

IN THE WAITANGI TRIBUNAL

**WAI 2700
WAI 1511**

CONCERNING

the Treaty of Waitangi Act 1975

**AND
IN THE MATTER OF**

Kaupapa Inquiry into claims concerning mana wahine (Wai 2700)

**AND
IN THE MATTER OF**

A claim by Georgina Kerr, Llani Harding, Paula Davis and William Newton on behalf of Te Rūnanga o ngā Toa Āwhina (the Rūnanga of the New Zealand Public Service Association)

STATEMENT OF CLAIM

Dated this 21st day of September 2018

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MAY IT PLEASE THE TRIBUNAL:

Introduction

1. This statement of claim is brought by Georgina Kerr, Llani Harding, Paula Davis and William Newton on behalf of Te Rūnanga o ngā Toa Āwhina (the Rūnanga of the New Zealand Public Service Association) (herein referred to as "the Claimants").
2. Te Rūnanga o ngā Toa Āwhina ("Te Rūnanga") represents the Māori membership of The New Zealand Public Service Association ("PSA"). PSA are New Zealand's largest union representing more than 63,000 workers in central and local government, state-owned enterprises, health boards and community groups.
3. The Claimants are Māori and claim that they have been and remain prejudicially affected by the acts and omissions, policies and practices of the Crown which were enacted, promulgated, formulated, undertaken, done or omitted to be done by the Crown in breach of the principles of the Treaty of Waitangi that have had and continue to have a detrimental impact on the mana of wahine Māori as a result of inequities faced by wāhine Maori in employment.

Principles of the Treaty of Waitangi

Partnership

4. The Tribunal has found that a cornerstone of the principle of partnership is the principle of mutual benefit or mutual advantage. In the Mangonui Sewerage Report, the Tribunal notes:¹

The basic concept was that a place could be made for two people of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed ... It is

¹

obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.

5. An underlying premise is that both partners signed the Treaty expecting to benefit from the arrangement. This principle requires that “the needs of both cultures must be provided for and compromise may be needed in some cases to achieve this objective”.²

Active Protection

6. It is well-founded that the Crown’s duty of active protection is central to the principles of the Treaty of Waitangi. The principle recognises that the Crown is no longer at liberty to merely “smooth the pillow of the dying race” or to sit on its hands and turn a blind eye to serious levels of harm suffered by Māori in breach of the principles of the Treaty of Waitangi. The notion that the principle encompasses an obligation upon the Crown to take proactive steps to ensure that Māori interests and taonga are protected was established by the Tribunal as early 1985 in the Manukau Report where it stated:³

The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests specified in the Treaty but actively to protect them. The possessory guarantees of the second article must be read in conjunction with the preamble (where the Crown is “anxious to protect” the tribes against envisaged exigencies of emigration) and the third article where a “royal protection” is conferred. It follows that the omission to provide that protection is as much a breach of the treaty as a positive act that removes those rights.

7. The duty of active protection is not limited to the protection of proprietary interests but extends to the protection of Māori themselves:⁴

² 342.

³ *Report of the Waitangi Tribunal on the Manukau claim (Wai 8)* 2nd ed. Ministry of Justice Wellington 1989, p 79.

⁴ *He tirohanga o kawa ki te Tiriti o Waitangi, the principles of the Treaty of Waitangi as expressed by the courts and the Waitangi Tribunal* Te Puni Kōkiri/Ministry of Māori Development Wellington 2001, p 95.

The Tribunal's conception of the Māori interests to be protected go beyond property and encompass tribal authority, Māori cultural practices and Māori themselves, as groups and individuals. The Tribunal has endorsed a holistic reading of the Treaty and presents the principle of protection as a theme fundamental to the entire document, which is explicitly referenced in the Preamble and Article III, and which is not confined to Article II matters.

8. From a tikanga Māori perspective, nothing could be more sacrosanct than the life and wellbeing of wāhine. The Privy Council further noted that the duty of active protection requires vigorous action where a taonga is threatened, especially where its vulnerability can be traced to earlier breaches of the Treaty:⁵

... if as is the case with the Māori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations. This may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches of the Crown of its obligations and may extend to the situation where those breaches are due to legislative action.

Participation and Equity

9. The obligations arising from partnership, and active protection give rise to the principle of participation and in particular, the principle that Maori are entitled to participate equitably alongside Pākehā from Crown policy and legislation. This requires the Crown to act fairly toward both Pākehā and Māori – the interests of settlers could not be prioritised to the disadvantage of Māori. Where Māori have been disadvantaged, the principle of participation and equity – in conjunction with the principles of partnership and active protection require that active measures be taken to restore the balance.

⁵ *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets case*] at 517.

Crown Breaches of the Principles of the Treaty of Waitangi

10. In breach of the principles of partnership, protection and participation, the Crown has failed in its role as employer of wāhine Māori and as a procurer and funder of a significant number of employers of wāhine Māori, and in its role as regulator of all employers of wāhine Māori to take adequate steps to address inequities suffered by wāhine Māori in employment.
11. This breach is heightened by the fact that inequities in employment suffered by wāhine Māori can be traced back to additional Crown breaches of the principles of the Treaty, for example by implementing an education system that is entrenched with discrimination and unconscious bias which has systematically undermined mana wāhine and failed wāhine Māori, including by failing to adequately prepare them for employment.
12. At an overt level the breaches include a procurement and funding system which openly discriminates against Māori service providers and leads to a predominantly Māori workforce being paid significantly less than their non- Māori counterparts.
13. This claim focuses on the Crown's acts and omissions which have a particularly egregious effect on wāhine Māori within employment.

Crown failure to adequately monitor, assess and address issues affecting wāhine Māori in employment

14. There has been an abject failure on the part of the Crown to adequately monitor and assess issues facing wāhine Māori in employment which impact their economic, social, cultural rights and holistic wellbeing.
15. Those statistics gathered with respect to inequities facing women in employment either depict the situation of wāhine Pākehā or subsume wāhine Māori in a depiction of "all women". In both instances, statistics fail to adequately monitor, reflect and respond to the even greater disparities suffered by wāhine Māori.

16. The Claimants have struggled to source Crown statistics to adequately support their claim and have had to commission their own research in this regard.
17. As such, statistics used throughout this claim will at times reflect women or Māori generally, unless otherwise stipulated.
18. The failure on the part of the Crown to collect data affecting wahine Maori represents an inherently bias approach to the identification of issues and prioritisation of policy to address those issues.
19. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 the United Nations Committee on Economic, Social and Cultural Rights adopted the observations set out below with respect to unconscious bias towards Maori on the part of the Crown:

10. The Committee is concerned about the entrenched unconscious bias towards Māori in education, health, justice and social services, negatively affecting their enjoyment of economic, social and cultural rights (art. 2).

11. The Committee recommends that the State party introduce a government-wide strategy to ensure that the nature and impact of unconscious bias is understood by governance bodies and employees at all levels, due to the significant detrimental impact unconscious bias has on Māori in all areas of life. The Committee also recommends that the State party ensure that this strategy takes on board public procurement procedures and is supported by comprehensive training and education as well as effective monitoring mechanisms. The Committee draws the State party's attention to its general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

Particular Breach of Principles of the Treaty of Waitangi

20. In breach of the principles of partnership, good faith and active protection the Crown has and continues to fail to adequately monitor and assess issues facing wāhine Māori in employment.

21. In breach of the principle of participation, equity and redress the abject failure on the part of the Crown to adequately monitor and assess issues facing wāhine Māori in employment enables the Crown to ignore those issues and the obligation to take active steps to redress them in order to ensure wāhine Māori enjoy equitable participation in employment alongside Pākehā.
22. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.

Education, Unemployment and Standard of Living Discrepancies

23. Inequities presently suffered by wāhine Māori in employment can in many ways be attributed to the Crown's education system which has systematically undermined mana wāhine and failed wāhine Māori, including by failing to adequately prepare them for employment. We refer to *The Wānanga Capital Establishment Report*, published by the Waitangi Tribunal in 1999 where it states, "It would not be difficult to argue that the seeds of Māori underachievement in the modern education system were sown by some of the past education policies ..."⁶
24. Between 1993-2007, Maori were more likely than any other ethnicity to leave school with no formal qualification, and a lower proportion of Maori students achieve NCEA qualifications than any other ethnic group. As a result, Maori students are still far more likely to leave school earlier than their non-Maori peers with fewer qualifications than other students.⁷
25. In 2006, nearly half of all Māori students who left school had gained no qualifications at any level. In 2008, 43% of all male students and 34% of all female students who left school in year 10 were Māori. Of those who left in year 11, Māori students made up 32.8%.⁸
26. The proportion of wāhine Māori who are not in education or training continues to exceed that of other genders and ethnicities. The statistics

⁶ Waitangi Tribunal (1999), *The Wānanga Capital Establishment Report*, Wellington, chapter 2.

⁷ Office of the Auditor General, Education for Maori: context for our proposed audit work until 2017, 2012, p 20.

⁸ Office of the Auditor General, Education for Maori: context for our proposed audit work until 2017, 2012, p 21.

for 2015 show that wāhine Māori continue to be the group of young women most likely to leave school with NCEA Level 2 or its equivalent.⁹

27. Whilst the Crown is attempting to implement strategies to support Maori to gain qualifications and progress into higher paid vocations, wāhine Māori are not receiving any targeted attention.
28. This inequity represents the start of the standard of living discrepancies between the genders which is particularly acute for wāhine Māori. For example, the unemployment rate among Māori is about double the general rate and women are more likely to be unemployed.
29. Women are also disproportionately engaged in multiple employment, and more likely to be engaged in part-time, casual, and low-paid employment which constitutes an obstacle to eliminating the gender wage gap, making them amongst the most vulnerable employees in New Zealand.
30. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 the United Nations Committee on Economic, Social and Cultural Rights adopted the following observations on unemployment:

23. While noting the information on the decrease in the general unemployment rate in recent years and the statistics provided, the Committee expresses its concern that the number of underemployed people has doubled (estimated at 221,000). **It also notes with concern that the unemployment rate among Māori and Pasifika is about double the general rate, in spite of the efforts undertaken by the State party, and that women and persons with disabilities are more likely to be unemployed. Moreover, the Committee is concerned about the high numbers of youth, particularly among Māori, Pasifika, and persons with disabilities, who are not in employment, education or training (art. 6).**

24. The Committee recommends that the State party take targeted measures to address underemployment more effectively. **The Committee also recommends that the State party assess the effectiveness of measures taken to increase employment**

⁹ NZ. Ministry of Education. [nd]. *18-year-olds with a minimum of NCEA Level 2 or equivalent*. <http://www.educationcounts.govt.nz/statistics/indicators/data/education-and-learning-outcomes/114329/>

opportunities in general and for specific groups, notably Māori, Pasifika, women, persons with disabilities and youth. In doing so, the State party should work in partnership with the concerned groups to increase their participation in the labour market and create incentives for companies to employ persons with disabilities such as a decrease in social security employer contribution for a fixed time period. Moreover, the Committee encourages the State party to step up its efforts to address the increasing numbers of youth not engaged in education, employment or training. The Committee draws the State party's attention to its general comment No. 18 (2005) on the right to work.

Particular Breaches of the Treaty of Waitangi

31. In breach of the principles of partnership, good faith, protection, participation, equity and redress and through the establishment and maintenance of an education system which systematically undermines mana wahine and fails wāhine Māori, the Crown has failed to adequately prepare wāhine Māori for employment and the benefits of higher paid vocations.
32. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.

Vulnerability, unjust, unsafe and unhealthy work conditions

33. The acute vulnerabilities faced by wāhine Māori employees makes them particularly susceptible to unjust and unfavourable work conditions. This includes a willingness to accept low paid, insecure, unhealthy, unsafe work.
34. The aspect of this claim pertaining to the pay gap experienced by wāhine Māori is set out separately in the final section of this claim.
35. A significant number of wāhine Māori labour within the likes of the manufacture, hospitality, agriculture or horticultural industries for minimum wage, on temporary and fixed term contracts with little to no enduring benefits and little to no job security.

36. By means of example, in advocating for better work conditions for employees within an Auckland based factory, an E Tū Union advocate stated that more than 80 per cent of workers were paid the minimum wage whilst being required to work compulsory 60-hour weeks comprised of five 12-hour shifts with some of the shifts being graveyard shifts.¹⁰
37. In addition to health and safety risks arising out of fatigue, tiredness and overall stress, workers often experienced injuries caused by hot moulds coming off the production line as high staff turnover contributed to low levels of staff education in health and safety.¹¹
38. These working conditions are not uncommon. It is well known that, in rural areas kiwifruit workers are required to work long hours during “the season” in order to pick, pack and dispatch fruit while it remains in optimum condition. The majority of seasonal workers are on casual contracts for minimum wage, working twelve hour shifts with few if any days off over the course of the week. Coupled with stress and fatigue, workers commonly experience chronic illness as a result of being exposed to unhealthy work environments including concerning levels of dust and pollen polluting the air within the packhouses and extreme temperatures in kiwifruit coolstores.
39. In addition, Maori workers report disproportionately high levels of harassment, bullying and discrimination in the workplace. A survey commissioned by NZEI Te Riu Roa in 2017 found that 27.1% of Māori and Pasifika school leaders (principals and deputy principals) reported incidents of discrimination at work on the basis of their ethnicity compared to 8.5-8.9% of non-Māori leaders experiencing tension or discrimination due to their ethnicity.¹²
40. Types of discrimination experienced commonly ranged from over-policing of Maori employees to overtly racist statements about survey participants

¹⁰ John Anthony *Staff at Sistema factory demand better work conditions and more than minimum wage*, Stuff NZ, 30 July 2018.

¹¹ John Anthony *Staff at Sistema factory demand better work conditions and more than minimum wage*, Stuff NZ, 30 July 2018.

¹² *Discrimination findings from New Zealand School Leaders Occupational Health and Wellbeing 2017 Survey*, NZEI Te Riu Roa New Zealand Educational Institute 2017, p 3.

themselves or other Māori; from “micro-aggressions” through to bullying, and from threats of violence to actual physical violence.¹³

41. In addition to racial discrimination in the workplace, female employees also suffer disproportionately high levels of sexual harassment and gender discrimination which compounds the existing vulnerability of wāhine Māori. By means of example, a 2018 survey commissioned by the New Zealand Law Society found that nearly one third of female participants reported being sexually harassed during the course of their working life.¹⁴
42. Despite improvements made in the Health and Safety at Work Act 2015, these predominantly focus on high risk industries such as construction and forestry and fail to meet the health and safety needs of many women workers especially in relation to chronic health conditions and mental illness.¹⁵
43. A report into the health and safety needs of women workers reports that New Zealand is poorly served by regulation, monitoring and research regarding gradual process injuries, occupational disease and psychosocial harm and that female-dominated industries tend to be poorly understood and regulated.¹⁶
44. The reason is cited that New Zealand health and safety and accident compensation laws are still primarily designed for the ‘accidents’ that occurred in 20th century factories - mines and workshops - and not for the health consequences of poor job design, bullying or stress.¹⁷
45. The work-related health problems most likely to affect women are the least likely to receive Accident Compensation Commission (ACC) insurance cover (or are completely excluded from cover) and the least likely to

¹³ *Discrimination findings from New Zealand School Leaders Occupational Health and Wellbeing 2017 Survey*, NZEI Te Rūi Roa New Zealand Educational Institute 2017, p 3.

¹⁴ *Commitment to tackle cultural crisis within legal profession* New Zealand Law Society 30 May 2018.

¹⁵ Submission of the New Zealand Council of Trade Unions Women’s Council to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), September 2017, pp 10.

¹⁶ Duncan, D (2015) *Regulating to better meet the needs of Women’s Workers*, Presentation to Labour and Employment Conference, Wellington

¹⁷ Submission of the New Zealand Council of Trade Unions Women’s Council to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), September 2017, Pp 11.

receive regulator attention. This results in a problem of data not being collected. This lack of statistical information renders many of the work-related health problems of women invisible to policy makers and enforcement agencies and reinforces the perception that women's work is safer.¹⁸

46. Where legislation does exist to protect workers from unjust working conditions, vulnerable workers such as wāhine Māori are less likely to enforce these rights for want of losing their jobs – in many cases there simply are no other employment alternatives.
47. It is further unjust to place the onus on vulnerable workers to carry the burden of policing the behaviour of exploitative employers through raising complaints and risking their livelihoods in the course of doing so, particularly when they are already living on the borderline. The burden of policing non-compliance should rightfully be met by the Crown as regulator of employers.
48. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 the United Nations Committee on Economic, Social and Cultural Rights adopted the observations set out below on unjust working conditions. Although the issues raised by submissions to the Committee focused on migrant workers, they affect the most vulnerable of workers which include wāhine Māori:

27. The Committee is concerned about the working conditions of migrant workers, which are characterized by excessive working hours and non-payment or underpayment of wages. It is also concerned about the significant non-compliance by employers with employment laws, including in industries that employ migrant workers. Moreover, the Committee is concerned about the prevalence of workplace deaths and injuries, especially in the agriculture, forestry and construction sectors, engaging a higher proportion of Māori workers (art. 7).

28. The Committee urges the State party to:

¹⁸ Submission of the New Zealand Council of Trade Unions Women's Council to the United Nations Committee on the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), September 2017, Pp 11.

- (a) Adopt the measures to ensure that all migrant workers enjoy the same conditions as other workers as regards remuneration, limitation of working hours, and rest and leisure;**
- (b) Take measures to raise awareness among migrant workers on existing complaint mechanisms and facilitate their access to legal assistance;**
- (c) Strengthen the capacity of the labour inspectorate to monitor the conditions of work, including at workplaces with migrant workers, with a view to fully enforcing employment standards, bringing exploitative employers to justice, and compensating victims;**
- (d) Effectively implement workplace health and safety legislation.**

Particular Breach of Principles of the Treaty of Waitangi

- 49. In breach of the principles of partnership, good faith and active protection the Crown has failed to ensure that the most vulnerable of workers including wāhine Māori enjoy:
 - a. just and fair working conditions and contracts for fair remuneration;
 - b. limitation of working hours to allow for adequate rest and leisure;
 - c. healthy, safe working conditions and environments;
- 50. The Crown has further failed to adequately legislate to protect against harm suffered by vulnerable workers including wāhine Māori such as chronic illness, fatigue and mental health related conditions.
- 51. Where legislation does exist to protect vulnerable workers the Crown systematically fails to effectively implement that legislation, by failing to adequately monitor and take measures to address non-compliance of employers.
- 52. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.
- 53. In particular the Claimants seek that:
 - a. WorkSafe and ACC be directed to investigate and address gendered occupational employment issues in New Zealand workplaces; and

- b. Legislative and policy changes are enacted to ensure New Zealand's health and safety and accident compensation laws are able to meet the needs of women workers; and
- c. The health and safety regulator implement adequate regulation and guidance to manage the risks and effects of gender-based violence and harassment in the workplace.

Underfunding of Māori Service Providers

- 54. The Crown adopts an overtly discriminatory approach to funding of Māori service providers who are systematically granted comparatively less than their non- Māori counterparts.
- 55. By means of example, whereas mainstream early childhood education centres receive a 20-hour funding subsidy of up to \$12.01 per hour per full-time enrolment Māori early childhood education centres (kōhanga reo) receive only \$8.76 per full time equivalent, almost 30% less.
- 56. This is a difference which whānau are overwhelmingly unable to makeup leaving the predominantly female kōhanga reo staff obliged to work for minimum wages.
- 57. The racially discriminatory application of funding by the Crown is not limited to chronically underpaid industries such as care and education. Even the Māori Land Court receives the lowest funding of all judicial bodies and by legislative determination a judge of the Māori Land Court is entitled to the lowest salary of all judicial officers.¹⁹
- 58. In addition, contracts of Māori social service providers are more likely to be renewed on annual basis while non-Māori's contracts are renewed each 5 years which gives rise to issues of social security for the predominantly wāhine Māori staff further adds to the vulnerability which they face in their work.
- 59. It also puts pressure on the staff to meet the demands of their roles as they are both under-resourced and spending a significant amount of time reapplying for funding contracts whilst dually required to meet the workload demands of the contracts themselves.

¹⁹ Judicial Salaries and Allowances (201/18) Determination 2017.

60. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 the right to social security the United Nations Committee on Economic, Social and Cultural Rights and adopted the following observations:

Right to social security

34. The Committee is concerned that previous reforms of the social security system have resulted in imposing sanctions on non-compliant beneficiaries, including those with dependent children, and in excessively focusing on getting beneficiaries into paid work. **The Committee is also concerned that, due to the nature of the activities or services being provided and the assessment of the level of risk involved, among other factors, contracts of Māori social service providers are more likely to be renewed on annual basis while non-Māori's contracts are renewed each 5 years (art. 9).**

35. The Committee recommends that the State party pursue its intention to reform the social security system including the Social Security Act (1964), in wide consultation with the social partners, the National Human Rights Commission, and civil society in order to ensure the realisation of the right to social security. In doing so, the State party should ensure that social security legislation and policy are based on the pursuance of the realization of the right to social security. In particular, the Committee recommends that the State party:

(a) Ensure that persons in need of social assistance effectively receive social security benefits that are adequate and allow the beneficiaries and their families to enjoy an adequate standard of living;

(b) Assess the effectiveness of the sanctions regime, bearing in mind the core content of the right to social security and the best interests of the child;

(c) Ensure equal work conditions, including concerning contract renewal, of all social services providers, and address any indirect disparity in that regard.

Particular breach of the Principles of the Treaty of Waitangi

61. The Crown has breached the principles of partnership, good faith, active protection, participation and equity by funding Maori service providers inequitably in comparison to their non-Maori counterparts.
62. This breach is further exacerbated by the Crown's failure to adequately disclose the extent of its discriminatory practice in order to give effect adequate redress.
63. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.

Underrepresentation of Wāhine Māori in Leadership

64. Wāhine Māori are severely under-represented in high-profile, well paid, decision-making roles within management, governance, and leadership at both national and local levels within the political, public, private and voluntary sectors.
65. This under-representation contributes not only to the wage-gap felt by wāhine Māori, but also to the ability to influence decision making and organisational culture to eliminate discrimination and unconscious bias experienced by wāhine Māori.
66. In 2014, only 14% of board members of the NZX top 100 companies (including overseas) were women²⁰, whilst in 2012, only 28% of private sector senior management positions were held by women and only 5% of NZ businesses were likely to be led by a woman.²¹
67. Within the state sector, a 2015 study concluded that, whilst women make up the majority of public servants, disparities remain in terms of seniority, occupational segregation, pay and career progression opportunities.²²

²⁰ https://www.nzx.com/regulation/diversity_statistics

²¹ Grant Thornton. 2012. *International Business Report 2012: Women in senior management: still not enough*. <https://www.grantthornton.global/en/insights/articles/women-in-business-2012/>

²² Washington S; Peak M; Fahey K. 2015. Engendering diversity – women's employment in the public service. *Policy Quarterly*, 11(1): 11-18
http://ndhadeliver.natlib.govt.nz/delivery/DeliveryManagerServlet?dps_pid=IE24527493

68. While women predominate the public service workforce, they comprise only 38% of chief executives, based mainly in the smaller ministries.²³
69. As at 30 June 2015, the percentage of women in senior management was 44.2%.²⁴
70. In 2013 and 2014, women held 41.7% of appointments on state sector boards and as Ministerial Appointees.²⁵ Among directors of state sector statutory bodies, 41% are women.²⁶
71. Women are not yet approaching parity in local government. Following the 2013 elections, women were 22% of local government chairs and mayors. On city and district councils they were respectively 33% and 30% of councillors, but only 21% of the members of regional councils, which cover larger areas and are more remote from their constituents than the other councils. Women members were 37% of community boards²⁷ and 52% of school boards of trustees.²⁸
72. It must be stressed that these statistics represent women generally. The percentage of wāhine Māori within these positions is far less and cannot be stated with accuracy as the Crown has failed to collect this data.
73. A major reason for the overall lack of women in senior roles is the lack of legislation enforcing public and private sector efforts to attract competent women to senior positions. Employment equity legislation dealing with this was enacted in 1990, but was immediately repealed by the incoming

²³ NZ. State Services Commission. 2015. Media Statement: More women senior leaders in State sector, while CE pay remains in check. <http://www.ssc.govt.nz/media-statement-state-sector-workforce>.

²⁴ NZ. State Services Commission. 2015. *Human resources capability in the New Zealand state sector*, November 2015. <https://www.ssc.govt.nz/sites/all/files/HRCReport-2015.pdf>

²⁵ NZ. Ministry for Women. *2012 Gender Stocktake of State Sector Boards and Committees as at 20 December 2012* http://women.govt.nz/sites/public_files/MWA%20Gender%20Stocktake-v5_0.pdf, and *2013 Gender Stocktake of State Sector Boards and Committees* http://women.govt.nz/sites/public_files/FINAL%202013%20Gender%20stocktake%20of%20State%20Sector%20Boards%20and%20Committees%20.pdf

²⁶ NZ Human Rights Commission. 2012. *Census of Women's Participation 2012*. <https://www.hrc.co.nz/your-rights/business-and-work/tools-and-research/census-womens-participation/>

²⁷ *Female representation in parliament and local government* http://www.stats.govt.nz/browse_for_stats/snapshots-of-nz/nz-social-indicators/Home/Trust%20and%20participation%20in%20government/female-rep-parl-local-govt.aspx

²⁸ NCWNZ. 2015. *Enabling women's potential: the social, economic and ethical imperative*. https://www.ncwnz.org.nz/wp-content/uploads/2015/11/EnablingWomensPotential_OnlineViewing-1.pdf

government, and has not been reinstated. Policies are in place in the public sector, but it appears that many chief executives are not held to account in this respect. The private sector has no such incentive.

74. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 and the issue of discrimination in the private sector and under representation of women in leadership the United Nations Committee on Economic, Social and Cultural Rights and adopted the following observations:

16. The Committee regrets that the State party has not yet adopted a national action plan on business and human rights and is concerned that **the regulatory framework for companies operating in the State party, and those domiciled under its jurisdiction acting abroad, does not fully ensure respect for economic, social and cultural rights.** Moreover, the Committee is concerned about the reported under-resourcing of the National Contact Point established under the OECD Guidelines for Multinational Enterprises (art. 2.1).

17. **The Committee recommends that the State party:**

(a) Expedite the adoption of a national plan of action on business and human rights to implement the Guiding Principles on Business and Human Rights;

(b) Strengthen the regulatory framework, including concerning legal liability, for companies operating in the State party, and those domiciled under its jurisdiction acting abroad, to ensure that their activities do not negatively affect the enjoyment of economic, social and cultural rights, and that victims can claim reparations through the State party's judicial and non-judicial mechanisms;

(c) Strengthen the capacity of the National Contact Point.

21. **The Committee notes the increase in women's representation in elected bodies but remains concerned that while women comprise the majority of civil servants (60.5%), only 38% of Chief Executives of public departments are women, and that in the private sector the representation of women in leadership roles and on boards remains much lower (art. 3).**

22. The Committee recommends that the State party pursue its efforts to achieve gender parity in all elected bodies. It also recommends that the State party step up its measures to increase women's representation in leadership roles in the public sector, and to that end strengthen awareness-raising campaigns on the roles of women and men in the family and in society. The Committee encourages the State party to take targeted measures, such as quotas to promote gender equality in the private sector. The Committee draws the State party's attention to its general comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights.

Particular Breaches of the Principles of the Treaty of Waitangi

75. In breach of the principles of partnership, active protection, participation, equity and redress the Crown:

- a. as regulator and procurer of employers, has and continues to fail to influence employers to encourage diversity in their workplaces and to encourage women, including wāhine Māori into positions of leadership; and
- b. as employer has and continues to fail to encourage the participation of more ethnically diverse women in all spheres of the public service sector including by:
 - i. failing to put in place appropriate mentoring, training and support mechanisms for advancement of wahine Maori in the sector; and
 - ii. failing to put in place policy requiring the state sector to set tangible targets to address gender inequities; and
 - iii. failing to introduce Employment Equity legislation that requires the state sector to report annually to Parliament on its progress in increasing the number of women in senior positions;

76. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.

Wahine Maori Pay Disparity

77. Over time, the pay received by Māori women from wages and salaries has consistently been less than the average and in particular of Pākehā women and men.
78. The 2018 Household Labour Force Survey (HLFS) carried out by Statistics NZ show that at June 2018 indicated that the average weekly pay of Māori women was 86.3% of Pākehā women and 60.02% of Pākehā men and 74% of the overall average. The figures also show that Māori women have the lowest average weekly earnings of all groups formed by gender and ethnicity.²⁹
79. The 2018 Household Labour Force Survey also showed that at June 2018 the average hourly earnings for Māori women were 85.48% of those earned by Pākehā women, 72.22% earned by Pākehā men and 82% of the overall average.
80. The Household Labour Force Surveys carried out from when the surveys began in 1997 show consistent similar gaps between average earnings of Māori women and others over the 21year survey periods.
81. The gap between wages and salaries received by Māori women and the rest is in part driven by Māori women suffering higher rates of unemployment than other groups. As at 2018 with an overall unemployment rate of 4.5%, 12.1% of all Māori women over 15 were unemployed³⁰, compared with 3.9% of Pākehā women and 3.1% of Pākehā men. Māori women between 15 to 24 years of age, were particularly affected with 23.6% of them being unemployed and seeking work.³¹ Since 2007 the overall unemployment rate has run with between 3 and 11 % but at between 7 and 265 for Māori women and the gap

²⁹ With reported ethnic groups being Pākehā, Māori, Pacific and Asian

³⁰ Being those actively seeking work.

³¹ Statistics NZ, Infoshare employment status data

between the overall unemployment rate and those of Māori women has widened.

82. Māori women also experience disproportionate under-employment. In 2017 8.5% of Maori women in part-time employment were seeking more hours of work compared with 2.5% of men.³²
83. Of Māori women who are employed, a disproportionate number of them are “precariously employed” in that they are employed on casual or fixed term arrangements. For example, in a 2014 survey, 28.8% of Māori were precariously employed as compared with 14.6% of Europeans. Of the Māori precariously employed, 57.8% were Māori women.³³
84. The lower levels of pay for Māori women also appears to be driven in part by Māori women being disproportionately employed in occupations which are historically being paid less than other comparative occupations.

Government Policy to address the pay gap Between Māori women and others

85. For some time now, the Government has been aware of the issue of Māori women being paid less than other groups but to date has done little to address the situation.
86. In 1988, the Minister of Women’s Affairs published the report ‘*Māori Women in the Economy*’³⁴. This documented that Māori women did not enjoy equal outcomes in many respects including disproportionate unemployment and pay rates.
87. In 1990, the National Advisory Council on the Employment of Women published the report, ‘*Beyond the Barriers; the State, the Economy and Women’s Employment 1984-1990*’ which described the concentration of Māori women low paid occupations and noted higher unemployment rates and lower wages for Māori women.

³² Human Rights Commission, Tracking Equality at Work, and Household Labour Force Survey Data 2017, <http://tracking-equality.hrc.co.nz>

³³ . Groot, C. van Ammen, B. Master-Awatere, N. Tassell-Matamua, *Precarity: uncertain, insecure and unequal lives in Aotearoa New Zealand*, Massey University Press, 2017.

88. The abovementioned report recommended the enactment of an Employment Equity Act which was subsequently enacted as the Employment Equity Act 1990. This was, however, repealed after three months by the incoming National Government as part of its wider labour law reforms.
89. In April 1999 Te Puni Kokiri and the Minister for Women's Affairs published '*Māori Women in Focus; Tiro Hangi, Ka Marama*', which laid out key facts about the situation of Māori women and their families compared with non-Māori women. It found that, while in 1986 Māori women received a similar median income to non-Māori women since then the median pay for Māori women had fallen behind. It also found that during the same period the proportion of Māori women out of the labour force had risen significantly. Following this report, the Minister of Women's Affairs, Georgina Te Heu, stated that the statistics issued a "challenge to mainstream agencies to recognise that the needs, experiences and interests of Māori women are different to those of non-Māori women".³⁵
90. In September 2001, the Ministry of Women's Affairs issued the report, '*Māori Women: Mapping Inequalities and Pointing Ways Forward*'. This report covered a broad range of issues for Māori women; education, income, health, housing and criminal justice as well as employment. The outcomes for Māori women were compared with those for Māori men and non-Māori men and women. In this regard, it noted disproportionately low rates of pay with high rates of unemployment for Māori women which had been worsening since the 1990s.
91. As part of its public consultation document prepared for developing its policies and pay equity, the Labour Government produced in 2002 the publication, '*Mahi Qrite Etu Tokeke*' which found that Māori women on average earned 70.6% of the average hourly pay earned by Pākehā men and 85.7% earned by Pākehā women.
92. Ultimately, the Labour Government decided to attempt to address pay equity through efforts to achieve pay equity in the Public Service rather than in the general labour market. A Pay and Employment Unit was set up within the Department of Labour to oversee public sector pay policies.

³⁵ Ministry of Maori Development, *Newsletter* No.51, May 1999.

However, by the end of the Labour Government in 2009, this had not resulted in any pay increases for women.

Pay Equity Settlement

93. The proceedings brought by Christine Bartlett with regard to pay equity in the aged care sector under the Equal Opportunities Act³⁶ led to the Government negotiating with the Unions a settlement of care and support workers historical pay equity claim which was legislated in the *Care and Support Workers' (Pay Equity) Settlement Act 2017*.
94. There are a significant number of Māori women working in aged care and support who will benefit from this settlement. However, the *Bartlett* decision illustrates how women's rights to equal pay under the Equal Pay Act 1972 have historically not been enforced and there are other occupations in which significant numbers of Māori women have worked where equal pay rates have similarly not been enforced.

Prejudicial effects of Government policies deregulating markets

95. Over recent decades, the structural changes to the labour market resulting from changes in Government policy have disproportionately prejudiced Māori women.
96. Prior to 1991, New Zealand operated under a 'Compulsory Arbitration' based industrial relations system involving National awards negotiated upon the basis of providing fair levels of wages that would be appropriate for the socioeconomic needs of society. Under this system, Māori women were paid the same award-based wages that applied to everyone else working in the relevant industry.
97. The *Employment Contracts Act 1991* ended the system of Compulsory Arbitration and Awards and instead brought in a legislative scheme under which employees would need to individually negotiate the terms of their employment with employers. Under this deregulated labour market, the levels of collective agreements and Union membership decreased significantly.

³⁶ Leading to the Decision of the Court of Appeal *Terra Nova Homes & Care Limited v Service and Food Workers' Union Nga Ringa Tota Incorporated and Bartlett* [2014] NZCA 516

98. Since the deregulation of the labour market in 1991 general wage increases have fallen below general increases in labour productivity. Over that period, the average annual wage increase has been 1.5% per annum as compared with the average GDP increase per hour of 2.2% per annum.³⁷
99. Also, since 1991 the bulk of the general wage increases have benefitted non- management employees. Overall, the average wage increase for non-management employees has been 1.2% per annum as compared with 4.6% average increase for management staff.
100. The overall result of this has been that if the pay of lower and middle-class income earners in New Zealand had increased with levels of productivity since the 1980s. their current pay should be about 25% higher than it is at present.³⁸ If wages had kept pace with productivity growth over this period, the average wage of \$75,000.00 at present would instead be around \$93,000.00. Over this relevant period Māori women have consistently been largely in lower wage and salary brackets than other groups.
101. As such, the deregulation of the labour market by the Government since 1991 has directly led to Māori women receiving pay increases that lag behind other groups and below improvements in productivity with the result being that their pay being more than 25% less than what it would have been if Government policy had allowed the labour market to operate properly.
102. Over this period other Government policies aimed at deregulation of markets have also had a prejudicial effect on Māori women. This includes policies from the 1980s privatising industries previously operating by the Government, including Railways, Forestry Service, Ministry of Works and the Post Office. As a result, Māori women, who previously had long term secure and relatively well-paid employment in such Government owned industries, after the privatisations, tended to be provided with less secure, well paid employment opportunities.

³⁷ **Rosenberg, B. (2017).** A brief history of labour's share of income in New Zealand 1939-2016. In G. Anderson (Ed.), *Transforming Workplace Relations*. Wellington, New Zealand: Victoria University Press*

³⁸ **Rashbrooke, M. (2013).** *Inequality: A New Zealand Crisis* (1st ed.) p.719-819

103. Overall Government policies of deregulation over recent decades have increasingly required Māori women to find gainful employment in the market place where they had relatively little bargaining power and were subject to the systemic prejudices against them because of their race and sex.

Pay gaps for Māori women in the Public Service

104. A significant proportion of Māori women have traditionally worked for the Government or Government owned entities. However, in recent decades, the Government has failed to ensure that Māori women in the Public Service receive pay and conditions on a par with others in the Public Service. This has not only prejudiced Māori women working in the Public Service but also Māori women in general in that the Government has failed to set a precedent and example for equal treatment of Māori women in employment to be followed by private industries.

105. Since the 1960s Government policy progressively removed lower female pay rates in the Public Service. However, little has been done to address the predominance of Māori women in lower paid occupations in the Public Service.

106. Over recent decades the SSC has published regular reports and papers documenting inequality in the public service for women and ethnicity minorities. There has however been a lack of specific reporting on the situation relating Māori women. Of the reporting provided however there have been regular indications that there are a predominance of Maori women in lower paid occupation groups in the public service.

107. The 1988, *Te Ohu Whakatapu* Report indicated that over 75% of all women public servants were in some form of clerical work and there was only one Māori woman with a permanent appointment in the more senior grades of the Public Service.

108. The 1998 State Services Commission Report *Māori in the Public Service* which reported that Māori women were mainly employed in “front line”

clerical positions. The reported salary bands showed a “glass ceiling” for Māori at about \$50,000.00 per annum.³⁹

109. The 2000 SSC Report ‘*Equal Opportunities: Progress in the Public Service*’ reported that there was a 9% gap between the average earnings of Māori women and Māori men and 19% compared with Pākehā men.⁴⁰
110. The 2001 *EEO Outcomes in the Public Service* reported that Māori women were earning 81% of the average salaries of men.
111. The 2003 Report *EEO Progress in the Public Service with Specific Focus on Māori* reported that there was a predominance of Māori in the lower pay ranges of the Public Service and this had been worsened by particularly low levels of pay for Māori women.
112. Despite the evidence of an ongoing problem with pay inequality for Māori women within the public service there has been very little Government policy response.
113. The State Services Act 1988 required chief executives to be “good employers” and for Departments to have equal employment opportunity programmes and policies overseen by the State Services Commission. The Equal Opportunities Unit in the State Services Commission established programmes intended to ensure equal opportunities in wages and promotions for Māori women among others. However, by the end of the Labour Government in 2009, this had not resulted in any pay increases for women.
114. In the mid-2000s, the Labour Government set up a Pay and Equity Unit in the Department of Labour to oversee Department pay reviews and develop a general neutral job evaluation tool. An extensive set of pay review gender neutral job evaluations and training tools was developed. However, in February 2009, with the incoming National Government, the Unit was disbanded and no significant pay increases for women eventuated.

³⁹ State Services Commission (1998) *Maori in the Public Service: A Statistical Profile 1992-1998*. Wellington, December

⁴⁰ SSC, *Equal Opportunities: Progress in the Public Service* as at 30 June 2000.

115. Overall, the Government has failed to take significant steps to address pay inequity for Māori women in the Public Service and, in particular, to ensure the obligations under the State Services Act for the Government to be good employers in providing equal employment opportunities, programmes and policies.
116. At present Māori women in the public service continue to be prejudiced by the continuing pattern of the both Māori and women being largely in lower paid occupation groups in the Public Service.
117. At 2017 Māori women in the Public Service earned annual salaries that were on average 22.6% less than Pākehā men and 9.9% less than Pākehā women.
118. In reviewing the Crown's performance with respect to the International Covenant on Economic, Social and Cultural Rights in March 2018 and the gender wage gap the United Nations Committee on Economic, Social and Cultural Rights and adopted the following observations:

30. The Committee notes that New Zealand has the lowest gender wage gap among OECD countries. **It is however concerned that women are more likely to be engaged in part-time, casual, and low-paid employment, constituting an obstacle to eliminating the gender wage gap and affecting women's pension benefits when they retire. It is also concerned that women are disproportionately engaged in multiple employment. Moreover, the Committee remains concerned that the principle of equal pay for work of equal value is still to be incorporated in the State party's legislation (art. 7).**

31. The Committee recommends the State party to:

(a) Intensify its efforts to diversify women's work opportunities, including occupations that are traditionally male-dominated, and ensure that ethnic and disability perspectives are integrated in all such efforts;

(b) Adopt targeted measures to foster an environment conducive for realising equal employment opportunities for men and women, including by undertaking awareness-raising campaigns, adopting

temporary special measures, and further promoting flexible work arrangements that helps parents in balancing family and work;

(c) Address effectively the causes for the high percentage of women engaged in multiple employment;

(d) Adopt measures to incorporate the principle of equal pay for work of equal value in the State party's legislation and develop a streamlined mechanism to implement it across occupations.

Particular Breaches of the Principles of the Treaty of Waitangi

119. In breach of the principles of partnership, active protection, participation, equity and redress the Crown has failed to adequately protect wāhine Māori from experiencing acutely high levels of inequity in employment as a result of pay disparity.

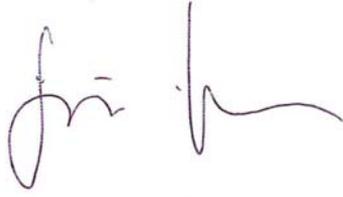
120. As a starting point for redress, the Claimants support and adopt the recommendations of the United Nations Committee on Economic, Social and Cultural Rights set out above.

Recommendations Sought

121. In these circumstances, the Claimant asks for the following findings:

- (a) That the Crown has and continues to breach its obligations of active protection towards wāhine Māori by failing to adequately protect wāhine Māori from inequities suffered in employment in the respect set out above;
- (b) That the government should engage in consultation with the claimants alongside other affected claimants in order to formulate more appropriate policies to meet their specific needs in this regard.

DATED this 21st day of September 2018



.....
T Te Whenua/Michael Sharp
Claimant Counsel

THIS STATEMENT OF CLAIM is filed by Tania Te Whenua, Solicitor for the Claimant. Documents for service on the Applicant may be:

- (a) Posted to their solicitor at PO Box 12094, ROTORUA 3045.
- (b) Emailed to counsel at tania@tewhenua.maori.nz; and michael@michaelsharp.co.nz.