

## CHAPTER 1

### INTRODUCTION

#### 1.1 THE PURPOSE OF THE REPORT

This report of the Mohaka ki Ahuriri Tribunal is concerned with the Napier Hospital services claim, registered as Wai 692. The scope of the claim ranges from a particular local controversy – the closure of Napier Hospital – to broad issues of policy and practice in the health sector as they have been applied in Hawke’s Bay.

One matter must be clarified right at the outset. We cannot but be fully aware that what the people of Napier have seen as the loss of their hospital has been an intensely felt local issue, one that has been fiercely contested in successive campaigns over the past two decades. It resounds more loudly still in the passions of a wider and longstanding rivalry between the cities of Napier and Hastings.

We wish to make it clear what this report does and does not address. It does not re-examine the general issues surrounding the hospital’s closure. It does not review the pros and cons of the regional hospital project, except in so far as they are relevant to the grievances raised in terms of the Treaty of Waitangi. And it does not consider the merits of restoring Napier Hospital to its former status, a remedy which the claimants are not seeking.

Our task is to assess the claim before us in terms of the principles of the Treaty of Waitangi and to establish whether the claim is well-founded. The purpose of the report is to determine whether the claimants have been prejudiced by the Treaty breaches they allege, and, if they have, to make appropriate recommendations. In so doing, the report will range widely over the history of State health services in central Hawke’s Bay from the Ahuriri Crown purchase in 1851 up to the opening of the Napier Health Centre in 1999. Its central focus, however, is the relationship between Ahuriri Maori and the Crown in the field of healthcare.

#### 1.2 THE TREATY IN THE SOCIAL POLICY SPHERE

The Napier Hospital services claim raises issues of public health policy and practice. It alleges breaches of the Treaty of Waitangi concerning the obligations of the Crown to protect and improve Maori health and the delivery of State health services to Maori. This is one of a growing number of claims that arise out of events occurring in recent times. Like Mokai School, on which

the Tribunal recently reported,<sup>2</sup> it was triggered by an attempt to close an institution that was important to the local Maori community and at the same time part of a mainstream social service.

Many question the relevance of the Treaty to social policy and service delivery, and thus the right of the Tribunal to enter this debate at all. Sir Douglas Graham, a former Minister of Justice, Attorney-General and Minister in Charge of Treaty of Waitangi Negotiations, has argued:

In health, education, welfare, housing and social services generally the question is whether [the Treaty] is relevant at all. Did the signatories really consider Maoris were to have any different rights in these areas than any other New Zealander? Did the Treaty really guarantee all Maoris would enjoy good health, with compensation if they did not?

. . . Entitlements to health, education, welfare, housing and other social benefits are not drawn from the Treaty at all but through citizenship . . .

There are rights that both parties have under the Treaty that must be respected. But there are many areas where the Treaty is simply irrelevant. The provision of health services is one of them.<sup>3</sup>

In similar vein, former Minister of Conservation Dr Nick Smith, commenting on the Tribunal's *Mokai School Report*, considered that 'the Waitangi Tribunal is outside its brief and it undermines its own credibility by accepting such claims as Treaty issues'.<sup>4</sup>

Such views are widely held. Where the Treaty is acknowledged to hold any continuing validity today for the purposes of redress, many would limit it to unfair alienations of Maori land and, like Sir Douglas, to protecting 'the customary ways of Maoris'.<sup>5</sup>

The criticism extends to Treaty-based remedial action that singles out Maori for special treatment. In the course of the public debate during the year 2000 on the inclusion of a so-called 'Treaty clause' in the Health and Disabilities Bill, Race Relations Conciliator Dr Rajen Prasad told a parliamentary select committee that it would be 'inappropriate to include a provision in this form in social policy legislation which could be seen as privileging one race over another'. He believed that it risked increasing racial tension, and might contravene both international human rights standards and the domestic New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.<sup>6</sup> Opponents of the clause also cited the risk of exposure to legal action to enforce entitlement and the consequent expense that would involve.

Contrary views have been equally strongly expressed in favour of including a 'Treaty clause' in the governing health legislation, which was a remedy requested by the claimants. There has also been support for the relevance of the Treaty to the social policy sphere of government, perhaps most comprehensively from the Royal Commission on Social Policy.<sup>7</sup> We do not intend to enter the debate at this point in our report, but draw attention in particular to our discussion of Treaty principles in chapter 3.

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2. *The Mokai School Report*

3. Graham 2000

4. Smith 2000

5. Graham 2000

6. Race Relations Conciliator 2000

7. Royal Commission on Social Policy 1988

All Tribunal reports are founded on the formal and procedural obligations it is required to meet. Under the Treaty of Waitangi Act 1975, the Waitangi Tribunal is mandated to inquire into and report on all the claims it registers as falling within its jurisdiction. To qualify for registration, a claim must state that the claimant(s), being Maori, have been or are likely to be prejudicially affected by Crown agency (legislation, statutory instrument, policy, practice, act or omission) and that the Crown has acted in a manner ‘inconsistent with the principles of the Treaty’. The Act does not discriminate for or against any particular grounds of claim.

This is in accord with the fundamental tenets of natural justice that are reflected in general legislation governing citizens’ rights of redress, such as the Human Rights Act 1993: it is for the claimants to specify the ‘take’, or cause of action. Whether that cause enters the arena of social policy, or for that matter any other field of Government activity, is irrelevant to the test of validity for the registration of a claim. Thus, it is the claimants, not the Government or the Tribunal itself, who set the agenda on which the Tribunal reports. It is for the Tribunal then to assess the merits of the claimants’ case, although it has discretion not to inquire if it deems the subject trivial or the claim to be frivolous, vexatious, or not made in good faith.

Our principal reason for issuing a separate report on this claim is procedural. Because its grievances fall largely within the geographical area of the Mohaka ki Ahuriri regional inquiry, the claim was consolidated into that inquiry. Ordinarily, the Tribunal would integrate it into its general report on the regional inquiry. Issuing a report on one claim in advance runs the risk of preempting the Tribunal’s analysis and findings on the other claims before it. We have agreed to do so mainly in order to meet the Crown’s concerns about the continuing costs of holding the Napier Hospital site pending the Tribunal’s recommendations.

There is also a broader dimension. We are aware that because the alleged grievances relate to a mainstream social sector – hospital and other State health services – the claim takes the Tribunal into new territory. It also addresses contemporary issues that are directly relevant to current Crown policy and practice. Although it has a local focus, at the same time it raises questions that are likely to be of wider concern.

We do not believe that it would be appropriate to broaden our inquiry into a generic inquiry into the health sector nationally. However, in addressing for the first time grievances that derive from the mainstream health sector, we are conscious that our analysis of the evidence, findings and recommendations may be seen as relevant in other situations. We have taken this wider context into account in preparing our report.

Amongst the broader issues raised by the claim are the following:

- ▶ To what extent can a verbal commitment on future Government benefits, made at the signing of an early Crown purchase deed, be interpreted as a promise, and can such a promise be construed as part of such a binding agreement?
- ▶ Does the Treaty of Waitangi, as the claimants assert, place a general obligation upon the Crown to ‘provide for the health and well-being of Maori’, and, if so, does this entitle Maori to special or privileged access to Government resources?

- ▶ What kinds of statement of Government intentions and objectives in respect of health services to Maori are to be regarded as ‘policy’ that is susceptible to scrutiny in terms of the Treaty, and by which criteria and standards?
- ▶ Does the Treaty’s guarantee to Maori of equal rights as citizens apply to standards of health-care, to health outcomes, or to both, and what obligations are implied in terms of health and other State social services?
- ▶ To what extent are Government agencies required to consult Maori in making decisions on how health services are to be provided in a particular district, and what forms and standards of consultation should be adopted?
- ▶ How are Maori communities to be identified for the purposes of fulfilling the Crown’s Treaty obligations in respect of mainstream health services, including its duty of consultation, particularly where those communities are in urban areas?
- ▶ If the Crown is found to have breached Treaty principles in providing health services to Maori, how can the resulting prejudicial effects be identified, measured and analysed?

### 1.3 APPROACH AND METHOD

The subject-matter of this report is diverse. It ranges from particular actions or decisions to the broad sweep of national policy and its local implementation; from short sequences over weeks or months to a century or more; and from single locations such as the site of a hospital to district and national dimensions.

Such diversity raises difficulties of thematic scope, presentational balance and consistency of treatment. In this report, we have adopted a mix of narrative and analysis organised into chapters covering broad historical periods. Thus, the historical grievances are divided into two periods – up to and following the Ahuriri transaction in 1851 – while the contemporary grievances occupy three thematic chapters covering the 1980s and 1990s.

Whatever the complexities, the principal purpose of any Tribunal in reporting on a claim is at heart to make practical recommendations. The Tribunal sets out to assess all the information available to it so as to arrive at findings on the stated grievances and to make appropriate recommendations. As we will discuss further in chapter 3, in order to find a grievance well founded, the Tribunal must be satisfied:

- ▶ that the grievance is substantiated by the available evidence;
- ▶ that the Crown has violated one or more principles of the Treaty of Waitangi; and
- ▶ that the claimants have suffered or will suffer prejudice thereby.

We apply this three-step process of assessment to each grievance, or to the substantive issues raised in support of the grievance. In chapters 4 to 8, which review the evidence, our findings are presented at the end of each chapter. The findings of Treaty breaches and prejudice arising are then gathered together into the summary chapter 9.

In order to assure consistency of treatment and ease of reference, we have adopted a standard form of presentation in chapters 4 to 8 in reviewing the evidence and making findings thereon. Each chapter is accordingly set out as follows:

- (a) a brief outline of the chapter;
- (b) a review of the evidence, arranged by main topics and sub-themes;
- (c) the positions of the parties, outlining the cases of claimant and Crown counsel;<sup>8</sup>
- (d) our conclusions and findings; and
- (e) a summary of the findings.

#### 1.4 THE ARRANGEMENT OF THE REPORT

The report is organised as follows. We begin in *chapter 2* by presenting the claim. After introducing the claimants, we outline the development of the claim and analyse the grievances it alleges against the Crown. We describe the hearings and the evidence presented. We review the question of research access to official information, which raised difficulties during the preparation of the claim for hearing. We then address a number of factors that bear on the scope of the report.

In *chapter 3*, we consider Treaty principles. We place this chapter early in the report for two main reasons. First, since we record our findings on the various grievances at the end of each chapter, it is essential to establish in advance the principles of the Treaty that we determine are applicable to this claim, as the Treaty of Waitangi Act 1975 requires us to do.<sup>9</sup> Secondly, we consider it advisable in entering the new terrain of health policy and practice to summarise at the outset our view of the applicability of the Treaty to the issues that we have been asked to consider.

The main body of the report then proceeds more or less in chronological order. In *chapters 4 and 5*, we consider the grievances described by the claimants as historical and cover the century between the signing of the Treaty in 1840 and the implementation of the Social Security Act 1938, concluding with a brief summary of the post-war period up to 1980.

In *chapter 4*, we outline the general background to events in Hawke's Bay during the first decade of British colonisation, the period during which the Crown had the right of pre-emption on all land sales by Maori. In particular, we review the situation of Maori health and the formation of national policy on the provision of hospital and health services to Maori. We then examine more closely the context, negotiation, and completion of the Ahuriri transaction in 1851, focusing on the respective Maori and Government understandings of the agreement and on the alleged promise of a hospital on Mataruahou.

In *chapter 5*, we review the follow-up to the Ahuriri transaction and the State medical services provided to Ahuriri Maori from Napier. Against the backdrop of major shifts in national policy, we cover the founding of the first provincial hospital in 1860 and the short-lived extension of the native medical officer (NMO) service to the Napier area. We describe the establishment and

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8. For the names of counsel, refer to appendix iv.

9. Section 5(2) of the Treaty of Waitangi Act 1975

growing significance of the second Napier Hospital after 1880, the brief excursion into community-based health improvement through the Maori councils, and the launching of the first primary healthcare programmes such as district nursing. In a brief concluding section, we traverse the rapid post-war growth of Napier and Hastings and the entrenchment of a two-hospital structure.

*Chapters 6 to 8* cover the period described by the claimants as contemporary, that is, the period of the modern health reforms from the late 1980s onward. In *chapter 6*, we review the tangled history leading to the downgrading and closure of Napier Hospital. We examine in depth the process of consultation with local Maori prior to the making of each of the key decisions.

In *chapter 7*, we consider issues of policy, structural change, and accountability in the health sector, placing local issues in the wider context of the health reforms. There are three main sections:

- ▶ the statutory, policy, and contractual framework for meeting Treaty obligations to Maori and for improving Maori health;
- ▶ the outcomes in respect of health services to Ahuriri Maori; and
- ▶ monitoring procedures and their effectiveness in the case of Ahuriri Maori.

We conclude *chapter 7* by assessing the extent to which the State medical facilities in Napier and Hastings provided for specific Maori needs and tikanga, including the level of Maori participation and representation in the institutions themselves.

In *chapter 8*, we review the available evidence on the health and socio-economic status of Maori in the Napier area, looking in particular at indicators of health disparities and trends in health improvement. We also consider the extent to which the relocation of hospital services away from Napier Hospital has affected the objective of improving Maori health outcomes.

In *chapters 9 and 10*, we integrate the analysis, findings, and recommendations of the preceding chapters. *Chapter 9* brings together the findings on Treaty breaches and prejudice and *chapter 10* presents our recommendations.

The appendices contain a range of reference information, including a *chronology*, a *list of witnesses* and the matters on which they gave evidence, all the *statements of claim*, and the two texts of the *Treaty of Waitangi*. The *bibliography* contains the record of inquiry, which lists the relevant documents submitted in evidence, and other official, secondary, and unpublished sources cited in the report.