

KI MUA I TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI

WAI.....

IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

**a claim by DR. TIMOTI KARETU, TINA
OLSEN-RATANA and DAME IRITANA
TE RANGI TAWHIWHIRANGI on behalf
of TE KŌHANGA REO NATIONAL
TRUST BOARD**

**MEMORANDUM OF COUNSEL FOR THE CLAIMANTS IN SUPPORT OF
APPLICATION FOR URGENCY**

Dated 25 July 2011

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MAY IT PLEASE THE TRIBUNAL:

1. This Memorandum of Counsel for the Claimants is submitted in support of the Claimants' application for an urgent hearing of their Waitangi Tribunal Claim. The grounds in support of the application are set out in the briefs of evidence of Dame Iritana Te Rangi Tawhiwhirangi dated 25 July 2011 and Tina Olsen-Ratana dated 25 July 2011.
2. Counsel are available to appear at short notice in support of this Memorandum if the Tribunal so requires.
3. The grounds on which an urgent hearing is sought are as follows:
 - (a) The nature and significance of the substantive claim;
 - (b) The claim challenges an important current or pending Crown action or policy;
 - (c) Significant and irreversible prejudice will be suffered by the Trust Board and Kōhanga Reo as a result of current or pending Crown actions or policies;
 - (d) The Trust Board has exhausted all other avenues and there is no other forum available to the Claimants ; and
 - (e) The Claimants are ready to proceed to an urgent hearing.

Nature of the Claim

4. The claimants are trustees of Te Kōhanga Reo National Trust Board and represent its interests and those of the Kōhanga Reo chartered to it. The Trust

Board has 471 Kōhanga Reo chartered to it, with approximately 9,340 mokopuna.

5. The Claim seeks redress against regulations, statutory instruments, policies, practices, acts and omission by the Crown, since 21 September 1992, which have prejudicially affected the Trust Board and Kōhanga Reo and are in breach of Articles 1, 2 and 3 of the Treaty of Waitangi.
6. Since about 1990, the Crown has treated Kōhanga Reo as early childhood providers. That decision was made unilaterally by the Crown, without consultation.
7. This has failed to recognise the kaupapa of Kōhanga Reo, which was never intended to be only about early childhood education, but also about te reo Māori, tikanga Māori, and whānau development. This has also resulted in a steady decline in Kōhanga Reo from a peak of approximately 809 Kōhanga Reo and approximately 14,514 mokopuna in the early 1990s to 471 Kōhanga Reo and 9,364 mokopuna today. This has coincided with a continuation of the decline in te reo Māori.
8. The Claimants allege the following breaches by the Crown:
 - (a) Breaches under Article 2 of the Treaty by failing to:
 - (i) Recognise or protect the kaupapa of Kōhanga Reo as an expression of tino rangatiratanga;
 - (ii) Protect Kōhanga Reo as a taonga;
 - (iii) Protect te reo Māori through the Kōhanga Reo model;
 - (iv) Allow the Trust Board, Kōhanga Reo, and whānau to exercise kaitiakitanga over Kōhanga Reo and their mokopuna;
 - (v) Allow the Trust Board and Kōhanga Reo the right to develop Kōhanga Reo in accordance with its own kaupapa; and

- (vi) Allow kohanga, whānau, the trust and iwi to decide if kohanga should be devolved from the Trust Board to iwi.
- (b) Breaches under Article 1 of the Treaty by failing to:
 - (i) Govern properly in a manner that gives appropriate priority to Māori interests; and
 - (ii) Act in accordance with the principle of partnership in its dealings with the Trust Board and/or Kōhanga Reo; and
 - (iii) Make informed decisions in relation to Kōhanga Reo as matters affecting Māori.
 - (c) Breaches under Article 3 of the Treaty by failing to:
 - (i) Treat the Trust Board and/or Kōhanga Reo fairly and not subject them to discrimination; and
 - (ii) Take special measures to ensure that Māori can attain equality with other citizens of New Zealand in matters such as health, employment and educational achievement.

Background to the Claim

9. The background to the claim is set out in the brief of evidence by Dame Iritana Tawhiwhirangi. The brief explains how Kōhanga Reo were conceived by Māori as a response to the decline in te reo Māori. A kaupapa was developed to safeguard and promote te reo as a taonga, using the existing resources and expertise of Māori communities, after which the Trust Board was established. In particular, Kōhanga Reo sought the involvement and guidance of kuia and kaumatua, who had been raised in te reo Māori, and sought to pass on their knowledge in natural, whānau-oriented environments, often centred at marae. At the heart of that kaupapa lay the principles of full immersion in te reo Māori and whānau development.
10. Although Kōhanga Reo involved children, they were not early childhood education centres. They did not “teach” te reo, but rather used it in the context

of a home environment: the principle was that te reo should be “caught” rather than “taught”. As the brief of Tina Olsen-Ratana explains, the purpose of Kōhanga Reo was the transmission and preservation of custom and culture, and involved the entire whānau.

11. Between 1982 and 1989, the Crown supported Kōhanga Reo through the Department of Māori Affairs, and the relationship prospered. Kōhanga Reo flourished during this period.
12. However, following the abolition of the Department of Māori Affairs, the responsibility passed to the Ministry of Education. Since that time, Kōhanga Reo have effectively been treated as early childhood education centres, without any or adequate consideration of their unique kaupapa. As noted above, this has resulted in a serious decline in the numbers of Kōhanga Reo, and in the number of children attending.
13. This history of treating Kōhanga Reo as early childhood education centres, and the denial or erosion of their kaupapa, lies at the heart of this claim, and will be addressed in detail at the substantive hearing. But the grounds for urgency arise out of the latest development in that history.

Reasons for Urgency

14. The Crown is currently in the process of making decisions which are likely to cause further significant and irreversible prejudice for the Trust Board and Kōhanga Reo. Although this claim arises out of a history or pattern of behaviour by the Crown towards Kōhanga Reo since the early 1990’s, matters have been brought to a head by the publication of the Early Childhood Education Taskforce Report, “An Agenda for Amazing Children” (“**the Report**”). The Trust Board is concerned that the Crown intends to implement recommendations in the Report which will ultimately expedite the decline in Kōhanga Reo, and exacerbate the crisis facing te reo Māori.
15. The ECE Taskforce (“**the Taskforce**”) was established by the Minister of Education in October 2010. At the time, there was a tripartite arrangement in existence between the Trust Board, the Ministry of Education and Te Puni

Kōkiri. The Taskforce was discussed informally between the Trust Board and the Ministers responsible in November 2010. At that time the Trust Board was advised that the Crown had already made its appointments, but that the Taskforce would be sure to consult with the Trust Board and take account of its views in the Report: refer to the brief of Tina Olsen-Ratana paragraphs 29-37.

16. This did not happen. There was no meaningful consultation, and certainly nothing of the sort that should have been expected in light of the principle of partnership between the Crown and the Trust Board arising under Articles 1 and 2 of the Treaty of Waitangi. Nor did the Taskforce advise the Trust Board that it was considering making recommendations that would materially affect Kōhanga Reo.
17. On 1 June 2011, the Report was released for consultation. That Report makes a number of adverse findings and comments about the Trust Board and Kōhanga Reo which are incorrect. It even recommends (page 145) that kohanga be devolved from the Trust to iwi within five years, facilitated by the Ministry of Education and Te Puni Kokiri when that is surely a decision for whanau, kohanga, the trust and iwi to make. These are summarised in the brief of evidence by Tina Olsen-Ratana at paragraph 35.
18. The Trust Board met with officials from the Ministry of Education and Te Puni Kōkiri regarding its serious concerns with the Report on 5 and 7 July 2011. Despite such concerns, the Trust Board was advised at the 7 July 2011 meeting by the Ministry that the timelines adopted in relation to the Report would not change and that the Trust Board should provide any submissions in relation to the Report by the deadline for consultation: refer to the brief of evidence by Tina Olsen-Ratana at paragraph 39.
19. The consultation period for the Report ends on **8 August 2011**. Counsel has been advised by the Ministry of Education that from 8 August, officials will make recommendations based on the Report to the Minister of Education, the Hon Anne Tolley, and that a Cabinet decision is likely to be made around the week ending 26 August 2011. Having regard to the recommendations made in the Report, Cabinet is likely to make decisions which will have substantial

adverse and irreversible consequences for Kōhanga Reo and for the survival of te reo Māori as a living language and as a taonga.

20. In a media release dated 1 June 2011 the Minister stated that she welcomed the release of the Report and that the Taskforce had done “a very thorough job.” The Minister also stated that it was heartening that serious issues had been identified by the Taskforce and that positive suggestions had been made to deal with areas of concern. The Minister went on to state that “any proposals for major changes to ECE will form part of the election campaign.” However, the Trust Board’s view is that any proposals which impact upon the future of Kōhanga Reo are not matters for the electorate to decide, but are matters for Māori and the Crown under the partnership established by the Treaty of Waitangi.

Prejudice

21. The Trust Board is concerned that it and Kōhanga Reo have already suffered irreversible prejudice due to being brought within the early childhood education framework. If further decisions are permitted to be made based upon the Report, then the Trust Board and Kōhanga Reo may effectively cease to exist as independent Māori entities with their unique kaupapa: see brief of evidence by Dame Iritana Te Rangi Ta Whiwhirangi at paragraph 42.
22. The Report is based on a misconception of Kohanga Reo and fails to address the kaupapa of Kōhanga Reo. Kōhanga Reo are not simply early childhood education centres. Rather, they are taonga in their own right, and serve important functions as Kaitiaki of Māori tikanga and te reo. They perform this function according to a unique kaupapa. Bringing Kōhanga Reo within the early childhood regulatory regime has alienated their kaupapa, and resulted in the steady decline of Kōhanga Reo. The recommendations in the Report, if adopted, will exacerbate this process, making Kōhanga Reo increasingly indistinguishable from early childhood education centres: refer to the brief of Tina Olsen-Ratana at paragraphs 41 and 42.

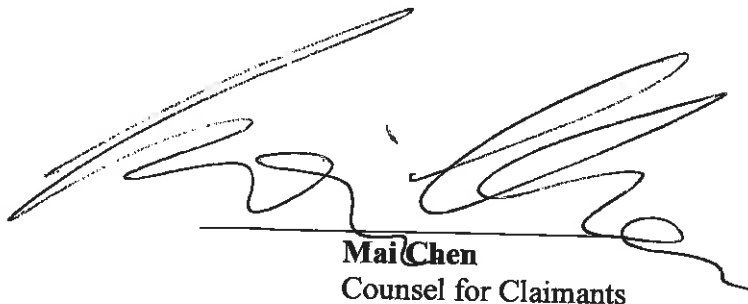
23. The experience of the Trust Board has been that Kōhanga Reo cannot overcome these setbacks and the decline in numbers is likely to be permanent. This has a flow on effect for the survival of te reo Maori as it is less likely that people become fluent, if not from a fluent-speaking whanau, unless they acquire te reo during their early years. In addition, the number of kaumatua raised in te reo will dwindle and they will not be able to pass on their knowledge. This means that any damage caused to Kōhanga Reo as a consequence of the Report is likely to be irrevocable: refer to the brief of evidence of Tina Olsen-Ratana at paragraphs 41-42.
24. The redress sought by the claimants includes a recommendation that the Crown give statutory recognition to Kōhanga Reo. Specifically, the Trust Board considers that Kōhanga Reo will remain “ghettoised” within the early childhood education sector until Parliament passes legislation which recognises their status as taonga and adopts their kaupapa as the fundamental principle for determining funding and assessing performance. The Trust Board considers that law reform is the only way of giving effect to the Crown’s Treaty obligations to Kōhanga Reo.
25. However, on the basis of its experience to date, the Trust Board is concerned that the Crown will not address these concerns properly unless the Tribunal makes findings that the Crown has breached the principles of the Treaty, and makes recommendations that the Crown’s duty of active protection requires law reform. Wananga have statutory recognition of their role and status under the Education Act 1989, but Kōhanga Reo have no such recognition or protection.
26. The Trust Board has met twice with officials to seek a resolution following release of the Report, but the Crown has given no undertaking that it is willing to introduce or work towards legislation which recognises and addresses these issues. Rather, the Crown has offered a return to the tripartite relationship, despite that relationship being dysfunctional and failing to address the Trust Board’s concerns in the past, or to reverse or stop the decline of Kōhanga Reo.

27. The Trust Board has been belatedly invited to make submissions in respect of the recommendations in the Report, and to work on a response on a tripartite basis with the Ministry of Education and Te Puni Kōkiri, after it vehemently objected (through counsel) to its unfair treatment. But there was no agreement to delay the 8 August deadline, and the Trust Board has no reason for confidence that this process will address its concerns fully or fairly, bearing in mind the history of the relationship with the Crown up to and including the process adopted by the Taskforce. This is, in effect, a continuation of the Crown's previous approach towards the Trust Board and Kōhanga Reo, rather than a new relationship which gives effect to the principles of the Treaty. The Trust Board is still being required to work within a process dictated by the Crown, and continues to be treated solely as a provider of early childhood education. The Crown appears to be taking steps to better understand the nature and kaupapa of Kōhanga Reo, but without a commitment to fundamental reform, the Trust Board considers this is "business as usual". It will not reverse the decline in Kōhanga Reo or allow them to fulfil their potential: refer briefs of evidence by Dame Iritana Te Rangi Ta Whiwhirangi at paragraphs 40 - 41 and Tina Olsen-Ratana at paragraphs 44 - 45.
28. Further, any advice given to the Minister will be considered in light of the existing recommendations made by the Taskforce.
29. If the Tribunal does not hear this claim urgently, the claimants are concerned that, from **8 August 2011**, recommendations and decisions will be made which may permanently constrain Kōhanga Reo within an early childhood education framework, resulting in further decline. This will have irreversible and long-lasting effects on the Trust Board and Kōhanga Reo, and ultimately on the survival of te reo Māori.
30. There are no alternative avenues for the Trust Board and Kōhanga Reo whānau given the nature of the substantial claim that Kōhanga Reo have been inappropriately categorised as early childhood education services. The Trust Board has repeatedly attempted to resolve matters with the Crown as set out in the briefs of evidence of Dame Iritana Tawhiwhirangi and Tina Olsen-Ratana

without achieving any resolution. It is also unlikely that a Court would consider such a matter by way of judicial review. Upon that basis, the only appropriate forum to consider all aspects of the claim is the Tribunal.

31. Accordingly, Counsel respectfully requests that this matter be timetabled as an urgent hearing. The Claimants also respectfully request that the Tribunal ask the Crown, in the spirit of partnership, to suspend any actions or decisions concerning the Report and its recommendations affecting Kōhanga Reo until the Tribunal's inquiry and report are completed.

Dated at Wellington this 25th day of July 2011.



Mai Chen
Counsel for Claimants

TO: The Registrar, Waitangi Tribunal

AND TO: Treaty Team, Crown Law Office, P O Box 2858, Wellington 6140