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How does the Pae Ora (Healthy Futures) Act 2022 Allow and Entrench Māori Health Inequities in Breach of Aotearoa New Zealand Government's Obligations under Te Tiriti o Waitangi (The Treaty of Waitangi)?

I Introduction

It is indisputable that Aotearoa New Zealand's healthcare system breaches obligations under Te Tiriti O Waitangi (the Treaty of Waitangi).[1] A landmark report of the Waitangi Tribunal (the Tribunal), representing the first stage of the WAI2575 inquiry into health services and outcomes emphatically concluded the Crown had breached its Treaty of Waitangi obligations in the primary healthcare system, contributing to unacceptable Māori health inequities.[2] The report is credited with driving legislative reform.[3] The Pae Ora (Healthy Futures) Act 2022 (the Act) came into force on 1 July 2022 and is the Crown's response to the Tribunal's recommendations for legislative and policy change. Replacing the New Zealand Public Health and Disability Act 2000, the Act prescribes the legislative framework for public healthcare in Aotearoa New Zealand.

Firstly, the essay briefly describes the two Treaty texts and the current state of hauora Māori (Māori health) in Aotearoa. Secondly, the WAI2575 report, its recommendations and the Act are critically examined. At a surface level, the Act is a good faith effort of the Crown to create a "Treaty-complaint healthcare system that prioritises equity and empowers tino rangatiratanga (sovereignty) of hauora Māori".[4] However, in reality, decision-makers weaponise legislative references to the Treaty in their interpretation and application of the Act, enabling decisions which are wholly inconsistent with the Crown's Treaty obligations. Thirdly, exemplifying this reality, the essay discusses the disestablishment of Te Aka Whai Ora, the Māori Health Authority (MHA). Finally, the essay concludes that legislative references to the Treaty in the

[1] This essay will refer to Treaty of Waitangi (the Treaty) rather than Te Tiriti O Waitangi to reflect the WAI 2575 Report.
[2] Waitangi Tribunal *Hauora Report on Stage One of the Health Services and Outcome Kaupapa Inquiry* (Wai 2575, 2023) at 171.
[3] Joanna Manning "New Zealand's Bold New Structural Health Reforms: The Pae Ora (Healthy Futures) Act 2022" (2022) 29 JLM 987 at 996.
[4] Waitangi Tribunal, above n 2, at 159-160.

Act are inconsistent with the findings and recommendations made by the Tribunal. It is suggested that such legislative references are not dissimilar to those featured in earlier legislation, allowing and entrenching Māori health inequities in breach of the Crown's Treaty obligations.

A The Relationship Between Te Tiriti O Waitangi and the Treaty of Waitangi

The signing of Te Tiriti o Waitangi (the Māori text) and the Treaty of Waitangi (the English text) on 6 February 1840 was an agreement of Te Whakaminenga rangatira to pākehā (non-Māori) remaining on their lands in Aotearoa New Zealand. Their agreement was subject to the conditions recorded in the document they signed. For rangatira, this was overwhelmingly Te Tiriti, not the text in a foreign language they did not understand.[5] Irrespective of the glaring differences between the two texts, both refer to Māori retaining tino rangatiratanga over all taonga (treasures) and health is understood to be a taonga.[6] Both texts also record that the Crown affords Māori and British subjects equal rights and protection. Despite these agreements, Māori experience "significant and enduring" health inequities.[7] Such inequities are an established breach of the obligations that the Crown owes to Māori by virtue of an agreement which permitted British settlers to remain on Māori land.

B The General Status of Māori Health

The downstream indicators of health status discussed in the Tribunal report are a grim insight into the current state of Māori health. For example, Māori have disproportionately high morbidity and mortality for non-communicable diseases such as diabetes and cardiovascular disease.[8] Perhaps most reflective of overall population health is life expectancy. In 2024, Māori life expectancy was approximately seven years shorter compared to non-Māori.[9] These statistics are most commonly communicated and understood as reflecting the health status of a population. However, such statistics often take a 'cultural deficit' approach, implying that inequities result from an inherent cultural flaw. Applying an accepted conceptual framework for understanding the structural factors causative of health inequities reveals it is more

[5] Margaret Mutu "Constitutional Intentions: The Treaty of Waitangi Texts" in Malcom Mulholland and Veronica Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 17 at 19-20.
[6] Nicole Sheridan and others "Hauora Māori – Māori health: a right to equal outcomes in primary care" (2024) IJ Equity Health 1 at 2.
[7] Waitangi Tribunal, above n 2, at 18.
[8] Waitangi Tribunal, above n 2, at 19.
[9] Ministry of Health *Tatau Kahukura: Maori Health Chart Book 2024* (December 2024) at 27.

appropriate to understand that Māori health inequities flow from colonisation and should be understood through this lens.[10]

II Hauora – Report on Stage One of the Health Services and Outcomes Inquiry

Pursuant to s 6 of the Treaty of Waitangi Act 1975, WAI2575 is the Tribunal's landmark inquiry into grievances related to health services and outcomes. *Hauora* is the first stage of the Tribunals broader inquiry and heard from Māori Primary Health Organisations and Hauora Māori providers. Overall, the report sought to ascertain whether the primary healthcare system was Treaty-compliant. The report was released on a pre-publication basis in 2019 and intended for the Crown to make progress on implementing the Tribunal's interim recommendations. The final report, which is discussed in this essay, was released in 2021 to assess the Crown's progress.[11]

A Tribunal Findings and Recommendations Made

Whilst this essay cannot canvass all the conclusions reached, it is suffice to say that the report emphatically concluded that Aotearoa New Zealand's primary healthcare framework was not Treaty-compliant. The Tribunal found Māori health inequities were the consequence of historic Crown under-funding and under-resourcing of the primary healthcare system. Crown inaction created a system which failed to allow Māori to exercise tino rangatiratanga and mana motuhake over hauora Māori (self-government over Māori health delivery and outcomes). The effectiveness of s 4 of the New Zealand Public Health and Disability Act 2000 which specifically related to implementation of the Crowns Treaty obligations in the public healthcare system were also considered. The Tribunal was highly critical of s 4, finding it to be reductionist and ineffective, amounting only to mere contribution to decision-making "at the margins".[12] Overall, it was an insufficient commitment to Māori health equity in a manner inconsistent with Crown Treaty obligations.

The Tribunal made two overarching recommendations which broadly focused on the Crown committing itself to achieving equitable health outcomes for Māori. To achieve this, the Tribunal recommended amending the legislative and policy framework and elucidated several

[10] Curtis and others "Indigenous adaptation of a model for understanding the determinants of ethnic health inequities" (2023) 3 Discov. soc. sci. health 10 at 12-13.
[11] Waitangi Tribunal, above n 2 at 1-11; and 14-16.
[12] Waitangi Tribunal, above n 2, at 77-78; and 116-117.

principles to govern the operation of a Treaty-compliant primary healthcare system.[13] It also made interim recommendations regarding structural reforms to the primary healthcare system. Crucially, this included "exploring the concept of a stand-alone Māori primary health organisation".[14]

Although the Tribunal does not have powers to make binding recommendations, its uncompromising findings made it somewhat incumbent on the Crown to action recommendations made. Hence the Hauora report was the impetus for health system reforms which had been brewing for decades. In October 2021 the Labour government introduced the Act which actioned one of the Tribunal's overarching recommendations for an amended legislative framework which realised the principles elucidated by the Tribunal.[15]

III The Pae Ora (Healthy Futures) Act 2022

The Act governs delivery of publicly funded healthcare services in Aotearoa New Zealand through a singular Crown entity known as Te Whatu Ora, Health New Zealand. It is an amalgamation of 20 pre-existing District Health Boards and is the most significant structural change to Aotearoa New Zealand's public healthcare system since the early 2000s.[16] Read together, ss 6 and 7 of the Act establish the legal framework for the Crown's recognition of their Treaty obligations to Māori. This dual approach to incorporation is a common feature of contemporary legislation.[17] Section 6 is a 'defined' Treaty provision which refers to the Crown's "*intention* to give effect to *principles* of Te Tiriti O Waitangi (the Treaty of Waitangi)". Employing mandatory language, s 6(a) *requires*, inter alia, that decision-makers are guided by "health sector principles", implying the five principles outlined in s 7(1)(a)-(e) regulate delivery of public healthcare services. Section 7 serves as an 'implementation' provision which provides the framework for the Crown's intention to give effect to the principles of Te Tiriti (the Treaty) as provided for in s 6.

A The Language of Sections 6 and 7 and its Consequences

[13] Waitangi Tribunal, above n 2, at 163-164.
[14] Waitangi Tribunal, above n 2, at 165.
[15] Heather Came and others "Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024: further Crown breaches of Te Tiriti O Waitangi" (2024) 137 NZMJ 94 at 94.
[16] Rae and others "A Critical Tiriti Analysis of the Pae Ora (Healthy Futures) Bill" (2022) 135 NZMJ 106 at 106.
[17] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [150].

Superficially, ss 6 and 7 are a marked departure from the unitary Treaty clause in the New Zealand Public Health and Disability Act 2000. Commentators have also recognised that embedding guiding principles in s 7 intended to regulate the public healthcare system amounts to a "profound and bold" change.[18] However, it is suggested that in practice, the permissive language of ss 6 and 7 makes these provisions no different from s 4 of the New Zealand Public Health and Disability Act which the Tribunal found was inconsistent with the Crown's Treaty obligations.

In the context of Aotearoa New Zealand's unwritten constitution, the orthodox position requires Parliament to have expressly referred to the Treaty in legislation before it can be addressed by the courts.[19] Though more contemporary decisions signal a departure from doctrinal orthodoxy, legislative references to the Treaty are instrumental to Crown recognition of their Treaty obligations. It follows that the language Parliament has chosen to use when incorporating the Treaty into legislation will colour the extent of the Crown's obligations.

When the Tribunal considered s 4 of the New Zealand Public Health and Disability Act 2000, it referred to the Supreme Court's decision in *Ngai Tai Ki Tāmaki Tribal Trust v Minister of Conservation* where the Court considered the Treaty incorporation provision in the Conservation Act 1987. It concluded that the provision, stated in imperative terms requiring the Act be "interpreted and administered as to give effect to the principles of the Treaty of Waitangi" was a strong directive imposing positive obligations on the Crown to make decisions under the Act that realise Treaty principles.[20] The Tribunal concluded that such imperative wording should have been used to embed the Treaty principles into the New Zealand Public Health and Disability Act 2000.[21]

Section 6 of the Act refers to the Crown's *intention* to "give effect to the principles of Te Tiriti (the Treaty of Waitangi)". Although invoking this imperative wording, it is tempered by it only being an "*intention*" for the Crown to give effect to such principles. "Intention" implies that the Crown giving effect to Treaty principles may be qualified by other considerations and principles will not always take precedence in decision-making. This discretion is underscored

[18] Manning, above n 3, at 998.
[19] *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] 1 NZLR 590 (PC) at 596.
[20] *Ngāi ta ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [48]; and [52].
[21] Waitangi Tribunal, above n 2, at 79.

by s 7(2) of the Act which provides decision-makers are only guided by the five health sector principles "as far as reasonably practicable", having regard to considerations like resource-constraints.

The interaction between ss 6 and 7 reinforces the consequences of this problematic wording. Section 6 states it is an *intention* that the decisions made under the Act give effect to principles of Te Tiriti (the Treaty), with such decisions purportedly guided by the five health sector principles in s 7. The health sector principles in s 7 must therefore colour the extent of the Crowns intention to give effect to Treaty principles pursuant to s 6. The five s 7 principles are taken directly from the Tribunals recommendations. These principles are expressed in mandatory language in the Hauora report. For example, the "*guarantee* of tino rangatiratanga", "the Crown is *obliged to ensure*".[22] However, the principles existence in the Act are couched in permissible language, thereby lessening the intensity of Crown obligations to give effect to Treaty principles. For instance, principles listed in s 7 include that the health sector *should* be equitable, that the health sector *should* engage with Māori, and that the health sector *should* provide opportunities for Māori to exercise decision-making authority (but does not explicitly refer to the exercise of tino rangatiratanga). Moreover, the principles are qualified by s 7(2) as discussed above.

B Conflation of the Two Texts and Reliance on Treaty Principles

In addition to the questionable protection afforded to the Treaty as a consequence of the ss 6 and 7 language, the Act seems to conflate the Māori and English texts. Reference to principles of "Te Tiriti o Waitangi" are immediately bracketed by the "Treaty of Waitangi". Concurrent references imply a false equivalence and dismiss accepted differences and the practical implications flowing from such differences. As argued by scholars like Ani Mikaere, this is indicative of the Crown's assertion that the incompatible texts can be read together.[23] Furthermore, the Act relies on the Crown giving effect to Treaty 'principles'. It is asserted by legal and public health academics alike that principles obscure the full extent of rights guaranteed to Māori and enable the Crown to perpetuate the myth that the two texts can be read together.[24]

[22] Waitangi Tribunal, above n 2, at 163-164.
[23] Ani Mikaere *Colonising Myths – Māori Realities: He Rukuruku Whakaaro* (Huia Publishers, Wellington, 2011) at 73.
[24] Mikaere, above n 26 at 80-82; and Rae and others, above n 17, at 109.

Comments made at the inception of this Act by then-Minister of Health Hon Andrew Little demonstrate that the Act was intended to implement Tribunal recommendations regarding amending the legislative framework to support equitable health outcomes.[25] However, the permissive language of ss 6 and 7, the conflation of the two texts and a reliance on the concept of 'Treaty principles' is a disingenuous approach to implementing recommendations intended to address Treaty breaches in the primary healthcare system that contribute to Māori health inequities. It can be argued that instead of remedying Treaty breaches, the Act allows and entrenches Māori health inequities in a continuation of the Crowns breach of Treaty obligations. This reality is exemplified by the disestablishment of the MHA.

IV Disestablishment of the MHA

Central to the Tribunals 2019 recommendations for structural reform was the establishment of a standalone "Māori primary health organisation".[26] Upon enactment in 2022, the MHA existed as an independent agency tasked with designing and commissioning kaupapa Māori health services.[27] Pursuant to earlier Tribunal recommendations, the proposed MHA intended to respond to a historically universalist, inequitable healthcare system to fundamentally alter how health services were designed and delivered for Māori. In the final 2021 report, The Tribunal expressed its approval for Labour's proposed autonomous MHA as reflecting the aspirations of claimants and largely addressing the Tribunals initial findings and recommendations.[28]

What started as a promising step towards changing health service delivery to improve the state of Māori health[29] fell victim to sensationalist, separatist claims advanced by the current right-leaning coalition government.[30] Pursuant to the current government's 100-day plan the Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024 entered into force on 30

[25] (27 October 2021) 755 NZPD (Pae Ora (Healthy Futures) Bill – First Reading, Andrew Little).
[26] Waitangi Tribunal, above n 2, at 165.
[27] Pae Ora (Healthy Futures) Act, s 18.
[28] Waitangi Tribunal, above n 2 at 178-179.
[29] Andrew Little and Peeni Henare "Establishment of the new Māori Health Authority takes a first big step" (press release, 7 May 2021).
[30] Meriana Johnsen "Collins says her party won't stand for 'racist separatism' in New Zealand" (28 April 2021) Radio New Zealand <https://www.rnz.co.nz/news/political/441350/collins-says-her-party-won-t-stand-for-racist-separatism-new-zealand>.

June 2024.[31] This decision was not only contrary to immense opposition and criticism[32], but was also wholly inconsistent with the governments purported commitment to effectively respond to Tribunal recommendations.[33] It exemplifies the precarious position of the Treaty under the Act where references couched in discretionary terms make Treaty considerations and implementation vulnerable to the whims of decision-makers who are inevitably influenced by the prevailing political climate. More broadly, it is reflective of the Crown's longstanding dismissive attitude to actively giving effect to the Treaty within design and delivery of the healthcare system. The hasty disestablishment forces Māori to remain in a system not designed for them, thereby perpetuating and worsening health inequities.

V Conclusion

Hauora, the report representing the first stage of the Tribunal's inquiry into health services and outcomes is not only a damming assessment of Māori health inequities but is also an authoritative confirmation of the Crown's failure to deliver a Treaty-compliant primary healthcare system. In 2021 the introduction of the Act pursuant to Tribunal recommendations seemed a positive step signalling the possibility of real change for Māori health outcomes. However, the Act expresses purportedly 'strong' Treaty clauses in discretionary terms, qualifies recognition of the Treaty, conflates two incongruous texts and relies on the indeterminate idea of 'Treaty principles'. Masquerading as change, the Act only serves to allow and entrench Māori health inequities.

Moreover, it is reflective of commentary from the Tribunal that a "commitment to equity is admirable but this is rendered ineffective if the strategy amounts to mere rhetoric".[34] Disestablishment of the MHA is not only indicative of the precarious status that such permissive wording affords the Treaty in the Act (and therefore in the public healthcare system) but is more broadly reflective of a legal, political and constitutional system where any recognition of the Treaty is contingent on the language used in legislative incorporation.

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[31] Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024, s 2.
[32] Human Rights Commission "Loss of Māori Health Authority Out of Step with te and human rights" (29 February 2024) https://tikatangata.org.nz/news/government-out-of-step-with-erasure-of-maori-health-authority; Came and others, above n 16, at 97; and Isaac Davison "Tears, anger as Māori Health Authority scrapped in urgent debate" *The New Zealand Herald* (online ed, Auckland, 28 February 2024).
[33] (27 February 2024) 775 NZPD (Pae Ora (Disestablishment of Māori Health Authority) Amendment Bill – First Reading, Hūhana Lyndon).
[34] Waitangi Tribunal, above n 2, at 71.

The healthcare system has available to it "some of the strongest levers to effect change".[35] This underscores the importance of a Treaty-compliant healthcare system underpinned by legislation which genuinely commits the Crown to its Treaty obligations.

[35] Waitangi Tribunal, above n 2, at 190.