

**BEFORE THE WAITANGI TRIBUNAL
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of a claim called the Partnership School I Kura Hourua Claim by **SIR TOBY CURTIS** and **DAME IRITANA TAWHIWHIRANGI** for and on behalf of the claimants and Māori generally

STATEMENT OF CLAIM

3 July 2018

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. This statement of claim is filed pursuant to section 6 of the Treaty of Waitangi Act 1975 (the **TOW Act**) by Sir Toby Curtis and Dame Iritana Tawhiwhirangi (the **Claimants**) for and on behalf of the Claimants and Māori generally.
2. The Claimants are Māori for the purposes of section 6(1) of the TOW Act.
3. This claim concerns Crown policy, acts and omissions in relation to Kura Hourua and, in particular, the Crown's decision to terminate the Partnership Agreements pursuant to which Kura Hourua operated (**Partnership Agreement**).
4. The Claimants say that this policy, acts and omissions are in breach of the Crown's obligations under te Tiriti o Waitangi (**te Tiriti**).

BACKGROUND

Education Amendment Act 2013

5. In 2013, Parliament passed the Education Amendment Act 2013 which inserted Part 12A into the Education Act 1989 (the **Education Act**) (and associated provisions throughout).
6. Part 12A of the Education Act provides for the approval and operation of Kura Hourua by, inter alia, allowing the Minister of Education (**Minister**) to approve a sponsor of a Kura Hourua (**Sponsor**) and providing that the Minister may enter into a contract (the **Partnership Agreement**) with that Sponsor for the operation of the Kura Hourua.

Kura Hourua

7. Kura Hourua were state-funded but independently operated schools.
8. There are currently 11 Kura Hourua open in New Zealand, each under a Partnership Agreement. They are:

- (a) Vanguard Military School
- (b) Te Kapehu Whetu – Terenga Paraoa
- (c) South Auckland Middle School
- (d) Rise Up Academy
- (e) Te Kāpehu Whetū (Teina)
- (f) Middle School West Auckland
- (g) Pacific Advance Senior School
- (h) Te Kura Maori o Waatea
- (i) Te Aratika Academy (Napier)
- (j) Te Kopuku High School (Hamilton)
- (k) Te Rangihakahaka Centre for Science and Technology

9. As of 7 June 2018, 10 Kura Hourua have been served with notices of termination of their respective Partnership Agreements by the Ministry of Education (the **Ministry**).

10. The Kura Hourua framework provided Kura Hourua with high levels of freedom compared to state schools both in terms of how students were taught and how the schools were organised. Such flexibility was achieved in a variety of ways:

- (a) Kura Hourua were entitled to a degree of self-determination by way of being privately owned, fully funded by the Crown, and free to appoint fit-for-purpose governance;
- (b) Kura Hourua were able to set their own curriculum provided they used the vision, principles, values and key competencies of the New Zealand Curriculum or equivalent standards in Te Marautanga o Aotearoa;
- (c) the requirement under the Education Act for all teachers to be registered was relaxed (a percentage of teaching hours could be covered by non-registered teachers), as well as the restrictions around salary conditions for teachers; and
- (d) Kura Hourua were bulk-funded.

11. The model for the operation of Kura Hourua enabled Kura Hourua to act with independence and flexibility while still being required to meet educational standards that were linked to the New Zealand Curriculum.
12. Under the Partnership Agreements, Kura Hourua were contractually required to have at least 75% of their enrolled students made up of Priority Learners (Māori, Pasifika, decile 1-3 students, Special Needs). A key reason for this requirement was to address the under-achievement of Māori and Pacific students and students from low-income families in mainstream education.
13. The school roll across existing Kura Hourua is 75% Māori/Pacific. Some individual schools exceed that threshold in terms of Māori enrolment.
14. On the whole, the level of educational achievement for Priority Learners attending Kura Hourua has been better than the levels of achievement achieved by Priority Learners in state schools.
15. The results achieved by Kura Hourua secondary schools, Te Kapehu Whetu Terenga Paraoa and Vanguard Military School, are outstanding when compared to all New Zealand schools.
16. Kura Hourua primary schools have achieved learning success at or above the national average of all New Zealand schools.

Partnership Agreements

17. A Partnership Agreement recorded the terms and conditions upon which the Sponsor would operate and manage a Kura Hourua and the payments that the Minister would make to the Sponsor in consideration for the Sponsor's operation and management of the Kura Hourua.
18. A Partnership Agreement set out the following:
 - (a) the term of the agreement: each Partnership Agreement had an initial six-year term followed by two further rights of renewal of six-years each (this term was standard across all Partnership Agreements);

- (b) the key requirements of the Kura Hourua, including: special features of the Kura Hourua; enrolment requirements; the curriculum;
- (c) governance arrangements;
- (d) teaching arrangements, including: number of teaching positions; requirements regarding qualifications of teachers; teacher salaries;
- (e) the performance regime, including: the minimum performance standards for the school; the requirements for recording and reporting on performance;
- (f) consequences for breach of the Partnership Agreement;
- (g) termination provisions: a Partnership Agreement could be terminated by the Minister for cause where the Kura Hourua failed to meet performance standards or otherwise breached the Partnership Agreement or its statutory duties. Partnership Agreements could be terminated without cause by either the Minister or the Sponsor for “convenience”. They could also be terminated by mutual agreement of the parties.

Education Amendment Bill 2018

19. On 8 February 2018, the Education Amendment Bill (the **Bill**) was introduced into the House of Representatives (the **House**). The Bill is currently before the Education and Workforce Select Committee. The Bill proposes to remove the Kura Hourua model from the education system.
20. The Explanatory Note to the Bill states that the policy objective underlying this change is to “strengthen the quality of school education...”
21. Clause 10 of the Bill repeals Part 12A of the Education Act - the provisions enabling the establishment of Kura Hourua.
22. Clause 18 of the Bill amends Schedule 1 to the Education Act, inserting a transitional provision for existing Kura Hourua which provides as follows:

Transitional provisions for existing partnership schools kura hourua

(1) *In respect of any partnership school kura hourua in existence immediately before the commencement of this clause, this Act applies as if sections 10, 18, and 20 of the Education Amendment Act 2018 had not come into force.*

(2) *Despite subclause (1), section 158C does not apply.*

(3) *This clause ceases to apply in respect of a partnership school kura hourua on the earlier of—*

(a) the expiry of the partnership school contract for the school; and

(b) the termination of the partnership school contract for the school.

23. While the Bill, if enacted, will prevent the establishment of any new Kura Hourua, it does not itself disestablish the existing Kura Hourua. The Bill in fact, confirms that existing Kura Hourua will continue to operate until the earlier of the expiration or the termination of the relevant Partnership Agreement.

24. The Crown's decision to terminate the existing Partnership Agreements was one that is distinct from the provisions of the Bill.

TE TIRITI O WAITANGI AND EDUCATION

25. The Waitangi Tribunal has previously considered the relationship between the principles of te Tiriti and the provision of education services and educational outcomes for Māori.

26. The Tribunal's consideration has largely focused on historical treaty grievances concerning the Crown's compliance with its Treaty obligations in relation to education services within specific inquiry districts.

27. The Tribunal considered contemporary Treaty claims of more national scope relating to education in the *Matua Rautia: The Report on the Kohanga Reo Claim*¹ and the *Report on the Aotearoa Institute Claim concerning Te Wananga o Aotearoa (Te Wananga o Aotearoa Report)*².

28. The Tribunal has found that, generally, the Crown owes obligations to Māori under te Tiriti in respect of education.

¹ Waitangi Tribunal, *Matua Rautia: The Report on the Kohanga Reo Claim*, 2013

² Waitangi Tribunal, *The Report on the Aotearoa Institute Claim concerning Te Wananga o Aotearoa*, 2005

29. In relation to the termination of Partnership Agreements with Kura Hourua, the following Treaty principles are particularly applicable:
- (a) *Partnership*: the Crown and Māori, being Treaty partners, must act reasonably and in good faith towards each other.
 - (b) *Active Protection*: the Crown has a duty to actively protect the interests of Māori specified in te Tiriti.
 - (c) *Reciprocity*: the Crown must respect tino rangatiratanga in exercising kāwanatanga and this should be reflected in its decision making.
 - (d) *Equity*: the Crown has a duty to treat Māori and non-Māori equally.
30. The overarching principle when considering whether the Crown has met its Treaty obligations in relation to education is the principle of partnership, which involves the balancing of kāwanatanga and tino rangatiratanga.
31. All other relevant Treaty principles derive from the principle of partnership.
32. In *Te Whanau o Waipareira Report* the Tribunal observed that “most of all the concept of partnership serves to answer questions about the extent to which the Crown should provide for Māori autonomy in the management of Māori affairs, and more particularly how Māori and the Crown should relate to each other that such issues might be resolved”.³
33. In the context of education, the Tribunal has found that the cession by Māori to the Crown of kāwanatanga under article 1 of te Tiriti gives the Crown a right to determine education policy in accordance with the principles of good government and for the benefit of all New Zealanders.⁴
34. Kāwanatanga also involves the active protection of tino rangatiratanga.⁵
35. Therefore, the exercise of kāwanatanga by the Crown in respect of education requires the Crown to:

³ Waitangi Tribunal, *Te Whanau o Waipareira Report*, 1998, p. 30

⁴ *The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa*, p. 35

⁵ *Ibid*, the Waitangi Tribunal observed that “the point has been made by many Tribunals”.

- (a) Have a fully informed understanding of and respect for the Māori interest.⁶
 - (b) Consider “carefully the effect of executive action and changes in policy, and to engage in consultation and negotiation with its Treaty partner” to understand how Māori interests are affected.⁷
 - (c) Conduct consultation in good faith.
36. The standard and manner of consultation is not fixed but depends on the issues in question and the relative impact on Māori and Māori interests.⁸
37. For the Crown to have meaningfully consulted, the Crown must have at least:
- (a) sufficiently informed itself of the Māori interest at stake; and
 - (b) engaged with Māori prior to making the final decision to proceed with termination.

CROWN BREACHES OF TE TIRITI O WAITANGI

38. The Claimants allege that the Crown has breached the principles of te Tiriti by:
- (a) failing to act in good faith to the Claimants and Māori in general by, without consulting:
 - (i) terminating the Partnership Agreements between the Crown and existing Kura Hourua; thereby forcing:
 - i. the closure of Kura Hourua; and
 - ii. the transition of Kura Hourua to a different type of state school under the Education Act;

⁶ *The Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa*, p. 35

⁷ *Ibid*

⁸ See for example the Tribunal’s discussion of consultation standards in the *Report on the Trans-Pacific Partnership Agreement*, 2016, pp. 39-40

- (b) failing to take into account the effect the decision to terminate the Partnership Agreements will have on Māori and in particular the impact the decision to terminate will have on Māori students, their families and their communities; and
- (c) failing to provide alternatives which make appropriate provision for the needs of Māori as represented by the Claimants.

PARTICULARS

Termination of Partnership Agreements

- 39. In early February 2018, the Minister confirmed that the Crown would explore options for the termination of Partnership Agreements with existing Kura Hourua. He stated publicly that the operators of Kura Hourua wanting to continue to be involved in education would have to apply to establish another form of school, such as a designated character school.
- 40. To become a designated character school or any other type of school under the Education Act, applications need to meet the relevant requirements for state schools under the Education Act.
- 41. There is no guarantee that all Kura Hourua will meet the requirements and therefore be able to transition to a state school under the Education Act.
- 42. The Minister also stated that if early termination could not be agreed between the Crown and Kura Hourua by the middle of May 2018, and regardless of whether Kura Hourua were permitted to transition to a different type of school, the Minister would proceed to terminate the Partnership Agreements. The Minister indicated therefore that the Partnership Agreements would not be permitted to run to the expiry of term.
- 43. On June 7 2018, the Ministry issued notices of termination to 10 Kura Hourua, with termination to take effect at the end of the 2018 school year.
- 44. Only one school, Vanguard Military School, was approved to remain open as a state school with designated character prior to the notices of termination being issued. The Minister has indicated that the applications of the

remaining schools to become a different type of state school will be decided by 31 July 2018.

45. The Crown's decision to terminate the Partnership Agreements with existing Kura Hourua:
 - (a) will lead to the closure of existing Kura Hourua; and
 - (b) has forced the Sponsors of Kura Hourua to apply to establish a new state school under the Education Act if they wish to continue to operate the school.
46. There was no prior consultation by the Crown in relation to the decision for the early termination of Partnership Agreements with Kura Hourua.
47. The Crown has not considered the Māori interest in making the decision for the early termination of Partnership Agreements with Kura Hourua, including in particular the impact on the levels of educational achievement by Priority Learners.
48. The Crown has not considered the impact of the decision for the early termination of Kura Hourua on the Māori communities that will be affected by that decision.

Review of the education system

49. On 21 February 2018, the Minister announced that over the next three years the Government will undertake a comprehensive review of the education system (the **Review**). A main component of the Review is to look at ways to address the under-achievement of Māori in the current state system. The Minister did not consult with the Claimants prior to the announcement of the Review.
50. All changes projected in respect of Kura Hourua, in particular, the termination of Partnership Agreements and closure of existing Kura Hourua, will have occurred in advance of the conclusion of the Review.

No evidence to justify termination

51. There is no policy justification for the termination of Partnership Agreements with existing Kura Hourua. The Minister has not stated how the abolition of Kura Hourua will provide better educational outcomes for Māori learners.
52. There is no compelling evidence that the existing Kura Hourua are not performing. This was recognised in the Regulatory Impact Summary (the **RIS**) that was prepared by the Ministry on the Bill: “there are limitations relating to the problem definition, including the fact that there is limited information on the long term performance of schools in the PSKH [Kura Hourua] model”.
53. In fact, the evidence indicates that the existing Kura Hourua are generally performing and students are succeeding in those schools.
54. It is also well evidenced, and acknowledged by the Crown, that Māori students are chronically under-performing in mainstream education.
55. The diverse and often unique challenges for Māori in education arguably require a distinctive response from the Crown.⁹ The Kura Hourua model has been one such response to Māori under-achievement in mainstream primary and secondary education, which has had a positive impact.
56. Despite a lack of compelling evidence to justify their termination, the Crown unilaterally determined to terminate the Partnership Agreements with existing Kura Hourua, thereby removing schools with greater curriculum flexibility and autonomy (rangatiratanga), while at the same time forcing Māori back into a system in which they have historically performed poorly. This cannot be a proper exercise of the Crown’s kāwanatanga.

No consultation with Māori

57. There has been an absence of consultation with Māori on the proposed termination of Kura Hourua. In the RIS on the proposed legislative changes, the Ministry acknowledged that there was no public consultation and testing

⁹ See for instance Waitangi Tribunal: *The Whanganui Land Report; Report on the Kōhanga Reo Claim; Report on the Aotearoa Institute Claim concerning Te Wānanga o Aotearoa*

of the proposal to repeal the legislation allowing for Kura Hourua. Similarly, the decision to terminate the Partnership Agreements with existing Kura Hourua was a unilateral decision by the Crown without consultation with the Claimants or Māori generally.

58. The fact that the disestablishment of Kura Hourua was a commitment by the (now) Government during the 2017 election campaign does not negate the Crown's duty to consult with Māori under te Tiriti.
59. While the Crown has undertaken discussions with existing Kura Hourua on future alternative schooling options (and continues to engage with the schools on this matter), there is no possibility that these discussions will alter the Crown's decision to terminate the Partnership Agreements, which has now been effected by notice. A discussion of transition options at this juncture is not a substitute for the meaningful dialogue that should have occurred prior to the Crown's decision to take steps to terminate the Partnership Agreements.
60. In order to meet its Treaty obligations, the Crown should have undertaken a consultation process with affected Māori groups before deciding to proceed with a termination process. As no consideration was given to the affected Māori community's values and aspirations, it cannot be said that the Crown and Māori are working together, nor that the principle of rangatiratanga has been maintained.
61. There is a lack of clarity - both in terms of process and outcome - regarding the discussions that the Crown is now undertaking with each school/Sponsor. This is exacerbated by the fact that the Crown holds these discussions with each Sponsor individually and subject to confidentiality, which creates uncertainty for schools, students and their whānau alike.

Lack of adequate alternative options

62. For Kura Hourua the consequences that flow from the Crown's decision to terminate the Partnership Agreements are as follows:
 - (a) Kura Hourua will be forced to close;

- (b) Sponsors of existing Kura Hourua have been forced to make an application to the Minister to establish a new state school as defined under s 156 of the Education Act.
63. The Crown has not stated how the abolition of Kura Hourua will assist in advancing educational outcomes for current and prospective Māori students of Kura Hourua.
64. Despite the fact that it is widely accepted and acknowledged by the Crown that Māori are chronically under-achieving in the state system, by terminating Kura Hourua the only option for Sponsors to potentially continue to be involved in education has been to exercise the right to make an application to the Minister to establish a new state school. The Crown has not stated how forcing Māori back into the state system will help to advance educational outcomes for Māori, rather than perpetuate the inequities currently suffered by Māori in state education.
65. The Crown has not guaranteed that all Kura Hourua will be able to transition to a different type of state school under the Education Act.
66. In any event, dislocation is an inevitable consequence for those students currently enrolled at Kura Hourua. Students of Kura Hourua will not be able to continue their education in its current form when termination of the Partnership Agreements takes effect at the end of the school year. They will have no option but to enrol at a state school if they wish to remain in education. There is the added risk that students of Kura Hourua, who are targeted Priority Learners, may choose not to continue their education.
67. The Crown has committed to addressing ways to raise Māori achievement as part of its 3-year Review. The Crown has not rationalised why Partnership Agreements with Kura Hourua needed to be terminated in advance of any findings and recommendations that come out of the Review.
68. The fact that the Government has committed to undertaking a Review also indicates that there are recognised deficiencies in the current system for Māori for which no alternative solutions or strategies have yet been developed or implemented. The Crown's decision to terminate Kura Hourua

in the absence of any adequate alternative options for Māori was therefore premature.

PREJUDICE

69. The Crown's actions will have a disproportionate affect on Māori.
70. Partnership Agreements required Kura Hourua to enrol Priority Learners, with a focus on Māori students not succeeding in mainstream education. The school roll across the existing Kura Hourua is 75% Māori/Pacific. Some individual schools exceed that 75% threshold in terms of Māori enrolment. The changes to the operation of Kura Hourua resulting from the actions of the Crown to terminate Partnership Agreements will disproportionately affect Māori students.
71. The majority of the Sponsors are Māori trusts/incorporations, which entered into Partnership Agreements with the Crown in good faith and have now invested time and money into developing Kura Hourua for the purpose of advancing Māori educational and future employment outcomes. The termination of Partnership Agreements by the Crown will also have an impact on those trust/incorporations and their capacity to provide education services to Māori. The Tribunal has found, in the context of the delivery of social services such as education, that the Crown owes duties to Māori entities under te Tiriti.¹⁰
72. The breaches of te Tiriti by the Crown described above have caused or are causing significant and irreversible prejudice to the Claimants and to Māori generally by, including (but not limited to) the following:
 - (a) eroding Māori rangatiratanga by exercising kāwanatanga:
 - (i) without regard to the disproportionate effect the decision to abolish Kura Hourua will have on Māori;
 - (ii) without regard to the views and aspirations of Māori in respect of education and Kura Hourua in particular;
 - (iii) without seeking to inform itself of the views and aspirations of Māori in respect of education and Kura Hourua in particular;

¹⁰ *Te Whanau o Waipareira Report*, p. 16

- (iv) without evidence to justify the termination of Kura Hourua;
- (v) without providing adequate alternative options for Māori students;
- (b) compromising the valuable role played by Kura Hourua in advancing Māori achievement in primary and secondary education;
- (c) causing harm and loss to current and prospective Māori students of Kura Hourua by refusing to maintain or develop an educational framework that reduces inequities suffered by Māori in primary and secondary education; and
- (d) dislocating Māori students currently enrolled at Kura Hourua.

RELIEF SOUGHT

73. The Claimants, on behalf of themselves and Māori generally, seek the following relief:

- (a) that the Tribunal find that:
 - (i) the claims are well founded; and
 - (ii) the Crown's policies, actions and conduct as outlined in this statement of claim are inconsistent with Te Tiriti o Waitangi;
- (b) that the Tribunal recommend that:
 - (i) the Crown not further progress the termination of the Partnership Agreements; and
 - (ii) enter into consultation in good faith with the Claimants and Māori on the future of Kura Hourua.

74. The Claimants reserve the right to further particularise and amend this Statement of Claim.

DATED this 3rd day of July 2018



M K Mahuika / T N Hauraki
Counsel for the Claimants

TO: The Registrar, Waitangi Tribunal, Wellington.

AND TO: Crown Law Office.

This **STATEMENT OF CLAIM** is filed by **MATANUKU MAHIKA** solicitor for the above named Claimants of the firm of Kahui Legal.

The address for service on the above named Claimant is at the offices of Kahui Legal, Level 11, Intilecta Centre, 15-17 Murphy Street, Wellington.

Documents for service on the above named Claimant may be left at the address for service or may be:

- (a) posted to the solicitor at Kahui Legal, PO Box 1654, Wellington;
- (b) emailed to the solicitors at Matanuku@kahuilegal.co.nz and Tara@kahuilegal.co.nz ; or
- (c) transmitted to the solicitor by facsimile to (04) 495 9990.