Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024: further Crown breaches of Te Tiriti o Waitangi

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ABSTRACT

The Waitangi Tribunal[1] in their Wai 2575 Report recommended the establishment of Te Aka Whai Ora (the Māori Health Authority) to remedy some of the contemporary breaches of Te Tiriti o Waitangi (Te Tiriti). Te Aka Whai Ora was the culmination of decades of Māori advocacy for the establishment of independent Māori health leadership, policymaking and commissioning.

Under urgency, the new National-led coalition Government passed the *Pae Ora (Disestablishment of Māori Health Authority) Amendment Act 2024* in February.

In this paper we use Critical Tiriti Analysis (CTA), a five-stage process, to review the extent to which the *Act* is compliant with the five elements of Te Tiriti (the authoritative Māori text), the preamble, the three written articles and the oral article.

We found that the *Act* had very limited Tiriti compliance and the potential to do great harm. We offered practical suggestions how this could have been avoided.

A major driver of recent health reforms[2] was the desire to reduce systemic ethnic health inequities and uphold Te Tiriti o Waitangi (Te Tiriti). Ethnic health inequities are longstanding within Aotearoa,[3] driven by uneven access to the determinants of health, intergenerational legacies of colonial trauma and institutional racism, which manifest in part as the quality and accessibility of healthcare and in health outcomes. The evidence is clear that culture and racism are key determinants of health.[4]

The Wai 2575 Waitangi Tribunal[1] enquiry, which occurred simultaneously with the 2020 health system review, examined allegations of breaches of Te Tiriti and the Treaty of Waitangi (English text) within the health system. The report recommended that the legislative and policy framework recognise and provide for "the Treaty of Waitangi and its principles". The Tribunal recommended stronger accountability mechanisms and processes for the manifest health policy failures since the signing of Te Tiriti, and in particular the two decades past, that there be a stand-alone commitment to achieving health equity and compensation for the historic underfunding of Hauora Māori. Likewise, co-governance in service design and delivery were seen as being essential to upholding respectful Tiriti relationships. The establishment of the Māori Health Authority (MHA) was fundamental to the Wai 2575 recommendations.

The urgent need to address long-standing inequities was recognised by previous governments, including the previous National Government, whose ministers Coleman and Goldsmith developed and signed off the *New Zealand Health Research Strategy*.[5] This strategy calls for partnerships with Māori and an assurance that the Treaty principles are part of all health research. The *Strategy* also calls for the promotion of rangatiratanga that enables whānau, hapū, iwi and Māori individuals to exercise control over their health and wellbeing.

Further reforms were enabled through the *Pae Ora (Healthy Futures) Act 2022*, which set up the structural components of the new health system, including Te Aka Whai Ora. Rae et al.[6] in their Critical Tiriti Analysis (CTA) of the *Pae Ora* Bill raised concerns about the legislation's lack of compliance with Te Tiriti, concerns that were amplified in our CTA of *Te Pae Tata Interim New Zealand Health Plan*.[7] We noted the problematic use of "treaty principles" rather than the authoritative Māori text and the failure to recognise that Māori never ceded sovereignty.

Te Aka Whai Ora was the pounamu within *Pae Ora*, enabling development of research and

health services that encapsulated the key principles of the *New Zealand Health Research Strategy*. Along with community engagement, developing community leadership and workforce capacity-building, Te Aka Whai Ora was addressing disparities and contributing to enhanced health and wellbeing. Extensive consultation with community researchers strengthened the level of support from Māori communities and held significant potential for improved Māori health outcomes.

Methodology

CTA, a methodology initially designed to monitor the Crown and inform policy writing,[8–9] is a collaborative way of assessing alignments of policy, strategy or plans to five elements of Te Tiriti —the preamble, three written articles and the oral article. CTA involves a five-stage process of i) orientation—a high level read of the document, ii) close reading—looking at content in relation to the five elements of Te Tiriti, iii) determination—applying indicators (see Table 1), iv) strengthening practice—ideas for improvements, and v) a Māori final overall word about how the document aligns with lived experience and lifeways. The authors HC and TM (Pākehā activist scholars) along with NC (Kāi Tahu scholar and CEO) and CA (Ngāti Maru, Ngāti Whanaunga and Ngāti Tamaterā scholar and health research activist) reviewed the *Disestablishment Act* separately and then reached a collective determination.

Findings

Stage one: orientation

The *Disestablishment Act* was introduced to Parliament under urgency on 27 February 2024 and received Royal Assent on 5 March 2024. This *Act* comes into force on 30 June 2024, at which stage Te Aka Whai Ora will cease to exist, with any residual authority/actions or aspirations subsumed elsewhere in the health sector.

The *Disestablishment Act* Part 1 makes amendments to the *Pae Ora Act*, while other parts deal with practical matters (pay, conditions, review requirements), consequential references to the MHA in other legislation. For our current application of CTA to the *Disestablishment Act*, we focus on Part 1, leaving these other components as implied or encompassed within our assessment.

Part 1 of the *Disestablishment Act* lists some 40 amendments or deletions (mainly the acronym MHA), along with a series of changes to specific clauses in *Pae Ora*. In addition, it creates a further 21 significant clauses to *Pae Ora*, inserted into its Schedule 1 as a new Part 2, to substantively change its direction. It is to these substantive changes that the lens of CTA is now applied. This initial reading of the text suggests the *Disestablishment Act* achieves a reversal of an approach to health justice that Māori have (albeit with caveats) defended, supported and collaborated with.

Stage two: close reading

Our close reading of the *Disestablishment Act* is dominated by the point that its sole reference to Te Tiriti is the remnant at Section 6 of the *Pae Ora Act*. Here the rendition is compromised by reference to the "principles of Te Tiriti o Waitangi (the Treaty of Waitangi)", which are non-existent. The problem here is that the *Treaty of Waitangi Act 1975*, through which the principles were legitimated, referenced only the English text, which bears scant relationship to Te Tiriti as the negotiated, signed, authoritative version of the agreement.[10]

As a result, we can see no evidence of the *Disestablishment Act* aligning to the preamble of Te Tiriti, which specifically promises to control the excesses of settler communities in Aotearoa and ensure that tangata whenua cultures and lifeways are guaranteed, supported and thriving. The *Act* ignores these Crown promises and expressions of intent and proceeds as if its only responsibility is to address what are deemed the excesses of the original *Pae Ora Act*.

In terms of kāwanatanga, the *Disestablishment Act* fails in the promise of good governance through its rejection of the provisions that Māori, in fulsome consultation, initiated and agreed to in the *Pae Ora Act*, which the current Government has dishonoured. There is no evidence of Māori community, provider or scholarly engagement with the *Disestablishment Act*, and it ignores Te Tiriti relations in a brazen expression of colonial power.

Further, rather than recognising tino rangatiratanga through embedding it into legislative development, as required by Article 2, the Government exerts the full stretch of its imagined sovereignty to destroy the enactment of even the limited form of mana motuhake envisaged within Te Aka Whai Ora. As a result, and in defiance of the WAI 2575 rulings, there are no mechanisms remaining by which independent Māori aspirations, as embodied in Te Tiriti, might be recognised, or realised. The various advisory groups and boards that persist

through the *Pae Ora Act* are without significant decision-making power and are hampered by the provisions that limit Crown resourcing of their roles.

Under the ōritetanga provisions of the Third Article, equity among the citizens of the country is a right and an aspiration to for a fair and just society, which is unlikely to be achieved within existing colonial structures. The *Disestablishment Act* shifts the dial away from Māori and population health achieved, reflected in the initiation of Te Aka Whai Ora alongside Te Whatu Ora – Health New Zealand. There is certainly no sense in which Māori communities are defining policy intent, as is their civil right and duty, so that as noted above they are not party to the decision to disestablish the strongest contemporary mechanism for achieving health equity.

The *Disestablishment Act* is entirely silent in terms of the Fourth Article of Te Tiriti around wairuatanga, which has come to be included in consideration of the oral promises made in Te Reo Māori at Waitangi and elsewhere, that all faiths of the country would be equally protected. Without acknowledgement of this dimension of holistic health, the *Act* breaches this vital domain of responsibility.

Stage three: determination

This *Act* seems to be firmly oriented to the destruction of tino rangatiratanga embodied in Te Aka Whai Ora, one of the only legislative initiatives within the health sector to give substance to Te Tiriti. Rather, we see the return to the colonial universalist tendencies of health policy found non-compliant with Te Tiriti within the WAI 2575[1] and Haumaru[11] Waitangi Tribunal reports. The continuities with policies that overtly excluded, marginalised and denigrated Māori within settler health systems show that the *Disestablishment Act* is inadequate in terms of Crown responsibilities under Te Tiriti. This move arguably steps health policy backwards into the colonial assumptions that have created and maintained disparities since the records of health outcomes began in the 1950s.

There is little evidence the health practice and leadership expertise within Māoridom has been conserved, except to dismiss it along with the community input and advice that went into the creation of Te Aka Whai Ora. We argue that ignoring such inputs in favour of an ideological position to disestablish Te Aka Whai Ora represents blatant institutional racism as well as a manifest breach of Te Tiriti.

The Fourth Article has rarely been adequately acknowledged by the Crown, although its existence was well documented by observers at Te Tiriti signings. Adherence to this article is of particular importance in the health arena, where Māori beliefs and practices around wairua are of signal importance to hauora in physical, mental and spiritual terms.[12]

The *Disestablishment Act* is not in keeping with tikanga Māori. Tikanga has been well described in research and scholarship. Tikanga has long been considered to have the character and authority of law. Tikanga is enshrined in Te Tiriti, elements of which reside across all the articles. Māori have

Table 1: Critical Tiriti Analysis (CTA) determination of Te Aka Whai Ora *Disestablishment Act* against indicators.

Critical Tiriti Analysis indicators	Silent	Poor	Fair	Good	Excel
Recognition that Te Tiriti is central, and Māori are equal or lead parties, and the legislation preserves Māori interests and contributes to peace and good order.	X				
Mechanisms to ensure Māori engagement and/or leadership in setting priorities, resourcing, implementing and evaluating the legislation.		X			
Evidence of the influence of Māori chiefly authority, values and worldviews.		X			
Māori exercising their rights and privileges of equitable citizenship as Māori.	X				
Recognition of wairuatanga and tikanga in legislation.	X				

always reserved the right to engage as partners with the Crown in a way that recognises tikanga, but at no point in this process has the Crown allowed for a discourse with Māori based on tikanga.

Discussion

Phase four: strengthening practice

A decision as big as the disestablishment of Te Aka Whai Ora required significant discussion with whānau, hapū, iwi and Māori health leaders. A political campaign trail is not respectful engagement with Māori or civil society. The public service is charged with developing policy and legislation and should have led engagement.

Legislative and policy development that is going to serve the public needs to be evidence-based. There is clear evidence in the health sector that "one size fits all" policy and interventions tend to fail to engage Māori.[13] We have a profoundly disappointing history of monocultural health policy that fails to fulfil Te Tiriti responsibilities. It is useful to remember that Te Aka Whai Ora was a response to the failure of monocultural practices and systemic institutional racism within the health sector.

Honourable kāwanatanga is about governance that serves everyone, but also particularly serves Māori as tangata whenua, as the Indigenous peoples of Aotearoa. The *Declaration on the Rights of Indigenous peoples*[14] outlines the unique collective human rights of Indigenous peoples, including the standards of how governments should engage with Indigenous peoples. These collective human rights were breached in relation to the *Disestablishment Act*.

The *Disestablishment Act* is likely to be profoundly damaging to Crown relationships with Māori. It failed to respect Māori tino rangatiratanga, Māori expertise and mātauranga Māori. Te Tiriti o Waitangi granted the Crown the right to govern their (non-Māori) people, which was affirmed in the Wai 1040 hearings. Māori health leaders needed to be at the table and be part of decision-making about the future of Te Aka Whai Ora in order to enact Māori tino rangatiratanga—that right for Māori to make decisions about things Māori.

Health inequities are driven by the legacies of colonisation, institutional racism and uneven access to the determinants of health. The burden of disease, and economic, educational and employment disadvantage is predominately held by Māori. The evidence shows that Māori receive less quality and quantity of healthcare, yet the greatest health need continues to be with Māori in this country. To achieve equity, health policy and legislation needs to embrace what Marmot[15] calls proportional universalism. That is, services need to be provided for everyone, but then targeted based on need.

That means prioritising Māori. That said, it is useful to remember that according to Manatū Hauora – Ministry of Health[16] figures, Māori health providers continue to receive only 1.91% of Vote Health. This does not recognise the burden of disease, recognise the legacies of colonisation and institutional racism, or align well with equity targets, Te Tiriti responsibilities nor international human rights obligations.

Conclusion

Phase five: Māori final word

From its establishment, Te Aka Whai Ora gained significant support from Māori communities across Aotearoa. Their investment in capacity building at local community levels, as well as their commitment to supporting Māori health research based on Te Tiriti, showed potential that could lead to advances in Māori health and equitable outcomes for all.[17] The disestablishment of this innovative strategic approach to improving health outcomes will likely contribute to Māori community disenchantment and further entrenchment of long-standing shameful health and social outcomes.

The health reforms initiated by the *Pae Ora* legislation, with Te Aka Whai Ora at the forefront, were a once in a lifetime opportunity to address Māori health inequities and enhance health outcomes for everyone who calls Aotearoa home. The call for rangatiratanga and kāwanatanga to underpin all aspects of the work of Te Aka Whai Ora was deliberately designed to give effect to ōritetanga. Given that there has been no indication of what will replace Te Aka Whai Ora, the disestablishment of this world-leading initiative is likely to lead to regressive measures and do nothing to improve the health and wellbeing of this country's Indigenous peoples. Moreover, the hasty non-Tiriti compliant measures taken by the coalition Government to disestablish Te Aka Whai Ora are likely to impede efforts to eliminate institutional racism and further disadvantage Māori for generations to come. Almost 200 years after the signing of Te Tiriti o Waitangi, both partners, and the Crown in particular, must commit to the original intentions of the agreement and implement innovative measures, such as a Māori-focussed entity to achieve equitable health outcomes for Māori and ensure social justice for all.

COMPETING INTERESTS
HC has received payment for expert testimony for the Waitangi Tribunal evidence brief.

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