BEFORE THE WAITANGI TRIBUNAL
TE ROOPUU WHAKAMANA I TE TIRITI

WAI 2575
WAI 3307

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF Te Aka Whai Ora (the Maaori Health Authority) Urgent Claim (Priority Inquiry)

AND

IN THE MATTER OF The Health and Services Outcome Kaupapa Inquiry

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CLOSING SUBMISSIONS FOR TE PUNA ORA O MATAATUA: TE AKA WHAI ORA PRIORITY INQUIRY (STAGE TWO)

3 June 2025

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CONTENTS

TEENAA, E TE TARAIPIUNARA:

1. These submissions are filed on behalf of the trustees of Te Puna Ora o Mataatua (**Te Puna Ora**)[1] in Stage Two of this priority inquiry concerning the disestablishment of Te Aka Whai Ora and the Crown's alternative plans to address Maaori health in lieu of a Maaori health authority.

2. Te Puna Ora's closing submissions are primarily focused on those matters addressed orally by counsel in closing at the hearing.[2] Te Puna Ora endorses the closing submissions of Lady Tureiti Moxon and Janice Kuka, and does not seek to repeat matters traversed in those submissions in detail.[3]

SUMMARY OF POSITION

3. The reality of the situation remains as articulated by this Tribunal in *Hautupua:*[4]

> …The Pae Ora Act implemented a carefully calibrated system for the equitable delivery of health care and services in

[1] Wai 3421, Te Aka Whai Ora (Te Puna Ora Mataatua) claim.
[2] Te Puna Ora does not repeat matters outlined in its openings (confirming that its case remains the same as set out in openings following the hearing) and continues to rely on the evidence of Dr Chris Tooley for Te Puna Ora.
[3] Counsel has also had the opportunity to review the submissions of Te Ohu Rata o Aotearoa (Kahui Legal) and Te Puna Ora equally endorses those submissions (noting, in particular, the compelling evidence of Dr Rawiri Jansen and Associate Professor Dr Elana Curtis in this stage, and Professor Dr Paparangi Reid in stage one of this priority inquiry).
[4] *Hautupua: Te Aka Whai Ora (Maaori Health Authority) Priority Report, Part 1*, (Wai 2575) 2024) (***Hautupua****)* at 70.

> 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…

4. Te Puna Ora maintains that the Crown has failed to present any Treaty-compliant alternative to Te Aka Whai Ora. The Crown did not (at the time of disestablishing Te Aka Whai Ora), nor does it now, have an adequate Te Tiriti compliant alternative for addressing Maaori health. That gives rise to breaches of te Tiriti and its principles.

5. The Crown's position has changed since Stage One of this inquiry. The Crown's position as at the end of 2023 / early 2024 was that further detail about an alternative to Te Aka Whai Ora, in addition to the then proposed changed legislative settings, were in development and not yet available. Now, the Crown's case is that the alternative *is* the amended legislative settings, post the disestablishment of Te Aka Whai Ora through the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Act 2024 (the **Amendment Act**).

6. Despite the change in position, the Crown's case (now over 18 months since the application for urgency was filed, 14 months since the Amendment Act was passed and almost a year after the disestablishment of Te Aka Whai Ora) continues to rely on a reformed system without the "linchpin"[5]. The Health system remains undermined as a whole as "[T]he Pae Ora Act was not designed to stand independently of the Maaori health authority."[6]

[5] Hautupua at 60.
[6] Ibid.

7. Te Puna Ora seeks findings based on the lack of an alternative in lieu of Te Aka Whai Ora as at the date of the Coalition Agreements,[7] the date of the Amendment Act and as at today. Breaches are evident in those distinct time periods. The Crown has breached the principles of equity, active protection and options in that the Crown is not showing it is committed to achieving equitable health outcomes for Maaori *by its actions*; the Crown is *not acting*, to the fullest extent practicable to achieve equitable health outcomes for Maaori and the Crown is not providing for nor is it properly resourcing kaupapa Maaori health and disability services). The Crown's continued failure to allow Maaori to design, deliver and monitor Maaori interventions and approaches is a breach of the principle of tino rangatiratanga. Not having an alternative is also a breach of tino rangatiratanga and partnership in that Maaori were not given occasion to choose their own alternative nor was the current work of the Crown developed in partnership.

8. The Tribunal is encouraged to report expeditiously. Much of what the Crown now relies on has been known for over a year. The Crown continues to speak of its positive intentions and concern for Maori Health but these words are not reflected in Crown action.

THERE IS NO TREATY COMPLIANT ALTERNATIVE TO TE AKA WHAI ORA

9. The Crown's previous position was that the alternative to Te Aka Whai Ora was in development and, given the political nature of the decision to disestablish Te Aka Whai Ora[8], the Government was "not yet in a position in detail how it will do

[7] #6.2.11, p8 ; #6.2.23, p8.
[8] Wai 3307, #3.1.28 at [14].

so [the improvement of health outcomes for Maaori]".[9] The Crown also said:[10]

> Ministers will take decisions in 2024 on how a restructured health system, with the Maaori Health Authority disestablished, will achieve improved health outcomes for Maaori. The Government will also decide how it will engage with Maaori before it makes future decisions. It will have available to it Tribunal's Hauora report, including the Tribunal's findings on the merits of the Crown's proposal in 2021 to establish a Maaori Health Authority.

10. The Crown's changed position is that the "detail" about an alternative to Te Aka Whai Ora are those legislative settings that were implemented through the Amendment Act, now reflected in the amended Pae Ora (Healthy Futures) Act 2022. The Crown needs to be clear about this and the change of position.

11. The Crown now seeks to rely on small hand-full of disconnected elements, with no decision-making power, and (on the Crown's own evidence) minimal influence, that fall well short of a Treaty-compliant approach for Maaori Health. These elements can be addressed briefly:[11]

    (a) **The Maaori Health Advisory Committee** (**MHAC**): This body is advisory only and can only advise on matters requested by the Minister.[12] The Crown emphasised MHAC's engagement on the Hauora Maaori Strategy.[13] Yet, as shown by the documents in Mr Whaanga's bundle, the MHAC commended the Strategy and encouraged the Minister to prioritise its release as soon as practicable;[14] rather than do so,

[9] Wai 3307, #3.1.28 at [15].
[10] Wai 3307, #3.1.28 at [16].
[11] Te Puna Ora emphasises that its criticisms of these parts of the system is structural. It is not a criticism of the individuals who sit on the MHAC, the IMPBs or work within the Ministry and/or Te Whau Ora.
[12] Pae Ora (Healthy Futures) Act 2022, s 89(1).
[13] Wai 2575, #M34(c), pp 431 - 441.
[14] Wai 2575, #M34(b), p 95.

the Minister then paused the Strategy.[15] It does not appear MHAC was consulted on this decision to pause the Strategy. However, what the evidence does suggest, is that the MHAC was meeting with officials and writing to the Minister endorsing the Strategy in March 2025, when the Minister had *already* gone to Cabinet earlier in March to "refocus the purpose, objectives, and functions of Health New Zealand and improve the efficiency of the health system and intends to reform aspects of the Pae Ora (Healthy Futures) Act 2022."[16] That is not good faith engagement. It is certainly not evidence of the MHAC having influence within the system.

(b) **Iwi-Maaori Partnership Boards** (**IMPBs**): The evidence from IMPB members, brought by the claimants, is stark.[17] These boards are structurally lacking in power and under-resourced. To suggest that these boards are part of a viable alternative to Te Aka Whai Ora is not only unrealistic; it is setting them up to fail.

(c) **A (now paused) Hauora Maaori Strategy**: The short point is that the strategy is paused pending broader legislative reform; there is no current Hauora Maaori Strategy despite the obligation in the Pae Ora Act.[18]

12. The Crown also points to Mr Whaanga, Mr Whaanga's team within the Ministry of Health and the Maori directorate within Te Whatu Ora as support for the Crown's alternative. However, what the evidence shows is that neither the Ministry

[15] Updated Brief of Evidence of Joh Norman Whaanga, 24 May 2025, at [40].
[16] Updated opening submissions for the Crown dated 23 May 2025 at [6].
[17] See for example, WAI 2575, #M44(a); and #M4(c).
[18] Te Pae Ora Act, s 42(1).

nor Te Whatu Ora[19] are being engaged on the Minister's current review of the Pae Ora Act and the respective Maori teams within the Ministry and Te Whatu Ora either have been, or are being, restructured, the result of which is less resource focused on reducing inequities for Maaori.

13. The final submission on the Crown's alternative is a trite one; the mechanisms outlined in [11] were in place in the Pae Ora Act prior to the disestablishment of Te Aka Whai Ora. In that regard, these mechanisms are expected to essentially do the work for Maaori health in the sector designed to include Te Aka Whai Ora, without Te Aka Whai Ora.

TE AKA WHAI ORA HAD BROAD CLAIMANT SUPPORT

14. No witness has claimed Te Aka Whai Ora was perfect. But it was a critical part of the reformed Health eco-system. As Tā Mason Durie has said:[20]

> Back in 1984, the Whakaoranga Maaori health planning hui was discussing similar challenges that we are still addressing today. Te Aka Whai Ora had the potential to lift Maaori health and wellbeing to new heights. It was a contemporary initiative that was built on a century-old Maaori commitment to healthy whānau: oranga tangata…

15. As Whaea Moe Milne said:[21]

> Te Aka Whai Ora was the pou that we looked to in order to work through the systemic health issues faced by Maaori and the weaving we utilised to drive system change in a way that was right for Maaori. Without Te Aka Whai Ora, it is like we are flailing, being pushed and pulled with no clear direction.

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[19] As at the date of filing these closing submissions the Crown has not clarified whether other teams within the Ministry or Te Whatu Ora have engaged with the team in the State Services Commission responsible for the review of the Pae Ora Act. Mr Whaanga confirmed he had not engaged with that team.

[20] The New Zealand Herald "Taa Mason Durie reflects on advances in Maaori Health over the past four decades" NZ Herald (18 March 2024) <http://www.nzherald.co.nz/kahu/ta-mason-durie-reflects-on-advances-in-maori-health-over-the-past-four-decades/4VRF55DHPFD2TPEK6Y7YWADCFU/>.

[21] WAI 2575, #M17(a) at [13]. See also Tania Kingi's oral evidence on day 2 of the WAI 2575 stage two inquiry hearing.

16. Dr Chris Tooley, CEO of Te Puna Ora and former interim board member of Te Aka Whai Ora, emphasised the whakapapa of the Maaori Health Authority: it was a kaupapa of Maaori thought leadership. While it was a Crown entity, it was an independent one.[22] That leadership came from the claimants and the experts who gave evidence.

17. Dr Tooley's evidence also made clear:

    (a) Te Aka Whai Ora was delivering real cultural and outcome shifts;[23]

    (b) Te Aka Whai Ora was different; decision-making and access to data was strengthened under Te Aka Whai Ora and these levers for achieving equity are not present in the current context without Te Aka Whai Ora;[24]

    (c) disestablishment caused immediate harm to providers and whānau;[25]

    (d) there was no engagement with Maaori about what would follow;[26] and

    (e) the current reality lacks transparency, durability, and genuine partnership.[27]

18. Te Puna Ora also acknowledges the voices of other claimants and witnesses. Their evidence reflects the depth, diversity, and strength of Maaori health leadership.

[22] Pae Ora (Healthy Futures) Act 2022, s 17(2), as enacted provided for Te Aka Whai Ora as an "independent statutory entity".
[23] Wai 2575, #M13(d) at 9.
[24] Wai 2575, #M13(d) at 14-17, 19, 20, and 35.
[25] Wai 2575, #M13(d) at 9 and 15.
[26] Wai 2575, #M13(d) at 28 and 34(f); and #M13 at 42-44.
[27] Wai 2575, #M13 at 34-37.

TREATY BREACHES AND PREJUDICE

19. At the time of the Coalition Agreements and the Amendment Act, the Crown had no Tiriti-compliant alternative in lieu of Te Aka Whai Ora. That alone is a breach of partnership and tino rangatiratanga. The Crown dismantled an institution specifically designed to address longstanding Maaori health inequities, with no functional or structural alternative in place.

20. The disestablishment without an alternative was not just a policy change — it was a reversal of a Te Tiriti commitment. The Crown breached the principle of equity by removing a mechanism specifically targeted at addressing inequities for Maaori within the system. The Crown breached the right to options by removing the kaupapa Maaori model without engagement or consent.

21. Those breaches are ongoing. The Crown's own evidence confirms it is reverting to a system that has already failed Maaori; a system where the Hauora Maaori Strategy is paused, IMPBs are under-resourced, and the Maaori Health Advisory Committee is advisory only and lacks influence in the current environment. None of these structures can deliver what Te Aka Whai Ora was designed to do: share authority, commission, advocate within the kawanatanga system and lead on systemic change for Maaori health.

22. There has been no Maaori partnership in the design or decision-making. There has been no consultation. The Crown claims reasonableness, but regression without engagement, in the face of persistent inequities is not reasonable; it is a further breach. The Crown continues to rely on a process that the Tribunal has already found to be in breach of the principles of Te Tiriti in Stage One. It has failed to improve its engagement, and in several ways, its approach has deteriorated; the Crown did not present key evidence until days before the hearing (or, in the case of providing further

detail on the March Cabinet Paper, throughout the week of the hearing) nor did the Crown did not offer witnesses from crucial institutions like Te Whatu Ora, the IMPBs, or the Maaori Health Advisory Committee. Ultimately, the Tribunal is entitled to rely on its findings in Stage One of this priority inquiry with respect to the Crown's approach to engagement on its alternative.[28]

23. Further, the lack of evidence able to be shared about the work being undertaken by the separate unit within the Public Service Commission leading the further reform of the Pae Ora Act, undermines this inquiry and breaches the principles of good faith and partnership.

24. In addition, the Crown has sought to rely on Lord Cooke's dicta *Broadcasting Assets* case namely that the yardstick for the Crown's Te Tiriti obligations is "what is reasonable in the circumstances".[29] and that "[T]he Crown is entitled to make decisions that are reasonable: that is, within the bounds of its own broad responsibilities and authority but with consideration of all the circumstances (including competing demands on funding as well as the economic and other circumstances of the day) and based on sound procedure and consideration of relevant material."[30]

25. However, what is currently missing from the Crown's analysis is *how* it is acting reasonably in the prevailing circumstances. The Crown has also not brought evidence on the "competing demands on funding" nor "the economic and other circumstances of the day"; it is unclear then how the Crown can seek to credibly put those matters forward as a part of the prevailing circumstances. Te Puna Ora submits that the

[28] *Hautupua* at 69-70.
[29] Updated opening submissions for the Crown dated 23 May 2025 at [9].
[30] Ibid.

clear prevailing circumstances for Maaori health, that the Tribunal is appraised of, are:

(a) Non-Maaori still live longer, healthier lives than Maaori.[31]

(b) In 2001, Maaori as a population group had, on average, the poorest health status of any ethnic group in New Zealand.[32]

(c) In 2019, on average, Maaori lived seven years less than non-Maaori and were 2.5 times more likely to die from diseases that can be addressed through health care.[33]

(d) Maaori experience a higher rate of disability than non-Maaori (24 per cent to 17 per cent), higher rates of mental ill-health, and more negative health impacts from addiction than any other ethnic group in New Zealand.[34]

(e) In 2015 there was a nearly 20 per cent difference between Maaori and non-Maaori preschool oral health enrolment (one-third of Maaori preschool children receive no oral care), and in 2017 more than half of 5-year-old Maaori children had dental caries (33 per cent higher than for non-Maaori children).[35]

26. Against this backdrop, the Crown's decision to dismantle a dedicated Maaori health authority, without a viable alternative, consultation, or meaningful engagement, cannot

[31] Health and Disability System Review. 2019. Health and Disability System Review - Interim Report. Hauora Manaaki ki Aotearoa Whānui – Pūrongo mō Tēnei Wā, Wellington: HDSR (**Health and Disability System Review Interim Report**) at 40.
[32] Waitangi Tribunal Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575, 2019) at 18 (**Stage One Report**).
[33] Stage One Report at 18. 3; Health and Disability System Review Interim Report at 40.
[34] Stage One Report at 18.
[35] Stage One Report at 40.

be credibly submitted as reasonable in the circumstances. It simply is not.

FINDINGS SOUGHT

27. Te Puna Ora continues to seek the following findings at this Stage of the inquiry:

    (a) That at the time of the Coalition Agreements, when Cabinet took decisions to disestablish Te Aka Whai Ora, and when the Amendment Act was passed, the Crown did not have an adequate alternative plan for addressing Maaori health.

    (b) That the absence of an adequate alternative at the time of disestablishment breached the principles of equity, active protection, and options.

    (c) That the Crown currently does not have an adequate plan for addressing Maaori health in lieu of Te Aka Whai Ora.

    (d) That the ongoing absence of such a plan breaches the principles of equity, active protection, and options.

    (e) That the Crown has not adequately consulted with Maaori following the disestablishment, in breach of the principles of tino rangatiratanga and partnership.

    (f) That the Crown's failure to enable Maaori to design, deliver and monitor our own interventions and approaches is a breach of the principle of tino rangatiratanga.

28. Te Puna Ora submits further that the Tribunal's findings in the Stage One phase of this priority inquiry equally continue to apply to this stage namely:

(a) 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.[36]

(b) 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 obligations and by modifying its electoral pledges in the 100-Day Action Plan in light of them.[37]

(c) The Crown 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.[38]

(d) By failing to discharge its duty to consult and be sufficiently informed, the Crown breached the Tiriti principle of partnership.[39]

(e) The Crown 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.[40]

(f) The Crown breached the principle of tino rangatiratanga in its decision to disestablish Te Aka Whai Ora.[41]

(g) The Crown's decided to disestablish Te Aka Whai Ora in the absence of any alternative plan for Maaori

[36] *Hautupua* at 69.
[37] *Hautupua* at 69.
[38] *Hautupua* at 70.
[39] *Hautupua* at 70.
[40] *Hautupua* at 70.
[41] *Hautupua* at 70.

health, which was in breach of the principles of partnership and good government.[42]

(h) The Crown's unilateral decision to remove Te Aka Whai Ora effectively took that redress arising from the Tribunal's *Hauora* report away, prima facie in breach of the Tiriti principle of redress.[43]

(i) 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;[44] and

(j) 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.[45]

RECOMMENDATIONS SOUGHT

29. Te Puna Ora endorses the recommendations sought by Lady Moxon and Ms Kuka in their closing submissions.

30. Te Puna Ora also supports the recommendation sought by Wai 1194 and Wai 1212 (represented by Annette Sykes and Co) in their closing submissions at [103][46] namely that the Te Pae Ora Act be removed from the Treaty principles review (or that a bespoke option be developed for Te Pae Ora Act as counsel understands to be the case for the Resource Management Act 1991).

[42] *Hautupua* at 71.
[43] *Hautupua* at 71.
[44] *Hautupua* at 71.
[45] *Hautupua* at 71.
[46] Closing submissions of Annette Sykes and Co, 3 June 2025, at [103].

WHAKAARO WHAKAMUTUNGA

31. This Tribunal in *Haumaru* aptly said:[47]

> 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.

32. This applies equally to this phase of the priority inquiry into the disestablishment of Te Aka Whai Ora; the Crown must adopt "rational, scientific, equitable policy choices for Maaori" in the context of any alternative plan in lieu of Te Aka Whai Ora. It has not yet done so.

33. The reality is that the Crown disestablished Te Aka Whai Ora without a viable, credible or Treaty consistent alternative. This remains the case today. The Tribunal has already made findings and recommendations in both Stage One of the Hauora inquiry and Stage One of this priority inquiry that it can continue to rely on when reporting in this stage.

34. The Crown's conduct in this phase of the priority inquiry has also lacked transparency and candour. This is not a criticism of counsel; rather, it reflects a deeper issue that the Crown is presently unwilling to be held to account, unwilling to participate fairly in the Tribunal process, in the face of clear Treaty breaches and in the context of something as serious as Maaori Health outcomes. The Crown is being reckless in its approach to Maaori health and, as a consequence, is being reckless in its approach to Maaori lives.

[47] Haumaru: the COVID-19 Priority Report (2023) at 108.

35. Te Puna Ora closes its submissions as it started, with the words of this Tribunal in *Hautupua*, which continue to be particularly relevant to this phase of the priority inquiry:[48]

> These observations remain pertinent here [referring to the quote cited in Haumaru at [31] of these submissions] – 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.

DATED this 3rd day of June 2025

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[48] Hautupua at 65.