IN THE WAITANGI TRIBUNAL	**WAI 3060**
	WAI 2575
	WAI 2624
UNDER	The Treaty of Waitangi Act 1975
AND	
IN THE MATTER OF	The Health Services and Outcomes Kaupapa Inquiry and; the Justice System Kaupapa Inquiry
AND	
IN THE MATTER OF	A claim by David Ratu

AMENDED STATEMENT OF CLAIM

DATED 25 AUGUST 2021

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MAY IT PLEASE THE TRIBUNAL

PART A: THE PREJUDICE TO MĀORI RESULTING FROM THE SALE AND SUPPLY OF ALCOHOL

The Claim

1. Māori suffer more harm from the sale and supply of alcohol than any other demographic group in New Zealand, including – but not limited to:
   a. Māori being 1.8 times more likely to "binge drink", or have a hazardous drinking pattern when compared to non-Māori drinkers.[1]
   b. Māori being 2.5 times more likely to die from an alcohol-attributable death when compared to non-Māori;[2]
   c. Māori being twice as likely as non-Māori to die from cardiovascular disease,[3] a disease linked to alcohol consumption.[4]
   d. Māori women being more likely to suffer from breast cancer than non-Māori, a disease linked to alcohol consumption;[5]
   e. Māori comprising approximately half of New Zealand's prison population. Police data shows that 31-46% of all offences are committed by persons affected by alcohol.[6]
   f. Prevalence rates of Alcohol and Drug addiction amongst prisoners are much higher than the rest of the New Zealand population. Approximately 60% of community-based offenders have an identified Alcohol or Drug need and 87% of prisoners have experienced an Alcohol or Drug problem over their lifetime.[7]
   g. Māori being overrepresented as victims and perpetrators of violent crime. Police data shows that alcohol is involved in one in three cases of violent offending, and half of all homicides. Approximately

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[1] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 7.
[2] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 9.
[3] Ministry of Health "Cardiovascular disease" (Ministry of Health, 2 August 2018).
[4] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 10.
[5] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 11.
[6] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 12.
[7] Brinded PM, Simpson AIF, Laidlaw TM, et al. 2001. Prevalence of psychiatric disorders in New Zealand prisons: a national study. Australia and New Zealand Journal of Psychiatry 35: 166–73.

54% of physical assaults and 57% of sexual assaults occur when the perpetrator has been drinking.[8]

h. Rates of fetal alcohol spectrum disorder are estimated to be much higher than average in communities with a prevalence of hazardous drinking.[10] In a 2015 study, an estimated 34% of Māori women consumed alcohol while pregnant, in comparison to 20% of European women.[11]

i. Young Māori men aged 15-24 years suffer more harm from living in areas with high numbers of liquor outlets in comparison to European men living in communities with the same number of liquor outlets.[12]

j. New Zealand Secondary school students who report experiencing ethnic discrimination are almost twice as likely to report binge drinking as those who do not[13](“the alcohol related prejudice suffered by Māori”).

2. While significant, the alcohol related prejudice suffered by Māori is only part of this claim. The main focus of this claim concerns two important aspects, namely a) the intersect between the alcohol related prejudice suffered by Māori and the New Zealand Justice System and b) the legislative Treaty failings of the Sale and Supply of Alcohol Act 2012 (“the Act”) and the subsequent prejudice suffered by Māori as a result of both, including:

   a. The Crown’s failure to include a ‘Treaty Clause’ and/or other appropriate references to the Treaty of Waitangi/Te Tiriti o Waitangi in the Act;

   b. The Act failing to guarantee that Māori have ‘standing’ within the meaning of Section 102(1) of the Act;

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8 New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 12.

10 Fetal Alcohol Network NZ “Fetal Alcohol Spectrum Disorder” <http://www.fan.org.nz/fetal_alcohol_spectrum_disorder>.

11 Patricia A Jamieson “The challenge of supporting children with Fetal Alcohol Spectrum Disorder in Aotearoa New Zealand: A narrative literature review” (Masters in Health Sciences, dissertation, University of Canterbury, 2017) at 24.

12 Alcohol Healthwatch “Harm to Māori” <http://www.ahw.org.nz/Issues-Resources/Harm-to-M%C4%81ori>.

13 Alcohol Healthwatch “Harm to Māori” <http://www.ahw.org.nz/Issues-Resources/Harm-to-M%C4%81ori>.

c. The Act failing to guarantee Māori representation on bodies that decide whether an alcohol licence is granted ("the legislative Treaty failings of the Act");
d. The overrepresentation of Māori in the New Zealand Justice System; and
e. The underrepresentation of Māori in bodies and organisations that contribute to the formation of policy and practice.

3. This claim therefore raises constitutional issues, namely the importance and place of the Treaty in the Act (and New Zealand legislation generally), and the Treaty based right of Māori to participate in matters directly affecting their quality of life, and the Crown's failure to ensure the same.

PART B: THE CLAIMANT

4. The claimant is David Ratu of Ngāti Te Ata O Waiohua descent and he brings this claim on behalf of those affected by the alcohol related prejudice suffered by Māori as a result of the failings of the Act ("the claimant(s)"). The claimant is entitled to file this claim because he satisfies section 6(1) of the Treaty of Waitangi Act 1975 namely:
   a) That he is Māori; and
   b) Has been and continues to be or is likely to be prejudicially affected by the various Acts and Crown policies, practices, acts and omissions adopted by, or on behalf of the Crown or its agents.

PART C: THE BACKGROUND TO THE SALE AND SUPPLY OF ALCOHOL ACT 2012

5. The Act was enacted on 18 December 2012 following a detailed 2010 Law Commission Report, *Alcohol In Our Lives: Curbing the Harm* ("the 2010 Report").[14] It also followed the usual process of the drafting of a bill (in this case, the Alcohol Reform Bill), consideration of the bill by a Select Committee (following submissions made by the public) and readings of the bill by Parliament.

Alcohol In Our Lives: Curbing the Harm

6. In the 2010 Report, the Law Commission noted that alcohol contributes to many of the broad health and social issues with which Māori are concerned. The Law Commission noted in a section of the 2010 Report that: [15]

    a. There was evidence of alcohol misuse when looking at the high rates of Māori imprisonment, domestic violence cases, lack of educational achievement and the comparatively high rate of Māori youth suicide;
    b. Māori were more likely to die of alcohol-related causes, more likely to be apprehended by police for an offence that involved alcohol, and more likely to experience harmful effects on areas such as financial position, work, study or employment, injuries and legal problems as a result of their drinking compared with other New Zealanders;
    c. Māori women suffered greater adverse effects as a result of other people's drinking in terms of effects on their friendships or social lives, home lives, financial problems, becoming victims of physical or sexual assault, and being involved in car accidents;

[14] Law Commission, *Alcohol In Our Lives: Curbing the Harm* (Report 114, 2010).
[15] Law Commission, *Alcohol In Our Lives: Curbing the Harm* (Report 114, 2010) at 92-95.

d. Māori had higher unmet needs for reducing alcohol consumption. It was also more difficult for Māori to regain control of the causes of alcohol-related harm to their whānau and community; and

e. Alcohol may not simply be reflecting existing inequalities between Māori and other New Zealanders, but it may be *actively driving* inequalities.

7. Despite these acknowledgments, the Law Commission made no specific recommendations to address these concerns.

Alcohol Reform Bill

8. Prior to the introduction of the Alcohol Reform Bill 2010 to Parliament, Cabinet considered a detailed Cabinet Paper, *Alcohol Law Reform*.[16] The Paper responded to the recommendations of the 2010 Report and noted a number of concerns regarding Māori and alcohol.[17] Nonetheless, while Cabinet accepted a number of operational recommendations and legislative proposals made in the Cabinet Paper, none sought to specifically address the concerns identified regarding Māori and alcohol. In addition, there was no consideration in the Cabinet Paper of the relevance of the Treaty of Waitangi. As a consequence, the Alcohol Reform Bill 2010 did not include any specific provisions addressing the concerns regarding Māori and alcohol.[18]

Ngāi Tahu Submission on the Alcohol Reform Bill 2010

9. The bill was forwarded to the Justice and Electoral Committee for consideration. Of significance in terms of submissions received by the Select Committee on the Alcohol Reform Bill 2010, was the submission of Te

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[16] Cabinet, Alcohol Law Reform.
See https://www.beehive.govt.nz/sites/default/files/alcohol-law-reform-cabinet-paper-final.pdf

[17] See Cabinet, Alcohol Law Reform, pages 10, 49, 86 and 87.

[18] See Alcohol Reform Bill 2010 (236-1); See the speech by Hone Harawira (Māori Party-Te Tai Tokerau) on the First Reading of the Alcohol Reform Bill.

Rūnanga o Ngāi Tahu. The opening paragraphs of the Ngāi Tahu submission noted that:

a. The Māori population suffers disproportionately from the effects of alcohol. Māori have four times the alcohol-related mortality of non-Māori, and more than double the rate of years of life lost due to alcohol. Consequently, harm from alcohol misuse is a significant inhibitor and barrier to Māori development and well-being, particularly when measured in years of life lost due to alcohol related harm;
b. Whilst the Alcohol Reform Bill goes some way in addressing alcohol related harm in New Zealand, key elements of the Law Commission proposals have not been included in the government's proposed reforms. [The] government has confined itself to those more politically palatable reforms and has focussed on alcohol misuse by youth;
c. Ngāi Tahu and Māori will benefit more from the implementation of an integrated and holistic package of alcohol reforms, rather than a piecemeal, ad hoc approach, as currently reflected in the Bill.

10. The Ngāi Tahu submission also set out very specific amendments to the Alcohol Reform Bill that could have gone toward addressing these concerns. Those submissions are attached as Appendix **'A'**.

11. Despite the detailed Ngāi Tahu Submission, the Report of the Justice and Electoral Committee did not address or mention any of these concerns, and as noted above, the Act was passed on 18 December 2012.

12. Despite the explicit objective in the Act to minimise the harm caused by excessive alcohol consumption, [19]the application of the Act has resulted in the continual granting of licences to alcohol outlets in areas where the alcohol related prejudice suffered by Māori is most acute.

[19] Sale and Supply of Alcohol Act 2012, s 4.

PART D: COMPLETE DISREGARD OF THE TREATY OF WAITANGI

District Licensing Committees and the Alcohol Regulatory Licensing Authority do not need to take into account or have regard the Treaty or its principles

Jurisprudence

13. Māori have the right to expect a level of protection from the Crown in respect of their taonga, waters, language, lands and tribal estate, including themselves and their communities. It is called the principle of active protection. This protection imposed upon the Crown flows through to those acting in its place or those empowered by the Crown via statute, to ensure those entities also discharge that duty to Māori. This includes the District Licensing Committees ("DLC") and the Alcohol Regulatory and Licencing Authority ("ARLA").

14. Active protection was discussed in the Tribunal's Manukau Report and those findings are relevant here. The Tribunal states that if the protections owed by the Crown are not in place, as is the case with the legislative failings of the Act, then that is a breach of the Treaty:

> "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."[20]

15. The duty of active protection is, in the view of the Court of Appeal in the historic *Lands* case, 'not merely passive but extends to active protection of

[20] Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985) at 70.

Māori people in the use of their lands and waters to the fullest extent practicable', and the Crown's responsibilities are 'analogous to fiduciary duties'.[21]

16. The Waitangi Tribunal has found that active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.[22]

17. The protective view taken by the Tribunal was similarly acknowledged in the Muriwhenua Land Report, where the Tribunal acknowledges that the Treaty can neither be negated or reduced – as opposed to completely omitted as is the case here:

> "Although the [Treaty of Waitangi] Act refers to the principles of the Treaty for assessing State action, not the Treaty's terms, this does not mean that the terms can be negated or reduced. As Justice Somers held in the Court of Appeal, "a breach of a Treaty provision … must be a breach of the principles of the Treaty."[23]

18. In respect of ensuring that the protections owed to Māori are given effect, the Tribunal has acknowledged that it can take a wide interpretation. In the Kaituna River Report it acknowledges that where 'the spirit of the Treaty is not being given true recognition', then it must act:

> "Our statutory authority is to make a finding as to whether any action of the Crown, or any statute or Order in Council is inconsistent with the principles of the Treaty. This wide power enables us to look beyond strict legalities so that we can in a proper case, identify where the spirit of the Treaty is not being given true recognition."[24]

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[21] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) at 37, per Cooke P.

[22] Waitangi Tribunal *Te Tau Ihi o Te Waka a Maui Report on Northern South Island Claims Volume 1* (Wai 785) at 4.

[23] Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 386.

[24] Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984) at 18.

19. The Ngāwhā Geothermal Resources Report is important and relevant here because it notes that duties owed by the Crown to Māori carry though to bodies acting in its place, such as DLCs and ARLA:

> "The duty of active protection applies to all interests guaranteed to Māori under article 2 of the Treaty. While not confined to natural and cultural resources, these interests are of primary importance. There are several important elements including the need to ensure … that the Crown cannot avoid its Treaty duty of active protection by delegation to local authorities or other bodies (whether under legislative provisions or otherwise) of responsibility for the control of natural resources in terms which do not require such authorities or bodies to afford the same degree of protection as is required by the Treaty to be afforded by the Crown. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled."[25]

Duty

20. The Crown has a duty to ensure that legislation is Treaty compliant but in respect of alcohol and the Act, it has failed in this duty. It has failed Māori because there are no references to the Treaty or its principles in the Act; particularly section 105 which concerns the criteria for issue of licences. Therefore, the Crown has failed in its duty to Māori as DLC's and ARLA are neither guided by nor bound by the principles of the Treaty of Waitangi.

21. The Crown has a duty to ensure that entities, third parties or agents acting under statute such as DLCs or ARLA, fulfil Crown Treaty obligations owed to Māori – but the Crown has failed in this duty too. Because the Act legislatively omits any reference to the Treaty, those empowered under it are legislatively unrestrained by the Treaty – and actively ignore it to the ultimate detriment of Māori.

[25] Waitangi Tribunal *The Ngāwhā Geothermal Resources Report* (Wai 304, 1993) at 100–101.

Particulars

22. The first step in applying for an alcohol licence requires making an application under the Act. If there are no objections, the application is generally approved.

23. If there are objections, the application is put before a DLC. Each territorial authority has a DLC appointed under section 186 of the Act.

24. Section 105 of the Act lists the criteria to be taken into consideration when considering whether to grant a licence to sell alcohol. Section 105 is set out in full at Appendix **'B'**.

The needs of the surrounding community

25. The criteria listed at section 105 do not specifically include considering the social issues or needs of a community where a licence to sell alcohol is sought.

26. The Law Commission has stated that "there is no escaping the reality that high [alcohol] outlet density is more common in lower socio-economic neighbourhoods than in high socio-economic neighbourhoods."[26] A 2012 study recognised that off-licence liquor outlets tend to locate in areas of high social deprivation and high population density, while on-licence liquor outlets (such as restaurants) tend to locate in main centres with high amenity value.[27]

27. As many Māori have low incomes and often reside in lower socio-economic neighbourhoods, they are particularly susceptible to the likelihood of increased alcohol consumption as a result of the high density of outlets.[28]

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[26] Law Commission, *Alcohol In Our Lives: Curbing the Harm* (Report 114, 2010) page 129.
[27] Michael P Cameron and others "The Impacts of Liquor Outlets in Manukau City Summary Report – Revised" (Alcohol Advisory Council of New Zealand, 2012) at 15.
[28] Law Commission, *Alcohol In Our Lives: Curbing the Harm* (Report 114, 2010) page 129.

28. A 2009 study observed that people living in lower income areas which have a greater density of alcohol outlets will be routinely exposed to more alcohol promotion via signage, advertising, price competition and marketing of events.[29] Additionally, greater competition in those areas leads to lower alcohol prices and longer operating hours.[30] These factors contribute to the greater harm caused by alcohol in lower income areas.

The lack of a "Treaty clause"

29. The Crown has failed to include a 'Treaty clause' in the Act (as sought in the Ngāi Tahu Submission) resulting in a denial of the claimant's Treaty rights owed to him by the Crown and prejudice has been suffered by Māori as a result.

30. Despite the recognition of the significance of the principles of the Treaty of Waitangi in key legislation such as the Resource Management Act 1991[31] and the Local Government Act 2002,[32] the Act, and section 105 in particular, fails to include any reference to Māori and/or the Treaty of Waitangi at all.

31. As set out below, the claimant has raised the need for DLCs to consider the impact of alcohol applications upon Māori and he has submitted that they must have regard to the Treaty of Waitangi. The claimant's submissions have been rejected, with DLC members saying that they are limited to considering only the matters set out in section 105.

32. In *Hi Sports Bar* [2018], for example, the Auckland DLC stated the following in reply to submissions concerning obligations to consider Māori concerns and the Treaty of Waitangi:

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[29] Geoff Hay and others "Neighbourhood deprivation and access to alcohol outlets: A national study" (2009) 15 Health and Place 1086 at 1092.

[30] Michael P Cameron and others "The Impacts of Liquor Outlets in Manukau City Summary Report – Revised" (Alcohol Advisory Council of New Zealand, 2012) at 15.

[31] Resource Management Act 1991, s 8.

[32] Local Government Act 2002, s 4.

Section 4 of the Local Government Act 2002 states:

"In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes".

Section 4 does not impose the principles of the Treaty on local government. Instead, s 4 restates that it is the Crown's responsibility to take appropriate account of the principles of the Treaty. Section 4 states that principles designed to increase Māori participation in local government decision-making have been included in Parts 2 and 6 in order for the Crown to meet its responsibilities" [original emphasis].

There is nothing in the criteria contained in the Act that prescribes that we must consider the Treaty of Waitangi or provide an impact report pursuant to that. We are of the opinion that the obligation of Auckland Council has been met, insofar as the appointment of the Committee was subject to participation of the Independent Māori Statutory Board in the selection criteria, which included both understanding of the Treaty and "Tikanga Māori".

That is not to say that we do not turn our minds to the impact of any application on Māori, it simply points out that we are restricted by the Act as to the criteria that we are able to consider."[33]

33. This was in response to submissions made by Mr Ratu, the relevant parts of which are included as Appendix **'C'**.

[33] *L&H Graces Place Mangere Ltd (Hi Sports Bar)* [2018] NZDLCAK (25 June 2018) at 23.

34. Submissions have been made by Mr Ratu before the Auckland DLC in *Sunbeam Services Ltd (Curlew Bar)*, and *The Phoenix Tavern,* both of which returned similar decisions to *Hi Sports Bar*.

35. In *Sunbeam Services Ltd (Curlew Bar),* an application for a new on-licence, the Auckland DLC decided in respect of the claimant's reference to the Treaty of Waitangi and impact on Māori:

    a. The District Licensing Committee (DLC) is an independent statutory board established as part of the Sale and Supply of Alcohol Act 2012. Its decision making is enabled and made under that Act. Any reference or lack thereof to the Treaty of Waitangi within that Act is not an issue for the DLC;
    b. Whilst the Auckland Council has some administrative obligations conferred upon it by the Act, it does not have any other power or ability in regard to the decision making of the DLC;
    c. The section of the Local Government Act referred to by Mr Ratu has no relevance to the decision making of the DLC;
    d. A DLC decision is not a report to any council body and as such there is no requirement for a Māori Impact Statement on the basis that it is council policy; and
    e. There is no evidence to convince the Committee that on this occasion, there is a need for any statement as to any specific impact on Māori.[34]

36. In *The Phoenix Tavern Ltd,* which concerned an application to renew an on-licence, the claimant addressed the Auckland DLC in respect of its obligations towards the Treaty. The Auckland DLC made no decision other than simply observing, "Mr Ratu addressed the Treaty of Waitangi and the obligations of Council and the committee in respect of the Treaty."[35] By not addressing the substance of the claimant's submission in respect of the Treaty, any argument in respect of the Treaty were also avoided.

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[34] *Sunbeam Services Ltd (Curlew Bar)* [2018] NZDLCAK (12 February 2018) at 13.
[35] *The Phoenix Tavern Ltd* [2016] NZDLCAK (21 March 2017) at [20].

37. In *Te Ariki Morehu v Lake Rotiti Hot Springs Ltd*, an appeal against a new on-licence by Mr Morehu, ARLA decided that:

> "Section 155(5) aside, the primary ground in this application is that the DLC did not have regard to cultural values of Māori in determining the application before it.
>
> As set out *in New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at p 517, the principles of the Treaty are "the underlying mutual obligations and responsibilities which the Treaty places on the parties." These principles are primarily 'protection', 'preservation', and 'partnership'.
>
> The respondent, in his submissions, considers that cultural values are fundamental in terms of the Resource Management Act 1991 and as such ought to also apply in considering an application for a license.
>
> Section 8 of the Resource Management Act 1991 requires all persons exercising functions and powers under that Act, in relation to managing the use, development and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). There is, however, no equivalent provisions in the Sale and Supply of Alcohol At 2012 which incorporates the Treaty of Waitangi or its principles. Nor is the Treaty of Waitangi part of the general law of New Zealand. As a result, the Treaty of Waitangi and its principles are not matters to which a DLC must have regard to under s 105 of the Act."[36]

38. As the appeal authority, the ARLA decision acts as a precedent that must be followed by all DLCs.

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[36] *Te Ariki Morehu v Lake Rotiti Hot Springs Ltd* [2017] NZARLA 313 at [23] – [26].

Prejudice

39. Māori suffer prejudice as a result of the legislative failings of the Act:
    a. Rights guaranteed to Māori by the Treaty are being denied;
    b. Cultural values are being disregarded;
    c. Māori communities are being overrun with alcohol outlets (see the Claimant's brief of evidence); and
    d. Māori are being ignored as mana whenua, as signatories to the Treaty and as the Crown's Treaty partner.

PART E: DENIAL OF STANDING TO MĀORI

Treaty Principles, and the right of Māori to participate in matters that directly concern them, including their health and well-being

Jurisprudence

40. In the Te Whānau o Waipareira Report (1998) the Tribunal noted "a duty to protect the Māori duty to protect [their taonga], and an obligation to strengthen Māori to strengthen themselves."[37] According to the Tribunal, Māori communities protect and strengthen themselves through the exercise of tino rangatiratanga. Therefore, the Crown must recognise the status of Māori exercising rangatiratanga in order to honour its Treaty obligations. However, under the Act, both the DLC and ARLA have failed to recognise and provide for the status of Māori.

Duty and Breaches

41. The Treaty guaranteed Māori the right to participate in all matters that directly concern them, including their health and well-being, but the Act actively denies this to Māori. The Act not only fails but actively ignores Māori and their special status as tangata whenua and as signatories to the Treaty by ignoring their tikanga, tribal landscape, kaitiakitanga and mana whenua.

[37] Waitangi Tribunal *Te Whānau o Waipareira Report* (Wai 414, 1998) at 16.

Particulars

42. Section 102(1) of the Act provides that:

    "A person may object to the grant of a licence only if he or she has a greater interest in the application for the licence than the public generally."

43. Section 102(1) fails and prejudices Māori in several aspects. Firstly, it fails to acknowledge that Māori have a special place in society greater than that of the public generally. Māori are signatories to the Treaty of Waitangi. The general public are not. Under the Act, Māori are not given that recognition or status.

44. Section 102(1) fails to take into account that the alcohol related prejudice suffered by Māori - is greater than that of the general public.

45. DLC decisions are creating caselaw helping to define 'standing'. In the minute of Auckland DLC Chairperson Katia Fraser, the following was cited as a definition of 'standing':

    The Authority, under the 1989 Act, similar provisions held that status was established by the following:

    a. A territorial local authority and its mayor and/or council;
    b. Another licensee;
    c. Some trade organisations; and
    d. Geographical proximity; in *Re I S Dhillon and Sons Ltd* [2013] NZARLA 256 a one kilometre radius was described as "a notional area often used to determine whether there is an interest greater than the public generally ("the standing definition").

46. The standing definition actively prejudices Māori:

    a. It makes no reference to Māori, including their whānau, hapū, iwi, marae or organisation of their choosing;
    b. It makes no reference to mana whenua; and
    c. It disregards whakapapa.

47. Section 102(1) fails to take into account tikanga, including mana whenua, thereby abrogating mana whenua away from Māori, subjugating them to the same status as non-Māori (vis a vis the general public).

48. As a noun, mana whenua means territorial rights, power from the land, authority over land or territory, jurisdiction over land or territory – power associated with possession and occupation of tribal land[38].

49. Section 102(1) completely ignores mana whenua. Section 102(1) has been interpreted narrowly by DLCs and ARLA as mainly being a geographical requirement. Usually, individuals are only given standing if they reside within 500 metres or 1 kilometre of the outlet from where the alcohol will be sold, with 1 kilometre being considered "generous".[39] This interpretation prejudices Māori as it ignores and disregards the concept of mana whenua.

50. For each liquor licence application made under the Act, there will be a distinct identifiable Māori community, each with their own mana whenua, none of whom would be able to satisfy the criteria listed in the standing definition.

51. Section 102(1) disregards tikanga, including how Māori choose to represent themselves. The term *Māori* means not only themselves as individuals, but their whānau, hapū, iwi and organisations of their own choosing - including their marae, whānau trusts or community Māori trusts, none of which are explicitly provided for under the standing definition.

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38 Māori Dictionary "Mana whenua" <https://maoridictionary.co.nz/word/3452>.

39 *Re Liquor World* NZLLA 1189 (2009) at [7]–8] and [21]–[23]; While this case pre-dates the 2012 Act, the cases considering this point under the previous legislation continue to apply.

52. The standing definition prejudices Māori as it does not explicitly recognise their whakapapa: Māori objectors may not live within 1 kilometre of the premise applying for an alcohol licence, but whakapapa to the area concerned.

Prejudice

53. If Māori - which includes whānau, hapū, iwi, marae or organisations or groupings of their choice - are not granted 'standing', they are actively prevented from participating in the DLC and ARLA processes. Māori will suffer as a result, including the full and complete abrogation and denial of their Treaty right to participate in a process that actively and directly impacts upon their health and well-being.

PART F: THE ALCOHOL LICENSING PROCESS; THE COMPOSITION OF DLC's and ARLA

Māori are not required to be appointed to a District Licensing Committee or to the Alcohol Regulatory Licensing Authority

Jurisprudence

54. The legislative failings of the Act pleaded to in this claim abrogate the rights guaranteed to Māori by the Treaty. This includes the right to tribal self-regulation or self-management, sometimes referred to as tino rangatiratanga. These rights were discussed in the Muriwhenua Fishing Claim Report where it was found that the Crown's obligation to actively protect Māori Treaty rights, including the right of tribal self-regulation or self-management, was integral to the principle of reciprocity.[40]

55. Self-regulation or self-management must include active participation in processes and matters that directly impact Māori, their way of life and their quality of life. This must include participation in the process of granting an alcohol licence given the alcohol related prejudice suffered by Māori.

[40] Te Puni Kōkiri *He Tirohanga o Kawa ki te te Tiriti o Waitangi* (2001) at 81.

56. In its interim Taranaki Report, the Tribunal recognised an obligation on the Crown to acknowledge the existence and constitutional status of Māori as the prior inhabitants of New Zealand. Accordingly, the Crown is obliged to respect Māori autonomy as far as practicable, that is, Māori authority and rights to manage their own policies, resources and affairs according to their own preferences.[41]

57. It is inherent in the Tribunal's view of the principle of reciprocity that: "The Treaty was an acknowledgement of Māori existence, of their prior occupation of the land and of an intent that the Māori presence would remain and be respected."[42] The Act fails to acknowledge Māori; fails to maintain a Māori presence; and pays no respect to Māori at all.

Duties and Breaches

58. The Treaty guaranteed Māori the right to participate in all matters that directly concern them, including their health and well-being, but in respect of alcohol, the Act actively prevents Māori representation as members of a DLC or ARLA. Further, members of a DLC do not need to have knowledge or understanding of tikanga Māori, Māori issues or the Treaty of Waitangi.

Particulars

59. Members of a DLC are appointed by each territorial authority from a list of licensing committee members established under section 192 of the Act. That section of the Act does not include a requirement for the list of licensing committee members to include Māori members. Nor does section 192 require any members (or potential members) to have any knowledge or understanding of tikanga Māori, Māori issues, or the Treaty of Waitangi.

60. Section 189 of the Act provides for territorial authorities to appoint district licensing committees as required from time to time, with members

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[41] Te Puni Kōkiri *He Tirohanga o Kawa ki te te Tiriti o Waitangi* (2001) at 81.
[42] Te Puni Kōkiri *He Tirohanga o Kawa ki te te Tiriti o Waitangi* (2001) at 81.

appointed from the list of licensing committee members established under section 192 of the Act and the chair as a member of the territorial authority or a commissioner. That section of the Act does not include a requirement for the DLC members to include Māori members or for the chair to be Māori. Nor does section 189 require the chair to have a knowledge or understanding of tikanga Māori, Māori issues, or the Treaty of Waitangi.

61. Without a statutory requirement to include Māori members or chairs, it is unlikely that Māori will be represented as members of a DLC. The claimant has appeared several times before the Auckland DLC and to his knowledge, there has never been a Māori member.

62. As noted above, section 192 of the Act is silent as to any requirement for members to have experience or knowledge of the Treaty of Waitangi or Māori issues. The Act leaves the burden of establishing processes or guidelines in relation to the consideration of the Treaty and Māori to individual councils.

63. Auckland Council has set an expectation that DLC chairs and members must have a grounding in matters of importance to Māori and an understanding of tikanga relating to hearings. A candidate's understanding of the Treaty and tikanga Māori is also tested during the recruitment process.[43] It is unclear if other councils have established such a process.

64. By permitting councils this discretion, the Act has failed to set definitive guidelines or requirements relating to the appointment process. As such, councils have no statutory obligation to ensure that DLC members have any understanding of te reo, tikanga, te ao Māori, or the Treaty of Waitangi.

Prejudice

65. The Act does not guarantee Māori representation on DLC's.

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[43] Report of the Auckland Council Regulatory Committee of 15 June 2017, concerning the Appointment of District Licensing Committee chairs and members 2017-2020 (File No: CP2017/10315).

66. Without proper Māori representation on DLC's, Māori are likely to be:

    a. Ignored as mana whenua;
    b. Silenced in the alcohol licence granting process - or having no input at all;
    c. Actively disabled in protecting their communities from the alcohol related prejudiced suffered by Māori; and
    d. Actively prevented from exercising kaitiakitanga (the protection of their community) and tino rangatiratanga - meaning the ability to practice kaitiakitanga.

PART G: MĀORI ARE NOT REPORTING AGENCIES - BUT THEY SHOULD BE

The Police, the Medical Officer of Health and an Alcohol Licencing Inspector <u>must</u> inquire into applications for licences, but not Māori

Jurisprudence

67. The Treaty guaranteed that certain Māori interests would be actively protected. While initially this applied to land and water, today the principle of active protection extends past the tangible to include the language, customs and all matters important to Māori including themselves as a people, the proper protection of their communities, the right to participation and tribal authority.

68. Active protection is a paramount precept upon which Māori are highly dependent. Given the alcohol related harm suffered by Māori, the principle has a wide meaning and rightly imposes considerable restraint on the conduct of the Crown. This claim is premised on the principle of active protection and what happens when the Crown does not give effect to it – because as evidenced by the alcohol related harm suffered by Māori, if their rights are not protected, the effects on Māori can be devastating.

69. The high level of protection envisaged under the Treaty was emphasised by the Tribunal in Te Tau Ihu report:

> "Active protection requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected."[44]

70. This is not occurring under the Act.

Duties and Breaches

71. The Treaty guaranteed Māori the right to exercise tino rangatiratanga in all matters that directly concern them, including their health and well-being. It also guaranteed them the right to be consulted, and the right to participate – and the Crown must ensure this occurs. But it doesn't. In respect of alcohol which is shown to be a massive contributor to ill-health and overrepresentation of Māori in the criminal justice system, Section 103 of the Act fails to include Māori on the list of those who *must* receive a copy of an application for a licence that has been lodged and also fails to provide that Māori *must* have the opportunity to *inquire* into it.

Particulars

72. Section 103 of the Act states that three parties, namely the police, the medical officer of health and an alcohol licensing inspector *must* receive notice of and inquire into applications for a licence to sell alcohol ("the three parties"). There is no provision for Māori (meaning them or their whānau, hapū, iwi and organisations of their own choosing) to be sent a copy of applications under section 103.

[44] Waitangi Tribunal *Te Tau Ihu o Te Waka a Maui Report on Northern South Island Claims Volume I* (Wai 785, 2008) at 4.

Due notice

73. There is also considerable risk that Māori will not become aware of notifications of alcohol licence applications.

74. Because Māori are not included as one of the three parties, they are not guaranteed to receive a copy of an application for an alcohol licence and must rely on public notification under section 101 to become aware. In the Report by author Dr Liz Gordon, *The regulatory regime of the 2012 Sale and Supply of Alcohol Act,* the difficulties in respect of notice were highlighted ("the Report"):[45]

> Notifications under the Act are highly specified. The applicant must put a notice on or near the premises within 10 working days of filing the application and must give public notice of the application within 20 days. Stakeholders noted a lack of enforcement of these rules, with notices "upside down", "a single sheet of paper that gets rained on", "in the window of the often-vacant building that no-one passes". In one recent case, the notice was behind multiple fences on a building site, until a complaint had it go up on the fence.
>
> Public notification is problematic. Some argue for newspaper and/or online notification, but either have their problems. Of those that have online notification, there are a number with problems. In Auckland, so many applications come through, often with so little information attached, that it is hard to make sense of them. Christchurch has put a substantial amount of information online but has made it so that the search function is by day of month (e.g. 1st, 2nd) rather than by overall date. This means that one must search through each day/date to find any notification.

[45] Liz Gordon *The regulatory regime of the 2012 Sale and Supply of Alcohol Act* (Final report presented to the Law Foundation and the Borrin Foundation, October 2018) at 8.

In short, while notification processes are highly prescribed under the Act, the ability to actually access those notifications depends heavily on where a person is located. A model is Nelson City Council's online system, shown on the next page. This clearly indicates the business name, the type of licence and the closing date for objections. Clicking on a link gives a summary of the submission and information on how to view the whole submission. The Dunedin City Council website goes one step further, making the whole application available for viewing online by clicking on a link. This ensures that people do not have to travel into the city to view applications. We were told that other places had received legal advice that applications could not be put online.

Once advertised by whatever means (whenever the first notice appears), community objectors have only fifteen working days to lodge their objections. A large number (67) of community stakeholders noted that locals do not always find out in time to object. Even where notification is good, how can ordinary people keep track of new applications and renewals. This is a mammoth task, and one the ordinary citizen is unlikely to be able to maintain over time.

Making submissions

75. The Report noted further issues with the alcohol licencing process in respect of presenting submissions that also prejudice Māori, namely a 'power imbalance', with 'the power stacked in favour of the applicant', not being 'prepared for the level of legal contestation they encountered' and feeling 'intimidated' and viewing the process as 'very unfair'[46].

76. The Report is attached as Appendix '**D**'

[46] Liz Gordon *The regulatory regime of the 2012 Sale and Supply of Alcohol Act* (Final report presented to the Law Foundation and the Borrin Foundation, October 2018) at 10.

Prejudice

77. The Act does not identify Māori as having to receive a copy of an application for a licence after it has been lodged, and also fails to provide that Māori must *inquire* into it. Therefore, the Act ignores Māori and their special status and abrogates their mana, mana whenua, kaitiakitanga and tino rangatiratanga.

78. The process of receiving notice and providing for submissions is not 'user friendly' nor tikanga compliant and actively prejudices Māori who may therefore be prevented from submitting an objection.

PART H: ALCOHOL RELATED PREJUDICE, MĀORI WITH DISABILITIES AND ITS CONNECTION WITH THE NEW ZEALAND CRIMINAL JUSTICE SYSTEM

Māori with disabilities and alcohol consumption

79. The New Zealand Disability Survey 2013 ("Disability Survey") indicated that Māori were more likely to be disabled than non-Māori. Māori adults had a disability rate of 32 percent, compared with 27 percent for non-Māori adults. Māori children had a disability rate of 15 percent, compared with nine percent for non-Māori children.[47]

80. The Disability Survey also found that Māori were significantly more likely to experience psychological/psychiatric impairments, difficulties with learning, difficulties with speaking, and intellectual disabilities than non-Māori.[48]

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[47] Statistics New Zealand "Disability Survey 2013" at 9 <http://archive.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx>.

[48] Statistics New Zealand "Disability Survey 2013" at 9 <http://archive.stats.govt.nz/browse_for_stats/health/disabilities/DisabilitySurvey_HOTP2013.aspx>.

81. In 2017 and 2018, Māori were found to be 1.62 times more likely to be classified as hazardous drinkers than non-Māori.[49]

82. New Zealand research on the relationship between alcohol abuse and disability is scarce. However, international research indicates that alcohol and substance abuse is a problem for people with physical, cognitive, or psychological disabilities. For example, it is estimated that 7% of persons with disabilities in the United States of America struggle with substance abuse.[50]

83. People with disabilities are less likely to access treatment for alcohol and substance abuse as people without disabilities.[51] Alcohol is a particularly common substance of abuse for people with disabilities because of its availability, social acceptance, and central nervous system depressant effects which can relieve pain.[52]

84. Māori are more likely to be disabled than non-Māori and are more likely to be hazardous drinkers than non-Māori. Māori who are disabled face all the factors which contribute to the overrepresentation of Māori with hazardous alcohol consumption, including economic deprivation, colonisation, and institutional and structural biases. However, for Māori who are disabled, these factors are compounded and exacerbated by their lived experience of disability. Māori who are disabled face a double prejudice; first for being Māori, and secondly for being disabled.

Māori and Fetal Alcohol Spectrum Disorder

85. The consumption of any amount of alcohol at any stage of pregnancy may lead to fetal physical, cognitive and behavioural impairments collectively

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49 Action Point "Alcohol Harm to Māori" Action Point Communities targeting alcohol harm <https://www.actionpoint.org.nz/alcohol-harm-to-maori>.

50 "Treating an alcoholic who is differently abled" (3 July 2019) Alcohol.org <https://www.alcohol.org/disabled/>.

51 "Treating an alcoholic who is differently abled" (3 July 2019) Alcohol.org <https://www.alcohol.org/disabled/>.

52 "Treating an alcoholic who is differently abled" (3 July 2019) Alcohol.org <https://www.alcohol.org/disabled/>.

known as Fetal Alcohol Spectrum Disorder ("FASD").[53] Fetal Alcohol Syndrome ("FAS") occurs at the most severe end of the FASD spectrum, and can result in growth deficits, facial malformations, and brain and central nervous system disorders.[54] FASD and FAS are part of the alcohol related prejudice suffered by Māori.

86. FASD is recognised by the Ministry of Health as a disability.[55] Despite this recognition, FASD is an under-diagnosed and under-supported condition which greatly impacts the lives of those who are affected by FASD and their whānau.[56]

Duties and Breaches

87. The Crown has a duty to provide equitable health care to Māori, including Māori affected by FASD. This includes ensuring that whānau, hapū and iwi are able to contribute to the development and implementation of support services to assist those with FASD and their whānau. But it doesn't:

    a. In 2016, the Ministry of Health released New Zealand's first attempt to take a strategic and coordinated national approach to FASD in the document Taking Action on Fetal Alcohol Spectrum Disorder: 2016-2019 ("the Action Plan").[57] The Action Plan committed to conducting a full review of the Plan after three years, however, this full review has yet to be released;

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53 Fiona Rossen and others "Alcohol consumption in New Zealand women before and during pregnancy: findings from the Growing Up in New Zealand study" (2018) 131(1479) The New Zealand Medical Journal 24.

54 Health Promotion Agency *Drinking alcohol during pregnancy: A literature review* (2014, Wellington, Research New Zealand) at 23.

55 Ministry of Health "Fetal alcohol spectrum disorder" (29 August 2018) <https://www.health.govt.nz/your-health/conditions-and-treatments/disabilities/fetal-alcohol-spectrum-disorder-fasd>.

56 FASD Working Group "Taking Action on Fetal Alcohol Spectrum Disorder: 2016-2019: An Action Plan" (2016, Ministry of Health).

57 FASD Working Group "Taking Action on Fetal Alcohol Spectrum Disorder: 2016-2019: An Action Plan" (2016, Ministry of Health).

b. The Crown has failed to develop and implement an FASD Action Plan which recognises and commits to the principles of the Treaty of Waitangi; and

c. While the Crown, through its Action Plan, placed emphasis on the prevention of FASD, it failed to specifically commit to reducing the number of wāhine Māori who drink during pregnancy. Further, the Crown failed to commit to developing methods of working with wāhine Māori, and their whānau, hapū, iwi and community support services in order to achieve this objective.

88. The Crown has a duty to provide adequate assistance to those Māori in the Criminal Justice system affected by FASD. But it doesn't:

a. The Crown has failed to develop and implement kaupapa Māori services, and act in conjunction with Māori, to support and assist children and people who are affected by FASD and their whānau. Rather, the Crown has emphasised adapting current services, which are not developed in accordance with the principles of the Treaty, to assist persons who are affected by FASD.

b. The Crown has failed to develop and implement an Action Plan which provides for Māori to actively contribute and participate in the prevention of FASD.

c. The Crown has failed to develop a process in the criminal justice or corrections system whereby inmates and offenders are screened and tested for FASD.

d. The Crown has failed to offer rehabilitation services for criminal offenders and those inside prisons that caters to the specific complex needs of those with FASD.

Particulars

89. It is estimated that between 600 and 3000 babies are born with FASD in New Zealand each year, making up approximately one to five percent of all live births in 2015.[58] The prevalence of FASD in middle-aged or older adults is unknown in New Zealand but current estimates suggest a total of around 46,000 New Zealanders may be affected by FASD.[59]

90. A 2014 study found that while female drinkers in the total population consume alcohol more frequently than Māori female drinkers, Māori females drink more on a typical occasion than females in the total population.[60]

91. In a 2018 study, Māori women were found to be more likely to drink during the first trimester of pregnancy.[61] Heavy drinking (considered to be at least four or more standard drinks at a session during early pregnancy) when a woman may not yet be aware she is pregnant is considered to be the most harmful pattern which could lead to FASD.[62]

92. The total number of Māori born with FASD and FAS is unknown, however the prevalence of drinking amongst Māori women during their first trimester of pregnancy indicates that Māori children are more likely to be affected by FASD than non-Māori children.

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[58] Fiona Rossen and others "Alcohol consumption in New Zealand women before and during pregnancy: findings from the Growing Up in New Zealand study" (2018) 131(1479) The New Zealand Medical Journal 24.

[59] Ministry of Health "Fetal alcohol spectrum disorder" (10 September 2018) <https://www.health.govt.nz/our-work/diseases-and-conditions/fetal-alcohol-spectrum-disorder>.

[60] Health Promotion Agency *Drinking alcohol during pregnancy: A literature review* (2014, Wellington, Research New Zealand) at 24.

[61] Fiona Rossen and others "Alcohol consumption in New Zealand women before and during pregnancy: findings from the Growing Up in New Zealand study" (2018) 131(1479) The New Zealand Medical Journal 24 at 27.

[62] Fiona Rossen and others "Alcohol consumption in New Zealand women before and during pregnancy: findings from the Growing Up in New Zealand study" (2018) 131(1479) The New Zealand Medical Journal 24 at 25.

Prejudice

93. Māori are more likely to be affected by FASD than non-Māori. Māori who are affected by FASD and their whānau do not have access to adequate or culturally appropriate support services.

94. The Ministry of Health states that "people born with FASD are at an increased risk of child abuse and neglect, poor educational outcomes, developing mental health and substance abuse issues, coming into contact with the justice system, benefit dependence and premature mortality – including through suicide."[63]

95. Further, it is estimated that 50 percent of children and young people in the care of Oranga Tamariki are affected by FASD.[64] Māori make up 59 percent of children in Oranga Tamariki care.[65] It is very likely that a great proportion of those children in care who are affected by FASD are Māori.

96. Empirical evidence from Canada and Australia suggests that 10-36% of Prisoners are affected by FASD compared with 2-5% of the regular population.[66] New Zealand prisoners have not had wide-scale testing for FASD.

97. Active-case ascertainment studies have found that the prevalence of FASD is greater in indigenous corrections populations than in non-indigenous corrections populations.[67] It is very likely that a great proportion of Māori prisoners are affected by FASD.

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[63] Ministry of Health "Fetal alcohol spectrum disorder" (10 September 2018) < https://www.health.govt.nz/our-work/diseases-and-conditions/fetal-alcohol-spectrum-disorder>.

[64] FASD Working Group "Taking Action on Fetal Alcohol Spectrum Disorder: 2016-2019: An Action Plan" (2016, Ministry of Health) at 2.

[65] Jamie Ensor "Māori over-represented in state care harm statistics" *Newshub* (online ed, 23 July 2019).

[66] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

[67] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

98. FASD may affect outcomes at all stages of the criminal justice system, from communication impairments affecting initial contact with police to difficulties participating in rehabilitative programmes due to memory impairments and social-skills deficits.[68]

99. Adverse outcomes associated with FASD, such as cognitive impairment, substance abuse and mental health disorders, may increase vulnerability of individuals to exploitation and increase the likelihood of adverse criminal justice outcomes.[69]

100. Current therapeutic practices, such as drug rehabilitation programmes offered in the prisons and probation services, do not adequately account for the multiple, complex needs of individuals with FASD, leading to high rates of relapse and recidivism.[70]

101. A diagnosis of FASD in adult prisoners is essential for their effective management in prison, for pre-release planning, for developing strategies to transition care to the community and for ensuring continuity of care for soon-to-be-released individuals.[71] However, diagnostic services for FASD are extremely limited in New Zealand, particularly in prisons. Māori who have FASD are not identified and do not have their issues catered too in the appropriate way.

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[68] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

[69] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

[70] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

[71] Jessica McCormack, Valerie Mcginn, Samantha Marsh, David Newcomble, Chris Bullen, Joanna Chu "Fetal alcohol spectrum disorder and prisoners: the need for research-based information" The New Zealand Medical Journal April 2021 119-120.

PART I: ALCOHOL, CRIME AND PRISON

Māori, alcohol and crime

102. Māori comprise approximately half of New Zealand's prison population. Police data shows that 31-46% of all offences are committed by persons affected by alcohol.[72]

103. Māori are overrepresented as victims and perpetrators of violent crime with Police data showing that alcohol is involved in one in three cases of violent offending, and half of all homicides. Approximately 54% of physical assaults and 57% of sexual assaults occur when the perpetrator has been drinking.[73]

104. Evidence shows that an increase in alcohol outlets in an area significantly increases violent crime within that area, even after controlling for other factors such as social deprivation.[74]

105. Māori are more likely than any other ethnic group to be apprehended by the Police for an offence that involves alcohol.[75]

106. Māori are more likely to be a victim of interpersonal family violence than any other ethnic group.[76] More than a quarter of offenders of interpersonal family violence are thought to be affected by drugs or alcohol.[77]

107. Prevalence rates of alcohol and drug addiction amongst prisoners are much higher than the rest of the New Zealand population. Approximately 60% of community-based offenders have an identified Alcohol or Drug need and

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72 New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 12.

73 New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 12.

74 Peter Day, Gregory Breetzke, Simon Kingham, Malcolm Campbell "Close proximity to alcohol outlets is associated with increase in serious violent crime in New Zealand" (Australian and New Zealand Journal of Public Health 2012 Vol. 36 No. 1)

75 Alcohol Healthwatch "Alcohol Harm to Māori" Action Point 2012.

76 Te Puni Kōkiri "Understanding family violence: Māori in Aotearoa New Zealand) (June 2017)

77 Ministry of Justice "Interpersonal Violence: How often is alcohol or drugs a factor in interpersonal violence?" (4th March 2020)

87% of prisoners have experienced an Alcohol or Drug problem over their lifetime.[78]

Duties and Breaches

108. The Crown has a duty to treat all New Zealanders the same. But it doesn't. In breach of that duty, it permits by way of legislative omission, alcohol to be more readily accessible in 'Māori' communities than in other non-Māori communities. That includes advertising of alcohol. And Māori suffer as a result – as evidenced in the alcohol related prejudice suffered by Māori.

109. The Crown has a duty to minimise the harm experienced by Māori who come into contact with the Police - under the influence of alcohol. But statistically, Māori are more likely than non-Māori to be arrested by Police for alcohol related incidents.

110. The Crown has a duty to provide proper and equitable care to Māori in the criminal justice system who are affected by alcoholism. But it doesn't. Those in prison (most likely to be disproportionately Māori) do not get the drug and alcohol care they need and statistically are more likely to reoffend upon release and be returned to jail.

111. The Crown has a duty to take into account alcohol related issues of Māori offenders in the Court process. But it doesn't. And Māori are disproportionately incarcerated at rates higher than non-Māori.

Particulars: Alcohol Screening and brief intervention

112. Hazardous consumption of alcohol or 'binge drinking' places a significant burden on the nation's justice system.

[78] Ministry of Corrections "Breaking the cycle: Our drug and alcohol strategy through to 2020" (21 April 2016)

113. Māori are 1.8 times more likely to "binge drink", or have a hazardous drinking pattern when compared to non-Māori drinkers.[79]

114. There is a substantial body of international evidence on the effectiveness of alcohol screening and brief intervention ("SBI") for reducing hazardous drinking and harm caused for individuals.[80]

115. SBI is a process that captures hazardous drinkers who may not seek help for alcohol problems. It is primarily an opportunistic treatment intervention that leverages off people's presentations to services for reasons other than self-diagnosed alcohol issues.[81]

116. More than one third of criminal offences are committed under the influence of alcohol. People who commit offences under the influence of alcohol are prime candidates for alcohol screening and brief intervention.[82]

117. This is a particularly useful opportunity to provide early intervention for those who commit alcohol-related offences before they graduate on to more serious crime and offending.

118. Currently, there is no system whereby those who commit crimes under the influence of alcohol are offered alcohol screening and intervention.

Prisoners

119. Despite high levels of problems with alcoholism for prisoners in New Zealand, the majority of prisoners in New Zealand are not receiving drug and alcohol treatment.

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[79] New Zealand Medical Association *Reducing alcohol-related harm* (Policy Briefing, May 2015) at 7.
[80] K Maynard & S Paton (2012) Increasing the use of alcohol screening and brief intervention in New Zealand, Kotuitui: New Zealand Journal of Social Sciences Online, 7:2, 72-82
[81] K Maynard & S Paton (2012) Increasing the use of alcohol screening and brief intervention in New Zealand, Kotuitui: New Zealand Journal of Social Sciences Online, 7:2, 72-82
[82] K Maynard & S Paton (2012) Increasing the use of alcohol screening and brief intervention in New Zealand, Kotuitui: New Zealand Journal of Social Sciences Online, 7:2, 72-82

120. There are approximately 8,700 prisoners in New Zealand as of March 2021.[83] Since 2017, the number of inmates getting treatment for drug and alcohol issues has fallen from 4300 to 928.[84] This represents a treatment rate of only 10.6%.

121. The number of prisoners participating in the Alcohol and Drug Intensive Treatment Programme has fallen from 283 in 2017 to 184.[85]

122. The Crown is failing to treat Māori prisoners in need of treatment for alcohol disorders.

Alcohol and Drug Courts

123. Te Whare Whakapiki Wairua, the Alcohol and Other Drug Treatment Court, was a pilot court system established in November 2012 in Auckland and Waitakere. [86]

124. In 2021 a third Court was established in Hamilton.

125. This Court provides an alternative to the regular Court system and imprisonment for those whose offending is being driven by alcohol and/or drug substance use disorders.[87]

126. Te Whare Whakapiki Wairua enters offenders into an intensive one to two year programme designed to help deal with their substance abuse issues. Following a participant's completion they are given a community-based sentence rather than a custodial sentence.

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[83] Department of Corrections, "Prison facts and statistics" March 2021.
[84] Meriana Johnson "National, Māori Party slam drop in alcohol, drug programmes for prisoners" RNZ (24 June, 2021)
[85] Meriana Johnson "National, Māori Party slam drop in alcohol, drug programmes for prisoners" RNZ (24 June, 2021)
[86] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[87] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)

127. The 2019 Outcomes report found that graduates of Te Whare Whakapiki Wairua are less likely to reoffend, be in prison and be involved with Police for two years following their participation.[88]

128. Te Whare Whakapiki Wairua did offer a Kaupapa Māori treatment programme, but this was rescinded in 2018.[89]

129. Despite successes of this Court, opportunities to participate in this process are limited for Māori offenders.

130. Only offenders in the Auckland, Waitakere and Hamilton areas are able to participate in the Te Whare Whakapiki Wairua process.[90]

131. As of 13 April 2016, only 282 offenders had taken part in Te Whare Whakapiki Wairua since it's inception in 2012.[91] 44% of these offenders were Māori.[92] Despite high proportion of Māori, this number represents only a very small fraction of those Māori nationwide who committed offences fuelled by drugs and alcohol during this time.

Prejudice

132. Māori experience the highest rate of imprisonment of any ethnic group in New Zealand.

133. Māori experience the highest re-imprisonment rate of any ethnic group in New Zealand. Over 48 months, 55% of Māori offenders will be re-imprisoned. [93]

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[88] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[89] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[90] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[91] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[92] Ministry of Justice "Alcohol and Other Drug Treatment Court Outcomes Evaluation 2018-19" (June 2019)
[93] Department of Corrections "Re-conviction rates of released prisoners: a 48-months analysis" (June 2008)

134. Māori make up 26% of all those victimised by Crime, more than double their proportion of the New Zealand population.[94]

135. Māori are more likely than any other ethnic group to be apprehended for a crime that involves alcohol.

136. Māori are more likely to be a victim of interpersonal family violence than any other ethnic group.[95] More than a quarter of offenders of interpersonal family violence are thought to be affected by drugs or alcohol.[96]

137. Māori experience untold trauma and negative effects on their whānau structure, quality of life, health and wellbeing as a result of alcohol-related crime.

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[94] Ministry of Justice "Māori highly victimized by Crime, Survey finds" (16 June 2021)

[95] Te Puni Kōkiri "Understanding family violence: Māori in Aotearoa New Zealand) (June 2017)

[96] Ministry of Justice "Interpersonal Violence: How often is alcohol or drugs a factor in interpersonal violence?" (4th March 2020)

PART J: RELIEF

Findings and Recommendations

Jurisprudence and the Principle of Redress

138. The alcohol related prejudice suffered by Māori is beyond calculation, both financially and in terms of the human impact. Nor will that prejudice be removed or ameliorated quickly as it is likely that it will take generations to address, as the effects are intergenerational and the pathway to resolution riddled with institutional racism.

139. The claimant does not seek financial compensation with the filing of this claim. In the historic *Lands* case the insufficiency of monetary compensation in settling a claim was recognised by Bisson J, who stated that "compensation in money terms is not a satisfactory recompense in the case of some grievances," and will not always satisfy the Crown's Treaty obligation to remedy breaches of the Treaty. [97] Bisson J suggested that other forms of redress may be required. The claimant reserves the right to file further amendments to this claim in respect of redress.

140. Rather, should the Tribunal find this claim to be well founded, the claimant seeks recommendations that the Act be amended to reflect the principles of active protection, consultation and good faith, so as to actively address the issues pleaded to in this claim. It will require that the legislative failings of the Act be removed as a minimum, and legislative change to the Act to ensure the proper recognition of the Treaty and the special status of Māori.

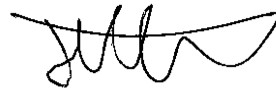
141. Justice Somers, in *Lands*, considered that where breaches of the Treaty had occurred, then a fair and reasonable recognition of and recompense for the wrongdoing was required:

> As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms

[97] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 27 per Bisson J.

> of the Treaty by one of its parties gives rise to a right of redress by the other – a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.[98]

DATED at Auckland this 25th day of August 2021.



David Stone | **Harry Clatworthy**

Counsel for the Claimant

To: The Registrar, Waitangi Tribunal and Crown Law Office, and those on the notification list for the Wai 3060 Justice System Kaupapa Inquiry and the Wai 2575 Health Services and Outcomes Kaupapa Inquiry.

[98] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 22 per Somers J.