

9 December 2021

Secretariat
Pae Ora Legislation Committee
Select Committee Office
Parliament Buildings
WELLINGTON 6011

RE: PAE ORA (HEALTHY FUTURES) BILL

This submission on the Pae Ora (Healthy Futures) Bill is submitted on behalf of Democracy Action Inc.

Democracy Action was established in 2012 in Auckland by a group of citizens concerned about the erosion of democratic principles. We have members throughout New Zealand. Our website is <http://www.democracyaction.org.nz/>. I write this submission as secretary for the group.

This submission does not necessarily reflect all the views of any or all members of Democracy Action, but it does reflect the group's overall view.

Democracy Action commissioned a legal opinion from Gary Judd QC on the provisions in the Bill. This submission draws on this opinion.

We wish to present to the committee to further clarify points made in our submission.

Susan Short
(Secretary)



Submission

Thank you for the opportunity to provide comment on the Pae Ora (Healthy Futures) Bill.

We support the purpose of the Act to protect, promote, and improve the health of all New Zealanders and build towards pae ora (healthy futures) for all New Zealanders. The Crown has an obligation to govern for all New Zealanders. The importance of citizenship over race was recognised in the Treaty of Waitangi in 1840, in which all New Zealanders were given the rights of British citizenship and protection of the Crown and to ensure equality of citizenship, with no discrimination. However, we have grave concerns that this bill fails to uphold this obligation and will not achieve this stated purpose.

General objections:

1. We oppose all provisions in the Bill which would treat a person or group of people differently based on their race or ethnic descent. Under Pae Ora (Healthy Futures) Bill (the Bill), the government is promoting legislation which does not guarantee the right of everyone, without distinction as to race, or national or ethnic origin, to equality before the law in the enjoyment of the right to public health and medical care. If enacted, Pae Ora will institutionalize racial discrimination by creating a permanent structure promoting preference based on race through the maintenance of unequal and separate rights for different racial groups.
2. We oppose all provisions in the Bill that are a threat to the principle of equality for all citizens regardless of ethnicity, however well-meaning the intention.

3. We are concerned that non-Māori New Zealanders, and what the Bill calls “other population groups,” are likely to be disadvantaged by provisions in the Bill.
4. We object to imposing, by law, a racially based structure on the whole community. We are concerned that considerable weight has been given to providing for Māori governance, input, and health outcomes, without the same consideration given to all New Zealanders.
5. We are concerned about the Bill’s implications for the rights and interests of all New Zealanders. Therefore, we strongly object to the provision that Health New Zealand (HNZ) and the Māori Health Authority (MHA) have the function of jointly developing and implementing a New Zealand Health Plan: ss 14(1)(a) and 19(1)(a). The explanatory note, page 3, says the Plan will set the operational direction for the system. These joint decision-making rights would allow veto power to be placed in the in the hands of the MHA over the strategies, policies, service plans and health services that affect everyone at all levels of the system.
6. We oppose the discriminatory provisions whereby the Bill provides pathways enabling Māori to participate in governance of the health system and to challenge ministerial and Ministry of Health decisions and HNZ decisions, with no corresponding official path for other citizens to do likewise.
7. We object to all provisions that are antithetical to the principles of liberal democracy, such as the establishment of a system that gives special governance privileges to one sector of our population. Doing so discriminates against the rest of the population.
8. We object to the provisions whereby non-Māori New Zealanders, or what the Bill calls “other population groups” or “other people” are likely to be disadvantaged by this Bill.

We are concerned that should this legislation be passed, that in the deployment of health system resources, the tilting towards the Māori population will result in relative advantage to the Māori community and relative detriment to the non-Māori community. Indeed, if this is the outcome, this will be no accident, as this appears to be the intention of the Bill.

SUMMARY

The Crown has an obligation to all New Zealanders to act in good faith, reasonably, fairly and with honour. Our main concern is that the Bill does not live up to this obligation, and that the legislation would have significant implications on the rights and interests of all New Zealanders.

A publicly funded health system should operate fairly and justly for all citizens. If it does not do so, it will be an inequitable system. A health service funded by the taxpayer which gives priority to one section of society not based on their health needs (even though they may have health needs) but on their race is unfair, and unjust. If the government proceeds with this ill-judged legislation, it should do so in the full knowledge that it is going down an inequitable path. It should also do so in the full knowledge that it offends the principles of the Treaty in that the Crown is breaching its obligation to all New Zealanders to act in good faith, reasonably, and fairly.

RECOMMENDATIONS

Our recommendations look to rebalance what is proposed in the Bill to ensure the Crown fulfils its obligation to act in good faith, reasonably, fairly and with honour towards all New Zealanders

Recommendation 1:

Our foremost recommendation is that the government go back to the drawing board to remove the provisions which institutionalise racial discrimination by creating a permanent structure promoting preference based on race through the maintenance of unequal and separate rights for different racial

groups. While we acknowledge the statistics that show Māori are overrepresented in aspects of morbidity and mortality, a publicly funded universal health care system must find ways of improving health outcomes without denying equality in the enjoyment of the right to public health and medical care, and that do not involve discrimination on racial grounds.

Recommendation 2:

We recommend placing equality at the forefront by guaranteeing the right of everyone, without distinction as to race, or national or ethnic origin, to equality in the enjoyment of the right to public health, medical care, and social services. We maintain that health needs — only health needs — should be the determinant of how health resources are deployed.

Recommendation 3:

We recommend taking a needs-based approach to the improvement of health outcomes for all New Zealanders, so that all New Zealanders can enjoy equally good health outcomes. Those who need the most support will naturally receive the most attention, support, and resources from the system.

Recommendation 4:

We suggest that health legislation facilitate the formation and operation of groups, which might for example be associations of iwi or hapū or whānau or Māori living in a particular locality irrespective of their iwi, hapū or whānau links, but could be any grouping of people, joining together for the purpose of providing health care or services. These people would join together to form associations or collectives, not based on race, but because they identified needs which could be better met by joining together. Having been established and demonstrating a case for seeking support to achieve identified health outcomes, they could ask for and if criteria are satisfied, could receive funding to enable them to deliver services.

However, as this submission is required to deal with the Bill as presented, further recommendations are as follows:

Recommendation 5:

The Act must be refocused towards improving health outcomes for all New Zealanders. The Bill contains significant mechanisms for the engagement with Māori, but none for the engagement with other population groups and other people.

Recommendation 6:

Any and all special provisions that are accorded to Māori and Māori populations be afforded to all population groups and all New Zealanders. For instance, the Bill makes no provision for other groups to have any structured input, in contrast to the highly structured mechanisms for Māori input. Therefore, as the Crown has obligations to protect the interests of all New Zealanders, we recommend that provisions around community participation must be strengthened for all population groups, and indeed for all the people of New Zealand.

Recommendation 7:

The removal of veto power by the MHA over the strategies, policies, service plans and health services that affect everyone.

Recommendation 8:

Establish accountability mechanisms in relation to the Māori Health Authority.

Recommendation 9:

Clarify whether the Minister of Health can direct the Māori Health Authority or not, as this is an important part of the accountability mechanism.

Recommendation 10:

If equity is to be a main driver of the health system, there must be a clear definition of what it is to achieve equity. Measurable outcomes must be defined in the legislation.

Recommendation 10:

The Act must acknowledge and consider when measuring health outcomes that clinical and medical care accounts for only about 20% of a person's health and wellbeing status. Equitable Outcomes required under 7 (1) iii would be impossible to achieve without also taking into account other factors which statistically have a far greater impact on health outcomes, such as: socio/economic, inherited genetic conditions, lifestyle, the conditions in which a person is born, grows, lives, works, and ages, including physical, cultural and natural environments, geographical location, housing, education, accidents, personal choice, and other health behaviours. To suggest otherwise is flying in the face of reality and is setting the health system up to fail in this objective.

SPECIFIC COMMENTS ON AREAS TO BE ADDRESSED

Obligations of the Crown to the people of New Zealand

The Crown has an obligation to all New Zealanders to act in good faith, reasonably, fairly and with honour. This was guaranteed to all New Zealanders in te Tiriti o Waitangi (the Treaty of Waitangi). This has also been confirmed by the Courts and the Waitangi Tribunal.

The Crown has a fundamental obligation, when formulating any Treaty related policy, as intended by this legislation - (general policy statement & cl. 6) - or taking any other Treaty related act, to consider and act in accordance with its duty to all New Zealanders, to treat all New Zealanders (of all ethnicities) with fairness and justice. It cannot sacrifice one to the other. When engaging with Treaty matters, the Crown's obligations must be fashioned in such a way that the discharge of its duties to Māori is achieved in a manner which has regard to the interests of all New Zealanders of all ethnicities.

In WAI 2575 (Health Services and Outcomes) Inquiry, the Waitangi Tribunal inquiry that has informed a large part of this bill, the Tribunal begins its consideration by stating that *"The Treaty established a relationship akin to a partnership and imposed on both Treaty partners an obligation 'to act towards each other reasonably and with the utmost good faith'."* It relies for that statement on *New Zealand Māori Council v Attorney-General (the 1987 "lands case")*.

The Tribunal goes on to say, at 3.4 on page 33 of the Hauora Inquiry:

A further condition of the Treaty relationship is the Crown's duty to act with fairness and justice to all citizens. Article 3 of the Treaty confirm that Māori have all the rights and privileges of British subjects. The Tribunal has found that this article not only guarantees Māori freedom from discrimination it also obliges the Crown to positively promote equity. It is through article 3 that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.

Although the Waitangi Tribunal, throughout its WAI 2575 (Health Services and Outcomes) Inquiry may have focused on Māori (this is not surprising because the Treaty of Waitangi Act 1975 established the Tribunal with the function of inquiring into and making recommendations in connection with claims by Māori claimants of being prejudicially affected by Crown actions), it is the Crown's duty to act with fairness and justice to all citizens, and as it is the Crown which has that duty, the primary responsibility for ensuring it is discharged rests on the Crown, not the Waitangi Tribunal. In our opinion, and in line with the Tribunal's observations quoted above, the Crown fails to fulfil its responsibilities if in

purporting to provide fairness and justice to Māori it does so in a way that is unfair and unjust to other people within New Zealand.

Obligations of the Crown to the people of New Zealand in relation to the Pae Ora (Healthy Futures) Bill

The Bill creates a serious structural imbalance where the determinant is race, not health needs. If there is to be a publicly funded health system, it should operate fairly and justly for all. It is the Crown's responsibility to ensure this is the case. However, under the legislation our publicly funded health system will be subject to conditions that prioritise race over health.

This is contrary to the Crown's obligation when formulating any other Treaty related policy or taking any other Treaty related act, to consider and act in accordance with its duty to all New Zealanders, to treat all New Zealanders with fairness and justice.

The following provisions breach the fundamental right to equality of all citizens:

- a) The creation of the Māori Health Authority (established by s 17), and associated matters. This undoubtedly introduces distinction, exclusion, restriction, and preference based on race, descent, or ethnic origin. The MHA has objectives which relate solely to outcomes for Māori (s 18). The Authority's functions are, likewise, focused on Māori (s 19). As the MHA's statutory objectives and functions are to represent Māori interests, it will be acting contrary to its legislative mandate if it does not represent Māori interests, including in the development and implementation of the New Zealand Health Plan.
- b) HNZ's objectives include to design, arrange, and deliver services to achieve the purposes of the Act in accordance with the health system principles. As the principles are heavily weighted towards desirable outcomes for Māori, not only do Māori have a special position by reason of the MHA's partnership function and other mechanisms, but HNZ also must act with a bias towards Māori because of the health system principles.
- c) Under the co-governance model between HNZ and the MHA, Māori influence will be greater than equal because of the respective objectives, functions, and other mechanisms that guide HNZ and the MHA.
- d) Health NZ is a Crown agent, subject to government direction, whilst the Māori Health Authority is to be largely independent of government policy.
- e) Under s 15, HNZ must provide information to iwi/Māori partnership boards to support them to achieve their purpose, which, according to s 87 (not s 92 as s 15 states), is to represent local Māori perspectives on the needs and aspirations of Māori in relation to hauora Māori outcomes, how the health system is performing in relation to those needs and aspirations, and the design and delivery of services and public health interventions within localities. The Bill makes no provision for other population groups to have structured input, in contrast to the highly structured mechanisms for Māori input.
- f) Health system principle (s 7) (c) requires the system to provide opportunities for Māori to exercise decision-making authority on matters of importance to Māori, but there is no requirement for the system to provide opportunities for anyone else to exercise decision-making authority on matters of importance to them. Similarly, health system principle (d) requires the health system to provide choice of quality services to Māori and other population groups by doing certain things. There is no requirement to provide choice of quality services to "other people" — "other people" are left out of principle (d).
- g) In addition to the structural aspects, the Act contains mechanisms to weight the system towards Māori: see s 3 (Purpose), s 6 (giving effect to the principles of the Treaty), s 7 (specific

reference to Māori in the health system principles, including that the health system provides opportunities for Māori to exercise decision-making authority on matters of importance to Māori.

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

In terms of deployment of health system resources, this tilting must result in relative advantage to the Māori community and correspondingly a relative detriment to the non-Māori community: from a total allocation for health services, obviously if more resources per capita are devoted to Māori, less resources per capita are available for other citizens.

The question arises whether it is just and fair that the Crown should be designing a system responding to the aspirations and needs and best health outcomes of Māori and promoting Māori health with no similar provision for other disadvantaged New Zealanders.

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

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

The Bill of Rights is a constitutional provision. Sir Kenneth Keith in his Introduction to the Cabinet Manual also accords constitutional status to the Treaty. As the reciprocal nature of the obligations undertaken by the Crown and Māori is fundamental to the Court of Appeal’s the 1987 lands case decision, our emphasis on it is well justified. In our opinion there is also a sound case for arguing that the Treaty imposes an obligation on the Crown of the same nature but owed to all New Zealanders, as was indeed recognised by the Tribunal in the Hauora Inquiry.

In the ‘lands case,’ Richardson J saw the Treaty as a *“positive force in the life of the nation and so in the government of the country.”* We have no doubt that the judges in this case believed their decision was establishing a foundation whereby the Treaty could be a positive force in the life of the nation. Fogarty J made the point that *“the promise in the Treaty of Waitangi at its core was to respect Māori property rights and to bring the peace of the Crown to the administration of government.”* Overreach by the Tribunal and others, including the government, extends the ambit of the Treaty way beyond that contemplated by the Court of Appeal’s findings. This threatens to transform the Treaty from a positive force to a negative force.

Definition of Equity

Although clearly spelt out as a primary purpose of the Bill, there is no clear definition of what it is to achieve equity. Additionally, the Bill fails to recognise socioeconomic deprivation and the wider determinants of health when striving to achieve equity in the health system. The Health and Disability System Review, Interim Report (p.25) states:

“Although many people continue to consider health care in the context of clinical and medical care only, it is widely acknowledged that this accounts for only about 20% of a person’s health and wellbeing status. The other 80% arises from the conditions in which a person is born, grows, lives, works, and ages, including physical, cultural, and natural environments, housing, education, the distribution of power and income, and health behaviours. The impacts of these can accumulate over a lifetime.”

Clarification of accountability in relation to the Māori Health Authority

Under this legislation the Māori Health Authority is to be set up as an independent Crown entity, not as a Crown agent. There is no provision in the Bill enabling directions to be given to the Māori Health Authority. Section 59 of the bill states that “no direction may be given to the Māori Health Authority under section 103 of the Crown Entities Act 2004 unless it relates to improving equity of access and outcomes for Māori.”

However, this seems to have overlooked that no direction can be given under section 103 of the Crown Entities Act 2004 at all, because section 103 of the Crown Entities Act 2004 relates to “The responsible Minister of a Crown agent,” and the Māori Health Authority is not a Crown agent.

Under section 25(c) of the bill, it states “The following provisions of the Crown Entities Act 2004 apply, subject to this Act and with all necessary modifications, to the Māori Health Authority: ... Part 3 except sections 104 to 106 and 116”.

Section 105 of the Crown Entities Act 2004 states “A responsible Minister of an independent Crown entity or a Crown entity company may not direct the entity or company to have regard to or to give effect to a government policy unless specifically provided in another Act.”

This implies that the Minister can give directions on government policy, but this cannot be unless the Minister is given statutory power in the Crown Entities Act 2004 or somewhere else, because a Minister cannot give directions without the statutory power to do so. The Minister is not given statutory power to give directions on government policy by the Crown Entities Act 2004 because the sections which so empower the Minister (ss 103 and 104) do not apply to independent Crown entities.

For example, regarding the Government Policy Statement on Health, although the Māori Health Authority as a health entity is required by section 35 to give effect to the Government Policy Statement to the extent it is relevant to the Māori Health Authority’s functions, the Government Policy Statement is not itself a direction for the purposes of the Crown Entities Act 2004 and the Minister cannot give directions to the Māori Health Authority under s 103.

Community participation

Section 13 provides that one of HNZ’s objectives is to “encourage and maintain community participation in health improvement and service planning”. However, the Bill does not go into detail as to how this is to be achieved except for engagement with Māori, as summarised below:

- Under s 15, HNZ must provide information to iwi/Māori partnership boards to support them to achieve their purpose, which, according to s 87 (not s 92 as s 15 states), is to represent local Māori perspectives on the needs and aspirations of Māori in relation to hauora Māori outcomes, how the health system is performing in relation to those needs and aspirations, and the design and delivery of services and public health interventions within localities.
- Although one of the key purposes of the Act is to “achieve equity by reducing health disparities among New Zealand’s population groups, in particular for Māori,” there is no provision in the Bill to directly engage with these other population groups to establish how the health system is performing for them, or indeed, for the population as a whole.
- According to the Ministry of Health’s website - Populations, as part of “Our work A to Z” - lists: Māori health, refugee health, Pacific health, rural health, and Asian and migrant health. Therefore, it appears that the Ministry currently does place some specific focus on these communities. However, the Bill makes no provision for these groups to have any structured input, in contrast to the highly structured mechanisms for Māori input.

Conclusion

If the Pae Ora (Healthy Futures) Bill becomes law, Māori will have rights and privileges greater than those of other New Zealanders. Pae Ora does not achieve equality - it introduces inequality. Regarding health, Māori and non-Māori will not have "the same rights and duties of citizenship." This contravenes te Tiriti o Waitangi (the Treaty of Waitangi).