Moana Jackson

Brief of Evidence Royal Commission of Inquiry into Abuse in Care

Contextual Hearing 29 October – 8 November 2019

INTRODUCTION

1. My name is Moana Jackson, I am Ngāti Kahungunu and Ngāti Porou. I am a lawyer and have researched and written widely on a number of subjects including criminal justice, colonisation, race, and constitutional change in Aotearoa. I have also worked for some time on Treaty of Waitangi/Te Tiriti o Waitangi issues, and have worked on international Indigenous rights issues overseas.

2. In 2015 I was selected to be a member of Te Taumata o Kahungunu. The Taumata is the traditional body in Kahungunu tasked with providing advice on matters of tikanga and other related issues to Hapū within the Iwi. At the present time it also provides advice to Ngāti Kahungunu Iwi Incorporated, the Iwi Authority for Ngāti Kahungunu.

3. The other members of the Taumata are Sir Timoti Karetu, Sir Pita Sharples, Professor Piri Sciascia, Dr. Rangimarie Rose Pere, and Elizabeth Hunkin. At various times I have discussed the matters in this brief with them.

4. I graduated from Victoria University with an LLB and in 2017 I was conferred an Honorary Doctorate in Law from the same University.

5. After my original graduation I undertook postgraduate research with the Justice Department of the Navajo Nation in Arizona. Whilst there, I had the privilege of also working with their social welfare agencies and was exposed to the experiences of people who had been "uplifted" and taken by the United States Government to Residential Schools. Their experiences were sadly unique but also similar to similar policies of child removal that I was familiar with in New Zealand. The abuse suffered by the Navajo and other Native American children in care was also similar.

6. In 1988 I was asked to join the first Māori delegation to the United Nations Working Group drafting the Declaration on the Rights of Indigenous Peoples. Perhaps the most important right advocated by Indigenous Peoples was the right to self-determination which necessarily includes the right to care for and protect Indigenous children.

7. In 1990 I was elected Chairperson of the Indigenous Peoples Caucus of that Working Group and in that capacity I was also able to assist in ensuring that those rights were specifically included in the Declaration. It was disappointing however that when the Declaration was finally taken to a vote at the United Nations General Assembly New Zealand was one of only four countries which voted against the Declaration. I was informed at the time that one major reason for the government's opposition was its long-standing aversion to the inclusion of the right to self-determination.

8. It is pleasing that some years later the Crown did finally accede to the Declaration. However, it is still disappointing that their accession was bound by several reservations and that the full extent of the right to self-determination has yet to come to pass. That failure is especially regrettable in the context of this Commission's work as it continues to limit the ability of Iwi and Hapū to properly protect mokopuna.

9. In 1988 I was the author of a Report on Māori and the Criminal Justice system, He Whaipaanga Hou, which is referenced later in this brief. In the same year I also worked with a Māori Resource Group established after the Report into the then Department of Social Welfare, Pu-Ao-Te-Ata-Tū. That Report is also referenced later in this brief.

10. In 1993 I was appointed as a judge on the independent International Peoples Tribunal which heard the claim of the Kanaka Maoli Peoples (of Hawaii) against the United States Government. In subsequent years I have sat on similar tribunal hearings in Canada, Mexico and Guatemala.

11. The Tribunals were established following the Russell Tribunal which heard claims of Indigenous Peoples in North and South America in 1972. They consist of international jurists, some of whom are indigenous, and in each hearing the taking of Indigenous children by State governments has been one of the major concerns of the claimant groups. In each case the Tribunal has found such policies to be in breach of the Indigenous Peoples' law, and more latterly the UN Declaration on the Rights of Indigenous Peoples.

12. More recently I have studied the history and consequences of colonising law. This has included research in England, Spain and Portugal among other places. In England I spent time in the archives of the Colonial Office, the Privy Council and the Church Missionary Society. In Spain I researched the debates held in Valladolid in 1550 which set the baseline for the colonial law relating to Indigenous Peoples. In Portugal I studied the records dealing with the submissions to and eventual promulgation of the 1493 Inter Caetera Papal Bull which outlined some of the other baselines enabling European states to erect their imperium in indigenous territories.

13. The debates at Valladolid are referenced later in this brief. However the common thread that has emerged from that research on the foundational theories and legal presumptions of colonising law is the consistent belief that a colonising State had the power to take Indigenous children from their families. It is that belief which underpins the policies that have been adopted by the Crown in this country.

14. It is that work and history which informs this brief. In presenting it I am mindful and respectful of the evidence that will be given to this Tribunal by others, and particularly those who have suffered abuse while in State or church administered institutions. I acknowledge and honour their evidence. They are the proper commentators on this kaupapa and I only hope that this brief may give some context to their words and some explanation of the ways in which successive governments have failed them.

15. This Brief has five Parts.

Part One: a brief Preliminary Explanation – he Whakamārama.
Part Two: an explanation of colonisation as a process and an exploration of the symmetry of colonial intent that can be seen in the United States, Canada, Australia, and Aotearoa. Such intent is in my respectful view an important framing for the issues before the Commission.
Part Three: a discussion of Te Tiriti o Waitangi and the fundamental treaty breach that the abuse of children in care represents. This Part of the brief also interrogates the assumed right of the Crown to take Māori children from their whānau as a similar breach of Te Tiriti.
Part Four: Pu-Ao-Te-Ata Tū and its aftermath.
Part Five: a discussion of possible treaty-based resolution and the kind of treaty-based constitutional transformation that will ensure the future well-being of all children.

PART ONE: HE WHAKAMĀRAMA.

16. Over the last four years I have been involved in research on the relationship between Māori and the Criminal Justice System. The research is an update of the 1988 Report on the same issue, He Whaipaanga Hou. It has been conducted with two young researchers, Ngawai McGregor and Anne Waapu. The new Report will be published early next year.

17. The research has been distressing because of the stories of hurt that have been shared by mokopuna who have done harm and those who have been harmed. That harm has included abuse in care.

18. The research has also been distressing because so little has changed. As the Commission will know, Māori men make up 52% of the prison population as they did at the time of He Whaipaanga Hou. Māori women however now make up nearly 64% of the female prison population when on average they were less than half that number in the 1980's. That is an especially shameful statistic.

19. The research involved hui and interviews with over 6000 Māori people, including 600 Māori men and women who are, or were, in prison. Of those 600 current or former inmates, over half were placed in State or church care as children. Over half of them were abused in care.

20. Their treatment, or mistreatment, in care was part of their almost inevitable progression into prison. Many of them are still comparatively young and suffered abuse in institutions after 1999. It was a matter of concern that may not have the opportunity to tell their stories to this Commission. In my earnest hope that the Commission will exercise its discretion in a helpful way to address the abuse suffered by those victims.

21. The abuse which our research uncovered, and the ensuing trauma which the victims have suffered did not only make the work personally difficult. It also compelled us to look at causative and systemic factors in a quite different way to that which was adopted in He Whaipaanga Hou, and indeed in most other criminological research.

22. An important part of that difference has been shaped by the fact that the research for the first time includes a comparative analysis of the incarceration of other Indigenous Peoples in

Canada, the United States and Australia. The high incarceration rates on those countries are similar to the rates in this country.

23. What is also disturbingly similar is that all four countries have followed the same trajectory of colonisation and have employed similar ideologies and practices. The comparable injustice of the current rates of indigenous incarceration in our view flows from those colonising similarities which prompted a quite specific research question – "Why do States with a history of colonisation imprison so many Indigenous Peoples?"

24. It became clear in the course of the research that such a question was not only appropriate but necessary. Indeed there seemed to be clear symmetries between the injustice of colonisation and the injustice of disproportionate indigenous incarceration which were system-based rather than offender-specific.

25. It is my considered view that the abuse of Māori children in care also arises from the same context, as indeed does the abuse of all children. Colonisation is an inherently abusive process.

26. I accept with considerable sadness that many of those who will speak to this Commission about abuse will be Māori. For some time now, the statistics about Māori overrepresentation in negative social and economic spheres have been regularly and publicly cited. I am pleased that the terms of reference of this Inquiry state that appropriate recognition will be given to Māori interests, acknowledging the disproportionate representation of Māori, particularly in care and that the work of the Inquiry will be underpinned by Te Tiriti and its principles.

27. However, while the over-representation may be known there seems less understanding about why Māori are so overrepresented. Some governments have appeared eager to invest in programmes targeting Māori outcomes but have been less willing to properly consider the reasons for the disproportionality.

28. I believe that this Royal Commission offers an opportunity for New Zealand to grapple with those reasons. In my considered view they are unavoidably linked to the history of colonisation and the failure of successive governments to honour Te Tiriti o Waitangi.

29. To honestly consider the issue in this way is to necessarily consider how colonisation evolved as a transnational process of dispossession that has had destructive effects on Indigenous Peoples throughout the world. An interrogation of its systemically violent and racist nature helps position the recent and current abuse of Māori children, and indeed all children, in a context where understanding and eventual resolution might be achieved.

30. Indeed I would submit that reckoning with colonisation and acknowledging the constitutional implications of that reckoning will help better develop policies to care for children and vulnerable people. That will require a certain courage which I hope the Commission will feel able to express.

31. I know that the Commission is aware of the work already done in other jurisdictions to consider related issues, such as the Australian Inquiry into the "Stolen Generations" and the

Canadian Inquiry into Residential Schools. However, I would like to quote from the Executive Summary of the Canadian Inquiry's Report as it provides the transnational colonising context referred to earlier and illustrates the harsh complexity of the issue:[1]

> *Canada's residential school system for Aboriginal children was an education system in name only for much of its existence. These residential schools were created for the purpose of separating Aboriginal children from their families, in order to minimize and weaken family ties and cultural linkages, and to indoctrinate children into a new culture—the culture of the legally dominant Euro-Christian Canadian society, led by Canada's first prime minister, Sir John A. Macdonald.*
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> ...
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> *The Commission heard from more than 6,000 witnesses, most of whom survived the experience of living in the schools as students. The stories of that experience are sometimes difficult to accept as something that could have happened in a country such as Canada, which has long prided itself on being a bastion of democracy, peace, and kindness throughout the world. Children were abused, physically and sexually, and they died in the schools in numbers that would not have been tolerated in any school system anywhere in the country, or in the world.*
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> ...
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> *Getting to the truth was hard but getting to reconciliation will be harder. It requires that the paternalistic and racist foundations of the residential school system be rejected as the basis for an ongoing relationship. Reconciliation requires that a new vision, based on a commitment to mutual respect, be developed. It also requires an understanding that the most harmful impacts of residential schools have been the loss of pride and self-respect of Aboriginal people, and the lack of respect that non-Aboriginal people have been raised to have for their Aboriginal neighbours. Reconciliation is not an Aboriginal problem; it is a Canadian one. Virtually all aspects of Canadian society may need to be reconsidered.*

32. I believe that the observations of the Truth and Reconciliation Commission are relevant to the work of this Commission. Although the experience in this country has been different in many ways, the intent, and indeed the underlying and purposeful ideologies of colonisation, have been the same.

33. It is that belief which most guides this brief.

PART TWO: THE CONTEXT OF COLONISATION

34. I understand that many others who will speak with the Commission will address the issue of colonisation. I would like to focus especially on its ideologies as well as its effects and will discuss how the issues before the Commission are inevitably framed by its violent history in this country.

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[1] *Honouring the Truth, Reconciling for the Future; Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* The Truth and Reconciliation Commission of Canada, 2015.

35. Words like colonialism and colonisation are contested and often misunderstood. However, in simple terms colonisation has always been a process in which people are dispossessed of their lands, lives and power. It is an inherently brutal process that has been defined as a "crime against humanity."

36. In this country there has unfortunately been a historical reluctance to acknowledge either its true nature or the costs it has exacted upon Māori. That situation has changed somewhat in recent years but there is still considerable unawareness of its history and the ideologies which underpinned its development prior to 1840. Yet it is that history which provides context for both the general status of Iwi and Hapū today and for the particular antecedents that have shaped the issues before this Commission. It is also of course the context within which the text of Te Tiriti o Waitangi was signed.

37. It is not possible in this brief to give a detailed chronology of the colonisation of the world's Indigenous Peoples that has occurred since the arrival of Christopher Columbus in the Americas in 1492. However, the dispossession of Māori is part of that wider trans-national history and in my view cannot be understood without some recognition of the forces and ideas which preceded it in the dispossession of Indigenous Peoples in the Americas and Australia.

38. Those historical forces are the whakapapa explaining the colonisation of Māori. They were developed through centuries of European discourse about the status and even the humanity of Indigenous Peoples. Indeed the development of racism as an ideology and the assumption that some peoples were inferior and could therefore be dispossessed by more superior races evolved contemporaneously with colonisation.

39. One of the most influential colonising discourses derives from a series of canon law debates convened by the King of Spain in Valladolid in 1550. The purpose of the debates was to determine firstly whether Indigenous Peoples were fully human and secondly whether they could be dispossessed "without damage to our conscience...and (in) accord with justice and reason."

40. The prevailing view at the debates was that Indigenous Peoples were in fact human, although not so fully human they could not be dispossessed provided it was done "with kindness and gentle usage." It was essentially a race-based conclusion and there is a certain contradiction in terms in the assumption that people could be dispossessed with "kindness." Certainly the assumption was abused in the centuries that followed.

41. Yet the idea that colonisation could somehow be humane and benevolent was adopted by the British Humanitarian Movement that became influential in the formulation of colonial policy in the 19th century. It led in turn to the notions of Crown "good faith" and the "honour of the Crown" which have marked the dominant narratives about colonisation in this country.

42. It has also led to the equally misleading presumption that colonisation was consequently somehow "better" here than elsewhere. It is that presumption perhaps more than any other which has underscored the reluctance to honestly discuss colonisation as both a history and an ongoing reality.

43. Colonisation has of course occurred in different ways in different places, but the ideas behind it have always remained the same. So too have its costs for Indigenous Peoples because its very "taking" has always been destructive and traumatic. In this country the misremembering of colonisation as somehow "better" here has led to an abstraction of those costs which distorts their true and ongoing nature.

44. For taking away the land from people who live as people of the land is not simply some passing land "loss." It is an ongoing rupture that fractures the essential spiritual and practical ties to identity and belonging. A people cannot be tangata whenua if they have no whenua to be tangata upon.

45. Taking away a people's political and constitutional power to determine their own destiny breaks the fundamental construct that ensures their independence and thus the authority to make the best decisions for themselves.

46. Taking people's lives and the simple tragedy of loss induces a collective intergenerational grief that compounds the trauma of the other takings. In such circumstances the possibility of maintaining a nurturing sense of cultural integrity and collective strength is necessarily diminished.

47. Each taking merges historically in colonisation's ultimate goal which is to assume power and impose legal and political institutions in places which already have their own. It means subordinating the power of Iwi and Hapū mana and tino rangatiratanga or self-determination and thus limiting the ability to properly protect what are the most important taonga for any people - the land, the culture, and the mokopuna.

48. In that context the taking of Māori children has been a cost that has been both intensely personal and inherently political. The presumed right to do so was derived from the same racist presumptions of European superiority that marked colonisation as a whole, and the attendant belief that Indigenous children needed to be "saved," "civilised," and "protected" from themselves.

49. Indeed, the ethos of "saving" and "protecting" was a key part of the Humanitarian ideology. Its precedents were established in the dialectics developed after the Valladolid debates and given practical transnational effect for example in the process of "uplifting" and placing Indigenous children in Residential Schools in the United States and Canada that was referred to earlier in this brief.

50. A brief examination of the policy may be helpful to the Commission. One of its earliest proponents in the United States was Richard H. Pratt who outlined its philosophical intent in a Paper at the Nineteenth Annual Conference of Charities and Correction:[2]

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[2] *Official Report of the Nineteenth Annual Conference of Charities and Correction (1892), 46–59.* Reprinted in Richard H. Pratt, *"The Advantages of Mingling Indians with Whites," Americanizing the American Indians: Writings by the "Friends of the Indian" 1880–1900* (Cambridge, Mass.: Harvard University Press, 1973), 260–271.

> *"A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man."*

51. The aim then was to take the "Indianness" out of the children in order that they might be successfully assimilated into the "superior" European civilisation. In many ways the policy simply reflects the abusiveness that is systemic in colonisation as a process. The consequent sexual, physical and spiritual abuse that was consequently suffered by the thousands of Indigenous children in the schools was simply a dreadful manifestation of that inherent violence. It was not due just to some individual perversity but was an inevitable and accepted expression of colonisation's purpose.

52. The Truth and Reconciliation Commission referred to above described that purpose and the practice as cultural genocide.[3]

> *Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred, and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next.*
>
> *In its dealing with Aboriginal people, Canada did all these things.*

53. Colonising Governments in this country never established residential schools but they shared the same assimilative intentions. They also assumed the same authority to take Māori children from their whānau. Their actions, as pertinent to this enquiry, may equally and properly be described as cultural genocide.

54. Again it is not possible in this brief to canvass the all of the history which may fit within the definition of cultural genocide adopted by the Truth and Reconciliation Commission. However, some indicative examples may be listed using the component parts of its terminology. I am sure the commission is aware of many more.

> *Land is seized, and populations are forcibly transferred, and their movement is restricted*
>
> ***The New Zealand Wars*** which **Dr Rawiri Waretini-Karena** has referred to for example in respect of his whakapapa to Waikato.
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> ***Native Lands Act 1862 and the several dozen other land acquisition statutes***
>
> ***Parihaka***
>
> **Ngāti Whātua Ōrakei Bastion Point**

[3] *Honouring the Truth, Reconciling for the Future; Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* The Truth and Reconciliation Commission of Canada, 2015, pg. 1.

Ihumātao

Languages are banned

The **Native Schools Act** 1867.
The stories of those like **Putiputi Onekawa** also referred to in the evidence of Dr Rawiri Waretini-Karena.

Spiritual leaders are persecuted:

Te Whiti o Rongomai and Tohu Kakahi
Te Kooti Arikirangi
Rua Kenana.

Spiritual practices are forbidden

The Tohunga Suppression Act 1907

Objects of spiritual value are confiscated and destroyed

The taonga and wharenui now housed overseas.
The scorched earth policy which saw whare and kāinga razed in Tūhoe and other rohe.

And, most significantly to the issues before the commission, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next

Closed Adoptions –as referenced in the statement of Alison Green.
Social Welfare and Youth Justice Facilities such as Kohitere, Epuni, and others.
The disproportionate taking of Māori babies.

To paraphrase the Truth and Reconciliation Commission –

In its dealings with Māori, New Zealand did all these things.

55. It is therefore my submission that while the implementation of colonisation may have differed in some ways in this country, it has not been "better." The intention to take has been the same as in other countries and dispossession is dispossession even when it is carried out with an allegedly honourable intent or "kind usage."

56. Colonisation has always been genocidal, and the assumption of a power to take Māori children has been part of that destructive intent. The taking itself is an abuse.

PART THREE: TIKANGA AND TE TIRITI O WAITANGI

57. I acknowledge that this Commission is not mandated to be a deliberative body on Te Tiriti o Waitangi. However, Te Taumata o Kahungunu has long held the view that the authority assumed by the Crown to remove Māori children from their whānau is not consistent with Te Tiriti.

58. This view was supported at the Hui called by the Whānau Ora Commissioning Agency earlier this year to establish an Independent Māori Review of current Oranga Tamariki policies. A member of the Governing body for the Review, Dame Naida Glavish stated "Our tūpuna did not sign Te Tiriti giving permission for the Crown to take our tamariki."

59. For that reason, I hope it might be helpful for the Commission to briefly canvass the consistent Māori understanding of Te Tiriti as it indicates the grounds upon which the taking and abuse of Māori children is regarded as a breach of Te Tiriti. It also presages the suggested resolutions outlined later in this brief.

60. History shows that every society realises very early on that it cannot survive in a lawless state. They therefore establish ways of ensuring social cohesion and harmony by developing a philosophy or jurisprudence of law as well as a discrete legal system to give effect to it. Both are shaped by the land, history and values of the people concerned - the idea and ideals of law are unique cultural creations.

61. Iwi and Hapū long ago developed a law or tikanga that grew out of the stories and the culture that developed in this land. It developed from philosophies to do with the sacred interrelatedness of whakapapa as well as from precedents and customs devised by the tipuna. It recognised the need for sanctions but stressed the ethical base of any behaviour and sought reconciliation rather than punishment. It recognised the relationships between people and every part of the universe, both seen and unseen, physical and spiritual.

62. Perhaps the clearest example of the efficacy of tikanga as law is seen in the ceremonies that were performed when a baby was born. The rites of birth associated with naming and blessing the child were not just a cultural celebration but a legal affirmation of the rights or entitlements that would vest in the child as he or she grew into adulthood. They established the child's tūrangawaewae and the interests or title in land that went with his or her whakapapa. At the same time they were a public declaration of the collective's obligation to care for and protect the child.

63. Tikanga itself was thus relational as well as values based. It was bound by the ethics of what ought to be in a relationship as well as the values that measured the tapu and mana of individuals and the collective. It set prescriptive and proscriptive guidelines for what was legal or illegal (tika or non-tika) behaviour, and because it was so whakapapa-based people lived with the law rather than under it. The idea that someone might be above it was simply a cultural contradiction in terms.

64. As in all cultures law was symbiotic with the exercise of political power. The effective exercise of mana or tino rangatiratanga was proscribed and prescribed by tikanga, which in turn was given efficacy by the mana of the Iwi and Hapū.

65. The concept of mana as a political and constitutional power denoted an absolute authority. It was absolute because it was absolutely the prerogative of Iwi and Hapū, but it was also absolute in the sense that it was commensurate with independence and an exercise of authority that could not be tampered with by that of another polity. It necessarily included a number of different components that may be called the specifics of power such as:

    a. a power to protect – that is the power to protect, manaaki and be the kaitiaki for everything and everyone within the polity;
    b. a power to define – that is the power to define what should be protected, and the power to define the rights, interest and place of individuals and collectives;
    c. a power to decide – that is the power to make decisions about everything effecting the wellbeing of the people; and
    d. a power to develop – that is the power to change to meet new circumstances in ways that are consistent with tikanga and conducive to the advancement of the people.

66. But if Iwi and Hapū were independent they were also necessarily interdependent through whakapapa. The mana of one polity was necessarily connected to the mana of another in the same way that individuals were interdependent and the mana of humans was inseparable from mana whenua, mana moana and mana atua.

67. Within this reality two fundamental tenets underpinned mana and tino rangatiratanga and determined how they could be exercised –

    a. firstly, the power was bound by law and could only be exercised in ways consistent with tikanga and thus the maintenance of relationships and responsibilities.
    b. secondly the power was held by and for the people, that is it was a taonga handed down from the tīpuna to be exercised by the living for the benefit of the mokopuna.

68. The ramification of those prescriptions was that mana was absolutely inalienable. No matter how powerful rangitara might presume to be, they never possessed the authority nor had the right to give away or subordinate the mana of the collective because to do so would have been to give away the whakapapa and the responsibilities bequeathed by the tipuna. It would have been to abdicate the responsibility to protect the people and the land.

69. To hold mana and tino rangatiratanga was the only way in tikanga terms to hold the mana of every child acknowledged in the rites of birth. The fact that there is no word in te reo Maori for 'cede' is not a linguistic shortcoming but an indication that to even contemplate ceding or giving away mana would have been legally impossible, politically untenable, and culturally incomprehensible.

70. It was those legal and political understandings which naturally guided the process of treaty-making. For like all polities iwi and Hapū have a long history of negotiating treaties with each other. It predates Te Tiriti o Waitangi and was known in Ngāti Kahungunu as te mahi tūhono, or the work to bring people together. Like tikanga as law, treating was a relational process dependent upon mana and the notion of equitable interdependence.

71. The important question in situating Te Tiriti in the Maori reality is not whether rangatira understood sovereignty (a preoccupation of many Pākehā historians and jurists) but whether they understood mana. Sovereignty after all was a foreign concept of power and because evidence shows that all of the understandings reached by the rangatira were concluded in te reo rather than a foreign language the key interpretive lens was obviously mana and tino rangatiratanga with all of their implications and absoluteness.

72. The evidence in Iwi histories in te reo before and at the time of the signing clearly indicates that rangatira were mindful of their responsibility to preserve and even enhance the mana they were entrusted with. In 1840 they could only act according to tikanga and commit the people to a relationship that was tika in terms of their constitutional traditions.

73. The constant statements in those histories that the words in Te Tiriti do not envisage or permit a cession of mana or even a recognition of some sort of overarching Crown authority therefore reaffirm a fundamental Maori truth. They simply could not consent to something that was not only contrary to law but also the very base upon which Iwi and Hapū society was built.

74. That truth points to an obvious Maori meaning to Te Tiriti which the Waitangi Tribunal reaffirmed in its First Stage Report on the Paparahi o Te Raki claim: He Whakaputanga me Te Tiriti. In its Report the Tribunal declared that Māori did not cede sovereignty to the Crown but rather sought the recognition of different "spheres of influence." They retained mana and tino rangatiratanga because that was the prerequisite to any equitable relationship.

75. The tikanga understanding of Te Tiriti as affirmed by the Tribunal may be illustrated with an analogy. For just as part of the responsibility of mana was to recognise relationships with others and to expect that they would reciprocate by ensuring that their people did nothing to impinge upon one's own harmony and well-being, so rangatira actively sought a relationship with the Crown through Te Tiriti and granted it a limited power, kawanatanga, to ensure its people did not impinge upon the mana of Iwi and Hapū.

76. Maori linguists have explained the nuances of the words in Te Tiriti but the legal and political realities of Iwi and Hapū give those nuances a specific meaning. If mana was not ceded, then Te Tiriti was a Maori reaffirmation of a tikanga-based expectation that Iwi and Hapū would continue to have the authority to protect their mokopuna. The subsequent usurpation of that authority by the Crown may consequently be seen as a breach of Te Tiriti.

77. The fact that such a tikanga-based understanding has been dismissed in the colonising history since 1840 does not invalidate it. Rather it merely indicates the steps this country still needs to take to properly honour Te Tiriti. It also indicates that there is already a Tiriti-based framework in place that could justly provide both a measure to assess the wrongs of abuse in care and a way to prevent such harm in the future.

PART FOUR: PU-AO-TE -ATA-TŪ AND ITS AFTERMATH

78. Puao-te-Ata-Tū, the Report of the Advisory Group tasked with investigating the policies and operations of the then Department of Social Welfare was released in 1988. The Group was

chaired by the Tūhoe rangatira John Rangihau, and appointed by the Minister of Social Welfare, Anne Hercus.

79. In many ways the Report was a seminal attempt to reframe the obligations of the Department within the mutual Crown/Māori obligations agreed to in Te Tiriti. It was based on a lengthy period of discussions with Māori and noted a culture of institutional racism within the Department. The first two of its 13 recommendations give some indication of the then new approach that it envisaged:[4]

> ***Recommendation 1 (Guiding Principles and Objectives)***
>
> *We recommend that the following social policy objective be endorsed by the Government for the development of Social Welfare policy in New Zealand:*
>
> *"Objective*
> *To attack all forms of cultural racism in New Zealand that result in the values and lifestyle of the dominant group being regarded as superior to those of other groups, especially Maori, by:*
> *(a) Providing leadership and programmes which help develop a society in which the values of all groups are of central importance to its enhancement; and*
> *(b) Incorporating the values, cultures and beliefs of the Maori people in all policies developed for the future of New Zealand."*
>
> ***Recommendation 2***
>
> *We recommend that the following operational objective be endorsed:*
>
> *"To attack and eliminate deprivation and alienation by:*
> *(a) Allocating an equitable share of resources.*
> *(b) Sharing power and authority over the use of resources.*
> *(c) Ensuring legislation which recognises social, cultural and economic values of all cultural groups and especially Maori people.*
> *(d) Developing strategies and initiatives which harness the potential of all of its people, and especially Maori people, to advance."*

80. After the Report was released a Māori Resource Group was established. Among its deliberations was a consideration of the prevailing convention of the time that the Director General of Social Welfare was the guardian of children in care in New Zealand.

81. The Resource Group suggested that if those children were Māori then the proper Tiriti and whakapapa-based guardian was the Iwi, Hapū, and whanau. The suggestion was never acted upon, but it was a genuine attempt to give effect to the power to protect mokopuna which was reaffirmed in Te Tiriti.

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[4] *Puao-te-Ata-tu* – The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare.

82. It also presaged the Waitangi Tribunal finding that Te Tiriti envisaged different "spheres of influence" and the logical tikanga assertion that the care and protection of mokopuna was inherently a Māori sphere of influence.

83. It is my considered view that the failure of the Crown to acknowledge that power to protect vesting in Iwi, Hapū and whānau is a continuation of the denial of what Te Tiriti actually means. It is part of an ongoing colonising dialectic which is not ameliorated by the recent moves by Oranga Tamariki to establish relationship agreements with Iwi.

84. While those agreements are a positive initiative entered into by Iwi and officials of Oranga Tamariki with good intent they do not address the power imbalances in the current iteration of Treaty partnership. Neither do they address the systemic and historical issues which led to the uplift and abuse of Māori children.

85. That kind of transformational change will only come with a meaningful honouring of Te Tiriti and a different constitutional arrangement between the Crown and Iwi and Hapū.

PART FIVE: CONSTITUTIONAL TRANSFORMATION AND THE CARE OF MOKOPUNA

86. It may seem outside the Terms of Reference of this Commission to consider issues of constitutional transformation. However, it is my submission that the ultimate resolution of the issue of abuse in care, and of children in care in general, resides in returning the care and protection of mokopuna to Iwi and Hapū.

87. That necessarily means something more than an Iwi responsibility for care within parameters prescribed by the Crown. It ultimately requires a shift in the constitutional decision-making processes which finally acknowledges that Māori have the right to self-determination in its fullest sense.

88. Such a discourse is not a new one for Māori. As discussed earlier it was the base of the relationship envisaged in Te Tiriti in 1840. In subsequent years it was the motivation for the establishment of the Kotahitanga and Kingitanga Movements as well as the establishment of the Māori Parliament in 1892.

89. The discussion has not changed over the years because Māori people have always sought equitable and conciliatory arrangements with the Crown. That is consistent with tikanga as well as necessary if the injustice of colonisation is to be finally remedied. To address that issue as part of a discussion about the care of all our mokopuna seems a good place to continue that dialogue.

90. At a national Hui in 2010 the issue was once again raised which led to the Iwi Chairs' Forum establishing a Working Group, Matike Mai, to discuss the issue with Māori around the country. I was asked to convene the Working Group and Professor Margaret Mutu was appointed its Chair.

91. The Brief given to the Working Group was to hold discussions about a new constitutional framework based upon tikanga, the 1835 Declaration of Independence (He Whakaputanga),

Te Tiriti o Waitangi, and relevant international human rights instruments. Over the next five years the Working Group held 252 hui and the associated rangatahi group organised 70 wānanga with young people.

92. The Report of the Working Group, "He Whakaaro Here Whakaumu Mō Aotearoa" was released on Waitangi Day in 2016. It is not appropriate to canvass its findings in detail before this Commission but it may be helpful to outline the main Tiriti-based values it identified as they are pertinent to the creation of a truly Treaty-based society where all mokopuna may be safe and cared for.

93. Although the values were discussed as prerequisites for constitutional transformation they may also be seen as interrelated parts of a wider ethic of caring –

    a. The value of place – that is the need to promote good relationships with and ensure the protection of Papatūānuku so that all her mokopuna might live with manaakitanga and aroha.
    b. The value of tikanga – that is the core ideals that describe the "ought to be" of living in Aotearoa and the particular place of Māori within that tikanga.
    c. The value of community – that is the need to facilitate good relationships between all peoples.
    d. The value of belonging – that is the need for everyone, and especially the young, to grow with a secure sense of belonging.
    e. The value of balance – that is the need to maintain harmony in all relationships in whānau and within the wider community.
    f. The value of conciliation – that is the need to guarantee a conciliatory and consensual democracy.

94. Two major themes were identified at every hui and underpinned the values outlined above. The first was that the land was a taonga that should be protected for all. The second was that mokopuna were also taonga who should be free to grow in a safe and loving whānau.

95. The values and themes were then incorporated into different constitutional models based on the notion of different "spheres of influence" suggested by the Waitangi Tribunal. In each model the care of mokopuna Māori was rightly placed in the tino rangatiratanga "sphere of influence.

96. It was acknowledged throughout the hui that in relation to the well-being of children there were instances where for various reasons mokopuna might be unsafe. However, it was also clearly expected that the authority to decide whether the child might need to be removed and other care provided was equally rightly a decision for Iwi and Hapū to make.

97. It was also clearly recognised that any removal needed to be within the child's whakapapa and involve assistance for the whānau to address whatever social or economic issues it might have. The word rangatiratanga can literally be translated as "weaving the people together" and it is that sustaining and mending of relationships that has always been fundamental to the proper Māori care of Māori children.

98. Those conclusions were part of the long struggle of Iwi and Hapū to have the Treaty honoured and to at last address the injustice of colonisation. The historic abuse of mokopuna Māori is one of colonisation's most egregious wrongs.

99. If this Commission finds some way to offer solace to those who have been abused that will be some measure of justice long overdue. If it frames that comfort in a willingness to systemically and constitutionally address the overarching injustice of colonisation that will be a justice which offers hope for the future.

Tēnā tātou katoa.