

LAWPUBL 422 Contemporary Tiriti Issues 2024

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A Critical Analysis of how the Pae Ora (Healthy Futures) Act 2022 recognises te Tiriti o Waitangi

I Introduction

The health of Māori, the indigenous peoples of Aotearoa, New Zealand, reflects the nation's historical, social, and political landscape. Despite efforts to address disparities, Māori experience inequities in health outcomes and access to healthcare services within the New Zealand health system. This essay aims to provide a comprehensive exploration of the context of Māori health, a comparison between the Pae Ora (Healthy Futures) Act 2022 ("the Act") and the Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024 ("the Amendment Act"), in light of the recent disestablishment of Te Aka Whai Ora – Māori Health Authority ("MHA"). By understanding the impact of the disestablishment of the MHA, the essay critically analyses how the Pae Ora (Healthy Futures) Act 2022 recognises te Tiriti o Waitangi ("te Tiriti") and the Treaty of Waitangi ("the Treaty").

II Context of Māori Health

The historical context of Māori health is rooted in centuries of colonisation, dispossession, and marginalisation. The signing of te Tiriti in 1840 marked the beginning of a tumultuous relationship between Māori and the British Crown, characterised by land confiscations, epidemics, and cultural suppression.¹ For over a century, Māori have consistently experienced inferior health outcomes compared to non-Māori, despite the Treaty of 1840 guaranteeing Māori the same rights and privileges as British citizens residing in Aotearoa, New Zealand.

¹ Heather Came, Rhonda Cornes and Tim McCreanor "Treaty of Waitangi in New Zealand public health strategies and plans 2006-2016" (2018) 131 NZMJ at 32-37.

Māori health continues to be shaped by structural inequalities, systemic racism, and cultural insensitivity within the Aotearoa New Zealand healthcare system. An example of the health inequities experienced by Māori include higher vulnerability to infectious and non-communicable diseases that can be addressed through health care.² Although Māori retained Tino rangatiratanga (sovereignty) over their taonga (treasures), with health being recognised as one such taonga, their current life expectancy is seven years shorter than that of non-Māori.³ Māori also develop diabetes up to 10 years before non-Māori and are less likely to receive appropriate monitoring and treatment. Social determinants such as socioeconomic deprivation, inadequate housing, and limited access to healthcare services exacerbate these disparities, highlighting the Crown's failure to recognise the status of tangata whenua as their treaty partner.⁴

III Healthcare Reform

Māori have advocated countless times for reform to address the failure of the health system to meet the needs of Māori, particularly in access to services and health outcomes. Evidence shows Māori receive lower-quality secondary care and have more significant unmet needs in primary care.⁵ The health inequities Māori face are a clear result of the failure to fulfil Te Tiriti obligations. For example, the stage one WAI 2575 report found that Māori health was underfunded, and the Crown knew this for over a decade yet omitted to act.⁶ As a result, Māori can not exercise Tino rangatiratanga in administering primary health care in Aotearoa.

² Ministry of Health *Wai 2575 Māori Health Trends Report* (Ministry of Health. 2019. Wai 2575 Māori Health Trends Report. Wellington: Ministry of Health).

³ Waitangi Tribunal *Hauora Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2023).

⁴ Above at n1.

⁵ Joanna Manning “Legal Issues New Zealand’s Bold New Structural Health Reforms: The Pae Ora (Healthy Futures) Act 2022” (2022) 29 JLM 987.

⁶ Above at n2.

Treaty-based healthcare reform has emerged as a crucial pathway towards addressing historical injustices and achieving health equity for Māori.⁷ Te Tiriti and the Treaty provide a foundational framework for transformative change within the health system, centred on the principles of Tino rangatiratanga, equity, active protection, options and partnership.⁸ Legislation such as the Act reflected a commitment to recognising and upholding Te Tiriti principles within healthcare provision, marking a historical epoch for Māori.

IV Pae Ora (Healthy Futures) Act 2022

On 1 July 2022, the Act came into effect. At its core are provisions that explicitly acknowledge Te Tiriti and embed its principles within the healthcare system.⁹ The legislation was influenced by the findings of the WAI 2575 Inquiry, which determined that the Crown had breached the Treaty of Waitangi by neglecting to administer and implement the primary healthcare system in a manner that effectively addressed Māori health inequities. Furthermore, it failed to uphold the Treaty's guarantees of Tino rangatiratanga, encompassing autonomy, self-determination, sovereignty, and self-government.¹⁰

The Act delineated a significant restructuring of the healthcare system aimed at redressing disparities in health outcomes encountered by Māori, Pacific peoples, and tāngata whaikaha (persons with disabilities) while also acknowledging the Crown's obligations to Māori under Te Tiriti.¹¹ Implementing Te Tiriti within the health sector would eliminate institutional racism and attain health equity for Māori.¹² The Act reflects agreement that inequitable health outcomes stem from "a reliance on singular 'one size fits all' policies and

⁷ Nicholas Stewart “How the Framework and Delivery of the Primary Healthcare System Can be Changed to Combat Māori Health Inequity” (2022) 9 PILJNZ at 98.

⁸ Manatū Hauora Ministry of Health “Te Tiriti o Waitangi – Our approach to achieving these goals” (1 December 2023) Manatū Hauora Ministry of Health <<https://www.health.govt.nz>>.

⁹ Section 6.

¹⁰ Above at n2.

¹¹ Pae Ora (Healthy Futures) Act 2022.

¹² Heather Came and others “Upholding Te Tiriti, ending institutional racism and Crown inaction on health equity” (2019) 132 NZMJ 61.

processes as a demonstration of 'treating everyone equally,' which is often the orthodox position do not meet the needs of Māori or other marginalised communities.¹³

Under the Act, significant health system reforms were implemented, such as an independent statutory authority, MHA, whose focus was enhancing Māori health outcomes and prioritizing the integration of mātauranga Māori (Māori knowledge) as central to achieving health improvements. MHA functions not as a separate health system for Māori but as an entity for co-designing and co-commissioning within the new health system framework.¹⁴

The Act **gives effect** to the principles of te Tiriti o Waitangi.¹⁵ The strong language within the legislation is a positive obligation on the Crown to ensure the principles of te Tiriti are given their rightful effect at a more comprehensive legal level and to ensure their principles are upheld. However, the Act refers to "te Tiriti o Waitangi" with "The Treaty of Waitangi" in brackets, implying their equivalence. It is widely recognised that the two versions of Te Tiriti differ significantly, with the English text often watering down or altering the essence of obligations and assurances. The interchangeable use of the two documents may need clarification. Nevertheless, the Act reflected years of Māori advocacy for institutional reform in the healthcare system.

Instead of employing a broad, standalone Tiriti incorporation clause, which has been more typical in the past, the Act featured a "defined" te Tiriti clause, a newer approach. This clause lists (in paragraphs (a)–(n)) specific ways in which the legislation embodies the Crown's commitment to uphold the principles of te Tiriti. These measures mandate adherence to five health system principles by the Minister, Ministry, and all health entities to improve Māori health outcomes. The Minister must consider the MHA and Hauora Māori Advisory Committee's advice and direct the development of a Hauora Māori

¹³ Reid Papaarangi "Structural reform or a cultural reform? Moving the health and disability sector to be pro-equity, culturally safe, Tiriti compliant and anti-racist. (2021) NZMJ 134 at 7-10.

¹⁴ Above at n7.

¹⁵ Above at n9.

Strategy. Additionally, the Act enables iwi-Māori Partnership Boards for local service planning and design and require the Government Policy Statement (GPS) to prioritise Māori health.¹⁶

The five "health principles" outlined in section 7(1) of the Act serve as a compass for the Minister, the Ministry, and all health entities as they carry out their legal duties. These principles directly mirror the five principles of te Tiriti, as outlined by the Tribunal to govern the primary health care system in the Wai 2575 report.¹⁷ The significance of embedding these principles as guiding lights in the overarching statute that regulates the system marks a profound and courageous shift.

However, to avoid making unrealistic commitments, especially considering constraints like funding limitations in a public health system, there is an obligation to do so only "to the extent reasonably feasible, taking into account all circumstances, including any resource constraints, and as far as applicable to their situation."¹⁸ Such qualifiers have a longstanding history of use. They are typically understood as tempering legal assertions to access entitlements while acknowledging the necessity for, if not explicitly permitting, rationing within the system.¹⁹ Including qualifiers within statutory mandates concerning adherence to Te Tiriti principles raises concern. While these qualifiers ostensibly accommodate practical limitations within the implementation framework, they inherently introduce ambiguity regarding the extent to which Te Tiriti obligations must be fulfilled. This ambiguity may lead to disparate interpretations and application of Te Tiriti principles, potentially undermining the unequivocal recognition and enforcement of Māori rights and interests as guaranteed under Te Tiriti. By introducing discretion based on practicality and resource availability, these qualifiers may diminish the legal entitlements of Māori and other affected parties under Te Tiriti, thereby warranting thorough legal scrutiny and

¹⁶ Above at n9.

¹⁷ Above at n8.

¹⁸ Section 7(2).

¹⁹ Above at n5.

assessment of their implications within the broader legal framework governing indigenous rights and treaty obligations.

Collectively, the Act marks a significant shift in the overarching policy direction of the health system. The vision of equity outlined in section 7(1)(a) is ambitious, extending beyond mere access to services to ensure that Māori and other groups achieve fair health outcomes. Equity does not always mean equal access to the same services. If providing more extraordinary or different services for Māori, such as kaupapa Māori services, is deemed necessary to address unequal health outcomes, the Act empowers health entities to pursue such initiatives. Principle (c) goes beyond contributing to decision-making; it mandates creating opportunities for exercising decision-making authority, thus integrating Māori tino rangatiratanga over Hauora Māori outcomes, as envisioned by te Tiriti.

The implemented reforms envisioned substantial restructure of existing frameworks and established new health entities with revised objectives and principles, emphasising the pursuit of health equity. This transformation was extensive and fundamental, with significant potential for change in the healthcare system and Māori and legal recognition of Te Tiriti.

V Pae Ora (Disestablishment of Maori Health Authority) Amendment Act 2024

The Amendment Act holds significant implications for recognising Te Tiriti and Māori within the New Zealand healthcare system. While the Act was designed to recognise and uphold Te Tiriti o Waitangi principles and address health inequities for Māori, the Amendment Act raises concerns regarding the regression of Māori involvement in healthcare decision-making.

The Amendment Act repealed the provisions establishing the Māori Health Authority and integrated its functions back into the Ministry of Health.²⁰ The Amendment Act

²⁰ Section 4.

undermines the partnership model envisaged by Te Tiriti o Waitangi, whereby the Crown and Māori work together to achieve health outcomes and erodes trust and confidence within Māori communities. The government risks sidelining Māori voices and perspectives in healthcare governance by centralising decision-making within the Ministry of Health. Repealing the MHA by the Amendment Act represents a significant setback in recognising Te Tiriti o Waitangi and Māori within the New Zealand healthcare system. It undermines the principles enshrined in Te Tiriti o Waitangi and perpetuates systemic barriers to Māori health and well-being. The Amendment Act highlights the fragility of Treaty-based healthcare reform and the need for ongoing commitment to Treaty principles in healthcare provision.

VI Disestablishment of the MHA

The New Zealand government's decision to disestablish the Māori Health Authority raises concerns about the future recognition of Te Tiriti within the healthcare system. The Act was a landmark piece of legislation aimed at redressing historical injustices and improving health outcomes for Māori.

However, there were concerns prior to the Act, in submissions on the Bill, regarding the potential establishment of a separatist, "race-based" health system, ostensibly favouring the health requirements of Māori and affording them preferential access to healthcare services.²¹ This apprehension formed the foundation of opposition from the National and ACT NZ parties towards the proposed reforms. National contended that the Act disproportionately emphasises a Treaty-centric approach over a health-focused one, advocating instead for health necessity to serve as the primary criterion for allocating limited public health resources. In the event of assuming governance, National proposed the dissolution of the MHA, relegating it to a directorate within the Ministry. However, in cases where specific demographic groups consistently experience notably inferior health outcomes compared to the general populace, their healthcare requirements amplify, and there is justification for resource allocation prioritization to address these needs.²²

²¹ Above at n5.

²² Above at n5.

The resistance to legislative reforms aimed at addressing health disparities among marginalised communities, particularly indigenous populations like Māori, underscores the enduring legacy of discrimination within political entities. The opposition from political parties to measures intended to prioritise the healthcare needs of disadvantaged groups reflects deep-seated apprehensions about perceived preferential treatment based on ethnicity. This reluctance showcases the persistence of systemic biases and discriminatory attitudes that have historically marginalised and disadvantaged Māori. Despite societal advancements and legislative efforts such as the Act to promote equity, the Amendment Act demonstrates how discriminatory perspectives continue to influence policymaking and obstruct meaningful progress towards addressing systemic inequities. Such opposition perpetuates a cycle of inequality and reinforces the enduring legacy of colonisation within the corridors of power.

MHA was intended to connect whanau with the health system and fund solutions that work for Māori communities, ensuring their voices were heard at every healthcare system level.²³ However, without a dedicated entity to champion Māori interests, there is a risk that Māori participation will be marginalised within the Ministry of Health bureaucracy. The absence of a dedicated MHA exacerbates power imbalances within the healthcare system, with Māori communities having less influence and Tino rangatiratanga over policy development and service delivery. This contradicts the Treaty principle of partnership, which requires meaningful collaboration and shared decision-making between the Crown and Māori. This could limit opportunities for Māori-led initiatives and innovations in healthcare provision, stifling creativity and responsiveness to community needs. It may also diminish trust between Māori communities and the health system, leading to disengagement and disempowerment. Without a robust mechanism for Māori representation and leadership, the Amendment Act may struggle to fulfil its commitment to Treaty-based healthcare reform.

²³ Te Aka Whai Ora “Tō mātou moemoeā Our Vision” (2024) Te Aka Whai Ora <<https://www.teakawhiora.nz>>.

The MHA was envisaged as a vehicle for advancing the protection of Maori rights and interests in healthcare provision, such as Maori healing practices, championing culturally appropriate care and addressing systemic inequities within the health system. Without a dedicated entity to advocate for Māori health, there is a risk that the Ministry of Health will prioritise mainstream approaches that may not adequately meet the needs of Māori communities. This could perpetuate existing disparities in health outcomes and exacerbate tensions between the Crown and Māori. To fulfil its obligations under Te Tiriti, the government must ensure that Māori rights and interests are protected within the healthcare system, including through robust mechanisms for monitoring and accountability.

VII Recommendations

Policymakers must take proactive steps to ensure the effectiveness of their response. This section makes the following recommendations.

Firstly, meaningful engagement entails more than just consultation. It necessitates active listening and co-designing solutions with Māori communities. This involves establishing mechanisms for ongoing dialogue, such as regular hui (meetings) or forums, where Māori leaders, organisations, and stakeholders can voice their concerns, share their priorities, and contribute to decision-making processes. Through these engagements, Māori communities can retain Tino Rangatiratanga over how to manage and execute healthcare for their own people while ensuring policies and interventions are culturally appropriate and responsive.

Investment in Māori-led solutions involves more than just financial support; it requires recognizing and valuing the expertise, knowledge, and innovation within Māori communities. Policymakers should prioritize funding for initiatives developed and led by Māori, including community-led health programs, traditional healing practices, and initiatives aimed at addressing social determinants of health such as housing, education, and employment. By investing in Māori-led solutions, policymakers can empower communities to take ownership of their health outcomes and foster resilience and self-determination.

Restoration of trust between the government and Māori communities requires tangible actions demonstrating a genuine commitment to partnership and accountability. This includes transparent decision-making processes, clear communication of policy intentions and outcomes, and meaningful involvement of Māori representatives in all policy development, implementation, and evaluation stages. Building trust also involves acknowledging and addressing historical injustices and systemic barriers that have eroded trust in government institutions. By fostering an environment of trust and collaboration, policymakers can create the conditions necessary for meaningful partnerships that advance health equity and reconciliation.

Recognition of Treaty rights involves more than just symbolic gestures; it requires concrete actions to uphold and give effect to the principles of partnership, participation, and protection enshrined in Te Tiriti. This includes acknowledging Māori sovereignty and self-determination, respecting the authority of Māori governance structures, and ensuring that Māori have a meaningful voice in decisions that affect their health and well-being. Policymakers should also prioritise initiatives that specifically address Treaty obligations, such as developing Treaty-based health indicators, establishing mechanisms for monitoring and reporting progress towards Treaty goals, and allocating resources to support Māori-led initiatives aimed at advancing Treaty rights.

By adopting a holistic approach that integrates meaningful engagement, investment in Māori-led solutions, restoration of trust, and recognition of Treaty rights, policymakers can effectively address the repercussions of the Amendment Act and promote the well-being of Māori communities in Aotearoa, New Zealand, giving effect to te Tiriti.

VIII Conclusion

In conclusion, the health of Māori in Aotearoa, New Zealand, is deeply intertwined with the nation's historical, social, and political context. Despite efforts to address health disparities, Māori continue to experience inequities in health outcomes and access to healthcare services. The enactment of the Act represented a significant step towards recognising and upholding Te Tiriti principles within the healthcare system. However, the

subsequent disestablishment of the MHA through the Amendment Act raises concerns about the regression of Māori involvement in healthcare decision-making. To address the repercussions of the Amendment Act and promote the well-being of Māori communities, policymakers must take proactive steps to advance health equity and reconciliation in Aotearoa, New Zealand, giving effect to Te Tiriti o Waitangi.