**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2024-485-199**
**[2024] NZHC 931**

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| UNDER | the Judicial Review Procedure Act 2016 |
| IN THE MATTER | of an application for judicial review |
| BETWEEN | MINISTER FOR CHILDREN<br>Applicant |
| AND | THE WAITANGI TRIBUNAL<br>First Respondent |
| AND | MĀORI WOMENS WELFARE LEAGUE, VERNA GATE, COLLEEN SKERRETT-WHITE, TIMITEPO HOHEPA AND TE ARIKI DEREK MOREHU<br>Second Respondents |

Hearing: 22 April 2024

Counsel: U R Jagose KC, J N E Varuhas and K E E Whiting for Applicant
M K Mahuika and W I Gucake for Respondent
M Smith and H Z Yang for Ms Skerrett-White, Timitepo Hohepa and Te Ariki Derek Morehu, the Hapū of Ngāti Te Rangiunuora and Ngāti Pikiao
B R Arapere, A E Gordon and A L E Chesnutt for Māori Womens Welfare League
J P Ferguson and R K Douglas for Waikato-Tainui
J P Ferguson and C P Terei for Ngāti Hine
T H Bennion for Verna Gate

Judgment: 24 April 2024

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**JUDGMENT OF ISAC J**
**[Application for judicial review]**

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## Introduction

[1] On 1 July 2019, s 7AA was inserted into the Oranga Tamariki Act 1986.[1] The section was introduced by the previous National Government in the Children, Young Persons, and Their Families Act 2017.[2] Section 7AA imposes a number of duties on the Chief Executive of Oranga Tamariki in order to "recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)".[3] The duties require Oranga Tamariki to develop and deliver policies, practices, and services to ensure they positively improve the well-being of tamariki and rangatahi Māori and their whānau, hapū, and iwi. This includes the development of strategic partnerships with iwi and Māori organisations to the same ends.[4] It also places an obligation on the Chief Executive to report on the progress being made to improve outcomes for tamariki Māori and their whānau, hapū, and iwi.

[2] Following the general election on 27 November 2023, a new government was sworn in consisting of the New Zealand National Party, New Zealand First, and ACT New Zealand. Under the coalition agreement between National and ACT, the Coalition Government resolved to repeal s 7AA.[5] In response, on 20 December 2023, Ngāti Pukenga and Ngā Potiki filed a statement of claim in the Waitangi Tribunal seeking a recommendation that the repeal would breach the Treaty principles of active protection and equality.[6] Other parties filed similar claims and a number of parties joined as interested parties.[7] The Tribunal has granted urgency, given the proposed repeal will take place next month.

[3] In this proceeding the Minister for Children, the Hon Karen Chhour, seeks judicial review of a summons issued by the Waitangi Tribunal, in the context of its urgent inquiry, requiring her to attend and give evidence on a number of questions at a hearing on 26 April 2024.

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1 Pursuant to the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017, ss 2 and 14.
2 Section 14.
3 Oranga Tamariki Act 1989, s 7AA(1).
4 Section 7AA(2)(c)(i)-(vi).
5 *Coalition Agreement: New Zealand National Party & ACT New Zealand* (24 November 2023) at cl 11. The Coalition Agreement records, as part of the ACT Policy Programme: "Remove Section 7AA from the Oranga Tamariki Act 1989".
6 Wai 3309 #1.1.1(a).
7 See: Wai 682 #1.1(w); Wai 2959 #1.1.1(e); and Wai 3350, #2.5.1(a).

[4] The Minister argues that a summons is only lawful if it requires the provision of relevant evidence. She says the Government has already supplied all relevant material to the Tribunal, so to the extent the summons requires her to provide information already before the Tribunal, her evidence compelled under summons could not be relevant.

[5] In addition, the Minister argues the power of the Tribunal to issue a summons is constrained by the principle of legality, and the fundamental constitutional principle of comity, requiring the branches of government, including the Tribunal, to act with mutual respect and restraint. The principle requires that the Minister should only be compelled to give evidence if that step is "clearly necessary". Given the summons does not meet the requirement of relevance, it cannot meet the more stringent test of clear necessity, and the use of compulsion in these circumstances crosses a clear constitutional boundary. The Minister's attendance to give evidence would also undermine the fundamental principles of collective ministerial responsibility and cabinet confidentiality.

[6] The Tribunal, the first respondent, abides by the decision of the Court. In response to the Minister, the second respondents, parties involved in the Tribunal's inquiry, argue that the correct test of relevance is whether the evidence has the "potential to assist" the inquiry. The relevance of the evidence is a question for the Tribunal, not this Court on judicial review.

[7] The second respondents also argue that comity is not strongly engaged by the relationship between the Tribunal and the Minister. Rather, the rule of law and the separation of powers are the stronger constitutional values at play. Ministers do not have an exemption from being summonsed by the Tribunal. The evidence shows that the Tribunal has shown an appropriate level of respect and restraint. There is therefore no basis to set the summons aside.

[8] The parties accept the Tribunal's decision is amenable to review. The questions I must determine are therefore:

(a) Is the evidence required by the summons relevant in light of the material already provided to the Tribunal by the Crown?

(b) Is the summons unlawful because it infringes the principle of comity between the judicial and executive branches of government?

**The Waitangi Tribunal**

[9] The Waitangi Tribunal is established by the Treaty of Waitangi Act 1975 and occupies an important place in Aotearoa New Zealand's legal and constitutional framework.[8] As the Supreme Court recently observed, its role is to "inquire into the Treaty-consistency of actions and policies of the Crown and Acts of the legislature, as well as failures to act, develop policy or enact legislation" from 1840 onwards.[9] Section 6(1) of the Act defines the Tribunal's jurisdiction in these terms:

> Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be affected –
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> (a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force) passed at any time after 6 February 1840; or
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> (b) by any regulation, order, proclamation, notice or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or
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> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown.
>
> and that ordinance or Act, or the regulations, order, proclamation, notice or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.

[10] The breadth of the Tribunal's jurisdiction to inquire into claims is illustrated by the fact that a specific limitation has been included in the Act to preclude the

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8 See *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd* [2022] NZSC 142 at [16] discussing the place of the Tribunal in relation to historical Treaty of Waitangi claims. See also Cooke J in the High Court stage of this litigation in *Mercury NZ v Waitangi Tribunal* [2021] NZHC 654 at [1].

9 *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*, above n 8, at [16].

Tribunal from inquiring into a Bill before the House of Representatives.[10] This suggests that the Tribunal has jurisdiction to inquire into policies, practices, acts or omissions of the Crown leading up to the introduction of a Bill.

[11] The Tribunal's powers are primarily recommendatory, and its recommendations are generally not binding upon the Crown.[11] Upon receipt of a claim, the Tribunal is obliged to inquire into it.[12] This does not mean the Tribunal is required to recommend a remedy, even where claims are well founded. However, the Tribunal is required to decide whether a remedy should be recommended.[13]

[12] The Tribunal is constituted as a standing Commission of Inquiry under the Commissions of Inquiry Act 1908.[14] It has broad powers to regulate its own procedure "as it sees fit".[15] It also has a power to receive as evidence any statement, document, information or matter "which in the opinion of the Tribunal may assist it to deal effectually with the matters before it".[16] There are two sources of power to issue a summons. The first is in cl 8(2)(b) of sch 2 of the Treaty of Waitangi Act. It provides that the Chairperson of the Tribunal may "issue summonses requiring the attendance of witnesses before the tribunal, or the production of documents". Section 4D of the Commissions of Inquiry Act — the focus of the parties' submissions — similarly empowers a commission "for the purposes of the inquiry" to issue a summons requiring a person to attend a hearing and:[17]

> …give evidence, and to produce any papers, documents, records, or things in that person's possession or under that person's control *that are relevant to the subject of the inquiry*.

[13] Given this, the parties all accept the Tribunal holds a power to summons a minister in appropriate cases. The real issue is whether, in the specific context of this

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10 Treaty of Waitangi Act 1975, s 6(6). However, the Tribunal can inquire into a Bill before the House of Representatives if it is specifically referred to the Tribunal by the Speaker of the House: Treaty of Waitangi Act, s 8(2)(a) and subs (3)(a).
11 Section 6(2) and subs (3).
12 Section 6(2); and as emphasised in *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [80].
13 At [80].
14 Treaty of Waitangi Act, sch 2 cl 8(1).
15 Schedule 2 cl 5(9).
16 Schedule 2 cl 6(1).
17 Emphasis added.

case, the evidence already available to the Tribunal in light of constitutional principle limits the exercise of the power.

## The proposed repeal of s 7AA and the Tribunal's urgent inquiry

[14] Before turning to the grounds of review and the parties' arguments, it is first helpful to understand the scope of the Tribunal's inquiry, the evidence the Crown has already made available to it, and the additional evidence the Tribunal seeks under summons from the Minister.

### *The scope of the Tribunal's inquiry and its first request for information from the Minister*

[15] In a decision of 26 March 2024, the Tribunal granted the claimants' application for urgency.[18] In doing so, Judge Reeves recorded that the inquiry would be "targeted and specific".[19] Its focus would be on whether the "action and policy of the Government to repeal section 7AA of the Oranga Tamariki Act 1989 is in breach of the principles of the Treaty of Waitangi".[20] She then recorded that it was for the Tribunal panel hearing the claim "to define the specific issues that arise in this regard".[21]

[16] Subsequently, on 28 March 2024, Judge Doogan, as the presiding officer of the inquiry, outlined the issues for the inquiry by posing a series of questions directed specifically to the Minister for Children. This had come about because Crown counsel had submitted that the decision to repeal s 7AA was not the product of an orthodox policy process undertaken by officials, but instead reflected a political commitment in the Coalition Agreement created as part of the process of forming a government. This led the Judge to conclude that it was necessary to direct the Tribunal's questions to the Minister personally, because:[22]

> … information central to our inquiry is held primarily at the political and not the departmental level. It is therefore from that source that we must seek information and clarification. The first part of the directions that follow are

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18 Wai 3350 #2.5.1 [Urgency Decision] at [39].
19 At [40].
20 At [40].
21 At [40].
22 Wai 3350 #2.5.3 [First Request for Evidence] at [7].

accordingly directed to the responsible minister (Minister Chhour, whose party (ACT) secured the commitment to repeal s 7AA.) If relevant information is held by other ministers or by officials then that should of course be provided.

[17] The Tribunal went on to direct:

> **The Crown, through the responsible minister, is directed to respond to the following questions:**
>
> 8. With respect to the proposal to repeal section 7AA of the Oranga Tamariki Act —
>
> (a) What is the policy problem this addresses?
>
> (b) Could that policy objective be better advanced by way of amendment rather than repeal of s 7AA? If not, why not?
>
> (c) Has the Minister taken legal advice on the proposed repeal and its effects? If so, please provide.
>
> (d) Has the Minister taken policy advice on the proposed repeal and its effects? If so, please provide.
>
> (e) Oranga Tamariki's *Section 7AA Annual Report 2023* lists 10 strategic partnership agreements entered into pursuant to section 7AA and notes a number of other relationships with Post Settlement Governance Entities and Māori Providers. Has the Crown consulted with its partners to these agreements about the proposed repeal of section 7AA? If not, does it intend to do so?
>
> (f) For all agreements established under s 7AA, will they endure, or be replaced if s 7AA is repealed?
>
> (g) Has the Crown consulted with Māori more generally on the proposed repeal of s 7AA? If not, does it intend to do so?
>
> (h) What are the actual and predicted fiscal implications of a repeal of s 7AA in terms of investing in iwi and Māori Providers and service contract funding?
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> 9. It would assist if responses to these questions could be provided by way of a brief of evidence or affidavit from the Minister …

[18] Questions were also directed to the Chief Executive of Oranga Tamariki to answer by affidavit or brief of evidence.[23]

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[23] At [10].

*The provision of the Cabinet paper and Regulatory Impact Statement*

[19] In response, on 5 April 2024, the Crown filed a memorandum confirming that Cabinet, on 2 April 2024, had considered and agreed to repeal s 7AA of the Oranga Tamariki Act.[24] The Crown advised the Tribunal that the underlying reasons for this decision were set out in a Cabinet paper addressing the reasons for the repeal and a Regulatory Impact Statement (RIS) which accompanied it. The Crown provided these documents to the Tribunal to assist its inquiry.

[20] It is fair to say that the Minister's Cabinet paper, and her officials' RIS, highlight different views on the merits and consequences of the proposed repeal.[25] The Cabinet paper at the outset acknowledges the Coalition Agreement and specifically the commitment to repeal s 7AA. The provision is said to create "a conflict" for Oranga Tamariki when making decisions in the best interests of children and young persons.[26] The first concern identified is that the section "creates a system that treats children and young people as an identity group first and a person second".[27] The paper records that:[28]

> There have been prominent individuals who criticised the role section 7AA may have had in several high-profile cases involving these changes to planned long-term care placements. They noted that this practice was traumatic and stressful for children and young people.

[21] The second concern identified in the Cabinet paper is that s 7AA creates a "divisive system that has had a negative impact on caregivers".[29] In support of this concern, the paper refers to "some caregivers" suggesting that the provision has

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24 Cabinet "Report of the Cabinet Social Outcomes Committee: Period Ended 29 March 2024" (2 April 2024) CAB-24-MIN-107. See also Cabinet Social Outcomes Committee "Oranga Tamariki Act 1989: Repeal of Section 7AA" (27 March 2024) SOU-24-MIN-14.

25 Given the apparent policy development of the repeal proposal as part of a political process, it is also understandable that there may be differences between the advice of officials, and the view of the Government, as to the appropriate way forward. That is very normal in a representative democracy.

26 The Minister proposed the repeal as a way to ensure decision-making is child-centric and ensures a child's wellbeing and best interests. She notes that the RIS did not support the repeal as policy officials did not consider the repeal would achieve the objective the Minister was seeking: see Office of the Minister for Children "Repeal of section 7AA of the Oranga Tamariki Act" [Cabinet Paper] at [3]–[6].

27 At [12].

28 At [14].

29 At [16].

resulted in "a requirement for culturally appropriate environments, which is valued more than children's welfare".[30]

[22] In contrast, the view of officials in the RIS is that the repeal of s 7AA will not have a significant impact on how care decisions are made.[31] That is because s 7AA is not part of the provisions that determine how care decisions are made and because considerations under s 7AA appear in other sections of the Oranga Tamariki Act that will not be repealed.[32] It accepted, however, that the repeal may make some social workers perceive cultural factors as less important in making care decisions.[33]

[23] The RIS also notes a lack of robust evidence to support the view s 7AA causes harmful changes to long-term care arrangements. The concerns identified in the Cabinet paper were anecdotal and from a small number of caregivers.[34] In response to the "high-profile changes to care arrangements", the RIS said there was no evidence that s 7AA explicitly influenced relevant care decisions, and that any errors were the result of poor "practice" decisions.[35] Officials also raised a concern that the repeal of s 7AA may cause a loss of trust and reputation which may lead to significant social and financial costs for Oranga Tamariki.[36] The RIS concludes that the repeal of s 7AA would be worse than the status quo, and that to fulfil the policy objective of the Government, s 7AA should be retained and Oranga Tamariki should focus on strengthening practice and its operational guidelines.[37]

[24] Having provided this information in response to the Tribunal's questions, the Crown informed the Tribunal it did not intend to depart from the orthodox approach of not calling Ministers to give evidence before the courts, commissions or tribunals. The questions posed to the Minister were canvassed in the Cabinet paper and associated RIS, these papers were the official information put before Cabinet who

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30 At [16]. The Cabinet paper also goes on to note that other sections of the Oranga Tamariki Act recognise the importance of whānau, hapū and iwi, that strategic partnerships with Māori organisations would continue, and that, despite perceived inconsistencies with human rights, the repeal would not be inconsistent with the rights of tamariki Māori: at [18]–[20] and [32]–[34].

31 *Regulatory Impact Statement: Repeal of section 7AA* (12 March 2024) [RIS] at 1.

32 At 1.

33 At 1.

34 At 10.

35 At 10.

36 At 27.

37 At 2 and 23.

ultimately made the decision to progress the repeal, and Oranga Tamariki officials would be able to speak to the process that led to the finalisation of the Cabinet papers. The Crown submitted the evidence of the Minister is not necessary to inform the Tribunal of the relevant information.

*The Tribunal's decision to issue the summons*

[25] In response, on 9 April 2024, the presiding officer issued directions inviting the Minister to reconsider her position.[38] The Tribunal considered the Minister's answers to the questions posed to her would still assist its inquiry. In particular, the Minister could provide more information about the instances, high-profile cases, and the stakeholders mentioned in the Cabinet paper. The Tribunal went on to say:[39]

> 10. *We see as significant the fact that the Minister has been able to convince cabinet to proceed with the proposed repeal of section 7AA notwithstanding [conflicting policy advice]*, and within a timeframe that forecloses the possibility of reasonable consultation with effected parties including those iwi and Māori organisations that having existing agreements with the Chief Executive pursuant to section 7AA.

[26] The Tribunal observed that it had taken an approach to evidence gathering directed to the Minister because it considered it is the "Minister and her cabinet colleagues that we must persuade if we have recommendations to make at the end of our inquiry."[40] The Tribunal noted it held a power to summons witnesses and considered the cases cited by the Crown, supporting the orthodox position that Ministers ought not be summonsed unless it is clearly necessary, were distinguishable from its jurisdiction and the circumstances of the inquiry.[41] Despite this, the Tribunal again noted that it preferred "constructive engagement voluntarily".[42]

[27] Crown counsel filed a memorandum in response on 10 April 2024. The Crown reaffirmed its position that it would not call the Minister as a witness and submitted that she should not be summonsed for a number of reasons. First, it was said there is a general presumption against compelling a Minister to give evidence unless it is

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38 Wai 3350 #2.5.5 [Second Request for Evidence] at [13].
39 Emphasis added.
40 At [14].
41 At [12].
42 At [14].

"clearly necessary". This reflects the constitutional principle that the relationship between courts and tribunals and the government is not one based on coercion — but rather comity through mutual respect and restraint. Second, the request for elaboration of matters in the Cabinet paper was said to be based on a misconceived premise that the Minister single-handedly developed the policy. In reality, it was a political commitment campaigned on and, therefore, preceded any Crown action. Third, the information requested was of "questionable salience" to the inquiry as the decision to repeal s 7AA is not based on empirical public policy but rather political or philosophical views. Finally, the summons would likely breach Cabinet collective responsibility and confidentiality, as the Tribunal was proceeding incorrectly on the assumption that the Minister had persuaded Cabinet to her view, when in fact the repeal policy now reflected a collective decision of Cabinet.

[28] On 11 April 2024, the Tribunal issued the summons. In the directions accompanying the summons, the Tribunal reiterated that its preference was for the Minister to give evidence voluntarily.[43] In response to the matters raised by the Crown, the Tribunal observed:[44]

> 8. Our inquiry must focus on the question of the Treaty consistency of the government's decision to repeal section 7AA. Claimant counsel and claimant evidence so far filed raise issues of both process and substance concerning the Treaty consistency of this policy.
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> 9. We noted the fact that the Minister appeared to have convinced Cabinet to proceed because when the now-Minister Chhour introduced a private member's bill to repeal section 7AA last year the position of the National party was that they did not support a repeal but would consider amendment.
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> 10. That observation should not be taken to mean that we expect the Minister to breach Cabinet confidentiality, it is simply an inference from the evidence available. *It also reinforces our view that the Minister as the primary mind behind this policy is in the best position to explain it to the Tribunal*. As we see it, it would assist our inquiry to have the opportunity to hear from the Minister, to better understand the reasons for the policy, and, as appropriate, test both the philosophical and empirical premises for the policy against consistency with the Treaty and its principles.
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> 11. Crown counsel may be correct that the Minister will not be able to add significant additional information from that already available to us from the documents, or otherwise available from the evidence to be given by the senior officials. We simply do not know at this point, but I believe we are entitled to

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43 Wai 3350 #2.5.7 [Summons Directions] at [12]–[13].
44 Emphasis added.

> ask. I accept that legal privilege remains a legitimate reason to withhold, unless the privilege is waived. The broad ranging questions we have asked of the Minister arise largely from the fact that this is an unusual policy development process in which officials appear to have had a purely instrumental role. In such circumstances their ability to speak for the Minister concerning the rationale for the policy is likely to be constrained.

[29] The summons requires the Minister to attend the Tribunal and furnish information, by way of affidavit or brief of evidence, to the questions asked by the Tribunal in its original request for evidence. However, apparently in response to the Cabinet paper and accompanying RIS, the summons includes an additional set of questions for the Minister that were not included in its original directions:

> (i) In regards to the Cabinet paper can the Minister provide more detail as to the basis for the opinions recorded at paragraphs 12 to 17, and in particular;
>
> > a. How many instances the Minister is aware of where it is said that decisions were made concerning care arrangements for Māori children which were not safe or in the child's best interest due to the operation of section 7AA?
> >
> > b. Who are the "prominent individuals" and what are the "several high profile cases" referred to at paragraph 14 of the Cabinet paper?
> >
> > c. How many caregivers have informed the Minister of concerns about section 7AA as noted at paragraph 16 of the Cabinet paper?

[30] The day after the summons was issued a hearing took place before the Tribunal at which three senior officials from Oranga Tamariki gave evidence. They had previously provided affidavits and supporting materials addressing the questions posed by the Tribunal to the Minister and officials. The officials were subject to questioning from the Tribunal members, which took into account the evidence filed by claimants and interested parties. Further evidence and material has been supplied to the Tribunal as part of its inquiry. By the time the matter came before this Court, there were over 2,200 pages of material, including responses by officials to questions by the Tribunal, forming the bundle of Tribunal documents.

**First ground of review: is the evidence required by the summons relevant in light of the material already provided by the Minister?**

[31] In support of the first ground of review the Minister advances two arguments. The first is that the summons is unlawful because it purports to require the production of an affidavit, when it is said the Tribunal holds no such power under s 4D of the

Commissions of Inquiry Act. The second is that in light of the material provided by the Government to the Tribunal, the evidence now sought under summons by the Minister is not relevant to the Tribunal's inquiry. I address both arguments in turn.

*Is the summons unlawful because it requires the production of an affidavit?*

[32] For the Minister, Mr Varuhas submitted that the summons goes beyond the Tribunal's power insofar as it compels the Minister to provide answers to questions in an affidavit or brief of evidence. Section 4D of the Commissions of Inquiry Act only empowers the Tribunal to compel a witness to attend a hearing and to produce "any papers, documents, records, or things in that person's possession or under that person's control". An affidavit or brief answering specific questions does not fall within the provision's reach. Further, cl 8(2)(b) of sch 2 of the Treaty of Waitangi Act only confers a power to issue summonses requiring attendance before the Tribunal or the production of documents. Mr Varuhas accepted that s 4C(1)(c) and subs (2) of the Commissions of Inquiry Act may confer a power on the Tribunal to require a person to provide an affidavit, but he emphasised the summons in this case was issued pursuant to s 4D, not 4C.

[33] Mr Smith, for Ngāti Pikiao, submitted the Tribunal has broad powers concerning processes and evidence gathering, including the power to summons a witness. There was no reason to consider that the summons power properly construed in its context was restricted only to requiring attendance and the production of documents. This submission was echoed in the oral submissions of Mr Ferguson, for Ngāti Hine and Waikato-Tainui, and Ms Arapere, for the Māori Women's Welfare League.

[34] The power to issue a summons under s 4D of the Commissions of Inquiry Act must be ascertained from its text and in light of its purpose and context.[45] Parliament is unlikely to have intended that it should be construed without reference to the adjacent evidence gathering powers conferred on the Tribunal in ss 4B and 4C. The power in s 4C(1)(c) is to *require* any person to furnish, in a form acceptable to the Commission, any information. Subsection (2) then provides that the Commission may,

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45 Legislation Act 2019, s 10.

if it thinks fit, require any written information furnished under the section to be verified by statutory declaration or otherwise.

[35] Clause 8(2) of sch 2 of the Treaty of Waitangi Act also confers on the Tribunal a specific power to issue summonses. Under cl 8(2)(c), the Tribunal also has the power to do "any other act preliminary or incidental to the hearing of any matter by the Tribunal".

[36] Armed with these powers, the only machinery provision available to a commission of inquiry to carry them into effect appears in s 4D, relating to a summons. There is nothing in the drafting of that provision to suggest, despite the wider powers conferred on commissions, that they are unable to require an affidavit or brief of evidence under summons. To do so would rob a commission's ancillary powers of practical effect.

[37] I am therefore unable to accept the Minister's first challenge to the lawfulness of the summons.

*Is summons unlawful because the evidence is not "relevant"?*

[38] The Minister's second challenge is that the statutory power to issue a summons is subject to a basic requirement of the law of evidence, in that the evidence sought must be relevant. This relevance requirement is reflected in the express terms of s 4D in the Commissions of Inquiry Act, which refers to the provision of evidence or documents "relevant to the subject of the inquiry".

[39] Mr Varuhas argued the Crown had already placed a significant body of material before the Tribunal, including the Cabinet paper, the RIS, the Cabinet minute of decision, related departmental papers, and affidavits and oral evidence of senior officials. That material provided a detailed response to the Tribunal's questions, and nothing sought under summons would add materially to the information already available. The Tribunal is seeking to "fill gaps that cannot be filled". As such, since there is no reasonable basis for saying a witness could give relevant evidence, the summons should be set aside.

[40] Mr Smith submitted that the Tribunal has wide powers to receive information.[46] It is for the Tribunal, as a commission of inquiry, not this Court to decide what documents are relevant to its inquiry.[47] Although the Tribunal has received evidence in the form of papers and from other Crown witnesses that does not mean the Minister has no relevant evidence to give. For instance, the Minister could explain the lack of consultation with some strategic partners, comments made by the Minister to others, and also address the reasons for her apparent rejection of the advice of officials in the RIS. Counsel for the other second respondents and interested parties supported these submissions.

[41] I accept a precondition of a lawful summons is that it must relate to evidence relevant to the Tribunal's inquiry. However, I am unable to accept the Minister's submission that the summons is unlawful in this case because there is already other relevant evidence available to the Tribunal.

[42] Evidence is relevant if it has a tendency to prove or disprove a fact in issue.[48] In an evidential sense, information does not cease to be relevant simply because there is other relevant evidence available to the decision-maker, or there is better evidence available. The difficulty has arisen for the Minister in this case because despite the Tribunal's measured requests for an affidavit from her personally, she has preferred not to provide one. Given there is no challenge to the scope of the Tribunal's inquiry, in the absence of an affidavit recording that the Minister is unable to usefully add anything to the material already before the Tribunal, it cannot be said that the Minister's possible answers are irrelevant.

[43] The Minister is on stronger ground when she submits that the Tribunal's focus on her personally as a witness may misunderstand her role in the executive Government's decision to repeal s 7AA of the Oranga Tamariki Act. As Mr Varuhas submitted, the proposal to repeal s 7AA derives from the National-ACT coalition agreement, which forms a premise of the present government. It became government

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46 This, Mr Smith submitted, is reflected in: Treaty of Waitangi Act, sch 2 cl 6; and Commissions of Inquiry Act, s 4B.

47 Relying on *Brannigan v Davison* [1997] 1 NZLR 140 (PC) at 148; *Controller and Auditor General v Sir Ronald Davison* [1996] 2 NZLR 278 (CA) at 341 per Richardson J; and *Garrick v Amnesty International Canada* 2011 FC 1099, [2013] 3 FCR 146 at [97].

48 Evidence Act 2006, s 7.

policy from the time the coalition government was formed.[49] All proposals for legislative change must be put to Cabinet, including proposals in coalition agreements. The way this occurs is for the responsible minister with the relevant portfolio to prepare a cabinet paper. In this case, the Minister for Children prepared the relevant paper because the repeal proposal fell within her portfolio. It was then the Government, acting collectively through Cabinet, that has agreed to implement the policy. On this basis, the policy is not the Minister's alone but rather the product of the collective decision of Cabinet, and it is Cabinet as a whole that has collective responsibility to Parliament for the decision.[50]

[44] As noted in [16]–[28] above, the Tribunal has made comments to the effect that it considers the answers to its inquiry are to be found "primarily at the political and not the departmental level", and that it is the Minister personally who may be responsible for the policy, and for persuading her cabinet colleagues to her view. Given the repeal policy has its genesis in the Coalition Agreement, and formed part of the ACT Party Policy Programme, it seems the Tribunal's focus on the Minister as the, or the only, source of information at the "political level" may be misplaced. The focus on the Minister is made all the more difficult because the policy has now been the subject of Cabinet consideration, and the principles of collective responsibility and confidentiality attach to the decision to proceed with the repeal proposal.

[45] Ultimately the Tribunal's role is to examine the acts and policies of the Crown for compliance with Treaty principles. The Minister's personal views, and the information she may or may not have had available when preparing the Cabinet paper, while potentially relevant to the Tribunal's inquiry, does not represent the totality of the executive Government. She cannot speak to the decision of Cabinet, which is the relevant decision-maker, without infringing the principles of confidentiality and collective responsibility.

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49 I took counsel for the second respondents to accept that the Tribunal is not empowered to examine policy formulation of political parties before they are sworn in as part of the executive Government.

50 Matthew Palmer and Dean R Knight *The Constitution of New Zealand: A Contextual Analysis* (Hart Publishing, London, 2022) at 62–63 and 76–84; and Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004) at 76–89.

[46] Recognising the Tribunal's constrained scope for inquiring into the Minister's personal role in Crown's policy, Mr Smith and Mr Ferguson argued that the Tribunal may wish to consider and make recommendations concerning the policy process followed in this case, and in particular the Minister's role within it. Without determining the submission, it does seem that the Tribunal's focus is, rightly, much broader. It is examining the potential impact of the repeal on Māori and its consistency with the duties of the Crown under the Treaty. Consistent with that broad focus, the questions the Tribunal has posed are directed to the Crown more generally, or are capable of response by witnesses beyond the Minister.[51] While I do not consider the Tribunal's focus on the Minister's personal involvement in the policy process renders the summons unlawful due to lack of relevance, it does have a bearing on the weight attaching to the constitutional requirements of comity, to which I will turn shortly.

[47] For these reasons, I dismiss the Minister's first ground of review.

**Second ground of review: is the summons unlawful because it infringes the principle of comity?**

*The constitutional principle*

[48] Comity has been repeatedly recognised by the senior courts as an important constitutional principle in New Zealand.[52] It is based on mutual restraint and respect between the branches of government. It is designed to ensure that each can exercise their constitutional functions within their own spheres while recognising that overlap, and therefore tension, is inevitable. Most of the case law referred to in these proceedings discuss the principle of comity in the context of the relationship between the legislative and judicial branches of government.[53] The expectation of comity,

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51 Of the nine questions identified by the Tribunal, only the last could be said to be answerable by the Minister alone, although evidence has already been provided by senior officials providing their evidence on the specific points identified.

52 See *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd*, above n 8, at [47] citing *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2022] NZSC 142. See also *Make it 16 v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [22] and [26]–[30]; *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24; and *Wairarapa Moana ki Pouākani Inc v Attorney-General* [2023] NZHC 2086.

53 *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd*, above n 8, at [47] citing *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General*, above n 52. See also *Make it 16 v Attorney-General*, above n 52, at [22] and [26]–[30]; *Attorney-General v Taylor*, above n 52; and *Wairarapa Moana ki Pouākani Inc v Attorney-General*, above n 52.

however, is not limited to that one relationship. Sir Owen Woodhouse, speaking extra-judicially, emphasised that comity is made necessary "by the imprecise distribution of constitutional powers among the *three* branches of government".[54] Expressions of comity which speak to the relationship between the judicial and executive branches can be seen, for example, in the Cabinet Manual.[55]

[49] In his submissions, Mr Mahuika, for the Tribunal, emphasised that comity is a reciprocal obligation,[56] or a "two way street" as he framed it. This was echoed in the submissions for the other respondents, interested parties, and the Minister. The duty of candour in judicial review, for example, may be seen as a reflection of comity in that it is a positive obligation on the executive to voluntarily disclose information in order to facilitate the constitutional functions of the courts and tribunals. In return, the judiciary will express reluctance in requiring the cross-examination of a Minister unless a high threshold is met.[57]

[50] What is made clear by the authorities and sources referred to by all parties in these proceedings is that frustration by one branch of government of the performance of another branch's function is likely to lead to escalation of constitutional tension. When this arises, additional constitutional principles are put at risk. These are the rule of law and the separation of powers. It follows that undue deference to comity will frustrate the ability of the adjudicative branch of government to perform its own functions. In doing so, the rule of law and the separation of powers are undermined.[58] These three principles can therefore be seen to pull in different directions. This case requires the Court to consider the appropriate balance between all three against its particular circumstances.

[51] The Solicitor-General, Ms Jagose KC submitted a high level of comity is required here due to the important constitutional function the Tribunal plays in

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54 *Attorney-General v Taylor*, above n 52, at [74] citing Owen Woodhouse "Government under the law" (The J C Beaglehole Memorial Lecture, Victoria University of Wellington, 4 October 1979). Emphasis added.

55 Cabinet Office *Cabinet Manual 2023* at [4.32].

56 *Attorney-General v Taylor*, above n 52, at [74].

57 Cabinet Office, above n 55, at [4.27]–[4.34].

58 See for example *Port Nicholson Block Settlement Trust v Attorney-General* [2012] NZHC 3181 at [62]–[63] cited in *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [42].

New Zealand, akin to that between the judiciary and Parliament. The Tribunal's summons powers must be exercised in line with the principle of legality, in that its power is presumptively subject to constitutional principles, like comity, unless expressly ousted. Comity creates two implied limits on the summons power. First, in line with the case law in the context of judicial review, Ministers can only be summonsed if the evidence is "clearly necessary" which is a more stringent test than mere relevance. The Minister's evidence is not "clearly necessary" as all the answers to the Tribunal's questions have been provided through papers and the evidence of Oranga Tamariki officials. Second, the summons cannot put the Minister in a position of conflict with the constitutional principles of collective responsibility and cabinet confidentiality. In the Tribunal's directions and decisions, the Minister is described as the primary mind behind the proposal to repeal s 7AA and the Tribunal wrongly apprehends she was able to convince her cabinet colleagues to agree to the proposal. This crosses constitutional boundaries and, in accordance with the principle of legality, renders the summons unlawful.

[52] Mr Smith, whose submissions were adopted by the second respondents and interested parties in the proceedings, submitted the relevant constitutional principles at play are the separation of powers and the rule of law. Mr Smith accepted that comity has relevance in a general way as a value and principle to inform the exercise of discretion, but it does not control it. In his submission, comity is akin to a mandatory relevant consideration. If comity is invoked to allow the Crown to insulate itself from relevant scrutiny and inquiry, it would effectively be the "sole arbiter of its own justice".[59] That is not and cannot be the law. The "clearly necessary" standard does not apply to the Tribunal, having a different role from the courts in the context of judicial review. Unlike the High Court in judicial review, the Tribunal is empowered to look into the merits of Crown actions and policy. The particular lines of questions in the summons do not cross constitutional boundaries and if there is a risk of that, there are mechanisms available to the Tribunal to address this. The only ground in which the summons could be seen as unlawful is if it is irrational in a *Wednesbury* sense. The second respondents say the decision to issue the summons does not meet that high threshold.

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59 *Port Nicholson Block Settlement Trust v Attorney-General*, above n 58, at [63].

[53] Counsel for the parties referred to a range of authorities and public inquiries where comity has been engaged in light of members of the executive branch of government providing evidence in courts and tribunals. None of the cases directly touched on the circumstances before this Court, due to the novelty of the issue raised.[60] However, there are two authorities which in my view provide helpful guidance in relation to the application of comity to the present case.

[54] In *New Zealand Fishing Industry Association Inc v Attorney-General*, the Court of Appeal considered a challenge to the Minister of Agriculture and Fisheries' decision to increase resource rentals under the Fisheries Act 1973. The Minister had not filed an affidavit to assist the Court understand whether there had been a failure to take into account relevant considerations. The Court commented:[61]

> One can understand that a Minister may be reluctant to expose himself to cross-examination, but cross-examination is not permitted as of right in judicial review proceedings, and in my opinion the Court should not allow a Minister to be cross-examined in such proceedings unless this is clearly necessary to enable the case to be disposed of fairly … Another course open to the Court is simply to decline to allow a Minister's affidavit to be read if he is not willing to be cross-examined. Ultimately the choice is the Minister's. No one can force him to give evidence. But of course our system of government involves the rule of law. When a Minister's handling of a particular matter has naturally given rise to serious doubts about whether he has had regard to the obligations placed on him by Parliament, refraining from being prepared to justify himself in court can serve to strengthen misgivings, as well as rendering the Court's task more difficult. As this case should demonstrate yet again, the Courts recognise that they should not trespass into the legitimate policy sphere of Ministers. The constitutional corollary should be Ministerial candour with the Courts about their policy. This does not seem too much to ask.

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60 Many of the cases referred to were in the context of judicial review, which I have already noted is quite a different jurisdiction to that exercised by the Tribunal: *Butcher v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA); *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA); *Hawkins v Davison* (1990) 3 PRNZ 700 (HC); *Attorney-General v Air New Zealand Ltd* (1991) 4 PRNZ 1 (CA); and *Auckland Hebrew Congregation Trust Board v Minister of Agriculture* HC Wellington CIV-2010-485-1423, 25 November 2010 at [20]. Similarly overseas authority, and the very recent authority of the Court of Appeal, on commissions of inquiries did not engage with comity as acutely as these proceedings do: *Christian Congregation of Jehovah's Witnesses (Australasia) Ltd v Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions* [2024] NZCA 128; *(Cabinet Office) v Chair of the UK COVID-19 Inquiry* [2023] EWHC 1702 (Admin), [2024] 2 WLR 485; and *United States v Nixon* 418 US 683 (1974).

61 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA). In text citations omitted.

[55] References in the passage above to the obligations placed on a Minister by Parliament might usefully be replaced with obligations placed on the Crown by Te Tiriti o Waitangi | the Treaty of Waitangi.

[56] The second decision is that of Katz J in *Deliu v New Zealand Law Society.*[62] *Deliu* concerned an application for judicial review of a decision made by a Law Society Standards Committee. The committee members had declined to provide the Court with an affidavit, and Mr Deliu sought to require their attendance at the hearing to give evidence. This Court observed that in situations where an affidavit has not been provided by a decision maker the appropriate remedy is to draw an adverse inference rather than compel attendance:[63]

> [16] The authorities are replete with examples of cases where Courts have robustly criticised decision makers for failing to provide an affidavit. However, it has never been suggested, to the best of my knowledge, that the appropriate course in such circumstances would be to subpoena the decision maker to give oral evidence at trial. For example, in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* the Court of Appeal heavily criticised the Minister for his failure to provide an affidavit, which was seen as being inconsistent with his duty of candour. However, there was no suggestion that the appropriate "remedy" was to compel his attendance at trial. Rather, the Court observed that a decision-maker who fails to provide an affidavit risks adverse inferences being drawn in relation to matters of doubt on which he was best placed to give evidence.

*Consideration*

[57] I accept the Minister's submission that the power of the Tribunal to issue a summons on a serving Minister may, in appropriate cases, be constrained by the requirements of comity. However, as I have noted, there are three constitutional principles engaged in this case which pull in different directions. The other two relevant here are the rule of law and the separation of powers. They must each be considered in the context of this case.

[58] The role of comity must also be considered against the unique constitutional space the Tribunal holds, and the breadth and limits of its jurisdiction. Its very purpose is to inquire into, and where appropriate hold accountable, Crown actions that are

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62 *Deliu v New Zealand Law Society* [2013] NZHC 2597, [2014] NZAR 112.
63 Footnotes omitted.

inconsistent with the principles of the Treaty. By virtue of its statutory function, the Tribunal must fearlessly investigate Treaty compliance by the executive government. The broad jurisdiction of the Tribunal, particularly in relation to contemporary claims, may therefore call into question political judgments and preferences. But these political judgments must be those of the Crown. To the extent the genesis of the repeal policy is a product of political party autonomy and not that of executive action, it is beyond the reach of the Tribunal's investigation.

[59] As Mr Mahuika submitted, comity is also a two-way street. The duty of candour on Ministers is heightened in the context of the relationship between the Tribunal and the Crown, given the principles of the Treaty and the duties of the Crown arising from it. The Tribunal was entitled to ask the questions it did of the Minister, and to expect her response. It does not matter whether the Minister was in a position to usefully add to the sum-total of information made available by officials. The Tribunal cannot be criticised for resorting to a summons in these circumstances, given its repeated and measured requests for the Minister's response. As a member of the executive Government, she might be expected to demonstrate the same respect and restraint she now seeks from the Tribunal. For this reason, in large part the difficulty the Minister now finds herself in is in my view a consequence of her own decision.

[60] However, two related considerations have led me to conclude that the summons should be set aside.

[61] First, despite the Minister's lack of personal response to the Tribunal, the Crown has proactively made available a significant body of relevant material. Given the Tribunal's focus must be on the Treaty consistency of acts and policies of the Crown, the Minister's personal involvement in the development and promulgation of the repeal proposal—in the period between her appointment as a Minister and the Cabinet decision—can only be incidental to the real issue.[64] This approach is also consistent with the principles of collective responsibility and cabinet confidentiality.

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[64] I took the parties to accept that the Tribunal has no jurisdiction to inquire into the repeal policy while it remained a matter of political party policy or negotiation between the parties making up the Coalition Government. I also took them to accept that the cabinet conventions of collective responsibility and confidentiality would prevent the Tribunal from examining what occurred within Cabinet before its decision to proceed with the proposed repeal.

[62] Second, as the cases noted above suggest, the normal remedy where a serving minister fails or refuses to provide evidence is an adverse inference. These inferences typically strengthen the probative value of other evidence already available to the decision maker.[65] So, while the Tribunal may not have the benefit of the Minister's personal response to its questions, there is no suggestion that it will be impeded in its inquiry or the rule of law undermined if she is not compelled to give evidence.

[63] These factors have led me to conclude that the requirements of comity are heightened in this case. While it is unnecessary to determine whether a test of clear necessity is appropriate in cases such as this, it is at least a useful guide. Given the conclusions I have reached concerning the focus of the Tribunal's inquiry, and its ability to proceed in the absence of evidence from the Minister (whether under summons or not), I do not consider it was clearly necessary for the Tribunal to require the Minister's attendance or to provide an affidavit under summons.

[64] This conclusion should not be taken as an endorsement of the Minister's approach to the Tribunal, or a criticism of the Tribunal's decision. It is simply the result of an important constitutional principle and its application in the circumstances of this case. Had I concluded that the lack of evidence would affect the Tribunal's ability to discharge its statutory functions, I would have dismissed the application for judicial review. It goes without saying, then, that the power of the Tribunal to summons a serving minister to attend and give evidence under compulsion, if clearly necessary, is very much alive.

[65] Finally, both the Minister and the second respondents made submissions in relation to the role tikanga might have in resolving the grounds of review. Unfortunately, this case is unsuitable for resolution of the question given the need for mature consideration. I mean no disrespect to the parties in reaching this view.

**Conclusion and result**

[66] Given the urgency with which the parties require an answer, it has not been possible to do justice to the depth of thought they have brought to the Court. I thank

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65 *Perry Corporation v Ithaca (Custodians) Ltd* [2004] 1 NZLR 731 at [153]–[154].

all counsel for the care with which they presented both their written and oral submissions, and their assistance at the hearing.

[67] The application for judicial review is granted. The summons issued by the Tribunal is set aside. The mana of the Tribunal and the importance of its work is not diminished by this decision.

[68] Leave to apply is reserved. So too is the issue of costs. However, given the importance of the issues raised in the proceeding, my preliminary view is that costs should lie where they fall.

**Isac J**

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