DR MOANA JACKSON - AFFIRMED

EXAMINED BY MR MERRICK

CHAIR: Dr Jackson, may I in terms of the Inquiries Act, ask you as follows. (Witness affirmed).

MR MERRICK:

Q. (Opening in Te Reo Māori). Just before we start, behind tab 6 of the volume in front of you, the folder in front
15.40 of you, there should be - that folder which is sitting in front of you - I think a signed copy of your brief of evidence. Can I get you to sight that and confirm that is your brief of evidence and it's true and correct to the best of your knowledge?

A. Yes.

Q. Thank you. Now, in that brief of evidence you've outlined the experience that brings you here. I don't intend to cover that ground again today. That can be taken as read from your brief of evidence.

15.41 And so, what I wanted to do simply is to handover the time to you to pick up from where you feel is the best place to start and we can go from there.

A. Kia ora. (Talks in Te Reo Māori). If it pleases the Commission, I'd like to begin at paragraph 14 which refers back to the biographical details which informs this brief. But I did want to begin there because I say that in presenting my brief, I am mindful and respectful of the evidence that will be given to this Tribunal by others, and particularly those who have suffered abuse
15.42 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.

The brief has five parts and because I'm mindful of the time, I'll try and condense different parts as well but I'm happy to answer questions on any part of the brief.

So, part one, He Whakamarama is an explanation and I'd like to pick up from paragraph 16. Over the last four years I have been involved in research in the relationship between Māori and the Criminal Justice
15.43 System. The research is an update of the 1988 report on the same issue *He Whaipaanga Hou*, and it's been conducted with two young researchers Ngawai McGregor and Anne Waapu and the new report will be published early next year.

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.

The research has been distressing because so little has changed. As the Commission will know, Māori men make
15.44 up 52% of the prison population as they did at the time of *He Whaipaanga Hou* in the 1980s. 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 1980s. That is an especially shameful statistic.

The research involved hui and interviews with over 6,000 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.

15.45 I would also like to add that among those 600, were 44 who identified as Takatāpui, gay or transgender. Over half of those were also placed in care and all of those Takatāpui were abused in care as children. 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 they may not have had the opportunity to tell their stories to this Commission. It is my earnest hope that the Commission will exercise its discretion in a helpful way to address the abuse suffered by those victims.

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
15.46 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.

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

15.47 What is also disturbingly similar is 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?"

It became clear in the course of the research that such a question was not only appropriate but necessary.
15.47 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.

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.

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 over representation in negative social and economic spheres has been regularly and publicly cited.

If I move to paragraph 27.

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

If I can just interpolate here. That is why it was important to us to make those comparisons with Canada, Australia and the United States.

15.49 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.

To honestly consider the issue in this way, is to necessarily consider how colonisation evolved as a trans-national 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

15.50 of Māori children, and indeed all children, in a context where understanding and eventual resolution might be achieved.

And my friend Rawiri and Alison also alluded to some of that history. But I'd 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.

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 Stolen Generations and the Canadian Inquiry into Residential
15.51 Schools. However, I would like to quote from the Executive Summary of the Canadian Inquiry's report as it provides the trans-national colonising context referred to earlier and illustrates the harsh complexity of the issue:

"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 minimise and weaken family
15.51 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.

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 as being a bastion of democracy, peace and
15.52 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.

Getting to the truth was hard but getting to

reconciliation will be harder. It requires that the paternalistic and racist foundations of a residential school system be rejected as a basic for an ongoing relationship. Reconciliation requires that a new vision, based on commitment to mutual respect, be developed. It also requires an understanding that the most harmful impacts of residential schools have been the loss and self-respect of Aboriginal people, and the lack of respect that non-Aboriginal peoples have been raised to
15.53 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."

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

The context of colonisation. I understand that many others who will speak to the Commission will address the issue of colonisation. I would like to focus specifically 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.

Words like colonisation are contested and often misunderstood. However, in simple terms colonisation has always been a process in which people are dispossessed of
15.54 their hands, lives and power. It is an inherently brutal process that has been defined by the United Nations as a crime against humanity.

In this country, there is unfortunately been an historical reluctance to acknowledge either its true

nature or the costs that 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 underpin its development prior to 1840. Yet, it is the history that provides context for both the general status of iwi and hapu 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.

15.56 It is not possible to give a detailed chronology of colonisation of the world's indigenous peoples that has occurred since the arrival of Christopher Columbus in the Americas in 1492. However, the disposition 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.

Those historical forces are the whakapapa explaining
15.56 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.

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
15.57 the debates was to determine firstly whether indigenous peoples were fully human and secondly whether they could be dispossessed in terms of the debate remit "without damage to our conscience and in accord with justice and reason".

The prevailing view of 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.

Yet the idea that colonisation could somehow be humane and benevolent was adopted by the British Humanitarian Movement that became influential in the
15.58 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.

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.

15.59 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 mis-remembering of colonisation as how "better" has led to an abstraction of those costs which distorts their true and ongoing nature.

For taking away the land from people who live as people of the land is not simply some passing land
16.00 "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.

Taking people's lives and the simple tragedy of loss

induces a collective inter-generational 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.

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
16.01 hapu 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.

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
16.01 saved, civilised and protected from themselves.

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 trans-national effect for example in the process of uplifting and placing indigenous children in the residential schools in the US and Canada referred to earlier.

A brief examination of the policy may be helpful to the Commission. One of its earliest proponents in the US
16.02 and the director of the first residential school Richard H Pratt who outlined his philosophical intent in a paper at the 19th Annual Conference of Charities and Correction in which he said "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".

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
16.03 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 inevitable and accepted expression of colonisation's purpose.

The Truth and Reconciliation Commission referred to above described that purpose and the practice as cultural genocide. To quote again from their report:

"Cultural genocide is the destruction of those
16.04 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
16.05 and identity from one generation to the next.

In dealing with Aboriginal people, Canada did all these things".

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 Inquiry, may equally and properly be described as cultural genocide.

Again, it is not possible in this brief to canvass 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. And I am sure the Commissioners are aware of many more.

The first point which they raised:

Land is seized, populations are forcibly transferred, and their movement is restricted.

The wars which Dr Rawiri Waretini-Karena referred to, the various Native Lands Act and several dozen land acquisition statutes. The assault on Parihaka, Ngati Whatua Orakei, Bastion Point and Ihumatao are examples of cultural genocide.

Languages are banned.

The Native Schools Act 1867, the stories of those like Putiputi Onekawa also referred to in the evidence of Dr 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.

Objects of spiritual value are confiscated and destroyed.

The taonga and wharenui now housed overseas.

The scorched earth policy which saw whare and kainga razed in Tuhoe and other rohe.

And most significantly to the issues before this 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. Social Welfare and Youth Justice Facilities such as Kohitere, Epuni and others.

And the disproportionate taking of Māori babies.

To paraphrase, the Canadian Truth and Reconciliation Commission "In its dealings with Māori, New Zealand did all these things".

It is therefore my submission that while the
16.08 implementation of colonisation may have been different 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.

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.

16.09 Part 3, Tikanga and Te Tiriti o Waitangi. I acknowledge the Commission is not mandated to be a deliberative body on Te Tiriti o Waitangi. However, Te Taumata o Kahungunu of which I am a part 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. This view is supported by 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 tupuna did not sign
16.10 Te Tiriti giving permission for the Crown to take our Tamariki".

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.

I will try to paraphrase the next few paragraphs, if that's all right for the Commission.

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
16.11 law, as well as a discrete legal system to give effect to it.

In paragraph 61. Iwi and hapu 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.

16.11 It recognised the relationships between people and every part of the universe, both seen and unseen, physical and spiritual.

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
16.12 child's turangawaewae and the interests in title or 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.

It may be helpful to refer the Commission, although

it's not mentioned in the brief, to the Native Land Act 1867 and subsequent regulations which actually initiated policy moves to ban Māori child birth ceremonies and particularly the burying of the after birth of whenua and the whenua of the child.

Paragraph 63. Tikanga itself was thus relational as well as valued based. It was bound by the ethics of what ought to be in a relationship as well as the values that measure the tapu and mana of individuals and the collective.

Paragraph 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 hapu.

The concept of mana as a political and constitutional power denoted an absolute authority. It was made up of what may be called the specifics of power.

(a) The power to protect - that is the power to project, manaaki and be the kaitiaki for everything and everyone within the polity.

(b) 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 affecting the wellbeing of the people.

(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.

But if iwi and hapu were independent, they were also necessarily inter-dependent 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.

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

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.

16.16 Secondly, the power was held by and for the people, that is it was a taonga handed down from the tipuna to be exercised by the living for the benefit of the mokopuna.

The ramifications of those prescriptions was that mana was absolutely inalienable. No matter how powerful Rangatira 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

16.17 the responsibility to protect the people and the land.

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 Māori 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.

It was those legal and political understandings

16.17 which naturally guided the process of Treaty making. For like all polities iwi and hapu have a long history of negotiating treaties with each other. It predates Te Tiriti o Waitangi and was known in Ngati Kahungunu as te mahi tuhono, 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.

The important question in situating Te Tiriti in the Māori reality therefore 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
16.19 reached by the Rangatira in relation to Te Tiriti 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.

The evidence in iwi histories in Te Reo before and at the time of the signing clearly indicates 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
16.19 to a relationship that was tika in terms of their constitutional traditions.

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

That truth points to an obvious Māori meaning to
16.20 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 what the Tribunal

has called different spheres of influence. They retained mana and tino rangatiratanga because that was the prerequisite to any equitable relationship.

The tikanga understanding of Te Tiriti is 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 wellbeing, 16.21 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 hapu.

Māori linguists have explained the nuances of the words in Te Tiriti but the legal and political realities of iwi and hapu give those nuances a specific meaning. If mana was not ceded, then Te Tiriti was a Māori reaffirmation of a tikanga based expectation that iwi and hapu would continue to have the authority to protect 16.22 their mokopuna. The subsequent usurpation of that authority by the Crown may in my view consequently be seen as a breach of Te Tiriti.

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 Te Tiriti based framework in place that could justly provide both a measure to assess the wrongs of abuse in care and 16.23 a way to prevent such harm in the future.

Part four, Pu-Ao-Te-Ata-Tu and its aftermath. Because this has been covered in some detail already, I would like to refer the Commission to paragraph 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.

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

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.

It is my considered view that the failure of the Crown to acknowledge that power to protect vesting in iwi, hapu 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.

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.

That kind of transformational change will only come
16.25 with a meaningful honouring of Te Tiriti and a different constitutional arrangement between the Crown and iwi and hapu.

And so the final part of my brief, constitutional transformation and the care of mokopuna.

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 hapu.

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

Such a discourse is not a new one for Māori. As discussed earlier in the brief it was the base of 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.

16.27 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 finally be 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.

At a national hui of Māori in 2010, the issue was once again raised which led to the Iwi Chairs' Forum
16.27 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 as Chair.

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 Rangitahi group organised 70 Wananga with young people.

The report of the Working Group, "He Whakaaro Here Whakaumu Mō Aotearoa" was released on Waitangi Day in 2016. It is not appropriate to discuss its findings in detail before the Commission but it may be helpful to outline the main Te Tiriti 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.

Although the values were discussed as prerequisites for constitutional transformation, they may also be seen as inter-related parts of a wider ethic of caring.

The first is the value of place. That is a need to promote good relationships with and ensure the protection of Papatuanuku so that all her mokopuna might live with manaakitanga and aroha.

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.

The value of community - that is the need to facilitate good relationships between all peoples.

The value of belonging - that is the need for everyone, and especially the young, to grow with a secure sense of belonging.

The value of balance, that is the need to maintain harmony in all relationships in whānau and within the wider community.

The value of conciliation - that is the need to guarantee a conciliatory and consensual democracy.

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 mokopuna was also taonga who should be free to grow in a safe and loving whānau.

The values and themes identified 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
16.31 rangatiratanga sphere of influence.

It was acknowledged throughout the hui that in relation to the wellbeing 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 hapu to make.

It was also clearly recognised that any removal needed to be within the child's whakapapa and involve
16.32 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.

Those conclusions were part of the long struggle of iwi and hapu 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
16.33 egregious wrongs.

If this Commission offers some way to offer solace to those that was 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 over-arching injustice of colonisation that will be a justice which offers hope for the future.

Kia ora.

Q. I wondered, just one additional question, whether you had any comment around section 7AA of the Oranga Tamariki Act which is a new provision. You've touched on it earlier in your evidence but whether you wanted to elaborate on in effect whether that goes far stuff against the korero that you've given us this afternoon?

16.34 A. If I could just preface my response by repeating a point I made in the brief, that iwi certainly, and I believe on the ground staff in Oranga Tamariki have entered into those agreements with good intent but they are systemically flawed because they do not address the power imbalances which exist. They retain the power of decision-making with the Crown and do not acknowledge the right inherent in tino rangatiratanga for iwi and hapu to make those decisions.

The second part of my response, is that the rhetoric
16.34 currently used by the Crown is to establish relationships that are by and for Māori and there is some value in that depiction of the relationship but it is actually also inadequate. If I can draw what might seem a farfetched analogy that is nevertheless true.

When Abraham Lincoln gave his famous Gettysburg address during the American civil war, he spoke about the return of government "of the people for the people by the people." The Treaty does not require a relationship just for and by Māori. It requires a relationship of Māori,
16.35 in which Māori have the power of making decisions, and that's the, if you like, philosophical shortcoming in the whole idea of relationships based by and for Māori.

Q. Kia ora. I don't have any further questions and I am conscious that others might, so I'll just take this

opportunity (speaks in Te Reo Māori).

A. (Speaks in Te Reo Māori).

CHAIR: Thank you. Are there any counsel who wish?

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MOANA JACKSON

QUESTIONED BY MS SKYES

Q. (Speaks in Te Reo Māori). I notice in your brief which is carefully constructed, you've tried hard to limit the disclosures to yourself in the current project you're doing to events between perhaps 1989 and 1999 and the
16.38 interviews you conducted with people that have been in State care in that period.

One of the matters that you don't elaborate on is, did you notice, as Ms Green did, that the numbers of Māori really escalated in significant levels between the research that you did in 1988 and your current research? I'd really like to focus on that period and the trends that you observed between 1988 and 1999.

A. The numbers of Māori men in prison has remained constant at around 52% for over 40 years. The sharp increase has
16.38 been in the numbers of Māori women imprisoned which coincides with the implementation of neoliberal policies, what I call the criminalisation of poverty, so a lot of Māori women who are in prison are in prison for crimes of poverty.

And the rise of a rate in the 1980s of less than 10% of the female prison population being Māori to now being 64%, which in the research we'd done per capita now makes Māori women the most imprisoned group of women in the world. But while that increase has been stark in the
16.39 last 30 years, I think it's part of a longer trajectory as well which is part of colonisation as well. Because in the period of the most assimilative pressure being placed on Māori people in the 19th Century, a lot is similar to the pressure that was placed on Māori women

and the role that Māori women played in Māori society. So, there was not only an attack on the integrity of whānau, there was a specific attack on the role of Māori women which particularly infected the integrity of whānau and the inter-generational effects were then played out.

The inter-generational effects of that were exacerbated constantly by the criminal justice system being the enforcing arm of the Crown.

What happened from about the mid 1890s, for the next 16.40 60 odd years, was when Māori were classified at the end of the 19th Century as a dying race, we retreated to those safe largely rural areas that had not been confiscated. So, there was little contact between - comparatively little contact between Māori and Pākehā people.

And so, the Māori imprisonment rate which had soared during the wars, when Māori who resisted the confiscation of land were imprisoned, so there was a criminalisation of Māori resistance, so the prison rate rose. But then 16.41 with the dying race and the retreat into rural safety, the imprisonment rate declined.

Then in the Second World War, with the passage of national emergency manpower regulations, when Māori began to be moved into the cities to provide labour in the essential wartime industries in the beginning of what some people call the urban drift but I prefer to call it an urban shift because Māori did not just drift into the cities, they were shifted because of politico economic policies. After the war that exacerbated with the taking 16.42 of more Māori land which is catalogued in research done on Town and Country Planning Act, the Public Works Act and so on. Māori were moved more into the cities to provide labour in the burgeoning manufacturing industries.

And as greater contact occurred between Māori and others, then three things happened. Closed adoptions of Māori children were introduced. The first tranche of Māori children being taken into care occurred. And the rate of imprisonment of Māori began to rise. And those first generation of largely Māori boys who were taken from their family and placed in care in the 1950s were pipelined through to become the burgeoning Māori male imprisonment rate in the 60s and 70s.

16.43 So, those statistics are traceable and then they begin to rise again with Māori women in the 1990s. And that coincides with the increasing number of Māori girls being taken into care in the 1970s and 1980s.

Q. So, there is socioeconomic policy of that period, and I'm talking '60s, '70s, '80s that are causing a transmigrating shift of Māori whānau from rural areas to urban communities. There's economic pressures. What's happening to the cultural identity of those whānau and cultural connections of those whānau and were there any

16.44 policies that impacted on their ability to retain that identity?

A. If I could perhaps just illustrate the answer with the latest criminal justice research we've done. Of the 600 Māori men and women we interviewed who are or were in prison, all of them were what would be called "urban Māori". They were either shifted from their whānau, either shifted from their rural homelands into the cities, or they grew up in cities within their iwi but with no access to land because the land and their iwi

16.45 had been taken.

Those who moved into the cities, the generation that moved were usually fluent in Te Reo, confident in their tikanga. The economic and social pressures, which I call the modern equivalent of colonising pressures, then made

it really difficult to sustain those taonga, that integrity, in the city environment. And because some of that generation had also been punished for speaking Te Reo, they chose not to hand it on to their children because the assimilative pressure was to learn English.

And so, in the '60s, '70s and '80s you begin to see the marked decline of Māori language, for example, as the first language, the bulk of the younger generations.

Q. So, I'm puzzled by the fact we see the revival of - we have activists like myself and others committed to the revival of Te Reo Māori in urban and rural realities, and yet reading your evidence or listening to your evidence today we see incarceration rates and the taking of children increasing and an expediential rate notwithstanding that cultural revolution. Can you help me explain, I want to limit it to that period 1988-1989?

A. There is now a growing cohort of prisoners and ex-prisoners who were children of Kohanga reo and kura kaupapa, fluent in the language, confident again in their tikanga as our generation hoped they would be. But that has not protected them from becoming pipelined into prison, just as a number of the old people often say, well, people who were arrested in the 19th Century for resisting colonisation were absolutely fluent in Te Reo, absolutely confident in the tikanga. So, that is why I think it's important to look at other colonising countries like Canada, Australia and the United States, and say, well, what is it about those societies, what is it about their histories, which makes it more likely that indigenous peoples will be imprisoned, whether they are secure in their tikanga or not.

Q. And my last question is, your report in 1988, like the report that Ms Green took us to and the other report you've taken us to, all talked about children being

placed in the sphere of influence where Māori had control and tino rangatiratanga over the decision-making of tamariki, mokopuna, rangitahi.Notwithstanding those recommendations in 1988, what have been the barriers to achieving that transformation or change that certainly you and many other Māori leaders of that time, Sir John Rangihau, Dame Mira Szászy, the late Bishop Bennett, Bishop Vercoe, they were all part of that vanguard, what were the barriers to achieving their aspirations?

16.48 A. It is essentially the unwillingness of the Crown to acknowledge the relationship which was actually entered into in Te Tiriti o Waitangi. It is an unwillingness of the Crown to have the imagination to imagine the justice of the relationship. It's been an unwillingness to acknowledge that if Māori are able to exercise Māori authority and Māori sphere of influence, this country will not slide into the sea, and that's part of a process of the Treaty journey which we are still on. In the Constitutional Transformation Report we recommended 2040,

16.49 200 years after the signing of the Treaty, as a good point to envision a Treaty based constitutional relationship and I think it might take that time to encourage the conversation, the social conversation, which is needed for that to occur but the barrier has been the Crown unwillingness to listen to Māori concerns.

Q. I suggest that to share power has also been a major barrier, particularly in the context of what you also mention in your brief, a desire now for Māori to design our own systems and to implement those system with

16.50 appropriate resources?

A. Well, one of the currently popular Crown terms at the moment is "co-design" which rather like the relationship agreements that are being entered into between some iwi and Oranga Tamariki, sounds good in theory but in

practice you are co-designing a relationship where the Crown retains absolute power. So, that's not an equal Tiriti based co-design. Whereas a Tiriti based process of constitutional transformation will help deliver that, I think.

MS SKYES: **I can't** thank you enough for your evidence. Thank you. Kia ora, Moana.

CHAIR: Thank you, Ms Skyes. Are there any other counsel who wish to address questions to Dr Jackson? There aren't.

16.51

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MOANA JACKSON

QUESTIONED BY THE COMMISSIONERS

COMMISSIONER ERUETI: I would like to ask you as a longstanding champion of international indigenous rights a few questions, firstly about the Declaration on the Rights of Indigenous Peoples.

16.52 It would be useful to know, I think, the reasons why Māori and other indigenous peoples journeyed all the way to Geneva in the 1980s to draft an international instrument on indigenous rights, particularly given that there were the two international human rights covenants that had been in place for some time. Could you give us the reason for that mahi?

A. Happy to do that. There is a whakapapa. In 1923, a delegation of Rangatira, frustrated at the inability to meet with the Crown and the person of the monarch in

16.53 London heard about a new international organisation that had been established after the First World War called the League of Nations in Geneva. A group of Rangatira travelled to Geneva in 1923 to petition the League of Nations about the grievances of our people and they were refused admission because the New Zealand Government had informed the other delegates that the League of nations was a League of Nations States and to quote the words "the native peoples waiting in the forecourt are not a nation".

16.54 So, those Rangatira turned and sailed back home. One of them kept a diary and on the day that they were declined admission he wrote, "The halls of this palace are not yet ready to hear the voice of our people". 50 years later in 1973, a group of Indigenous Peoples, mainly from the Americas, travelled back to Geneva, which

by then had become what had previously been the League of Nations Palace de Justice had become the human rights headquarters of the new United Nations and they travelled with the same hopes as Māori delegation. And they too were declined admission. But every year after that, they returned asking for a place where their voice could be heard and eventually at the instigation of a number of Scandinavian Governments, Norway, Sweden and so on, enough state support was gathered to establish within the
16.55 United Nations a Working Group on the rights of indigenous peoples. And because my grandfather had been one of the Rangatira who travelled to Geneva in 1923, I was asked to be one of the Māori delegation that went to the first meeting of the Working Group in 1988. And we there drafted two agenda items for the Working Group. One was that there would be an international study of indigenous treaties. And the second was that work would begin on drafting a Declaration on the Rights of Indigenous Peoples because there was no extant or
16.56 distinct document of fundamental human rights pertaining to Indigenous Peoples. There were discrete conventions being developed, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women and so on. And so, we thought it was important that there should be an international set of minimum human rights standards for indigenous peoples.

We also thought it was important because, as I alluded to in my brief in talking about the Valladolid
16.57 debates, colonisation was predicated on the less than full humanity of indigenous peoples and we felt that if there was a distinct statement of indigenous human rights, it was one way of restoring the full humanity of indigenous peoples.

So, that was the consensus thinking, I guess, which

led to the actual drafting.

COMMISSIONER ERUETI: So, they are human rights but they are adapted and fit so that they are specific to indigenous peoples around the world; is that right?

A. I could perhaps illustrate that best, if it's helpful, by referring to Article 3 of the declaration which is the right to self-determination. The major human rights conventions are the convention on civil and political rights and so on, have statements on self-determination. They say all peoples have the right to self-determination. And so, what we did in the drafting of the declaration, we took that article and just inserted indigenous, so that in the declaration it reads "all indigenous peoples have the right of self-determination" and then the rest of the article articulates what that right is. But, again, it was to recover that full humanity, that peoplehood, if you like, of indigenous peoples around the world.

COMMISSIONER ERUETI: Thank you. You mentioned the right of self-determination in your brief of evidence and you emphasise that, are there other rights in the declaration that you think are also important to this kaupapa?

A. If I can just contextualise that again. Yes, there are. The drafting or the inclusion of Article 3 in the declaration is regarded as crucial by indigenous peoples because it's from that right seminal right that all rights flow. So, you can't have a right, for example, to education in your own language, which is another article in the declaration, unless up the right to self-determine what that education should be.

And so, you can't have an effective right, say the rights of indigenous women, of indigenous children, of indigenous old people and so on, which are also included

in the declaration, without that right of self-determination because they are dependent upon the ability of indigenous peoples to determine for themselves what those rights are.

And so, there are a number of distinct articles which I am sure members of the Commission will be aware of which relate to the wellbeing of children and so on and they flow from Article 3, in my view.

COMMISSIONER ERUETI: Kia ora. Dr Jackson, you note also that when the declaration was finally endorsed by the New Zealand Government several years after, it was endorsed by the UN General Assembly, that there were a number of reservations that the State made against the declaration. In your view, why was New Zealand so opposed to the declaration and in particular, the rights to self-determination?

A. I mention in my brief the work we've done in the criminal justice research on Canada, Australia, the United States and New Zealand, what are called the settler colonial states, and they all oppose Article 3. They all oppose the right of self-determination being included. And their arguments were that when the programme of decolonisation began after the Second World War, the right of self-determination was articulated as part of the right of peoples who had been colonised to be independent again in their own countries. So, the great independence struggles in Africa and Asia and so on. The settler state Governments, New Zealand, Australia and so on, sought to limit the right of self-determination to exclude indigenous peoples in New Zealand, Australia, Canada and the United States, and they did that by inventing a doctrine called The Blue Water Doctrine which said that the only peoples who are entitled to self-determination are those whose colonies are across a

stretch of blue water from the governing authority. So, Kenya was entitled, the people of Kenya were entitled under that configuration to self-determination because the Metropol government was in London, across a stretch of water. Māori, indigenous peoples in Canada and so on, under that configuration were not entitled to self-determination because the government in those countries was not across a stretch of water. The settlers there did not go home, they came to stay. And
17.03 so, that rather fatuous distinction of a blue water colony was created. When indigenous peoples began to talk about all peoples being entitled to self-determination, they resurfaced the blue water thesis and when the vote was taken to ratify the declaration in the General Assembly, as you will know, only four countries opposed it, and those four countries were New Zealand, Canada, Australia and the United States. When they subsequently acceded to the declaration, they placed a number of reservations on it, including
17.04 reservations on the right of self-determination.

COMMISSIONER ERUETI: So, it was fundamentally the human right to equality, the basis for demanding the right to self-determination for indigenous peoples, as with other peoples around the globe?

A. Well, if we say that indigenous peoples say Māori people of this country do not have the full right of self-determination, then we are actually saying that Māori are not fully human. We are not walking away from the dreadful legacy of colonisation. We are embedding
17.04 the power structures within that legacy. And so, either you have human rights because you are fully human or you don't have them because you're not fully human. And the whole basis of human rights discourse is that, as the United Nations declaration says, all humans are born

alike in freedom and dignity. It doesn't say some humans, it says all humans, and that's the basis on which the declaration was drafted and I think it's the basis on which Te Tiriti o Waitangi should be understood.

COMMISSIONER ERUETI: You just mentioned Te Tiriti o Waitangi and I wondered if we could shift also to consider if we have the Declaration, He Whakaputanga, and Te Tiriti about their relationship to one another, are they mutually
17.05 reinforcing, are they slightly different in some way?

A. They are all about the full humanity of people. When our tipuna sought a relationship with the Crown, we had no concept of these people coming here were other than human. We recognised they were different. The term we've used has never been Pākehā, we've used the term rereke, they were different but they were human. There was never any presumption or otherwise that in their own way they had whakapapa, they were mokopuna. Colonisation created
17.06 a situation in which Māori were not seen in the same way and that's been the basis on which the Crown has interpreted the Treaty, that it is some superior humanoid creation which can rule over Māori, and that's not the basis for an interdependent conciliatory relationship, I don't think. So, Te Tiriti, the Declaration, He Whakaputanga, to me are part of the overall constitutional framework which gives us an opportunity to have something quite unique in this country and create something which will, I think, help prevent the abuse
17.07 that this Commission is tasked with dealing.

COMMISSIONER ERUETI: Kia ora, Dr Jackson. I note also that your tikanga based construction of Te Tiriti is a longstanding one, from memory.

A. I am sorry?

COMMISSIONER ERUETI: Is a long-standing construction

that you've had.

A. Yes.

COMMISSIONER ERUETI: Well before the He Whakaputanga Tribunal report, is that correct?

A. The notion that is fundamental to the Treaty, and I talk about the Treaty as the English words favoured by the Crown, is that Māori would do something which iwi had never done. There is nothing in Māori history where, say, Tuhoe would voluntarily give away Tuhoe
17.08 decision-making authority to Ngati Kauhanganui. It is not a Māori reality. I don't think it is a human reality. I am not aware of anywhere say in European history where the King of England woke up one day and said "I'm going to give all the authority making power that I have to the Emperor of France". It is just not a human reality. And so, the notion that we would not have given away our authority but sought an equitable inter-dependent relationship with these new people is indeed a long-standing tikanga understanding, I think.

17.09 **COMMISSIONER ERUETI:** Kia ora.Just finally, it's good to see that the legal historians have caught up with your construction. So, rather than piecemeal reforms at the bottom, if you like, the solution is the starting point for Matike Mai, for the model is for fundamental reform at a constitutional level reflecting those relative spheres of influence to rangatiratanga and another sphere of influence for the Crown. And clearly tamariki Māori fit within the Rangatira sphere. So, does it follow from this
17.10 model that in the Crown's sphere of influence that is confined to non-Māori, Pākehā children?

A. Because our people in the constitutional transformation process talked mainly about values, rather than constitutional models, they wanted constitutional

transformation that talked more about the values which should underpin it, which is why the Tribunal finding about spheres of influence was really helpful because it enabled us to frame models. So, the sort of models we looked at, and there are several in the report, were the two spheres, if you like, the rangatiratanga sphere, the Kawanatanga sphere and what we called a relational sphere where we would come together within the Treaty relationship to make joint decisions about matters of
17.11 common interest. But some issues are so values based within tikanga, for example, such as looking after mokopuna, that that would clearly be within the Rangatiratanga sphere but they would not be isolated spheres because we share this country because of Te Tiriti.

COMMISSIONER ERUETI: Kia ora.

COMMISSIONER SHAW: No questions from me, thank you.

COMMISSIONER GIBSON: If I'm understanding you right, and appreciating the power, the wisdom, the
17.12 matauranga behind what you say, we may make some progress in the short terms with values of tikanga based frameworks but to sustain what we are striving to around abuse in care for tamariki mokopuna and young people, vulnerable adults, ultimately we need to sustain some kind of constitutional transformation which falls out of Te Tiriti as opposed to Te Tiriti falling out of the constitution.

Alongside that, you talk about the various
17.12 international human rights instruments. Is there a tension between the United Nations Convention on the Rights of the Child and the paramountcy of the child, perhaps the individual and the United Nations Declarations on the Rights of Indigenous People with more of a collective rights focus? Is there a tension or is

there a misinterpretation, misrepresentation, about what can be achieved, together with the children?

A. No, I think the tension exists because people misinterpret the notion of collectivity and tikanga. The interests of the child are paramount in tikanga but they're paramount within a collective. You cannot isolate the child from the whakapapa to which he or she belongs. So, to talk about the paramountcy of the child is to talk about the paramountcy of the whakapapa to which he or she belongs. There is not a tension there. The tension arises because under the individuated notion that permeates the Oranga Tamariki legislation and so on, it actually isolates the child, whether the child is Māori or Pākehā or whatever. It is the interests of that individual child which are paramount. And in tikanga that is a contradiction of terms. The child is paramount within the whakapapa to which they belong.

COMMISSIONER GIBSON: Kia ora, thank you.

CHAIR: Thank you, Dr Jackson. The Royal Commission has been the beneficiary of your remarkable clarity of expression. Mr Merrick, I think we should conclude the day. Madam Registrar, would you connect us with Ngati Whatua.

THE REGISTRAR: If everyone would please stand and we will end the day with a karakia and waiata.

Hearing adjourned at 5.17 p.m.