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Re: Pae Ora (Healthy Futures) Bill overview and conclusions

1. The publicly-funded health system will be subject to co-governance by HNZ and the MHA.

2. In reality, Māori influence will be greater than equal because of the respective objectives, functions, and other mechanisms, as summarised in paragraphs 184-187.

3. The MHA, established by s 17, has objectives which relate solely to outcomes for Māori: s 18. The Authority's functions are, likewise, focused on Māori: s 19. HNZ's functions include to jointly develop and implement a New Zealand Health Plan with the MHA. As the MHA's statutory objectives and functions are to represent Māori interests, it will be acting contrary to its legislative mandate if it does not represent Māori interests, including in the development and implementation of the New Zealand Health Plan.

4. HNZ has been established with a bias towards Māori. MHA's chairperson is an ex officio member. The members collectively must have knowledge of, and experience and expertise in relation to the Treaty: s 12. Its functions require joint development and implementation of a New Zealand Health Plan with the MHA, and it must work with the MHA when performing other functions. HNZ must engage with iwi-Māori partnership boards (s 6(e) and s 14(1)(l)).

5. Under s 15, HNZ must provide information to iwi/Māori partnership boards to support them to achieve their purpose, which, according to s 87 (not s 92 as s 15 states), is to represent local Māori perspectives on the needs and aspirations of Māori in relation to hauora Māori outcomes, how the health system is performing in relation to those needs and aspirations, and the design and delivery of services and public health interventions within localities.

6. In addition to the structural aspects, the Act contains mechanisms to weight the system towards Māori: see s 3 (Purpose), s 6 (giving effect to the principles of the Treaty), s 7 (specific reference to Māori in the health system principles, including that the health system provides opportunities for Māori to exercise decision-making authority on matters of importance to Māori).

7. In short, MHA is established to be entirely Māori focused, and although HNZ has additional focuses, it is also significantly focused on Māori, so the whole system is tilted towards Māori. It is clear from the explanatory note and from the Regulatory Impact Assessment that this is precisely what is intended.

8. In terms of deployment of health system resources, the tilting must result in relative advantage to the Māori community and relative detriment to the non-Māori community: from a total allocation for health services, if more resources per capita are devoted to Māori, less resources per capita are available for non-Māori. Whilst this is so, the real concern is not so much with resource allocations, but with the "dignity and equality inherent in all human beings," to draw from the first few words of the Convention. The failure to focus on the dignity and equality of all New Zealanders and to give effect to these fundamental characteristics of humanity reveals a gaping chasm in the understanding of the Ministry and the government.

9. I earlier gave and discussed the Ministry's definition of "equity":

> In Aotearoa New Zealand, people have differences in health that are not only avoidable but unfair and unjust. Equity recognises different people with different levels of advantage require different approaches and resources to get equitable health outcomes (Achieving Equity in Health Outcomes, page 7, published in August 2019).

10. When the government takes on the responsibility for providing a health service funded by the general taxpayer, it is concerning itself with a community comprising different people, and different populations, requiring different approaches and resources. This may require recognition of, amongst other things, different levels of advantage. Different people with different levels of advantage and in differing circumstances may have unequal health outcomes. That the outcomes are unequal does not necessarily mean that there is any inequity involved. As an example, take rough sleepers — one of the groups recognised in the NHS definition — they may have relatively poor and unequal health outcomes, but if they have chosen to adopt this way of life, the consequence of what they have chosen is not inequitable. Of course, if they have not chosen the way of life but it has been forced upon them, that may be the consequence of inequitable policies. But the inequity lies not in the public health, but elsewhere.

11. In a publicly funded health service, the public provider should not be looking to remedy unfairness and injustice. It should be looking to try to achieve equal health outcomes, so the second sentence of the Ministry's definition should properly read: Equality recognises different people with different levels of advantage require different approaches and resources to get equal health outcomes.

12. The Ministry's definition seems to have been driven by the desire to use a so-called rights-based approach. What it really is, is rationalisation of the aim to discriminate on the basis of race. Perhaps

this is because of a mistaken view that discrimination is required by the Treaty, but it is still discrimination. In a health system which did not exist before 1938 and was established and has been continued to provide a health service funded by the general taxpayer, health needs — only health needs — should be the determinant of how the resources are deployed. Pae ora adopts the Ministry's lopsided application of a suspect definition and goes further to create a serious structural imbalance where the determinant is race, not health needs.

13. Crown counsel acknowledged in opening submissions to the Tribunal's Hauora Inquiry that "there is no need for this Tribunal panel to enquire into the question of whether Māori health status is significantly worse than for non-Māori at a population level; this is well-established and not disputed."[1] Accepting that to be so, and assuming the fault lies with the system, it would be proper for a health service funded by the general taxpayer to direct attention to remedying deficiencies in the system by applying criteria developed by reference to health needs, not the race of the beneficiaries. Approaching the problem in this way means that those Māori, along with those non-Māori, who have special health needs would have those needs recognised within the system. For example, diabetes is a major health problem within the whole community. If there are proportionately more Māori than non-Māori with or likely to become affected by diabetes, it will be a purely factual matter that Māori will proportionately benefit more than non-Māori from resources directed to its prevention and treatment. The proportionate greater benefit will be health-based, not race-based.

14. There is also irrationality in comparing Māori with non-Māori, as if there were only those two populations needing consideration in the context of a universal, publicly funded health service. Pae ora's explanatory note opens with an acknowledgement of consistently poor outcomes for some groups, in particular Māori, Pacific peoples, and peoples with disabilities, and significant unwarranted variation in service availability, access, and quality between population groups and areas of New Zealand. However, the bill's response to those acknowledged deficiencies (apart from in relation to Māori) is limited to the requirement in the "Key health documents" part of the Act. In the Overview,, s 29, it is summarised that the Minister is required to determine identified strategies for improving the health status of New Zealanders: New Zealand Health Strategy, Hauora Māori Strategy, Pacific Health Strategy, and Disability Health Strategy.

15. In the context of legislation which tilts the whole system towards Māori, by the structures and institutions it creates, this is just paying lip service to the special needs of other population groups.

16. Whilst Parliament can do anything, or virtually anything it likes, a government promoting legislation may be properly criticised for failing to act rationally. A determination in the Canadian Supreme Court, on a question concerning the constitutionality of a provision of the Criminal Code alleged to infringe the presumption of innocence guaranteed by the Canadian Charter of Rights and Freedoms, is pertinent. The Chief Justice said: "The measures adopted must be carefully designed to meet the objective in question. They must not be arbitrary, unfair or based on irrational considerations."[2] Of course, Pae ora has been designed to meet an objective. The objective itself is irrational, as being chosen for other than health reasons in a system for the delivery of health resources funded by the general taxpayer. Additionally, the measures proposed are arbitrary, unfair

[1] Ibid., 17-18.

[2] *R v Oakes* [1986] 1 S.C.R. 103, 139, reiterated in *R v Chaulk* [1990] 3 S.C.R. 1303, at 1335-1336 (LamerJ).

and based on irrational considerations, because they adopt race as their governing criterion and in doing so contravene the Convention.

17. Our Bill of Rights is not directly engaged by Pae ora, but it is indirectly engaged because of its recognition that New Zealand is a free and democratic society. Section 4 of New Zealand Bill of Rights Act 1990 provides:

> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Bill of Rights is a constitutional provision. Sir Kenneth Keith in his Introduction to the Cabinet Manual also accords constitutional status to the Treaty. As the reciprocal nature of the obligations undertaken by the Crown and Māori is fundamental to the Court of Appeal's lands case decision, my emphasis on it is well grounded in legal authority. In my opinion there is also a sound case for arguing that the Treaty imposes an obligation on the Crown of the same nature but owed to all New Zealanders, as was indeed recognised by the Tribunal in the Hauora Inquiry.

18. It is legitimate when considering proposed legislation to measure it in a manner similar to the way in which it would be measured if those Treaty obligations imposed constitutional constraints on the government. That does not mean that the government cannot have its way if it wishes to use its majority to proceed regardless, but what it is proposing can and should be judged by considering whether what it is proposing can be demonstrably justified in a free and democratic society. In my opinion, Pae ora cannot be demonstrably justified in a free and democratic society because apart from its generally undemocratic approach, it offends the principles of the Treaty in two ways. First, the Crown is breaching its obligation to all New Zealanders to act in good faith, reasonably, fairly and with honour. Secondly, it is placing Māori in a position where they are seen to be demanding something which they cannot in good faith, reasonably, fairly and honourably demand.

19. In addition to these Treaty breaches, the government will be making New Zealand contravene its obligations under the Convention.

20. A health service funded by the general taxpayer which gives priority to one section of society not based on their health needs (even though they may have health needs) but on their race is unfair, unjust, and contrary to the principles of a free and democratic society. In the lands case, Richardson J saw the Treaty as a "positive force in the life of the nation and so in the government of the country."[3] I have no doubt that all those judges believed their decision was establishing a foundation whereby the Treaty could be a positive force in the life of the nation. In 2017, Fogarty J made the point that "the promise in the Treaty of Waitangi at its core was to respect Māori property rights and to bring the peace of the Crown to the administration of government." Overreach by the Tribunal and others, including the government, has sought to extend the ambit of the Treaty way beyond that contemplated by the Court of Appeal's findings. This threatens to transform the Treaty from a positive force to a negative force. If the government proceeds with this ill-judged legislation, it should do so in the full knowledge that it is going down that path.

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[3] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682.

21. It should also do so in the full knowledge that it is acting in contravention of the International Convention on the Elimination of All Forms of Racial Discrimination.

22. In my opinion, if the government wishes to disestablish the District Health Boards and put something else in their place, it needs to go back to the drawing board to produce a structure and mechanisms which place the aim of achieving equal health outcomes (equally good health comes) at the forefront and eliminates Pae ora's race-based approach.

Yours faithfully

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