

**IN THE WAITANGI TRIBUNAL
HEALTH SERVICES AND OUTCOMES KAUPAPA INQUIRY**

**WAI 2575
WAI 2109**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575)

AND

IN THE MATTER of a claim by Maaka Tauranga Tibble for himself and on behalf of all Kapo Maori (Maori blind, vision impaired and deaf blind persons) and their whanau and Kapo Maori Aotearoa/New Zealand Incorporated (Wai 2109)

AMENDED AND PARTICULARISED STATEMENT OF CLAIM FOR WAI 2109

Dated: this 12th day of December 2019



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The claimants by their solicitors say:**1. INTRODUCTION**

- 1.1 This Amended Statement of Claim (“**ASOC**”) is filed for Mr Maaka Tauranga Tibble for himself and on behalf of all Kapo Maori (Maori blind, vision impaired and deaf blind persons) and their whanau and Kapo Maori Aotearoa/New Zealand Incorporated (“**Kapo Maori Claimants**”).
- 1.2 The named claimant, Mr Maaka Tibble, is of Maori descent and brings this claim against the Crown.
- 1.3 This claim is supported by Kapo Maori Aotearoa/New Zealand Incorporated (“**Kapo Maori Aotearoa**”). Kapo Maori Aotearoa was initially formed in 1983 by Kapo Maori and their whanau and was formally registered as an Incorporated Society in 1991.¹ It is a Maori owned, governed and managed organisation that provides support and advice for Kapo Maori and their whanau across Aotearoa/New Zealand.
- 1.4 Kapo Maori Aotearoa support members and their whanau to attain individual and whanau self-determination in accordance with whanau ora health and well-being outcomes. This extends to advocating for and on behalf of Kapo Maori and their whanau with the Crown, non-government agencies and iwi regarding Kapo Maori health inequity and inequality.
- 1.5 The terms “Maori living with disabilities” and “Maori with disabilities” have been avoided in this ASOC due to their possible negative connotations. Instead, the term “Tangata whaikaha”, meaning “people determined to do well”, has been used. This phrase is empowering and enhances mana, and is therefore considered to be a more appropriate term. For the purposes of this ASOC, “Tangata whaikaha” will be solely used to refer to Maori Tangata whaikaha.
- 1.6 This ASOC amends the earlier Statement of Claim filed for the Kapo Maori Claimants in the Waitangi Tribunal dated 27 August 2008 and registered as Wai 2109.²

¹ At the time of the original statement of claim for Wai 2109 filed on 27 August 2008, the organisation was registered as Ngāti Kapo (Aotearoa) Incorporated.

² Wai 2109, #1.1.1.

2. THE CLAIM

- 2.1 In Te Ao Maori, Maori with conditions such as limited vision, were generally viewed as valuable members of their whanau, hapu and iwi. The focus was on valuing the strengths and abilities they possessed.
- 2.2 Traditionally, Maori with vision impairments were likely to have been embraced within their whanau, and most, if not all, lived within communities on their marae.
- 2.3 Crown acts and omissions have left Tangata whaikaha in a dire situation, in terms of their health, their wellbeing, and their ability to live full and active lives among their whanau, hapu and iwi.
- 2.4 The claim of the Kapo Maori Claimants highlights the situation faced by Tangata whaikaha, including in particular Kapo Maori.
- 2.5 In particular, the claim addresses:
- (a) The failure by the Crown to ensure an adequate role was and is provided for Tangata whaikaha in the design, establishment, management, and implementation of policies and services affecting Tangata whaikaha.
 - (b) The lack of health research and data available regarding Tangata whaikaha, which has in turn impeded the Crown's ability to develop and provide appropriate health, disability and other welfare policies, strategies and services for Kapo Maori.
 - (c) How the health and disability services provided to Kapo Maori have generally been inadequate and inappropriate, including those services that resulted in the institutionalisation of Kapo Maori, and the alienation and separation of Kapo Maori from their whanau, hapu and iwi.
 - (d) How Kapo Maori, as a group of Tangata whaikaha:
 - (i) face significant barriers to accessing required health and disability services;

- (ii) have significantly worse health status than both non-Maori and Maori generally, being disproportionately over-represented in relation to virtually all, if not all, negative health statistics; and
- (iii) are disproportionately over-represented in negative socioeconomic statistics.

3. THE TREATY

3.1 By Te Tiriti o Waitangi / the Treaty of Waitangi (the “**treaty**”)³, the Crown:

- (a) promised to protect the rights guaranteed by the treaty and perform the obligations arising out of the treaty;
- (b) confirmed and guaranteed to Maori their tino rangatiratanga including the full, exclusive and undisturbed possession of their whenua, estates, forests, fisheries, other properties, rivers, waterways and taonga; and
- (c) extended to Maori all the rights and privileges of British subjects.

3.2 The principles of the treaty relevant to the Kapo Maori Claim include the following:

- (a) Partnership: the treaty imposed on both treaty partners an obligation ‘to act towards each other reasonably and with the utmost good faith’. The principle of partnership involves a balancing of the concepts of kawanatanga and tino rangatiratanga.⁴
- (b) Active protection: the Crown has an obligation to actively protect Maori tino rangatiratanga. This should afford Maori, through their iwi, hapu or other organisations of their choice, the right to decision-making power over their affairs.⁵ The Tribunal in its report for the Napier Hospital and Health Services inquiry found that the principle of active protection includes the Crown’s responsibility to actively protect Maori health and wellbeing through the provision of health services.⁶

³ Hereafter, when referring to both the te reo Māori and English versions, counsel will refer to “the treaty” in the lower case as per: Waitangi Tribunal *He Whakaputanga me te Tiriti – The Declaration and the Treaty* (Wai 1040, 2014) at 11.

⁴ Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 27-28.

⁵ Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 30.

⁶ Waitangi Tribunal *Napier Hospital and Health Services Report* (Wai 692, 2001) at 30, 53.

- (c) Equity: the Crown has an obligation to give equitable treatment to Maori to ensure fairness and justice with other citizens.⁷ In the Napier Hospital and Health Services report, the Tribunal found that Māori also have a right to equal⁸ standards of healthcare and to general equality of health outcomes.⁹
- (d) Options: as treaty partners, Maori have the right to choose their social and cultural path.¹⁰

3.3 The Kapo Maori Claimants have been prejudicially affected by Crown acts and omissions, including in relation to the development and implementation of health and disability policies, strategies, and services, since 1840.

3.4 These acts and omissions were and are inconsistent with the principles of the treaty. The principles of the treaty include its terms.

4. FIRST CAUSE OF ACTION: PROVISION FOR OR INVOLVEMENT IN DESIGN, ESTABLISHMENT, MANAGEMENT AND IMPLEMENTATION OF POLICIES AND SERVICES

4.1 In breach of its duties arising from the treaty, the Crown:

- (a) Failed to adequately provide for and actively protect the tino rangatiratanga of Maori (including Kapo Maori) in the design, establishment, management, and implementation of health and disability policies and services.¹¹
- (b) Failed to actively protect the ability of Maori (including Kapo Maori) to promote the wellbeing of their people, including their care and welfare.¹² This includes through failing to adequately provide for the ability of Maori to choose how to organise themselves, and failing to work through structures Maori prefer when it comes to health and disability services.¹³

⁷ Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 33.

⁸ See further discussions in the Te Urewera report regarding the concept of equity, as compared with equality – Waitangi Tribunal *Te Urewera Report Vol VIII* (Wai 894, 2017) at 3774, 3873.

⁹ Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxvii.

¹⁰ Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 35.

¹¹ Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28-29.

¹² Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxv, xxvi.

¹³ Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 28.

- (c) Failed to:¹⁴
- (i) ensure that Maori (including Kapo Maori) voices were and are adequately heard in relation to the design, management and delivery of health and disability services;
 - (ii) allow Maori (including Kapo Maori) perspectives to influence the type of health and disability services delivered to Maori people (including Kapo Maori) and the way in which they are delivered; and / or
 - (iii) empower Maori (including Kapo Maori) to design and provide health and disability services for their people.

Particulars

Involvement in design, establishment, management and implementation of policies and services

4.2 Overall, the Crown's approach to Maori health and wellbeing, and to disability in particular, has failed to acknowledge the self-determination rights of Maori.

4.3 Kapo Maori have not been adequately involved in the design, establishment, management and implementation of policies and services affecting Tangata whaikaha for an extended period of time. There has been insufficient opportunity for these perspectives to influence the type of health and disability services delivered to Kapo Maori, and the way in which they are delivered. In particular:

- (a) The Crown has failed to ensure sufficient opportunities were and are provided for Tangata whaikaha, including Kapo Maori, to develop, establish, and sustain Maori approaches in relation to disability.
- (b) The Crown has failed to ensure sufficient opportunities were and are provided for Tangata whaikaha, including Kapo Maori, to contribute effectively and strategically to the health and disability services and support provided to them, or about their treatment and care.

¹⁴ Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxvi, xxviii.

- (c) The Crown has failed to ensure that overarching guidance regarding the treaty principles in policies and strategies is given effect to through corresponding requirements or structures, such that Kapo Maori are adequately involved in health and disability decision-making.
- (d) The Crown has failed to adequately include Kapo Maori or Kapo Maori Aotearoa in the development of government policy in a decision-making capacity.
- (e) The Crown has failed to ensure that district health boards (“**DHBs**”) provide sufficient opportunities for Tangata whaikaha, including Kapo Maori, to be involved in organisational decision-making in a meaningful way. For example:
 - (i) There are no Maori board members with disabilities on DHB boards in Aotearoa.
 - (ii) Most DHBs have the minimum number of Maori board members.
 - (iii) Where support is provided to participate in governance and decision making for Tangata whaikaha, this is limited to physical accessibility.
 - (iv) DHBs do not have policies to support Tangata whaikaha to participate in formal decision making.
 - (v) DHBs are passive in involving Tangata whaikaha.
- (f) The Crown has failed to ensure that Crown health agencies adequately involved Tangata whaikaha in organisational decision-making.
- (g) The Crown has failed to ensure that Tangata whaikaha, including Kapo Maori, are adequately represented across government departments and agencies involved in the provision of health and disability services. In particular:
 - (i) The Crown has failed to ensure that Tangata whaikaha are appropriately represented within DHBs and the DHB workforce.

- (ii) The Crown has failed to ensure that Maori, including Tangata whaikaha, are appropriately represented amongst Ministry of Health staff.
 - (iii) The Crown has failed to ensure adequate representation of Maori, including Tangata whaikaha in health professions.
- (h) The Crown has failed to adequately inform itself of the position of Tangata whaikaha, including in particular, Kapo Maori. There is limited, if any, effective engagement of the Crown with Tangata whaikaha, including Kapo Maori, in terms of reform or policy changes.
- (i) The Crown has failed to ensure that DHBs engage or consult appropriately with Tangata whaikaha, including Kapo Maori. In particular:
- (A) DHBs generally make high level statements about the treaty that do not translate into policies and practices.
 - (B) There is very little evidence of DHBs consulting with Tangata whaikaha.
 - (C) Participation of Tangata whaikaha groups such as alliance leadership teams, consumer groups, or clinical governance, is rare or non-existent.
 - (D) Often people living with disabilities are not involved in key advisory or operational groups. Where people living with disabilities are involved, or recruited, there is generally no particular attention paid to Maori within that group.
- (j) The Crown has failed to adequately recognise and incorporate Maori frameworks of disability and identity despite these having been theorised and developed by Maori scholars over time.

Provision for the ability of Tangata whaikaha, including Kapo Maori, to promote the health and wellbeing of their people

4.4 The Crown has failed to:

- (a) actively protect the ability of Kapo Maori to promote the health and wellbeing of their people;
- (b) adequately empower Kapo Maori to design and provide health and disability services to their people; and
- (c) provide for the ability of Kapo Maori to be self-determining.

4.5 Instead, through its acts and omissions, the Crown has restricted the ability and opportunities for Maori, including Kapo Maori, to develop, establish and sustain their own approaches to disability.

4.6 In terms of resourcing and support for Maori health and disability support providers:

- (a) The Crown has failed to ensure that sufficient resourcing is provided to Maori providers of health and disability support services that is equitable and/or proportionate to the scale of health inequities for Tangata whaikaha. For example:
 - (i) Only a small percentage of disability support service providers are Maori owned and governed.
 - (ii) Tangata whaikaha are able to access Maori providers for some, but not all of their health and/or disability needs, as DHBs only contract Maori providers for a subset of health and disability services.
 - (iii) With respect to DHBs:
 - (A) The amount of total Maori health provider funding from DHBs is very small compared with total DHB funding, and has increased at a slower rate than non-Maori providers overall.

- (B) DHBs do not adequately track the funding they provide to services delivered by Maori-run health and/or disability support providers for Tangata whaikaha.
 - (C) DHBs do not interrogate their funding to analyse whether or not Tangata whaikaha receive appropriate health care funding.
 - (D) Tangata whaikaha are least likely to receive equitable funding increases.
- (b) The Crown has failed to ensure that there is sufficient resourcing and support, and quality of advice provided to bodies representing the interests of Tangata whaikaha. Further, groups that do exist are not always involved in decision-making directly relating to matters affecting Tangata whaikaha.

4.7 In terms of barriers for the effective operation of Maori health and disability service providers, the Crown has failed to take steps necessary to address these. Barriers include systemic barriers affecting Maori providers to a greater degree than non-Maori providers. These include:

- (a) Inadequate and insufficient funding from Crown funding allocations and mechanisms. When responsibilities increase, funding generally does not.
- (b) Restrictive contracting (including, for example, generally shorter contract periods than for non-Maori providers), making planning more difficult.
- (c) Multiple contracts with different agencies, increasing monitoring and compliance requirements.
- (d) Misunderstandings about “kaupapa Maori services” by Crown agencies.
- (e) An under-developed and under-paid workforce.
- (f) Being more frequently audited than non-Maori providers.
- (g) For Kapo Maori Aotearoa in particular:

- (i) Resourcing is an ongoing issue and a constant challenge. While today there is greater awareness of the needs of Kapo Maori, adequate resourcing for services has not been forthcoming.
- (ii) The funding for Kapo Maori Aotearoa has not increased in line with the increased services Kapo Maori Aotearoa provides for Kapo Maori, in line with inflation, or in line with increasing overheads.
- (iii) Funding fails to recognise the cultural competence of Kapo Maori Aotearoa in valuing it as a service provider.
- (iv) Funding often requires annual application, meaning it is harder to develop longer term initiatives and negotiate service provider contracts for longer periods.
- (v) The time commitment to apply for annual grants is significant and there is an almost constant lack of certainty over whether operation will remain feasible.
- (vi) Various reporting accountabilities are all different and time consuming.
- (vii) Multiple audits take significant time and resources.
- (viii) It is an ongoing challenge to ensure the voice of the community of Kapo Maori is heard and respected by the Crown.

5. SECOND CAUSE OF ACTION: ADEQUACY AND APPROPRIATENESS OF HEALTH AND DISABILITY SERVICES PROVIDED TO KAPO MAORI

5.1 In breach of its duties arising from the treaty, the Crown:

- (a) Failed to actively protect Kapo Maori health and wellbeing through the adequate and appropriate provision of health and disability services.¹⁵
- (b) Failed to take reasonable steps to ensure Maori (including Kapo Maori) received equitable standards of health and disability care as compared with non-Maori.¹⁶

¹⁵ Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at 53.

- (c) Failed to actively protect Maori culture and various components of customary health knowledge and healing practices of Maori in relation to health and disability care. This includes failing to take reasonable and appropriate steps to ensure the respect of Maori culture by medical professionals and within medical institutions such as hospitals.¹⁷
- (d) Failed to protect the mana, taonga and the culture, lore and customs of Maori, including Kapo Maori, within the health and disability system. This includes failures to actively protect te reo Maori.¹⁸

Particulars

5.2 In general, the health and disability services provided through and by the Crown to Kapo Maori have been inadequate and inappropriate.

Particular position of Kapo Maori Claimants

5.3 The Crown has failed to ensure that health and disability services take into account the particular vulnerabilities of Kapo Maori Claimants and their whanau.

5.4 These vulnerabilities include the additional disabilities or impairments often suffered, over-representation in relation to negative health statistics and negative socioeconomic statistics, unique transport needs, the need to reintegrate back into their communities, whanau, hapu and iwi, and any mental health, abuse, alcohol or drug dependency issues.

Health research and data

5.5 The Crown has failed to ensure that sufficient health research and data has been collected regarding Tangata whaikaha, including Kapo Maori. In particular:

- (a) There has been a failure to collect adequate data relating to Tangata whaikaha, including regarding Maori disability rates.
- (b) The Crown has been aware of data quality issues for disability issues generally for some time, but has failed to address these.

¹⁶ Waitangi Tribunal *Te Urewera Report* (Wai 894, 2017) Vol VIII at 3774-3777, 3783.

¹⁷ Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxv, xxvi, xxviii.

¹⁸ Waitangi Tribunal *Te Reo Maori Claim* (Wai 11, 1986) at 20, Waitangi Tribunal *Wananga Capital Establishment report* (Wai 718, 1999) at xii.

- (c) There are significant gaps in time between the disability surveys conducted.
- (d) With respect to DHBs in particular:
 - (i) DHBs do not generally hold information on spending on disability responsiveness or Maori health training.
 - (ii) DHBs do not have accurate disability data that can be used in service monitoring, planning and development.
 - (iii) DHBs do not track spending in a way that shows how much it spends across populations broken down by ethnicity and disability.
 - (iv) As DHBs were not able to collect information on Tangata whaikaha, there was no performance monitoring information provided by DHBs.

5.6 The lack of research and data has:

- (a) Directly impacted on the ability of the Crown and those to whom it has devolved its responsibilities to develop, fund, and provide appropriate health, disability, and other social services to address Kapo Maori health and wellbeing.
- (b) Negatively impacted the quality of the health and disability policies, strategies and services provided to Kapo Maori, and the ability to appropriately address the health and wellbeing of Kapo Maori.
- (c) Negatively impacted on the ability of Kapo Maori Aotearoa to make informed decisions for the Kapo Maori community.
- (d) Has meant that the voice, perspective and needs of Kapo Maori in relation to their health and well-being is not properly taken into account.

Policies, strategies and legislation

5.7 The Crown has failed to provide appropriate policies, strategies and legislation to actively protect the health and wellbeing of Kapo Maori. In particular:

- (a) There have been significant disconnect between high-level statements and the services received by Tangata whaikaha.
- (b) Permissive legislative and policy frameworks mean accountability around Maori health equity is very limited.
- (c) Aspirational statements about Maori participation at all levels of the health and disability system lack follow-through generally, but this is amplified when it comes to Tangata whaikaha.
- (d) The Crown has regularly reformed health and disability services, which in part have been politically or economically motivated. This has interrupted or prevented progress towards meeting aspirations and meeting the needs of Tangata whaikaha. For example:
 - (i) Initiatives, institutions and processes relating to disability have been frequently disestablished or restructured, often within a short period of establishment.
 - (ii) Reforms and policy change have often occurred without sufficient resourcing, to the detriment of Tangata whaikaha, including Kapo Maori.
- (e) The Crown has failed to adequately recognise that Maori and non-Maori disabled needs are different and need different solutions.
- (f) There have been and continue to be inconsistencies in policies, strategy, and legislation, including:
 - (i) In respect of Crown definitions of disability.
 - (ii) Between legislation and the prescriptive purchasing guidelines for disability support services procurement.
 - (i) Between the Crown's responses to accidental injury versus non-injury related impairment. This has led to or increased inequities between Tangata whaikaha.
- (g) In terms of DHBs:

- (i) There was no evaluation of the impacts from the devolution of disability support services to DHBs in the early 2000s on Tangata whaikaha.
- (ii) Insufficient consideration was given to the implications for Maori of an age-related split in disability support services planning and funding.
- (iii) DHBs do not have accountability mechanisms that are specific to ensuring services are responsive and effective for Tangata whaikaha.
- (iv) DHB health promotion programmes do not usually have a strong focus on Tangata whaikaha.
- (v) Disability action plans, policies or strategies, where these exist, do not have a strong focus on Maori.
- (vi) The quality and impact of high level equity statements vary.
- (vii) Specific Maori health strategies or frameworks do not refer to Tangata whaikaha or make provision to address their needs.

5.8 The Crown has failed to ensure that Maori holistic views of health and the fact that Tangata whaikaha value their identity as a central part of their wellbeing has been taken account of. This, combined with the limited quality data on Maori and disability, has contributed to the ineffective planning and provision of disability support services.

Inadequate and inappropriate services

5.9 The Crown's approach to Tangata whaikaha has been inappropriate and inadequate for an extended period of time. The Crown has failed to actively protect the mana, health and wellbeing of Tangata whaikaha, including Kapo Maori. In particular:

- (a) Over time, Tangata whaikaha, including Kapo Maori, have been subjected to culturally unsafe models of health, institutional racism, and both explicit and implicit bias within health and disability services.

- (b) Kapo Maori have experienced, and continue to experience, disabling, racist, and gendered stereotyping by professionals within the health and disability system.
- (c) Historically, provision of health and disability services to Tangata whaikaha has focused at various times on segregation, assimilation, suppression, and paternalism. In particular:
 - (i) In the 1800s, Maori were often excluded from access to health and disability services. It is unclear whether Maori had access to disability services prior to World War II.
 - (ii) In the 1900s, legislation made education compulsory, including for Kapo Maori. The Blind Foundation,¹⁹ which followed a European structure, was the only institution for vision impaired during this time. As a consequence, Kapo Maori children were forced to move away from their whanau and communities to large centres, often leading to marginalisation, and disconnection from their whanau, their iwi, and their reo.
 - (iii) Prior to the 1980s, Tangata whaikaha were removed from their homes and whānau and were often placed in institutions. The experience of institutionalised Maori tamariki was especially traumatic, and often disconnected tamariki from their whanau, and from their cultural identities.
 - (iv) Institutionalisation caused Tangata whaikaha to be removed from their homes and whānau. Within institutions, they often lost their reo and connection to their rohe. Evidence indicates that deinstitutionalisation in the 1980s gave little thought to how to reconnect Maori back to their rohe and people.
 - (v) The 1980s and 1990s saw the devolution and decentralisation of many functions of the Crown. While this enabled Maori groups who were dissatisfied with the existing services to institute new approaches to look after whanau, these reforms were

¹⁹ Formerly the Jubilee Institute for the Blind.

devastating for many whanau, who relied heavily upon state support and services.

- (d) Disconnection resulting from institutionalisation and being forced to travel to receive health, disability, education, and other services has contributed to increased vulnerability and exclusion for Kapo Maori as well as contributing to increased health issues arising from, for example anxiety, depression, and drug and alcohol abuse. Further, in this regard:
 - (i) The Crown has failed to take appropriate action to ameliorate the negative impacts of disconnection, even when this has been requested by Kapo Maori.
 - (ii) The Crown failed to provide appropriate services to educate whanau, hapu, iwi and Marae regarding the re-integration of Kapo Maori back in to their whanau, hapu, iwi and Marae.
- (e) For an extended period of time, Crown has failed to adequately address the high degrees of unmet need faced by Kapo Maori in terms of health and disability services. For example:
 - (i) Despite higher prevalence of disability, Maori have higher proportions of unmet need, including for access to health professionals, special equipment, and disability support services, compared with non-Maori.
 - (ii) Kapo Maori experience high degrees of unmet need for low vision services.
- (f) For an extended period of time, the Crown has failed to provide sufficient services and resourcing to enable Kapo Maori to either receive appropriate treatment, rehabilitation training and education locally and/or at home supported by their whanau, hapu, iwi and marae, or away from home with adequate whanau support:
 - (i) Community care and resourcing for whanau to provide such roles has often been either non-existent or insufficient.

- (ii) For an extended period of time, whanau carers were not funded by the Ministry. The burden on whanau carers was and is significant. This is particularly so where full time care is required and/or multiple impairments are involved.
 - (iii) Whanau carers sometimes experience being made to feel guilty for asking for assistance and feeling inadequate and powerless when engaging with health and disability services.
- (g) The Crown has failed to ensure services, programmes, support, and funding take into account the wider needs of Kapo Maori (including those with additional impairments or health conditions) and of their whanau. These have tended to be primarily based on certain needs of the Kapo Maori individual.
- (h) The Crown has failed to adequately address inequities in seclusion/segregation rates as between Maori (including Tangata whaikaha) and non-Maori in care or in prison, which generally see Maori secluded/segregated at disproportionate rates as compared with non-Maori. Further, the Crown has generally failed to ensure that these and associated actions, are sufficiently and appropriately monitored or recorded.

Quality of care and cultural responsiveness

5.10 For an extended period of time:

- (a) There have been calls for mainstream services to incorporate Maori perspectives and understandings.
- (b) There has been evidence available indicating that Tangata whaikaha need services that operate within a Maori cultural context, that are responsive to the needs of Maori.

5.11 Despite this, the Crown has generally failed to ensure that health and disability services provide the same quality or level of care to Maori as to non-Maori, in part due to different cultural contexts. In this respect:

- (a) Historically and to the present day, services provided to Tangata whaikaha have generally been Pakeha-centric, and in conflict with Maori worldviews of health and wellbeing.
- (b) Crown policy and legislation has embedded models of disability that have undermined Maori world views.
- (c) Pakeha disability support services have generally been unresponsive to Maori and further have denied cultural preferences and the right of Maori to exist, engage and thrive in their own culture.
- (d) Those involved in providing health and disability services to Tangata whaikaha do not generally receive responsiveness training for Maori and persons living with disabilities.
- (e) DHBs and Crown health agencies do not usually offer disability responsiveness training.
- (f) Within DHBs, medical staff were least likely to have completed Maori health and disability responsiveness training.
- (g) The Crown has not ensured that culturally safe care reflecting tikanga Maori is provided across all health and disability services.
- (h) Current services fail to deliver mental health services that are suitable and appropriate for Maori, including Tangata whaikaha.

Maori service providers

5.12 The Crown has failed to ensure that there are sufficient and appropriately resourced²⁰ Maori owned and governed providers in Aotearoa to address the needs of Tangata whaikaha, including Kapo Maori. For example:

- (a) There are a number of DHB areas in which Maori owned and governed disability support providers are not available.
- (b) The number and range of kaupapa Maori mental health services are not proportionate to Maori service users.

²⁰ See also allegations contained at [4.6] to [4.7] in this respect.

6. THIRD CAUSE OF ACTION: ACCESS TO HEALTH AND DISABILITY SERVICES

6.1 In breach of its duties arising from the treaty, the Crown has failed to take reasonable steps to ensure Maori, including in particular Kapo Maori, received equitable access to appropriate health and disability services, as compared with non-Maori.²¹

Particulars

6.2 Kapo Maori, as Tangata whaikaha, had and continue to have less adequate access to health and disability services, compared with the population as a whole. Moreover, due to their unique needs and particular vulnerability, Kapo Maori generally face additional barriers to accessing services.

6.3 The Crown has created, maintained, and reinforced multiple systemic and structural barriers that have affected Tangata whaikaha, including Kapo Maori.

6.4 Further, the Crown has failed to adequately address these barriers.

6.5 In particular:

(a) The Crown has failed to adequately address a number of barriers to accessing health and disability services for Maori, including organisational, appointment and transport costs, and other indirect costs. These barriers are greatest for Tangata whaikaha. For example:

(i) Access to services, such as ophthalmology services, has often been difficult for Kapo Maori, particularly those who do not live in or near main centres. This issue generally affected and affects Maori to a greater degree than it does non-Maori.

(ii) Negative or racist provider attitudes, and a lack of respect, create further barriers for Kapo Maori and their whanau seeking to access services.

(iii) Not all health services have been fully government subsidised. This makes access particularly difficult for Tangata whaikaha,

²¹ Waitangi Tribunal *Te Urewera Report* (Wai 894, 2017) Vol VIII at 3774-3777, 3783.

who are overrepresented in lower income brackets and in negative socioeconomic indicators more generally.

- (iv) Maori experience worse health literacy than non-Maori.
- (b) The Crown has often failed to ensure that Kapo Maori are made aware of available health and disability services and resources for Kapo Maori, including those designed and provided for by Maori.

7. FOURTH CAUSE OF ACTION: ENDURING DISPARITIES IN HEALTH AND OTHER SOCIOECONOMIC OUTCOMES

7.1 In breach of its duties arising from the treaty, the Crown:

- (a) Failed to actively protect the health and wellbeing of Kapo Maori as Maori.²² This includes through failing to take those steps necessary (such as affirmative action) to address the significant disparities in health outcomes as between Kapo Maori and Maori, and non-Maori, which persist to the present day.
- (b) Failed to take reasonable steps to ensure a general equality of health outcomes for Kapo Maori and Maori as a whole, as compared with non-Maori. This includes failing to take reasonable and treaty compliant steps to address other factors (such as those arising or contributed to by Crown acts and omissions) that impact on the health and wellbeing of Maori, such as socioeconomic status, housing, and educational attainment.²³

Particulars

Health status

- 7.1 War, land confiscation, and ongoing land alienation have had significant negative impacts on Maori and their health status generally.
- 7.2 For an extended period of time, Maori have been over-represented in negative health statistics, from disability to mental health. With respect to disability in particular:

²² Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxv, xxvi.

²³ Waitangi Tribunal *Napier Hospital and Health Services report* (Wai 692, 2001) at xxvii.

- (a) Maori have higher rates of disability than non-Maori across all age groups. This includes higher rates of vision impairment than non-Maori.
- (b) Maori also have a higher prevalence of disability, as well as a higher proportion of disability across all age groups compared with non-Maori.
- (c) Maori experience more severe impairment than non-Maori.
- (d) Tangata whaikaha are more likely to have multiple impairments compared with non-Māori adults across all age groups.

7.3 Further, Kapo Maori, as a group of Tangata whaikaha, experienced and continue to experience worse health outcomes than non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities.

7.4 Kapo Maori, as Tangata whaikaha, suffer persistent and significant inequities as a population group. In particular:

- (a) There are significant inequities for Tangata whaikaha compared with non-Maori when it comes to health outcomes, exposure to determinants of health and wellbeing, access to services, and the quality of care received.
- (b) Disabled Maori aged 25 and over are more likely to develop a multitude of health conditions, including cancer, diabetes, gout, stroke and traumatic brain injury, and high blood pressure or ischaemic heart disease, than disabled non-Maori.

7.5 The Crown, through its acts and omissions, has contributed to and/or caused the inequities faced, and further, has failed to take adequate steps to address these.

Other factors impacting on health and wellbeing

7.6 The health of Maori, including Kapo Maori, is influenced by a wide range of factors, including income and poverty, employment, education, and housing.²⁴

²⁴ Waitangi Tribunal *Hauora: Report on Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019) at 20.

- 7.7 Maori experience significant inequities across many socioeconomic indicators, the majority of which have arisen as a result of Crown acts and omissions.
- 7.8 However Kapo Maori experienced and continue to experience significant socioeconomic inequities as compared with non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities. In particular:
- (a) Within the Maori population, there were and are even further significant inequities for Tangata whaikaha. These occur across various socioeconomic indicators.
 - (b) Kapo Maori earn less income, are more likely to live in the most deprived areas, and are disproportionately over-represented in negative socioeconomic statistics generally. In this respect:
 - (i) Tangata whaikaha were and are generally more likely to have lower incomes than non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities.
 - (ii) Tangata whaikaha were and are less likely to have an education qualification than non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities.
 - (iii) Tangata whaikaha were and are less likely to live in low deprivation areas, and more likely to live in high deprivation areas, than disabled non-Maori, non-disabled Maori, and non-disabled non-Maori.
 - (iv) Many Kapo Maori experienced and continue to experience multiple physical and mental health issues, including alcohol and drug dependence, obesity, and poor self-esteem.
 - (v) Many Kapo Maori experienced and continue to experience poor housing conditions.
 - (vi) Many Kapo Maori experienced and continue to experience being left out of or ignored in the education system.

- (vii) Many Kapo Maori experienced and continue to experience challenges in obtaining any or meaningful and appropriate work.
 - (c) The impact of disabilities on Maori was and is more severe than for non-Maori, as the responsibilities of caring and accessing support rests with whanau who often have limited resources.
 - (d) The combined impacts of factors including poverty, institutionalisation, and urbanisation on Kapo Maori have been significant, including on mental health.
- 7.9 The Crown has failed to take adequate steps to address these disparities and issues experienced. This includes failing to take a holistic approach that takes into account the needs not only of the individual Kapo Maori, but also, in appropriate circumstances, the needs of their whanau as well.
- 7.10 The Crown has failed to adequately and appropriately address the wider spectrum of Maori wellbeing.

8. PREJUDICE

- 8.1 As a result of the Crown's acts and omissions, Kapo Maori Claimants have been and continue to be prejudicially affected, including in that:
- (a) Kapo Maori experience and continue to experience significant health inequities as compared with non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities. This includes with respect to mental health.
 - (b) Kapo Maori experience and continue to experience significant socioeconomic inequities as compared with non-Maori with disabilities, Maori without disabilities, and non-Maori without disabilities. Socioeconomic issues, including poor housing and low incomes, have negatively impacted on the health and wellbeing of Kapo Maori.
 - (c) Kapo Maori have not received equitable treatment and access in the provision of health and disability services.
 - (d) Kapo Maori have received and continue to receive inadequate and inappropriate health and disability services.

- (e) Kapo Maori have experienced disconnection from their reo, their culture, and their whanau, hapu, iwi and communities generally.
- (f) Kapo Maori have been unable to exercise their tino rangatiratanga in the design, establishment, management, and implementation of health and disability services.
- (g) Kapo Maori have been unable to influence the kind of health and disability services they have received in a meaningful way.
- (h) Kapo Maori have experienced significant and ongoing whakama and the undermining of mana and tino rangatiratanga.
- (i) Kapo Maori Aotearoa has been prevented from realising their aspirations with respect to promoting the health and wellbeing of Kapo Maori.

9. RELIEF

9.1 The Kapo Maori Claimants seek the following relief:

- (a) Findings that:
 - (i) The claim by the Kapo Maori Claimants is well founded. This includes a finding that the Crown has failed to actively protect the health and wellbeing of the Kapo Maori Claimants to ensure that a general equality in the health outcomes between Kapo Maori, non-Maori and Maori generally.
 - (ii) The Kapo Maori Claimants have been prejudiced in the ways set out in [8.1(a)] to [8.1(i)].
- (b) Recommendations that the Crown:
 - (i) Provide opportunities for Kapo Maori Aotearoa to meet with the relevant Ministers of the Crown and Chief Executives of Crown agencies to discuss matters affecting the health and wellbeing of Kapo Maori, including in particular health and disability policy and services, on an annual basis.

- (ii) Work in collaboration with Kapo Maori Aotearoa and other Maori disability providers to set up a stand-alone body for Tangata whaikaha, and to report back to the Tribunal on how this can be achieved.
- (iii) Work in collaboration with Kapo Maori Aotearoa to develop solutions that will actively protect the health, wellbeing and quality of life of Kapo Maori Claimants and their whanau, enabling them to be full and productive members of their communities. This includes working in collaboration to:
 - (A) Undertake targeted research and intensive monitoring to ensure that the goals of reducing levels of inequality and improving Kapo Maori health and wellbeing are met.
 - (B) Develop and implement a holistic approach to the broader determinants of health arising from factors such as cultural disconnection, poverty, poor living conditions and overcrowding, sub-standard housing, educational underachievement, unemployment, access to health services, caregiver availability and discrimination.
 - (C) Design research to enhance the health and wellbeing of Kapo Maori and their whanau through use of technology, both existing and emerging.
- (iv) Work in collaboration with Kapo Maori Aotearoa to develop solutions for improving effectiveness of mainstream services for Kapo Maori. This includes working in collaboration with Kapo Maori Aotearoa in order to:
 - (A) Ensure primary health care and disability services meet the needs of Kapo Maori and their whanau more effectively.
 - (B) Significantly improve the quality and access to health and disability services for Kapo Maori and their whanau.

- (C) Properly take into account Kapo Maori views on quality of care.
 - (D) Properly take into account the need for cultural as well as clinical safety.
- (v) Work in collaboration with Kapo Maori Aotearoa, in terms of health, disability, and other social services, to develop needs assessment processes and criteria appropriate to Kapo Maori. The individual needs assessment would identify the most immediate and/or urgent needs of Kapo Maori and, where necessary, their whanau. The needs assessment would also form the basis of a plan (with appropriate milestones and monitoring) to action or alleviate the needs and challenges identified. Each needs assessment would be comprehensive and include an assessment of needs and access to:
- (A) Appropriate health and disability providers and services.
 - (B) Necessary advocacy support, which is tailored to the individual, including their age.
 - (C) Assistance to help reconnect Kapo Maori and their whanau with their reo, whakapapa, and tikanga.
 - (D) Culturally appropriate life skills training which properly take into account the unique needs of Kapo Maori as well as Maori values and tikanga. This includes the need to access education in te reo and training in whakapapa, haka and tikanga Maori.
 - (E) A full and comprehensive individual health plan. Any assessment should include the health needs of Kapo Maori and, where necessary, the needs of their whanau. Any plan should also address the other factors that impact on the health and wellbeing, including:

- I. Individual educational plans. Any assessment should include the educational needs of Kapo Maori as educational attainment is essential for good health.
 - II. Both active and passive recreational training. Such an assessment is essential to help ensure good physical and mental health and well-being of Kapo Maori.
 - III. Vocational training and workplace experience programmes. This includes connecting Kapo Maori with potential employers to ensure that their vocational needs are being met and to get Kapo Maori actively engaged in the workforce.
 - IV. Abuse identification and support.
 - V. Pakeke support. There is an ageing Kapo Maori population. It is vital to ensure that Kapo Maori is properly resourced to provide advocacy support services for elderly Kapo Maori which take into account their unique needs and cultural differences including whanaungatanga, whakapapa, mana and manaaki.
 - VI. Plans to alleviate any issues arising from poverty, including poor living conditions.
- (vi) Work in collaboration with Kapo Maori Aotearoa, in relation to the provision of disability services, to improve service co-ordination between primary care services, Maori disability providers (including Kapo Maori Aotearoa) and Maori health initiatives.
 - (vii) Ensure that services for Kapo Maori are provided holistically under an approach that considers all of the needs of Kapo Maori and their whanau. This would see Kapo Maori Aotearoa resourced by the Crown to develop and implement this approach

as a pilot project in the first instance. Once trialled, this approach would be adopted for all Kapo Maori.

- (viii) The Crown, and in particular the Ministry of Health, work with Kapo Maori Aotearoa and other Tangata whaikaha organisations to lead a review of the support (including funding) available to Tangata whaikaha, to identify any gaps in that support, and to report back to the Tribunal on this and provide proposals of how to address the gaps identified.
- (ix) The Crown, and in particular the Ministry of Health, require district health boards to report to the Ministry and Kapo Maori Aotearoa about how they are including Tangata whaikaha (including Kapo Maori) in decision-making, governance, planning, policies, and strategies that affect Tangata whaikaha, on an annual basis.
- (x) In relation to funding:
 - (A) Urgently address the inadequate funding of health and disability services for Tangata whaikaha. This includes a recommendation that the Crown urgently provides sufficient funding and resources to Maori disability providers, including Kapo Maori Aotearoa.
 - (B) Adequately resource Kapo Maori Aotearoa to ensure that they are able to assist Kapo Maori to live a fulfilling life and in particular, ensure that their health and wellbeing needs are met.
 - (C) Adequately resource Kapo Maori Aotearoa to develop and implement strategies to undertake an assessment as set out at [9.1(b)(v)] of the needs of Kapo Maori and their whanau.
 - (D) Adequately resource Kapo Maori Aotearoa to undertake an auditing function, whereby it would review the appropriateness of services provided to Kapo Maori by

other health, disability, and social service providers. For example, this could include the Ministry of Health working with Kapo Maori Aotearoa to ensure that the provision of health and disability services by DHBs are responsive and effective for Tangata whaikaha.

- (E) Adequately resource Kapo Maori Aotearoa to work with iwi to address the health and wellbeing needs of Kapo Maori. For example, this could include the placement of Kapo Maori into programmes to help reconnect them with their whanau, hapu and marae. It could also include specific education regarding the use of guide dogs on marae and to dispel myths regarding guide dog use.
- (F) Adequately resource Kapo Maori Aotearoa to develop cultural programmes to help reconnect Kapo Maori and their whanau with their reo, whakapapa and tikanga. This would include programmes to help reconnect them with their whanau, hapu and marae.
- (G) Adequately resource Kapo Maori Aotearoa to develop culturally appropriate life skills programmes that properly take into account Maori values and tikanga, for use by agencies.
- (H) Adequately resource Kapo Maori Aotearoa to help Kapo Maori (including tamariki and pakeke) to remain actively involved in their whanau, marae, and communities.
- (I) Adequately resource Kapo Maori Aotearoa to work collaboratively with services such as Workbridge (a recruitment service for the disabled) and school vocational services. This would include Kapo Maori Aotearoa working with employers to demonstrate that jobs can be done by Kapo Maori with only minor modification.

- (J) Adequately resource Kapo Maori Aotearoa to develop programmes and policies to raise awareness of work options for Kapo Maori. The programmes and policies would also be designed to connect Kapo Maori to opportunities to meet with employers and engage in workplace experience programmes.
- (K) Adequately resource Kapo Maori Aotearoa to work with the Ministry of Education, universities, Whare Wananga, Kura Kaupapa, mainstream schools, and Kohanga Reo and other early learning institutions to ensure that these are all properly resourced to cater for all Kapo Maori including tamariki and rangatahi.
- (L) Adequately resource Kapo Maori Aotearoa to work with agencies to ensure that the vision of all Maori children are regularly checked, to ensure that those with vision impairments receive appropriate free treatment and, if necessary, eye glasses to enable them to succeed at school. This also includes advocating for schools to purchase braille books and other aids to assist with kapo Maori educational achievement.
- (M) Adequately resource Kapo Maori Aotearoa to work with Kapo Maori pakeke to ensure that they are able to remain in their own homes and/or with their whanau.
- (N) Adequately resource Kapo Maori Aotearoa to work with agencies to develop and implement strategies to protect all Kapo Maori regardless of age and gender from abuse. This includes providing education on what is unacceptable behaviour and working with whanau and agencies to better identify abuse. Once any abuse has been identified, it is important that the victim is appropriately supported. This may include surrounding them with whanau and professional support or, where

appropriate, providing a safe and supportive environment away from the abuser.

- (O) Adequately resource Kapo Maori Aotearoa to develop and maintain a full and comprehensive database/health assessment tool of Kapo Maori and their health needs.
- (xi) Work with Kapo Maori Aotearoa to undertake research about the health needs and wellbeing of Kapo Maori going through the justice system and whether or not appropriate steps are being taken to ensure that there is intervention at an early stage to keep them out of the prison system.
- (c) The granting of any other relief the Tribunal sees fit.

10. LEAVE TO AMEND

10.1 This ASOC is as particularised as is possible given the information and research available to the Kapo Maori Claimants at the time of filing this ASOC.

10.2 However, counsel reserve the right to raise further specific allegations and particulars and / or other causes of action that are not included in this ASOC, including if further information and research (including in relation to tobacco, alcohol and substance abuse) become available.

This **AMENDED AND PARTICULARISED STATEMENT OF CLAIM** is filed by **PETER TANARA JOHNSTON** of Rainey Collins Lawyers, Solicitor for the Claimants. The address for service for the Claimants is Level 19, 113–119 The Terrace, Wellington.

Documents of service on the Claimant may be left at that address or may be:

- (a) Posted to the solicitor at PO Box 689; or
- (b) Left for the solicitor at document exchange for direction to DX SP20010, Wellington; or
- (c) Transmitted to the solicitor by email at pjohnston@raineycollins.co.nz.

Documents served on the Claimants should be marked for the attention of Peter Johnston.