

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3307

E PĀ ANA KI
CONCERNING

te Treaty of Waitangi Act 1975

Ā,
AND

an application for an urgent hearing by Janice Kuka and Lady Tureiti Moxon on behalf of the governors, managers, staff and Māori cared for by Māori owned Primary Health Organisations and Māori Providers with General Practitioner clinics

TE WHAKATAUNGA MŌ TE TONO OHOTATA**E PĀ ANA KI TE AKA WHAI ORA**

19 Hānuere 2024

Hei tīmatanga kōrero / Introduction

1. This decision concerns an application for urgent hearing by Janice Kuka and Lady Tureiti Moxon (the applicants), on behalf of the governors, managers, staff and Māori cared for by Māori-owned Primary Health Organisations (PHO) and Māori Providers with General Practitioner (GP) clinics (Wai 3307, #1.1.1, #1.1.1(a) & #3.1.1).
2. The application concerns the Crown's intention to disestablish Te Aka Whai Ora, the Māori Health Authority, as outlined in the 100-day plan released by the coalition Government on 29 November 2023.
3. The applicants seek findings that the disestablishment of Te Aka Whai Ora is likely to prejudicially affect Māori and is inconsistent with the principles of the Treaty of Waitangi (Wai 3307, #3.1.1 at [57]). They ask the Tribunal to recommend the Crown do not disestablish Te Aka Whai Ora.

Ko te hātepe ture o te tono nei / Procedural history

4. On 8 December 2023, counsel for the applicants, Roimata Smail, filed a statement of claim and an application for urgent hearing with supporting documents (Wai 3307, #1.1.1, #1.1.1(a), #3.1.1), #A1, #A1(a), #A2, #A2(a), #A2(b), #A3 & #A3(a)).
5. On 11 December 2023, the Deputy Chairperson registered the claim and referred the determination of the urgency application to Judge Stone, as Presiding Officer of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575), along with the panel members of that inquiry (Wai 3307, #2.5.1).
6. On 12 December 2023, I directed the Crown and any interested parties to make submissions in response to the application for urgency by 18 December (Wai 3307, #2.5.2).
7. On 18 December 2023, Geoffrey Melvin, for the Crown, filed a response opposing the application (Wai 3307, #3.1.28).
8. On 20 December 2023, the applicants filed their submissions in reply (Wai 3307, #3.1.29).
9. Between 18 to 22 December 2023, the Tribunal received 29 requests to participate as interested parties and claimants (Wai 3307, #3.1.2 - #3.1.37). These parties and their submissions are included as **Appendix A**.
10. All parties listed in Appendix A meet the requirements set out in section 4A of the Commissions of Inquiry Act 1908 as having an interest in these proceedings part from any interest in common with the public. These parties are subsequently granted interested party status.

Horopaki i te kereme / Background in the claim

11. The applicants were one of the six lead claimants in stage one of the Wai 2575 inquiry, which resulted in the Tribunal's *Hauora* report. The applicants provide an outline of the relevant *Hauora* findings and recommendations in document Wai 3077, #A3 at 14 – 23.

12. On 29 November 2023, the new coalition Government announced its 100-day plan, which included the intention to introduce legislation to disestablish Te Aka Whai Ora, less than a year and a half after its establishment.
13. In the *Hauora* report the Waitangi Tribunal found that the primary healthcare funding model disadvantaged Māori organisations, and consequently, the Māori patients enrolled with these organisations. The Tribunal also said the Crown breached its Treaty of Waitangi obligations by failing to design and administer the primary healthcare system to address Māori health inequities and by failing to give effect to tino rangatiratanga. The Tribunal noted that the prejudice suffered by Māori because of the Crown's failure to uphold the Treaty is extensive.
14. The applicant says that the Tribunal recommended the establishment of a Māori Health Authority to address these inequities and to bring about transformational change for Māori.

Ngā tāpaetanga a ngā Kaitono / Applicants' submissions

15. The applicants submit that the disestablishment of Te Aka Whai Ora would mean that Māori will continue to be particularly impacted by racism and stereotyping in primary healthcare, and experience a significantly lower standard of health, including significantly shorter lives than non-Māori (Wai 3307, #3.1.1).
16. They submit that the disestablishment of Te Aka Whai Ora would mean that there will no longer be a Māori body with express objectives to:
 - (a) ensure that planning and service delivery in the health sector respond to Māori aspirations and needs;
 - (b) design, deliver and arrange health services to achieve the best possible outcomes for Māori;
 - (c) promote Māori health;
 - (d) undertake the functions set out in s 19 of the Pae Ora (Health Futures) Act 2022 ('the Act'); and
 - (e) engage with Māori to find out their health aspirations and needs and report back to them, support iwi-Māori partnership boards or jointly prepare the Hauora Māori Strategy (ss 20, 21 and 42 of the Act).
17. Since its establishment, Te Aka Whai Ora has taken over the monitoring of new and existing contracts for primary health outcomes and services. The applicants submit this reduces the disproportionate burden of auditing carried out by Māori PHOs and Providers, which frees up their capacity to improve standards of health.
18. The applicants submit that Te Aka Whai Ora's new contracts for Māori PHOs and Providers have the potential to be better targeted to improve Māori health. The applicants further submit Te Aka Whai Ora's contracts can better targeted to what Māori PHOs and Providers offer as opposed to non-Māori organisations. Moreover, the contracts can be less burdensome in terms of auditing.

19. Finally, the applicants submit that the Tribunal is the only available forum to review the proposed policy, there is no alternative remedy and they are ready to proceed urgently to hearing.

Ngā tāpaetanga a te Karauna / Crown's submissions

20. The Crown opposes the application for urgency. Counsel for the Crown submits an inquiry into the proposal to disestablish Te Aka Whai Ora would be premature. Counsel submit that the implications of the decision to inquire into this matter cannot yet be properly ascertained and evaluated until the Crown puts in place its alternative plans to address poor Māori health outcomes (Wai 3307, #3.1.28).
21. Counsel submit the Crown is well-informed about the poor health outcomes that Māori experience and accepts there is a need to address this. Counsel for the Crown submit the operation of Te Aka Whai Ora is not the only way to improve Māori health outcomes and there are more effective ways to do so. However, the Crown is not yet in a position to articulate in detail how it plans to improve health outcomes for Māori.
22. The Crown acknowledges there has not been a consultation process with the Treaty partners leading up to the decision to promote policy to disestablish Te Aka Whai Ora.
23. Crown counsel advises that the coalition Government will make decisions in 2024 on how a restructured health system will achieve improved health outcomes for Māori. The Government will then decide how it will engage with Māori.
24. Counsel submits that the Crown will have the Tribunal's *Hauora* report available to it, including the Tribunal's findings on the merits of the Crown's proposal in 2021 to establish a Māori Health Authority.
25. Additionally, counsel submits the intention to promote legislation to disestablish Te Aka Whai Ora is not the product of a policy process that officials have undertaken. The decision has been made at the political level following political parties campaigning on this issue ahead of the recent General Election and as a result of the agreements establishing the coalition Government.
26. Counsel for the Crown therefore submits the application for urgency should be declined.

Ngā tāpaetanga whakahoki o te Kaitono / Applicant's submissions in reply

27. The applicants submit that the Crown's 100-day plan only includes one commitment for Māori Health, and that is to disestablish Te Aka Whai Ora. The Tribunal can assess whether disestablishing Te Aka Whai Ora on its own will cause significant and irreversible prejudice for Māori (Wai 3307, #3.1.29).
28. The applicants submit the Crown should not be able to rely on its failure to have a plan for Māori health to avoid scrutiny for disestablishing the central Māori health focussed feature of the current structure, being Te Aka Whai Ora.
29. The applicants say further that the Crown has provided no evidence to suggest that any health restructure in contemplation by the coalition Government be more effective than Te Aka Whai Ora at improving Māori health outcomes.

30. The applicants submit that because the Crown concedes the decision to disestablish the Māori Health Authority was political, any restructure will not be based on the Treaty principles and is likely to be significantly less effective than Te Aka Whai Ora.
31. The applicants say a Māori Health Authority was recommended by the Tribunal and was based on Treaty principles and the claimants' call for tino rangatiratanga. This recommendation was adopted in the 2019 Health and Disability System Review and was implemented through legislation which was subject to public scrutiny through a select committee process. The applicants submit there is no indication from the Crown that any such rigorous or transparent process is contemplated to develop a restructure of the health system.
32. The applicants submit the Tribunal should inquire into the disestablishment of Te Aka Whai Ora, particularly given that the decision to do so was made to gain popular support for a political party during an election. The applicants refer to the *Haumarū report*, which stated that the Crown has a moral and ethical duty to defend Māori against unreasonable public backlash.
33. The applicants submit the election promise to disestablish Te Aka Whai Ora goes beyond pandering to the public to avoid backlash. This promise was intended to create backlash against Māori, by creating a false impression of special treatment of Māori as a means to gain votes.
34. The applicants note that the Crown makes no arguments regarding the other two urgency criteria regarding alternative remedies and the readiness to proceed urgently to hearing.

Whaimana / Jurisdiction

35. The Tribunal has jurisdiction to inquire into this claim, pursuant to section 6(1)(c) of the Treaty of Waitangi Act 1975. Section 6(1)(c) of the Treaty of Waitangi Act 1975 states the Tribunal can inquire into any policy or practice adopted by or on behalf of the Crown or proposed to be adopted by or on behalf of the Crown which is likely to prejudicially affect any Māori or Māori group.

Urgency Criteria

36. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

Kōrerorero / Discussion

37. An application for an urgent hearing will only be granted in exceptional circumstances where the applicant can demonstrate that the Tribunal should prioritise a new urgent inquiry and redirect its limited staff and resources from its programme of current inquiries to do so. The threshold is high, and the application will fail if the criteria set out above are not satisfied.
38. The threshold for urgent inquiries is higher than the threshold for granting a priority inquiry. Previously, Tribunal priority inquiries have prioritised specific claims within an existing work programme of an inquiry. I note that on 23 November 2021, the Wai 2575 panel granted a priority hearing on Crown Covid-19 policy, within the existing Health Services and Outcomes Kaupapa inquiry (Wai 2575, #2.6.70).
39. It is indisputable that the proposed disestablishment of Te Aka Whai Ora represents an important current and pending Crown action and policy. Further, the claimants have no reasonable alternative remedy but to seek an urgent Tribunal inquiry into this proposal. They are clearly ready to proceed. These factors weigh in favour of us granting urgency to this application. Indeed, Crown counsel does not seem to argue otherwise.
40. The key ground for urgency, therefore, is whether the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of the proposed disestablishment of Te Aka Whai Ora. On this, we have half the picture. The coalition Government plans to disestablish Te Aka Whai Ora by 8 March 2024.¹ That much is clear. Crown counsel has confirmed that the improvement of health outcomes for Māori will be a strong focus of the coalition Government. However, the coalition Government is not yet in a position to articulate how that will be achieved. We are therefore in the difficult position of assessing prejudice without knowing exactly what the coalition Government will do.
41. In the *Hauora Report*, we found that achieving equity will not be possible without tino rangatiratanga of hauora Māori.² To reiterate, we recommended the following principles be adopted for the primary health care system:

¹ This is 100 days after the date of the coalition agreement signed by the current coalition Government.

² Ibid, p 179.

- (a) The guarantee of tino rangatiratanga, which provides for Māori self-determination and mana Motuhake in the design, delivery, and monitoring of primary health care.
- (b) The principle of equity, which requires the Crown to commit to achieving equitable health outcomes for Māori.
- (c) The principle of active protection, which requires the Crown to act, to the fullest extent practicable, to achieve equitable health outcomes for Māori. This includes ensuring that it, its agents, and its Treaty partner are well-informed on the extent, and nature, of both Māori health outcomes and efforts to achieve Māori health equity.
- (d) The principle of options, which requires the Crown to provide for and properly resource kaupapa Māori primary health services. Furthermore, the Crown is obliged to ensure that all primary health care services are provided in a culturally appropriate way that recognises and supports the expression of hauora Māori models of care.
- (e) The principle of partnership, which requires the Crown and Māori to work in partnership in the governance, design, delivery, and monitoring of primary health services. Māori must be co-designers, with the Crown, of the primary health system for Māori.³

42. During Stage One of the Health inquiry, the Crown accepted that Māori health outcomes are inequitable, and the primary health care framework was inadequate for Māori. Crown counsel has reconfirmed that the Crown accepts there is a need to address the poor health outcomes that Māori as a population experience. In response to these inadequacies, in our *Hauora Report*, we called for a primary health care sector which empowers tino rangatiratanga.⁴ We issued an interim recommendation in 2019 that the Crown commit to exploring the concept of a stand-alone Māori primary health authority. Following our interim recommendation, the Crown confirmed the establishment of such an authority, which was to become Te Aka Whai Ora. Then, in our final *Hauora Report* in 2021, we acknowledged that the establishment of a Māori health authority was a significant, positive development and recommended finally that the Crown and the Stage One claimants continue working together on the operational details of Te Aka Whai Ora to achieve “a tino rangatiratanga-compliant model”. Accordingly, our focus has always been on the establishment of a tino rangatiratanga-compliant model – “tino rangatiratanga of hauora Māori is necessary to pursue health equity”.⁵ It is against this background that we assess whether the claimants have demonstrated that they are suffering, or will likely suffer, significant and irreversible prejudice.

43. There are at least two bases on which the claimants can show prejudice. The first relates to process. The second relates to substance.

³ Waitangi Tribunal, *Hauora Report*, p 180.

⁴ Waitangi Tribunal, *Hauora Report*, p 183.

⁵ Ibid, p 160.

44. The Treaty guarantee of tino rangatiratanga provides for Māori self-determination and mana Motuhake in the design, delivery, and monitoring of primary health care. It is axiomatic that this extends to decisions on the disestablishment of Te Aka Whai Ora. In terms of process, the claimants complain that Māori were not consulted on the proposal to disestablish Te Aka Whai Ora. Crown counsel concedes this point. Crown counsel says this decision is not the product of a policy process undertaken by Crown officials. Rather, it is a political decision of the coalition Government at the political level following campaigning during the recent 2023 General Election and the subsequent coalition agreements. This argument seems to suggest that Treaty compliance is subject to election promises. Whatever the case, the fact that Māori have not been consulted on the disestablishment of Te Aka Whai Ora means that the claimants can demonstrate that they are suffering, or will likely suffer, prejudice.
45. In terms of substance, the policy announcement by the coalition Government to disestablish Te Aka Whai Ora before an alternative model is developed is problematic. Crown counsel argues that “there are more effective ways” to improve health outcomes for Māori, yet concedes that the coalition Government is not in a position to articulate how. In general terms, it is difficult to understand how the coalition Government can be sure that there is a more effective way to improve health outcomes for Māori without knowing what that way is. In Treaty terms, the disestablishment of a tino rangatiratanga-compliant model for something unknown is, on its face, prejudicial.
46. We are therefore satisfied that the claimants are suffering, or will likely suffer, significant and irreversible prejudice through the proposed disestablishment of Te Aka Whai Ora. The grounds for urgency are made out.
47. Crown counsel argues that the application for urgency should be declined because the implications of the decision to disestablish Te Aka Whai Ora cannot be properly ascertained and evaluated until the coalition Government puts in place its alternative plans to address poor Māori health outcomes. We disagree. As noted, the disestablishment of Te Aka Whai Ora in itself is sufficient to satisfy the grounds for urgency. We also note the Crown’s acknowledgement that there has not been a consultation process with Treaty partners leading up to the decision to promote policy to disestablish Te Aka Whai Ora, and its intention to engage with Māori only after it has been decided how a restructured health system will achieve improved health outcomes for Māori. That said, we acknowledge that full nature and extent of any prejudice must be assessed against the coalition Government’s alternative plans (whatever they may be). Thus, we agree with Crown counsel to the extent that the implications of the disestablishment of Te Aka Whai Ora should be properly ascertained and evaluated by reference to the coalition Government’s alternative plans.
48. Finally, we simply note at this stage the Treaty obligation for the Crown to partner with Māori in the development and implementation of policy, especially where Māori are expressly seeking an effective role in that process. Further, we note the requirements for the Crown to partner with Māori is heightened where disparities in outcomes exist.⁶

⁶Ibid, pp 28 – 29.

Kupu whakatau / Decision

49. The applicants satisfy the grounds for urgency. However, the implications of the disestablishment of Te Aka Whai Ora should be properly ascertained and evaluated by reference to the coalition Government's alternative plans. Accordingly, the final decision on the application for urgent hearing is adjourned pending the receipt by the Tribunal of the Crown memorandum and further information referred to below.
50. The Crown is directed to file a memorandum by **31 January 2024** which provides details as to:
- (a) how it intends to progress and engage with Māori on its alternative plans; and
 - (b) the nature of those proposed alternative plans and the extent to which they are Treaty compliant and consistent with the principles outlined in the *Hauora Report*, particularly those included at [40] above.
51. Crown counsel should include information regarding:
- (a) When the coalition Government intends to introduce legislation into the House of Representatives to disestablish Te Aka Whai Ora;
 - (b) When the Crown will be in a position to provide the Tribunal with information about its alternative plans and how they are Treaty compliant, if it is unable to do so at the time of filing; and
 - (c) Whether the Crown is prepared to give the Tribunal sufficient notice of its intention to introduce legislation into the House to enable the Tribunal to undertake an urgent hearing then.

The Registrar is to send a copy of this direction to counsel for the applicant, Crown counsel and those on the notification list for Wai 3307, Te Aka Whai Ora (Māori Health Authority) Urgent Claim.

DATED at Whanganui-a-tara this 19th day of Hānuere 2024.



Judge Damian Stone
Presiding Officer

WAITANGI TRIBUNAL



Tania Simpson
Tribunal Member

WAITANGI TRIBUNAL



Professor Linda Tuhiwai Smith
Tribunal Member

WAITANGI TRIBUNAL



Professor Tom Roa
Tribunal Member

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Professor Susy Frankel
Tribunal Member

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