WAITANGI TRIBUNAL

Wai 2336

CONCERNING the Treaty of Waitangi Act 1975

AND an application for urgency by Dr Timoti Karetu, Tina Olsen-Ratana and Dame Iritana Te Rangi Tawhiwhirangi, on behalf of the Te Kōhanga Reo National Trust Board

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DECISION ON AN APPLICATION FOR URGENCY OF DEPUTY CHIEF JUDGE C L FOX, PRESIDING OFFICER, THE HON SIR DOUGLAS KIDD AND MR KIHI NGATAI, QSM

Tihei mauri ora. E ngā mana, e ngā reo, e ngā parikarangatanga maha, puta noa o te motu, kei te mihi maioha atu ki a koutou mō tēnei kaupapa whakahirahira e whakara nei. Hei aha? Hei whakaara ake i tō tātou reo, kia kore ai e memeha, kia kore e ngāro. Tēnā koutou katoa.

Korowai Aroha
The Nurturing Cloak of Love

Te Korowai, Korowai Aroha
Te Kaupapa o Te Kōhanga Reo
Kei a koe kei ahau
Kei tēnā, kei roto i tēnā
Te Kaupapa o Te Kōhanga Reo
He parirau ki aku pōuri
He kahu ki aku mamae
Kia mahana i te ao mokemoke
Kei a koe kei ahau
Ko miria nā he miro
Ka whatu ki ngā mahara
Tūtahi ai ki ngā mahi ā-iwi
Kei a koe kei ahau
Ka whatu mai ka whatu atu
Te Kaupapa Korowai Aroha
Kei a koe, kei ahau, kei tēnā kei roto i tēnā
Te Kaupapa o Te Kōhanga Reo

The Cloak, the nurturing cloak of love
The cornerstone of Te Kōhanga Reo
Its protection is with you and me
It is with each and every one of us
The cornerstone of Kōhanga Reo
A shelter for my distress
A covering for my pain
Warmth in a lonely world
Its protection is with you and with me
A chiefly covering woven of significant threads
Woven with the history, instilled with the thoughts of our ancestors
Built on the fabric of our cultural practices
Its protection is with you and with me
Woven by one and all
The cornerstone, the nurturing cloak of love
Its protection is with each and every one of us
The cornerstone of Te Kōhanga Reo

Introduction

1. The waiata above was sung for us by the claimants. It captures the subject matter of their claim filed on 25 July 2011. On that date the Tribunal received a Statement of Claim regarding the Crown's alleged treatment of the kōhanga reo movement.[1] The claim was filed by Dr Timoti Karetu, Tina Olsen-Ratana and Dame Iritana Te Rangi Tawhiwhirangi, on behalf of the Te Kōhanga Reo National Trust Board (the Trust). The Trust is the national governing body of the kōhanga reo movement. Of the 472 kōhanga reo in Aotearoa, 463 operate under the umbrella of the Trust.

2. The claimants allege that since about 1990, the Crown has unilaterally treated kōhanga reo as early childhood providers. In their view, 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.

3. They allege further that this has 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 472 kōhanga reo and 9,364 mokopuna today. This, in the claimants' view, has coincided with a continuation of the decline in te reo Māori.

4. This number is approximately commensurate with the understanding of the Ministry of Education (the Ministry), which cited the figure of 463 kōhanga reo in 2010. The Ministry confirms that numbers have declined from a peak of over 800 kōhanga reo in the early 1990s. Evidence for the Ministry presented during the hearing, indicated that around 40% (38,580) of Māori children aged 0-4 are enrolled in early childhood education (ECE) and of those, 10% are in kōhanga reo. It was the Ministry's evidence that in total kōhanga reo provide immersion education for 9,370 children. The witness for the Crown added that a "small, though increasing, number of other bodies also provide te reo Māori immersion." The witness went on to state the following:

> "Māori children continue to participate in ECE before starting school at rates below the national average: 90.1% for Māori compared to 94.8% overall (figures as at March 2011). Kōhanga Reo

[1] Wai 2336, #1.1.1 and see Amended Statement of Claim dated 22 September 2011 Wai 2336, #1.1.1(a)

make an important contribution to Māori participation in ECE. As services responsive to the language, identity and culture of Māori learners, Kōhanga Reo have an important part to play in achieving the priority outcome – Māori enjoying education success as Māori."

5. As the figures provided in this evidence did not seem correct, the Tribunal sought further clarification as to the Ministry's understanding of current enrolments of Māori children in early childhood education (ECE) and kōhanga reo. In submissions from Crown counsel, the Tribunal was advised that Statistics New Zealand has estimated the population of Māori children aged 0-4 on 30 June 2011 at 90,500.[2] The Ministry also estimates that:

> "15.1.1 90.1% of Māori children participate in one or more forms of ECE and/or kōhanga reo in the 4-5 years before starting school, most commonly at ages 3-4; and
>
> 15.1.2 On the most recent data (1 July 2010), 38,580 children were enrolled at that date in some form of ECE, including that provided by kōhanga reo. Of these:
>
> (a) 8916 (23.1%) of these children were enrolled in kōhanga reo;
>
> (b) 8024 (20.8%) were enrolled in other immersion or bilingual services;
>
> (c) 21,640 (56.1%) were enrolled in other ECE services."[3]

6. The Trust's claim seeks redress against regulations, statutory instruments, policies, practices, acts and omissions by the Crown since 21 September 1992, which the Trust claims have prejudicially affected the Trust and kōhanga reo and are in breach of Articles 1, 2 and 3 of the Treaty of Waitangi.

7. The claim was accompanied by an application for an urgent inquiry, with supporting affidavits.[4]

8. The grounds for urgency are based on a concern that the Crown is currently in the process of making decisions which are likely to cause further significant and irreversible prejudice for the Trust and kōhanga reo. While the substantive claim alleges a history, or pattern, of behaviour by the Crown towards kōhanga reo since 1992, the claimants say that matters were brought to a head by the establishment of

[2] Wai 2336, #3.1.26

[3] Ibid.

[4] Wai 2336, #3.1.1

an ECE Taskforce in October 2010 and the publication of its report in June 2011.[5] This report makes certain comments about the Trust and kōhanga reo.

9. The Trust argues that the Crown will implement recommendations from the publication *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (the ECE Taskforce Report)[6] and that the recommendations contained within the report will expedite the decline of kōhanga reo, and exacerbate the crisis facing te reo Māori.[7]

10. The Trust allege that if further decisions are permitted to be made based upon the Report, then the Trust and kōhanga reo may effectively cease to exist as independent Māori entities with their unique kaupapa.[8]

11. The Trust is certain that kōhanga reo cannot overcome these setbacks, and that the decline in numbers, due to the resulting decline in enrolments, is likely to be permanent. The Trust claims there will be a flow-on effect for the survival of te reo Māori as it is less likely that people will become fluent. This particularly affects those who have not been raised in a fluent te reo Māori-speaking whānau. In addition, the number of kaumatua raised in te reo will dwindle and they will not be able to pass on their knowledge.[9] We infer from this that even if enrolments pick up in later years it will be too late as the majority of elders fluent in te reo will have passed away.

12. This means, according to the Trust, that any reputational damage caused to kōhanga reo or subsequent implementation by the Crown of the ECE Taskforce recommendations is likely to be prejudicial and irrevocable for kōhanga reo and te reo Māori.

[5] Wai 2336, #3.1.1, paragraph [14]

[6] Wai 2336, #A4 vol 1

[7] Wai 2336, #3.1.1, paragraphs [14], [29]

[8] Wai 2336, #3.1.1, paragraph [21]

[9] Wai 2336, #3.1.1, paragraph [23]

Procedural Background

Delegation to Presiding Officer and Members

13. On 26 July 2011, the Chairperson, His Honour Chief Judge Isaac, appointed Deputy Chief Judge Caren Fox as presiding officer to consider the Crown's response and determine the steps that need to be taken in respect of the urgent application.[10]

14. Mr Kihi Ngatai and the Hon. Sir Douglas Kidd were later appointed to assist Deputy Chief Judge Fox in her determination of whether or not to grant the application for urgency.[11]

15. On 26 July 2011, Chief Judge Isaac also issued directions requesting the Crown to respond to the application for urgency by 1 August 2011.[12]

Memoranda and submissions received

16. On 4 August 2011, the Tribunal received a memorandum from Mr Ben Keith and Dr Damen Ward for the Crown opposing the application for urgency.[13] The memorandum was accompanied by a brief of evidence from the Acting Group Manager ECE at the MOE.[14]

17. On 9 August 2011, Ms Chen, counsel for the claimants, filed a memorandum in response to the Crown's memorandum in opposition to urgency.[15] Counsel submitted, inter alia, that there is a substantial risk of imminent, significant and irreversible prejudice to kōhanga reo, which merits urgency.

18. The Tribunal issued a direction on 9 August 2011, announcing there would be a hearing of the application for urgency on Wednesday 17 and Thursday 18 August

[10] Wai 2336, #2.5.1

[11] Wai 2336, #2.5.5

[12] Wai 2336, #2.5.1

[13] Wai 2336, #3.1.7

[14] Wai 2336, #A3

[15] Wai 2336, #3.1.10

2011.[16] The Tribunal also directed the Crown to file all the documents (so far as they related to the application for urgency) referred to in the memorandum of Ms Chen dated 28 July 2011.[17]

19. On 11 August 2011, the Crown filed a memorandum seeking clarification of the direction to file further information.[18] On 12 August 2011, the Tribunal advised parties that only documents relevant to the urgency were to be filed by the Crown.[19]

Application Hearing

20. The application for urgency was heard in Wellington on Wednesday 17 and Thursday 18 August 2011. The Tribunal heard opening submissions for the claimants and then evidence from Dr Timoti Karetu, Dame Iritana Te Rangi Tawhiwhirangi, Ms Titoki Black and Ms Tina Olsen-Ratana on behalf of the Te Kōhanga Reo Trust Board. Crown counsel presented submissions in response followed by the evidence of the Acting Group Manager ECE.

21. Following the hearing the Tribunal issued directions directing the Crown to file further documents and information which would assist the Tribunal in making its decision.[20] The Crown filed further information[21] and the accompanying papers on 29 August 2011.[22]

22. The Crown filed their closing in opposition to the application for urgency on 29 August 2011.[23]

23. Closing submissions for the claimants were filed on 9 September 2011.[24]

[16] Wai 2336, #2.5.3

[17] Wai 2336, #3.1.2

[18] Wai 2336, #3.1.11

[19] Wai 2336, #2.5.4

[20] Wai 2336, #2.5.6 and #2.5.7

[21] Wai 2336, #3.1.26

[22] Wai 2336, # A13-A19

[23] Wai 2336, #3.1.25

[24] Wai 2336, #3.1.38

Mediation

24. By memorandum-directions of 19 August 2011, the Tribunal directed the parties to mediation pursuant to clause 9A of the Second Schedule to the Treaty of Waitangi Act 1975. The Tribunal suggested that mediation between the parties of the Tripartite Agreement would assist in re-establishing an effective working relationship between the parties. The Tribunal called for parties to suggest suitable candidates for the role of mediator.[25]

25. After considering responses from the parties, the Tribunal advised that Mr Royden Hindle and Mr Kevin Prime would act as co-mediators.[26]

26. On 20 September 2011, the Tribunal received a letter from the co-mediators advising that mediation was unsuccessful.[27]

Background to Application for Urgency

27. In October 2010, following approval from Cabinet, the Minister of Education, the Hon Anne Tolley (the Minister) established an advisory Taskforce on ECE with responsibility for reporting on the sector by April 2011. The members of the Taskforce were Dr Michael Mintrom (chair), Tanya Harvey, Claire Johnston, Professor Richie Poulton, Peter Reynolds, Professor Anne Smith, Aroaro Tamati, Laurayne Tafa and Ron Viviani.

28. The terms of reference for the Taskforce required it:

    (a) undertake a full review of the value gained from the different types of government investment in early childhood education in New Zealand;

    (b) consider the efficiency and effectiveness of Government's current early childhood education expenditure, and ways that this might be improved, particularly for Māori, Pasifika, and children from low socio-economic backgrounds;

[25] Wai 2336, #2.5.6

[26] Wai 2336, #2.5.10

[27] Wai 2336, #3.5.1

(c) develop new ideas on innovative, cost effective and evidence-based ways to support children's learning in early childhood and the first years of compulsory schooling;

(d) make recommendations to Government about proposed changes to funding and policy settings for early childhood education, and their costs, benefits and risks; and

(e) consider how to achieve its recommendations without increasing current government expenditure.[28]

29. The terms of reference also record that the Taskforce will be "independent from Government."[29] In terms of Māori, the Taskforce was specifically directed to be "mindful of Government's objectives around education success for Māori" and the status of *Ka Hikitia – Managing for Success* as a key strategy. They were also to be mindful of the prime importance in the provision of ECE of the need for services, "which recognises language, culture and identity as key for increasing participation in early childhood education and improving learner outcomes."[30]

30. It was the evidence before this Tribunal, that in October 2010, the Trust invited the Ministers of Education and Māori Affairs to an informal lunch[31] to discuss the te reo Māori review led by Te Puni Kōkiri (TPK)[32]. The ECE Taskforce was also discussed. In evidence given by the Co-Chair of the Trust Ms Olsen-Ratana, representatives of the Trust suggested that it be included on the ECE Taskforce.[33] The Minister of Education, we were told, advised the Trust that it was too late as appointments had been made. According to Ms Olsen-Ratana, the Minister indicated that she would get back to the Trust about its input and that she would make sure the ECE Taskforce took into account the Trust's views.[34]

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[28] Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011) p. 176

[29] Ibid.

[30] Ibid., p. 177

[31] Wai 2336, #A5, Appendix C

[32] Wai 2336, #A1, p 7 paragraph [31]-[32]

[33] Ibid.

[34] Ibid.

31. The Taskforce met with a number of "sector" groups and called for public submissions with a closing date on 31 January 2011. By that date, 439 written submissions had been received from a range of groups, including parents, ECE sector organisations and employees, academics and government agencies.[35] Comments added to the ECE Taskforce website and Facebook page were also considered.[36] The ECE Taskforce did not meet with the Trust.

32. During the existence of the ECE Taskforce, the MOE acted as a secretariat for its work and provided it with a series of briefing papers on different aspects of the ECE sector, a number of which were subsequently filed with the Tribunal at our request. The Taskforce released its report publicly on 1 June 2011.

33. The Taskforce made 65 wide-ranging recommendations, a number of which indirectly or directly impact on the Trust and kōhanga reo. These include:

> *"An immediate focus on system quality and the effectiveness of government spending. This includes:*
>
> - *A careful review of spending to ensure its high value*
> - *Strengthening quality measures for home-based services, education and care for children under two years of age, group sizes, and accountability measures for kōhanga reo*
> - *Reduced tolerance for variability and under-performing services – intensive support followed by decisive action for services receiving supplementary ERO reviews regulating for a minimum of 80% registered staff in teacher-led, centre based services (up from 50%)."*[37]

34. The ECE Taskforce recommended sequenced phase 1 and 2 changes that it claimed would enable "later reforms to build on earlier reforms in a sensible, sustainable fashion." Phase 1, would focus on "immediate quality improvements."[38] These were considered "urgent to safeguard children's welfare and to ensure the sector is performing how it should." This phase "will also include some immediate regulatory change."[39]

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[35] Wai 2336, #A18, vol 5, tab 4

[36] Ibid.

[37] Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011) p. 32

[38] Ibid., p. 35

[39] Ibid., p. 35

35. Figure 7 in the report depicts the phased recommendations and kōhanga reo are specifically identified for phase 1 with cross-references to pages 46, 47 & 48 of the report.[40] Those pages discuss recommendations that will support a state of "continual improvement" and measures to achieve this, including reducing "adult to child ratios" and requiring that in teacher-led or centre-based ECE services, they employ at least 80% registered ECE teachers, with incentives for having in excess of 80% to 100%.

36. The Report has a number of sections on Te Kōhanga Reo which the claimants say are "unfair and derogatory." We note in particular where the report authors commented:

> *"The ECE Taskforce wants to acknowledge the incredible contribution Te Kōhanga Reo has made to Māori immersion early childhood education. The mission of Te Kōhanga Reo National Trust is the protection of te reo, ngā tikanga me ngā āhuatanga Māori by targeting the participation of mokopuna and whānau into the Kōhanga Reo movement and its vision is to totally immerse kōhanga mokopuna in te reo, ngā tikanga me ngā āhuatanga Māori. We unequivocally acknowledge the phenomenal achievements of kōhanga reo in relation to whanāu development and Māori language revitalisation. As we see it, there are some realities that need to be urgently addressed – in particular the steady decline of kōhanga reo enrolments and the disproportionate number of supplementary ERO reviews of kōhanga reo.*
>
> *Figure 5 shows that kōhanga reo enrolments have not increased as most other service types' enrolments have, but rather, have slightly declined.*
>
> *One indicator of low-quality services is a supplementary review from ERO. ... Supplementary reviews are therefore a possible indicator that a service is suffering from quality difficulties in one or more aspects of its operation.*
>
> *Kōhanga Reo have an extremely high rate of supplementary reviews – over a third of all settings received them between 2007-2010. ...*
>
> *This is not intended to reflect badly on the Kōhanga Reo movement as a whole. There are many reasons why whānau could struggle. Poor access to appropriate development or resources, lack of funding, and the availability of whānau members, kaumatua or kuia can all impact on a kōhanga reo's operation. These are difficult situations, and they must change. But nonetheless, our primary concern has to be for the welfare of the mokopuna in these kōhanga reo.*

[40] Ibid., p.36

Government must think seriously about the way it invests in kōhanga reo. This is discussed further in Essay 4: Achieving Access for all Children."[41]

37. There is a larger section on pages 145-146 following a further comment on the "disproportionate number of supplementary Education Review Office (ERO) reviews" of kōhanga reo, and suggesting concerns must be addressed. Then the authors state:

> *"It appears that the kōhanga reo movement has, for some time, been viewed as too hot a political issue to touch. Added to this, any scrutiny of the institution is difficult because Te Kōhanga Reo National Trust strongly objects to what it views as any attempt to diminish its autonomy. However, while some kōhanga reo are providing exceptional Māori immersion early childhood education, the issues outlined in Essay 2: Reprioritising Government Expenditure raise questions about consistent quality early childhood education provision, and national body leadership for all children who attend kōhanga reo, and whether the Trust is a key barrier or contributor to the original application of the movement. Political sensitivities in any guise should never trump the safety and well-being of children. A lack of progress in the area of ensuring quality early childhood education provision, targeted support and guidance for kōhanga reo is of great concern to the ECE Services. We discuss our view of the nature of quality in Essay 1: Aiming for High-Quality Services. We believe meaningful change is overdue and must be addressed. We need to do whatever it takes for all children to have access to quality early childhood education in the form that is most appropriate for them and their community. That is their right."*[42]

38. The Taskforce made a further recommendation as follows:

> *"The Tripartite Review be completed immediately, and that the quality of initial teacher training should be added to the Tripartite Review. We also think that Te Kōhanga Reo National Trust's reporting and compliance requirements should be aligned with those required in other early childhood education settings. We also believe that the recommendations of the Gallen Report (2001) and the PricewaterhouseCoopers Report (2006) on Te Kōhanga Reo National Trust should be revisited, and where appropriate implemented."*[43]

39. The Gallen Report[44] recommended that (a) the Trust allow kōhanga reo to receive capital funding through the Trust from the MOE Discretionary Grants scheme, without incurring repayments by them to the Trust, (b) the Government agree to a

[41] Ibid., pp. 57-58

[42] Ibid., p. 146

[43] Ibid., p. 146

[44] Ministry of Education (2001). *Review of the Relationship between the Crown and Te Kōhanga Reo Nationa Trust, "The Gallen Report".* Wellington as referenced in Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011)

process to support future funding commitments previously met by the Property Putea, including specifically funding for Te Arahiko, Māori Language Training, Resource Development and Research, and (c) kōhanga reo be devolved from the Trust to iwi within five years, facilitated by MOE and TPK.[45]

40. The PricewaterhouseCoopers Report[46] suggested a facilitated forum to discuss issues concerning (a) reporting and compliance by way of an MOU, (b) agreed outcomes, activities, inputs and outputs, and (c) an examination of funding and expenditure of the Trust, in light of the early childhood sector, the MOE goals, the philosophies of the Trust and the kōhanga reo movement and the wider socio-economic environment. It was to also include a comparison with other parts of the ECE sector.[47]

The Crown's Response to ECE Taskforce Report

41. The last meeting of the Taskforce was held in March-April 2011. On 20 May 2011, the MOE provided a briefing paper to the Minister seeking her direction on the level of consultation she required on the recommendations of the ECE Taskforce. She indicated in response that consultation must begin as soon as possible, beginning on 7 June 2011 for four weeks.[48] The purpose for such a rushed period, it seems from the evidence, was to complete the exercise before the election.[49] Ultimately, it was decided to engage in an eight-week consultation period from 15 June to 8 August 2011.[50]

42. On 26 May 2011, the Minister received the ECE Taskforce Report.[51] On that same date, she received from officials a paper to assist her to present an oral item to Cabinet scheduled for 30 May 2011.[52] The paper indicates she intended to

[45] Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011), p. 145

[46] Ministry of Education; PricewaterhouseCoopers (2006). *Costing Review of Te Kōhanga Reo National Trust.* Ministry of Education: Wellington as referenced in Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011)

[47] Wai 2336, #A1, Appendix 4, *An Agenda for Amazing Children – Final Report of the ECE Taskforce* (June 2011), pp. 145-146

[48] Wai 2336, #A18, vol 5, tab 6

[49] Wai 2336, #A18, vol 5, tab 6

[50] Wai 2336,#A3, p. 10, paragraph [36]

[51] Wai 2336, #3.1.26, paragraph [16]

[52] Wai 2336, #A18, vol 5, tab 7

announce that she wanted to consult the sector, parents and employers on their views of the Taskforce's recommendations as part of her strategy development.[53] She was to use the results of the consultation process, along with other advice, to consider which of the Taskforce's recommendations to implement and what other long-term actions to undertake in ECE over the next three to five years.[54] She would report to Cabinet on 7 June 2011.[55] On 30 May 2011, however, Cabinet delegated this matter to the Cabinet Social Policy Committee (SOC) for consideration.

43. On 31 May 2011, the Minister received a paper from officials requesting she sign it and forward it to the SOC.[56] The paper details the general recommendations of the Taskforce and steps for consultation and it attached, as Appendix 1, a draft consultation survey document.

44. Appendix 1 indicated that the MOE was interested in views on a number of issues, including targeting Māori and Pacific Island children and "what changes should be made to ensure high levels of quality and value for money, including how to support services that have difficulty providing high quality ECE, especially those in the high growth area of home-based ECE, education and care services for under two year olds, *and the important Māori immersion sector*."[57] It specifically lists on page 5 the recommendations affecting the Trust and kōhanga reo.[58] The Minister was to ask the SOC to note, inter alia, that she intended to report back to Cabinet by the end of August 2011,[59] but these documents were subsequently redrafted.

45. Within 24 hours on 1 June 2011, the Minister received the redrafted papers, comprised of the same content with some additions. These additions included a new paragraph 14, which reads:

> *"Māori whanau and communities will be contacted by utilising existing Māori networks to inform communities, and tailoring the information to the target audience and ensuring the information can be accessed easily."*[60]

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Wai 2336, #A18, vol 5, tab 8

[57] Wai 2336, #A18, vol 5, tab 8, Appendix 1, p. 2 (emp. in italics added)

[58] Wai 2336, #A18, tab 8, Annex 1, p. 5

[59] Wai 2336, #A18, tab 8, p. 4

[60] Wai 2336, #A18, tab 9, p. 3

46. The paper had attached a redrafted Appendix 1. This version of the draft consultation survey document would ask the public for their views on a number of areas including on kōhanga reo.[61] It later asked the question, should Government establish a support function for Māori immersion and bilingual ECE services? If yes, what should it do?[62] The recommendations concerning kōhanga reo from the ECE Taskforce Report were summarised and the public would be asked, (1) Do you agree that compliance requirements for kōhanga reo should be the same as other services? If not, why not? (2) Do you agree that the recommendations of previous reviews should be revisited?[63]

47. In their memorandum dated 29 August 2011, Crown counsel indicate that the final set of these papers dated 1 June 2011 were sent to the Minister for signing and she then submitted these to the SOC.[64]

48. The papers, signed by the Minister, were considered by the SOC on 8 June 2011.[65] However, the SOC then referred the papers back to Cabinet noting that the Minister would provide Cabinet with further advice on the timing of key decisions on the policy work programme arising from the recommendations of the Taskforce and the public consultation process. The Minister was also to provide a revised draft discussion document.[66]

49. The paper that the Minister prepared for Cabinet is signed and dated 9 June 2011.[67] In that paper she indicated that she planned "to bring a paper for initial discussion of possible future ECE policy to the Cabinet Strategy Committee on 1 August 2011".[68] This, she indicated, would help position a full strategic work programme for ECE, informed by the results of the consultation, which she planned to take to the SOC in early September.[69] This would enable her to take key decisions in December 2011 so as to inform the Budget 2012 process.[70] The Minister also considered that this

[61] Wai 2336, #A18, tab 9, Appendix 1, p. 1
[62] Wai 2336, #A18, tab 9, Appendix 1, p. 3
[63] Wai 2336, #A18, tab 9, Appendix 1, p. 5
[64] Wai 2336, #3.1.26, paragraph [9]
[65] Wai 2336, #A18, tab 10
[66] Wai 2336, #A18, tab 11
[67] Wai 2336, #A18, tab 12
[68] Wai 2336, #A18, tab 12, p. 1, paragraph [3]
[69] Ibid.
[70] Ibid.

work would position the Crown to proceed with any significant work – for example, "any necessary legislative changes – early in 2012."[71] Cabinet was asked to note inter alia, that she proposed that consultation be part of the first stage in the development of a strategic work programme and that her paper, and the results of the consultation, will inform development of a more detailed work programme to be considered by Cabinet in September 2011.[72]

50. Appendix 1 to this paper indicates that work would commence in October – November 2011 so it would be available for immediate focus in 2012. In December 2011, key decisions would be made and initiatives identified for the Budget in 2012, particularly around a detailed funding system combining recommendations of the ECE Taskforce, the Welfare Working Group and the development of the "Children's Action Plan."

51. Appendix 2 was yet another draft of the consultation survey paper. There was one change to the first question directly relevant to this application for urgency. It asked "Is there a need for a governance support function for Māori immersion and bilingual ECE services? If yes, what should it do, and who should provide it?"[73]

52. A further unsigned version of the Minister's Cabinet paper was filed.[74] We were left in doubt as to the status of this document, given it was not signed. We sought the June-July 2011 version of the consultation survey from the Crown by memorandum-directions dated 19 October 2011.[75] The Crown responded on 20 October 2011, filling a copy of the final consultation survey document.[76]

53. That document asked respondents to rate their agreement with the following statements (a) There is a need for a governance support function for Māori immersion and bilingual ECE services, (b) If you agreed or strongly agreed ... please set out what the functions should include and who should provide them?.[77] It also asked in what ways can early childhood education services and government better support communities with low rates of early childhood education participation,

[71] Wai 2336, #A18, tab 12, p. 2, paragraph [12]

[72] Wai 2336, #A18, tab 12, p. 4, paragraph [29]

[73] Wai 2336, #A18, tab 12, Appendix 2, p. 3

[74] Wai 2336, A18, vol 15, tab 13

[75] Wai 2336, #2.5.12

[76] Wai 2336, #3.1.47, Attachment

[77] Ibid.

for example Māori, Pasifika, and children from lower socio-economic backgrounds.?[78]

54. The document notes the ECE Taskforce recommendations concerning the previous reviews into the Trust and whether these should be revisited and whether compliance requirements for the Trust should be the same as other services.[79] Respondents were asked to rate their agreement with these statements. It also sought any other comments regarding the ECE Taskforce recommendations as these concerned the Trust.[80]

55. It is common ground that the Trust was not consulted directly by the ECE Taskforce either before or subsequent to the public release of its Report.

56. Nor did the Minister or the relevant MOE officials consult the Trust after she received the ECE Taskforce Report on 26 May 2011, or while the Crown papers reviewed above were developed. This includes the content of the survey document that has been circulated to the public and the ECE sector.

57. The consultation round was approved by Cabinet and commenced on 15 June 2011, with submissions due by 8 August 2011.[81] According to the Crown witness, the Trust provided written and oral submissions.[82]

58. The Tribunal was advised on Friday, 14 October 2011, that the Crown has proceeded to make decisions concerning the ECE Taskforce Report which will impact upon kōhanga reo. These include establishing sector advisory groups to work with Government on (a)(i) identifying and improving the practice of low-quality services, (ii) developing new and improved policies for ECE for children under two years old, (iii) improving the transition for children from ECE to primary school, (b) carrying out a national evaluation of ECE curriculum *Te Whariki* to make sure it is continuing to meet the needs of children and to decide if any improvements need to be made; and (c) developing a new funding system. The Tribunal notes that these

[78] Ibid.

[79] Ibid.

[80] Ibid.

[81] Wai 2336, #A3, p. 10, paragraph [36] and Wai 2336, #3.1.47, p. 2, paragraph [1.2]

[82] Wai 2336, #A3, p. 10, paragraph [36]

tasks bear a striking resemblance to aspects of the Phase 1 programme devised by the ECE Taskforce discussed in their report at pages 35-36.

The Tripartite Relationship Agreement 2003

59. We were told that one of the important features of the Gallen Report produced in 2001 was its recommendation that the Trust's relationship with the Crown be enhanced through a formal tripartite relationship with the MOE and TPK. This recommendation was advanced by way of a Tripartite Relationship Agreement dated 27 March 2003.[83]

60. The Agreement outlines a shared vision for Māori children and te reo Māori expressed with a degree of reasonableness and good faith rarely seen before this Tribunal.

61. It acknowledges each party's autonomous governance role and it recognises that by using the combined strengths and resources of each in a way that is collaborative and constructive, there were multiple pathways to achieve a shared vision for the future. It states shared outcomes, goals, principles, and values, many of which are relevant to the issues before this Tribunal. Under the section entitled "Shared Understandings" each party agreed to acknowledge and respect the arrangement in utmost good faith and to endeavour to keep "each other informed about important education and Māori development policies and issues, particularly those that might impact each other's core business." This Agreement was signed by Trust members, the Minister and Secretary of Education and the Minister of Māori Affairs and the CEO of TPK.

62. For whatever reason, it would not be until 2008 before the Tripartite Group was reactivated allowing further work on the relationship between the parties to commence afresh.

63. Then in September 2008, a Tripartitle Kōhanga Reo Funding, Quality and Sustainability Working Group (Working Group) was established.[84] This Working Group was to focus on the funding, quality, and sustainability of kōhanga reo.[85] One

[83] Wai 2336, #A2, Appendix 1

[84] Wai 2336, #A 1, Appendix 3

[85] Wai 2336, #A1(a), Appendix 3

of the areas of work was to develop a three-year agreement between the Trust and the MOE. The other area was to produce (a) a plan to support the work of the Trust to ensure "high quality provision by kōhanga reo", (b) a joint sustainability plan, and (c) a review of kōhanga reo. This Group was to have completed its report in 2009. A draft report was not produced until October 2010, but it has never been finalised.

64. The evidence before the Tribunal indicates that the delay since that time has not been due to any actions of the Trust. Rather, it appears, Ministry officials have been preoccupied with the work of the ECE Taskforce and earthquake recovery in Christchurch.

Overview of Submissions for the Claimants

65. As noted above, the Trust's substantive claim concerns the alleged failure of the Crown to recognise the kaupapa of kōhanga reo, which was never intended to be solely concerned with early childhood education (ECE), but rather Kōhanga were concerned with te reo Māori, whānau development and wairua Māori.[86] Ms Chen advised that the application for urgency arose from the alleged harm caused by the publication of ECE Taskforce Report and what the claimants consider is a real likelihood that the Crown will adopt the Taskforce's recommendations contained therein.

66. The Trust contends that the Report has caused, and is continuing to cause, significant and irreversible prejudice to the Trust Board and kōhanga reo, both in terms of damage to reputation, and in terms of a "chilling" effect on enrolments and the future of te reo Māori speakers.

67. This prejudice, they claim, is irreversible because children who do not enrol at kōhanga reo are unlikely ever to acquire fluency in te reo Māori and we were referred to the evidence of Dr Karetu on this point. This evidence was not contradicted or challenged by the Crown. When taken together with the findings of the Tribunal on te reo Māori in the *Ko Aotearoa Tēnei Report* (Wai 262, 2011), counsel for the claimants submit that the risk of imminent harm to kōhanga reo and te reo Māori is too serious to be disregarded.

[86] Wai 2336, #3.1.38

68. In answer to the Crown's submissions that the ECE Taskforce is not the Crown, Ms Chen for the claimants submitted that the ECE Taskforce did not act independently of the Crown, as it reported to the Minister and was serviced by officials from the Ministry.

69. In the alternative, she submitted, the Crown through the ECE Taskforce Secretariat and the Minister participated in the conduct of the affairs of the ECE Taskforce to a significant degree.

70. Finally, it was submitted that the Crown has commenced taking decisions in response to the ECE Taskforce Report.

Overview of Submissions and Evidence for the Crown

71. The Crown accepts that the Trust Board, was not, but ought to have been, consulted by the ECE Taskforce. Counsel submitted that while the Crown is committed to redressing that failure, it does not accept that there are grounds for an urgent hearing of the substantive claim.

72. The Crown also acknowledges that it is "arguable, perhaps even strongly arguable," that the administrative law duties of fairness would have required notice to be given over adverse comments in the Taskforce Report.[87] But it does not concede that there has been a breach of natural justice by the Taskforce making comments on the Trust without seeking comment or response from them.[88]

73. In any event, it was submitted, the views of the ECE Taskforce are those of an independent advisory body, which does not form part of Government and its views are not Government policy. We accept this position and have only analysed the actions of the Crown upon and following receipt of the report on 26 May 2011.

74. In addition, it was contended that the Crown has committed to working with the Trust in addressing its concerns over the ECE Taskforce report.

75. In the Crown's view there was no imminent harm stemming from any proposed policy changes being considered by the Crown and in particular (1) there are no

[87] Wai 2336, #3.1.26, p.5, paragraph [22]

[88] Wai 2336, #3.1.26, p. 5, paragraph [21]

imminent policy changes affecting kōhanga reo, and (2) the Crown will consult the Trust prior to any such decisions affecting kōhanga reo.

Legal Context

76. It is the principal function of the Waitangi Tribunal to inquire into and make recommendations on claims submitted to it under s. 6 of the Treaty of Waitangi Act 1975. Section 6(1)(c) and (d) provides that where any Māori claims that he or she, or any group of Māori of which he or she is a member, is or is likely to be prejudicially affected by any policy or practice adopted or proposed to be adopted by the Crown, or any act done or omitted, by or on behalf of the Crown (and such matters are inconsistent with the principles of the Treaty of Waitangi) they may bring a claim to the Waitangi Tribunal. With limited exceptions, the Tribunal is obliged to inquire into every claim.[89] The Tribunal's obligation to inquire into every claim submitted to it under s. 6(2) is subject to s. 7.

77. Section 7(1) permits the Tribunal, in its discretion, to refuse to inquire into, or further inquire into, a claim if its subject-matter is trivial, if the claim is frivolous or vexatious or not made in good faith, or if there is an adequate alternative remedy available. This provision is simply not relevant here as there has been no suggestion that the Trust's claim on behalf of kōhanga reo fits into any of these categories.

78. Section 7(1A), however, provides the Tribunal with a general power to defer its inquiry into this claim for such period as it thinks fit, *if it has sufficient reason* to do so *(emp added*). If we choose to do so, under section 7(2) we are required to inform the claimants of the decision and to state our reasons for using those powers.

79. The Tribunal, of course, has limited resources to meet the many demands on it for hearings of claims. This was recognised in the majority judgment of the Supreme Court in *Haronga v Waitangi Tribunal* (2011).[90] Although the ratio of this case is limited to applications for resumption hearings, which the matter before us is not, the Supreme Court did make a number of statements about the interpretation of ss. 6(2) and 7 germane to all inquiries.

[89] Section 6(2)

[90] [2011] NZSC 53

80. The Supreme Court, for example, discussed the prioritisation process adopted by the Tribunal to hear claims.[91] It indicated that due to its limited resources, the Tribunal may lawfully use its powers under s. 7(1A) to prioritise hearing claims, subject to the consideration of urgency in any particular case.[92]If the Tribunal does defer commencing an inquiry under s. 7(1A) it warns:

> *"[83] While this provision does not excuse the Tribunal from its duty to inquire, it does permit it to defer commencing an inquiry (and to adjourn it after it has commenced) for a period or periods. This can only be done for "sufficient reason". When the power is exercised, the Tribunal must inform the claimant of its decision and state its reasons for its decision. The power always looks to commencement or recommencement of the inquiry once sufficient reasons for the deferral cease to exist."*

81. In practice, the Tribunal has formulated guidelines for the prioritisation of claims and use of its resources. At the inquiry level, and pursuant to the Second Schedule to the Act,[93] a Practice Note has been issued which, *inter alia,* includes a list of factors that may be considered when deciding whether an application for urgency should be granted.[94]

82. Generally, the Tribunal will grant urgency only in exceptional cases and only after satisfying itself that adequate grounds have been made out.[95] His Honour Judge Harvey, for example, when hearing a Ngāti Kahungunu application for urgency, recently justified such an approach on the basis that the Tribunal has limited resources and granting an urgent hearing has the effect of "leap-frogging" it ahead of many other claims that have been partially heard, or are ready, or nearly ready to be fully inquired into.[96] We accept that this is the consequence of granting an application for urgency, but if an exceptional case exists with adequate grounds made out, then the Tribunal must grant it, as no sufficient reason can exist to justify not hearing the claim.

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[91] Ibid, paragraph [86]

[92] Ibid, paragraph [86]

[93] Treaty of Waitangi Act 1975, Schedule 2, cl 5(10)

[94] Waitangi Tribunal *Practice Note, Guide to the Practice and Procedure of the Waitangi Tribunal* (April 2009)

[95] Ibid, paragraph [2.5]

[96] *Environmental Protection (EEZ and ECS) Proposed Legislation Claim* (Wai 2338 # 2.5.3, 22 August 2011) Decision of Harvey J on an *Application for Urgency from Ngāti Kahungunu*

Grounds for Urgency

83. The current version of the Waitangi Tribunal *Practice Note, Guide to the Practice and Procedure of the Waitangi Tribunal* (April 2009) contains a list of factors to be considered. These are set out in full below:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants are ready to proceed urgently to a hearing.

84. Other factors that will be considered by the Tribunal include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal; and
- Any other grounds justifying urgency have been made out.

85. The Trust's application for urgency was filed on the all the above grounds.

86. The Crown contends that the grounds for urgency have not been made out and there is no need to grant the application.

Decision and Discussion

87. We consider that there are grounds for granting the application for urgency. After summarising and weighing up the submissions and evidence for the parties, we provide our detailed reasons for granting the application below.

First Ground for Urgency

88. Under this ground, the claimants claimed that there is a risk of imminent harm arising from the ECE Taskforce Report, that being reputational damage caused to the Trust and kōhanga reo and, as a consequence of that damage, "the chilling

effect" that it will have on enrolments at kōhanga reo and the future of te reo Māori speakers. The claimants relied on evidence presented by Ms Olsen-Ratana, the Co-Chairperson of the Trust, Ms Black, the CEO of the Trust, and Dr Karetu. The claimants say that the Trust was not adequately consulted in relation to the work of the Taskforce or its Report, its findings and its recommendations despite the "undertaking" they consider they had from the Hon Anne Tolley, the Minister, that the Taskforce would consult.[97] They contend further that the Taskforce was not properly informed or did not properly inform itself about the Trust and kōhanga reo.[98] In this respect the Tribunal was referred to a review of the ECE Taskforce Secretariat briefing papers and ECE Taskforce Minutes filed by the Crown on 29 August 2011.[99] Presumably this review was completed by counsel for the claimants.

89. Ms Chen also submitted that much of the evidence for the claimants was uncontested and should be considered in the context of the Tribunal's previous findings about the "perilous health of te reo Māori, and its transcendent importance to Māori."[100]

90. The Crown, on the other hand, has argued that there is no prospect of any imminent adverse policy decisions occurring without consultation with the Trust.[101] The Crown's case is that the only decisions arising from the Taskforce Report that are being made, concern the overall planning and prioritisation of policy work. Thus statements made by the Minister and the Prime Minister have simply reserved the possibility that changes may be made in the future.[102] Furthermore, the practical scope for decisions to be made will be curtailed by the election and the Government's "caretaker period".[103]

91. The Crown does not accept the evidence and submissions of the claimants' alleging unacceptable Crown interference and regulation in the autonomous affairs of the

[97] Wai 2336, #4.1.2, pp. 96-p.97

[98] Wai 2336, #3.1.38, p. 31, paragraph [44]

[99] Ibid, Appendix 4 and see Wai 2336, #A14 - #A19

[100] Wai 2336, #3.1.38, p. 15, paragraph [23]

[101] Wai 2336, #3.1.25, p. 6, paragraph [7.1] and see *Ko Aotearoa Tēnei Report – Te Taumata Tuarua* (Wai 262, 2011) pp. 407-417

[102] Wai 2336, #3.1.25, p. 6, paragraph [7.1]

[103] Ibid, p. 7, paragraph [7.1.5]

Trust or kōhanga reo.[104] In its view, there is a balance to be struck between the principles of rangatiratanga and kawanatanga and its right to regulate the ECE sector. It asks the Tribunal to be mindful of this.

92. On balance we are persuaded that the claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown action or policy.

93. We note that (a) the Trust and kōhanga reo have claimed reputational damage has occurred as a result of the publication and release of the ECE Taskforce Report. This may have been aggravated by the Crown's consultation survey document,[105] (b) these developments have occurred without consultation by officials or the Minister with the Trust,[106] (c) this is likely to result in a further reduction of enrolments for the 2012 and the 2013 years with consequent long term prejudice to te reo Māori, and (d) there is an imminent likelihood that the Crown will make, and is making decisions, on the basis of the Taskforce's recommendations, particularly around funding the ECE sector in preparation for the budget rounds commencing in December 2011.

94. The evidence before this Tribunal was that a high-level paper was to be prepared for the Minister by the end of September 2011. Documents filed since by the Crown and the claimants indicate that the Crown has gone further, and officials are preparing policy for approval by the Minister in September/October and December 2011 through to 2012. It also appears to be moving towards implementing aspects of Phase 1 of the ECE Taskforce Report. In our view, several tasks identified for this phase must have some long-term effect on the Trust, the kōhanga reo movement, and te reo Māori.

95. We further note the decision to undertake general consultation, following the release of the ECE Taskforce Report in June 2011, on issues of prioritisation, accountability, quality of services and general funding and human resource implications for Māori children and te reo Māori within the ECE sector. The final consultation survey document included requesting comments on the ECE Taskforce Report's findings and recommendations concerning the Trust. The

[104] Ibid, pp. 22-25, paragraphs [28]

[105] Wai 2336, #3.1.47, Attachment

[106] Wai 2336, #A8; Wai 2336, #A1 paragraphs [36]-[38] & #A6 paragraph [9a]

Crown has not directly explained why it has sought comment from parents and other relevant stakeholders **across the entire ECE sector** on the Trust.

96. We have considered the Crown's limited offers of relief, these being undertakings to (a) publish the Trust's response to the ECE Taskforce Report,[107] (b) consult the Trust on any policy decisions affecting kōhanga reo that arise from the Taskforce Report,[108] (c) work with the Trust on issues in the ECE Taskforce Report affecting kōhanga reo,[109] and (d) expedite, finally, the Tripartite review process, and allocate more resources to that end.[110] In our view these do not go far enough. We are not reassured that work on policy affecting kōhanga reo and the Trust in the long term is not already underway.

Second Ground for Urgency

97. There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise, as it is the actions of the Crown that are impugned, not the publication authorised by the ECE Taskforce. Thus, for example, defamation proceedings per se would not be sufficient in this case to provide a remedy.

98. As noted above the Crown did, however, make a commitment to working with the Trust in relation to the ECE Taskforce Report and any subsequent policy. Counsel for the Crown contended that it made a commitment from July 2011, in addition to the eight-week public consultation period, to work with the Trust on issues affecting kōhanga reo.[111] To this end the Crown was, we were told, committed to pursuing the Tripartite Agreement process at an accelerated rate. The evidence for the Crown was that from July 2011, the CEOs of TPK and MOE have been committed to ensuring additional Crown resources were allocated for this purpose.[112] But in our view, this is not sufficient as an alternative remedy or process. All it offers is a process to engage in further dialogue with the Crown to address issues raised by the Trust.

[107] Wai 2336, #3.1.25, p.14, paragraph [18.2]

[108] Ibid., p. 14, paragraph [18.3]

[109] Ibid., pp. 15-16 paragraph [20]

[110] Ibid., p. 15, paragraph [20.2.2]

[111] Ibid., pp.14-15, paragraph [20]

[112] Wai 2336, #4.1.1, p. 8, lines 24-34

99. Although we would not go so far as to find that this offer lacks a certain degree of credibility, as submitted by Ms Chen,[113] we do note that the parties acknowledge that meetings have taken place pursuant to the Tripartite Agreement since 2008 and no progress has been made on establishing something as basic as an understanding of the Trust's kaupapa. This suggests that the Tripartite Relationship with the Crown is bordering on dysfunctional. Ms Chen and the claimants uncharitable view of it is that the relationship has become stuck in a quagmire of endless meetings, generally, but not always, with low-level officials, who like the Crown witness in this inquiry, appear not to understand or inform themselves of the kaupapa of kōhanga reo.

100. In our view, such a process is unlikely to result in any effective remedy given the state of relationships.

101. In this regard we are mindful that relations between the parties have deteriorated exponentially following the release of the ECE Taskforce Report. It has been aggravated by the Crown's inadvertent misplacement of the Trust's correspondence sent in June 2011 seeking meetings with Crown officials to discuss the ECE Taskforce Report, and the difficulty of organising such meetings.[114]

102. We note that the claimants complain that during these meetings the Crown did not (a) apologise for the harm caused, (b) acknowledge any breach of the Tripartite Agreement, (c) halt the process in relation to the ECE Taskforce Report, (d) prevent Taskforce Members from making public comment on the Report, (e) make any public statement or comment to help restore the reputation of the Trust or kōhanga reo, (f) or otherwise take action to disclaim or distance the Crown from the findings and recommendations set out in the ECE Taskforce Report.[115]

103. We note in this regard the evidence of Ms Tina Olsen-Ratana, who told the Tribunal that as part of its kaitiaki role the Trust has tried to work with the Crown in good faith on many occasions so that the kaupapa of kōhanga reo would be acknowledged and understood.[116] Dame Iritana Te Rangi Tawhiwhirangi confirmed this evidence and described the attempts made by the Trust to find a way forward to resolve the

[113] Wai 2336, #3.1.38, pp. 43-45

[114] Ibid., p. 51, paragraphs [78]-[79]

[115] Ibid., pp. 51-52, paragraph [80]

[116] Wai 2336, #A1

issues facing kōhanga reo.[117] They claim that despite their best efforts, comments made by certain Ministers and officials demonstrate a continuing misunderstanding of the kaupapa of kōhanga reo.

104. We also consider that the Crown's actions indicate either (a) an acceptance of the ECE Taskforce Report findings and recommendations concerning the Trust and kōhanga reo, or (b) an openness to engage with other Māori and others in the ECE sector without involving the Trust. This may potentially be a breach of the principles of fairness given that the Trust have not been able to fully respond to the findings and recommendations of the ECE Taskforce Report.

105. We are convinced that as a degree of respect and confidence has been lost,[118] and as mediation has failed, a hearing will give both parties the opportunity to have their respective positions transparently and independently assessed against Treaty principles.

Third Ground for Urgency

106. The Tribunal is persuaded that the claimants are ready to proceed to hearing; however, the Tribunal wishes to have available for its deliberations some independent expert evidence, as we describe below, hence there will be a delay until February 2012 before the Tribunal can commence its inquiry.

Fourth Ground for Urgency

107. The claim or claims challenge an important current or pending Crown action or policy. The right of the Crown to regulate the general ECE sector is not at issue and its general policy choices in this regard are not a concern for this Tribunal. But where the Crown is developing ECE policies that may impact directly on taonga (e.g. te reo Māori) under the Treaty, it is an important current or pending policy that may raise this Tribunal's jurisdiction.

108. The Trust and kōhanga reo are challenging policies that impact on this taonga. The Crown's policies identified include (1) the decision to receive and take out for public consultation those aspects of the ECE Taskforce Report that affect the Trust and

[117] Wai 2336, #A2

[118] Wai 2336, #3.1.38,, pp. 45-50

kōhanga reo (2) the decision to publish these before consulting with the Trust and kōhanga reo and despite knowing the content of the ECE Taskforce Report and the consultation round would impact on them, and (3) the failure on the part of the Crown to protect kōhanga reo and the Trust or alternatively the failure to denounce the findings and recommendations, and (4) the making of decisions concerning the implementation of recommendations in the ECE Taskforce Report which will have a long-term effect on funding arrangements of the Trust and kōhanga reo.

109. The Trust referenced the evidence of Dr Timoti Karetu, who alleged that the ECE Taskforce Report is the latest in a long line of initiatives which have forced or incentivised the assimilation of kōhanga reo into ECE services.[119] In his view the Taskforce was clearly unsympathetic to, and lacked any empathy with, the kaupapa of kōhanga reo. His concern was that the decisions that may be made by the Government based on that Report will move kōhanga reo further away from its kaupapa and further away from being the whānau development initiative it was intended to be. Dr Karetu was concerned that all of these steps will make kōhanga reo less attractive to Māori families and so exacerbate the decline of te reo Māori.

110. Ms Olsen-Ratana advised that the Trust was not adequately consulted about the work of the ECE Taskforce Report, or about the findings which adversely affect the Trust.[120] The report, in her view, was based upon a misconception of kōhanga reo and does not take into account its kaupapa. The Crown, it was claimed, has in the past implemented policies which have denied the kaupapa of kōhanga reo, forced them out of marae and alienated kaumatua.

111. Conversely, the Crown argued that much of the evidence led by the claimants addressed issues that concern broader issues (for example the state of te reo Māori), which extend beyond the application for urgency and the Tribunal should refrain from making any findings adverse to the Crown on such matters.

112. The Crown denies all allegations and it points to the Waitangi Tribunal's *Ko Aotearoa Tēnei Report* (Wai 262) where the Tribunal emphasised that declining enrolments in kōhanga reo could not be attributed to any single cause. That

[119] Wai 2336, #A7

[120] Wai 2336, #A1

Tribunal acknowledged concerns over teaching quality, parental needs and choice may be factors in the decline.[121]

113. We note, as the Crown did, that the Tribunal did not hear from the Trust during the hearing of the Wai 262 claim. Thus its findings on any issues of quality of teaching and parental needs and choice must be seen in that light and may even add to, rather than take away from, the need to give the Trust a hearing.

114. The Wai 262 Tribunal also noted that te reo Māori is a taonga, and the platform upon which mātauranga Māori stands.[122] It noted that from 1996 to 2006, the number of Māori children under 10 (excluding those for whom 'no language' was recorded) who spoke te reo Māori declined from 22.1 per cent to 18.5 per cent – a deficit of more than 4,000 children.[123] The Wai 262 Tribunal made the point that "the decline in Māori-language acquisition among children must be a matter of the deepest concern."[124] That is because, and as we ourselves have heard, "it is literally true that the survival of te reo depends on this age group."[125] The Wai 262 Tribunal discussed the fact that the Māori demand for Māori-language education was at its highest in the 1980s when the language revival movement was "new and optimistic."[126] At this point demand exceeded supply and officials should have taken proper and rigorous steps to estimate kōhanga demand and the flow through demand for Māori-medium primary education.[127] It concluded that it was the "failure of imagination and planning in the education sector that led to the major gulf between Māori-medium education supply and demand."[128] In that Tribunal's view, it was this deficit of supply that drove demand down and "may continue to drive it down."[129] We also note the following from the report:

> *Looking back, the bureaucracy's efforts to put in place measures to deal with and encourage the Māori language renaissance were decidedly leaden-footed. The explosion in the numbers attending kōhanga reo in the early 1980s should have instantly signalled that greater opportunities were needed in primary schools for te reo to be learned or for Māori-medium*

[121] Ibid, pp. 23-24, paragraph [29]

[122] Waitangi Tribunal, *Ko Aotearoa Tēnei Report*:*Te Taumata Tuatahi* (Wellington, 2011) p. 154

[123] Ibid, p. 157

[124] Ibid

[125] Ibid

[126] Ibid, p. 163

[127] Ibid, p. 164

[128] Ibid, p. 165

[129] Ibid

learning (or both). However, the reaction was pedestrian, perhaps because officials saw kōhanga reo as a passing fad or perhaps because they simply could not make the mental leap that follow-through at school would be needed. Various schools began to offer some form of Māori-medium education but, as we have seen, this did not meet the ever-rising demand. Moreover, the first Māori immersion primary school – at Hoani Waititi Marae in west Auckland – was a Māori initiative, in 1985. By 1990, the number of kura kaupapa stood at only 6.

In 1987, bilingual education expert Bernard Spolsky was commissioned by the Department of Education to report on Māori – English bilingual education. Given the '493 kohanga reo programmes' then in operation, he estimated that at least 3,000 children a year would enter the school system expecting 'a significant use of Māori in their curriculum'. From these 'rough projections' he concluded that 'we are facing a need for at least 1000 qualified Māori bilingual teachers over the next decade'. He suggested that it was a 'matter of high priority for the department to prepare and maintain more precise projections to make possible the necessary long-term planning. One critical need is a survey of the present situation of qualified or nearly qualified Māori bilingual teachers.

Spolsky's projections were conservative; within the next few years, the number of kōhanga had in fact risen by several hundred over and above the 1987 total. The number of schools offering bilingual or immersion classes, or full immersion or bilingual programmes, rose markedly over the following decade as well. But the 1992 and 1995 surveys of demand for Māori language education showed clearly that supply remained well short of the mark.

It was the failure of Government supply that accounted for the eventual decline in student numbers and not the failure of the language movement. Indeed, buoyed by that movement, Māori demand swelled to meet the Māori-medium education supply and soon outstripped it. In short, there clearly existed an enormous and enthusiastic market with no apparent ceiling in the 1990s; the bureaucratic failure to capitalise on that represents a major opportunity squandered.[130]

115. Having considered the submissions made by the parties, we accept the Crown's view that no adverse findings can be made at this time against the Crown. However, given the findings of the Tribunal on the Wai 262 claim and given what is known about the state of decline in kōhanga enrolments and the potential flow-on effect for te reo Māori, an urgent hearing is necessary. While we accept the issues concerning the decline in enrolments for kōhanga reo may be complex, and while other factors may be at play causing such a decline, a hearing is necessary to completely be certain of this. After all, the Trust was not a party before the Wai 262 Tribunal, which described its findings on te reo issues as provisional and did not consider questions of early childhood educational quality, safety, and parental

[130] Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua, vol 2* (Wellington, 2011), p. 458

choice in depth. Conversely, and as we note above, the Tribunal made some very strong statements concerning the responsibility of the Crown for the decline in enrolments,[131] and it was critical of the Crown's policies for Māori language education, including those outlined in *Ka Hikitia*.[132]

116. What is clear to us is, that there is a risk of a flow-on effect from a decline in kōhanga reo enrolments causing likely or significant and irreversible prejudice to the health of te reo Māori and further consequential prejudice to Māori as a result of language loss. Much of the material before this Tribunal, indicates that it is likely that the state of the language will deteriorate further due to a decline in numbers of children receiving early childhood education in te reo Māori, the optimal time for language transmission.

Fifth Ground for Urgency

117. No injunction has been issued by the courts on the basis that the claim or claims for which urgency has been sought have been submitted to the Tribunal. It is unlikely that such a result could be sought, given that the issues raised move beyond defamation grounds, to concerns regarding the principles of the Treaty of Waitangi and alleged breaches of those principles causing prejudice.

Sixth Ground for Urgency

118. Ms Chen argued that the seriousness of the substantive claim should also be considered as a further ground justifying urgency, given the perilous health of Te Reo Māori and the consequences for the language of children not enrolling in kōhanga reo. We agree with her to the extent that a hearing will confirm whether the perilous state of te reo Māori may be affected by the Crown's policies concerning the Trust and kōhanga reo. The size of the claimant group (nearly 10,000 children) and the impact of the Crown policies and actions on them and the dependency of the Trust and kōhanga reo for ECE funding are also matters that we have considered.

[131] Wai 2336, #4.1.2, pp. 58 & 81-82

[132] Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuarua,* p. 425

Summary of Decision and Directions

119. The application for urgency is granted. The Registrar is directed to convene a judicial conference in November to discuss timetabling for a hearing to take place in February 2012. This time is needed to prepare independent expert evidence to be commissioned by the Waitangi Tribunal as follows:

- A comparative review of all evaluation reports completed by ERO on kōhanga reo, including their scope, terms of reference, evaluation standards, methodology and conclusions. The report will ascertain the degree to which the findings and views of the ECE Taskforce Report hold or lack substantive weight.

- A review of the scholarly and expert literature on approaches and models for the effective transmission of te reo Māori to children, with a particular focus on ECE and the consequences of not doing so through ECE.

- A review of the Wai 262 Record of Inquiry so as to identify relevant documents that should be transferred to the record of inquiry for this claim.

120. The Crown is directed to file all ERO evaluation reports on kōhanga reo completed since 2003, **by 4 November 2011**.

121. In order to assist in planning for the efficient conduct of the hearing, the judicial conference to be convened in November 2011 will also be an opportunity to discuss:

- the preparation of statements of issues and the Crown response;

- the inquiry process;

- the filing of additional evidence and supporting documents; and

- hearing planning and the allocation of hearing time

The Registrar is to send a copy of this direction to all those on the notification list for Wai 2336, the Te Kōhanga Reo (Karetu, Olsen-Ratana and Tawhiwhirangi) Claim and to any other interested ECE parties.

I te mutunga o ēnei kōrero, ka mihi atu ra ki a koutou, me te tūmanako ka tūtuki ngā wawata, ngā moemoeā mō te reo. Nā mātou ki a koutou, ki a tātau katoa.

DATED at Wellington this 25th day October 2011.

Mr Kihi Ngatai QSM
Member

The Hon. Sir Douglas Kidd
Member

Deputy Chief Judge Caren Fox
Presiding Officer