

**IN THE WAITANGI TRIBUNAL  
TAIHAPE - RANGITĪKEI KI RANGIPŌ DISTRICT INQUIRY**

**WAI 2180**

**IN THE MATTER** of the Treaty of Waitangi Act 1975

**AND**

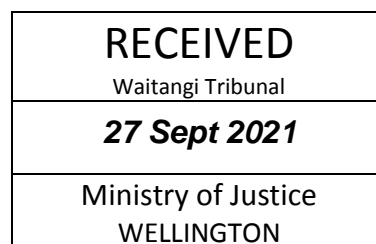
**IN THE MATTER** of Taihape - Rangitīkei ki Rangipō Inquiry (Wai 2180)

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**GENERIC CLAIMANT SUBMISSIONS IN REPLY REGARDING EDUCATION,  
HEALTH AND OTHER SOCIAL SERVICES (ISSUE 18)**

**Dated: this 27<sup>th</sup> day of September 2021**

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## **Contents**

<b>INTRODUCTION</b>	<b>2</b>
<b>CROWN POSITION AND ACKNOWLEDGMENTS</b>	<b>3</b>
<b>ASSESSING THE EVIDENCE AND KEY CONSIDERATIONS</b>	<b>5</b>
<b>CURRENT DAY PROVISION OF EDUCATION</b>	<b>7</b>
<b>SOCIAL SERVICE DELIVERY: EDUCATION, HEALTH, HOUSING</b>	<b>8</b>
<b>EDUCATION – HISTORICAL POSITION</b>	<b>11</b>
<b>HEALTH</b>	<b>17</b>
<b>EDUCATION-SPECIFIC ISSUES</b>	<b>22</b>
<b>URBANISATION, URBAN MIGRATION AND DISPERSAL FROM HOMELANDS</b>	<b>27</b>
<b>POLICY EFFECTS</b>	<b>27</b>

## MAY IT PLEASE THE TRIBUNAL

### INTRODUCTION

1. These generic claimant submissions in reply (“**reply submissions**”) address the Crown’s closing submissions on Issue 18 regarding education, health and other social services (“**Crown closing submissions**”) and are filed for the benefit of all claimants within the inquiry district.<sup>1</sup>
2. In the generic claimant closing submissions regarding education, health and other social services (“**generic claimant closings**”), counsel submitted that the experience of Taihape Māori in relation to these issues has been characterised by disempowerment, missed opportunities, and inequity.
3. Crown closing submissions have done little to address the concerns raised.
4. Instead, the Crown’s approach tends towards a high level focus, urging against presentism, and emphasising prevailing circumstances, reasonableness in the context and difficulties encountered due to the rural nature of the inquiry district. Similarly, there is a pattern of equating limited evidence with a need for caution, when in many instances, the main issue is that there is limited to no evidence the Crown did what it ought to have done.
5. In general, the Crown has simply highlighted particular services it has provided, set out its own position and not engaged with submissions made by claimant counsel, including those relating to the efficacy and appropriateness or otherwise of such services in practice; both key issues when analysing alleged breaches of te Tiriti o Waitangi / Treaty of Waitangi (“**Te Tiriti**”).
6. Thus, the difference between the Crown and claimant position is less about the facts in terms of services provided, but rather the adequacy and appropriateness of these, taking into consideration the Crown’s Te Tiriti obligations. It is this question that the Crown has largely failed to deal with.
7. As a consequence, counsel confirm reliance on the position already set out in generic claimant closings on this issue and do not propose to restate matters addressed there. Counsel only address Crown submissions where further analysis or submission appears necessary.

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<sup>1</sup> This is not to prevent claimants from taking their own positions in respect of any of these issues.

## CROWN POSITION AND ACKNOWLEDGMENTS

### Crown submission

8. At paragraphs 5.1 and 5.2 of the Crown closing submissions (#3.3.87), the Crown extends its concession acknowledging its failure to actively protect te reo Māori and encourage its use by iwi and Māori.

### Reply

9. The original concession and its extension serves to emphasise the consequent heightened duty on the Crown to actively protect te reo Māori and to provide redress for its past actions.<sup>2</sup>
10. Counsel highlight for example the statements made in various Tribunal decisions in light of the Privy Council's decision in the *Broadcasting Assets* case. These findings indicate that where the Crown's own actions have contributed to the "precarious state of a taonga", there is an even greater obligation for the Crown to provide "generous redress as circumstances permit".<sup>3</sup>
11. As Crown closing submissions emphasise, context is important,<sup>4</sup> and it is against this heightened duty that the Crown's acts and omissions, including its inaction in relation to the te reo pathway sought by Taihape Māori, must be assessed.

### Crown submission

12. At paragraphs 6 to 13, the Crown sets out its position on the Te Tiriti duties it considers it has to Taihape Māori in respect of education and refers to acknowledgements from Crown witnesses about the experiences of Māori learners, including Taihape Māori. In particular, counsel now address the following Crown submissions:

*"6. [...] Where the Crown provides education and other social services, the principle of equal treatment inherent in Article III of te Tiriti o Waitangi/the Treaty of Waitangi*

<sup>2</sup> For discussion on heightened duties when inequities exist, see for example Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 27-35, Waitangi Tribunal *Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 27, 54, 62-63, Waitangi Tribunal *Te Urewera* (Wai 894, 2017) at 3773.

<sup>3</sup> See for example in Waitangi Tribunal *Te Tau Ihu O Te Waka A Maui: Report on Northern South Island Claims – Vol I* (Wai 785, 2008) at 6, Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 19.

<sup>4</sup> See for example Crown closing submissions at [17.1], [17.2].

*requires the Crown to ensure Taihape Māori have the same access to, and standard of, education, health and housing services as non-Māori [...]*".

*"10. Ms Holsted, in discussion with the Tribunal, repeatedly affirmed the commitment of the Crown to using every tool at its disposal to improve educational outcomes, and to doing so in partnership with Māori [...] Given their direct focus on these critical matters, the Tribunal's Kaupapa Inquiries into Education, Health and Housing may provide a better process and evidential basis for exploring these complexities, including opportunities for ongoing improvements and the Crown's duty to address disparity in outcomes"*.

### *Reply*

13. Counsel continue to rely on the submissions made regarding Te Tiriti duties, inequitable outcomes, and the efficacy and appropriateness of programmes including Ka Hikitia in the generic claimant closings. Counsel say further:

- (a) In respect of paragraph 6, the reference to *equal* treatment misses a key nuance. The Crown is obliged to provide *equitable* treatment. This same submission applies in respect of other instances where the Crown refers to "equal" rights or treatment in the Crown closing submissions.<sup>5</sup> Counsel refer to the following passages of the *Te Urewera report*, which address the distinction between these two terms:<sup>6</sup>

*We believe that the distinction between equality and equity has a much broader application, which is highly relevant to the provision of social services.*

*The Oxford English Dictionary defines 'equal' in terms of sameness; for example, people having the same rights and status, or something being uniform in application. By contrast, equity is defined in terms of fairness. Crown counsel also suggested that 'equitably' is synonymous with 'fairly'. In terms of social services, we consider that equal provision means providing everyone with the same type and level of service, whereas equitable provision means providing everyone with the services which best meet their needs.*

*Perhaps the most important aspect of equitable provision derives from unequal needs. As we have stated above, following the Napier Hospital report, the Crown has a duty to reduce socio-economic disparity.*

- (b) In respect of paragraph 10:

<sup>5</sup> Including Crown closing submissions at [6], [24], [66], [119], [128].

<sup>6</sup> Waitangi Tribunal *Te Urewera* (Wai 894, 2017) at 3774.

- (i) In relation to the nature of the education provided to Taihape Māori, counsel have traversed significant evidence in the generic claimant closings and submit there is sufficient evidence on education from which to make findings in this inquiry; indeed, this Tribunal's findings may assist future kaupapa inquiries.
- (ii) While there may have been repeated affirmations of the Crown's commitment to "*using every tool at its disposal to improve educational outcomes*" and to do so "*in partnership with Māori*", the evidence suggests that for Taihape Māori, this simply has not occurred. In fact, these affirmations appear to contradict the evidence traversed in generic claimant closings, which demonstrates an unwillingness to use every tool at its disposal and to truly partner with Taihape Māori (counsel refer, for example, to the kura kaupapa sought by Taihape Māori)<sup>7</sup>.

## ASSESSING THE EVIDENCE AND KEY CONSIDERATIONS

### Crown closing submission

14. At paragraphs 15 to 17, the Crown sets out perceived limitations of the evidence available regarding education from Dr Christoffel and Ministry of Education ("**MOE**") witnesses, and at paragraph 17 states:

*17. The limitations identified above should be considered in assessing claims relating to education and other social services. The Crown also emphasises that all relevant facts and circumstances must be taken into account before a finding of Tiriti/Treaty breach relating to such claims can be made. In this regard:*

*17.1 The Crown is to be held to the principles of Te Tiriti o Waitangi/the Treaty of Waitangi – including recognising the importance of identity, language and culture within that framework. In doing so, care must be taken not to ascribe today's standards and reasonable expectations to the Crown actions and actors of the past. Historical context and prevailing circumstances are fundamental, including the state of knowledge at the time and the question of what was reasonably foreseeable.*

*17.2 Consideration should be given to the resources available to the Crown, and prioritisation of these, particularly when considering the Crown's response to calls for particular services. The Tribunal should be cautious in considering these issues where the full context of Crown actions and demands on its resources, including on a national*

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<sup>7</sup> For further detail, see for example generic claimant closings at [7.40] to [7.44].

*scale, is not known. Context, and a measurement of Crown action requires a comparative assessment with the experiences of others in New Zealand, both Māori and Pākehā.*

*17.3 The geographical location of the inquiry district also requires consideration. There have never been any significant urban centres in the inquiry district. Instead, the district is a collection of rural districts, small settlements and towns. Dr Christoffel considered the district's isolation, small population and rural characteristics caused enormous challenges to the provision of services such as education. It appears the provision of education services has reflected population fluctuations.*

### *Reply*

15. Counsel have already analysed the provision of education, health and other social services in generic claimant closings and continue to rely on these, but say further:

- (a) These caveats put forward by the Crown can only be taken so far:
  - (i) Crown has either met its Te Tiriti obligations or it has not.
  - (ii) Context, such as the prevailing circumstances of a particular time or reasonableness, can properly be part of an assessment of whether the Crown has met its Te Tiriti obligations. What is of concern is when there is a pattern of prioritisation of non-Māori interests over those of Māori, or persistent inequities, for example in involvement, opportunities, treatment, or outcomes.
  - (iii) Unfortunately, this has been a pattern for Taihape Māori in relation to education and social services issues.<sup>8</sup>
  - (iv) The fact that Taihape Māori consistently end up at the bottom of the pile when it comes to, for example, educational, health and housing outcomes,<sup>9</sup> must raise questions with assertions of reasonableness, difficulties with resourcing, and context. That disparities remain to the present day speak volumes of the extent to which actions of the Crown have addressed the needs of Taihape Māori.

<sup>8</sup> See for example analysis in generic claimant closings at [7.1]-[7.61].

<sup>9</sup> Ibid.

## CURRENT DAY PROVISION OF EDUCATION

### Crown closing submission

16. At paragraph 18, the Crown submits that “*The evidence from the Crown shows the continued commitment by the Ministry of Education to provide education to Taihape Māori and the population of New Zealand generally. The Ministry has been working to remedy historical disparities for some time and the Crown notes that there are several programmes underway that are designed to ensure students have the same educational opportunities, wherever they live*”.

### Reply

17. The evidence suggests that the commitment demonstrated by the Crown in respect of education of Taihape Māori has varied over time. In this regard, counsel have already addressed the delays in setting up a school at Moawhango in generic claimant closing submissions, along with difficulties encountered by Taihape Māori in accessing education as compared with non-Māori and the nature and appropriateness of the education provided to Taihape Māori at various times.
18. In respect of the assertion that the MOE has been “*working to remedy historical disparities for some time*”, counsel say:
- (a) The fact that, as the Crown has acknowledged, Māori learners “*have consistently experienced inequitable outcomes in education*” and that “*education outcomes for Maori in the Taihape Inquiry district (whilst on several metrics better than those of Maori elsewhere) are different to, and worse than, those of non-Maori*”,<sup>10</sup> indicates that:
- (i) What has been done to date has not been sufficiently effective.
- (ii) That inequities will not be addressed by continuing to introduce aspirational policies and strategies that, for example, are not properly implemented and thus have little to no meaningful effect on the day-to-day experiences of Taihape Māori and fail to empower Taihape Māori to become significantly more involved in the education of their tamariki, including the revitalisation of their

<sup>10</sup> Crown Opening Submissions for Evidence (Part Two) Hearing Week 11, dated 29 October 2019 (Wai 2180, #3.3.31) at [12]-[14].



reo.<sup>11</sup> These matters are dealt with extensively in the generic claimant closings.

- (iii) The Crown cannot be said to be taking reasonable steps to address inequities in educational outcomes in such circumstances. Consistent with the observation by the Tribunal when discussing inequities in health outcomes in *Tauranga Moana*, where a disparity has long been well known and still exists, this “*indicates a failure of active protection by the Crown*” and “*an inadequate determination to reduce disparities*”.<sup>12</sup>

### **Crown closing submission**

19. At paragraph 19, the Crown sets out that “*the education system is a decentralised one, with responsibility for the administration, management and governance of individual schools lying with individual School Boards. Schools are given the autonomy and flexibility to work closely with their local communities to allow them to respond directly to local priorities and needs*”.

### **Reply**

20. The Crown created the education system and chose to decentralise it.
21. The tenor of these submissions appears to try and minimise the Crown’s purview over matters affecting the education of Taihape Māori, but Tribunal jurisprudence is clear that the Crown is unable to avoid its Te Tiriti obligations by delegating functions to non-Crown entities.<sup>13</sup>

## **SOCIAL SERVICE DELIVERY: EDUCATION, HEALTH, HOUSING**

### **Crown closing submissions**

22. At paragraph 25, the Crown states that “*Te Tiriti o Waitangi/the Treaty of Waitangi does not impose on the Crown an absolute obligation to consult with Taihape Māori.*”

<sup>11</sup> For example, what MOE witnesses described as the “launch and hope” approach to the first iteration of Ka Hikitia. For further detail see generic claimant closings at [6.6]-[6.11], [7.34]-[7.39], which address this issue and the nature of roles provided for Taihape Māori in education.

<sup>12</sup> Waitangi Tribunal *Tauranga Moana 1886–2006* (Wai 215, 2010) Vol II, at 811.

<sup>13</sup> Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wai 692, 2001) at xxiv, Waitangi Tribunal *Tū Mai te Rangī: Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 22.

Reply

23. Counsel highlight the following Tribunal findings in relation to Crown engagement with Māori, which counsel submit are applicable to education, health and housing:

- (a) The Tribunal in *He Maunga Rongo* stated “*The obligations of partnership included the duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2.*”<sup>14</sup>
- (b) As observed by the Tribunal in *Te Tau Ihu*, active protection “*requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected [underline added]*”<sup>15</sup>
- (c) Particularly relevant to the position of tamariki receiving education, in a recent Tribunal report on the urgent inquiry into Oranga Tamariki, *He Pāharakeke, He Rito Whakakīkinga Whāruarua*, the Tribunal found, when considering submissions about whether tamariki are taonga:<sup>16</sup>

*Thus, in guaranteeing Māori chiefly authority over their kāinga and their taonga, we consider article 2 is nothing less than a guarantee of the right of Māori to continue to organise and live as Māori. From this guarantee flows the fundamental right of Māori to care for and raise the next generation.*

- (d) In the report on Oranga Tamariki, the Tribunal also cited *Te Mana Whatu Ahuru*, which included, relevantly, the statement that:<sup>17</sup>

*Kāwanatanga, as they saw it, was a power to govern and make laws, but it was a power that particularly applied to settlers, settlement, and international relations, and – to the extent that it might apply to Māori – was to be used for the protection of Māori interests, and in a manner that was consistent with Māori views about what was beneficial to them. It was therefore not the supreme and unfettered power that the Crown believed it to be; rather, it was a power that*

<sup>14</sup> Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, 2008) at 173, endorsed in Waitangi Tribunal *Horowhenua: The Muaūpoko Priority Report* (Wai 2200, 2017) at 16.

<sup>15</sup> Waitangi Tribunal *Te Tau Ihu O Te Waka A Maui: Report on Northern South Island Claims – Vol I* (Wai 785, 2008) at 4.

<sup>16</sup> Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua* (Wai 2915, 2021) at 98.

<sup>17</sup> Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua* (Wai 2915, 2021) at 98.

*was conditioned or qualified by the rights reserved to Māori* [underline added by counsel].

24. These findings give a sense of the high degree of engagement demanded of the Crown with Taihape Māori in relation to social services, including in particular education of tamariki Māori in the inquiry district.

### **Crown closing submissions**

25. At paragraph 26, the Crown states that *“The Crown notes that the available evidence, particularly on historic matters, is incomplete in that it often does not provide the background detail relating to the implementation of the Crown’s policies and practices relating to education and social services, including whether public consultation occurred generally, and whether there was specific consultation with Taihape Māori and what their views were. The Crown says this makes it difficult to respond to these issue questions, to the extent they relate to historic matters, with any precision.”*
26. These sentiments are repeated elsewhere in the Crown’s submissions including at paragraphs 59, 66 and 72, including in relation to Taihape Māori concerns and preferences.

### *Reply*

27. The difficulty for the Crown in this argument is that it was the one that ought to have been recording any “background detail”, such as that relating to public consultation and whether there was specific consultation with Taihape Māori in relation to education and other social services, including in relation to their concerns and preferences.
28. That the review of primary and secondary sources by Dr Christoffel has turned up limited evidence is significant.
29. Simply put, claimants have raised issue with the lack of engagement in relation to education and other social services and the Crown has only been able to point to very little of this occurring.
30. It is tenuous to suggest that if Taihape Māori had been consulted or engaged with in some way in relation to education or other social services, that this would not have been specifically recorded in the official record. This would certainly be

surprising if the degree of engagement demanded by Te Tiriti had occurred. Any deficiency in Crown records lies at its own door.

31. The main issue in this respect appears to be that there is often limited to no evidence that the Crown did what it ought to have done.

## **EDUCATION – HISTORICAL POSITION**

### **Crown closing submission**

32. From paragraphs 28 to 34, the Crown addresses the degree of input that Taihape Māori have had in the location, type and curriculum of schools. In particular, the Crown focuses on the setting up of Moawhango school, and Taihape Māori involvement on a school committee and at Taihape school. Counsel highlight the following paragraphs.

*31. The eventual establishment of a general school in 1896 by William Batley (a local settler who offered a building for lessons and free board to a teacher for a year) in conjunction with the Wanganui Education Board does not show the Crown failed to act unequally between Māori and non-Māori. In particular:*

*31.1 The establishment of the general school was consistent with the practice at the time of requiring settler families to provide land and/or school buildings until the need for a school was clearly established.*

*31.2 Acknowledging the record is incomplete, it shows there was much correspondence between the Crown and Moawhango Māori regarding their proposal for a native school, as well as genuine consideration of the proposal, and significant support for it from the Crown. The lack of an agreed site appears to have been the stumbling block. It was not the case that the Crown simply rejected the native school proposal and leapt at the general school proposal. ...*

*32. The subsequent conversion of Moawhango School to a Native school in September 1944 demonstrates the Crown's responsiveness to requests from Taihape Māori regarding their preferences for education in that era. ...*

*33. More broadly, the Crown notes that since 1877 there has been an ability for parents to elect and stand for election on school committees and, later, boards of trustees – both of which were set up to make decisions about the running of schools. School committees were historically active in both native and general schools, and – although there were limitations as to what decisions committees could make – it appears from the evidence that the Moawhango Māori school committee created a very close involvement between the community and the school. Dr Christoffel also indicated the official record appears to*

show extensive involvement by the Māori community in Taihape School during the periods in which it had a predominantly Māori roll. The Crown also notes that, although the historic record is poor, the evidence includes examples of teachers, principals and inspectors taking into account the community's views and preferences.

34. The Crown's position is that this evidence indicates Taihape Māori input into education services historically was more than minimal. The available evidence relating to Taihape Māori raising concerns or preferences about education in the district is limited, as is the Crown's response to them.

### Reply

33. In respect of Moawhango school:

- (a) With respect to equity of treatment, it is difficult to ignore the difference between the significant delay following a Māori request and a school being put in place almost immediately following the offer of a settler. There does not appear to be a basis on which to suggest there was "significant support" from the Crown for the Māori proposal in such circumstances. Counsel note that the settler did not have to put offer title to land in order to have the school started, instead offering a building and board for the teacher.<sup>18</sup>
- (b) The Crown's focus on uncertainty around the site to be offered for the school from Māori, appears to miss the key point. Counsel dealt extensively with the circumstances surrounding the delay with setting up the school in the generic claimant closing submissions and do not propose to repeat these submissions, other than to highlight that Dr Christoffel agreed under cross-examination that there was no evidence in his report that the Crown considered waiving the insistence on getting title to the land before providing a native school.<sup>19</sup>
- (c) Counsel also question the apparent inconsistencies in the Crown's characterisation of the issue with the site offered; at paragraph 31.2 it is suggested that "*The lack of an agreed site appears to have been the stumbling block*" while later at paragraph 102, the Crown states that the delay "*apparently due in part to the time taken to identify an appropriate site and for the land to be titled and subdivided [underline added]*".

<sup>18</sup> Christoffel, *Education, health, and housing in the Taihape Inquiry District, 1880-2013* (Wai 2180, #A41) at 62.

<sup>19</sup> Hearing week seven transcript (Wai 2180, #4.1.15) at 401-402.

- (d) Counsel do not consider it is tenable to suggest that the conversion of Moawhango School to a Native School in September 1944 demonstrates any commendable responsiveness to Taihape Māori educational preferences. This is particularly when one takes into consideration that if the Moawhango school had been set up after Taihape Māori offered a school site as early as 1886, this would have been a native school.
34. Counsel have already dealt with the limited involvement of Taihape Māori on school committees and boards of trustees at length in the generic claimant closings, including analysing the effectiveness of the measures outlined by the Crown above. Counsel will not repeat this again, other than to note that:
- (a) The “extensive involvement” of Māori with Taihape School that the Crown refers to appears to have lasted just five years (between 2000 to 2004)<sup>20</sup> and to have encompassed the period in which Taihape Māori were pushing for a kura kaupapa to be established, which, as the Tribunal will recall, the Crown declined in 2004.<sup>21</sup>
- (b) Importantly, Dr Christoffel in characterising the involvement as such, stated “*I think tangata whenua evidence would give you more insight on that [involvement]*”. Tangata whenua kōrero provides clear evidence of attempts of Taihape Māori to become involved in the education of their tamariki in a meaningful way, often to little or no avail.<sup>22</sup> Counsel also highlight that Dr Christoffel, having considered the evidence, concluded that other than Taihape Māori having some say over the location of two schools, “*their input into the location, type and curriculum of schools has been minimal*”.<sup>23</sup>
35. Even if Taihape Māori’s input into education services historically could be characterised as “more than minimal” as the Crown suggests, “more than minimal” is nowhere close to meeting the Crown’s Te Tiriti duties towards Taihape Māori.

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<sup>20</sup> #A41 at 43.

<sup>21</sup> Brief of evidence of Ngaire Anne Kauika-Stevens dated 19 March 2018 (Wai 2180, #J5), citing in particular [36], [39].

<sup>22</sup> Examples are dealt with and analysed in further detail in generic claimant closings, but counsel highlight by way of example: Brief of evidence of Nicola Chase dated 18 September 2017 (Wai 2180, #G9) at [6]-[42], Brief of evidence of Barbara Thomason dated 12 February 2018 (Wai 2180, #I2) at [19]-[22], see in particular [16].

<sup>23</sup> #A41 at 152.

## **Increasing provision for involvement of whānau, hapū and iwi in education matters**

### *Crown closing submissions*

36. From paragraphs 35 to 41.5, the Crown refers to iwi representatives appointed to the Taihape Area School Board of Trustees, mentions input being sought on aspects of that school's operation and curriculum, views of MOE witnesses on "educationally powerful relationships" particularly with reference to *Ka Hikitia* and *Tau Mai Te Reo*, involvement of Ngā Iwi o Mōkai Pātea Services in aspects of education, the kōhanga reo in the district, and higher level policy development and opportunities to provide input in that respect.

### *Reply*

37. Counsel have already analysed and made submissions on the effectiveness, adequacy and appropriateness of these sorts of opportunities in practice for Taihape Māori in generic claimant closings. There is little to add to this, particularly given that examples highlighted by the Crown include, for example, regional wānanga in 2018 that were not held in the inquiry district, with the closest wānanga being held some distance away, in locations including Palmerston North, Whanganui, and Te Tai Rāwhiti.<sup>24</sup>
38. It appears that Taihape Māori are caught up in a cycle of the Crown preparing its raft of aspirational new programmes, then later throwing its hands up and expressing how it is not sure why these are not having the effect hoped. It is essentially a case of Crown trial and error at the expense of Taihape Māori. Meanwhile, Taihape Māori still remain largely out of the picture, unable to engage with the Crown regarding the education of their tamariki in the way Te Tiriti intends.

## **Request for a kura kaupapa**

### *Crown closing submissions*

39. At paragraphs 42 to 50, the Crown sets out its position in relation to the kura kaupapa. The Crown then goes on at paragraphs 51 to 57 to set out its position on the adequacy of its provision of education in Māori more generally. Counsel highlight the following paragraphs:

<sup>24</sup> Hearing week eleven transcript (Wai 2180, #4.1.19) – Tribunal questions and cross-examination of Ministry of Education officials at 79-81.

49. *There is no record of the decision not to incorporate the request for a kura kaupapa (and the reasons for it) being communicated to iwi, either in relation to the proposal announced in January 2004 or in relation to the final decision on the Network Review. The Crown acknowledges that it failed to communicate its decision not to establish a kura kaupapa at that time (and the reasons for it). However, the Crown's position is that the consultation process was consistent with Tiriti/Treaty principles requiring good faith and informed decision-making on matters affecting Māori interests. The process allowed for Taihape Māori to participate meaningfully and communicate their interests.*

50. *In making its decision, the Crown was required to balance its duty to actively protect te reo Māori, along with other considerations that flow from the Crown's right to govern. The Crown may decide from a number of possible policy options how to give effect to its Tiriti/Treaty obligations provided, in pursuing a particular course of action, it is acting reasonably and in good faith.*

51. *Connected to the above issue is the broader provision of Māori language education in the inquiry district. Taihape Māori have experienced loss and dislocation as their children and whanau have relocated from the region in order to access such education services. This has been a strong feature of the tangata whenua evidence in this inquiry. Evidence in this inquiry has also shown the tireless efforts of tangata whenua to seek and provide te reo Māori education for their tamariki.*

### *Reply*

40. Counsel have already analysed and made submissions on the request by Taihape Māori for a kura kaupapa and the Crown's response in generic claimant closings. Again, there is little to add to this analysis, other than to respond to particular aspects of the points reproduced above.
41. The crux of the issue in this case is with the substantive decision made by the Crown to decline the request for a kura in the circumstances and its continued inaction in this respect.
42. The Crown's duty to actively protect te reo Māori is either met, or it is not. It is not a duty that can be balanced such that it is not given effect to, as counsel submit occurred in respect of this request. This is because while the Crown may elect from a number of possible policy options to address its Te Tiriti obligations, these obligations cannot be said to have been met by the Crown when it:



- (a) Pursued a course of action that saw Taihape Māori being told to work with what they had, which was an incomplete te reo pathway,<sup>25</sup> and not compliant with the Crown's Te Tiriti obligations towards te reo Māori.
  - (b) Later failed to reengage with Taihape Māori about a kura kaupapa, on the basis that it did not receive a further request for a kura,<sup>26</sup> when:
    - (i) Even this incomplete pathway became further reduced with the closure of the Reo Rua unit in 2011.<sup>27</sup>
    - (ii) The evidence indicates that no child at the only full secondary school in the inquiry district receives more than 3 hours of te reo tutoring a day and only 11 Māori students in the inquiry district have access to the kind of learning that would even afford them the opportunity to achieve bilingual outcomes.<sup>28</sup>
43. The Crown's failure to communicate its decision not to establish a kura kaupapa (and the reasons for it) to Taihape Māori, given the gravity of this decision, is deeply concerning. It demonstrates a lack of good faith on the part of the Crown towards its Te Tiriti partner and a disappointing insight into the level of importance seemingly placed by the Crown on its Te Tiriti relationship with Taihape Māori on this occasion.
44. In short, counsel submit that the Crown has taken an inactive approach to its duty to actively protect te reo Māori in this inquiry district. Indeed, it is difficult to reconcile the Crown's approach in this regard with its consistent references to "identity, language and culture",<sup>29</sup> its acknowledgement of the importance of te reo Māori to educational wellbeing and achievement, the negative impacts (such as loss and dislocation) of not having sufficient Māori language education available in the inquiry district, and the MOE's agreement that it needs to work

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<sup>25</sup> Brief of evidence of Ngaire Anne Kauika-Stevens dated 19 March 2018 (Wai 2180, #J5) at [32]-[39], Brief of evidence of Nicola Chase dated 18 September 2017 (Wai 2180, #G9) at [9].

<sup>26</sup> Responses from the Ministry of Education to questions of clarification (Wai 2180 #M27(g)) at 13-14.

<sup>27</sup> Brief of evidence of Tanya Beatty dated 4 May 2018 (Wai 2180, #K12) at [33]-[43].

<sup>28</sup> Appendices to the Brief of Evidence of Iona Holsted and Jann Marshall for the Ministry of Education, dated 18 February 2019 (Wai 2180, #M27(a)) at 68, 84-85. Tau Mai Te Reo at 68 outlines that a minimum of 50 percent formal Māori Language instruction is needed to achieve bilingual outcomes coupled with sustained participation and quality Māori medium education for at least six years.

<sup>29</sup> See for example Appendices to the Brief of Evidence of Iona Holsted and Jann Marshall for the Ministry of Education, dated 18 February 2019 (Wai 2180, #M27(a)), see Principle 4 of Ka Hikitia in EDU 1.

with Taihape iwi and hapū to “*find a solution that delivers quality te reo Māori education*”.<sup>30</sup>

45. When it comes to protecting this taonga, it seems that the difficulty Taihape Māori are consistently faced with is that the Crown has assumed control of making the bed, but Taihape Māori are the ones who have to sleep in it. Counsel question how much more in crisis te reo must be in the inquiry district before the Crown engages with Taihape Māori to rectify the serious gaps in this pathway.

## HEALTH

### Role for Taihape Māori in delivery health services

#### *Crown closing submissions*

46. At paragraph 59, the Crown points to evidence it says “*demonstrates that Taihape Māori did have opportunities to participate in the design, establishment, management, and implementation of healthcare policy and services in a number of ways*”.
47. In particular at paragraphs 59.1 to 59.10, the Crown refers to Māori councils, Native Health inspectors, Native Health Nurses, provision of hutments for tuberculosis, tribal executives and committees, the Māori Health Committee, the formation of a Māori Health Project team and Oranga Māori team, increasing employment of Māori community health workers, the Ōtaihape Māori Komiti work, the introduction of Māori scholarships to draw Māori into mental health training and adoption of Māori centred protocols in patient assessment and therapies and development of kaupapa Māori health services.
48. At paragraph 60, the Crown submits that “*the changing nature of the role for Taihape Māori in the management and delivery of healthcare services across time reflects changing demographics and prevailing philosophies. [...] The subsequent call for a new approach in light of on-going health disparities between Māori and non-Māori led to “the importance of Maori cultural beliefs and practices to good health outcomes [becoming] part of the health agenda” in the 1970s and then to specific provision for Māori input being reflected in the 1980 reforms*”.

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<sup>30</sup> See for example #3.3.87 at [8], [51], [52], [56].

49. The Crown goes on to submit at paragraph 61 that today “*Māori have significant opportunities for input into matters relating to their health and well-being, including in the development of health policy. For example, in order to recognise and respect the principles of te Tiriti/the Treaty, the New Zealand Public Health and Disability Act 2000 provides for a range of mechanisms to enable Māori to contribute to decision-making in relation to, and to participate in the delivery of, health and disability services*”. At paragraph 67 the Crown submits that designing and providing health care services is a complex matter and that “*various initiatives have been (and continue to be) developed which constitute the best endeavours of policy developers and decision makers at that point in time [...]*”.
50. The Crown submits at paragraph 62 that, in relation to Taihape Māori specifically, “*there are a range of initiatives that enable them to be involved in the management and delivery of health and well-being services. For example, Mōkai Pātea Services Trust work with other groups to provide an extensive range of services, including Tamariki Ora/Kaiāwhina Well Child services, Kaupapa Māori Community Mental Health, midwifery, and smoking cessation programmes. The Whānau Ora model has had significant impacts in this space*”. The Crown goes on to highlight recent reforms that have not been the subject of evidence in this inquiry at paragraph 63.

#### *Reply*

51. In response to paragraphs 59 and 59.1 to 59.10:
- (a) Counsel have already addressed the limitations faced by Māori councils due to lack of government funding, the limited health related functions of tribal executives and committees, the lack of Native Health Nurses based in the inquiry district, and the work of the Ōtaihape Māori Komiti (now Ngā Iwi o Mōkai Pātea Services Trust) in generic claimant closings.
  - (b) Counsel are not aware of any evidence to suggest that Taihape Māori were in any way involved with the Māori Health Standing Committee (which appears to be what is referred to), or the Māori Health Project Team, or the Oranga Māori team.

- (c) To conclude in respect of the initiatives listed at paragraphs 59.1 to 59.10, beyond the Kurahaupo Māori Council, three tribal committees based in the inquiry and the involvement of Ngā Iwi o Mōkai Pātea Services Trust in healthcare since the early 1990s, it is unclear how the remainder of these could be said to have provided Taihape Māori with opportunities to participate in the design, establishment, management, and implementation of healthcare policy and services.
52. In response to paragraph 60, counsel say that “prevailing philosophies” in relation to Māori involvement in healthcare should not be seen as a mitigating factor. The Crown’s Te Tiriti obligations were extant from 6 February 1840. That it took until the 1980s for “specific provision” to be made for Māori input (and apparently even longer for Taihape Māori) is a concerning insight into the lack of consultation and engagement by the Crown with Māori, including Taihape Māori, prior to this point.
53. In response to paragraphs 61 and 62, counsel say:
- (a) Generic claimant closings analyse tangata whenua evidence that sheds light on the barriers to Taihape Māori being involved in the health workforce and contributing towards the health of their people,<sup>31</sup> which does not appear to have been engaged with by the Crown.
- (b) In respect of the Crown’s reference to the opportunities for involvement in health and disability services arising from the Public Health and Disability Act 2000, counsel note the Tribunal in the *Hauora* report for the Health Services and Outcomes Kaupapa inquiry analysed that Act’s Te Tiriti provisions and the scope for Māori involvement. These findings indicate that present arrangements do not in fact provide Te Tiriti-compliant opportunities for Māori decision-making and participation, with the Tribunal finding that the New Zealand Public Health and Disability Act 2000 “*does not give proper and full effect to the Treaty or its principles, and is not Treaty-compliant*”.<sup>32</sup> Counsel highlight the following from that report:<sup>33</sup>

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<sup>31</sup> Generic claimant closings at [6.4(f)] and [6.4(g)].

<sup>32</sup> Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 162.

<sup>33</sup> Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 97.

*The arrangements providing for Māori representation on district health boards in particular do not afford Māori Treaty-consistent control of decision-making in relation to health care design and delivery.*

*Similarly, the ways in which district health boards have variously interpreted their obligations under sections 22 and 23 do not work consistently to afford Māori Treaty-compliant control of decision-making in relation to health care design and delivery. In particular, the lack of specific provision for Māori relationship boards and the variable effectiveness and oversight powers of those boards are not Treaty-consistent.*

- (c) While there has been improvement in the roles Taihape Māori have been able to play since the 1990s, it remains the case that, for an extended period of time, little to no role was provided by the Crown for Taihape Māori in relation to provision of health services, despite there evidently being an appetite amongst Taihape Māori (demonstrated for example through involvement in the Kurahaupo Māori council and through the work of the Ōtaihape Māori Komiti/Ngā Iwi o Mōkai Pātea Services Trust).

## **Response to particular concerns or preferences regarding healthcare**

### *Crown closing submissions*

54. The Crown sets out the background to the closure of Taihape Hospital in 2010 and asserts at paragraph 66 that *“there is no evidence of the principle of equal treatment having been compromised in these events and that the current arrangements for health services for Taihape Māori are reasonable in light of these contextual factors”*.
55. The Crown goes on to assert at paragraph 69 that today *“Taihape Māori have a range of processes through which they can raise concerns regarding the development, implementation, and provision of healthcare services. Raising issues directly with the Ministry of Health, DHBs, or specific healthcare providers is a clear option. Other processes include: 69.1 the Health and Disability Commissioner; 69.2 complaining to professional standards bodies, such as the Medical Council of New Zealand, the Nursing Council of New Zealand, and the Dental Council; and 69.3 District Inspectors of Mental Health”*.

*Reply*

56. In response to paragraph 66, relating to Taihape hospital:

- (a) The closure of Taihape Hospital was just one aspect of the difficulties faced by Taihape Māori in accessing health services. The crux of the issue regarding access relates to the cumulative effect of difficulties in accessing health services, including those arising in relation to Taihape hospital, rather than the closure of that service alone. As discussed in generic claimant closings, the effect of these was that Taihape Māori were disadvantaged to a greater degree than non-Māori.<sup>34</sup>
- (b) Indeed, as set out in Dr Christoffel's evidence, the main consideration of healthcare provision, as in the case of Taihape hospital, appears to have been the needs of settlers, which was a consistent pattern throughout most of the 20th century, with minor exceptions.<sup>35</sup> This is clearly inequitable.

57. In response to paragraphs 69 to 69.3:

- (a) The Crown elected not to lead evidence in relation to health services, including in relation to contemporary options for Taihape Māori to raise their concerns and preferences in relation to health services.
- (b) Counsel are not aware of evidence on the record that addresses the efficacy or otherwise of mechanisms available to raise concerns or preferences directly with the Ministry of Health, through DHBs or specific health providers. Counsel also note that the range of processes referred to by the Crown appear to be more related to complaints or concerns individuals might wish to raise about individual providers,<sup>36</sup> rather than avenues through which to express overarching concerns or preferences for Taihape Māori more generally.

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<sup>34</sup> Generic claimant closings at [7.17].

<sup>35</sup> #A41 at 254.

<sup>36</sup> For example, it is anticipated that professional standards bodies would be assessing the conduct of a particular provider against the professional standards of that profession.

## EDUCATION-SPECIFIC ISSUES

### Extent cultural assimilation guided state-run education

#### *Crown closing submissions*

58. At paragraph 75, Crown closing submissions record:

*The evidence in this inquiry does not provide a detailed analysis of assimilation and whether there was an assimilationist agenda inherent in the education that Taihape Māori received. The expert historian evidence on the record of inquiry provides a historical overview and the Crown urges the Tribunal to take a cautious approach in using the evidence to make findings that go beyond this.*

#### *Reply*

59. Counsel made substantial submissions on the question of assimilation that Crown has not engaged with.

60. Counsel do not propose to repeat these submissions other than to note that there is a wealth of evidence from tangata whenua relating to assimilation in education and to highlight the comments of expert historian Dr Christoffel. Significantly, these indicate his view that there was an assimilationist agenda inherent in the education received by Māori and further confirm he would defer to tangata whenua terms of how they had experienced that schooling system:<sup>37</sup>

*I think it's hard to dispute that you know the whole colonial enterprise had a strongly assimilationist agenda behind it and even before 1840 the missionaries were keen to impose you know what they saw as civilised values on Māori.*

*... There was already a system of Māori education established under the Native Schools Act and that did have a lot of overtly assimilationist aspects to it. In the main the general school system really tended to ignore Māori and in that sense it was assimilationist in that it ignored Māori language and culture.*

*Q. Yes, yes, and so of course when it comes to those practical experiences those will be something for the tāngata whenua and that's something you'd defer to them on in terms of how they've experienced those schooling systems of course?*

*A. Absolutely, yes.*

61. The caution urged by the Crown in this respect thus appears unwarranted. Counsel encourage the Tribunal to make findings in relation to assimilation,

<sup>37</sup> Hearing week seven transcript (Wai 2180, #4.1.15) at 400, 425, 426.

based on answers arising from cross-examination of Dr Christoffel and the evidence of tangata whenua, and with the findings in recent Tribunal decisions in mind.<sup>38</sup>

### **Integration of Māori culture and te reo Māori into schools**

#### *Crown closing submissions*

62. At paragraph 85, the Crown submits that “*the evidence demonstrates that from the 1930s there was increasing integration of Māori culture and te reo Māori into schools, particularly those schools with significant Māori student numbers.*” Thereafter, the Crown goes on to list examples.

#### *Reply*

63. Counsel have already analysed the integration of culture and te reo into the education system for Taihape Māori, and do not propose to repeat analysis. Counsel do highlight, however, that there does not appear to be any submission by the Crown that the degree of integration was in any way Te Tiriti compliant.

### **Extent of restricted curricula choices**

#### *Crown closing submissions*

64. At paragraph 87, the Crown sets out that “*there appears to be limited evidence on the ways in which Taihape Māori have historically been involved in the design of curricula and its delivery [...]*”.

#### *Reply*

65. Further to submissions made above, counsel note there is an important nuance here, namely the distinction between there being limited evidence about an issue and there being limited evidence that something that ought to have been done, was done. The latter is the case in respect of the current matter, and counsel have already addressed the degree of input Taihape Māori had into the design of the curricula and its delivery above at [33] to [35].

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<sup>38</sup> For further information in this regard, see the generic claimant closings, including at [6.14(d)], [6.39].



### **Extent curricula encouraged Taihape Māori into specific vocations**

#### *Crown closing submissions*

66. At paragraph 95 the Crown submits that “[...] *the evidence presented in this inquiry does not support a conclusion that the curriculum for Taihape Māori, in particular, was restricted in a way that sought to limit the vocational opportunities available to them as a group. Rather, the evidence shows that throughout the 19th and early 20th century teaching focused on matters relevant to students and work available in the New Zealand economy at the time and that practical vocational skills were taught to Pākehā students as well, particularly agricultural skills in rural areas*”.

#### *Reply*

67. Counsel conducted an analysis of and made submissions on restricted curricula in generic claimant closings and do not propose to take this further other than to make the following observation.
68. A key issue with the Crown’s submissions is that these sidestep some of the important practical effects of the education provided and the attitudes of educators towards Māori, including issues with racism and biases. Indeed, as the Crown acknowledges at paragraph 108, citing MOE evidence, *“the state education system has not sufficiently valued Māori cultural understandings and has had consistently low expectations of tamariki and rangatahi Māori”*.

### **Circumstances of financial or other resource contributions for education**

#### *Crown closing submissions*

69. From paragraphs 96 to 103, the Crown sets out financial or other resource contributions received from settlers and Māori in the inquiry district. In concluding, the Crown submits:

*104. As these examples show, it was therefore not quite so simple in all cases that Taihape Māori were required to provide land (and other resources) for their children’s schools but non-Māori were not. In addition, Māori were not restricted to attending Māori or native schools. Though the Crown acknowledges that there were some legislative differences as to contributions required for the establishment of native and general schools, this did not necessarily lead to major differences in reality.*

*105. Other than the fact Māori in the district generally lived further away from schools and therefore have a greater financial barrier to accessing education, there is very little*

*evidence of funding and resource differentials. The Crown also notes there have been measures to reduce such disparities, such as Māori scholarships, assistance with boarding costs and free rail passes.*

70. The Crown deals with the Owhaoko endowment, at paragraphs 97 to 100. Counsel address the following paragraphs and footnote 190 in particular:

*100. Perhaps not surprisingly given this experience [the school closing within about five years], in 1891 when he was asked about Māori setting aside land to endow schools, Mōkai Pātea Chief Hiraka Te Rango replied:*

*I do not approve of that. ...My objection is this: that, if I own certain land, why should I give it up for the purpose of providing education for other people's children? ... It is all right to give up land for my own child, but to give it up for the children of other people, I cannot see why I should do it. My hapu has set apart some land for school purposes. ...The Owhaoko school reserve was given as an endowment for the school Renata Kawepo set that land apart for school purposes, and yet there is no school established. It was one year at Omahu, and we do not know what has become of the money.*

[Footnote] 190 Wai 2180, #A43, at 451. Mr Stirling appears to accept that “the people of Mokai Patea were apparently sending their children to live at Ōmahu, in order to attend the Ōmahu Native School”, but then subsequently suggests that the fact that Pakeha parents objected to Māori boarders at the School meant that children of Taihape Māori were likely precluded from attending the School and therefore neither they nor their parents derived any benefit from the Ōwhāoko endowment. These appear to be inconsistent positions.

### *Reply*

71. Counsel have already analysed requirements for financial or other contributions in generic claimant closings. There does not appear to be anything add to this other than to say that:
- (a) The significant delay in setting up Moawhango school, apparently due to the Crown's insistence on receiving title to the site before a school could open, suggests that there were some important differences in reality. In this case, these differences led to Taihape Māori being without access to education for a substantial period of time, despite their requests, and

can be contrasted with settler successfully having the school opened within a year or so without providing title to land.<sup>39</sup>

- (b) In respect of differences in funding and resourcing in education, the differences between the support provided to native school committees versus general school committees is another good example,<sup>40</sup> and counsel highlight the Government's decision to suspend university scholarships for Māori for approximately a decade until 1920.<sup>41</sup>
- (c) In respect of the Owhaoko endowment, counsel submit that this is another good example of the significant interest Taihape Māori had and continue to have in being involved in the education of their tamariki. Further, taking the quote of Hiraka Te Rango together with the evidence of Mr Stirling in footnote 190, there appears to be no apparent inconsistency between the statements of Mr Stirling, as the Crown suggests. Rather, the evidence taken together suggests that children from Taihape may have been *sent to attend* the school but that *did not eventuate* because Pākehā parents objected to Māori boarders at the school. These difficulties are also eluded to in Dr Christoffel's evidence that "*Omahu School provided board for a few Pakeha students, and Renata Kawepo argued that it should provide board for Maori students too. It is unclear that it ever did*".<sup>42</sup> Indeed, Hiraka Te Rango's reluctance appears less concerned with an early school closure and more with the endowment being used for children of others.

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<sup>39</sup> #A41 at 62.

<sup>40</sup> See generic claimant closings at [6.46(c)].

<sup>41</sup> Hearing week seven transcript (Wai 2180, #4.1.15) at 410-412.

<sup>42</sup> #A41 at 154, footnote 604.

## URBANISATION, URBAN MIGRATION AND DISPERSAL FROM HOMELANDS

**Did Crown policy regarding social services influence moves away from ancestral lands? What were some of the socio-economic effects Taihape Māori experienced as a result of moving away from their ancestral lands? Was the Crown under any obligation to mitigate these effects?**

*Crown closing submissions*

72. At paragraphs 110 to 114, the Crown focuses on factors influencing urban migration and submits the Crown “*did not initiate or control this historical (and global) movement, nor could the Crown realistically suppressed or reversed it*”.
73. At paragraph 113, Crown acknowledges significance of tūrangawaewae to Taihape Māori. At paragraph 114, the Crown goes on to state:

*To the extent that urbanisation did have a negative impact, the Crown submits that the Treaty does not impose any general duty on the Crown to mitigate any such effects, although the range of socio-economic policies and initiatives developed and implemented by the Crown is motivated in part to reduce adverse impacts of those demographic trends.*

*Reply*

74. These submissions fail to acknowledge the pivotal role that the Crown had in wresting this tūrangawaewae from Taihape Māori.
75. In particular, these side step the catastrophic effect that Crown acts and omissions had on land retention, including through the introduction and implementation of the Native Land Court and Crown purchasing, which left many Taihape Maori with insufficient land, impoverished, and disempowered and with limited choices other than leaving the inquiry district. These issues are addressed in various generic claimant closing submissions.

## POLICY EFFECTS

**Did Crown policy, acts or omissions contributed to or facilitated impoverishment within Taihape Māori communities**

*Crown closing submissions*

76. At paragraph 116, the Crown states “*There is limited evidence which provides analysis of the causal link between Crown policies, actions or omissions and*

*impoverishment with Taihape Māori communities. Dr Christoffel comments that “[a] diminishing pool of land and an inability to develop what land was left all contributed to Maori poverty.” He noted under cross-examination that land loss was not “necessarily the only cause of poverty”, but that it was “a significant factor”. Dr Christoffel also refers to the effects of high unemployment and low wages being seen in poverty during the Depression of the 1930s. The Crown notes the impacts of that Depression were not particular to Māori”.*

77. At paragraph 118, the Crown goes on to state “[a]s Dr Christoffel accepted, impoverishment is influenced by a range of factors. The Crown is not able to control or influence all of these factors. For this reason, the Crown says assessing the causation of impoverishment is inherently difficult and, accordingly, submits that caution is required in assessing any claims concerned with impoverishment”.

#### *Reply*

78. Counsel repeat the submissions made at paragraphs [74] and [75] above and refer again to the generic claimant closings, which provide an analysis of causation and Crown culpability with reference to the evidence.<sup>43</sup>
79. Counsel also note that the fact that land loss was termed a “significant factor” by expert historian Dr Christoffel suggests a clear causal link can be drawn between Crown acts and omissions and the position of Taihape Māori.

**Did Crown social and economic policies lead to a breakdown of family and social structures for Taihape Māori? Where Crown social and economic policies can be shown to have negatively affected Taihape Māori social cohesion, what obligation does the Crown have to remedy these outcomes and how is fulfilment of its obligations appropriately assessed?**

#### *Crown closing submissions*

80. At paragraph 121, the Crown submits that “*the preservation of tribal identity is not a matter within the Crown’s responsibility and control: iwi identity is a matter for iwi, hapū, and whānau to determine. These are matters that are internal to the relevant group. As the Tribunal has found previously: How and why Māori*

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<sup>43</sup> Generic claimant closings at [6.64] to [6.73].

*choose to affiliate is no business of the Crown: at least in the sense that it is no part of the Crown's role to seek to influence that choice".*

81. At paragraph 123, the Crown refers to the Tribunal in the Wairarapa ki Tararua inquiry declining to make a finding in relation to tribal identity and noting the difficulty in determining Crown culpability. The Crown then expands on this position in terms of the identity of Taihape Māori.

*Reply*

82. In short, Te Tiriti obligations will arise if the Crown has caused or contributed to the erosion of a particular tribal identity and at least one previous Tribunal decision has made findings of Te Tiriti breach in relation to this matter. This is consistent with both the principles of active protection, equity, and redress.<sup>44</sup>

83. In particular, this occurred in a more recent report than the Wairarapa ki Tararua decision, in the Te Rohe Pōtae inquiry. Counsel highlight the following points in particular:

- (a) The Tribunal stated “[w]e agree with other Tribunals that it is the business of Māori to decide whether a group has iwi or hapū status. That said, the Crown's role can be quite influential”. The Tribunal went on to set out examples of this.<sup>45</sup>
- (b) In respect of two, but not all claims made in relation to tribal identity in that inquiry, the Tribunal found that the Crown had “acted inconsistently with the principle of equal treatment by failing to respect the identity” of those groups.

84. Counsel will leave it to individual claims to expand upon this matter further.

**Dated** this 27<sup>th</sup> day of September 2021

  
 P Johnston / E Martinez

<sup>44</sup> With respect to redress, counsel note the Tribunal's finding in *Te Mana Whatu Ahuru* at 189 “Should the Crown act in excess of its *kāwanatanga* powers, or should it breach the Treaty's terms in any other way by act or omission resulting in prejudice, the Crown should compensate.”

<sup>45</sup> Waitangi Tribunal *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae claims – Part V* (Wai 898, 2020) at 85-86.