

IN THE WAITANGI TRIBUNAL

WAI 3300

WAI 3349

CONCERNING

the Treaty of Waitangi Act 1975

AND

Tomokia ngā tatau o
Matangireia – the Constitutional
Kaupapa Inquiry

IN THE MATTER OF

A claim by Janice Panoho and
Georgina Kerr on behalf of
kaimahi Māori members of Te
Pukenga Here Tikanga Mahi,
the New Zealand Public
Service Association (Wai 3349)

CONSTITUTIONAL ISSUES RAISED IN STATEMENT OF POSITION

Dated this 27th day of January 2026

RECEIVED

Waitangi Tribunal

27 Jan 26

Ministry of Justice
WELLINGTON



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CONSTITUTIONAL ISSUES RAISED IN STATEMENT OF POSITION:

Who or what is “the Crown”?

1. An underlying constitutional issue for consideration with respect to our claim is, who or what is the Crown, and what if any duties are owed to Māori under Te Tiriti when acting within the systems and structures of the Crown?
2. In 1840, 'the Crown' title was used in relation to Queen Victoria and later to describe settler government.
3. To the extent that the term has evolved to describe government in Aotearoa today, the constitutional principle of separation of powers sets out that New Zealand has three branches of government:¹
 - a) The Legislature which consists of Members of Parliament and the Governor-General. The role of the Legislature is to make laws (legislation), and to scrutinise the Executive.
 - b) The Executive which consists of Ministers (both inside and outside Cabinet) and Government departments. The role of the Executive is to decide policy, propose laws (which must be approved by the Legislature) and administer the law.
 - c) The Judiciary which consists of all judges. The role of the judiciary is to interpret and apply the law. There are two main sources of law: statutes (the laws passed by Parliament) and the 'common law'. The common law has been developed by judges over the centuries and may be altered by the courts to meet changing circumstances.
4. The three branches operate independently from one another in accordance with the constitutional principle of the 'separation of powers'. This principle is intended to prevent abuse of power, as each branch acts as a check on the others.

¹ *New Zealand's constitutional system* Ministry of Justice
<https://www.justice.govt.nz/courts/going-to-court/without-a-lawyer/representing-yourself-civil-high-court/new-zealands-constitutional/> accessed 26 January 2026.

5. Te Kawa Mataaho describes the various organisations that make up the executive branch as:
 - a) Public Service agencies (departments, departmental agencies, interdepartmental executive boards or ventures)
 - b) Non-Public Service departments (Police, New Zealand Defence Force, Parliamentary Counsel Office)
 - c) Crown entities
 - d) Reserve Bank
 - e) State-owned enterprises
 - f) Various other companies and organisations
6. PSA kaimahi are employed broadly across the executive branch and beyond across the public sector as a whole including for example in the local government sector.
7. To the extent that the Crown represents the Tiriti partner of Māori questions arise as to whether the Crown includes the public sector in its broadest sense for example central *and* local government, Crown entities over which Ministers exert some level of control such as Pharmac, the three separate branches of government including the judiciary, and non-public service departments such as the police.
8. Moreover, what do these definitions mean for Māori when acting in the course of employment for public service entities to uphold the Crown's Tiriti obligations toward all Māori? At this point are kaimahi Māori "the Crown" or are they a Tiriti partner?
9. We argue that the status of kaimahi Māori as a Tiriti partner takes primacy, is constitutional in its source and cannot be extinguished or subjugated by Crown-made legislation or judicial common law.
10. In this case, the employment context defines an additional layer of relationship and obligation owed by both parties to each other that must be underpinned and defined by Te Tiriti as a primary constitutional commitment.

11. Put another way, the Crown as employer owes Māori Te Tiriti obligations regardless.
12. We argue that the this must be the case as Te Tiriti is the founding constitutional document upon which Kawanatanga hinges.
13. As to the question of whether the Tribunal is entitled to inquire into breaches of Te Tiriti against kaimahi Māori in the Crown's employment we argue that the priority hearing into the disestablishment of Te Aka Whai Ora within the Health Services and Outcomes Kaupapa Inquiry (Wai 2575) and the urgent inquiry into Te Reo Māori in the Public Sector (Wai 3327) are examples where the Tribunal has broadly accepted the jurisdiction to inquire into Tiriti breaches where the Crown's acts and omissions directly impact kaimahi Māori.
14. Further, in these Inquiries, the acts of kaimahi Māori were not considered "the Crown" for the purposes of Crown acts and omissions.
15. Our claim argues that, this must be the case as the concept of 'the Crown' refers to the institution of government as opposed to the individuals acting within it.

Parliamentary sovereignty

16. The doctrine of parliamentary sovereignty holds that Parliament can enact or repeal any law, and its legal authority is not bound by any other body such as the judiciary or previous parliaments.²
17. Under the doctrine, Parliament is able to pass legislation of any sort on te Tiriti o Waitangi including laws which may be contrary to Te Tiriti principles or text.³
18. Underpinning our claim is the view that, Ko te Tiriti te Mana Motūhake o te whenua.

² Wai3300, #6.2.18, p 5.

³ Ibid.

19. The exercise of constitutional authority by the Crown must be consistent with Te Tiriti, as it is Te Tiriti which is the first and founding constitutional principle.
20. The constitution should strengthen limits on the Crown's ability to legislate away the obligation to uphold Te Tiriti in any form of legislation including employment law.
21. In the exercise of legislative authority Parliament must ensure all law including employment law is consistent with Te Tiriti.
22. This includes a positive, 'active protection' obligation to require the executive to enact employment policy which uphold Te Tiriti obligations toward kaimahi Māori.

Kāwanatanga structures, systems and infrastructure must enable the Crown to honour Te Tiriti

23. Article 1 of te Tiriti o Waitangi conferred the Crown with kāwanatanga, which is the right to govern and to make laws for the 'good order and security' of the country.⁴
24. We argue that, in the exercise of kāwanatanga, the Crown must necessarily put in place structures, systems and infrastructure to enable it to honour Te Tiriti obligations that will withstand politicisation.
25. Presently, oscillating Crown policy toward Te Tiriti as a political football is completely at odds with the significant role that kaimahi Māori play in supporting the Crown to meet its Tiriti obligations.
26. Kaimahi Māori in the public service sector face inequitable levels of job insecurity as a result.
27. When policies of the Crown with respect to the Treaty partnership change kaimahi Māori of ngā tari karauna are the first to feel the direct detrimental impacts.

⁴ Ibid, p 4.

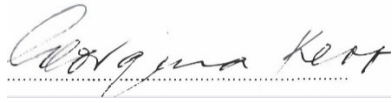
28. Negative impacts of Crown policy toward kaimahi Māori are a tangible measure of a downward shift in the capability and capacity of the Crown's ability to meet its Treaty of Waitangi obligations toward Māori generally.

Observance of tikanga in the public sector: a constitutional right

29. The theme of 'Ngā Ture Pākehā' concerns the interplay of ture Pākehā and tikanga Māori, including the position of tikanga Māori in Aotearoa's constitutional structure and the position of Western legal systems in relation to tikanga Māori.⁵
30. It is our position that, the exercise of kawanatanga should not entitle the Crown to enact law, make policy and issue directives that require Māori to act in ways that breach tikanga. This includes for example directives to suppress the use of te reo Māori, even in the context of employment.
31. We rely on the principle of Mana Rangatira to reassert that:
- a) Te Tiriti o Waitangi is New Zealand's founding constitutional document.
 - b) The rights guaranteed to Māori under Te Tiriti o Waitangi are constitutional rights.
 - c) Te Tiriti o Waitangi preserved the existing right of Māori to exercise rangatiratanga within their sphere of mana.
 - d) Mana Rangatira denotes the right of Māori to honour, uphold and live in accordance with tikanga Māori.
32. The exercise of kawanatanga must be done in a manner that respects Mana Rangatira, just as Māori are required to respect the principle of kawanatanga and the legal norms that flow from the exercise of it.

⁵ Ibid, p 5.

DATED this 27th day of January 2026


A handwritten signature in cursive script, reading "Georgina Kerr", is written above a horizontal dotted line.

Georgina Kerr
Claimant