for tangata whaikaha Maaori, and involve Maaori leadership in decision-making.

42. Counsel submit that while the New Zealand Disability Strategy 2016–2026 may present a well-intentioned framework, its effectiveness is undermined by weak accountability, lack of confirmed funding, insufficient focus on Maaori disability needs, and a failure to demonstrate measurable impact. To ensure that the Coalition Government meets its obligations under the UNCRPD, the Crown must take concrete steps to strengthen enforcement, improve monitoring, and embed genuine co-governance with disabled communities and taangata whaikaha Maaori.

Disability Action Plan 2016 - 2026

43. At paragraph 108, the Crown states that "(p)ublic consultation on the plan, including with taangata whaikaha Maaori, was undertaken in 2019 and 2019". However, despite that the DAP applies a one-size-fits-all framework, which does not account for the unique cultural, social, and economic barriers faced by taangata whaikaha Maaori. Concerns include:

    (a) Systemic discrimination in service delivery: Maaori experience worse outcomes in education, employment, and healthcare

[39] Wai 2575, #3.3.128 at [36(c)].
[40] Wai 2575, #3.3.128 at [77]-[79].

compared to non-Maaori, yet the DAP does not outline any targeted strategies to close these gaps.

(b) Failure to embed kaupapa Maaori frameworks: The DAP does not prioritize whaanau-based, tikanga Maaori approaches, despite clear evidence that these are more effective for Maaori.

(c) Colonial approach to disability: The strategy is rooted in Western models of disability, which do not align with how whaikaha is understood within te ao Maaori.

44. At paragraph 111, the Crown states it is; "(c)onsidering how to progress the UN's recommendations for implementing the UNCRPD in a way that reflects government priorities and the fiscal environment." This raises serious concerns:

(a) Maaori disability rights are not treated as a priority: The government's selective approach to UNCRPD implementation suggests that budget constraints take precedence over the rights of disabled Maaori.

(b) No ring-fenced funding for taangata whaikaha Maaori: There is no evidence that Maaori-specific funding exists within the DAP, meaning outcomes for Maaori disabled people will likely remain poor and inadequate, further widening negative disparities.

45. For the claimants, the Crown should secure long-term, ring-fenced funding for Maaori-led disability initiatives and prioritize Maaori employment solutions instead of deferring action due to fiscal constraints. By failing to address these fundamental issues, counsel submit that the Crown is not meeting its obligations under Te Tiriti or the UNCRPD, and the DAP risks reinforcing existing inequalities rather than addressing them.

Mahi Aroha Action Plan

46. At paragraph 121, the Crown states that "there has been longstanding concern about the lack of support for carers of disabled people," but it does not clarify whether Mahi Aroha actually improved this situation. In reflecting on the claimant evidence, the reality is that Maaori whaanau continue to face huge challenges in caring for their whaanau members. Mahi Aroha appears to have had no impact on their daily lives and adequate support for whaanau carers continues to be a significant issue.[41]

47. At paragraph 122, the Crown mentions that Maaori are one of the four "targeted populations" in the Mahi Aroha plan, recognizing the disproportionate representation of Maaori women and communities as carers. However, by grouping Maaori alongside Pacific peoples, young people, and the elderly, the plan risks oversimplifying the unique needs of Maaori carers. Maaori have distinct caregiving roles informed by whaanau structures, cultural practices and tikanga. Grouping Maaori with Pacific and elderly populations undermines the need for specific, tailored solutions for Maaori, such as ensuring access to culturally appropriate respite care or financial support for Maaori whānau caregivers. A more effective approach would be one where Maaori are not treated as a subset of a larger group but are recognized as having distinct needs that require Maaori leadership, resources, and strategies that align with the principles of Te Tiriti and kaupapa Maaori approaches.

48. At paragraph 122, the Crown mentions that Maaori are one of the four "targeted populations" in the Mahi Aroha plan, recognizing the disproportionate representation of Maaori women and communities as carers. However, by grouping Maaori alongside Pacific peoples, young people, and the elderly, the plan risks oversimplifying the unique needs of Maaori carers. Maaori have distinct caregiving roles informed by whaanau structures, cultural practices and tikanga. Grouping Maaori with Pacific and elderly populations undermines the need for specific, tailored solutions for Maaori, such as ensuring access to culturally appropriate respite care or financial support for Maaori whānau caregivers. A more

[41] Wai 2575, #3.3.128 at [60]-[68].

effective approach would be one where Maaori are not treated as a subset of a larger group but are recognized as having distinct needs that require Maaori leadership, resources, and strategies that align with the principles of Te Tiriti and kaupapa Maaori approaches.

49. The Mahi Aroha Action Plan is framed as a cross-agency initiative under MSD's New Zealand Carers' Strategy, but there is no mention of whether Maaori-led models of caregiving (manaakitanga, whānau ora approaches) were incorporated. This suggests a systemic approach rather than one that genuinely empowers Maaori carers or communities.

50. The Mahi Aroha Action Plan is framed as a cross-agency initiative under MSD's New Zealand Carers' Strategy, but there is no mention of whether Maaori-led models of caregiving (manaakitanga, whānau ora approaches) were incorporated. This suggests a systemic approach rather than one that genuinely empowers Maaori carers or communities.

No plans for the future

51. The Mahi Aroha Action Plan 2019–2023 has now expired, yet there is no mention in the Crown submissions of a successor plan or how its goals will be sustained. Given the ongoing demand for carers and the systemic lack of support acknowledged in the Crown's submissions, the absence of a clear continuation strategy raises grave concerns.[42] If Maaori were disproportionately represented as carers, what mechanisms are in place to ensure that the gaps identified in Mahi Aroha do not persist? Without a follow-up plan, there is a risk that the issues faced by Maaori carers will remain unaddressed, reinforcing inequities rather than resolving them.

52. Overall, the Crown's submissions suggest that Mahi Aroha acknowledged Maaori but failed to centre them in meaningful ways. If Maaori were a "targeted population," the plan should have integrated kaupapa Maaori frameworks, collaborated with Maaori-led organizations, and connected with Whaaia Te Ao Maarama to ensure a well-rounded holistic approach.

[42] Wai 2575, #3.3.128 at [71].

Workforce

53. Similarly, counsel consider the Crown's submissions regarding workforce issues do not address the submissions already made on behalf of the Claimants and are unlikely to mitigate those issues to a sufficient extent to meet the Crown's Tiriti obligations.

54. The Crown acknowledges the workforce system includes contracting and funding frameworks.[43] However, no changes to the funding frameworks are proposed to address the workforce issues acknowledged by the Crown.[44]

55. As set out in the closing submissions for Te Roopu Taurima, counsel submit any changes to education and career pathways are unlikely to have a significant impact on workforce issues without ensuring providers are able to remunerate staff for their skills, experience, delivery and career progression.[45]

56. Although, as the Crown states, non-regulated DSS are required to be audited against Ngaa Paerewa,[46] the Crown's own witnesses took the position that monitoring and contractual arrangements are insufficient to change provider practice.[47] Accordingly, there is no indication Ngaa Paerewa will go any way to improving the health and disability workforce.

57. The Crown asserts it has provided evidence on areas that can be improved to reduce some of the barriers for Maaori providers.[48] However, the evidence referred to in support of this point only relates to HCSS and little improvements to reduce barriers for Maaori providers are referred to in the brief.[49] The two improvements suggested in that brief are:

[43] Wai 2575, #3.3.138(a) at [153.2].
[44] Wai 2575, #3.3.138(a) at [156].
[45] Wai 2575, #3.3.130 at [77] – [80].
[46] Wai 2575, #3.3.138(a) at [158].
[47] Wai 2575, #4.1.026 at p 456 line 5 and p 458 line 19.
[48] Wai 2575, #3.3.138(a) at [160].
[49] Wai 2575, #L028(f) at [12] – [13]..

(a) Whaikaha plans to undertake a process to develop and consult on a definition Whaikaha will use to identify kaupapa Maaori providers.[50]

(b) Te Whatu Ora has established a Commissioning Procurement team which will develop operational policy to support the provision of kaupapa Maaori services.[51] No detail is provided on the membership of that team or how it will develop the operational policy, including whether kaupapa Maaori providers will be involved.

58. Counsel submit these proposals are unlikely to have any significant impact on the workforce issues in the health and disability system given neither Whaikaha nor Te Whatu Ora are responsible for DSS.

59. The Crown also acknowledges the lack of Maaori and taangata whaikaha Maaori representation in the workforce.[52] The only Crown proposal to address this shortage is for health agencies to implement the Health Workforce Plan 2023/2024.[53] That one-year plan has concluded yet the Crown has led no evidence of any resulting increase, or likelihood of an increase, in Maaori and taangata whaikaha Maaori representation in the workforce. The next three-year phase of the plan has no particular focus on increasing representation in the workforce.[54]

60. Counsel observe that plan will not address workforce issues outside of Te Whatu Ora.[55] Further, the Crown takes the position Te Whatu Ora is independent of the Crown,[56] but it has failed to demonstrate a causal link between the Health Workforce Plan 2023/2024 and any Crown action.

61. The Crown also acknowledges the closing submissions on behalf of Ngāi Tamahaua regarding the lack of support for whaanau carers.[57] In response the Crown asserts it provides support for whaanau carers on the basis that

[50] At [76].
[51] At [134].
[52] Wai 2575, #3.3.138(a) at [147.7], [156.3].
[53] At [157.2].
[54] Wai 2575, #L029(h) at [96].
[55] At [95] – [97].
[56] Wai 2575 #3.3.138(a) at [35.3.1].
[57] Wai 2575 #3.3.138(a) at [147.5] see footnote n 190 of the Crown's submissions.

Mahi Aroha was aligned with a range of strategies which aim to support and guide carers.[58] Counsel repeat paragraphs [70] and [71] of the closing submissions on behalf of Wai 2736 in reply.[59] Not only has Mahi Aroha expired with no indication it will be revived or continued, but even when it was in operation the Crown failed to introduce a scheme to enable spouses to be paid as carers.

Data

62. In counsels' submission the Crown's position on data set out from its paragraph [166] obfuscates the significant failures of the Crown to act to remedy the pronounced lack of data it holds regarding taangata whaikaha Maaori which are not caused by general issues with data collection in the context of lived experience of disability. Accordingly, counsel submit this Tribunal should make the findings and recommendations sought by the Claimants in relation to data.[60]

63. The Crown acknowledges the alternation of Te Kupenga and the Disability Survey means there is no longer simultaneous data collected on taangata whaikaha Maaori across a range of factors.[61] However, the Crown does not propose to change this. Instead, the Crown proposes to include more content relevant to taangata whaikaha Maaori in the 2028 Te Kupenga cycle.[62] This is despite the Crown also asserting there are limitations on the number of targeted questions which can be asked in collection settings.[63]

64. Accordingly, counsel submit the Crown is aware it intends to collect data about taangata whaikaha Maaori on a reduced basis and at the expense of recording data on Maaori generally. Counsel submit this is a breach of the obligation to be adequately informed and the principle of active protection.

[58] Wai 2575, #3.3.138(a) at [161], [121].
[59] Wai 2575, #3.3.128.
[60] Wai 2575, #3.3.130 at [41] – [48], [121] – [124(o)]; #3.3.135 at [62] – [69], [73], [75(g)].
[61] Wai 2575, #3.3.138(a) at [180].
[62] Wai 2575, #3.3.138(a) at [206].
[63] Wai 2575, #3.3.138(a) at [167.3].

65. Regarding the Disability Survey, the Crown does not propose to address the issues with data collection, only how the data will be published.[64] This will not improve the Crown's ability to understand trends in the data over time, or make informed decisions relating to the needs of taangata whaikaha Maaori.

66. The Crown's proposals to increase collection of and reliance on administrative data fails to recognise this data only captures interactions with the system and therefore cannot provide insight on the level of unmet need taangata whaikaha Maaori experience.[65] Counsel submit the Crown is therefore in clear and continued breach of the obligation to be adequately informed.

67. During the closing submissions hearing, counsel for the Crown cautioned the Tribunal against setting the standard for reasonable Crown action too high in respect of data collection.[66] Counsel refer to the closing submissions on behalf of Te Roopu Taurima.[67] The failures of the Crown in regard to the Disability Survey are failures to meet a Stats 101 standard. Obtaining data sets which are comparable over time is not a new problem created by advances in technology or synthesising a particular model of disability into a set of survey questions.

68. Given the lack of sufficient data on taangata whaikaha Maaori has persisted for decades counsel submit the current lack of data has been caused, in part, by past Crown breaches of the obligation to be adequately informed.[68] Therefore, the Crown is obliged to take vigorous action to remedy this breach as sought in the closing submissions on behalf of Te Roopu Taurima.[69]

[64] Wai 2575, #3.3.138(a) at [204].
[65] Wai 2575, #3.3.130 at [43].
[66] Hearing 11 Day 5 Livestream, above n 6 at 10:58:46.
[67] Wai 2575, #3.3.130 at [43].
[68] Wai 2575, #B022 at pp 204 – 205.
[69] Wai 2575, #3.3.130 at [124(m)] – [124(n)].

Response to past reports

69. The Tribunal's Report is intended by the Crown to be the latest in its large library of guidance for future decision-making.[70] However, the Crown declined to examine the lack of implementation of those reports during the course of this Inquiry in order to focus on the present process.[71]

70. Yet, the Crown has suggested the claimants ought to rely on the Tribunal's report once it is issued to achieve the change they require.[72] The suggestion made by Crown counsel in oral submission is that the Maaori Tiriti Partner, out of its own resources, time and effort, prepare some alternative plan for the Crown's consideration when the Disability Strategy is updated in the future.[73]

71. Counsel note there is no guarantee the Crown will account for the needs of Maaori at that point in time, let alone provide an opportunity for consultation or engagement.

72. The submission of the Crown ignores the evidence of the Claimants the pronounced lack of resourcing means any work undertaken over and above service delivery will come at the expense of service delivery.[74] With no suggestion Maaori will be genuinely involved in the update of the Disability Strategy, no resourcing provided to enable Maaori to undertake the significant work required, and a clear pattern of the Crown ignoring the reports it receives Counsel submit there is nothing reasonable or Tiriti-compliant about suggesting such an approach.

73. Further, the notion is overly paternalistic. Maaori are well aware self-determining indigenous peoples have the right to declare what is important to them.[75] That is what the Claimants have done in this Inquiry. The issue is the Crown's ongoing failure to acknowledge those

[70] Wai 2575, #33.138(a) at [15], [23], [37], and [245].
[71] Hearing 11 Day 5 Livestream, above n 6 at 14:16:05.
[72] At 09:43:26.
[73] Ibid.
[74] Wai 2575, #3.3.130 at [96].
[75] Hearing 11 Day 5 Livestream, above n 6 at 09:45:35.

declarations. This implies the issue lies with Maaori for not coming up with their own solutions, or for not bringing those "to the table".[76]

74. The table in question is not the table of partnership. The experience of the Claimants has been that the Crown will not come to te tēpu.[77] It will only sit at its own table. It will stand up its Tiriti partner if Maaori set the date.[78] When Maaori are finally invited to the Crown's table at all the Crown will order on their behalf.[79] The Crown has claimed total control of the partnership's accounts but insists on splitting the bill.[80]

75. The Crown cannot keep asking to be seated at another table. This Inquiry *is* the table. Despite their ongoing requirements to provide for themselves and their people the Claimants have come to this Tribunal in good faith with their experiences, insights and solutions and again the Crown is kicking the can down the road.

76. Counsel submit the Crown's lack of action on past reports, its failure to examine the implementation, or lack thereof, of past recommendations, and its lack of substantive engagement in this Inquiry constitute a continuing failure to act in good faith in breach of the principle of partnership.

Rural Communities

77. Counsel submit the Crown does not propose any real solution to the issues faced by taangata whaikaha Maaori living rurally in its submissions.[81] The only workstream proposed relates to respite care and is paused indefinitely.[82]

78. Contrary to the position advanced by the Crown, counsel submit it is unclear any future work proposed to be undertaken by the MSD DSS Taskforce to "reduce regional variability in how DSS operates in New Zealand" will address access issues taangata whaikaha Maaori living

[76] At 09:45:50.
[77] Wai 2575, #3.3.130 at [93].
[78] Wai 2575, #J010 at [37].
[79] Wai 2575, #3.3.130 at [46].
[80] At [94].
[81] Wai 2575, #3.3.138(a) from [288] – [295].
[82] Wai 2575, #3.3.138(a) at [295].

rurally experience.[83] 'Regional' in the context of the Independent Review refers to the regions covered by various NASCs or EGL sites, or programmes like Choices in Community Living and is not synonymous with 'rural'.[84] For example, the regions referred to in the Independent Review are Manawatu, Auckland, Waikato, Canterbury.[85]

79. Clearly regional variability between these regions could be reduced without improving service provision for those living rurally if DSS is restricted to major centres across all regions with no availability rurally.

80. Accordingly, counsel submit any breaches of the Crown's Tiriti obligations in relation to taangata whaikaha Maaori living rurally remain extant.

Kaupapa Maaori providers

81. Although the Crown's focus in its closing submissions has been on system-level matters, it has failed to acknowledge, explain or address the lack of Kaupapa Maaori options in its health and disability system.[86]

82. The lack of kaupapa Maaori providers in the system is a system-level issue. However, kaupapa Maaori service providers are only referred to a total of three times in the Crown's closing submissions outside of a specific context (Kapoo Maaori, ACC, FASD, HCSS):[87]

    (a) One relates to potential future decisions.[88]

    (b) The second summarises the concerns of the claimants.[89]

    (c) The third misleads the Tribunal on the current number of kaupapa Maaori health and disability service providers within the health and disability system.[90] The evidence of Ms Shearer was that the number of kaupapa Maaori providers had increased from 50 to 200 *by* the late 1990s, not since.[91] The evidence of Te Roopu Taurima is

[83] Ibid.
[84] Wai 2575, #N017(b) BMS-15 at [50].
[85] Ibid.
[86] Wai 2575, #3.3.138(a) at [51].
[87] Wai 2575, #3.3.138(a) at [91.1], [147.9.3], [150]
[88] At [91.1].
[89] At [147.9.3].
[90] At [150].
[91] Wai 2575, #L029 at [48].

> that since that time the Crown's approach to commissioning has led to a decrease in kaupapa Maaori providers.[92] Further, the Crown's evidence has been that Whaikaha are unable to identify kaupapa Maaori providers such that the Crown does not know how many kaupapa Maaori providers currently operate in the health and disability system.[93]

83. Counsel notes a further general reference to kaupapa Maaori providers at paragraph 160 of the Crown's closing submissions has been extrapolated from evidence relating specifically to HCSS.[94]

84. Counsel submit kaupapa Maaori providers are so centrally relevant to this Inquiry that the Crown's failure to meaningfully address the lack of kaupapa Maaori providers at a system-level in its closing submissions cannot be attributed to a lack of time or the burden of responding to significant volume of material. The Crown devotes a significant portion of its submissions on ACC to kaupapa Maaori services.[95] Counsel note the Crown is quick to distance itself from ACC otherwise.[96]

85. Additionally, the Crown is aware it has a duty to ensure Maaori have the option of kaupapa Maaori services. As noted above, the Crown's position is that the principles as articulated in *Hauora* apply in this phase of the Inquiry.[97] In *Hauora* this Tribunal said of the principle of options:

> "the Crown has a Treaty duty to enable Maaori to have available the options of Maaori or mainstream providers as they wish, and that either or both of these pathways are ensured equitable protection by the Treaty. Both pathways should be sufficiently supported by the Crown, meaning that each option offers a genuine, well-supported choice for Maaori"[98]

86. The Crown's closing submissions leave it open for this Tribunal to take the Crown's silence on any matter, evidence or submission as accepted or

[92] Wai 2575, #3.3.130 at [61].
[93] Wai 2575, #4.1.027 at p 194 line 32.
[94] Wai 2575, #3.3.138(a) at [160]; #L028(f) at [76] – [78].
[95] See paragraphs [329], [336.1], [336.6], [336.11], [336.13], [337] – [340].
[96] At [35.3].
[97] At para [10] above.
[98] *Hauora*, above n 15 at p 35.

conceded.[99] Given the significance of kaupapa Maaori providers to the claimants in this Inquiry and to the Crown's accepted obligation under the principle of options counsel submit this Tribunal ought to consider the lack of Crown submissions on kaupapa Maaori providers is an acceptance by the Crown of the evidence and submissions of the Claimants.

87. On that basis counsel submit this Tribunal is able to make the findings and recommendations sought by the Claimants in relation to kaupapa Maaori providers.

Residential Care

88. In its closing submissions, the Crown acknowledges the disability community has expressed dissatisfaction with the lack of control over their lives and in particular the moving of residents from institutions to residential care since at least the mid-1990s.[100] Counsel note that, despite taking this position, the Crown's system remains reliant on residential care services and there are no alternative options for those who require this type of support.[101]

89. In contrast, the Crown fails to acknowledge or even recognise the particular perspective of taangata whaikaha Maaori as it relates to residential care services under the Crown's system, again elevating the perspectives of the "disability community" over the lived experience of taangata whaikaha Maaori.

90. In counsels' submission the position taken by the Crown regarding residential care services demonstrates the significant failings of an approach where the Crown has full decision-making power over all aspects of the system. Not only has the system failed to respond to the needs and desires of taangata whaikaha Maaori, but the Crown's insistence on maintaining the decision-making power in relation to engagement and consultation has resulted in the erasure of the views of taangata whaikaha Maaori and kaupapa Maaori providers.

[99] Wai 2575, #3.3.138(a) at [34].
[100] Wai 2575, #3.3.138(a) at [59].
[101] Wai 2575, #N017(b) at p 184.

91. The Crown asserts this position on behalf of the disability community in reliance upon the evidence of Mr O'Meara.[102]

92. Mr O'Meara's evidence is derived from a 2008 Social Services Committee report, *Inquiry into the Quality of Care and Service Provision for People with Disabilities*.[103]

93. The Select Committee in turn drew their view from the report of the National Health Committee in 2003, *To Have an 'Ordinary' Life Kia Whai Oranga 'Noa'*.[104]

94. In their report, the National Health Committee summarised detail set out more comprehensively in the background papers.[105]

95. Those background papers contain the evidence of Te Roopu Taurima which counsel note is almost identical to their evidence in this Inquiry.[106]

96. Not only has the Crown assumed the "disability community" continues to hold this view over 20 years later, but repeated this perspective uncritically, with no consideration or examination of the reasons why the "disability community" may view residential care services in that way, or whether that perspective is inclusive of kaupapa Maaori providers.

97. The background papers make clear that institutional practices and thinking persisted notwithstanding the recent (at that time) legislative change and this was in part due to economic, workforce and other constraints facing service providers.[107] The approach of Te Roopu Taurima is explored in the background papers as something of a case study,

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[102] Wai 2575, #3.3.138(a) at [59].
[103] Wai 2575, #L002 at [32].
[104] *Social Services Committee Inquiry into the Quality of Care and Service Provision for People with Disabilities* (September 2008) at p 25 – 25.
[105] National Advisory Committee on Health and Disability *To have an 'Ordinary' Life Kia Whai Oranga 'Noa'* (National Advisory Committee on Health and Disability, Wellington, September 2003) at pp 22 – 23 see in particular footnotes 14, 15.
[106] National Advisory Committee on Health and Disability *To have an 'Ordinary' Life Kia Whai Oranga 'Noa' Background papers to inform the National Advisory Committee on Health and Disability* (National Advisory Committee on Health and Disability, Wellington, January 2004) at pp 130, 156 – 159, 164 – 170, 172 – 173.
[107] At pp 45 – 47.

highlighting the significant differences between mainstream and kaupapa Maaori providers and the value of kaupapa Maaori services.[108]

98. However, the Crown has carried none of that nuance through to the present day. What was once "In unequivocal terms the message is, "To meet Maaori needs effectively, things needs to be done differently, and that has resource implications which, as a matter of equity, the Crown must meet if it is to be taken seriously when it expresses its commitment under the Treaty; to ensuring Maaori have the same opportunity to good health as non-Maaori"[109] in 2002 has been refined by the Crown to "many people regard [residential care] as mini-institutions".[110]

99. Not only has the Crown failed to acknowledge the evidence of Te Roopu Taurima in this Inquiry, but the Crown's processes over the past two decades have distorted the evidence given by Te Roopu Taurima in 2002 beyond recognition and used it to scapegoat Te Roopu Taurima in the present.[111]

100. The Crown, then, is making the decision about what persons with lived experience of disability and taangata whaikaha Maaori want without any regard for their actual views as set out in the National Health Committee Report, or in this Inquiry. This illustrates the failings of partnership arrangements wherein taangata whaikaha Maaori are required to speak through a 'partnership' with Whaikaha rather than being permitted autonomy over their own advocacy as the Crown contemplates.[112]

101. Given the lack of substantive engagement by the Crown on this issue, and the Crown's reliance on a self-serving distillation of a twenty-year-old primary source, counsel submit the evidence and submissions of Te Roopu Taurima on residential care services in this Inquiry are sufficiently robust and causally connected to Crown action for this Tribunal to make the findings and recommendations sought.

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[108] At pp 164 – 166, 168 – 170, 172 – 173.
[109] At p 166.
[110] Wai 2575, #L002 at [16], [32]; #3.138(a) at [59].
[111] Wai 2575, #3.3.130 at [82], [105], [112].
[112] Wai 2575, #3.3.138(a) at [74.5].

102. In any case, counsel consider the distinct lack of Crown action to address this perceived issue since 2003 demonstrates a Crown failure to act to address poor outcomes suffered by taangata whaikaha Maaori in residential care in breach of the principles of equity, tino rangatiratanga and good governance.

Underfunding

103. There was some suggestion in the Crown's oral presentation of its closing submissions that the significant degree of complexity the Crown is faced with when dealing with the budget goes some way to refuting any particular claims of underfunding in this Inquiry:

> "It's entirely to be expected that you will hear a submission that says we need 'adequate funding' and who could disagree of course. But the challenge becomes, if you are the person who can say I need adequate funding but it's not your job to also figure out the sources of that adequate funding and the other demands for those resources then you're not faced with the same complexity as the state is and that eternal conundrum that manifests each year in the budget that's presented to parliament for appropriations and more behind the scenes manifests in the use of that money throughout the year."[113]

104. The Claimants do not take the position that determining the budget is a simple exercise. Rather, the Claimants say the Crown is ill-equipped to undertake that exercise in so far as it relates to the health and disability system. This is borne out in the Crown's failure to address the issues in the system through successive reforms and the continuing failure to set a budget the Crown is capable of meeting.[114]

105. Abstracting the concerns of providers out to the level of the Government's entire budget appropriation obfuscates the issue. Not only do the Claimants assert there has been an underfunding in terms of the strict dollar amounts received by kaupapa Maaori providers, they maintain the systems for allocating funding have led to a pattern of

[113] Hearing 11 Day 5 Livestream, above n 6 at 14:06:57.
[114] Wai 2575, #N017(b) at p 218 at [51].

inadequate funding to Maaori providers and inadequate funding to meet the needs of taangata whaikaha Maaori.[115]

106. The issue is not simply that the whole sector requires more funding, although that would go some way to resolving the issues. There is no sensitivity within the sector as the Crown has established, to the needs of taangata whaikaha Maaori.[116] This means that, when general budget pressures require state-wide adjustments, there is no guarantee services for taangata whaikaha Maaori will be delivered at all.

107. Counsel acknowledge providers are not in the position of the state considering the whole budget. However, in terms of that part of the budget which relates to DSS counsel submit providers are in a better position than the Crown. Where the Crown has no data or lived experience relating to the level of unmet need, and therefore the efficaciousness of the funding allocated to and by the system, providers intimately understand the gap between what they receive and what is required to deliver the necessary level of care for taangata whaikaha Maaori.[117] The fact that Te Roopu Taurima is not funded equitably with mainstream providers despite their reputation as the provider of last resort is a clear indication funding is not allocated reasonably within the system.[118]

108. Te Roopu Taurima's experience has been that they are underfunded every year, regardless of the state of the economy.[119] That is not reasonable limitations in response to prevailing conditions, or a careful balancing exercise in the face of significant complexity. That is chronic underfunding.

109. This submission by the Crown alludes to the evidence of Dr Bronwyn Croxson on the uncertainty in approaches to establishing and quantifying historic underfunding. Dr Croxson raised the idea that establishing underfunding in fact is conditional upon a value judgment of the actual

[115] Wai 2575, #3.3.130 at [60] – [72].
[116] At [117].
[117] At [93].
[118] At [66] – [70].
[119] Ibid.

use of funding which did not go to the service/organisation/sector in question.[120]

110. In the first instance, counsel submit this balancing exercise is not required in the case of the 30 years of underfunding experienced by Te Roopu Taurima. Te Roopu Taurima are the only kaupapa Maaori service provider of residential care services nationally.[121] Those who require residential services have the highest and most complex needs, and under provision for those persons often leads to cost increases in outyears.[122] Mainstream providers cannot and do not provide culturally competent care for taangata whaikaha Maaori.[123] Te Roopu Taurima do not offer services in all parts of the country.[124]

111. Therefore, if Te Roopu Taurima did not receive funding to deliver culturally competent services for taangata whaikaha Maaori in a particular year, then no provider did - nationwide. The value judgment being performed, therefore, is whether taangata whaikaha Maaori receive culturally competent services or not.

112. Whether or not the Crown has turned its mind to this value judgment in fact, this is a value judgment which the Crown has made in practical reality every year since deinstitutionalisation. The Crown has decided there is no year in which it can afford for taangata whaikaha Maaori in residential care to receive culturally competent care, or kaupapa Maaori care.

113. Secondly, uncertainty around under or over funding has not prevented the Crown from taking urgent action to modify funding levels or undertake reviews of pricing structures elsewhere. Although the Crown failed to respond to the claimants' request for an urgent review of funding of services for taangata whaikaha Maaori in this Inquiry,[125] it implemented a funding freeze and committed to an urgent review of

[120] Wai 2575, #4.1.027 at p 396 line 19.
[121] Wai 2575, #3.3.130 at [81].
[122] Wai 2575, #N017(b) at p 184.
[123] Wai 2575, #3.3.130 at [35], [39].
[124] Wai 2575, #J021 at [12].
[125] Wai 2575, #3.3.130 at [112].

contract and pricing models and justified doing so on the basis of uncertainty.[126]

114. The findings of the Independent Review Panel acknowledge the following uncertainties:

(a) Despite concluding that the delivery of DSS is inconsistent, "there is no evaluation to support assumptions on the reasons for this variation"[127], i.e. there is no evidence the delivery is inconsistent only that there is variation when viewed at the regional level;

(b) The causes of cost growth for flexible funding and residential care were not fully analysed and may reflect unmet need.[128] [129] Further the Panel was unable to quantify the impact of cost increases from pay equity, in-between travel and sleepover payment litigation.[130]

(c) The recommendations made have not been evaluated for their financial impact;[131]

(d) "A more detailed analysis of cost structures, contracts, pricing and the impact on DSS clients is required to determine better use of the DSS Budget";[132]

(e) "We have not seen any evaluation of the effectiveness of flexible funding in terms of both outcomes and cost"[133]; and,

(f) "There is a risk that the quality of care being provided to disabled people may erode during a period of funding constraint".[134]

[126] Wai 2575, #N017 at [72].
[127] Wai 2575, #N017(b) at p 217 at [49].
[128] At p 221 at [66]
[129] At p 222 at [71].
[130] At p 223 at [75].
[131] At p 228 at [97].
[132] At p 229 at [112].
[133] At p 231 at [129].
[134] At p 233 at [148].

115. In addition to those matters set out in the closing submissions on behalf of Te Roopu Taurima,[135] Whaikaha noted the following areas of uncertainty response to the Independent Panel's recommendations:

(a) There is no data on whether the reduction in spending caused by imposing budgets on NASCs in the past came at the expense of baseline allocations;[136]

(b) Freezing funding for residential care would have limited benefits and be more likely to have negative impacts for persons with lived experience of disability;[137]

(c) "the support and services offered to disabled people by providers could reduce in real terms";[138]

(d) "There are workforce and system capacity risks associated with not providing price uplifts and meeting wage inflation";[139]

(e) "Any reduction in access or quality of DSS will have a disproportionate impact on taangata whaikaha Maaori… and Pacific people, for whom disability is a compounding factor that magnifies their experience of poor life outcomes compared to European and Asian disabled people";[140] and,

(f) "The lack of quality data and evaluation of the effectiveness of flexible funding in terms of value for money, relative costs compared to other support options, and outcomes for disabled people and their family / whaanau leads to a significant risk that any criteria applied will not target flexible funding to the people and/or families/ whaanau that will benefit most from it, and may result in people who would benefit significantly from flexible

[135] Wai 2575, #3.3.130 at [114] – [116].
[136] Wai 2575, #N017(b) at p180.
[137] At p 185.
[138] At p 187.
[139] Ibid.
[140] At p 189.

funding compared to other supports not being able to access flexible funding."[141]

116. In essence, the Independent Panel failed to establish with any degree of certainty there was an over-funding in DSS which would be appropriately addressed by its recommendations *or* that its recommendations were able to be implemented without negatively impacting the quality of care and support delivered to those receiving the service.

117. Counsel note it was open to the Crown to commence an urgent review of pricing and funding to establish greater certainty without restricting funding in the interim. However, the Crown did not do so.

118. Accordingly, counsel submit the evidence and submissions of the Claimants in relation to underfunding are not only a sufficiently robust basis for this Tribunal to make findings and recommendations, but also for the Crown to take urgent action to establish the extent of this likely underfunding while delivering fiscal support to Maaori providers and support recipients in the interim. For the Crown to oppose this Tribunal making findings in favour of the Claimants on the basis of uncertainty while simultaneously taking further action to the prejudice of the Claimants in reliance upon the same is, in counsels' submission, another failure to meet the duty of good faith in breach of the principles of partnership and a breach of the principle of redress. Counsel further submit the failure of the Crown to propose an alternative measure for determining the extent of any alleged underfunding is a failure to be adequately informed in breach of the principle of active protection.

Compensation

119. Given the extensive evidence and submissions led by and on behalf of the Claimants in this Inquiry, and in light of the Crown's ambivalence on the existence and extent of underfunding suffered by Maaori disability service providers, counsel submit it is open to this Tribunal to make

[141] At p 193 - 194.

compensatory recommendations in line with those made in the *Hauora* report on the issue of compensation where that has been sought.[142]

120. These include that:

(a) the Crown and representatives of the claimants agree upon a methodology for the assessment and extent of underfunding of Maaori disability organisations and Maaori disability service providers;

(b) the methodology should include a means of assessing initial establishment and ongoing resource underfunding since the commencement of the New Zealand Public Health and Disability Act 2000;

(c) once the underfunding methodology is agreed, the Crown should, at the very least, fully compensate for the underfunding determined by that methodology those Maaori disability organisations and service providers that suffered from this underfunding, or their successor entities;

(d) once the full compensation amount has been calculated, the parties should negotiate as to how it should be paid out; and,

(e) the Crown fund the above processes and provide the necessary secretariat support.

What would it take to achieve a Tiriti-compliant system?

121. Without an understanding of the unmet needs of taangata whaikaha Maaori, either through data or through partnership, the Crown has demonstrated an inability to act reasonably in the design and implementation of its health and disability system sufficient to discharge its Tiriti obligations. In counsels' view the only reasonable course of action in the path towards a Tiriti-compliant system is to hard-wire genuine partnership into the system. That is, Maaori must be afforded a decision-making power at all levels of the system.

[142] *Hauora*, above n 15 at pp 167, 192.

122. Counsel further submit that in order to ensure Tiriti compliant implementation of system change, real improvements to the current state of affairs must be made immediately to ensure contemporary outcomes are improved while work is done on determining the path towards a Tiriti compliant system.

123. Taangata whaikaha Maaori, whaanau, hapuu and kaupapa Maaori providers can provide direction and models for immediate change. The kaupapa Maaori model exceeds mainstream standards of care.[143] These providers already operate to this standard from within the Crown's system.

124. Once those models are implemented in the short term, Maaori must be resourced and supported to come together and determine for themselves what is required of the system and how that is best achieved. Again, the intimate familiarity of kaupapa Maaori providers, taangata whaikaha Maaori, whaanau and their communities and advocates have with the Crown's system means they are perfectly placed to develop solutions which meet the needs of both Tiriti partners. They have had to meet the Crown's requirements to survive. In contrast, the Crown only familiarises itself with Te Ao Maaori to the extent it determines it is required to. Not only are they intimately familiar with the requirements of the Crown and able to adapt and incorporate those elements into their models of service, but they also have a holistic system-wide view of the friction points between the Crown's approach and Maaori approaches which must be addressed to fully liberate kaupapa Maaori providers to deliver kaupapa Maaori services.

125. Once a consensus is reached, the Crown may then participate in discussions on how that vision will be implemented. However, the final decision-making power must at all times remain with Maaori as the party with lived experience. Where the Crown has concerns about the reasonability of any aspects of that system reformation in light of prevailing or anticipated circumstances it should be able to wholly articulate the basis for a reasonable path of alternative action for the

[143] Wai 2575, #3.3.130 at [52].

consideration of the Maaori Tiriti partner. The partners can then, in good faith, agree to modify or stage the implementation as required.

126. Counsel submit the findings and recommendations sought by the Claimants in the closing submissions already filed chart a reasonable and achievable path towards a Tiriti-compliant system in the short, medium and long term. Counsel further submit the submissions on behalf of the Crown do not set out a sufficiently robust basis for contrary findings of any kind and therefore this Tribunal should make the findings and recommendations sought by the Claimants.

Dated at Auckland: this 5th day of February 2025

Coral Panoho-Navaja / Raewyn Clark / Neuton Lambert / Bobbi Walker / Jack Alexander