OFFICIAL

**Wai 3440, #A3**
**Wai 3470, #A3**

**I TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI** **WAI 3300**
BEFORE THE WAITANGI TRIBUNAL **WAI TBC**

| | |
|---|---|
| **I TE TAKE O**<br>IN THE MATTER OF | the Treaty of Waitangi Act 1975 |
| **Ā**<br>AND | |
| **I TE TAKE O**<br>IN THE MATTER OF | TOMOKIA NGĀ TATAU O MATANGIREIA – The Constitutional Kaupapa Inquiry (Wai 3300) |
| **E PĀ ANA KI**<br>CONCERNING | Tētahi tono nō Eru Kapa-Kingi, Te Rāwhitiroa Bosch, Anahera Mana-Tūpara, Nyze Manuel, Kiri Tamihere-Waititi me Hōhepa Thompson mō ngā tangata Māori i raro i te tāwharau o "Toitū Te Tiriti" |

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# BRIEF OF EVIDENCE FOR
# DR HINEMOA ELDER

19 O POUTU-TE-RANGI 2025

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**Introduction**

Te Kawariki, Te Kawariki,
Tirotiro kau noa kei hea
Te iwi nōna ngā tapuwae e whāia nei.
Rere whakateuru atu ki te tihi o Whangatauatia,
Mā te one i haea ai e Pōroa,
Heoi kāhore kau i reira.
Huri whakaterāwhiti atu ki Pūwheke,
Mā te moana a Rangaunu me ōna Pioke e.
Heoi kāhore kau i reira.
Ū ana te mata ki muri,
Ki ngā wai pūataata o Pārengarenga,
Ki te ara ka rere kore ki muri,
Ki te whakatōreretanga o te wairua,
Ki Te Reinga e.
Koia ahau te whakataukī e.
Tēnā a Te Kawariki,
Me whakapakari e.

1. My name is Dr Hinemoa Elder.

2. I am a recently elected Deputy Chair of Te Rūnanga Nui o Te Aupōuri and have been a director on the two commercial boards of Te Aupōuri for the last five years.

3. I am a specialist child and adolescent psychiatrist, a Fellow of the Royal Australian and New Zealand College of Psychiatrists, since 2006. I continue to work with tamariki, mokopuna me ōna whānau, children, adolescents, their families and communities in a range of settings. I have experience in inpatient and community child and adolescent psychiatry, perinatal, youth forensic psychiatry and in the neuropsychiatry of traumatic brain injury.

4. My doctoral research, supervised by Professor Sir Mason Durie and Professor Chris Cunningham, developed practical, evidence-based tools for whānau with traumatic brain injury which have subsequently been used in rehabilitation services. I received a Health Research Council, Eru Pomare post-doctoral research fellowship which continued this work.

5. My central current role is as Kaiārahi Oranga Hinengaro at Te Hiku Hauora, a primary health organisation, based in Kaitāia. In this way I am part of a wider team serving the needs of our community at home in Te Hiku o te Ika.

6. I am the author of four books, Aroha, Wawata, Waitohu and E Moko, which share the wisdom and insights of whakataukī and whakatauākī, proverbial sayings and our Okoro, our lunar cycle from Muriwhenua. These books are an attempt to create easily accessible Māori cultural resources in order to strengthen identity, a well-recognised, evidence-based protective factor contributing to the daily experience of mental health and wellbeing.

7. In addition, I have been a Deputy Psychiatry Member of the Mental Health Review Tribunal since 2012, the only Māori psychiatrist on the Tribunal over that time. This role has enabled me to be part of the workings of this aspect of our mental health system. I have written and co-written two book chapters at the interface of psychiatry and the law.[1] Since 2021 I have been part of the Professional Expert Advisory Group of Te Aka Matua o te Ture, The Law Commission, developing recommendations for legislation to replace the Protection of Personal and Property Rights Act 1988.

8. Through working in clinical practice, research and teaching, I am dedicated to the tino rangatiratanga, the self-determination of oranga Māori, of Māori health. One of the fundamental drivers of this commitment is that my younger brother Maru ended his own life in 1999. Every day, working alongside whānau struggling with their mental wellbeing, I am reminded of the critical importance of the principles of Te Tiriti o Waitangi in bringing to life tino rangatiratanga, self-determination, as essential for the many ways that wellbeing is experienced.

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[1] Elder H, Tapsell R *Māori and the Mental Health Act, in The Mental Health Act in New Zealand* (Otago University Press, 2013). Also see, Elder H (2019) Te Puna a Hinengaro: he tirohanga ki a Āheinga. The wellspring of Mind: reflections on capacity from a Māori perspective, in *Mental Capacity Law in New Zealand* (Thomson Reuters, 2019).

9. A copy of my full CV is attached as **Appendix 1**.

**The Regulatory Standards Bill**

10. I have significant concerns about the proposed Regulatory Standards Bill (the **RSB** or **Bill**). First, the timing of the RSB in relation a number of other proposed legislative changes is of grave concern. In my view, this cluster of proposed legislative changes signifies an escalation in the ongoing structural discrimination against Māori in Aotearoa. Second, I have also found the material provided for the RSB consultation difficult to engage with. Third, my area of work leads me to be deeply concerned about the potential for the RSB framework to be applied to the Mental Health Bill before Parliament which is due to take effect in July 2027, and the resulting prejudice this would cause to tāngata whaiora and their whānau.

11. I am providing this evidence as a practising psychiatrist who works with both Māori and non-Māori tamariki, mokopuna and whānau, mindful of my responsibilities as an advocate, upholding the requirements under the Medical Council of New Zealand to strive for equity for my patients and the importance of ethical regulations in that regard. A copy of a statement by the Medical Council of New Zealand on "Cultural Competence, Partnership and Health Equity: Professional Obligations Towards Māori Health Improvement" is provided in the document bank as Document **HE1.**

**Scope of evidence**

12. My evidence covers:

    (a) The difficulties I experienced in participating in the public consultation process for the RSB, including the lack of transparency in the documentation and barriers to engagement due to the nature of the material provided;

    (b) My concerns with the RSB in terms of how it seeks to undermine He Whakaputanga o te Rangatiratanga o Nu Tireni[2] ("**He**

[2] He Whakaputanga o te Rangatiratanga o Nu Tireni 1835.

**Whakaputanga**"), Te Tiriti o Waitangi[3] ("**Te Tiriti**"), and the Treaty Principles; and

(c) The significant potential impacts that the RSB may have on mental health and illness legislation and reforms, both now and in the future.

(d) A note about my use of the word Māori. I use the word Māori in this affidavit as a collective term for te tāngata whenua, te tāngata moana nō Aotearoa, the First Nations peoples of our lands and seas. I also acknowledge that we have our own nuanced and distinctive identities as decendants of waka, tūpuna, hapū and our iwi affiliations. And, recognising that the use of the word Māori may for some present limitations. At the same time, in situations such as this, this can be a useful word to reflect our aspirations for kotahitanga, encompassing our differences, and the activities of ngātahitanga that ignite and manifest these aspirations. Māori is also the word used to identify our ethnicity in the Aotearoa New Zealand Census of Population and Dwellings, it is used in the collection of our health data and in legislation such as our current Mental Health (Compulsory Assessment and Treatment) Act 1992.

**The Regulatory Standards Bill "Consultation Process"**

13. I took interest in the RSB after writing a submission opposing the Treaty Principles Bill. This was in the context of a group of proposed legislative changes that in my view would negatively impact Māori and I considered it my duty as an iwi member and as a doctor to inform myself of what impacts the RSB might have on tāngata whaiora and on communities I live and work in.

14. I went to the Ministry for Regulation website and read through the consultation document about the RSB called "*Have your say on the proposed Regulatory Standards Bill*"[4]. I found this 44-page document and

[3] Te Tiriti o Waitangi 1840.
[4] "Have your say on the proposed Regulatory Standards Bill", Ministry for Regulation, November 2024. https://consultation.regulation.govt.nz/rsb/have-your-say-on-regulatory-standards-bill/

questionnaire difficult to follow. In part, this was because there were links to other long documents which needed to be reviewed, requiring the reader to then return to the main document, making it hard to follow the rationale of the proposed legislation and analysis of its multiple potential impacts.

15. I also found the documentation itself to be contradictory. It stated that improving transparency in the quality of regulation was a goal and yet the history of earlier iterations of the proposed Bill, which had previously been rejected, was not included in the main document. In this way the document itself lacked in the very transparency it purported to address. I also found the questionnaire imbedded in the document was worded in such as way what suggested the RSB proposal would proceed as designed which was premature.

16. I looked at the other consultation documents provided[5] including the Interim Treaty Impact Analysis[6] ("**Treaty Analysis**") and became more gravely concerned when I noticed the large number of redactions made to the information throughout that document. Of the 51 points made in that document 20 points were either partly or fully redacted.

17. Given the purpose of the consultation documents was to inform the public about what is being proposed in order that we make informed submissions about the RSB proposal, I again found the document contradictory that so much information was redacted. I found these documents were not fit for purpose, as they prevented adequate engagement with the process, significantly preventing review of the entirety of the Treaty Analysis.

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[5] "Interim Regulatory Impact Statement: Legislating to improve transparency of the quality of regulation Coversheet", Ministry for Regulation, 30 October 2024. https://www.regulation.govt.nz/assets/RIS-Documents/Interim-Regulatory-Impact-Statement-Legislating-to-improve-transparency-of-the-quality-of-regulation-v2.pdf. "Preliminary Treaty Impact Analysis for the proposed Regulatory Standards Bill", Ministry for Regulation. https://www.regulation.govt.nz/assets/Publication-Documents/Preliminary-Treaty-Impact-Analysis-for-the-proposed-Regulatory-Standards-Bill.pdf. Cabinet Office Circular "Approval to consult on a proposed approach to the Regulatory Standards Bill" CAB-24-SUB-0437.

[6] "Preliminary Treaty Impact Analysis for the proposed Regulatory Standards Bill", Ministry for Regulation. https://www.regulation.govt.nz/assets/Publication-Documents/Preliminary-Treaty-Impact-Analysis-for-the-proposed-Regulatory-Standards-Bill.pdf.

18. I believe that like me, many people would have struggled to engage with these documents. I contemplated waiting until the RSB was introduced. However, what I had already read was so troubling that I decided to investigate further.

**Origin of the RSB**

19. Further research on previous iterations of the RSB lead me to the first version of the proposed legislation called the "Regulatory Responsibility Act" (RS Act), first published in a 2001 report (the **2001 Report**) for the New Zealand Business Roundtable, now called The New Zealand Initiative. A copy of this report is provided in the document back as Document **HE2**.

20. After reviewing the draft RS Act, included in the 2001 Report appendices, a number of issues were clear. Significantly, the draft RS Act was silent to He Whakaputanga, Te Tiriti o Waitangi, and to the principles of Te Tiriti o Waitangi. These fundamental matters pertaining to any legislation focussed on improving regulation were not mentioned. This seemed to me to be a pointed omission, which I interpreted as designed to seek the erosion of Māori rights by leaving out Te Tiriti o Waitangi completely.

21. Since the release of the 2001 Report, I read that attempts had been made to bring iterations of the draft RS Act into law. A former leader of the ACT Party tried in 2006, in 2011 the Regulatory Responsibility Taskforce, set up in a coalition agreement between the National and ACT Parties, tried again, and then in 2021, the current ACT Party leader, tried yet again to pass a version of the RS Act into law.[7] All of these attempts have been dismissed. Treasury, the Legislative Design and Advisory Committee and constitutional experts have all voiced serious concerns with the previous versions of the currently proposed RSB. As recently as 30th October 2024, the Interim Regulatory Impact Statement[8], prepared by the Ministry for Regulation itself, reported several limitations in their ability to analyse the impact of the proposed Bill, and did not endorse the Bill proceeding.

[7] "Have your say on the proposed Regulatory Standards Bill", Ministry for Regulation, November 2024. <https://consultation.regulation.govt.nz/rsb/have-your-say-on-regulatory-standards-bill/>
[8] A copy of the Interim Regulatory Statement is in the Document Bank as Document #2.

Despite this advice, efforts persist in attempting to bring this newest iteration of the original RSB into law.

22. The Coalition government has committed to passing the RSB "as soon as practicable"[9] and to introducing the RSB in the first half of 2025.[10] This hasty approach, with limited ability for adequate consultation is one of the reasons I agreed to provide evidence in support of this claim.

**Concerns with the RSB**

23. In the following sections I will explain some of my specific concerns regarding how the RSB framework could potentially affect the incoming Mental Health Bill, either now or in the future.

**He Whakaputanga, Te Tiriti and the Treaty Principles**

24. My primary concern is that the RSB creates a framework that seeks to undermine He Whakaputanga, Te Tiriti o Waitangi and the Treaty Principles. The RSB undermines these directly, by overriding and ignoring the mana of He Whakaputanga and Te Tiriti, in their omission. The RSB also seeks this outcome indirectly, by privileging individual property rights, a core element of the ACT Party ideology. The RSB then dictates that all current and future laws must comply with these ACT Party priorities. According to statistics from the last election, the ACT Party gained only 8.64% of the voting public's support. In my view these aspects make the RSB completely unacceptable.

25. I will now outline a brief summary of the current law that governs aspects of the Mental Health Sector, and describe a summary of some of existing inequities for Māori. I will then provide a few examples of how the RSB could be used to undermine the incoming Mental Health Bill, and specifically how it could be used to strip this new mental health legislation of its provisions relating to Te Tiriti, as well as the new initiatives that seek

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[9] Coalition Agreement New Zealand National Party and ACT New Zealand 54th Parliament, at page 4.
[10] "Have your say on the proposed Regulatory Standards Bill", Ministry for Regulation, November 2024. <https://consultation.regulation.govt.nz/rsb/have-your-say-on-regulatory-standards-bill/>

to address the existing inequities experienced by Māori with mental illness within the incoming mental health legislation.

**Current Law relating to Mental Health and Impacts on Māori**

26. As a registrar, a trainee psychiatrist since 2001, and then specialist psychiatrist since 2006, and for more than 10 years, a deputy member of the Mental Health Review Tribunal, I have worked with the current Mental Health (Compulsory Assessment and Treatment Act 1992 (the "**Mental Health Act**") for more than 20 years. This work provides a broad platform in terms of understanding how the mental health sector and Māori patients in particular are impacted by the current Mental Health Act.

27. I have a duty of care to tāngata whaiora, their whānau and communities to express my concerns about the negative effect the proposed RSB could have on future mental health legislation.

28. In my daily work with whānau, I see practice-based evidence of the lived experience of intergenerational trauma and inequity experienced by Māori in Aotearoa. Evidence-based findings in the medical literature also clearly show the ongoing impact of colonisation in terms of the inequities in mental health experienced by Māori compared to Pākehā. There are many examples which illustrate these issues in the mental health sector.

29. Significantly higher rates of suicide and attempted suicide, in particular for Māori men, and for Māori women in pregnancy, as well as higher rates of severe and persistent mental illness for Māori generally are just some of the current evidence- based inequities.

30. The experiences of the whānau I work with across a range of settings are not isolated. The collective experiences highlighting the severe over-representation of Māori with the need for support and treatment from mental health services is well-documented.

31. The contributing causes of these problems include intergenerational poverty of resource, caused by Māori land and economic bases being stolen, as well as the arduous, expensive processes in attempting to reclaim these taonga through forums such as this Tribunal. Access to our

language and customs being legally restricted or prohibited is another contributing factor.

32. The ongoing colonisation of Māori ways of thinking about ourselves and the world around us, limited access to cultural resources to alleviate these problems and also to ways in which we can exercise our tino rangatiratanga in terms of designing and delivering healthy ways of living for ourselves, further exacerbate poor mental health outcomes for Māori.

33. Overall, significant contributing factors to Māori inequity in the mental health sector include limited resourcing through the restricted application of Te Tiriti o Waitangi and the Treaty Principles in the current legislation and regulations pertaining to those with mental illness. The same is true with respect to the wider legal framework that has contributed to these mental health inequities for Māori in many areas of life.

**Current use of Te Tiriti and the Treaty Principles in health services and training of health professionals**

34. Professor Sir Mason Durie has written extensively about the Treaty Principles in the context of hauora, needs related to health and wellbeing, and the responses required to meet those needs. He describes three key Treaty Principles; Protection, Participation and Partnership. He has broadly posited three areas of application:

    (a) Applying the principles of protection, partnership and participation in understanding health and sickness;

    (b) Protection, partnership and participation in the delivery of health services; and

    (c) Protection, partnership and participation in the delivery of health policy and governance.

35. These core principles have remained relevant in the teaching and apprenticeship of medical students, doctors and health professionals of all disciplines in Aotearoa for the last 25 years. For instance, a copy of Sir M. Durie "The Treaty of Waitangi and Healthcare, New Zealand Medical Journal (1989) is provided in the document bank as Document **HE3.**

36. Specific to the practice of psychiatry, the Royal Australian and New Zealand College of Psychiatrists (**RANZCP**) has developed a position statement on the Principles of Te Tiriti o Waitangi (**Position Statement**), last updated in 2022.[11] The position statement reads as follows:

> *The principles have evolved over time and provide direction for how we are obliged to consider these principles and reflect on the implications for our mahi as a health organisation.*
>
> *The principles underpinning Te Tiriti, by which the RANZCP can demonstrate its commitment to Te Tiriti are:*
>
> ***Tino Rangatiratanga / Self-Determination***
>
> *The principle of self-determination - this provides for Māori self-determination and mana motuhake. It requires the RANZCP to support by Māori for Māori approaches and services, and advocate for tino rangatiratanga to be enshrined within the wider system.*
>
> ***Patuitanga / Partnership***
>
> *The principle of partnership. This requires all parts of the RANZCP to work with Māori in the design, delivery and monitoring of all our mahi/work.*
>
> ***Mana Taurite / Equity***
>
> *The principle of equity - this requires the RANZCP to commit to achieving equitable health outcomes for Māori through all its functions.*
>
> ***Whakamarumarutia / Active Protection***
>
> *The principle of active protection - this requires the RANZCP and all members to be well informed on the extent and nature of both Māori health outcomes and ways to achieve Māori health equity through culturally safe practice.*
>
> ***Kōwhiringa / Options***
>
> *The principle of options - this requires the RANZCP to ensure that all its services are provided in a culturally appropriate way that recognises and supports the expression of Te Ao Māori.*

37. The Position Statement provides clear guidance to our profession on how Te Tiriti o Waitangi and the Treaty Principles are to be incorporated and given effect within our daily practice and the wider legislative framework that we work within.

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[11] The Royal Australian & New Zealand College of Psychiatrists "*Recognising the significance of Te Tiriti o Waitangi*" (February 2022). <Recognising the significance of Te Tiriti o Waitangi | RANZCP>

**Potential Impacts of the RSB on Reform of the Mental Health Act**

38. The Mental Health Act has recently undergone its most significant reform in 30 years. The Mental Health Bill is currently before Parliament, at the Select Committee stage, which, if passed, is scheduled to take effect in July 2027. This reform has come to fruition following significant consultation about our current Mental Health Act.

39. The proposed Mental Health Bill is rights-based and has a strong emphasis on Te Tiriti o Waitangi and on specific Māori mental health initiatives. For example:

    (a) Clause 3 provides that, "the purpose of this Act is to provide for compulsory mental health assessment and care in a manner that… improves equity in mental health outcomes among New Zealand's population groups by striving to eliminate mental health care disparities, in particular for Māori"[12];

    (b) Clause 5 of the Act sets out a list of the provisions in the Act that provide for the Crown's intention to give effect to the Treaty Principles:[13]

    > *section 3(b), which states that it is a purpose of this Act to provide for compulsory mental health assessment and care in a manner that improves equity in mental health outcomes among New Zealand's population groups by striving to eliminate mental health care disparities, in particular for Māori:*
    >
    > *section 6, which establishes a compulsory care principle that supports whanaungatanga and recognises the importance of family and cultural ties:*
    >
    > *section 17, which provides for hui whaiora (well-being meetings) that may be convened to assist, among other things, tāngata whaiora to make decisions about their care:*
    >
    > *section 27, which provides that a patient is entitled to proper respect for their cultural, ethnic, and individual identity and their religious or cultural beliefs:*
    >
    > *section 40, which provides for the approval of advisers with expertise in matters involving tāngata whaiora Māori to advise on complaints and inquiries under this Act:*

[12] Mental Health Bill 2024, Clause 3.
[13] Mental Health Bill 2024, Clause 5.

*section 42, which requires provision of a rōpū whaiora (collaborative care team) for each patient that includes the expertise necessary to meet the needs of the patient, including cultural expertise:*

*section 43(4)(a) and (b), which requires a care plan for each patient that includes a holistic assessment of the person, including cultural considerations in relation to the person, and non-pharmaceutical options for care:*

*sections 164(4)(b) and 174(3)(b), which require the membership of a Mental Health Review Tribunal and the Forensic Patient Review Tribunal to include knowledge of tikanga and mātauranga Māori.*

40. I have serious concerns that the provisions identified above in the Mental Health Bill relating to Te Tiriti and the specific initiatives provided to address the stark and persisting inequities experienced by Māori in mental health ("**Māori Mental Health Provisions**") are an easy target for potential review and removal, either immediately or in the future, under the RSB framework if it were to pass. I note with concern that the ACT Party website (https://www.act.org.nz/mental-health) states, "Recommendation: Reform the Mental Health Act." with no mention of the background to the existing reform, nor the current Mental Health Bill.

41. In the specific context of the Mental Health Act, I believe that the RSB Equality Principle could be used to review and remove the Māori Mental Health Provisions on the basis that they are deemed inconsistent with the RSB Equality Principle, while ignoring the significant inequities for Māori with mental illness which I have already described. In doing so, the Ministry for Regulation, the Minister for Regulation and the proposed Regulatory Standards Board could use their significant new powers under the RSB to decide on the timing, scope and terms of reference for any such review of the Mental Health Bill, potentially as soon as the RSB is passed.

42. Many people have worked to ensure we have a Mental Health Bill with new provisions providing recognition of patients' rights as encompassed in Te Tiriti o Waitangi and the Treaty Principles. The prospect of those essential changes which improve our mental health legislation, with particular reference to the needs of Māori, being erased by the RSB is untenable.

43. In my view, the proposed RSB is yet another piece of evidence that colonising thinking is alive and well in our country. Practice-based

evidence from working alongside tāngata whaiora, some of our most vulnerable tamariki, mokopuna and whānau, demonstrates the detrimental, intergenerational impact of colonised thinking and action. This aligns with other forms of evidence that as Māori we are much more likely to experience serious and enduring mental illnesses, contributed to by racism and colonising structures in our society. A critical aspect of the my duty of care as a health practitioner is to advocate for the rights of whānau, especially those experiencing mental illness. The right to the freedom to access cultural resources, including those outlined in the principles of Tre Tiriti o Waitangi in order to express tino rangatiratanga, is an essential element of recovery and the experience of oranga. I have attempted to fulfil that duty by providing this evidence today. I am proud to stand alongside the many others who are providing evidence from their perspectives on this critical matter before The Waitangi Tribunal at this time.

E ai ki te whakaaro, ‘ehara taku toa i te toa takitahi, he toa takitini.’

**DATED** this 19th day of Poutū-Te-Rangi 2025

**DR HINEMOA ELDER**