

Does the Prejudicial Treatment of Takatāpui and Te Ira Takatāpui Constitute a
Breach of the Principle of Active Protection Under Te Tiriti o Waitangi and the
Treaty of Waitangi?

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Abstract

This thesis argues that the prejudicial treatment of takatāpui and te ira takatāpui constitutes a breach of the principle of active protection under Te Tiriti o Waitangi and the Treaty of Waitangi. Te ira takatāpui refers to the whakapapa of a way of life rooted in the culture of Māori who have diverse sexualities and genders. That way of life, and the cultural expression it entails, is a taonga to Māori. The Crown owes a duty of active protection toward taonga, yet its treatment of takatāpui has been consistently prejudicial. This includes the criminalisation of te ira takatāpui, the failure to act during the AIDS pandemic which resulted in the preventable deaths of many takatāpui, and the long-standing failure to afford equal rights and protections in areas such as hate crime and hate speech laws, protection from conversion therapy and the gay panic defence, and the delayed recognition of same-sex marriage and its associated legal benefits. The Crown's prejudicial treatment of takatāpui caused immense harm to a taonga, and therefore constituted a breach of its duty of active protection. This treatment disrupted the takatāpui way of life, interrupted the continuity of te ira takatāpui, and caused direct harm to a form of cultural expression rooted in te ao Māori. That breach gives rise to a corresponding duty to provide redress. In fulfilment of this duty, the Crown could consider issuing a state apology for breaching the principle of active protection, establishing a Ministry for Rainbow People, funding public service organisations that serve takatāpui communities, and restoring te ira takatāpui through the revitalisation and dissemination of mātauranga Māori.

I Takatāpui in Te Ao Māori

Queer identities were integral to Indigenous Pacific societies prior to colonisation.¹ Hawai'i and Tahiti had Mahu, Fiji had Vakasalewalewa, Papua New Guinea had Palopa, Samoa had Fa'afafine, Rarotonga had Akava'ine, Tonga had Fakaleiti, Niue had Fakafifine and Aotearoa New Zealand had takatāpui.² The British Crown's incursion into Indigenous lands and the imposition of English legal frameworks precipitated the systematic erasure of Indigenous queer identities. This pattern was equally evident in the context of Aotearoa New Zealand. The colonisation of Aotearoa New Zealand had a profoundly detrimental impact on takatāpui. Takatāpui, Indigenous queer people of Aotearoa New Zealand, were integrally woven into te ao Māori prior to British colonisation and the subsequent criminalisation of te ira takatāpui.³

This section is structured in three parts.

The first part of this section has a summary of the terminology used to refer to takatāpui. It includes a history of the introduction of the term takatāpui and the use of it through dictionaries, official documents, and stories. Following this history provides a conceptual overview of the evolution of the vocabulary and its meaning.

This section then turns to a discussion of takatāpui in te ao Māori. The second part of this section situates takatāpui within te ao Māori and pre-colonial Aotearoa New Zealand. Working through ancestral narratives, language and carving, this part canvasses the presence of takatāpui in te ao Māori and pre-colonial Aotearoa New Zealand.

Drawing on criticism of colonial accounts of queerness in pre-colonial Aotearoa New Zealand, the third part of this section focuses on dismantling efforts to portray queerness as non-existent in te ao Māori.

A Chronological Timeline on Terminology

¹ "Takatāpui, Rainbow and MVPFAFF+ experiences of abuse and neglect in care" Abuse in Care Royal Commission Inquiry <www.abuseincare.org.nz>; and Torika Tokalau and others "Navigating two tides" *Stuff* (online ed).

² "Takatāpui, Rainbow and MVPFAFF+ experiences of abuse and neglect in care", above n 1; and Tokalau and others, above n 1.

³ "Takatāpui, Rainbow and MVPFAFF+ experiences of abuse and neglect in care", above n 1.

Takatāpui came into common usage for the first time in the second edition of the Māori dictionary in 1852. It was defined as one's "travelling companion" in the second edition.⁴

Takatāpui was defined as "intimate partner of the same sex" in the third edition of the Māori dictionary in 1871.⁵

Takatāpui scholar and former politician Elizabeth Kerekere writes that when the term takatāpui was rediscovered by academic, writer and activist Ngāhuia Te Awēkotuku and Māori language expert Lee Smith, they gifted it to the community in the mid 1980s.⁶ In the mid 1980s, Māori lesbian, gay, bisexual and transgender people had started reclaiming the term takatāpui "as both an identity and an umbrella term" for diverse gender identities, sexualities and sex characteristics.⁷

The term takatāpui first appeared in print in 1991 in *Mana Wahine Māori: Selected Writings on Māori Women's Art, Culture and Politics* by Te Awēkotuku, who, Kerekere argues, "has always characterised it as including all diverse gender identities and sexualities" and then in 1992 in *Spiral 7: A Collection of Lesbian Art and Writing from Aotearoa/New Zealand*.⁸

The term takatāpui first appeared in a government document by public health researchers Herewini and Sheridan, which is considered its first official use.⁹ Kerekere suggests this is perhaps considered the official use of the term as it was used in a government document.¹⁰ The report defined takatāpui as men who have sex with men but do not identify as gay.¹¹

⁴ Elizabeth Kerekere "Part of The Whānau: The Emergence of Takatāpui Identity – He Whāriki Takatāpui" (LLD, Victoria University of Wellington, 2017) at 17 and 38.

⁵ Kerekere, above n 4, at 38 and 178.

⁶ Kerekere, above n 4, at 178.

⁷ Kerekere, above n 4, at 18.

⁸ Kerekere, above n 4, at 38; Ngāhuia Te Awēkotuku *Mana Wahine Māori: Selected Writings on Māori Women's Art, Culture and Politics* (New Women's Press, Auckland, 1991); and Heather McPherson and others *Spiral 7: A Collection of Lesbian Art and Writing from Aotearoa/New Zealand* (Spiral, Wellington, 1992).

⁹ Kerekere, above n 4, at 22; and T Herewini, and R.H. Sheridan *A Report on the Health Needs of Māori Gay* (Public Health Commission, 1994).

¹⁰ Kerekere, above n 4, at 22; and T Herewini, and R.H. Sheridan, above n 9.

¹¹ Clive Aspin "Gay Community Development in New Zealand in the 1970s and Implications for the Health of Gay Māori Men in the 1990s" (1996) 7 Social Policy Journal Of New Zealand Te Puna Whakaaro 42 at 45.

In addition to takatāpui, subsets of takatāpui use more specific terms to identify themselves. Some Māori transgender women identify as whakawāhine while some Māori transgender men identify as tangata ira tāne or whakatāne. Māori public health researcher Clive Aspin provides the following breakdown:¹²

Within contemporary Māori society, takatāpui tāne applies to men, takatāpui wāhine applies to women, takatāpui whakawāhine refers to male to female transsexuals and takatāpui whakatāne refers to female to male transsexuals.

Kerekere says the use of qualifying gendered terms rarely occurs within takatāpui communities as “The use of inclusive language in the definition of takatāpui is fundamental then to the development of takatāpui identity and communities.” Kerekere believes Aspin’s definition is not inclusive. Kerekere says:¹³

... an inclusive definition of ‘takatāpui wāhine’ would denote all female identified takatāpui who may be cisgendered, trans, trans feminine, intersex, genderqueer, genderfluid, non-binary or gender nonconforming; and who may or may not identify as lesbian, bisexual, pansexual, asexual, queer or heterosexual.

There is no single, fixed definition of takatāpui. Kerekere, having researched takatāpui communities extensively and worked with Māori and takatāpui for over 30 years, suggests a comprehensive definition of takatāpui:¹⁴

Takatāpui is an umbrella term that embraces all Māori with diverse gender identities, sexualities and sex characteristics including whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex and queer. Takatāpui identity is related to whakapapa, mana and inclusion. It emphasises Māori cultural and spiritual identity as equal to - or more important than – gender identity, sexuality or having diverse sex characteristics. Being takatāpui offers membership of a culturally-based national movement that honours our ancestors, respects our elders, works closely with our peers and looks after our young people.

¹² Kerekere, above n 4, at 24; and Heather Worth and others *Male Call/Waea Mai Tane Ma* (New Zealand Aids Foundation, 1997).

¹³ Kerekere, above n 4, at 24.

¹⁴ Kerekere, above n 4, at 25 and 178.

B Takatāpui in Te Ao Māori

Sexual diversity flourished in pre-colonial Māori society. There are many ways to show the existence and acceptance of takatāpui in pre-colonial and early-colonial days in te ao Māori. From language to stories to whakatauki to songs to carving, takatāpui were etched in every part of te ao Māori. Not only were takatāpui accepted, in some cases they were seen as a blessing from atua, crucial for the survival of Māori and celebrated.

1 Origin stories of takatāpui

(a) Hinemoa and Tūtānekai

Te Awēkotuku, and later Smith located the term takatāpui in Wīremu Maihi Te Rangikāheke's manuscript from the mid-nineteenth century of one of the most famous Māori love stories of Hinemoa and Tūtānekai. In the end, Hinemoa and Tūtānekai are married and have children, but their journeys as individuals show vibrant elements of queerness in pre-colonial Māori society.¹⁵ The story is said to have occurred approximately 400 years, in the 1300s, before Te Rangikāheke wrote his manuscript, long before British colonisers started colonising Aotearoa New Zealand.¹⁶

Hinemoa of Te Arawa is characterised as a beautiful, playful and headstrong woman.¹⁷ In the Victorian renditions of the story, Hinemoa falls in love with Tūtānekai when Tutākenai visits Hinemoa's village with his friend Tiki. Tūtānekai and Tiki return to live on Mokoia, in the middle of Lake Rotorua. Tūtānekai was of lower status and therefore deemed not a suitable match for Hinemoa by her family. Her family make efforts, such as removing all waka from the shore, to prevent Hinemoa from seeing Tūtānekai. However, Hinemoa, being the rebel she is, defies her family's orders, and finds a way to see Tūtānekai anyway. Hinemoa climbed the Ōwhata rock, dove into the cold night lake, and swam towards the tunes of Tūtānekai's flutes. Upon reaching Tūtānekai, Hinemoa and Tūtānekai are united and live together as lovers.¹⁸

¹⁵ Dean O'Rafferty "Queering Te Kore: Weaving together a takatāpui futurism from Witi Ihimaera's *The Uncle's Story*" (MA, University of Manchester, 2023) at 60; and Kerekere, above n 4, at 63-64.

¹⁶ Kerekere, above n 4, at 63.

¹⁷ Kerekere, above n 4, at 63.

¹⁸ Ngāhuia Te Awēkotuku "Hinemoa: Retelling a Famous Romance" (2001) 5 J. Lesbian Stud. 1.

Te Awekotuku, who is a descendant of Hinemoa, says that it did not seem complete that a woman in a tribal environment where men took the lead and initiative would do something like what Hinemoa did.¹⁹ She decided to read Te Rangikāheke's manuscript and discovered the story is not as simple as the Victorian era editors made it out to be.

The story, according to Te Rangikāheke's manuscript and Te Awekotuku is messier, more complex, and full of diverse sexualities and gender identities and expressions. According to Te Rangikāheke's manuscript, Tūtānekai had a "hoa Takatāpui" which was translated to mean an "intimate companion of the same sex".²⁰ Tūtānekai's hoa takatāpui was Tiki. Te Awekotuku's rendition of the story says Tūtānekai's relationship with Tiki was so close, intimate, and fulfilling, that Tūtānekai was:²¹

... nowhere near as impressed by Hinemoa as the romantic Victorian narrative had construed in Grey's English translation. The Te Rangikaheke version of this story, though recorded by a missionary-educated elder of noble birth, raises many questions about sexualities, relationships, and the nature of desire in the precontact Māori world.

Hinemoa presents herself as a warrior. Te Awekotuku argues that:²²

Hinemoa, the determined, valorous, superbly athletic woman – my ancestress – who took the initiative herself, swam the midnight water of the lake to reach him, and interestingly, consciously and deliberately masqueraded as a man, as a warrior, to lure him to her arms ...

which adds to Te Awekotuku's view that Tūtānekai was not heterosexual.

Te Awekotuku writes that Hinemoa is surprised by the fact Tūtānekai is not interested in her.²³ He does not pay her much attention. Instead, he is occupied by Tiki.²⁴ Tūtānekai and Tiki are shown to spend much of their time in each other's company hidden away from others. Te Awekotuku writes:²⁵

¹⁹ Te Awekotuku, above n 18, at 2.

²⁰ Te Awekotuku, above n 18, at 2; and O'Rafferty, above n 15, at 15.

²¹ Te Awekotuku, above n 18, at 2-3.

²² Te Awekōtuku, above n 8, at 37; Kerekere, above n 4, at 64; and Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, A148, 2022) at 5-6.

²³ Te Awekotuku, above n 18, at 9.

²⁴ Te Awekotuku, above n 18, at 5-6.

²⁵ Te Awekotuku, above n 18, at 5-6.

The men didn't seem to notice them at all; they were so absorbed with each other and their music; they'd glance at the two young women pleasantly enough, courteously play one or two tunes for Wai, and then get on with whatever they'd been doing. Often, they'd slip away into the flax, or swim far across the lake, or slope off to one of the hot springs hidden in the scrub. Moa puzzled over how the broad one kept his muscularity and fitness; he was never at the training ground. Perhaps he's a natural, she mused ... All the men she'd ever known, apart from her brother, had wanted her, sought out her laughter, competed for her smiles, even challenged each other for her touch. But not this one--which made her want him all the more.

Hinemoa feels so rejected by Tūtānekai, she questions if Tūtānekai has any interest in her. "He wasn't even aware of her; and probably not very interested, either. He probably didn't even like women", she wonders.²⁶

Aside from Tūtānekai's sexuality, Te Awekotuku describes Hinemoa in a manner atypical of a what was traditionally understood of women. She is often found imitating men. After Hinemoa swam to the island where Tūtānekai and tiki lived, Hinemoa is found bullying a young man at night time. Hinemoa is resting in a pond at night when she hears the sound someone pass by, so Hinemoa:²⁷

Imitating her father's taiaha training voice, she shouted, "Boy! Over here! I'm thirsty!" His eyes popped; he froze mid stride. The torchlight trembled; he nearly dropped his gourd.

"Ae? Who's there? Who are you?"

"Just a friend warming himself up. Hei aha. Put the hue over there, on the side."

Curious, the young man obeyed. Saw a hand come out, snatch the hue. Half emptying it into an unseen mouth. Then insolently throw it back, where it cracked, spilling against a rock, broken. He cursed.

Now he'd have to go and get another one and come all the way back; it was his night to do all the running around. A solo, lazy melody brought a smile to his finely boned face. Puzzled by

²⁶ Te Awekotuku, above n 18, at 9.

²⁷ Te Awekotuku, above n 18, at 9-10.

the unknown bather, but not that worried, he continued on his way. Moa wanted to howl with laughter. This was really funny; he didn't seem very bright.

She thought through her next move; what if her man didn't come down? It was like planning a skirmish. The steam rose all around her; she flexed her legs wide, worked her arms, slipped back behind a mossy boulder, fern leaves tickling her shoulders.

The same one came back, with another gourd, sweeping the ngawha with torchlight. Moa stayed fast, behind the rock. He filled the hue, passed by again. She sent her father's voice out, barking, "Boy! I'm still thirsty!"

She moved slightly out of the shadows, along the pool's side.

"I'm over here, come on, now!"

She thanked her ancestors for her husky, mannish tones.

Hinemoa's gender expression does not align with normative Pākehā femininity. Hinemoa embodies an androgynous gender expression that transcends the binary of masculine and feminine, challenging the notion that gender expression in pre-colonial Māori society was narrowly defined or restricted.²⁸

Although in the end Tūtānekai and Hinemoa are together, Te Awēkotuku and Kerekere contend Tiki was more than a friend to Tūtānekai. Many academics argue Tūtānekai loved Tiki so much, his heart belonged to Tiki. Kerekere writes "Tūtānekai may have loved Hinemoa but his heart belonged to Tiki, whom he called 'taku hoa Takatāpui'".²⁹ She adds "Tūtānekai missed Tiki so much that he moaned to his adoptive father, Whakaue; 'Ka mate ahau i te aroha ki tōku hoa, ki a Tiki'".³⁰ Kerekere translates this to: "I am dying for love for my friend, for my beloved, for Tiki."³¹

²⁸ Kara Beckford "Takatāpui: A Place To Start" (Internship Report, Ngā Pae o te Māramatanga, 2016) at 17.

²⁹ Kerekere, above n 4, at 64.

³⁰ Kerekere, above n 4, at 64.

³¹ George Grey *Ngā Mahi a Ngā Tupuna* (4th ed, Reed Publishing, Wellington, 1971) at 113; Kerekere, above n 4, at 64; and Clive Aspin "Hōkakatanga – Māori sexualities" (22 January 2019) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz>.

The story of Hinemoa, Tūtānekai and Tiki clearly demonstrates the existence of takatāpui in pre-colonial Māori society. Their story is known widely within Māori communities as a heterosexual love story but as discussed above, Te Rangikāheke's manuscripts illuminate a story rich of queerness. Kerekere says that:³²

Although Te Arawa has not issued a proclamation, the story of Tiki is not told in the official version of this love story. To deny that Tūtānekai and Tiki had an intimate relationship would cast aspersions on the validity of Te Rangikāheke's work which has not been in dispute otherwise.

(b) Wairaka

Transgender Māori men claim their title whakatāne from the town Whakatāne. Māori ancestor, Toi-he-huatahi, later known as Toi-kai-rakau, arrived at Kākahoroa in the 1300s searching for his grandson Whatonga. However, after failing to find Whatonga, Toi-he-huatahi settled in the area and created a village in a place now called Whakatāne Heads. About 200 years after Toi-he-huatahi created his village, the Mataatua people, travelling in a waka (ocean voyaging canoe) arrived at what was then Kākahoroa.³³

Once landed at the beach, the men left the waka to explore higher land while the women remained in the waka. During the absence of the men, a high tide drifted away the waka with the women. Ngāti Awa and Tūhoe believe Wairaka, daughter of the captain Toroa, recited a karakia (prayer) to their Atua (gods) in which she sought to transform to and to get the abilities, and strength of men.

Wairaka recited the prayer that contained the phrase “Ka whakatāne ake ahau i a au” translated to “I will make myself like a man”. Wairaka defied the tapu that forbid women from paddling a waka and acted the part of a man.³⁴ Ngāti Awa and Tūhoe believe the Atua blessed Wairaka with strength, with which she paddled the waka, preventing it from crashing against the rocks and brought it to safety to a landing.

³² Kerekere, above n 4, at 64.

³³ Kerekere, above n 4, at 64-65.

³⁴ “The lady on the Rock” Whakatane District: Everything under the sun <www.whakatane.com>.

The Mataatua people created a settlement in the area called Whakatāne.³⁵ Whakatane now means “to be like a man” and is the term some transgender Māori men use to identify themselves.³⁶

The story of Wairaka reflects gender diversity in pre-colonial Māori society, though not within the rigid frameworks used to define trans identities in Pākehā contexts. Takatāpui identities do not mirror Pākehā conceptions of queerness, and these divergences are both expected and culturally grounded. Wairaka’s transformation does not neatly align with Pākehā conceptions of transgender men, but it subverts the cis-heteronormative understanding many have of gender identity and expression. It demolishes the strict binary of gender identities and demonstrates the ability for people to move away from the gender they have to the gender they are, want, or need.

Wairaka’s story shows in te ao Māori, there was room for Māori to be more than cisgender, and the openness and willingness to embrace gender fluidity. Takatāpui held recognised roles in te ao Māori, which were at times vital to the survival and wellbeing of their communities. Wairaka prayed for a blessing in a desperate time of need, and Atua blessed her and her people with a power that brings cis-heteronormative understanding many have of gender identity and expression into question.

Additionally, this reinforces Kerekere’s point that takatāpui draw their whakapapa from their Atua and are a gift, a blessing and a taonga in te ao Māori.³⁷

(c) Tongameha

There is another such story of changing genders, the story of Tongameha, a tipua who had the ability to change form and gender, and of Tāwhaki, an ancestor.³⁸ Tāwhaki was on a journey when he encountered Tongameha who shapeshifted from a male form to that of a beautiful female and began flirting with Tāwhaki.

³⁵ O’Rafferty, above n 15, at 14-15.

³⁶ Kerekere, above n 4, at 65.

³⁷ (5 August 2021) 753 NZPD 4345; and Elizabeth, above n 4, at 81-82.

³⁸ Kerekere, above n 4, at 65.

Anthropologist and historian Hirini Moko Mead wrote:³⁹

Engari inaianei kua whakangāwari i tōna reo, kua whakarekareka, ka tīmata ia ki te whakato i a Tāwhaki; ‘Tāwhaki e, titiro mai. He wahine ātaahua ahau. Titiro mai ki aku kamo anō ko te moana. He tangata mate wahine koe, Tāwhaki e. Titiro mai ki aku hope e hurahura atu nei. Tāwhaki anei to kai! Āhahā, haramai kia awhitia koe e ahau.

Translation:⁴⁰

Instead he lowered the volume – softened it, sweetened it - and began to tease Tāwhaki: “Tāwhaki, look this way! I am a beautiful woman. Look at my eyelashes, they are like the sea. You like women, don’t you Tāwhaki! Look at how my hips sway. Tāwhaki, here is what you get. Ahaha! Come here so I can embrace you!”

Those who fell into Tongameha’s trap were turned to stone.⁴¹

2 Carving

Beyond origin stories, evidence of takatāpui in pre-colonial Māori society can be found in carving. Gender and sexuality researcher Dean O’Rafferty says in te ao Māori:⁴²

... sexual activity was natural and not shameful. The sexual union between Ranginui and Papatuanuku – the sky and earth – was what created the world, after all. Sexual activity was represented in carvings, in which figures would have genitalia on full display, sometimes in acts of intercourse.

O’Rafferty uses the example of a wakahuia (treasure box) from mid eighteenth century as an example of this. The waka huia, now held in the British Museum, depicts eight male figures engaging in various forms of penetrative sex with each other.⁴³

³⁹ Hirini Moko Mead *Ko Tāwhaki Nui-a-Hema: Āna Mahi Whakahirahira* (Reed Publishing, Auckland, 1996) at 45.

⁴⁰ Moko Mead, above n 39, at 45.

⁴¹ Moko Mead, above n 39, at 45.

⁴² O’Rafferty, above n 15, at 16.

⁴³ Jordan Harris *Takatāpui: a Place of Standing* (Oratia Media, Auckland, 2016) at 39.

While submitting evidence in the Mana Wahine claim, Māori and indigenous development researcher Byron Rangiwai told the Waitangi Tribunal (Tribunal) that:⁴⁴

... proof of non-heterosexual relationships in pre-colonial Māori society existed in carvings, many of which were destroyed by missionaries or taken away to museums in Europe ... but one striking artefact which has survived is a mid to late 18th-century feather box or treasure box (papahou) held at the British Museum. This papahou is made up of sexual poses ...

Rangiwai says that colonisation erased details of sexual and gender diversity and the acceptance of it in te ao Māori has been marginalised in historical records.⁴⁵

The British Museum, speaking about the papahou, says:⁴⁶

... the late 1700s early European explorers did record sexual practices between males in the eastern Pacific region. European missionaries and colonial officials in the following centuries strongly discouraged such activities. Today in parts of modern Polynesia, non-Western models of gender identity remain an accepted part of life.

The British Museum added the papahou “blurs sexual boundaries and gender roles”. Although colonisers and some academics attempted to erase any evidence of takatāpui in pre-colonial Māori society, carvings such as this one prove their viewpoint wrong.⁴⁷

The British Museum wrote that “This papahou is part of our Desire, Love and Identity Object trail, showcasing objects from the Museum which give glimpses into LGBTQ+ experiences from around the world”, again reinforcing that takatāpui existed in pre-colonial Māori society, and not only did they exist, but according to the British Museum the “papahou, would have been used to hold a high-ranking person’s most cherished personal ornaments: amulets, pendants, and combs and bird feathers worn in the hair”, showing that takatāpui were not a hidden part of Māori society but visible at the highest levels of Māori communities.⁴⁸

⁴⁴ Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, A146, 2022) at 6.

⁴⁵ Waitangi Tribunal, above n 44, at 5.

⁴⁶ “Desire, love, identity: exploring LGBTQ histories” The British Museum <www.britishmuseum.org>.

⁴⁷ “Desire, love, identity: exploring LGBTQ histories”, above n 46.

⁴⁸ “Desire, Love and Identity Object trail” (15 August 2023) The British Museum Facebook <www.facebook.com/britishmuseum>.

This point is laboured further by Māori academic Ella Henry who told the Tribunal in the Mana Wāhine claim that:⁴⁹

We are certain that sex, and sexual relations, were considered to be extremely important in traditional Māori society ... Māori sexuality, and its associated beliefs and practices, were fundamentally different from those of the 19th Century colonisers. It was not bound by the same social prohibitions, nor was it a means for men to control women's lives, bodies and reproduction.

This treasure box is not the sole example. Other carvings also depict takatāpui. Writer Heeni Collins told the Tribunal in the Mana Wāhine claim that:⁵⁰

Genitalia were often depicted in ancestral carvings, as our tupuna reflected the rich reality of life, in an open and down-to-earth manner, in a way which celebrated the sexuality, reproductivity and divinity of both tāne and wāhine. The arrival of Victorian attitudes and judgments brought over from England led to the destruction of many of these carvings.

Collins' viewpoint resonates with O'Rafferty, who says:⁵¹

The imposition of Victorian morality caused a disruptive change to Māori culture in the late-nineteenth century. Sexual organs in carvings were destroyed and Māori traditions tainted with apparent indecency were erased. Sexual activity was now confined to heterosexual marriage and procreation ...

3 Language as insight into culture

Language offers a profound window into cultural values and worldviews. Kerekere argues that te reo Māori, being largely gender-neutral in structure, allows for more fluid understandings of identity. For example, the personal pronoun "ia" refers to both "he" and "she," which stands in contrast to the rigid gender distinctions enforced by many Western

⁴⁹ Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, A63, 2021) at 17.

⁵⁰ Waitangi Tribunal *Mana Wāhine Kaupapa Inquiry* (Wai 2700, A108, 2022) at 9.

⁵¹ O'Rafferty, above n 15, at 17; and Tony Ballantyne *Entanglements of Empire: Missionaries, Māori, and the Question of the Body* (Duke University Press, Durham and London, 2014) at 140.

languages. This does not imply a complete absence of gender binaries in Māori thought, but it suggests that gender was not as linguistically central or hierarchically imposed.

Māori scholar and politician Āpirana Ngata and others have pointed out that te reo Māori relies on context rather than gendered grammar to determine meaning. As Kerekere notes, words such as kuia (female elder) and koro (male elder) are exceptions that show gender can be marked where culturally significant. Kerekere notes there are:⁵²

... no individual words existed for the terms of ‘mother’, ‘father’, ‘wife’, ‘husband’, ‘daughter’, ‘son’, ‘sister’, ‘brother’, ‘aunty’, ‘uncle’ shows that the British nuclear family was not the standard in Māori society. Instead, generic terms were used: wāhine woman/wife; tane man/husband; kōtiro/hine/tamatahine girl/daughter; tama boy/son; tuahine sister (of a boy)/female cousin; tungāne brother (of a girl)/male cousin; matua parent and those of the same generation; kaumātua grandparents and those of the same or older generation.

The presence of such terms does not necessarily negate gender diversity; it shows that where gender was relevant, it could be specified. Yet, there are few gendered terms for other social roles, and many relational words, such as tuakana and teina, are not gendered but age based.

Further, the Abuse in Care Royal Commission Inquiry wrote:⁵³

Before the colonisation of Aotearoa New Zealand, Māori men and women were regarded as essential parts of the collective whole, with evidence of fluid conceptions of gender and sexuality in pre-colonial Māori society. Ancestral names could be gender neutral, emphasising the importance of whakapapa rather than gender. Sexual expression was integrated into various aspects of life, both spiritual and social, and was regularly discussed and depicted in carvings.

The imposition of Victorian morality led to the censorship and sanitisation of te reo Māori. Where the language was once sex positive, it was rendered prudish. Historian and author Stevan Eldred-Grigg says:⁵⁴

⁵² Kerekere, above n 4, at 42.

⁵³ Takatāpui, Rainbow and MVPFAFF+ experiences of abuse and neglect in care” Abuse in Care Royal Commission Inquiry <www.abuseincare.org.nz>.

⁵⁴ Stevan Eldred-Grigg *Pleasures of the Flesh Sex & Drugs in Colonial New Zealand* (Reed Publishing, Wellington, 1984) at 6-14.

In Māori society, sexual language was much more explicit. The most intimate details of private life were discussed with what appears to be complete freedom, and speech seems not to have been modified according to whether women or children were present. The result, to Pakeha ears, was a language that was richly obscene ...

O’Rafferty uses the example of the word *ai*, that was an all-inclusive word for “any kind of sexual activity”, but was later changed to exclusively mean “‘lie with female’ or ‘procreate’”.⁵⁵ O’Rafferty contends that linguistic revisionism defines terms in ways that exclude the possibility of same-sex sexual interactions, restricting their meaning to solely heterosexual experiences.

An example of such revisionism exists in the lyrics of a *waiata* that lament the death of Papaka Te Naeroa, a young man. The original version was published in 1853 in a compilation of traditional Māori songs and stories.⁵⁶ The lyrics read, “Ko te tama i aitia e tera wahine, e tera tangata” meaning “a youth who was sexual with that woman, with that man”.⁵⁷ However, Ngata’s rendition changed the lyrics to “Ko te tama i awhitia e tera wahine, e tera tangata” meaning “a youth who was embraced by that woman, by that man”.⁵⁸

O’Rafferty argues that the modern retelling neutralises the story of *takatāpui*, rendering it devoid of sexuality, therefore contributing to the “erasure of sexual identities”, an erasure that has “led to the idea such identities did not exist within pre-colonial Māori culture.”⁵⁹

Rangiwai reinforced this point as he told the Tribunal in the *Mana Wahine* claim that:⁶⁰

Evidence of bisexuality exists in a traditional *waiata*, published in an 1853 collection by George Grey, which mourns the loss of a young man ... An English translation reads: “A youth who was sexual with that woman, with that man”. However, when the *waiata* was republished in 1928, the word *aitia*, which means to copulate, have sex, or make love was changed to *awhitia*, which means to embrace, hug, cuddle, or cherish.

⁵⁵ Herbert Williams *A Dictionary of the Māori Language* (6th ed, R.E. Owen, Wellington, 1957) at 5.

⁵⁶ George Grey *Ko Nga Moteatea: Me Nga Haikirara o Nga Māori* (Robert Stokes, Wellington, 1853) at 125.

⁵⁷ George Grey, above n 56, at 125.

⁵⁸ Āpirana Ngata “Nga Moteatea” (1956) 65 JPS 152 at 212; and Aspin, above n 31.

⁵⁹ O’Rafferty, above n 15, at 18.

⁶⁰ Waitangi Tribunal, above n 44, at 5.

Kerekere emphasises the importance of recognising the intentional toning down of te reo Māori as it gives insight into how cis heteronormativity has seeped into the translations and interpretations of traditional Māori narratives.⁶¹

Kerekere adds that for:⁶²

... takatāpui, gender and sexual fluidity became no longer ‘tika’ when the mātauranga that made sense of it was suppressed or disguised. The loss of mātauranga then impacted on subsequent tikanga which, as this study shows, continues to impact on takatāpui today.

Tikanga can be described as the guidelines by which Māori live their lives and tika is what is just or right. Mead states that this “involves moral judgements about appropriate ways of behaving and acting in everyday life”.⁶³ Kerekere says the process of colonisation has altered tikanga, making it no longer tika to be takatāpui. Kerekere says “While colonisation imposed significant judgment against the overall sexual conduct of Māori, it also pathologised any gender or sexual fluidity that existed in traditional Māori society.”⁶⁴

C Criticism of Colonial Accounts of Queerness in Pre-Colonial Aotearoa

Historical cultural revisionism by some academics would have many convinced that takatāpui did not exist in pre-colonial Māori society. Although colonisers and missionaries have overwhelmingly denied the presence of takatāpui in pre-colonial and early-colonial days, some of their behaviour demonstrates the contrary.

Historian Judith Binney described colonisers and missionaries engaging in sexual interactions with Māori men. Binney adds that the sight of naked Māori men and boy was a “common problem amongst the earliest missionaries scattered throughout the Pacific.”⁶⁵

⁶¹ Kerekere, above n 4, at 43.

⁶² Kerekere, above n 4, at 43.

⁶³ Hirini Moko Mead *Tikanga Māori: Living by Māori Values* (Huia Publishers, Wellington, 2003) at 6.

⁶⁴ Kerekere, above n 4, at 43.

⁶⁵ Judith Binney *The Legacy of Guilt: A life of Thomas Kendall* (Oxford University Press, Christchurch, 1968) at 93-99, 100 and 169.

The most popular story is that of Reverend William Yate who partook in mutual masturbation and oral sex with approximately 100 Māori youths.⁶⁶ Yate was taken to court, where four sworn affidavits from Māori youth, Yate's pupils, were sent as testimony of Yate's sexual conduct with Māori youth. There was no evidence of anal sex so Yate could not be prosecuted for the crime of sodomy or otherwise known as buggery.⁶⁷

Aspin claimed Yate's actions and relationships were welcomed by locals demonstrating their openness to sexual diversity.⁶⁸

Binney says that Yate's homosexual experiences were not an anomaly.⁶⁹ Many missionaries such as Yate were exploitative of Māori and their openness to sexual interactions and sexual diversity.⁷⁰

Anthropologist Anne Salmond adds that colonisers and missionaries who paid for sexual interactions were repeatedly sent boys as opposed to girls by Māori.⁷¹ When the men complained about being sent boys, Māori responded by sending more boys. Their complaints of homosexuality were not taken seriously by Māori. Kerekere says "Rather than accept that homosexuality might be part of Māori life, Banks was adamant that 'Vice is not practised here'".⁷² Salmond says, "if this was not good evidence of homosexuality, it certainly pointed to a local sense of humour".⁷³

Despite knowledge of Yate's and other missionaries' conduct, some academics have sought to erase takatāpui from the history books.

⁶⁶ Kerekere, above n 4, at 61.

⁶⁷ Kerekere, above n 4, at 61.

⁶⁸ Clive Aspin "Exploring Takatāpui Identity Within the Māori Community: Implications for Health and Wellbeing" in Driskill Wqo-Li (ed) *Queer Indigenous Studies: Critical Interventions in Theory, Politics, and Literature* (University of Arizona Press, Tucson, 2011) 113 at 115; and O'Rafferty, above n 15, at 16-17.

⁶⁹ Binney, above n 65, at 115.

⁷⁰ Kerekere, above n 4, at 61.

⁷¹ Anne Salmond *Two Worlds: First Meetings Between the Māori and Pākehā 1642-1772* (Penguin, Auckland, 1991) at 251-252.

⁷² Kerekere, above n 4, at 61.

⁷³ Salmond, above n 71, at 251-252.

Psychiatrist Laurie Gluckman argued that homosexuality did not exist in pre-colonial Māori society and Aotearoa New Zealand.⁷⁴ Gluckman believed Māori viewed heterosexual attraction, roles and behaviours as a necessity and anyone who deviated from this norm was seen as transgressing Māori ways of being. As a punishment, those who were not heterosexual were “forsaken by the Gods” and alienated and ostracised.⁷⁵

Te Awēkotuku refutes Gluckman’s emphasis on the requirement of compulsory heterosexuality for the purposes of reproduction, saying:⁷⁶

Sexuality was enjoyed in many forms. People chose partners of either sex for pleasure, and same sex love was not condemned or vilified. Continuing one’s line – having children – was nevertheless a priority. High performance and erotic skill were greatly admired, and accomplished individuals, both male and female, feature prominently in the chant poems of their time, their physical attributes and relevant behaviours fondly detailed.

Gluckman’s failure to locate references to homosexuality “as constructed in European terms” in Māori oral literature led Gluckman to assume Europeans introduced homosexuality to Māori.⁷⁷ However, many Māori elders told the Royal Commission on Social Policy that both lesbian and gay relationships existed in pre-colonial Māori society and that it was “more readily accepted than today”.⁷⁸

Male homosexuality researcher Manuel Arboleda and anthropologist Stephen Murray disagree with the view that homosexuality was introduced to Māori as a “European corruption”.⁷⁹ Unlike Gluckman, Arboleda and Murray say their failure to find references to

⁷⁴ Laurie Gluckman “Transcultural consideration of homosexuality with special reference to the New Zealand Māori” (1974) 8 RANZCP 121 at 121.

⁷⁵ Gluckman, above n 74, at 121-125; Douglas MacFarlane “Transsexual Prostitution in New Zealand: Predominance of Persons of Māori Extraction” (1984) 13 Arch. Sex. Behav. 301 at 308; and O’Rafferty, above n 15, at 35.

⁷⁶ Kerekere, above n 4, at 60; and Ngāhuia Te Awēkōtuku “Māori People and Culture” in Dorota Starzecka (ed) *Māori Art and Culture* (British Museum Press, London, 1996).

⁷⁷ Gluckman, above n 74, at 121; Kerekere, above n 4, at 60; and O’Rafferty, above n 15, at 35.

⁷⁸ The Royal Commission on Social Policy “Women and Social Policy Part 1 Māori Women” in The April Report, Vol II, Future Directions, Report of the Royal Commission on Social Policy Te Kōmihana A Te Karauna Mō Ngā Āhuatanga-Ā-Iwi (The Royal Commission on Social Policy, Wellington, April 1988) 163 at 167.

⁷⁹ Manuel Arboleda and Stephen Murray “The Dangers of Lexical Inference with Special Reference to Māori Homosexuality” (1985) 12 J. Homosex. 129 at 131.

homosexuality in Māori oral literature “does not imply the absence of homosexual behaviour”.⁸⁰

On the contrary, archivist, curator, and member of Hedesthia, one of Aotearoa New Zealand’s first transgender social, support, and advocacy organisations, Leone Neil wrote that Māori transgender women and fa’afafine held important roles in indigenous communities, describing them as “ideal as counsellors and mediators.”⁸¹ She argued that transgender people existed in indigenous communities prior to colonisation, and that failing to recognise this history has deprived society of “cultural enrichment.”⁸²

Australian chemist and author Douglas MacFarlane also challenges Gluckman’s view, though on different grounds. MacFarlane notes that although early accounts of Aotearoa New Zealand did not include mentions of homosexuality, the literature in surrounding Pacific nations such as Tahiti, Samoa and Hawaii held a wealth of vocabulary that referenced queerness. MacFarlane suggests that this regional linguistic context implies the likely existence of similar concepts within Māori culture.⁸³

O’Rafferty says, despite MacFarlane’s disagreement with Gluckman, both MacFarlane and Gluckman have racialised and reductionist views that verge on prejudicial understandings of Māori sexuality and gender.⁸⁴

O’Rafferty says:⁸⁵

Gluckman and MacFarlane’s analyses reflect the racialised prejudices common from the period. Both assume alcoholism played a part in Māori relationships in some way: causing sexual relations to turn violent, or absentee alcoholic Māori fathers causing their sons to develop homosexual tendencies from the lack of a father figure. Lesbianism was apparently completely alien to Māori; Gluckman anecdotally mentions unnamed Māori elders unfamiliar with the concept, while MacFarlane does not mention Māori lesbians at all.

⁸⁰ Arboleda and Murray, above n 79, at 131.

⁸¹ Will Hansen “‘Every Bloody Right To Be Here’ Trans Resistance in Aotearoa New Zealand, 1967-1989” (MA, Victoria University of Wellington, 2020) at 109.

⁸² Hansen, above n 81, at 109.

⁸³ MacFarlane, above n 75, at 307.

⁸⁴ O’Rafferty, above n 15, at 36.

⁸⁵ O’Rafferty, above m 15, at 36.

Although MacFarlane contests Gluckman's argument, he ultimately reinforces the view that homosexuality was introduced to Māori by Europeans. O'Rafferty says MacFarlane cites:⁸⁶

The rapid urbanisation of Māori after World War Two (which saw the urban Māori population rise from 26% in 1945 to over 80% by 1986) ... as another reason why homosexual Māori were mostly urbanised. If homosexuality was a European invention, then it was more likely found within the urban areas Māori migrated to.

The exploration in this section demonstrates that takatāpui have long existed within te ao Māori and pre-colonial Aotearoa New Zealand, deeply embedded in language, carvings, and ancestral stories. Carvings depicting diverse sexualities, stories, such as those of Hinemoa, Tongameha, and Wairaka, and language that resists binary and heterosexual constraints all point to a rich and complex cultural reality. Even the documented interactions between missionaries and Māori, often ignored or denied by colonial narratives, provide further evidence of Māori openness to sexual and gender diversity. Despite this, some academics, such as Gluckman, have engaged in historical revisionism, attempting to erase both the existence and legitimacy of takatāpui identities. Their distortions have not gone unchallenged. Māori scholars and activists continue to resist these narratives, reclaiming their cultural traditions and asserting that takatāpui identities are not only present, but were respected within te ao Māori. Through oral traditions, cultural artefacts, and ongoing scholarship, the place of takatāpui remains firmly embedded within Māori communities.

II Te Ira Takatāpui

At the heart of this section is the idea that te ira takatāpui embodies the whakapapa of diverse sexualities and genders deeply rooted in te ao Māori.

This section begins with a brief overview of the Māori creation story, tracing time back to the separation of Ranginui and Papatūānuku by their children. The creation story is presented to demonstrate how present-day Māori society has always been closely linked to the beginning through whakapapa.

⁸⁶ O'Rafferty, above n 15, at 36.

This section then examines te ira takatāpui demonstrating that that te ira takatāpui embodies the whakapapa of diverse Māori sexualities and genders. Exploring the lived experiences of takatāpui, this section then turns to demonstrates the resistance and cultural reclamation of te ira takatāpui.

A Māori Creation Story

Māori have a creation story that explains how the people and their environment came to be. That story demonstrates how whakapapa permeates from the beginning through generations to tie Māori to their Gods, the spiritual world, the people and the environment.

In the beginning there was Te Kore, the genderless void, the realm of potential that lay in a state of nothingness.⁸⁷ The journey from the nothingness to something, and Te Po (the long, great night; the darkness) to Te Ata (the dawn) to Te Ao (the light) is the story of how the Māori world was created.⁸⁸

Ranginui, the Sky Father, and Papatūānuku, the Earth Mother, held each other together in a tight embrace.⁸⁹ The space between Ranginui and Papatūānuku was narrow and filled with darkness, and their children were born into the darkness. The children longed for space and light. The children debated ways to create space and light, but it was Tāne Mahuta, the God of Forests, who forcefully separated their parents, leaving Ranginui above us and Papatūānuku under us.⁹⁰

Māui, the trickster demigod, fished Te Ika-a-Māui, North Island, from the ocean.⁹¹ Te Waipounamu, South Island came into being when Aoraki and his brothers froze at sea during a voyage to visit Papatūānuku. Their waka got stuck between the rocks. The brothers froze to

⁸⁷ Te Ahukaramū Charles Royal “Māori creation traditions” (4 March 2009) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz/>.

⁸⁸ Royal, above n 87.

⁸⁹ Royal, above n 87.

⁹⁰ Royal, above n 87.

⁹¹ Virtual Eye “Tales from the mythologies of Creation, Maui and Aoraki” (2 July 2012) YouTube <www.youtube.com/>.

stone on the waka, forming Te Waipounamu. The brothers formed Kā Tiritiri o te Moana, the Southern Alps. Aoraki as the tallest brother became the highest peak, Mount Aoraki.⁹²

Tāne Mahuta gave way to whiti mai te ra (letting the sun shine through). Light and life entered the world.⁹³ Tāne Mahuta covered his mother with forests, greenery, and bird life. Ranginui wept out of longing for Papatūānuku. His tears filled up the crevices and formed the creeks, lakes, rivers, seas, and oceans.⁹⁴ The tears also formed the mist.

Tawhirimātea was unhappy with the separation of the parents and stayed with his father. In rage against his brothers and to show love to his father, Tāwhirimātea plucked out his eyes, crushed them and threw them into his father's chest, creating the stars of Matariki.⁹⁵ He became the God of Weather, controlling the thunder and lightning, wind, clouds, and storms.⁹⁶ He blew from heaven to earth with fury. Tāwhirimātea, the blind god, feels his way through the sky, bringing us winds from different directions.⁹⁷

The other children, Tūmataunga, God of War and Human Activities, Tangaroa, God of Sea, Rongo, God of Cultivated Plants, and Haumia-tiketike, God of Wild and Uncultivated Food all played a part in making Aotearoa New Zealand habitable for humans.

The creation of the skies, oceans, mountains, trees, birds, and animals eventually led to the creation of people. Tāne Mahuta created the first human, Hineahuone, from clay at Kurawaka.⁹⁸ From Tāne Mahuta and Hineahuone came Hine-tītama, who later became Hine-nui-te-pō, the goddess of death, completing the cycle of life.⁹⁹

⁹² Virtual Eye, above n 91.

⁹³ Marcus Winter The Sandman “A Māori Creation Story in Sand – Ranginui and Papatūānuku” (19 May 2020) YouTube <www.youtube.com/>.

⁹⁴ Winter, above n 93.

⁹⁵ Auckland Libraries “Matariki [Ngā mata o te ariki, o Tāwhirimātea: The eyes of the god, Tāwhirimātea]” (1 May 2017) YouTube <www.youtube.com/>; and “Where did the name Matariki come from?” Museum of New Zealand Te Papa Tongarewa <www.tepapa.govt.nz/>.

⁹⁶ Winter, above n 93.

⁹⁷ Auckland Libraries, above n 95; and “Where did the name Matariki come from?”, above n 95.

⁹⁸ Te Ahukaramū Charles Royal “Papatūānuku – the land – Papatūānuku – the earth mother” (1 March 2009) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz/>.

⁹⁹ Hope Tupara “Te whānau tamariki – pregnancy and birth – Birth in Māori tradition” (1 June 2017) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz/>.

These gods are not distant figures, they are ancestors, and all Māori are linked to them through whakapapa. The gods, ancestors, land, sky, sun, air, rain, sea, flora, fauna, and people are interconnected through the sacred bond of whakapapa. Everything and everyone is linked back to Te Kore, and Ranginui and Papatūānuku.

B Whakapapa

Associate Professor at University of Waikato and kaupapa Māori academic Leonie Pihama explains whakapapa is crucial to Māori because whakapapa determines “who we are, where we are from, and how our many roles and responsibilities are grounded upon a relational worldview.”¹⁰⁰ It is why Pihama argues that whakapapa is the foundation for all aspects of te ao Māori.¹⁰¹

Takatāpui politician Benjamin Doyle affirms:¹⁰²

Whakapapa is understood as a guiding principle in Te Ao Māori that shapes our interactions with all things ... as we acknowledge that nothing exists in isolation, but is a product of its whakapapa.

Whakapapa, which is often conceptually understood in te ao Pākehā as genealogy, is by no means limited to people related through rigid genealogical structures. Whakapapa is an encapsulation of the vast relationships Māori have with “all animate and inanimate, known and unknown phenomena in the terrestrial and spiritual worlds.”¹⁰³ Unlike genealogy, whakapapa is expansive and fluid and transcends the cis-heteronormative nuclear understanding of families. The pepeha, which recites the connection between a person and the natural environment, such as mountains and rivers, as well as their waka, marae, whānau, hapū, and iwi, is an example of this point.

Pihama says:¹⁰⁴

¹⁰⁰ Leonie Pihama “Mana Wahine: Decolonising Gender in Aotearoa” (2020) 35 Aust. Fem. Stud. 351 at 355.

¹⁰¹ Pihama, above n 100, at 352-357.

¹⁰² Benjamin Doyle “Mana Takatāpui: Self-determination for queer rangatahi Māori” (MA, University of Waikato, 2023) at 10.

¹⁰³ Rāwiri Tanui “Whakapapa – genealogy – What is whakapapa?” (1 July 2015) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz/>.

¹⁰⁴ Pihama, above n 100, at 355.

Whakapapa, the cultural template through which we understand our descent and ancestral relationships, refers to a process of placing in layers, which reminds us that relationships between and amongst us as individuals and social groupings, are layered upon each other and extend as wide as our whānau and intergenerational connections reach.

Ngata affirmed the view that whakapapa is about layering experiences and relationships.

Ngata stated that whakapapa is:¹⁰⁵

the process of laying one thing upon another. If you visualise the foundation ancestors as the first generation, the next and succeeding ancestors are placed on them in ordered layers.

Kerekere wrote that although whakapapa is often loosely translated to genealogy, whakapapa literally means to place layers.¹⁰⁶

C Te Ira Takatāpui

Whakapapa is both a record of descent and a classificatory framework that organises all aspects of existence in te ao Māori, human, natural, and spiritual. It provides the structure through which ways of life, expressions of being, and forms of knowledge are positioned and understood. Within this expansive and relational system, te ira takatāpui is a strand of whakapapa, a distinct, culturally embedded way of life and being. Te ira takatāpui is an expression of culture, shaped and sustained by the intergenerational transmission. Just as te ira tāngata defines the human strand of whakapapa, and within it te ira tāne and te ira wāhine identify masculine and feminine expressions, so too can we recognise te ira takatāpui, the whakapapa strand through which Māori gender and sexual diversity are expressed and lived. This is a continuation of tikanga and mātauranga Māori that affirm takatāpui as legitimate descendants of atua and tīpuna.

Kerekere concurs, noting:¹⁰⁷

¹⁰⁵ Āpirana Ngata “Rauru-nui-a-toi lectures and Ngati Kahungunu origins” (Lecture presented to Victoria University of Wellington, 1972); and Tanui, above n 103.

¹⁰⁶ Kerekere, above n 4, at 46.

¹⁰⁷ Kerekere, above n 4, at 81-82.

As Māori, we claim our identity through whakapapa over countless generations of ancestors. Whakapapa places us within a whānau, hapū and iwi, which in turn connects us to marae and specific tribal areas on Papatūānuku, our earth mother. Because of this, whakapapa is central to takatāpui identity and spiritual connection to tupuna takatāpui. It is clear that fluid sexual intimacy and gender expression existed among Māori in pre-colonial and post-contact times and has continued ever since.

Pihama argues all things in te ao Māori belong to whakapapa and all people, things and ideas in te ao Māori have a whakapapa. Doyle states that “If we are to hold true that all things belong to a whakapapa, it follows then that there is a whakapapa of takatāpui identities and narratives”, and that te ira takatāpui reaches as far back as the ancient god at the beginning of time, Te Kore, from which all things emerge.¹⁰⁸

Takatāpui today draw their whakapapa back to their ancestors and gods. It is that whakapapa, that connection, that ability to lean into the past and pull forward, that enables takatāpui to keep their cultural expression alive. The whakapapa this thesis is primarily concerned with is the whakapapa of that cultural expression and the way of life and being. As scholars such as Pihama, Aspin, Kerekere and Te Awekotuku have shown, takatāpui have always held a place within the cultural and spiritual architecture of te ao Māori, evidencing a worldview that honours diverse expressions of sexuality and gender identity.

This thesis argues that colonisation violently disrupted this specific strand of whakapapa, not only erasing knowledge of takatāpui but interrupting the cultural, spiritual, and social ways through which takatāpui belonged. The disruption of te ira Takatāpui was the disruption of a way of life. Without that strand of whakapapa, takatāpui would not have access to this cultural expression, nor would they be able to retrieve it. While all things in te ao Māori have whakapapa, this thesis does not argue that the mere fact of categorisation renders something a taonga. It is this strand of whakapapa, the one that ties takatāpui today to their tūpuna, to the gods, to the beginning of Māori society, and to a culturally grounded way of being that is taonga. It is this living whakapapa, this ancestral and ongoing expression of takatāpui identity and culture, that must be recognised and restored and the disruption of which must be redressed.

¹⁰⁸ Doyle, above n 102, at 10.

Te ira takatāpui is commonly and incorrectly understood as intersectional identity.¹⁰⁹ Although this view recognises that parts of one’s identity such as their gender, sexuality, race, ethnicity, nationality, and social class intersect to paint the whole image of a person, they remain separate and independent in how they manifest within a person.¹¹⁰ Factors such as gender, sexuality, race, ethnicity, nationality, and social class are treated as separate components of identity. The only time these identities seem to interact in an intersectional identity is to inform compounding oppression. It recognises that, for example, while a white lesbian woman is targeted by homophobia and sexism, a Black lesbian woman is targeted by racism in addition to homophobia and sexism. Still, in this worldview, the oppression does not become one, and each of these identities and oppressions can be experienced independently of one another.¹¹¹

Such an understanding of one’s identity is fundamentally at odds with te ira takatāpui.¹¹² One cannot be takatāpui if they are not Māori, and thereby Māoritanga, first, does not intersect with queerness and second, is omnipresent for takatāpui. Being Māori is a prerequisite to being takatāpui. O’Rafferty asserts “For takatāpui Māori, whakapapa influences their identities as queer people along with their Māori identity, while connecting them with the past histories and lives of those who came before”.¹¹³

Pihama echoes O’Rafferty as she writes:¹¹⁴

... there is a strong support for using Māori terms, such as takatāpui, to locate ourselves fully and to highlight the interconnectedness of how we see our sexual identity, gender identity and cultural identity... The vast majority of those who shared their thoughts spoke of the term ‘takatāpui’ as a positive way of seeing themselves in a cultural worldview.

1 Takatāpui on te ira takatāpui

¹⁰⁹ Doyle, above n 102, at 9.

¹¹⁰ Doyle, above n 102, at 9.

¹¹¹ Doyle, above n 102, at 9.

¹¹² O’Rafferty, above n 15, at 12.

¹¹³ O’Rafferty, above n 15, at 12.

¹¹⁴ Leonie Pihama and others “Honour Aotearoa Project” (Health Research Monograph 3, Te Kotahi Research Institute, University of Waikato, 2020) at 24.

One takatāpui shared:¹¹⁵

For me it actually reinforces that we've always been here because it's our language embedded in our culture, it is and does reinforce whakapapa. Takatāpui, like a lot of our words in the Pacific so fa'afafine, fakaleiti, mahu, for me what they do is place us within a cultural context that's undeniable ... way pre colonization, so that's what it reinforces for me is that we've existed forever.

Despite takatāpui being an identity that many queer Māori feel properly captures who they are, there are some who feel that they cannot claim the identity of takatāpui because they feel they are not Māori enough. Kerekere writes that:¹¹⁶

... takatāpui was a Māori identity that was still emerging into the mainstream. Māori with diverse gender identities, sexualities and sex characteristics generally became exposed to it through Rainbow networks and the work of organisations such as Tīwhanawhana Trust. Some Māori felt they could not claim it because they were not 'Māori enough' which suggests that the level of comfort with 'being Māori' directly correlates with the level of comfort with 'being takatāpui.'

Other academics emphasise that despite takatāpui being a term in te reo Māori that fully communicates what the identity means, the lack of one's ability to communicate how they feel and who they are in te reo Māori does not preclude them from being takatāpui. They note:¹¹⁷

The term takatāpui is not a Māori translation of an English term. It has its own integrity and meaning which people may learn and embrace when they claim it. By claiming takatāpui identity, takatāpui recognised that their diverse gender identities, sexualities and sex characteristics were part of what made them Māori.

The lack of ability to communicate one's whakapapa in te reo Māori does not mean they are not Māori and therefore not takatāpui or they are less Māori and therefore less takatāpui. Takatāpui researcher Rebekah Laurence writes:¹¹⁸

¹¹⁵ Pihama and others, above n 114, at 24-25.

¹¹⁶ Kerekere, above n 4, at 176; and Tīwhanawhana is a takatāpui community group based in Wellington.

¹¹⁷ Kerekere, above n 4, at 151.

¹¹⁸ Rebekah Laurence "'You're not coming out – you've been there all along and just no one's looked': Māori LGBT+ youth and identity exploration" (MSocSc, University of Waikato, 2020) at 90.

... we are Māori because of our whakapapa. No amount of knowledge (or lack thereof) of te reo Māori me ōna tikanga can separate us from being Māori. Our takatāpui identities are also part of our whakapapa. Because colonial processes have robbed Māori people of our language and culture, many rangatahi takatāpui (including myself) are not fluent in te reo Māori. While fluent speakers of te reo Māori can express aspects of their whakapapa using te reo Māori, we who are not fluent must endeavour to use and adapt the English language to express our own whakapapa until such a time as we are fluent in te reo Māori.

Mere intersectionality stands contrary to the well-accepted concept that whakapapa connects and influences all things. It would be inconsistent to argue queerness can be separated from Māoritanga. Doyle states it is unnatural to separate queerness in isolation from Māoritanga. They say that to view Māoritanga and queerness “as intersecting suggests that they can come together at one time, and at another have no overlap or influence on the other.”¹¹⁹ Doyle asserts that te ira takatāpui cannot be disentangled from Māoritanga.

Experiences of takatāpui serve as testimony to this.

Alesha Adhar says:¹²⁰

... love identifying as takatāpui because it's the only kupu that really hit me as bringing my Māoritanga and my queerness and my nonbinary-ness together. It is the only kupu that feels right... There is only one thing that makes you Māori and that is your whakapapa. No one can take that away from you, no homophobe, no transphobe... can take away your Māoritanga.

Selena Pirika says “I am very proud of my Māoritanga. I’m not sure who I could be had it not been for my Māoritanga.”¹²¹

Indigenous Māori Health and Rights Research Investigator Kevin Haunui claims:¹²²

¹¹⁹ Doyle, above n 102, at 9.

¹²⁰ Alesha Adhar “Te Ao Takatāpui” (15 October 2021) YouTube <www.youtube.com/>.

¹²¹ Selena Pirika “Te Ao Takatāpui” (22 September 2021) YouTube <www.youtube.com/>.

¹²² National Library of New Zealand “E oho! Mana takatāpui” (21 December 2022) YouTube <www.youtube.com/>.

Perhaps takatāpui paved the way for gay liberation by just being who we are. Just being, knowing who we are. Knowing who our whanau are, knowing our whakapapa, knowing the ways of our world... we are Māori, and inextricably linked to being Māori.

In an OUTLine interview about being takatāpui, one interviewee said:¹²³

What takatāpui means to me is that it's a blend where you embrace both your culture and your sexuality. You need to embrace both of those aspects of yourself. Not just be one of the other, and then have those in harmony.

Another said it is "important to me that culture is mixed in with sexual orientation so that is encompasses you fully... they are not mutually exclusive. They have to be seen together", while another added that when their Māoritanga and queerness connect, it makes them feel "more complete."¹²⁴

Other takatāpui expressed it was their identity as takatāpui that made them feel stronger in their Māoritanga. They shared:¹²⁵

... takatāpui means for me a way to find a place in my Māori identity because I was brought up by my Pākehā grandmother and like my relationship with my dad who is the Māori side of my family hasn't been the strongest and I think my queerness was a way into that world for me, a way to start to legitimize myself as a Māori person. I think for us, the gay community, it's special because it gives us our own identity in Māori, you know the takatāpui is separate from the norm and we've got that understanding in our Māori community. Takatāpui have been around for centuries in the Māori community, goodness gracious, but I feel really comfortable that we have been given that kupu, that title as Māori to have our own stance as takatāpui nē.

There is ample lived experienced that te ira takatāpui is the embodiment of Māoritanga and queerness as one. For takatāpui it is inconceivable and impossible to separate and inspect the two independent of each other, which is consistent with Doyle's view that te ira takatāpui is not a mere intersection of Māoritanga and queerness.¹²⁶

¹²³ InsideOUT "Takatāpui – More Than Four" (4 March 2018) YouTube <www.youtube.com/>.

¹²⁴ InsideOUT, above n 123. .

¹²⁵ Leonie Pihama and others, above n 114, at 26.

¹²⁶ Doyle, above n 102, at 9-15.

Kerekere notes “Reclaiming whakapapa often means uncovering those layers to trace back into the past”, and takatāpui are not the first to reclaim their whakapapa through uncovering the layers.¹²⁷ Kerekere writes “Māori weavers may claim ancestry from the weavers of the past or direct descent from Hineteiwaiwa herself – the goddess of childbirth” and Te Whare Pora (house of learning for weaving and women’s arts).”¹²⁸ Takatāpui are analogously reclaiming their whakapapa and navigating their roots to their ancestors and gods. This is evidenced in that Māori:¹²⁹

... claim our identity through whakapapa over countless generations of ancestors. Whakapapa places us within a whānau, hapū and iwi which in turn connects us to marae and specific tribal areas on Papatūānuku, our earth mother. Because of this, whakapapa is central to takatāpui identity and spiritual connection to tūpuna takatāpui. It is clear that fluid sexual intimacy and gender expression existed among Māori in pre-colonial and post-contact times and has continued ever since. It was accepted without punishment and in spite of repressive English measures.

Laurence asserts:¹³⁰

... Māori inherit their gender and sexuality from our tūpuna [that is, our whakapapa] – it is part of our wairua. Therefore, rangatahi takatāpui cannot acquire being gay, queer, bisexual, or trans; these identities are already part of us. In exploring our gender and sexual identities, we discover aspects of our identities some of which may be embedded in our whakapapa.

O’Rafferty elaborates that through whakapapa, takatāpui can locate and connect with their ancestors, natural environment, and gods.¹³¹ O’Rafferty supports Doyle’s narrative that takatāpui draw their whakapapa from Te Kore. O’Rafferty writes:¹³²

Takatāpui belong in this narrative, as their whakapapa reaches back as far as the most ancient tūpuna. Takatāpui can also find themselves at the very beginning, through Te Kore – the

¹²⁷ Kerekere, above n 4, at 46.

¹²⁸ Kerekere, above n 4, at 46.

¹²⁹ Kerekere, above n 4, at 81-82.

¹³⁰ Laurence, above n 118, at 77.

¹³¹ O’Rafferty, above n 15, at 13-14.

¹³² O’Rafferty, above n 15, at 14.

genderless, fluid, primordial void from which all things and all potentiality descend. Oral traditions and stories demonstrate acceptance of a more fluid gender and sexuality before colonisation, and the word takatāpui has its origins in pre-colonial society. The transmission of these narratives, however, were violently disrupted upon the arrival of Europeans from the eighteenth century, leading to the loss of this history through disconnection from whakapapa, along with the loss of positive cultural, sexual and gender identity norms.

O’Rafferty asserts “Sexual diversity and acceptance flourished within pre-colonial Māori society.”¹³³

O’Rafferty adds:¹³⁴

Gender fluidity and non-conformity also feature in these narratives. The Mātaatua people tell of Wairaka, who asked the atua to grant her masculine strength to help guide her people’s waka (canoe) from a high tide. Wairaka gained that strength, and paddled her people to safety. The settlement they founded, which survives today, was named Whakatāne: ‘to become like a man.’ In modern times, this name has been adopted by Māori transmen.

Takatāpui echo this view.

Carym Wharerau, a young takatāpui, expresses that connecting with his te ira takatāpui strengthens his bonds with his ancestors. While expressing his te ira takatāpui through performing in the ballroom scene with poi, Wharerau expresses:¹³⁵

I definitely know that when I am using poi, it’s activating a lot of my femininity, it’s activating a lot of my tīpuna, it’s activating a lot of my mana ... so to bring that with vogue fem which is another sort of outlet that activates all four parts of me, it just feels ... ethereal ...

Wharerau believes:¹³⁶

¹³³ O’Rafferty, above n 15, at 14.

¹³⁴ O’Rafferty, above n 15, at 14.

¹³⁵ Carym Wharerau “Te Ao Takatāpui” (8 October 2021) YouTube <www.youtube.com/>.

¹³⁶ Wharerau, above n 135.

It's now a day and age where we're trying to figure out what actually our tūpuna want from us, and in my eyes, what they want from us is to live our truth, is to be ourselves, is to decolonise our binaries ...

Wharerau sees himself as an integral part of ensuring te ira takatāpui is restored, protected, cherished and passed on to the next generation in a stronger form than the form in which he received it. He says:¹³⁷

I want takatāpui people to grow up knowing they safe and in good hands. I want them to grow up knowing their tūpuna did all they could for them to be their true, authentic selves.

Another takatāpui shares being takatāpui means:¹³⁸

... fully embracing my whakapapa but I've always known and I wrote that in a takatāpui chapter that actually everything I am is a gift from my tūpuna; everything and all of it is about using all that talent, skills that I've been given to be the best that I can be as a representative of my tūpuna and that everything I achieve is actually about the love and nurturing that I got from my parents. But it's all grounded and knowing who you are and where you come from ...

2 Tupuna takatāpui

The term tupuna takatāpui refers to the ancestral figures and gods from whom takatāpui derive their identities and to whom they whakapapa back. Kerekere says there have been tupuna takatāpui who “who had fluid genders or sexuality or who embodied both female and male.”¹³⁹ However, colonisation and the resulting racism, sexism, homophobia, transphobia, and anti-queerness has destroyed knowledge of tupuna takatāpui and the songs, dances, art, and practices that stored and protected that knowledge for future generations.

Kerekere insists through whakapapa, takatāpui may draw upon the “historical resilience developed by our tūpuna takatāpui who were accepted for their fluid gender and sexuality in

¹³⁷ Wharerau, above n 135.

¹³⁸ Leonie Pihama and others, above n 114, at 36.

¹³⁹ Kerekere, above n 4, at 46; Te Awekōtuku, above n 8, at 37; and Mark Henrickson “Kō Wai Rātou: Managing Multiple Identities in Lesbian, Gay and Bisexual New Zealand Māori” (2006) 21 N. Z. Sociol. 247 at 259.

order to face discrimination; to show leadership, to survive and thrive.”¹⁴⁰ Nonetheless, there is acceptance that to fully identify, locate, embrace, and restore tūpuna takatāpui in te ao Māori, we must “further dismantle the tools of colonisation”.¹⁴¹

Kerekere adds “Because the forces of colonisation which affect Māori identity also affect takatāpui identity; claiming takatāpui was an act of decolonisation.”¹⁴² This act of reclaiming is a response to the systematic erasure of takatāpui presence and belonging. Colonisation suppressed individual expressions of te ira takatāpui and fractured the very strand of whakapapa through which takatāpui trace their cultural identity and continuity. The historical record of tūpuna takatāpui is now interrupted, not because takatāpui did not exist, but because colonisation sought to silence and eradicate their place within te ao Māori.

This thesis argues that despite this rupture, the right to reclaim te ira takatāpui endures. Reclamation is a decolonising practice, justified by the knowledge that the absence of comprehensive records is itself a colonial outcome. The gaps in historical visibility do not invalidate takatāpui identity or their ancestral connections. The whakapapa we are primarily concerned with is the whakapapa of a cultural expression, a way of life that has been nurtured by takatāpui across generations. It is that connection, to tūpuna, to atua, that takatāpui draw forward today. Without that strand of whakapapa, takatāpui would not be able to keep their cultural expression alive, nor retrieve it. That is why its restoration is necessary.

There is recognition that while we continue to exist within colonial structures that were imposed on Māori in the process of colonisation that actively promote anti-queerness and extend protection to those who practise anti-queerness, it is implausible to fully restore te ira takatāpui. If takatāpui are not safe to be themselves, then they are not safe to reclaim their whakapapa. Kerekere writes that “While the whānau may still be a strong way of connecting to Māori culture, parts of that society may no longer accept takatāpui behaviour.”¹⁴³ Consequently, due to prejudice, shame, and stigma, “Often this means that whānau do not accept their takatāpui members”.¹⁴⁴

¹⁴⁰ Kerekere, above n 4, at 82.

¹⁴¹ Kerekere, above n 4, at 82.

¹⁴² Kerekere, above n 4, at 175.

¹⁴³ Kerekere, above n 4, at 143.

¹⁴⁴ Kerekere, above n 4, at 143.

Lateral violence primarily occurs within groups who experience oppression from an external source. A group of researchers, Taylor-Jai Mcalister, Kris Rogers, Robert Brockman, Gawaian Bodkin-Andrew, and John McAloon wrote that “lateral violence can also be regarded as violence turned towards oneself or as a form of internalised colonialism,” and that it is “inextricably linked to processes of colonisation and assimilation.”¹⁴⁵

Researchers Theoni Whyman, Cammi Murrup-Stewart, Michael Young, Adrian Carter, and Laura Jobson add, “The tendency of Indigenous people to direct their frustration and anger, due to oppression, toward members of their own group is known as lateral violence. While settler-colonization is often attributed as the main cause of lateral violence.”¹⁴⁶

In the case of Māori, oppression by an external group, namely the British, led to the destruction of te ao Māori.

Whyman, Murrup-Stewart, Young, Carter and Jobson further explain:¹⁴⁷

Described initially in the post-colonial literature, lateral violence stems from oppression. The oppressors hold certain values and beliefs about themselves and those that they oppress. Over generations, the often unfavourable values and beliefs held by the oppressors toward the oppressed group can become internalized by the oppressed. This is known as internalized oppression and leads to feelings of inferiority, powerlessness, self-hate, resignation, and isolation. Internalized oppression can then manifest as lateral violence toward one’s self and other members of the oppressed group. The individual enacting lateral violence then becomes an oppressor, or sub-oppressor, and has internalized how the oppressor interacts in the world.

Lateral violence creates new hierarchies that reflect the oppressor’s ideal vision of how society should be structured. It empowers those placed at the top of this distorted power structure to oppress others within their own group. The combination of internalised colonial values and an empowered position within the group allows those at the top to enforce colonial beliefs onto others.

¹⁴⁵ Taylor-Jai Mcalister and others “The interactive effects of Indigenous identity and lateral violence on youth adjustment in Aboriginal and Torres Strait Islander children” (2024) 76 *Aust. J. Psychol.* 1 at 1.

¹⁴⁶ Theoni Whyman and others “‘Lateral violence stems from the colonial system’: settler-colonialism and lateral violence in Aboriginal Australians” (2023) 26 *Postcol. Stud.* 183 at 183.

¹⁴⁷ At 183-184.

Within Māori communities, those often positioned at the top of these internal hierarchies, namely, cisgender heterosexual men, have been known to perpetuate colonial ideologies against other Māori, particularly women and takatāpui. An example of this is self-appointed Apostle Brian Tamaki, who, despite being Māori, has used his position as a cisgender, heterosexual man to target and attack takatāpui and queer people in Aotearoa New Zealand.

Mcalister, Rogers, Brockman, Bodkin-Andrew and McAloon add that “experience of lateral violence is particularly damaging as it involves a threat to one’s identity and represents a form of cultural rejection from their in-group.”¹⁴⁸ This is evident in the experiences of takatāpui, who were once integral to Māori communities but have increasingly found themselves subjected to rejection from their own families and wider whānau.¹⁴⁹

A woman told Kerekere that her:¹⁵⁰

... cousin was beaten, belted. He was always cooking, cleaning. I remember my older cousin saying, ‘get outside and clean the hangi pit.’ Yet they didn’t mind eating his beautiful kai. He could only hold his own for so long. Sadly, my cousin died in his thirties. And I truly believe it was through...dying inside. He was not nourished and he was not nurtured ...

To allow takatāpui to reclaim their whakapapa, we must eradicate anti-queerness. Takatāpui are trapped in a paradox because “when gender and sexual fluidity in the past is hidden, it has a negative impact on the present.”¹⁵¹ Kerekere claims that knowledge of whakapapa imbues strength and confidence that if takatāpui were accepted by the gods and ancestors, then they should be accepted by Māori and non-Māori today. Kerekere states “Knowing who they were as Māori was critical for them knowing who they were as takatāpui.”¹⁵²

Speaking in support of the Conversion Practices Prohibition Legislation Bill, Kerekere reiterated her view that takatāpui were accepted by the ancestors saying “The weaponising of

¹⁴⁸ Mcalister and others, above n 145, at 2.

¹⁴⁹ Kerekere, above n 4, at 143.

¹⁵⁰ Kerekere, above n 4, at 143.

¹⁵¹ Kerekere, above n 4, at 143.

¹⁵² Kerekere, above n 4, at 151.

religion and spirituality has a particular impact on takatāpui, when our ancestors would have accepted us for who we are.”¹⁵³

(a) Rangatahi takatāpui

Although in parts of Māori communities there is denial that takatāpui are an integral part of ta ao Māori, many rangatahi takatāpui are staunch and confident in their te ira takatāpui.

Nathaniel, takatāpui, told Kerekere:¹⁵⁴

Takatāpui means that first and foremost, I’m Māori. Then I’m everything else but together I am everything I am. I am queer, I am Māori and I am tangata ira tane. And I have this entire community backing me up whenever I use that identity.

Kassie Hartendorp told Kerekere:¹⁵⁵

Nothing has really felt right until takatāpui, because to me takatāpui is about whakapapa. It is about connection to a huge history and trajectory of whānau and of amazing people and communities who have always existed. That feels like it really links me into that history as well and into that whakapapa.

Hartendorp adds:¹⁵⁶

... the kupu takatāpui has always meant more than this Pākehā idea that we are who we are, we choose who we love or our identity, in this very kind narrow sense. Takatāpui has always been more than that for me. It has been about whakapapa. And it is about whakapapa, yes, who you come from, but it’s also the people who nourish you and feed you and look after you... Takatāpui has always been about the collective. It’s about bigger than just us as individuals. It goes beyond space and time. It stretches into the past, into the present, but also into the future as well. We often don’t talk about how takatāpui also form our own whakapapa and our own whanau and our own families ...

¹⁵³ (15 February 2022) 757 NZPD 7453.

¹⁵⁴ Kerekere, above n 4, at 144.

¹⁵⁵ Kerekere, above n 4, at 144.

¹⁵⁶ National Library of New Zealand, above n 122.

Morgan told Kerekere the “diversity of Māori who hold this identity is I think really beautiful. For me, it’s a great word, because I don’t have to be specific about how I identify”.¹⁵⁷

Although the denial of the place of takatāpui in te ao Māori is a bleak remnant of colonisation, the confidence and assurance of rangatahi takatāpui brings hope to the journey of restoring te ira takatāpui in te ao Māori. Many rangatahi takatāpui exist and occupy the world in a way that is unapologetic about who they are, and for them “whakapapa becomes a defence against those who would discriminate today”.¹⁵⁸

There are pockets of spaces where older generations of takatāpui are finding a sense of belonging. Kayla Rairne, who is whakawāhine, has found comfort in preforming roles that are typically performed by women on Marae and in doing so, has found she belongs in her whanau. Whakawāhine is subsumed by Kerekere’s definition of takatāpui and refers to transgender women.¹⁵⁹ Rairne shares that whakawāhine are present at most marae. It is a common occurrence. Rairne claims “When you go to a marae, you see one of us.”¹⁶⁰

Rairne adds:¹⁶¹

Where are we? We are in the kitchen. We are we the aunties. We are workers. We don’t argue about things at the marae. We get up and do it, and we are respected for it. Just because I am trans does not mean I do not have feelings about where I come from, who I am and who I am a grandchild of for instance.

Older generations of takatāpui warn the fight for liberation is not over. Future generations of takatāpui and other queer communities will need draw strength of tupuna takatāpui to pick up and baton and keep running into the future. Haunui imagines “this is a never-ending battle of recognition of who we are”, sending a message to the younger generations to “think about

¹⁵⁷ Kerekere, above n 4, at 144.

¹⁵⁸ Kerekere, above n 4, at 38.

¹⁵⁹ Kerekere, above n 4, at 24-25 and 178.

¹⁶⁰ *Re: news* “Decolonising gender and sexuality in Wellington city” (24 April 2022) YouTube <www.youtube.com/>.

¹⁶¹ *Re: news*, above n 160.

how to respond to messages which look isolate us, which look to impose social conditions which are not our social conditions, which is not our social normalcy...”¹⁶²

Te Awēkotuku sharing a similar message notes “the fight will never end... we must never take stuff for granted ... we fight this battle with joy, because we have tasted that freedom.”¹⁶³

Te Awēkotuku charges takatāpui with a responsibility:¹⁶⁴

We have enjoyed the privilege of civil union. We have changed our passports. We have been able to marry each other. So it’s from, I think, a much stronger position, we continue the fight. But until everyone one of us is safe, the fight will continue. I think of the kids living in rural areas, in the regions, and how vulnerable they are. And is their only choice to come to the metropolitan cities? What future is there for them?

Taking account of the sharing of the likes of Haunui and Te Awēkotuku, younger takatāpui show a commitment to carry the responsibilities to protect the future of takatāpui. New generations of takatāpui are more confident and resourced in their activism, and have the benefit of the activism of multiple generations of takatāpui behind them.

3 Politicians on te ira takatāpui

Squarely relevant to the concept of activism is politics. The idea te ira takatāpui is about whakapapa is widely accepted by politicians. Te ira takatāpui was criminalised in Parliament. It is therefore significant to acknowledge that the very institution which once criminalised takatāpui now recognises it as an identity that predates both colonialism and the establishment of Parliament and affirms its integral place within Aotearoa New Zealand and te ao Māori.

Te Pāti Māori co-leader Rawiri Waititi, while speaking in favour of banning gay and gender conversion therapy noted Māori have always “celebrated our diversity as Te Ao Māori”,

¹⁶² National Library of New Zealand, above n 122.

¹⁶³ National Library of New Zealand, above n 122.

¹⁶⁴ National Library of New Zealand, above n 122.

emphasising that all Māori, including takatāpui “come with our own whakapapa, our own upbringings, and our own identities, but at the end of the day we are all whānau.”¹⁶⁵

Waititi emphasised that:¹⁶⁶

Conversion therapy is a direct attack on our whakapapa. It fails to uphold our mana motuhake, to be who we are, and does not meet our aspirations of mana orite—equality for all people. We will always support whānau to be who they are. Conversion therapy, which tries to stop takatāpui from being who they are, has no place in Aotearoa.

Te Pati Māori holds a strong Māori mandate. In 2023 general election, Te Pati Māori won all but one Māori seat. Waititi’s speeches made clear that it is the position of Te Pati Māori that protecting takatāpui from conversion therapies that seek to erase their diverse sexual orientation or gender identity is protecting whakapapa from further erosion at the hands of colonial practises.

Speaking to the Green Party of Aotearoa New Zealand’s policies, Kerekere identified takatāpui rights as a te Tiriti o Waitangi (te Tiriti) issue.¹⁶⁷ She did so the premise that the destruction of te ira takatāpui and the suppression of the enjoyment of sex were colonial importations introduced by missionaries. Kerekere stated, “we understand a colonial history that brought missionaries to our country” who told Māori that “enjoyment of sex was wrong, that any kind of sexual fluidity was wrong, any fluidity in gender identity was wrong”.¹⁶⁸ Speaking in support of banning conversion therapy, Kerekere further emphasised “Along with trying to take away all of our language, all of our land, all of our resources, they also tried to steal that story and whakapapa from us.”¹⁶⁹

Arena Williams MP, speaking in strong support of banning conversion therapy, further endorsed this position, claiming :¹⁷⁰

¹⁶⁵ (5 August 2021) 753 NZPD 4351.

¹⁶⁶ (5 August 2021) 753 NZPD 4351.

¹⁶⁷ (5 August 2021) 753 NZPD 4344.

¹⁶⁸ (5 August 2021) 753 NZPD 4344.

¹⁶⁹ (5 August 2021) 753 NZPD 4351.

¹⁷⁰ (8 February 2022) 757 NZPD 7233.

... whether it's the denial of our reo or our sexuality and gender, Māori are living proof that intolerance of expression and identity damages not only the individual but their children, their whānau, and their whakapapa.

In tracing through te ao Māori with the insights of academics, activists, politicians, and takatāpui themselves, it is clear that te ira takatāpui is a cultural identity and a living expression of whakapapa, an enduring strand that binds takatāpui to atua, tīpuna, whenua, and communities. As this and the previous section have shown, takatāpui have always existed within te ao Māori, and their whakapapa affirms their place in it. The whakapapa this thesis is concerned with is the one that allows takatāpui to trace their identity, way of life, and cultural expression back to the origins of Māori as a people. This unbroken thread of identity is what takatāpui draw upon to retrieve and revitalise their ways of being and it is through this whakapapa that they have withstood generations of colonial disruption, continuing to hold firmly to their place in te ao Māori.

III Te Ira Takatāpui as a Taonga

Te ira takatāpui is a vital strand of whakapapa through which takatāpui articulate their gender and sexuality. It connects takatāpui to their tīpuna, atua and whenua, sustaining intergenerational identity, knowledge and belonging. Building on the preceding section, which established te ira takatāpui as a distinct strand of whakapapa, this section contends that te ira takatāpui satisfies both jurisprudential and cultural criteria to be recognised as a taonga under Article II of te Tiriti and the Treaty of Waitangi (the Treaty). It further argues that the Crown has a continuing obligation to actively protect it.

This argument is developed across three key parts.

First, it establishes that taonga, as protected under the Treaties, encompasses both tangible and intangible elements.¹⁷¹ Drawing on the recognition of language as a taonga, this section

¹⁷¹ For the purposes of this thesis, the term “the Treaties” refers collectively to both Te Tiriti o Waitangi and the Treaty of Waitangi. The term “Te Tiriti” denotes Te Tiriti o Waitangi, while “the Treaty” refers to the Treaty of Waitangi. The phrase “treaty jurisprudence”, as used in this thesis, encompasses the body of jurisprudence that has developed in relation to both texts, not solely the Treaty of Waitangi.

demonstrates that intangible aspects of te ao Māori, such as strands of whakapapa, can qualify as a taonga.

The second part examines why strands of whakapapa should be regarded as intangible taonga. Using analogical reasoning, particularly comparisons to te reo Māori and relevant Tribunal jurisprudence, as well as arguments advanced by iwi and the Crown, it demonstrates that strands of whakapapa meet established criteria for taonga.

Having established that strands of whakapapa can qualify as a taonga, the final part applies this reasoning to te ira takatāpui. It argues that te ira takatāpui is an expression of a cultural identity and way of life which warrants the full legal protection accorded to other taonga of Māori cultural interest.

A Intangible Taonga

Whakapapa, unlike pounamu, weaving, or tā moko, cannot be seen or held in the physical sense. There are things that can be seen, heard, held, or worn such as traditional markings, dances, and songs that represent whakapapa. There is also the environment including trees, seas, and mountains that people are connected to through whakapapa. However, whakapapa, the linkage between all things, remains intangible. When it comes to taonga, whakapapa sits closer to language than to pounamu and weaving.

Article II of te Tiriti reads:

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.

In the Ko Aotearoa Tēnei report, the Tribunal translates the expression “o ratou taonga katoa” to “all their valued customs and possessions’ or ‘all things highly prized’” and covers both tangible and intangible things.¹⁷²

¹⁷² Waitangi Tribunal *Ko Aotearoa Tēnei: A report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua* (Wai 262, Vol 2, 2011) at 441; Department of Conservation Report and Recommendation of the board of Inquiry into the New Zealand Coastal Policy Statement (1994) at [1.1.3]; *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA

The view that taonga, as stipulated in the Treaties, captures both tangible and intangible things is widespread. In his submission in the Te Reo Māori claim, Mead defining Article II and Article III of te Tiriti wrote that “O ratou taonga katoa” captured both tangible and intangible things. Mead submitted “O ratou taonga katoa” extended to “all their valued customs and possessions”. Mead extends the scope of the expression from physical things or things people can possess to include Māori practises or rules and traditions that Māori live their lives by.¹⁷³

Mead’s view is consistent with the view reached by the Tribunal in the Manukau Harbour case where the Tribunal accepted that taonga as captured in the Treaties “means more than objects ¹⁷⁴of tangible value”.¹⁷⁵ In the Kaituna River Finding, the Tribunal accepted the expression “O ratou taonga katoa” included “all things highly prized”. The Tribunal found similarly in the Motunui Finding.¹⁷⁶

In the Te Reo Māori claim, the Tribunal concluded te reo Māori, an intangible part of Māori culture, is taonga. The Tribunal held that aspects of Māori culture regarded as “an essential part” and “a valued possession” by Māori qualify as a taonga.¹⁷⁷ The Tribunal wrote it was plainly clear that language is an essential part of Māori culture and therefore must be regarded as “a valued possession”.¹⁷⁸ The Tribunal added “The claim itself illustrates that fact, and the wide representation from all corners of Māoridom in support of it underlines and emphasises the point”.¹⁷⁹

The Tribunal supports this interpretation through its own legal analysis of the Treaties. The Tribunal believes:¹⁸⁰

401 at 403; and Law Commission Māori Custom and Values in New Zealand (NZLC SP9, Wellington, 2001) at 17.

¹⁷³ Waitangi Tribunal *Report of The Waitangi Tribunal on the Te Reo Māori Claim* (Wai 11, 1986) at 20.

¹⁷⁴ Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984) at [4.7].

¹⁷⁵ Waitangi Tribunal *The Manukau Report* (Wai 8, 1985) at 70.

¹⁷⁶ Waitangi Tribunal *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6, 1983) at 50.

¹⁷⁷ Waitangi Tribunal, above n 173, at 20.

¹⁷⁸ Waitangi Tribunal, above n 173, at 20.

¹⁷⁹ Waitangi Tribunal, above n 173, at 20.

¹⁸⁰ Waitangi Tribunal, above n 173, at 20.

... it is not possible to interpret the Treaty faithfully by looking at the English version only, nor the Māori version only. Those who read Article II of the Treaty in the English version could be led to believe that the Royal guarantee given in that Article relates only to ‘. . . exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties . . .’ thereby mistakenly concluding that the assurance was in respect of the specified interests and things of similar kind.

It is the Tribunal’s view that te Tiriti is broader than the Treaty, and so is the phrase “O ratou taonga katoa” in te Tiriti than “exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties” in the Treaty. The Tribunal states that:¹⁸¹

... the Māori version is broader than the English phrase used in this connection, and that we must, under our statute, “have regard to the two texts of the Treaty” set out in the Treaty of Waitangi Act 1975. The statute then goes on to require us “to decide issues raised by the differences between them” ...

Laying this ground is necessary as if intangible parts of te ao Māori were not considered taonga, then the argument for te ira takatāpui being taonga for the purposes of a Tribunal claim would end here. However, Tribunal decisions, case law and Māori academics and scholars have established that intangible parts of te ao Māori can be taonga. The question is whether the Treaties intended to protect strands of whakapapa as an intangible taonga, and whether the Crown has an active duty to protect it. This section therefore distinguishes between whakapapa as an organising framework and particular strands of whakapapa that are regarded as a taonga because of their cultural and spiritual significance.

B Whakapapa as an Intangible Taonga

While whakapapa functions as a classificatory framework that encompasses all aspects of te ao Māori, not every instance of whakapapa qualifies as a taonga. It is the strands of whakapapa that express, sustain, and pass on cultural identity, such as te ira takatāpui, that are treated as a taonga. Taonga is described as “an essential part” of Māori culture and “a valued possession” of all Māori. The broad guides set out by the Tribunal say that taonga is

¹⁸¹ Waitangi Tribunal, above n 173, at 20.

something of value, or something essential or highly prized, or all valued customs or possessions. Strands of whakapapa can fit within these guides.

While te reo Māori has been expressly recognised as a taonga in Tribunal findings, te ira takatāpui has not yet received formal recognition. However, it can be recognised as a taonga based on the same jurisprudential criteria established in the te reo claim. The argument rests not on asserting identical value of te reo Māori to te ira takatāpui, but on ensuring consistent application of established jurisprudence. Recognition of te ira takatāpui as a taonga remains grounded in precedent.

In the Te Reo Māori claim, one witness after another told the Tribunal about the importance of te reo Māori in the pursuit to convince the Tribunal to declare te reo Māori a taonga. One witness shared the whakataukī: “Ka ngaro te reo, ka ngaro taua, pera i te ngaro o te Moa”, translating to, if the language be lost, man will be lost, as dead as the moa, with the Tribunal.¹⁸²

The Tribunal’s conclusions were shaped by the extensive testimony presented by witnesses. The Tribunal asserted:¹⁸³

... it is quite obvious that the language and its preservation is important. It is unique, spoken nowhere else in the world, and is part of a rich heritage and culture that is also unique, There is a great body of Māori history, poetry and song that depends upon the language. If the language dies all of that will die and the culture of hundreds and hundreds of years will ultimately fade into oblivion. It was argued before us that if it is worthwhile to save the Chatham Islands robin, the kakapo parrot or the notornis of Fiordland, is it not at least as worthwhile to save the Māori language?

The Tribunal in Ko Aotearoa Tēnei report wrote:¹⁸⁴

But even describing te reo as a taonga understates its importance. The language is clearly a taonga of quite transcendent importance to Māori, and few other taonga could rival its status.

¹⁸² Waitangi Tribunal, above n 173, at 7.

¹⁸³ Waitangi Tribunal, above n 173, at 7.

¹⁸⁴ Waitangi Tribunal, above n 172, at 442.

Without it, Māori identity would be fundamentally undermined, as would the very existence of Māori as a distinguishable people.

As recognised in the Ko Aotearoa Tēnei report, taonga such as mātauranga Māori, haka, te reo Māori, and waiata serve as vessels for the transmission of culture, identity, and knowledge. Te ira takatāpui functions in a similar capacity, ensuring the continuity of these essential elements. If strands such as te ira takatāpui are lost, Māori risk losing essential elements of their culture.

Psychologist Catherine Love observed that separation from whakapapa renders Māori language and culture “lifeless and empty,” resulting in a loss of mauri, the life force embedded in words.¹⁸⁵ Māori researcher Rauna Ngawhare similarly argues that “whānau who struggle to locate whakapapa, struggle to retain their identity as Māori.”¹⁸⁶

Ngawhare emphasised:¹⁸⁷

Whakapapa holds many meanings for Māori, maintaining a comprehensive network of relationships designed to establish a Māori worldview. Without this connection, some might argue that whānau Māori fade from a collective strength, a collective identity, and the cultural positioning that binds them to Te Ao Māori.

1 Tribunal, the Crown and iwi on whakapapa as a taonga

The Wai 262 claimants, as represented in the Ko Aotearoa Tēnei report, clearly articulate the view that strands of whakapapa are taonga. Although the report does not explicitly state that strands of whakapapa are taonga, it affirms that associated elements, such as haka, waiata, and mātauranga Māori, are taonga. The framing of their arguments makes clear that the claimants regard whakapapa as inherently a taonga.

¹⁸⁵ Catherine Love “Māori Perspectives on Collaboration and Colonisation in Contemporary Aotearoa/New Zealand Child and Family Welfare Policies and Practices” (Paper presented at the Positive Systems of Child Welfare Conference, Ontario, June 2022) at 23.

¹⁸⁶ Rauna Ngawhare “Whakapapa Ora: An explanation of Māori Identity through Whakapapa” (MMPD, University of Waikato, 2019) at 7.

¹⁸⁷ Ngawhare, above n 186, at 7.

The claimants raised concerns about their role as kaitiaki of taonga held by the National Library and Archives New Zealand. They submitted the National Library and Archives New Zealand records had sensitive information such as about strands of whakapapa. The claimants' inability to control access to this information raised significant concerns. The claimants believed that despite the legal and policy frameworks governing the National Library and Archives New Zealand, and the staff's commitment to the material's significance, there were inadequate protections of "the relationship of kaitiaki with their taonga or taonga works".¹⁸⁸ The Te Tai Tokerau claimants expressed "serious concerns over the long-term protection of this material."¹⁸⁹

The Te Tai Tokerau claimants acknowledged the records held by "National Library and Archives New Zealand play an important role in preserving taonga" but argued there the government needed to put in place better protection of the information held. Counsel for Te Tai Tokerau told the Tribunal "Kaitiaki needed to be fully involved in any actions relating to their taonga, and 'databases, registers', which included knowledge of strands of whakapapa.

Counsel for Ngāti Koata also made submissions along the same lines in criticising the Public Records Act 2005, which governs the activities of Archives New Zealand, in failing to provide adequate powers to kaitiaki, and iwi, in protecting their taonga, including records holding information about strands of whakapapa. Ngāti Koata submitted the "archival material" carried "mana" which warrant "iwi Māori to be in a direct position to exercise kaitiakitanga with respect to these documents", however, the Public Records Act's "overriding principle' of public access has the clear potential to collide with Māori concerns".¹⁹⁰

Counsel for Ngāti Porou added to the concerns of Te Tai Tokerau and Ngāti Koata in criticising the lack of power imbued in Māori to control access to records held by the National Library and Archives New Zealand and in affirming that records that held strands of whakapapa alongside other information as being taonga. The Counsel for Ngāti Porou said there was no substantial rights conferred to the iwi Māori as customary owners or kaitiaki of taonga to safeguard the taonga held by the National Library and Archives New Zealand.

¹⁸⁸ Waitangi Tribunal, above n 172, at 533.

¹⁸⁹ Waitangi Tribunal, above n 172, at 533.

¹⁹⁰ Waitangi Tribunal, above n 172, at 534.

Māori were forced to rely on the goodwill of these organisations to protect taonga, and if the organisations did not discharge their duty, Māori were limited in ways to protect their taonga.¹⁹¹

The Tribunal wrote that Ngāti Porou witness Āpirana Mahuika was seriously concerned:¹⁹²

... about Māori Land Court records – including whakapapa, especially to Hikurangi – becoming increasingly available electronically. He felt that Ngāti Porou should be given ‘the prior and senior rights to this information’. Yet, he said, ‘the Māori Land Court, which is an arm of the Crown, has never entered into dialogue with Ngati Porou about this proposal. This is a further breach of our Treaty rights.

Claimants for Ngāti Porou tie strands of whakapapa, taonga and te Tiriti together in their submission. The Crown did not dispute that aspects of whakapapa, such as those carrying sacred knowledge or cultural identity, are taonga. These examples reflect the widespread understanding within te ao Māori that te ira takatāpui is taonga. Instead, the Crown provided a list of policies and provisions that it claimed protected the relationship of kaitiaki with their taonga, suggesting an implicit acknowledgment that strands of whakapapa are indeed taonga.¹⁹³

The Crown argued that considering many Māori grow up disconnected from their “knowledgeable in tribal whakapapa, one of the only ways for them to access their own whakapapa will be through minutes of the Native Land Court.”¹⁹⁴ It was the Crown’s position that the public access to taonga allowed Māori disconnected from their iwi to access their whakapapa.

The National Library and Archives New Zealand also did not contest the characterisation of strands of whakapapa as a taonga. Instead, the National Library, in response to the claimants’ argument about information on whakapapa, explicitly stated all taonga have mauri and the

¹⁹¹ Waitangi Tribunal, above n 172, at 534-535.

¹⁹² Waitangi Tribunal, above n 172, at 535.

¹⁹³ Waitangi Tribunal, above n 172, at 535-536.

¹⁹⁴ Waitangi Tribunal, above n 172, at 536.

National Library was committed to protecting it for future generations and Archives New Zealand stated it was impossible to not feel the mauri of the material they kept.¹⁹⁵

After considering both perspectives, the Tribunal concluded that material concerning strands of whakapapa constitute taonga. The Tribunal concluded:¹⁹⁶

It seems to us unarguable that collections of Māori material in archives and libraries are taonga because they hold mātauranga about, and generated by, kaitiaki communities – for example, Native Land Court Minutes recording whakapapa in relation to land ...

acknowledging that strands of whakapapa are taonga for Māori.

C Te Ira Takatāpui is Taonga

If the link that tells Māori who they are, where they come from, and where they belong is broken, it leaves Māori in a state of spiritual homelessness.¹⁹⁷ The preservation and passing on of whakapapa is necessary for survival of Māori. Accordingly, te ira takatāpui is an integral part of Māori culture and history. This cultural status, widely affirmed in lived experience, academia, and treaty jurisprudence, underpins the case for its formal recognition as a taonga under te Tiriti.

Māori Development researcher Tangaroa Ihaia Pirihongi Paora adds takatāpui are integral storers of cultural knowledge that is essential to the survival of Māori and therefore to protect that knowledge and to pass it on to the future generations, we must protect te ira takatāpui. Paora writes “Clearly, although gender roles are a site that is potentially contestable for takatāpui, surprisingly, there were participants who supported conventional sexual role differentiation in ritual life.”¹⁹⁸

Writer Rāwiri Keelan tells Paora:¹⁹⁹

¹⁹⁵ Waitangi Tribunal, above n 172, at 536.

¹⁹⁶ Waitangi Tribunal, above n 172, at 537.

¹⁹⁷ Pihama, above n 100, at 355.

¹⁹⁸ Tangaroa Ihaia Pirihongi Paora “He ia anō ta te Takatāpui I te Ao Māori – Takatāpui; Being of the Māori world” (MA, Auckland University of Technology, 2019) at 26.

¹⁹⁹ Paora, above n 198, at 26.

Some mātauranga that should be and can only be held [by] males, some mātauranga that can only be held by females, but there are other types of mātauranga that cannot be held neither of those gender and the perfect guardians for that mātauranga and that is how it was traditional[ly] ...

Musician Pere Wihongi says:²⁰⁰

There is a place there for takatāpui to teach and guide and tuku i ēnei mātauranga. I would rather teach wāhine Māori myself the karanga than do it myself. I would want to try and find strategies in which we can not only build our pae wahine but also allow our whānau takatāpui to gift those taonga by a specific gender, thus it is that mātauranga that is gifted to takatāpui because we are ...

Paora concludes that reclamation of te ira takatāpui is one essential part of restoring “tikanga, kawa and mātauranga Māori”.²⁰¹ The Tribunal has already recognised that culturally specific forms of knowledge qualify as a taonga where they are vital to the survival of Māori identity. The mātauranga held by takatāpui fits squarely within this logic. The restoration of te ira takatāpui is a targeted revival of a specific strand of cultural knowledge and identity. Its continuity is essential to the wellbeing of takatāpui and to the broader survival of Māori cultural expression.

Paora claims that in present day, young Māori have to fight to have a claim to their identity regardless of what their identity as Māori may be. Paora faults colonisation for the disruption of young Māori remaining confidently and securely connected to their whakapapa. However, Paora is of the view that despite colonisation, Māori “have come a long way in retaining, reclaiming and decolonising aspects of the Māori culture.”²⁰² Paora highlights the ongoing battle for cultural restoration, highlighting, “Due to the bastardisation and hybridisation of some of those cultural aspects” there is still a lot to be done, including, “more stories to be told, and traditional forms of knowledge to be recaptured and gifted back to our communities.”²⁰³ Paora stresses the importance of freeing Māori minds from the shackles of

²⁰⁰ Paora, above n 198, at 26.

²⁰¹ Paora, above n 198, at 37.

²⁰² Paora, above n 198, at 37.

²⁰³ Paora, above n 198, at 26.

colonisation, stating, the “practice of decolonising the minds of Māori people is vital to the survival and the development of this evolutionary culture that is steeped in tikanga, kawa and mātauranga Māori.”²⁰⁴ This underscores the point that decolonisation is not limited to reclamation of land, resources and language. Decolonisation is incomplete without the liberation of Māori minds; the ways of thinking, and the ways of being. Paora’s writing culminates to one important point, that Māori must work towards a future where cultural revival includes the restoration of takatāpui, saying that:²⁰⁵

It is a tumanako (aspiration) that one day te ao Māori will acknowledge and celebrate a third gender again so that those who identify as such can stand, not only within their communities and culture, but also, as their true, authentic selves.

Ngawhare expresses a similar view. Ngawhare looks at the attacks on whakapapa through government uplifting of Māori children and young people. Moana Jackson stated that children and young person’s welfare reforms of 2016 were “an attack on whakapapa, and...the fundamental Treaty right that we have the authority to care for our mokopuna”.²⁰⁶

Ngawhare sees the government interference as an attack on whakapapa, and an effort by the government to disconnect tangata whenua from te ao Māori. Ngawhare wrote repeated efforts of colonisation and the resultant trauma have profoundly undermined and harmed “our whakapapa systems” framing whakapapa as the only “(re)solution to (re)claim our rights.”²⁰⁷ Ngawhare declared “Whakapapa undoubtedly is a whānau, hapū, and iwi, hāpori responsibility. We must protect our tamariki and mokopuna, our taonga, guaranteed to us under Te Tiriti o Waitangi”.²⁰⁸

Ngawhare drew analogy between the government’s attacks on te reo Māori and mātauranga Māori with the government’s attacks on whakapapa. In her argument for why we should protect whakapapa from government interference, Ngawhare says we have already seen government action cause deprivation to other taonga such as language and education. Ngawhare adds “The succession of marginalisation has therefore starved the mauri of

²⁰⁴ Paora, above n 198, at 37.

²⁰⁵ Paora, above n 198, at 37.

²⁰⁶ Ngawhare, above n 186, at 20.

²⁰⁷ Ngawhare, above n 186, at 20.

²⁰⁸ Ngawhare, above n 186, at 20.

whakapapa, creating confusion of cultural identity, awareness, and reassurance of Māori identity”, concluding that “Whakapapa is a cultural taonga, defining layers that are seen and unseen. There is a need to preserve whakapapa.”²⁰⁹ Certain strands of whakapapa, such as those that sustain identity and mātauranga, including te ira takatāpui, are cultural taonga. These strands must be preserved and protected as they carry the vital knowledge Māori being.

Elaborating on her understanding of whakapapa as a cultural taonga, Ngawhare reflects that:

Throughout our kōrero, we shared variations of the taonga inherited by blood and tradition. Access to whenua, names, birthrights, wānanga, among other areas, nurtured the process of tino rangatiratanga. Our environments become the blueprint for whānau in terms of identity, behaviours, knowledge received, and education denied. Our stories are unique to our characters, personalities, and love for cultural identity. Each story shared during the interviews articulated descriptions of access to whakapapa. ‘Listening to kōrero on the paepae’ implanted names and histories in our minds. ‘Growing up around the marae’ provided stability and a place to learn. ‘Participation in kapa haka’ connected us through the vibration of waiata and haka. ‘Visiting and talking with kaumatua kanohi ki te kanohi’ showed us the respect of our elders, carrying the taonga of whakapapa pūrākau. The kōrero discussed presented a pūrākau of whakapapa transition from traditional to contemporary ways of whakapapa access.

1 Takatāpui on te ira takatāpui as a taonga

Many Māori experience being connected to te ira takatāpui as a taonga. It is seen as a sacred inheritance from atua and tūpuna, and its restoration is a vital act of cultural resurgence. Takatāpui believe that their existence, and their link to their gods, ancestors, the natural environment, the spiritual world, and the beginning of te ao Māori, is an essential and valuable part of Māori culture.

Speaking to te ira takatāpui, Haunui says he believes “that everyone, including myself, is a taonga.”²¹⁰ Haunui’s experience is not isolated from that of others.

²⁰⁹ Ngawhare, above n 186, at 99.

²¹⁰ Mental Health Foundation “Takatāpui: Part of the Whānau” (5 December 2015) YouTube <www.youtube.com/>.

One takatāpui individual shared what is important is:²¹¹

... full acceptance and love for myself for want of another ... it's just fully embracing my whakapapa but I've always known and I wrote that in a takatāpui chapter that actually everything I am is a gift from my tūpuna; everything and all of it is about using all that talent, skills that I've been given to be the best that I can be as a representative of my tūpuna and that everything I achieve is actually about the love and nurturing that I got from my parents. But it's all grounded and knowing who you are and where you come from ...

Rākau Buchanan, takatāpui, stated: ²¹²

I know that hopefully, my name will give people the hint that I'm not wāhine. I'm fortunate enough that I have grandparents and parents who accept me, although it hasn't been an easy journey. I understand that not everyone will accept us, but this shouldn't mean that the reason we don't get given access to whakapapa knowledge and mātauranga Māori is because of our transness or queerness. We are a taonga and solidarity with us should be a given because our liberation is bound together. We heal. We lead. We light up the room. We transform spaces.

Resonating with the experiences of Buchanan, Teddy O'Neill believes that: ²¹³

Takatāpui is a Māori identity which encompasses wairua, sexuality, gender, and the fluid nature between them. Our tupuna didn't live in a binary society governed by labels and the cishet rules that we live by now. They simply existed as they were. I want to hear more takatāpui stories drenched in our hītori, I want to experience takatāpui pūrākau, where us Māori queers can get together and talk about our own, real experiences. I want to kōrero with my kaumātua about their takatāpui experiences, I want to share my own stories with them. I want us to bask in the glow of being takatāpui, because takatāpuitanga is a taonga.

Families of takatāpui told Kerekere that children are a gift. One mother, Kellie, told Kerekere:²¹⁴

²¹¹ Leonie Pihama and others, above n 114, at 36.

²¹² Rākau Buchanan "Takatāpui Futurisms" (6 July 2024) *Te Tangi A Te Ruru* <tetangiateruru.wordpress.com/>.

²¹³ Teddy O'Neill "Takatāpuitanga" (22 April 2024) *Salient* <www.salient.org.nz/>.

²¹⁴ Kerekere, above n 4, at 150.

Children are the most important thing. They are our biggest gift. It wouldn't have mattered what [Morgan] came out as. You know, because it was the love that I felt for her. For parents out there that don't have family that have come out before, it's safer now than it was back then. And don't hide behind your fear... Bottom line is, they're our gift. We need to embrace them and love them regardless of what they are ...

Kerekere found that young takatāpui with diverse bodies and gender identities gave a specific meaning to their experience as takatāpui. Activist Emilie Rakete told Kerekere that “If you care about Māoritanga ... and all of our taonga, then part of that is making sure that takatāpui are safe and nourished”.²¹⁵

In her thesis for degree of Doctor of Philosophy, Kerekere wrote a karanga that read:²¹⁶

Call to me, our Takatāpui ancestors
Here I stand, your descendant
I call to you under the mana of Tūranganui a Kiwa
Ngāti Oneone, Te Aitanga a Māhaki
Whānau a Kai, Rongowhakaata and Ngāi Tāmanuhiri
Although the journey has been difficult and your form sometimes indistinct
You were never forgotten
This Whāriki Takatāpui is dedicated to you, to honour the treasures you have passed down
Although it may never end, Tīwhanawhana Trust will carry this work
To clear a pathway for coming generations who will ever move onwards

Kerekere begins her karanga by a call to her ancestors, clearly identifying her whakapapa to those takatāpui who have been. She situates herself and her identity as takatāpui in her iwi, again drawing te ira takatāpui from her gods, ancestors, whanau, hapu and iwi and land. While the colonisation attempted to suppress and erase takatāpui, te ira takatāpui remains intact. Kerekere uses the motif of whāriiki takatāpui, which endorses the conceptualisation of te ira takatāpui as weaving of whakapapa, layer by layer.

²¹⁵ Kerekere, above n 4, at 149.

²¹⁶ Kerekere, above n 4, at 3.

Kerekere identified two important things in her karanga; one, takatāpui are descendent from Māori ancestors and therefore linked by whakapapa, and two, te ira takatāpui is a treasure passed on through generations.

O'Rafferty claims:²¹⁷

How the Treaty relates to Takatāpui can be seen in Article 2 of the Māori version, guaranteeing Māori 'chieftainship over their lands, villages and all their treasures.' The word 'treasures' here translates from taonga to mean more than just physical, material possessions – as it does in the English version – but also encompasses more abstract elements, including cultural heritage and identity. Through the English version of the Treaty, British law and culture was established and imposed on the colony of New Zealand. With this came the dichotomisation of sexuality into heterosexual ('normal') and homosexual ('abnormal/illegal'), along with the gender binary and its similar associations of superiority and inferiority. Stigmatisation was further normalised when Māori began to absorb all these practices, forcing many away from their Māoritanga and into the new dominant European culture. This resulted in Takatāpui fighting for survival, through organising their identities and pride within their communities, and from there, fighting for recognition."

This section advances the argument that te ira takatāpui, the strand of whakapapa through which gender and sexual diversity are expressed and lived, is taonga protected by the principles of the Treaties. Te ira takatāpui, as a strand of cultural identity that connects takatāpui to their tīpuna, atua, whenua and mātauranga, deserves full recognition and protection as a taonga.

This section builds on Part I, which grounded te ira takatāpui in pre-colonial Aotearoa New Zealand and te ao Māori, and Part II, which argued that te ira takatāpui is a strand of whakapapa of that encapsulates the way of being and cultural expression of takatāpui. This section develops the legal and jurisprudential basis for recognising that strand as a taonga.

This section distinguishes between cultural recognition of te ira takatāpui as a taonga, already affirmed in Māori lived experience and identity, and formal legal recognition under the

²¹⁷ O'Rafferty, above n 15, at 48-49.

Treaties. While the former is well-established, this work advances the case for the latter, building on Tribunal precedent and the principle of active protection.

IV Development and the Historical Background to the Principles of the Treaties A He Whakaputanga o te Rangatiratanga o Nu Tirene

By 1839, 52 Northern Māori rangatira had signed He Whakaputanga o te Rangatiratanga o Nu Tirene (Declaration of Independence).²¹⁸ This document declared Aotearoa New Zealand an independent Māori state, asserting sovereignty through terms like tino rangatiratanga and Kīngitanga. Pōtatau Te Wherowhero, the first Māori King, was among the signatories.²¹⁹

The English translation of He Whakaputanga by late University of Auckland Associate Professor Mānuka Hēnare makes clear that Māori declared themselves the “absolute leaders of the tribes” who had “authority and leadership of our country” and “sovereignty/kingship and the mana from the land of the Confederation of New Zealand”.

Māori were clear about the role of British Crown and visitors under He Whakaputanga. Henare’s translation states that:²²⁰

We agree that a copy of our declaration should be written and sent to the King of England to express our appreciation (aroha) for this approval of our flag. And because we are showing friendship and care for the Pākehā who live on our shores, who have come here to trade (hokohoko), we ask the King to remain as a protector (matua) for us in our inexperienced statehood (tamarikitanga), lest our authority and leadership be ended (kei whakakahoretia tō mātou Rangatiratanga).

Māori also stated that no:²²¹

²¹⁸ “He Whakaputanga o te Rangatiratanga o Nu Tireni: The Declaration of the Independence of New Zealand” (11 June 2024) Archives New Zealand <www.archives.govt.nz/>.

²¹⁹ “He Whakaputanga o te Rangatiratanga o Nu Tireni: The Declaration of the Independence of New Zealand”, above n 218.

²²⁰ “He Whakaputanga o te Rangatiratanga o Nu Tireni: The Declaration of the Independence of New Zealand”, above n 218.

²²¹ “He Whakaputanga o te Rangatiratanga o Nu Tireni: The Declaration of the Independence of New Zealand”, above n 218.

Governorship (Kāwanatanga) to be established in the lands of the Confederation, unless (by persons) appointed by us to carry out (wakarite) the laws (ture) we have enacted in our assembly (huihuinga).

James Busby, the British Resident in Aotearoa New Zealand, authored the English version of He Whakaputanga, and missionaries Henry Williams and George Clarke translated He Whakaputanga to Māori and signed it as witnesses alongside merchants James Clendon and Gilbert Mair.²²² Busby sent He Whakaputanga to King William IV and it was formally acknowledged by the Crown in May 1836.²²³

Rangatira signed He Whakaputanga to protect their lands and people amid rapid European contact. Rangatira in Northern iwi:²²⁴

... had been meeting in the Bay of Islands, Hokianga, Whangaroa, and Whāngārei as early as 1808 to work collectively and manage their relationships with Europeans. In contrast to Busby, the signatories saw He Whakaputanga as a way to address the challenges posed by European contact, to strengthen an alliance with Great Britain, and to assert their authority to the wider world.

B Te Tiriti o Waitangi and the Treaty of Waitangi

In the late 1830s, many British immigrants arrived, seeking settlement on Māori land. With the increase of British immigrants, there was an increase of lawless and unruly behaviour from British settlers.²²⁵

Lieutenant-Governor William Hobson was tasked with acquiring sovereignty of Aotearoa New Zealand for the Crown. With the assistance of Busby, Hobson wrote the Treaty in a few days. Williams and his son translated the Treaty to te Tiriti overnight on 4 February before it was debated for a day and night by approximately 500 Māori and signed on 6 February.²²⁶

²²² “He Whakaputanga o te Rangatiratanga o Nu Tireni: The Declaration of the Independence of New Zealand”, above n 218.

²²³ “He Whakaputanga - Declaration of Independence” (31 July 2024) NZ History <nzhistory.govt.nz/>.

²²⁴ “Ko wai ngā rangatira i waitohu i He Whakaputanga? Who were the rangatira who signed He Whakaputanga?” Archives New Zealand <www.archives.govt.nz/>.

²²⁵ “The Treaty in brief” (17 May 2017) NZ History <nzhistory.govt.nz/>.

²²⁶ “The Treaty in brief”, above n 225.

43 rangatira signed te Tiriti on 6 February. By the end of 1840, around 500 rangatira, including 13 women, had signed copies sent across the country.²²⁷ Only 39 rangatira signed the Treaty.²²⁸ Māori overwhelmingly agreed with te Tiriti, not the Treaty.

The Crown proclaimed sovereignty over Aotearoa New Zealand on 21 May 1840 under the Treaty.²²⁹ The Treaty was treated as a treaty of cessation, giving the Crown sovereignty over Aotearoa New Zealand, however, te Tiriti secured sovereignty to Māori.

Te Tiriti and the Treaty are fundamentally different, making reconciliation between them complex.

In Article I of the Treaty, Māori “cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty”, while in te Tiriti, Māori give the give “te kāwanatanga katoa”.²³⁰ Professor of Social Anthropology and Māori Studies Hugh Kāwharu translated kāwanatanga to governance. To Māori, governance was not equivalent to sovereignty and no centralised authority ruled over all iwi. Individual iwi and hapu made their own rules for own groups. In line with this, Kāwharu argued there could be “no possibility of the Māori signatories having any understanding of government in the sense of ‘sovereignty’ i.e. any understanding on the basis of experience or cultural precedent.”²³¹

Further, in He Whakaputanga, rangatira used terms such as rangatiratanga and Kīngitanga to secure Aotearoa New Zealand as an independent nation, and used kāwanatanga in indicating who could establish a governing body in Aotearoa New Zealand. Te Tiriti cedes neither Rangatiratanga nor Kīngitanga.

It is also important to note that in 1840, there were about 2000 non-Māori living in Aotearoa New Zealand.²³² The Māori population in Aotearoa New Zealand in 1840 was somewhere

²²⁷ “The signing of the Treaty of Waitangi” Christchurch City Council Libraries <my.christchurchcitylibraries.com/>.

²²⁸ “The signing of the Treaty of Waitangi”, above n 227.

²²⁹ “The Treaty in brief”, above n 225.

²³⁰ “Te Tiriti o Waitangi: The Treaty of Waitangi” NZ History <nzhistory.govt.nz/>.

²³¹ “Te Tiriti o Waitangi: The Treaty of Waitangi”, above n 230.

²³² “Overview – immigration to New Zealand 1840-1914” (26 May 2023) NZ History <nzhistory.govt.nz/>.

between 70,000 to 90,000.²³³ It is unlikely that a population 45 times larger than settlers would cede sovereignty.

In Article II of the Treaty, Māori “yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors” but secure “exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties”.²³⁴ In te Tiriti, Māori secured something more significant. Māori secured “te tino rangatiratanga”, that was to mean “the unqualified exercise of their chieftainship over their lands, villages, and all their property and treasures.”²³⁵ This further demonstrates Māori intent to protect their sovereignty.

Kāwharu wrote that unqualified exercise of chieftainship “would emphasise to a chief the Queen's intention to give them complete control according to their customs. ‘Tino’ has the connotation of ‘quintessential’.”²³⁶

In Article III of the Treaties the Queen extends to Māori the Crown’s protection and the same rights and privileges as British subjects. Māori understood this as the Queen protecting and preserving tikanga Māori “since no Māori could have had any understanding whatever of British tikanga”.²³⁷

1 The legal effect of the Treaties

Although there are fundamental differences in te Tiriti and the Treaty, the courts have attempted to reconcile the two, often favouring the Treaty in the common law. Their legal status has long been contested.

Prendergast J declared the Treaties “worthless” and a “simple nullity” in *Wi Parata v Bishop of Wellington* in 1877.²³⁸

²³³ Ian Pool and Tahu Kukutai “Story: Taupori Māori – Māori population change – Population changes, 1769-1840” (1 April 2014) Te Ara – the Encyclopedia of New Zealand <teara.govt.nz>.

²³⁴ “Te Tiriti o Waitangi: The Treaty of Waitangi”, above n 230.

²³⁵ “Te Tiriti o Waitangi: The Treaty of Waitangi”, above n 230.

²³⁶ “Te Tiriti o Waitangi: The Treaty of Waitangi”, above n 230.

²³⁷ “Te Tiriti o Waitangi: The Treaty of Waitangi”, above n 230.

²³⁸ *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72 (SC) at 78.

In 1848, Ngāti Toa gifted the Whitireia land to the Anglican Church of England to build a school on it. No school was built, yet the Church received a Crown grant. Ngāti Toa filed proceeding asking for the return of the land as the promise of building a school was not fulfilled.

Prendergast J ruled the Treaties were worthless because they had been signed between “between a civilised nation and a group of savages,” labelling Māori as savages and deeming the Treaties a simple nullity as it had not been incorporated into domestic law.²³⁹ The Court held enquiring whether native title had been extinguished was non-justiciable, and the Crown grant was valid. Government “acts of state” were not examinable by courts.

In 1901, in *Nireaha Tamaki v Baker*, the Court ruled the ruling in *Wi Parata* went too far.²⁴⁰ The Privy Council held that native title was recognised by statute and common law and that any Crown grant was subject to native title until the native title was extinguished.²⁴¹ In response, the government passed the Land Titles Protection Act 1902 confirming previous Crown grants. The Native Land Act 1901 barred courts from reviewing land decisions, deeming them political.

Te Heuheu Tukino v Aotea District Māori Land Board overruled *Wi Parata*. In this case, a third party held Māori land in trust. The trust gave Māori land as loan security. Māori did not consent to their land being used as security. When the business failed, the land was called up and paid for the business’ liabilities. The Māori claims to the land based on the Treaties were considered political matters and therefore not for the Court to decide. The Court held:²⁴²

... it is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the courts except in so far as they have been incorporated into municipal law.

Here the Treaties shift from being a simple nullity to requiring incorporation into domestic law for enforcement.

²³⁹ *Wi Parata v Bishop of Wellington*, above n 238, at 78.

²⁴⁰ *Nireaha Tamaki v Baker* [1901] AC 561 (PC) at 571-574.

²⁴¹ *Nireaha Tamaki v Baker*, above n 240, at 571-574.

²⁴² *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) at 596-597.

In 1987, *Huakina Development Trust v Waikato Valley Authority* held the Treaties are extrinsic aid to interpret legislation.²⁴³ However, extrinsic aids were only to be used where there was ambiguity and lack of clarity in the law. The courts were required to give legislation its ordinary meaning if there was no uncertainty. This is the first case to explicitly require that the Treaties be considered in decision-making.

Barton Prescott v Director-General of Social Welfare took the law further and held:²⁴⁴

... since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and that for the purposes of interpretation of statutes, it will have a direct bearing whether or not there is a reference to the Treaty in the statute.

It also made specific rulings about Māori children stating all acts dealing with Māori children are to be interpreted as though they are coloured by the principles of the Treaties. The Court was of the view that:²⁴⁵

... the familial organisation of one of the peoples a party to the Treaty, must be seen as one of the taonga, the preservation of which is contemplated. Accordingly, we take the view that all Acts dealing with the status, future, and control of children are to be interpreted as coloured by the principles of the Treaty of Waitangi.

In *New Zealand Māori Council v Attorney-General (Radio Frequencies case)*, the government sale of radio frequencies prompted the Māori Council to seek a Tribunal hearing and to delay the sale until the Tribunal hearing was issued.²⁴⁶ The relevant legislation made no reference to the Treaties. The Court held that if the Crown properly considered the Tribunal's findings and the position of Māori in good faith, it discharged its duty. The Crown was not required to act a certain way, only to consider relevant factors, the findings for the Tribunal being one of them. The Crown could make any decision after that consideration.

²⁴³ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 189, 197 and 223.

²⁴⁴ *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 (HC) at 184.

²⁴⁵ *Barton-Prescott v Director-General of Social Welfare*, above n 244, at 184.

²⁴⁶ *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 (CA) at 135.

The Treaties were found to be more influential in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.²⁴⁷ Trans-Tasman Resources Ltd was issued a license to extract 15 million tonnes of iron from the seabed in Taranaki. The case concerned was the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act which made no reference to the Treaties. The Court held the Treaties have constitutional significance, are to be read generously and are relevant to statutory interpretation even when not referenced. The Crown must clearly overrule the Treaties if it does not want them to apply.

It stated:²⁴⁸

... given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

The Court went further to say:²⁴⁹

The submission is that, accordingly, the existing interests that the DMC needed to consider here are kaitiakitanga of iwi of their relevant rohe; rights recognised by the MACA Act; and interests under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. We agree.

The Treaties are only binding where incorporated into domestic law. Some examples of this include:

- Conservation Act 1987: This Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi;²⁵⁰
- Crown Research Institutes Act 1992: In relation to the transfer, pursuant to this Act, of any land, or any interest in any land, to a Crown Research Institute or a Crown entity subsidiary

²⁴⁷ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 (SC) at 859.

²⁴⁸ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 247, at 859.

²⁴⁹ *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*, above n 247, at 859.

²⁵⁰ Conservation Act 1987, s 4.

of a Crown Research Institute, the shareholding Ministers shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi);²⁵¹

- Resource Management Act 1991: In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi);²⁵² and
- Public Service Act 2020: The role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi (te Tiriti o Waitangi).²⁵³

Barrister Jack Oliver-Hood says:²⁵⁴

Where Parliament legislates, it is taken to have intended that legislation is to be interpreted in a manner consistent with the principles of the Treaty of Waitangi. According to that principle, empowering provisions in statute should be read to only allow the executive to act consistently with the principles of the Treaty of Waitangi, unless there is explicit parliamentary authorisation to the contrary.

C Treaty of Waitangi Act 1975

Following dissatisfaction of Māori in Crown efforts, or lack thereof, in attempting to settle breaches of the Treaties, there was a rise of calls for the establishment of a forum for Māori to voice their grievances against the Crown. Māori struggled in courts that favoured the Crown and could only enforce the Treaties when referenced in legislation.

Parliament passed the Treaty of Waitangi Act in 1975.²⁵⁵ The preamble of the Act makes the first ever mention of the principles of the Treaties in establishing the Tribunal. However, the Act does not define the principles of the Treaties, leaving a vacuum in the law. The preamble reads:²⁵⁶

²⁵¹ Crown Research Institutes Act 1992, s 10.

²⁵² Resource Management Act 1991, s 8.

²⁵³ Public Service Act 2020, s 14.

²⁵⁴ Jack Oliver-Hood “Our Significantly Indigenous Administrative Law: the Treaty of Waitangi and Judicial Review” (2013) 9 Auck UL Rev 53 at 54

²⁵⁵ Treaty of Waitangi Act 1975.

²⁵⁶ Treaty of Waitangi Act, preamble.

whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

The Tribunal is a commission of inquiry. The Tribunal has the “exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them.”²⁵⁷

The Tribunal can investigate and recommend on breaches from 6 February 1840 to the present.²⁵⁸ The Tribunal can make general or specific recommendations. The Tribunal can also review if “proposed legislation or any of them are contrary to the principles of the Treaty”.²⁵⁹

1 Tribunal process

Only Māori or Māori groups can bring Tribunal claims.²⁶⁰

Claimants must be likely prejudicially affected by:²⁶¹

- Act of Parliament
- Regulations, order, proclamation, notice
- Policy or practice of the Crown (historical, present, future)
- Act done or omitted by the Crown (historical, present, future)

Claimants generally approach such claims by:²⁶²

1. Identifying the impacted taonga or the principles of the Treaties that may have been breached.
2. Identifying the prejudicial effect, it had or has on the claimants.

²⁵⁷ Treaty of Waitangi Act, s 5(2)

²⁵⁸ Treaty of Waitangi Act, s 6.

²⁵⁹ Treaty of Waitangi Act, s 8.

²⁶⁰ “Claims Process” The Waitangi Tribunal <www.waitangitribunal.govt.nz>.

²⁶¹ Treaty of Waitangi Act, s 6(1).

²⁶² “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown” (June 2018) New Zealand Government <www.govt.nz> at 35.

3. Demonstrating how the principles of the Treaties have been breached.
4. Submitting what redress are appropriate for the breach.

If a breach is found, the Tribunal recommends remedies. There is usually a four-step process:²⁶³

1. Preparing claims for negotiations
2. Pre-negotiations
3. Negotiations
4. Ratification and implementation

Claimants and the Crown negotiate a Deed of Settlement. If accepted, the Crown legislates and implements it in partnership with the claimants.

The settlement includes three types of redress: historical account, acknowledgement and apology of breach, financial and commercial redress, and cultural redress. The settlement may not include all three.

(a) Historical account, Crown acknowledgements of breach and apology

The historical account, Crown acknowledgment, and apology begin the settlement process by recognising harm and initiating reconciliation.²⁶⁴

The historical account summarises the facts leading to the breaches, and the Crown acknowledgement and apology recognise the harm done by the breaches. The historical account is an agreed statement between the claimants and the Crown. While it does not get into every detail of history or the breach, it gives the public an understanding of what the claim is about. The historical account may be placed in the preamble of the settlement legislation.²⁶⁵

²⁶³ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 29.

²⁶⁴ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 79-80.

²⁶⁵ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 79-80.

The Crown acknowledgement includes an acceptance of the breach of the principles and the pain and suffering caused by it. The acknowledgement can demonstrate the loss suffered by the claimant in practical terms. The acknowledgment may also recognise claimant resilience and positive contributions of the claimants despite the breaches. Like the historical account, the acknowledgment can be included in the settlement legislation.²⁶⁶

The Crown apology formally expresses regret, acknowledges injustice, and accepts responsibility. The apology responds to the historical account of the breach and is a step towards restoring the mana of the claimants and rebuilding the relationship between the claimants and the Crown.²⁶⁷

(b) Financial and commercial redress

Financial and commercial redress refers to the economic components of the settlement. The claimant may receive cash or Crown assets such as property.²⁶⁸ The value of the financial and commercial redress should reflect fundamentally the nature and extent of the breach and the loss suffered by claimant, often being loss of land and resources. The Crown does not compensate for the whole value of the loss but the Red Book states that Crown contributes “to re-establishing an economic base as a platform for future development”.²⁶⁹ Although the Crown says the money needs to be used for the development of the claimants, the Crown does not specify or stringently restrict how the claimants use the funds. The use and distribution of the funds and assets is a matter for the claimants.

While an acknowledgement and apology attempt to resolve the emotional and spiritual harm, they do not reverse or solve the economic harm suffered by the claimant. In some cases, breaches of the principles have entrenched Māori poverty. The financial and commercial

²⁶⁶ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 79-80.

²⁶⁷ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 79-80.

²⁶⁸ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81-89.

²⁶⁹ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81.

redress seeks to tackle the material hardship so that alongside the acknowledgement and apology, there is both emotional and spiritual healing and removal of material hardship.²⁷⁰

- The Crown policy was updated in 2000. The new policy states:²⁷¹
- The redress should reflect the nature and extent of the breach and the harm suffered;
- There must be consistency between like claimants; and
- There is no fixed cap, but redress must be fiscally prudent and assessed on merit.

73 settlements had been passed into law as of August 2018. The value of the settlements amounted to \$2.24 billion, which relative to other yearly government spendings in an insignificant figure. In 12 months from August 2018, the government projected to spend \$14 billion on superannuation payments. This meant that 25 years of settlements equalled just two months of 2018 superannuation payments.²⁷²

(c) Cultural redress

The cultural redress is set to recognise the cultural interests and needs of the claimant rather than their economic interests. Also known as non-commercial redress.

Through many Tribunal hearings, claimants have spoken about the cultural and spiritual harm caused by the breaches. They talked about the loss of people, the loss of guardianship over land and important cultural or spiritual sites, and the damage to those environments. This damage has led to the loss of traditional practices on those lands and sites. They have also lost access to places where they gather traditional food and resources, and the ability to carry out those practices. Traditional healing practices have been lost too. Claimants have also been left out of decisions about people, land, the environment, and resources that are important to Māori.

The sites of cultural and spiritual importance include wāhi tapu, wāhi whakahirahira, rivers, lakes, coastal areas, wetlands, lagoons, customary fresh water and marine fisheries,

²⁷⁰ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81-89.

²⁷¹ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81-89.

²⁷² “What are Treaty settlements and why are they needed?” te tai <tetai.nz>.

geothermal and mineral resources, mountains and tussock lands, and forests. Claimants seek to affirm their special relationship with land and environment.²⁷³

This relationship is reflected in the Māori proverb “Ko au te whenua, te whenua ko au” translating to I am the land, and the land is me.²⁷⁴ While ownership is a foreign concept in te ao Māori, it is a necessary part of the current setup of land law to allow Māori to protect and use their land. Claimants may seek the guardianship of land, environment, resources, or animals or ask the Crown to protect it.

The cultural redress can include things such as changing the name of places back to its original Māori name, co-governance arrangements between iwi and government, or the transfer of Crown land to Māori or the Crown purchasing private land to return to Māori. It can include the restriction of inappropriate access to land or use of resources, and preservation of historical sites.

The Crown Red Book includes statutory vesting of fee simple estate, statutory vesting, and gifting back of sites of outstanding significance, statutory vesting of riverbed or lakebed, statutory vesting as reserve, overlay classifications, statutory acknowledgements, Deeds of Recognition, setting protocols, change of names of places, and setting up Joint Advisory or Management Committee as methods of achieving the cultural redress.²⁷⁵

D Development of Principles of the Treaties

There are three ways in which the principles of the Treaties are enforced:²⁷⁶

1. The Tribunal investigates Māori claims of Crown breaches of principles of the Treaties.
2. The courts can enforce the principles of the Treaties where they are incorporated into legislation.

²⁷³ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81-89.

²⁷⁴ “Chapter 1: Our place to stand” Ministry for the Environment <www.environment.govt.nz>.

²⁷⁵ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 81-89.

²⁷⁶ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 6.

3. The Crown addresses breaches of the principles of the Treaties by working with affected Māori to find solutions. The Crown has accepted a moral obligation to resolve its historical and present breaches of the principles of the Treaties and act in accordance with them.

Although the Treaty of Waitangi Act mentioned the principles of the Treaties, it did not define them. There is no single source, as the courts, government, and Tribunal continually develop these principles. The principles are referred to in legislation, Tribunal reports and The Red Book.

The Red Book guides Tribunal claims and Crown negotiations. The Office of Treaty Settlements writes the Red Book is a “practical guide to the negotiation and settlement of historical grievances” under the Treaties.²⁷⁷ It sets out an overview of the “historical background to Treaty grievances and settlements and explains how settlement policy has developed.”²⁷⁸

The 1987, *New Zealand Māori Council v Attorney-General (Lands case)* was the first case in which the courts tried to define and apply the principles of the Treaties. The case involved the government’s major privatization scheme and the creation of state-owned enterprises. Māori were concerned about the government’s proposed transfer of Crown land to state-owned enterprises.²⁷⁹

The transfers potentially meant Māori would not be able to claim back land that was privatised by the Crown. Returning such land to Māori required a willing seller and Crown repurchase at market price. This was happening as Māori were realising they could claim back land through the Tribunal.

²⁷⁷ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262.

²⁷⁸ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262.

²⁷⁹ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA); and Jacinta Ruru “*In Good Faith*” (New Zealand Law Foundation (2008) at 1.

The Crown accepted it had no one way to identify which land Māori had claims to and therefore could not guarantee land under claim was not privatised. However, the Crown maintained it should not have any restrictions on transfer of land to state-owned enterprises.

Section 9 of the State-Owned Enterprises Act 1986 stated “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”, opening the courts to define and apply the principles.²⁸⁰ The Court of Appeal characterised the relationship between Māori and the Crown as “akin to a partnership”.²⁸¹ The Court articulated principles reflecting the special Crown–Māori relationship. The Court of Appeal established good faith, active protection, partnership, mutual benefit, and options (choice) as some principles that captured the relationship between Māori and Crown.²⁸²

Despite acknowledging the principle of partnership, the Court also noted that the relationship between the Crown and Māori were analogous to a fiduciary relationship similar to those of a trustee and beneficiary. The Crown accepted a responsibility to act in the best interests of Māori, and to proactively protect Māori interests.²⁸³ The Crown and Māori are required to act in good faith and act reasonably towards each other.²⁸⁴ The Crown has to make informed decision on matters concerning Māori and consult Māori on matters implicating the Treaties.²⁸⁵

In 2020 the government released “New principles to guide the settlement of historical Treaty claims”. The six principles are:²⁸⁶

1. Good faith:

²⁸⁰ State-Owned Enterprises Act 1986, s 9.

²⁸¹ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 15.

²⁸² “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 15.

²⁸³ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 15.

²⁸⁴ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 15.

²⁸⁵ “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 15.

²⁸⁶ Margaret Wilson “New principles to guide the settlement of historical Treaty claims” (press release, 20 July 2000); and “Healing the past, building a future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown”, above n 262, at 25-26.

- a. Negotiations must be conducted with good faith, mutual trust, respect, and cooperation. The parties aim to work towards a common goal.
2. Restoration of relationship:
 - a. A key part of the negotiation and settlement processes is to restore the relationship between Māori and the Crown. The relationship between Māori and the Crown is to be protected.
3. Just redress:
 - a. The redress for the breaches of the principles of the Treaties must be just and fair and must reflect the extent and nature of the breach.
4. Fairness between claims:
 - a. Like cases should be treated alike. The Crown will seek to establish consistency in redress.
5. Transparency:
 - a. The government must clearly explain the Tribunal's purpose and the issues it investigates. It will also provide sufficient information to claimants to understand the basis of the settlement.
6. Government-negotiated:
 - a. The government negotiates directly with claimants to deliver settlements.

ACT Party leader David Seymour unsuccessfully tried to redefine the principles of the Treaties through his Principles of the Treaty of Waitangi Bill.²⁸⁷

V Principle of Active Protection

The Crown may have breached multiple principles of the Treaties, including the principle of active protection and the principle of partnership, specifically through failures to act in good faith, to consult with Māori, and to make informed decisions in the context of this thesis. This thesis focuses on the Crown's breach of the principle of active protection, as it is the most clearly breached and best supported by treaty jurisprudence. The extensive case law on active protection, particularly in relation to intangible taonga, renders it the most robust doctrinal basis for analysis in this context.

²⁸⁷ Principles of the Treaty of Waitangi Bill.

A Development of the Principle of Active Protection

1 Actions and omissions

One of the first references to the Crown's duty of active protection of Māori interest is in the Manukau Report. The Manukau Report examined the despoliation of Manukau Harbour and the continuing loss of tribal lands, beginning with the unjust confiscations of the 1860s and continuing through to 1985.²⁸⁸

The Tribunal considered the principle of active protection and concluded:²⁸⁹

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 the 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. It is the omission of the Crown to provide that protection that has been the main cause of complaint in this claim.

The Tribunal frames the principle as a proactive duty on the Crown to act to protect Māori interest and prevent it from harm. The Crown can breach its duty to actively protect Māori interests in two ways; one, by failing to provide protection for the interests or two, by taking an action that undermines those interests.

Two years later, in 1987, in *New Zealand Māori Council v Attorney-General (Lands case)*, the Court of Appeal, Aotearoa New Zealand's highest domestic court at the time, considered the principle of active protection in relation to the transfer of assets owned by the Crown and administered by government departments to business model state-owned enterprises.²⁹⁰

The State-Owned Enterprises Act, was enacted with section 9 that stated, “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the

²⁸⁸ Waitangi Tribunal, above n 175, at 1.

²⁸⁹ Waitangi Tribunal, above n 175, at 70.

²⁹⁰ *New Zealand Māori Council v Attorney-General*, above n 279; and *Ruru*, above n 279, at 1.

Treaty of Waitangi”.²⁹¹ The only legislation before the State-Owned Enterprises Act to use the words “principles of the Treaty of Waitangi” was the Treaty of Waitangi Act.²⁹²

The Crown passed the Treaty of Waitangi Amendment Act in 1985 allowing the Tribunal to look at breaches of the Treaties dating back to 1840. The claimants were concerned that the Crown’s transfer of Crown owned assets to state-owned enterprises would shrink the pool of assets the Crown would access to redress Māori for historical breaches of the principles of the Treaties.²⁹³

The Court of Appeal, in practise, endorsed the Tribunal’s statement in the Manukau Report, writing.²⁹⁴

... the duty of the Crown is not merely passive but extends to active protection of Māori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Tribunal's Te Atiawa, Manukau and Te Reo Māori reports which support that proposition and are undoubtedly well-founded.

2 Tangible and intangible taonga

In the Te Reo Māori Report, the Tribunal expanded the principle of active protection to apply to both tangible and intangible things.

Nga Kaiwhakapumau I Te Reo (The Māori Language Board of Wellington) asked the Tribunal to recommend that te reo Māori be recognised as an official language of New Zealand for all purposes. The claim was about preserving Māori culture through preserving an integral part of it, namely the language.

The Tribunal wrote:²⁹⁵

²⁹¹ State-Owned Enterprises Act, s 92; and Ruru, above n 279, at 1.

²⁹² Treaty of Waitangi Act, preamble; State-Owned Enterprises Act, s 92; and Ruru, above n 279, at 2.

²⁹³ Ruru, above n 279, at 2.

²⁹⁴ *New Zealand Māori Council v Attorney-General*, above n 279, at 642.

²⁹⁵ Waitangi Tribunal, above n 173, at 9.

Yet at that time and for years afterwards well towards the middle of the century, European New Zealanders believed that the Māori was dying out and that the Māori people of New Zealand would be assimilated into the European population as the decades went by. It therefore seemed wise in the light of that belief that all Māori children should be fluent in English. It was not realised then what a destructive effect this emphasis on English speaking would have on te reo Māori and ultimately on the culture which is part of our national heritage whether we are Māori or European.

The Tribunal found te reo Māori had been severely damaged by Crown assimilation policies. Despite Māori efforts to revive the language, they did so under severe disadvantage.²⁹⁶

The Tribunal accepted evidence which demonstrated:²⁹⁷

... in 1913 90% of Māori schoolchildren could speak Māori. Forty years later in 1953 this percentage had dropped to 26%. Twenty years after that the figure (in 1975) had fallen to less than 5%. These figures show how effective has been the educational policy that has operated in a social climate where children hear nothing but English on all sides—at the cinema, on radio and television, and in their ordinary social and school life.

The Tribunal noted that many Māori contributed, often unwillingly, to the erosion of te reo Māori. The Tribunal received in evidence that:²⁹⁸

There are many reasons why people decided (often against their will and despite their deepest feelings) to abandon the use of Māori in their homes. One major and ever-present factor in such decisions however has been the obvious lack of support for the language in the New Zealand community as a whole. In the 1950's when this process began, Māori was still the everyday language in dozens, probably hundreds of rural localities. Yet only a tiny minority of Māori speaking children were able to study their language, even at secondary school: some, like their parents and grandparents before them could not even speak Māori in the playground (let alone the classroom) without running the risk of being punished for transgressing school rules. It was very obvious that the only language that really counted in New Zealand was English ...

²⁹⁶ Waitangi Tribunal, above n 173, at 9.

²⁹⁷ Waitangi Tribunal, above n 173, at 11.

²⁹⁸ Waitangi Tribunal, above n 173, at 9.

The claimants argued that the Crown failed to protect te reo Māori and that was a breach of the principles of the Treaties. The Tribunal applied the principle of active protection to protection of te reo Māori noting:²⁹⁹

The evidence and argument has made it clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The ‘guarantee’ in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place.

3 Māori actions detrimental to taonga does not negate Crown’s duty

Importantly, although the Tribunal heard evidence of Māori taking actions that may have been detrimental to te reo Māori, it did not mean the Crown was off the hook. Even where Māori actions contributed to the erosion of taonga like te reo, the Crown’s duty remains. The Tribunal affirms that Crown-initiated harm cannot be excused by later Māori participation.

The Tribunal reiterated its position on the protection of intangible taonga in the Orakei Report. The Tribunal emphasised that the relationship between rangatiratanga and mana are inseparable, makes the point:³⁰⁰

The Māori text of the Treaty conveyed to the Māori people that, amongst other things, they were to be protected not only in the possession of their lands but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.

The Crown’s duty of active protection is extended to culture, which includes but not limited to language, whakapapa, diverse sexualities and genders and art practices such as dancing, singing, and carving.

In 1992, the Court of Appeal makes a statement in *New Zealand Māori Council v Attorney-General (Broadcasting case)* in line with the Tribunals’ decision in the Te Reo Māori Report and the Orakei Report.³⁰¹ Similarly to the *Lands case*, here the New Zealand Māori Council

²⁹⁹ Waitangi Tribunal, above n 173,) at 1.

³⁰⁰ Waitangi Tribunal *Report of the Waitangi Tribunal on the Orakei Claim* (Wai 9, 1987) at 209.

³⁰¹ *New Zealand Māori Council v Attorney-General* [1992] NZCA 311, [1992] 2 NZLR 576 at 2.

argued the proposed transfer of broadcasting assets was inconsistent with the principles of the Treaties and therefore section 9 of the State-Owned Enterprises Act did not allow such an action. Hardie Boys J, speaking to the protection of taonga, stated the “protection of the Māori language, an essential element of Māori culture, was and is a fundamental Treaty commitment on the part of the Crown.”³⁰²

The Court of Appeal reaffirms three things in its statement; one, the principle of active protection applies to intangible taonga, two, essential parts of Māori culture such as language are intangible taonga and three, the Crown is under an obligation to actively protect them.

4 Protection to fullest extent practicable

The Tribunal has created a caveat to the principle of active protection. In the Mohaka River Report, the Tribunal states the “Crown is obliged to protect Māori property interests to the fullest extent reasonably practicable”.³⁰³ The Privy Council, in the subsequent appeal to the *Broadcasting case, New Zealand Māori Council v Attorney-General (Broadcasting Assets case)*, drew further boundaries around the duty of active protection saying while the “obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.”³⁰⁴

5 Crown duty heightened with vulnerability of taonga

While drawing boundaries on one end, the *Broadcasting Assets case* created more onerous responsibilities on the other. The Privy Council stated the Crown’s duty is heightened with the vulnerability of the taonga.³⁰⁵ In 1994, te reo Māori was in an increasingly vulnerable state leading the Privy Council to state “this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations” and it “may well require the Crown to take especially vigorous action for its protection.”³⁰⁶

³⁰² *New Zealand Māori Council v Attorney-General*, above n 301, at 2.

³⁰³ Waitangi Tribunal *The Mohaka River Report* (Wai 119, 1992) at 77

³⁰⁴ *New Zealand Māori Council v Attorney-General* [1993] NZPC 7 at 10.

³⁰⁵ *New Zealand Māori Council v Attorney-General*, above n 304, at 10.

³⁰⁶ *New Zealand Māori Council v Attorney-General*, above n 304, at 11.

Further, the Privy Council held where the vulnerable state of a taonga can be attributed to the Crown's past breaches of its obligations, the Crown's responsibility is heightened.³⁰⁷

6 Essential exchange giving rise to the principle of active protection

The Tribunal has noted on many accounts that one of the rationales for the principle of active protection is the essential exchange that took place between the Crown and Māori during the signing of the Treaties.³⁰⁸ This essential exchange explains what taonga and to what extent that taonga is protected by the principle of active protection.

Tu Puni Kōkiri frames the Treaties as “an exchange of promises” where:³⁰⁹

Māori ceded to the British Crown the power to govern in New Zealand and in exchange the Crown promised to protect their chiefly authority, including their rights to their lands and other possessions.

The Tribunal claims the principle of exchange or reciprocity is the principle that recognises “cession by Māori of sovereignty to the Crown was in exchange for the protection by the Crown of Māori rangatiratanga”.³¹⁰

Professor of Politics at University of Otago Janine Hayward writes the Ngai Tahu Report:³¹¹

... laid the foundation for the overarching ‘principle of exchange’ – explained as the fundamental compact or accord embodied in the Treaty, and as being of paramount importance. Inherent in this principle of exchange is the notion of reciprocity – ‘the exchange of the right to govern for the right of Māori to retain their full tribal authority and control over their lands and all other valued possessions’...

³⁰⁷ *New Zealand Māori Council v Attorney-General*, above n 304, at 11.

³⁰⁸ "He Tirohanga o Kawa ki te Tiriti o Waitangi" (2001) Te Puni Kōkiri <www.tpk.govt.nz> at 50.

³⁰⁹ "He Tirohanga o Kawa ki te Tiriti o Waitangi", above n 308, at 14.

³¹⁰ "He Tirohanga o Kawa ki te Tiriti o Waitangi", above n 308, at 50.

³¹¹ Janine Hayward "Flowing from the Treaty's Words: The Principles of the Treaty of Waitangi" in Janine Hayward and Nicola R Wheen (eds) *The Waitangi Tribunal: Te Rōpū Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) 29 at 33.

If the view is that the principle of active protection flows from the essential exchange that took place between Māori and the Crown in 1840, then all things that would have been protected under exercise of tino rangatiratanga need to be protected under Crown sovereignty, as the signing of the Treaties “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”.³¹²

Te Puni Kokiri claims “kāwanatanga clearly allocated to the Crown the right to legislate, providing that the interests of the Māori Treaty partner were recognised and upheld.”³¹³ The Tribunal adds the Crown is under an obligation to respect and enable Māori autonomy and authority as far as practicable to manage their own policies, resources, and affairs according to their own preferences.³¹⁴

He Maunga Rongo: Report on Central North Island Claims, Stage One published in 2008 contained a discussion on the principle of exchange or reciprocity in which it stated:³¹⁵

The Crown, in exchange for kāwanatanga (governance) and the right to make laws for New Zealand, solemnly promised that Māori rights, including the right to exercise tino rangatiratanga (autonomy or self-government) over their whenua (lands), their kainga (estates), and their remaining taonga (including but not limited to forests and fisheries), would be protected ...

Underlying the principle of exchange or reciprocity is that where Māori no longer retain full tribal authority due to the Crown assuming sovereignty, the Crown has an active duty to protect all things treasured by Māori. Reciprocity then becomes paramount to this exchange as Māori have expectations that the Crown will reciprocate by ensuring the active protection of taonga or by ensuring the Crown does not undermine Māori authority in protecting and preserving their culture.³¹⁶ Where the Crown fails to protect taonga or where the Crown fails to enable Māori authority to protect at risk taonga, the Crown risks breaching the principle of active protection.

³¹² Waitangi Tribunal, above n 300, at 183; and Waitangi Tribunal, above n 176, at 52.

³¹³ “He Tirohanga o Kawa ki te Tiriti o Waitangi”, above n 308, at 58.

³¹⁴ Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatahi* (Wai 143, 1996), at 18-21.

³¹⁵ Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wai 1200, Vol 4, 2008) at 1237.

³¹⁶ Hayward, above n 311, at 33-35.

The Crown's obligation of active protection is heightened by its status as the dominant and better-resourced party in the relationship. The Treaties envisaged mutual benefit, not dominance to the detriment of the other. Where one party holds more power, it must ensure the other continues to benefit. Otherwise, the relationship's foundational reciprocity is undermined. In this context, Māori can only realise ongoing benefit from the relationship if the Crown actively protects Māori culture.

He Maunga Rongo: Report on Central North Island Claims, Stage One reads:³¹⁷

It is in the nature of the partnership forged by the Treaty that the Crown and Māori should seek arrangements which acknowledge the wider responsibility of the Crown while at the same time protecting Māori tino rangatiratanga. There was always to be room for two peoples, as both expected to gain from the Treaty.

The Tribunal expresses a similar view in the Mangonui Sewerage Report, noting:³¹⁸

The basic concept was that a place could be made for two people of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed ... It is obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.

An imbalance of power has allowed the Crown to ignore Māori authority in many circumstances, and often act in a self-serving manner. However, the Tribunal in *Te Whānau o Waipareira Report* said where there is an imbalance of power in favour of the Crown, "it should be offset by the weight of the Crown duty to protect Māori rangatiratanga", for example, where the Crown has overreached into Māori tribal authority and governed in a manner that is contrary to te ao Māori, the Crown assumes a responsibility to ensure Māori culture is protected.³¹⁹

B Summary of Principle of Active Protection

³¹⁷ Waitangi Tribunal, above n 315, at 1238.

³¹⁸ Waitangi Tribunal *Mangonui Sewerage Report* (Wai 17, 1988) at 4.

³¹⁹ Waitangi Tribunal *Te Whānau o Waipareira Report* (Wai 414, 1998) at xxvi.

- The Crown must actively protect Māori interests;³²⁰
- Breaches can occur through harmful actions or failures to act;³²¹
- Protection must be to the fullest extent practicable;³²²
- Applies to both tangible and intangible taonga;³²³
- Crown remains responsible regardless of Māori contributions to harm;³²⁴
- Duty increases with taonga vulnerability;³²⁵ and
- Rooted in the Treaties' principle of exchange.

VI Breach of the Principle of Active Protection

The principle of active protection imposed a duty on the Crown to protect taonga. Instead, its actions and inactions devastated one of Aotearoa New Zealand's most precious taonga: te ira takatāpui. This thesis argues that the Crown breached this duty by both actively harming te ira takatāpui and failing to protect it from ongoing harm, perpetrated by the Crown, and wider society.

Over decades, the Crown's actions and inactions criminalised, dehumanised, alienated, and traumatised takatāpui and queer people. Following the signing of the Treaties, the Crown swiftly imposed English law and culture, disrupting nearly every aspect of te ao Māori. Takatāpui experienced some of the harshest impacts of colonisation through the criminalisation of homosexuality and transgender identities, the Crown's failure to act during the AIDS pandemic, the widespread use of conversion therapy, and the persistent denial of equal rights. These actions and omissions formed part of the Crown's broader attempt to erase te ira takatāpui, causing direct harm to a taonga and breaching its duty of active protection. The swift criminalisation of same-sex relationships and gender diversity marked the beginning of the government's persecution of takatāpui and queer communities. In the decades that followed, these communities faced discrimination and exclusion that heterosexual and cisgender people were not subjected to. They were denied rights such as

³²⁰ Waitangi Tribunal, above n 175, at 70.

³²¹ Waitangi Tribunal, above n 175, at 70

³²² *New Zealand Māori Council v Attorney-General*, above n 279; and Waitangi Tribunal, above n 303, at 77.

³²³ Waitangi Tribunal, above n 173, at 9.

³²⁴ Waitangi Tribunal, above n 173, at 9.

³²⁵ *New Zealand Māori Council v Attorney-General*, above n 304, at 10.

civil unions and marriage, adoption, access to government benefits, protection from conversion therapy and discrimination, and the freedom to live as their authentic selves.

A Criminalisation

1 Criminalisation of homosexuality

The breach of the principle of active protection begins with the criminalisation of homosexuality and transgender people and, by extension, the criminalisation of te ira takatāpui. The case under this Crown action is straightforward. The Crown had, and still has, a duty to protect Māori interests, including taonga such as te ira takatāpui. Instead of safeguarding it, the Crown criminalised it. By doing so, it performed the diametrical opposite of protection.

By 1858, Parliament had imported most English laws, including those that criminalised homosexuality and transgender people. The English Laws Act 1858 declared that all English laws came into force in Aotearoa New Zealand as of 14 January 1840.

Following the English Laws Act:³²⁶

Sex between men was believed to be an 'unnatural offence' and a breach of moral and Christian codes – it was a crime 'not to be named among Christians'. Some heterosexual activity fell into this category as well, such as anal intercourse. Under English law, this act was known as 'buggery', and men found guilty of it could in theory suffer the death penalty. Many other sexual activities (oral sex and masturbation, for example) were not regulated by the law but were seen as immoral – although that did not mean that women and men did not experience and enjoy them.

For example, two consenting 40-year-old men engaging in anal sex in the privacy of their home could be prosecuted and sentenced to death.³²⁷

³²⁶ “Homosexual law reform – Setting the scene” (28 May 2024) New Zealand History <nzhistory.govt.nz/>.

³²⁷ “Homosexual law reform – Setting the scene”, above n 326.

“Sodomy” traditionally referred to sexual acts deemed immoral or non-procreative, including anal and oral sex.³²⁸ “Buggery,” in contrast, specifically targeted anal sex and was used to criminalise men who had sex with men. Sodomy covered a broad range of acts deemed immoral by those in power, whereas buggery was narrowly aimed at criminalising anal sex.

In 1861, England abolished the death penalty for buggery, replacing it with imprisonment for ten years to life, regardless of consent. Aotearoa New Zealand enacted similar legislation six years later in the Offences Against the Person Act 1867.³²⁹

By 1885, all sexual relations between men were criminalised in England, and Aotearoa New Zealand followed suit in the Criminal Code Act 1893.³³⁰ The English Criminal Law Amendment 1885 introduced the Labouchere Amendment, which criminalised all sexual activity between men, under the vague charge of “gross indecency.”³³¹ This vagueness gave the government sweeping powers to criminalise a wide range of conduct, including sexual acts, behaviours, and mannerisms between men that fell outside the scope of anal sex, effectively criminalising all sexual conduct between men. The Labouchere Amendment significantly influenced Aotearoa New Zealand legislation and policy.³³²

While its immediate impact was seen in policing, arrests, prosecutions, and convictions, the amendment had a longer-term effect of generating disgust, prejudice, and stigmatisation toward men who had sex with men. It portrayed them as sick, shameful, and dirty.³³³ The law changes fostered a culture of secrecy and fear, which suppressed identities and made men more vulnerable during the HIV AIDS pandemic. Because of the stigma and criminalisation, many could not easily come forward, get tested, or seek treatment without risking exposure.

The Criminal Code Act 1893 repealed the Offences Against the Person Act 1867. However, it continued to criminalise buggery and added penalties such as hard labour and flogging, alongside life imprisonment. It also criminalised sodomy. The Crimes Amendment Act 1941

³²⁸ Alison Laurie and Linda Evans “Legislating homosexuality” in *Twenty Years On - Histories of Homosexual Law Reform in New Zealand* (Lesbian & Gay Archives of New Zealand, Wellington, 2009); and “Homosexual law reform – Setting the scene”, above n 326.

³²⁹ “Homosexual law reform – Setting the scene”, above n 326; and Offences against the Person Act 1867.

³³⁰ Criminal Code Act 1893, part XIII; and “Homosexual law reform – Setting the scene”, above n 326.

³³¹ Laurie and Evans, above n 328, at 95.

³³² Laurie and Evans, above n 328, at 95.

³³³ “Homosexual law reform – Setting the scene”, above n 326.

removed flogging, and the Criminal Justice Act 1954 removed hard labour.³³⁴ These laws continued to use vague and broad terms such as “unnatural offences,” enabling the government to criminalise any sexual act between men it wished to target. The use of words like “unnatural” and “gross indecency” perpetuated misinformation and stigma against men who had sex with men.

The Crimes Act 1961 removed the punishment of life imprisonment for sodomy. However, it retained the offences of indecency between males and sodomy.³³⁵ Section 146 made it an offence to keep a “place of resort for homosexual acts”.³³⁶

Some argue that the Crimes Act criminalised same-sex relations between women, particularly through section 139, which addressed indecent acts involving women over 21 and girls under 16.³³⁷ However, the more plausible reading is that it targeted indecent acts involving girls under 16 where the perpetrator was an adult woman. An identical provision, section 140, applied to men and boys. Crucially, section 141 criminalised indecency between consenting adult males, but no equivalent provision existed for females. The law did not criminalise two adult women over the age of 21 engaging in behaviour considered indecent. Nonetheless, section 139 marks the first acknowledgment of lesbian sexual activity in Aotearoa New Zealand laws.³³⁸

In 1974, Venn Young MP introduced a member’s bill to decriminalise consensual sex between men over 21, but it failed to pass.³³⁹ In 1979, Warren Freer MP proposed a similar bill, setting the age of consent at 18 or 20. However, gay rights groups opposed it, arguing the age should match that for heterosexual acts: 16.³⁴⁰

In 1985, Fran Wilde MP introduced her member’s bill, the Homosexual Law Reform Bill, which passed in 1986 and decriminalised homosexuality between men. However, Wilde’s attempt to amend the Human Rights Commission Act 1977 to include sexual orientation in

³³⁴ Laurie and Evans, above n 328, at 95.

³³⁵ Randolph Hollingsworth “Milestones: Legal Status and Sexual Orientation/Identity” (15 December 2022) National Council of Women of New Zealand <www.ncwnz.org.nz/>.

³³⁶ Crimes Act 1961, s 146.

³³⁷ Crimes Act 1961, s 139.

³³⁸ Crimes Act 1961, s 139.

³³⁹ Laurie and Evans, above n 328, at 96.

³⁴⁰ Laurie and Evans, above n 328, at 96.

the list of prohibited grounds of discrimination failed. Sexual orientation was not added to the list until 1993.³⁴¹

2 Criminalisation of transgender people

While the law explicitly targeted gay men, the criminalisation of transgender people was more covert. Transgender people were criminalised and treated prejudicially under legislation that did not explicitly name them, but whose vague language and discretionary enforcement enabled targeted policing.

Prior to 1994, transgender people, then commonly referred to as transvestites or transsexuals, including those who had undergone medical transition (surgery and hormone therapy), were unable to marry someone of the opposite gender. In 1994, the Attorney-General applied to the High Court for clarification on whether, two people assigned the same gender at birth could marry if one had transitioned. The Court allowed transgender individuals who had undergone surgical and medical procedures to marry someone of the opposite gender.³⁴²

The Court ruled:³⁴³

I therefore make a declaration that for the purposes of s23 of the Marriage Act 1955 where a person has undergone surgical and medical procedures that have effectively given that person the physical conformation of a person of a specified sex, there is no lawful impediment to that person marrying as a person of that sex ...

Although transgender people were never explicitly criminalised in law, they were effectively criminalised in practice.³⁴⁴ Vague and broad statutes empowered police to arrest and charge transgender individuals, making their identities and expressions de facto illegal. Laws such as “behaving in an offensive manner in a public place,” “frequenting with felonious intent,” and “rogue and vagabond” were routinely used to target them.³⁴⁵ Many who lived through this

³⁴¹ Laurie and Evans, above n 328, at 97.

³⁴² *Attorney-General v Otahuhu Family Court* [1995] 1 NZLR 603 (HC) at 607-608.

³⁴³ *Attorney-General v Otahuhu Family Court*, above n 342, at 607-608.

³⁴⁴ Hansen, above n 81, at 6 and 63.

³⁴⁵ Johanna Schmidt “Story: Gender Diversity – Difficulties and visibility” (4 May 2021) Te Ara – The Encyclopaedia of New Zealand <teara.govt.nz>; and Hansen, above n 81, at 6 and 63.

period, especially into the 1980s, described their lives as “illegal.” Further, transgender literature was censored under the Indecent Publications Act 1963.³⁴⁶

Queer histories researcher Will Hansen says:³⁴⁷

The fact that trans material was viewed as posing a danger to the innocent, something that might ‘convert’ or ‘pollute’ an impressionable mind to lead a similarly deviant life, reveals the prevailing public assumptions held about the inherent immorality of trans life.

Transgender women were treated as men under the law, meaning all laws criminalising sex between men also applied to them.

Hansen notes:³⁴⁸

While in the 1950s the penalties for sex between men were reduced, the police concurrently began to pursue homosexual offences with more intensity and the number of convictions increased to a peak during the mid-1960s. Entrapment, raids of parties and bars, and general harassment of queer communities by police was not uncommon, forcing queer communities to operate largely underground.

In 1966, police arrested Carmen Rupe, transgender woman, drag entertainer and sex worker, for “behaving in an offensive manner” and “frequenting with felonious intent” after finding her dressed as a woman while waiting for a taxi.³⁴⁹ Judge McCarthy ruled he was “unable to find anything in our law which says that it is unlawful for a male to attire himself in female clothing.”³⁵⁰ Although Judge McCarthy misgendered Rupe and the case did not recognise transgender women as women, it is considered a landmark case for transgender people. The ruling limited police powers to arrest transgender women for dressing in alignment with their gender, removing one avenue of government interference. However, transgender people were

³⁴⁶ Hansen, above n 81, at 6.

³⁴⁷ Hansen, above n 81, at 6.

³⁴⁸ Schmidt, above n 345; and Hansen, above n 81, at 6.

³⁴⁹ Hansen, above n 81, at 63; and Arela Jiang “Transgressors: the changing regulation of trans* identities in New Zealand c 1920-1995” (2024) 11 NZFLJ 159 at 164.

³⁵⁰ Hansen, above n 81, at 63; and Jiang, above n 349, at 164.

not free from prosecution. Police relied on other offences, most commonly vagrancy and prostitution, to target them.³⁵¹

Employment discrimination against transgender people was not explicitly illegal, and arguably, still is not.

Employment law barrister David Burton writes:³⁵²

Section 21 of the Human Rights Act recognises 13 prohibited grounds of discrimination, including sex and sexual orientation. Sexual orientation is defined under the act to mean “heterosexual, homosexual, lesbian, or bisexual orientation”. The definition of sex simply states that the term “includes pregnancy and childbirth”. Although yet to be determined by the courts, the Human Rights Commission interprets “sex” under the act to include gender identity, gender expression and “sex characteristics”, and it accepts complaints of discrimination on this basis ... In the workplace, the Employment Relations Act prohibits discrimination on the basis of sexual orientation and sex, but it relies on the definition provided in the Human Rights Act.

According to the government website providing employment information:³⁵³

... transgender people may be protected under the Human Rights Act 1993 from unlawful discrimination on the grounds of gender identity in the workplace but this has not been tested in New Zealand courts.

Because transgender people were not protected from workplace discrimination until, arguably, the Human Rights Act, they were highly vulnerable to discrimination in the hiring process, leaving many unemployed. Hansen writes:³⁵⁴

Employment discrimination meant trans women had to “operate within very limited areas,” and many turned to sex work in order to survive. Yet, though Georgina Beyer, De’Anne Jackson and others would not have chosen sex work for themselves had they not found it necessary to survive, some sex workers enjoyed the work ... finding employment outside of

³⁵¹ Hansen, above n 81, at 63.

³⁵² David Burton “Gender identity, discrimination and employment law” *Stuff* (online ed, 26 April 2023).

³⁵³ “Discrimination” (13 January 2025) Employment New Zealand <www.employment.govt.nz/>.

³⁵⁴ Hansen, above n 81, at 29.

sex work was not totally impossible for everyone, though those that were employed generally felt lucky to be so.

Rupe stated that she would not have engaged in sex work had it not been “a way of surviving”.³⁵⁵

Hansen adds that:³⁵⁶

Beyer explained how it was common for trans people to twist the unforgiving beneficiary system in their favour. Trans women were denied the unemployment benefit unless they pretended to be men. Yet since the state classed trans people as having a psychosexual disorder, they would apply for the sickness benefit instead. She felt that this was both a matter of survival and retaliation ...

Many transgender women were forced into sex work as a means of survival. However, because sex work was criminalised, those who turned to it out of necessity were punished by the government. In effect, the state funnelled transgender women into sex work and then used their participation as justification for policing and punishing them.

Hansen writes that:³⁵⁷

... the criminalisation of sex work had a particularly profound effect on trans women. Under the Social Security Amendment Act 1961, welfare was legally available to all but married women. In practice, however, it was denied to trans people like Georgina Beyer, who was told by the Department of Social Welfare to “put [her] trousers back on” as she was “perfectly capable” of working. To pretend to be a man was never doable and as anti-trans discrimination meant that one “couldn’t fully participate in regular life,” Beyer felt “funnelled” towards “the street scene.” Although some trans women chose sex work for other reasons, employment discrimination meant that many trans women were left with no choice other than prostitution to survive.

³⁵⁵ Hansen, above n 81, at 31.

³⁵⁶ Hansen, above n 81, at 68.

³⁵⁷ Hansen, above n 81, at 6.

Hansen adds: “Queens, being a community of women who were predominantly Māori and Pasifika and largely sex workers, consequently found themselves the target of increased scorn and threatened by rising inequality.”³⁵⁸

Sex work was not only criminalised but dangerous, exposing transgender women to constant dehumanisation and violence. One sex worker recalled she:³⁵⁹

... hated the streets...I just didn’t like the fact that I was stuck in that whole world, where people looked at you, ‘oh yeah, you’re Māori you’re trans, you’re a prostitute.’ I didn’t want that. I wanted just a job, go home, you know?

Beyer said it was safer to work at a strip club “than having to ply your trade out on the street... better to be inside a strip club on a cold, wet, windy Wellington night.”³⁶⁰ She describes sex work as a “very rough job”.³⁶¹ Hansen notes that transgender women were “vulnerable to both the elements and to potential violence.”³⁶² This violence could take many forms: verbal, physical, and often sexual. Some transgender women who were mistaken for cisgender women felt that this misunderstanding protected them from “the sexual and physical abuse many of her fellow queens suffered. For those who were read as trans, the dangers were tangible.”³⁶³

One transgender sex worker said she “never worked lying down” because it made her more vulnerable to attack. She recalled being “hit by rotten eggs and bottles”.³⁶⁴ Hansen writes that in one case, a transgender sex worker was “brutally raped” and was “hospitalised with twenty-odd stitches” by a serial offender.³⁶⁵ The abuse faced by transgender sex workers led to severe mental health issues, including depression, suicide, and substance use as a coping mechanism to “block everything out” and “make the evenings bearable”.³⁶⁶

³⁵⁸ Hansen, above n 81, at 69.

³⁵⁹ Hansen, above n 81, at 31.

³⁶⁰ Hansen, above n 81, at 31.

³⁶¹ Hansen, above n 81, at 31.

³⁶² Hansen, above n 81, at 31.

³⁶³ Hansen, above n 81, at 32.

³⁶⁴ Hansen, above n 81, at 32.

³⁶⁵ Hansen, above n 81, at 32.

³⁶⁶ Hansen, above n 81, at 33.

Transgender women who fought back against those who harassed or assaulted them in day-to-day life or while performing sex work were charged with assault, with little to no consequences for those who attacked them.³⁶⁷ A transgender sex worker told Hansen that those who stood up for themselves and protected themselves from attacks all had “convictions for assault” as “they were not afraid to fight back when attacked.”³⁶⁸ The police did not protect transgender women who found themselves as victims of harassment and physical abuse. Many assault convictions against transgender sex workers resulted from police-instigated retaliation and self-victimising. Beyer said the police targeted transgender women because they “just had this innate hatred of such people, and would just fall short of being incredibly brutal to them, but [were] very mean and nasty and threatening,” while another transgender woman said the treatment of transgender women was “horrible, horrible. You had to run from the police in those days,” and that they “harassed working girls that did nobody any harm”.³⁶⁹

Older transgender woman advised younger peers to leave Auckland, where police violence was rife, for Wellington, where officers were relatively less abusive. One older transgender woman told a younger peer, “don’t stay here, I’ve been beaten so many times...I don’t want you to go through what I’ve been through”.³⁷⁰ Hansen writes that although the police may have been friendlier in Wellington, a vice squad was “tasked with doing a periodic ‘clean’ of the streets - or, as Detective Sergeant Paul Dimmery and Detective David Hirstich described it in 1989, a ‘tranny run.’”³⁷¹

Police regularly raided the homes of transgender women, damaging property, and assaulting residents in the process. They also raided trans-friendly businesses, subjecting them to entrapment techniques.³⁷²

The Crimes Act 1961 also criminalised procuring, brothel-keeping, and living off the earnings of prostitution. These laws left transgender women vulnerable to criminalisation on every front.

³⁶⁷ Hansen, above n 81, at 33.

³⁶⁸ Hansen, above n 81, at 33.

³⁶⁹ Hansen, above n 81, at 33.

³⁷⁰ Hansen, above n 81, at 34.

³⁷¹ Hansen, above n 81, at 34.

³⁷² Hansen, above n 81, at 34.

Hansen explains the crackdown:³⁷³

Before 1981 technically only cisgender women could be charged under the law with prostitution, but the introduction of the Summary Offences Act in 1981 broadened the charge of soliciting to include “men,” legally interpreted as those assigned male at birth and therefore inclusive of trans women. Massage parlours provided sexual services under the guise of sauna and massage, proliferating in the 1970s and sparking public outcry. This resulted in the Massage Parlours Act of 1978, which defined the massage parlour as a public place and in doing so made workers subject to the existing laws against soliciting in public. It also limited who could operate a parlour, “required workers to record their names and addresses for the police and banned workers who had had prostitution- or drug-related convictions in the previous 10 years.” Due to criminalisation, sex workers were without the rights accorded to other workers and were therefore more vulnerable to violence, coercion, and exploitation. Sex workers were also popularly depicted as a threat to public morality and hygiene, the psychological effects of which were a heavy burden to bear. In addition, police violence and abuse while incarcerated - in men’s cells - was not uncommon.

The discrimination and ill-treatment of transgender women did not end on the streets. They were locked in men’s cells and dehumanised in court. Transgender women were subjected to a “high risk of physical and sexual violence” while incarcerated.³⁷⁴ They were often kept in their arrest clothes over the weekend and denied access to grooming materials.³⁷⁵ Beyer told Hansen that when appearing in court, “you’ve got no makeup on, your beard [has] sprouted through, you look like crap.”³⁷⁶ Courts also deadnamed transgender women, even those who had legally changed their names.³⁷⁷ Hansen writes this was “purposefully belittling and delegitimising.”³⁷⁸

The Prostitution Reform Act 2003 decriminalised sex work.³⁷⁹

3 The criminalisation of takatāpui

³⁷³ Hansen, above n 81, at 7.

³⁷⁴ Hansen, above n 81, at 34-35.

³⁷⁵ Hansen, above n 81, at 35.

³⁷⁶ Hansen, above n 81, at 35.

³⁷⁷ Hansen, above n 81, at 35.

³⁷⁸ Hansen, above n 81, at 35.

³⁷⁹ Prostitution Reform Act 2003.

There were no laws that explicitly stated that they criminalised te ira takatāpui. Takatāpui, or te ira takatāpui, were not named in legislation. However, there may be various reasons for this.

Even if British colonisers and lawmakers had been aware of the term takatāpui, they were unlikely to name it in legislation when criminalising queerness, including homosexuality and transgender expressions and identities. British colonisers, politicians, and academics feigned ignorance of takatāpui, insisting that queerness did not exist in pre-colonial Aotearoa New Zealand. As discussed earlier, they engaged in historical revisionism, crafting a version of Aotearoa New Zealand's past that erased takatāpui and queerness as though they had never existed. Acknowledging takatāpui in legislation would have undermined their position.

Naming takatāpui in legislation would have undermined colonial revisionism, as it would require admitting that takatāpui existed in the first place. From this perspective, their absence in law does not reflect an absence in pre-colonial Māori society, nor does it indicate a lack of intent to criminalise takatāpui. The lack of explicit criminalisation may have been a deliberate strategy to fabricate their historical non-existence, while still criminalising the identities, practices, and expressions of takatāpui.

Another reason could be that British lawmakers imposed English law without consulting Māori or adapting it to local context, arguably breaching the principles of the Treaties. There was a lack of consideration for the societal norms in Aotearoa New Zealand when adopting English law. The acceptance of takatāpui in te ao Māori or the impact the adoption of English law would have on the indigenous peoples, particularly the impact of criminalising homosexuality and transgender identity on the takatāpui identity within te ao Māori were not considered at all. Criminalising what were seen as homosexual or transgender acts effectively criminalised te ira takatāpui as takatāpui engaged in many of those acts as a part of being takatāpui.

It is arguable that British colonisers, politicians, and academics did not understand the cultural nuances of te ira takatāpui. While takatāpui engaged in acts and expressions similar to those of homosexual or transgender people in Western societies, their identity was underpinned by culture. British lawmakers may have misunderstood te ira takatāpui and

instead imposed their own definitions, criminalising what they perceived as queer behaviour. They sought to control takatāpui through external acts, without grasping the cultural depth of the identity. This failure to appreciate te ira takatāpui does not mean takatāpui were not criminalised, indeed, they were deeply and detrimentally impacted by laws targeting behaviours that were essential to their identity.

It is important to note that the stated intentions of British colonisers did not always align with their actions or with the actual impacts of those actions. Although te ira takatāpui may not have been explicitly criminalised in law, it was clearly criminalised in practice. Takatāpui were either imprisoned or forced to suppress their identities to avoid persecution.

Takatāpui identity was never confined to criminalised sexual acts or behaviours, nor was it limited to external expressions such as wearing gender-affirming clothing or makeup. Yet these acts and expressions were key to being oneself, building relationships, and sustaining intimacy. Their criminalisation significantly hindered takatāpui from living authentically and safely. To avoid prosecution, takatāpui were forced to forgo essential expressions of their identity.

One might argue that te ira takatāpui could have been preserved if takatāpui had simply omitted or refrained from engaging in the acts, behaviours, and expressions criminalised by the British. But the demand to suppress core aspects of one's identity for safety is itself a form of violence. These acts and expressions were integral to takatāpui way of life. As previously discussed, Māori were a sex-positive people who engaged in sexual activity freely and openly. Such expressions were natural, and vital to community cohesion. Henry told the Tribunal that "We are certain that sex, and sexual relations, were considered to be extremely important in traditional Māori society".³⁸⁰ To suggest that takatāpui could have avoided criminalisation by altering their behaviour is to suggest they could survive only by ceasing to be takatāpui. This is not a viable argument. The behaviours and expressions targeted by colonial law were central to takatāpui identity. Accordingly, the criminalisation of homosexual acts and transgender expressions must be understood as the criminalisation of te ira takatāpui itself, or at the very least, of the expressions essential to its survival and flourishing.

³⁸⁰ Waitangi Tribunal, above n 49, at 17.

The criminalisation of te ira takatāpui and the wider queer community, and the prejudice that followed, caused immense harm. While this Thesis focuses on the specific impacts on takatāpui, many forms of harm were experienced more broadly across the queer community. Accordingly, this section at times considers the experiences of both takatāpui and the wider queer community. Due to incomplete and inconsistent records of persecution, it is difficult to identify every instance in which takatāpui were targeted under various laws or subjected to discrimination. Although it is well established that queer people were systematically targeted, only a limited number of high-profile cases have been documented, some of which do not involve takatāpui specifically. Nevertheless, these examples are important to include, as they help illustrate the broader climate of hostility in which takatāpui also suffered. This is justified given the ample evidence that takatāpui experienced harm.

Takatāpui suffered a distinct form of harm not experienced by others in the queer community. All people hold worldviews, but none share the exact same worldview as Māori: te ao Māori. Suggesting universal experiences of harm imposes a colonial lens on Indigenous communities. Although the criminalisation of homosexuality and transgender identities harmed all queer people by targeting their very existence, for Māori the impact extended beyond physical acts. This Thesis does not seek to cover all harm suffered by all queer communities, but to examine the harm inflicted on takatāpui.

While ostensibly targeting physical acts, the criminalisation of homosexuality and transgender identity also criminalised te ira takatāpui, and therefore a taonga for Māori. Te ira takatāpui is not reducible to physical conduct. It reflects a way of life embedded in Māori culture. Its survival depends on the ability of takatāpui to live authentically, to express themselves freely, and to transmit cultural knowledge and practice. Demands that Māori refrain from being takatāpui were, in effect, demands to abandon core cultural expressions and sever ties to whakapapa. These instructions, which compelled takatāpui to suppress their identities and relinquish practices fundamental to who they are, constituted a direct assault on te ira takatāpui. When takatāpui are denied the ability to live as themselves, they are denied the ability to sustain culture and nurture te ira takatāpui. The Crown's criminalisation disrupted individual lives and fractured the intergenerational continuity of te ira takatāpui, thereby inflicting harm upon a taonga. Whakapapa is the glue that binds Māori together. It tells them who they come from, who they are, and where they are going. Without whakapapa,

Māori experience a profound sense of spiritual homelessness. The criminalisation of takatāpui disrupted whakapapa, severing ties to whānau, hapu, iwi, tupuna, atua, and land. In breaking te ira takatāpui and damaging a taonga, the Crown failed in its duty of active protection.

Criminalisation embedded anti-takatāpui and anti-queer rhetoric throughout Aotearoa New Zealand, including within Māori communities, shifting attitudes from acceptance to oppression. The criminalisation of queerness, and the subsequent campaign to assimilate society into anti-takatāpui and anti-queer ideologies, deprived Māori of a future in which all members of the whānau, hapū, and iwi could thrive. Takatāpui were rendered spiritually homeless and disowned and estranged from their communities. This disconnection severed many takatāpui from their whānau, hapū, iwi, and whakapapa. If whakapapa is the foundation of te ao Māori, then criminalisation denied takatāpui the most essential element of being Māori.

Other communities also suffered harm, but none experienced the exact same cultural rupture that accompanied the severance of te ira takatāpui. This does not minimise the harm experienced by others in the queer community, it acknowledges the specific cultural harm suffered by Māori. The harm experienced by the broader queer community was nonetheless significant and warrants redress.

4 Other immediate effects of criminalisation

The criminalisation of homosexuality and transgender identities had the immediate effect of policing and punishing takatāpui and queer people. They were forced either to conceal their identities or face arrest and punishment. Policing occurred in dangerous, violent, and coercive ways, leading to heightened levels of stress, humiliation, and physical harm. Takatāpui and queer people lived in constant fear of police brutality.

Punishments for crimes relating to homosexuality were extreme and bleak, including the death penalty, life imprisonment, hard labour, and flogging. However, a debilitating yet often unspoken consequence of criminalisation was the stigma and disgust directed at takatāpui and queer people. Laws criminalising homosexuality described queerness as grossly indecent or

unnatural, often portraying queer people as ungodly, mentally ill, evil, dangerous, sick, and dirty.

Those not perceived to be takatāpui or queer could hide in the closet. For others, who could not conceal their queerness, discrimination, harassment, and violence were daily realities. Although many resisted society's oppressive attitudes and lived authentically, countless queer people never came out or lived as their true selves. For many, it was neither safe nor wise to do so. Even if takatāpui and queer people were not at risk of physical violence, they had to contend with bullying at school, the risk of being disowned by family and friends, discrimination in employment, homelessness, and loss of opportunities.

Speaking during the first reading of the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, Hon Grant Robertson stated:³⁸¹

I also want to speak today to those gay men who were not convicted in this period, but, rather, lived through it in the face of discrimination, in the face of hate, and in the face of stigma. We also owe all of you an apology. Whether you were convicted or not, this law was wrong and made your lives worse.

For many takatāpui and queer people, whether out or not, life was marked by loneliness, despair, and suffocation. Though it may seem less violent than other forms of harm, this suffering was anything but benign. The weight of hiding one's identity and the denial of natural, human connection was crushing to the soul. Takatāpui and queer people were denied the right to love, to express it, and to form meaningful friendships and communities. They resisted successive oppressive governments, often alone and unsupported. Deprived of safe access to love, friendship, and community, many takatāpui were lost to loneliness, trauma, heartbreak, and suicide. That suffering left lasting scars. The loss of takatāpui during this era created a lost generation. The sobering reality of violent oppression, endured even by those who eventually came out, is often overlooked, yet was debilitating for all.

Robertson, during the second reading of the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, added:³⁸²

³⁸¹ (6 July 2017) 723 NZPD at 19397.

³⁸² (6 July 2017) 723 NZPD at 19396.

It is hard, from a perspective of 2017, to comprehend a world in which it was a crime for two adult men to love one another. It is harder still to imagine the feelings of anxiety, fear, despair, and depression that such a law engendered. I cannot say it better than one of the submitters on Wiremu Demchick's petition. He quoted a man whose conviction forced him to resign from the army. These are his words: "This conviction still leads, after 53 years, to self-hatred, worthlessness, unjustified guilt and shame. To relieve the anguish and pain, chronic drinking and self-destruction took control over the next 10-15 years, until the realization that I wasn't a two headed monster, and there were many others like me throughout the world." He goes on: "I love my country, but live in fear of being 'found out', of further humiliation, panic attacks when I see a uniformed police officer, and a general feeling of being unworthy to be myself, something few others would understand.

Robertson concluded by saying:³⁸³

The illegality of homosexuality, the arrests and the imprisonments, and the fear of that happening did not just ruin lives and destroy potential; it killed people. Hundreds, or possibly thousands, of lives have been lost because men could not bear the shame, the stigma, and the hurt caused by this Parliament and the way that society viewed them as criminals.

The indirect criminalisation of te ira takatāpui triggered its disruption and resulted in one of the initial breaches of the Crown's duty to actively protect te ira takatāpui. The signing of the Treaties afforded Māori the authority to control their cultural matters as they saw fit. However, the criminalisation of te ira takatāpui subverted that right. It removed from Māori the authority to deal with te ira takatāpui according to their own cultural preference. The Crown's actions led to the loss of individual identity for many takatāpui, and to a broader disruption of Māori culture and its future. By seeking to erase takatāpui from Aotearoa New Zealand, the Crown prohibited the intergenerational transmission of te ira takatāpui, rendering invisible a unique expression of Māori identity. This erasure was tantamount to an attempt at annihilation. In no circumstance can that be seen as protection. Rather, it was a destruction of whakapapa and an outright violation of the Crown's duty to protect it.

³⁸³ (6 July 2017) 723 NZPD at 19396.

Criminalisation exposed takatāpui and queer people to policing. The Crown empowered both the police and the public to target and persecute takatāpui and queer people. The portrayal of takatāpui as dirty and sinful, combined with a justice system that criminalised and failed to protect them, emboldened anti-takatāpui sentiment and allowed violence and discrimination to flourish. The Crown enabled the systemic removal of takatāpui and queer people from public life. This exclusion was a deliberate effort to marginalise takatāpui and exile them from both Māori society and Aotearoa New Zealand. Many takatāpui and queer people, fearful for their safety and burdened by shame, never came out. They lived lives marked by silence, loneliness and isolation, and depression. Those who did come out faced hostility from an anti-takatāpui Crown and a society emboldened by that prejudice.

The breach of active protection must be assessed against what was reasonably expected of the Crown when signing the Treaties. The Crown was, and remains, obliged to protect Māori interests to the fullest extent practicable. Its actions must be both reasonable and protective in nature. During the mid and late 1800s, the steps required to prevent the criminalisation of takatāpui were neither onerous nor outside the scope of the Crown's obligations. Once the Crown adopted laws that, in effect, criminalised takatāpui, it had a duty to act swiftly to decriminalise and to restore takatāpui to their rightful place in society. Both preventative and corrective measures were within the Crown's jurisdiction and aligned with its duty of active protection. The Crown failed on both fronts.

The criminalisation of takatāpui heightened their vulnerability. This was evidenced by their exposure to violence, the absence of legislative protections, and the denial of fundamental rights.

A glaring example of how targeted queer people became is the murder of Charles Arthur Allan Aberhart. On January 23, 1964, Aberhart was killed in a homophobic attack in Hagley Park, Christchurch.³⁸⁴ Although all six young men involved admitted to some level of participation, including stating they went to the park intending to assault a gay man and admitting to punching Aberhart to the ground, none were held accountable. Despite witness

³⁸⁴ Sinead Gill "Alan Aberhart" The beloved family man killed in NZ's worst homophobic attack" *The Press* (online ed, 23 January 2024).

testimony and clear admissions, a jury acquitted all six after a five-day trial. Aberhart's killers walked free.³⁸⁵

In October 1963, Aberhart was sentenced to jail for three months for a homosexual act.³⁸⁶ A *Marlborough Express* article from October 17, 1963 stated the magistrate considered the offence to have occurred between two consenting adults.³⁸⁷ Aberhart's family say that he was neither investigated nor charged for an offence initially. Aberhart had heard a group of gay men had been arrested for indecent assault for being gay and Aberhart insisted he should be arrested too.³⁸⁸

The Aberhart family believe the jury felt comfortable acquitting the defendants because Aberhart was open about being gay.³⁸⁹ Aberhart's cousin, Nicole Skews-Poole, said he was treated with less humanity because he was gay and had a criminal record.³⁹⁰ Skews-Poole said "The jury had a lot more sympathy for the idea of youths getting up to mischief than they did for the idea that a man lost his life."³⁹¹

The failure to convict the offenders, despite mounting evidence, remains one of the greatest miscarriages of justice in Aotearoa New Zealand's legal history.

The Crown's duty to actively protect taonga intensifies with the vulnerability of the taonga, especially where the vulnerability stems from the Crown's own past breaches. Where a taonga becomes increasingly vulnerable due to the Crown's own failing, the Crown's duty is escalated, requiring "vigorous action for its protection."³⁹² By the late 1800s, takatāpui faced an imminent threat of erasure from public life. By the late nineteenth century, the Crown's assimilationist agenda forced takatāpui into crisis, demanding conformity to British norms of cisgender and heterosexual identity. Te ira takatāpui had become a site of assimilation, leaving takatāpui culturally displaced.

³⁸⁵ Gill, above n 384; and Sophie Trigger "Man whose death sparked a movement has convictions wiped" *Stuff* (online ed, 4 August 2019).

³⁸⁶ Trigger, above n 385; and Gill, above n 384.

³⁸⁷ Trigger, above n 385.

³⁸⁸ Gill, above n 384.

³⁸⁹ Gill, above n 384.

³⁹⁰ Trigger, above n 385.

³⁹¹ Trigger, above n 385.

³⁹² *New Zealand Māori Council v Attorney-General*, above n 304, at 11.

The Crown's failure to act urgently aided that erasure. Criminalisation heightened the Crown's duty to protect te ira takatāpui, just as it had a heightened duty to protect te reo Māori when it faced extinction in the 1900s. Unlike language use, the impact of the Crown's actions on takatāpui cannot be easily quantified. However, the loss of te ira takatāpui was no less profound, and the erosion of relationships between takatāpui and their whānau, hapū, and iwi no less destructive.³⁹³

If criminalisation is accepted as the initial breach of the Crown's duty to protect te ira takatāpui, then the resulting vulnerability must be attributed to that breach. This heightened vulnerability intensified the Crown's duty, from merely ceasing to cause harm, to proactively intervening to prevent further harm and to restore takatāpui to their rightful place in society. The Crown failed to fulfil its duties. The Crown took no steps, let alone vigorous action, to protect te ira takatāpui.

In lieu of fulfilling its heightened obligations, the Crown facilitated further harm against takatāpui. The violence Aberhart endured, and the government's failure to respond, are a stain on Aotearoa New Zealand's justice system. It reflects the Crown's longstanding inertia, decades of inaction amid rising hostility toward takatāpui. Instead of taking necessary action to protect takatāpui when in a state of heightened vulnerability, the Crown continued down the path of further endangering takatāpui.

B AIDS Pandemic

As takatāpui and queer people resisted criminalisation and hate-motivated violence, the AIDS pandemic began to devastate their communities. The late 1980s marked a turning point: efforts to decriminalise homosexuality collided with the AIDS crisis and were compounded by government negligence and discrimination.

³⁹³ Waitangi Tribunal, above n 173, at 9.

HIV and AIDS surveillance began in 1985 under the Department of Health, with the AIDS Epidemiology Group assuming responsibility in 1989.³⁹⁴ Between then and 2022, 5,430 people were diagnosed with HIV and 757 died of AIDS.³⁹⁵

The government's response to the AIDS pandemic in Aotearoa New Zealand was slow and inadequate. Warren Lindberg, Executive Director of the New Zealand AIDS Foundation, described the government as "gutless" in addressing the spread of HIV, comparing Prime Minister Geoffrey Palmer to Ronald Reagan, a reference to Reagan's notorious silence until tens of thousands had died from AIDS.³⁹⁶

Palmer rejected evidence-based measures, misleading the public into believing effective solutions, like condom use, were not "acceptable."³⁹⁷

When asked in an interview, "What about the suggestion of distributing condoms to help stop the spread of AIDS, if in the opinion of a doctor, that's a good idea?", Palmer said:³⁹⁸

I don't think that's acceptable. It is not our policy at the moment to do that, and no one in Australia does and no one is planning to do it.

Alongside the government, religious institutions, particularly the Catholic Church, voiced strong opposition to the promotion of condom use.³⁹⁹

Palmer's claim was inaccurate. During his tenure, the United States of America and other countries had already authorised the sale of condoms with HIV prevention as an indicated use.⁴⁰⁰

³⁹⁴ Nigel Dickson and others "The first 30 years of HIV in New Zealand: Review of the epidemiology" (2015) 128 NZMJ 31 at 31.

³⁹⁵ Clive Aspin "New Zealand's plan to eliminate HIV transmission ignores deepening inequities in health outcomes for Māori women" *The Conversation* (online ed, 5 August 2022).

³⁹⁶ Interview with Geoffrey Palmer, Prime Minister, video provided by Queer Aotearoa: We've Always Been Here.

³⁹⁷ Interview with Geoffrey Palmer, above n 396.

³⁹⁸ Interview with Geoffrey Palmer, above n 396.

³⁹⁹ Interview with Sarah Johnston, Researcher (Jesse Mulligan, Afternoons, *Radio New Zealand*, 4 December 2019) transcript provided by *Radio New Zealand*.

⁴⁰⁰ "The History of FDA's Role in Preventing the Spread of HIV/AIDS" (14 March 2019) U.S. Food & Drug Administration <www.fda.gov/>.

As with the COVID-19 pandemic, misinformation during the AIDS crisis was deadly. In the early 1980s, condoms were treated as taboo.⁴⁰¹ They were sold only in pharmacies, hidden from view, and had to be specifically requested.⁴⁰²

Because homosexuality remained a criminal offence in Aotearoa New Zealand until 1986, the act of purchasing condoms posed legal and personal risks for takatāpui, gay, and bisexual men. The government failed not only to promote condom use but also to ensure safe and affordable access.

Palmer's messaging falsely suggested there were no effective solutions to preventing the spread of HIV and AIDS, reinforcing the perception that the government could do nothing to help. It left takatāpui, gay, and bisexual men without accurate advice, preventing them from protecting themselves and putting more lives at risk. The failure of the government to take preventative measures advised by medical professionals meant HIV spread continued at a fast rate, leading to more infections and cases of AIDS, which, before medical advancements, was a death sentence.

Sarah Johnston of Ngā Taonga Sound & Vision recalled that misinformation fuelled irrational fear: "A lot of misinformation meant people were frightened you could get the disease by touching a gay person, or even using any kitchen utensils they had touched."⁴⁰³ She noted that when the first New Zealander diagnosed with HIV returned to Taranaki in 1984 to spend his final days at home, he was met not with compassion, but with stigma and fear.⁴⁰⁴

Johnston added:⁴⁰⁵

The hospital superintendent in chief Dr Don King admits to some concern among the staff over the new patient but he says overall they're happy with the precautions being taken: "He's confined to a single room, the nursing staff wear gowns, they wear gloves if they are handling and working with him."

⁴⁰¹ Interview with Sarah Johnston, above n 399.

⁴⁰² Interview with Sarah Johnston, above n 399.

⁴⁰³ Interview with Sarah Johnston, above n 399.

⁴⁰⁴ Interview with Sarah Johnston, above n 399.

⁴⁰⁵ Interview with Sarah Johnston, above n 399.

Amid a deadly pandemic, takatāpui, gay, and bisexual men were vilified, dehumanised, and isolated.

While Aotearoa New Zealand has made substantial progress in HIV prevention since the 1980s, Aspin argues that the government’s plan “to eliminate HIV transmission ignores deepening inequities in health outcomes for Māori women.”⁴⁰⁶ In 2022, the government allocated \$18 million to a ten-year strategy aimed at eliminating transmission.

Aspin criticises the plan, stating:⁴⁰⁷

... plan fails to take account of the changing pattern of the HIV pandemic. It does not reflect the mounting evidence that Māori, and Māori women in particular, have disproportionately high rates of HIV and are more likely to be diagnosed late.

Aspin observed that the government had failed to recognise Māori women as a group at heightened risk of HIV and AIDS, due largely to consistently late diagnoses.⁴⁰⁸

Aspin warns that “the world will not eliminate HIV any time soon if governments and decision makers fail to recognise the adverse impact of HIV on disadvantaged populations such as Indigenous peoples”.⁴⁰⁹ He proposes five key actions to curb HIV transmission among Indigenous communities, three of which relate directly to culture: recognising the impact of colonisation and trauma, ensuring Māori have access to their culture, and identifying and resourcing whānau-led preventative strategies.⁴¹⁰

In 1994, the Ministry of Māori Development released the report *Mate Kētoketo/Arai Kore*, which warned that Māori were particularly vulnerable to HIV and urged immediate government intervention.⁴¹¹ Aspin contends that the Crown’s inaction led to Māori being disproportionately affected, resulting in higher rates of late diagnosis and poorer health outcomes.⁴¹²

⁴⁰⁶ Aspin, above n 395.

⁴⁰⁷ Aspin, above n 395.

⁴⁰⁸ Aspin, above n 395.

⁴⁰⁹ Aspin, above n 395.

⁴¹⁰ Aspin, above n 395.

⁴¹¹ *Mate Kētoketo/Arai Kore* (Ministry of Māori Development, 1994).

⁴¹² Aspin, above n 395.

A 2021 report by Te Whāriki Takapou, a Māori organisation specialising in sexual health, found that Māori living with HIV were more likely than non-Māori to experience mental health challenges and struggle to meet basic needs but less likely to receive adequate support.⁴¹³

The report found that around one-quarter of participants had been forced to disclose their HIV-positive status to employers or government agencies. A similar proportion reported that their HIV status had been disclosed to friends without their consent.⁴¹⁴ Verbal abuse and discrimination impacted their ability “to work, to form close relationships with whānau and friends, to disclose they were living with HIV, to gain accommodation, and to access health services”.⁴¹⁵

Te Whāriki Takapou reported that there had “been no improvement since the first national HIV/AIDS hui in Auckland over 25 years ago.”⁴¹⁶ Māori who had lived with HIV for nearly three decades indicated that discrimination and stigma had persisted unabated.

The Crown’s conduct during the AIDS pandemic reveals a deeply troubling legacy. Its response was marked by inaction and, where it did act, dishonourable conduct, spreading misinformation and ignoring medical advice. This negligence accelerated the spread of HIV and AIDS to communities that might otherwise have been protected. The Crown’s failure reflects a disregard for the health and wellbeing of takatāpui and queer people.

The Crown’s inadequate response to the AIDS pandemic led to numerous preventable deaths among Māori and others. The absence of reliable advice and support from the health system left many takatāpui and queer individuals, particularly men, anxious, gravely ill, and, in some cases, dying in painful isolation. These deaths were a profound tragedy that not only disrupted individual lives but fractured whānau and communities. Some takatāpui died alone, isolated from their whānau and denied the presence of loved ones in their final moments. In te ao Māori, the process of dying is a sacred event, during which the mana of the individual is

⁴¹³ “Stigma blights lives of Māori with HIV” *waateanews.com* (online ed, 8 February 2021).

⁴¹⁴ “Discrimination still rife for Māori living with HIV, report finds” *Radio New Zealand* (online ed, 6 February 2021).

⁴¹⁵ “Stigma blights lives of Māori with HIV”, above n 413.

⁴¹⁶ “Stigma blights lives of Māori with HIV”, above n 413

elevated. These sudden and traumatic deaths disrupted te ira takatāpui and, in many instances, severed connections between takatāpui, their whānau, and future generations.

The Crown had a clear obligation to protect te ira takatāpui. It knew takatāpui were in danger and that death was a likely outcome and this would have a significant and lasting impact on Māori. Yet the Crown's actions and omissions during the AIDS crisis failed to uphold this duty. Instead, the Crown directly contributed to the needless deaths of numerous takatāpui. There can be no clearer breach of the principle of active protection than a failure that results in the loss of life and irreversible harm to a taonga.

Aotearoa New Zealand has made significant progress in addressing the spread of HIV and AIDS. However, this progress has not been equitable. Scholars argue that the government's plan to eliminate transmission continues to fail Māori.

Chief Executive of Te Whāriki Takapou Alison Green said ending discrimination against all New Zealanders is an obligation on the Crown under te Tiriti which promises a right to good health.⁴¹⁷ Aspin similarly contends that the government's action plan fails to deliver "long overdue improvements in equity for Māori," and insists that any serious effort to eliminate HIV must place "Te Tiriti o Waitangi and equity at the forefront of health policy and services."⁴¹⁸

C Failure to Provide Equal Rights and Protection

In many instances, such as the criminalisation of homosexuality and the dissemination of misinformation during the AIDS pandemic, the government actively caused harm. In others, its prolonged inaction exposed takatāpui and queer people to danger, denying them the protection and rights afforded to cisgender and heterosexual citizens. This sustained neglect entrenched structural inequality.

1 Incitement of violence

(a) Hate crime

⁴¹⁷ "Discrimination still rife for Māori living with HIV, report finds", above n 414.

⁴¹⁸ Aspin, above n 395.

Aotearoa New Zealand does not have specific hate crime offences, although police do record hate-motivated crimes.⁴¹⁹ Such offences occur when an existing crime, such as assault or property damage, is committed wholly or partially due to hatred toward a person's race, religion, gender, sexuality, disability, age, or other identity markers.⁴²⁰

Under the Sentencing Act, when an offence is committed partly or wholly due to hostility toward a group with a shared, enduring characteristic, such as race, colour, nationality, religion, gender identity, or sexual orientation, courts may treat that hostility as an aggravating factor at sentencing.⁴²¹ However, hate motivation is not a component of the substantive offence.

(b) Hate speech

In 2017, Christian Pastor Logan Robertson said to his congregation:⁴²²

My view on homo marriage is that the *Bible* never mentions it, so I am not against them getting married as long as a bullet goes through their head the moment they kiss. Because that is what it talks about, not homo marriage but homo death.

Robertson's website stated: "We believe that sodomy is a sin and an abomination before God which God punishes with the death penalty."⁴²³ In a video, he told his congregation that the death penalty for queer people "should be the law in New Zealand."⁴²⁴

A police spokeswoman confirmed:⁴²⁵

Police have finished making enquiries into a video posted online which showed an individual making concerning comments ... Police have considered the appropriate legislation and

⁴¹⁹ "Hate speech and hate crime related legislation" (26 November 2020) Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 <christchurchattack.royalcommission.nz/>.

⁴²⁰ "Hate-motivated crime" (2025) New Zealand Police <www.police.govt.nz/>.

⁴²¹ Sentencing Act 2002, s 9(1)(h).

⁴²² Shaneel Lal "I fear we are entering a decade of war on queer lives" *The New Zealand Herald* (online ed, 31 December 2022).

⁴²³ Lal, above n 422.

⁴²⁴ Lal, above n 422.

⁴²⁵ Lal, above n 422.

sought a legal opinion on the matter and we are not in a position to pursue the matter any further as no criminal offence has been committed.

In the absence of legal protections, homophobic and transphobic individuals have incited violence with impunity, often escaping prosecution or facing minimal consequences. New Zealand Police data indicates that between 1 January 2024 and 28 February 2025, there were 777 recorded offences in which “perceived hate” against takatāpui and queer individuals was a contributing factor.⁴²⁶ The enduring absence of adequate protective legislation highlights the Crown’s ongoing failure to discharge its duty of active protection toward takatāpui.

The Crown has consistently failed to enact legislation addressing hate-motivated offences, demonstrating a disregard for the safety of takatāpui and queer people. By withholding legal avenues for takatāpui and queer people to hold perpetrators accountable, the Crown allowed perpetrators to continue down the path of offending against takatāpui and queer people. The lack of consequences afforded perpetrators a free pass which emboldened more people to offend, and trapped takatāpui in a state of subjugation. This left takatāpui in a sustained state of heightened vulnerability, one that demanded a proportionate Crown response. The Crown turned a blind eye. The Crown’s failure to proactively intervene where it bore an elevated responsibility deepens the breach of its duty to actively protect takatāpui.

2 Prohibition of discrimination

In 1977, the Human Rights Commission Act passed, creating a list of prohibited grounds of discrimination. It did not include sexual orientation, or gender identity.⁴²⁷ The Human Rights Act 1993 amended the Human Rights Commission Act and added new prohibited grounds of discrimination including sexual orientation, but not gender identity.⁴²⁸

3 Gay panic defence

⁴²⁶ “WPQ 8315 (2025) table” (14 March 2025) New Zealand Parliament <www.parliament.nz>.

⁴²⁷ Human Rights Commission Act 1977; and Laurie and Evans, above n 328, at 96.

⁴²⁸ Human Rights Act 1993; and Laurie and Evans, above n 328, at 97.

Section 169 of the Crimes Act 1961 provided a partial defence to culpable homicide, reducing a charge of murder to manslaughter if successfully raised.⁴²⁹ The provocation defence applied where the offender had been provoked in circumstances sufficient to deprive an ordinary person of self-control, and where the offender was, in fact, so deprived and induced to commit the homicide.

The judge decided whether the provocation defence should be put to the jury and the jury had to decide whether the prosecution had proved beyond reasonable doubt that the provocation defence was not available to the defendant. All the defendants had to do was create a reasonable doubt that the defence was available to them to succeed.

Section 169 was often raised successfully by heterosexual men who killed gay men, so the provocation defence became known as the gay panic defence.

In 2003, a part-time sex worker, Philip Layton Edwards, 24, killed a gay interior designer and former television host, David McNee, 55, and argued the provocation defence.⁴³⁰ At trial, Edwards claimed he was heterosexual and had agreed only to masturbate in front of McNee for payment, on the condition that McNee not touch him. Edwards claimed McNee violated their agreement.⁴³¹ Edwards beat McNee nearly 40 times in the head and face, a level of violence the pathologist described as severe. McNee was left to choke on his own vomit and die.⁴³² In a police interview, Edwards said "He thought I was gay, so I killed him".⁴³³

He added:⁴³⁴

I had a fight with him. Told him I'm not gay. I beat him up with my hands ... blood started coming out of his face and then I killed him with my hands.

⁴²⁹ Crimes Act 1961, s 169.

⁴³⁰ *R v P L Edwards* HC Auckland T2003-004-025591, 16 September 2004 at [2]; and "Homicide detectives continue inquiry into designer's death" *The New Zealand Herald* (online ed, 28 July 2003).

⁴³¹ *R v P L Edwards*, above n 430, at [5]-[8]; and "The defence of provocation" *The New Zealand Herald* (online ed, 22 July 2009).

⁴³² *R v P L Edwards*, above n 430, at [38]; and "The defence of provocation", above n 431.

⁴³³ *R v P L Edwards*, above n 430, at [15]; and "Murder Accused 'sold sex to survive'" *The New Zealand Herald* (online ed, 4 August 2004).

⁴³⁴ Murder Accused 'sold sex to survive', above n 433.

The New Zealand Herald reported:⁴³⁵

Edwards did nothing to help Mr McNee, who perhaps could still have been saved, and instead he showered and took clothes, alcohol, Mr McNee's wallet and his sports car. Over the next few days, he drove around in the car and bragged he had killed someone.

Edwards, who had 56 convictions and had been on parole for just 11 days, successfully raised the provocation defence and his murder charge was reduced manslaughter.⁴³⁶ After serving his sentence for killing McNee, Edwards reoffended, first assaulting his girlfriend, then, two years later, kidnapping a two-year-old boy.⁴³⁷

In 2007, a Hungarian tourist Ferdinand Ambach, 32, violently beat Ronald James Brown, 69, to death after the two met at a bar and went to Brown's flat.⁴³⁸ Ambach alleged that Brown made a sexual advance towards Ambach which provoked him to kill Brown. Ambach's lawyer claimed the advance triggered "a murderous rage".⁴³⁹ Crown Prosecutor Deborah Marshall said Brown placed his hand on Ambach's thigh but there was no evidence of attempted rape, as alleged by the defence.⁴⁴⁰

Ambach struck Brown with a dumbbell and a banjo, then rammed the broken banjo down Brown's throat, leaving him to die.⁴⁴¹ As Brown lay unconscious on the stairs, Ambach continued his assault by throwing objects at him, blocking the stairwell.

Although Winkelmann J acknowledged the provocation was minimal, stating "Mr Brown was a homosexual ... that doesn't make it blameworthy", she instructed the jury to consider the defence. The jury accepted Ambach's claim that an alleged sexual advance from Brown deprived him of self-control. As a result, Ambach was convicted of manslaughter, avoiding the presumptive sentence of life imprisonment.⁴⁴²

⁴³⁵ "The defence of provocation", above n 431.

⁴³⁶ "TV designer's killer guilty of kidnap" *The New Zealand Herald* (online ed, 2 December 2014).

⁴³⁷ David Fisher "Fashion designer's killer back in prisoner as he faces assault charge" *The New Zealand Herald* (online ed, 19 September 2012); and "TV designer's killer guilty of kidnap", above n 436.

⁴³⁸ *R v Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009 at [4]-[6]; and "The defence of provocation", above n 431.

⁴³⁹ *R v Ambach*, above n 438, at [19] and "The defence of provocation", above n 431.

⁴⁴⁰ *R v Ambach*, above n 438, at [13] and "Banjo killer sentenced to 12 years in jail" *The New Zealand Herald* (online ed, 18 September 2009).

⁴⁴¹ *R v Ambach*, above n 438, at [4]-[6].

⁴⁴² "Banjo killer sentenced to 12 years in jail", above n 440.

In 2009, Aotearoa New Zealand passed the Crimes (Provocation Repeal) Amendment Act and abolished the provocation defence.

In 2016, Beauen Daniel George Wallace-Loretz and Leonard Natrass-Berquist, both 18, were found guilty of murdering Ihaia Gillman-Harris, 54, and aggravated robbery, and unlawfully taking a vehicle. Gillman-Harris took the two to a motel, where he allegedly offered to pay them for sex. The defence alleged that Gillman-Harris sexually assaulted Natrass-Berquist, prompting the pair to respond with violence that left him with fatal skull fractures. However, text messages sent before the motel encounter revealed the two had planned to rob Gillman-Harris, with Natrass-Berquist stating he was going to “fuck a gay cunt up.”⁴⁴³

In light of this case, University of Auckland Family Law Professor Mark Henaghan argued that lawyers continue to invoke provocation in cases involving the killing of gay men, and retired Law Professor Bill Hodge said “defence lawyers will still throw self-defence, they'll throw provocation, they'll throw other forms of justification” because actions of the victims could be relevant to juries deciding whether it is murder or manslaughter.⁴⁴⁴ Although formally abolished, the provocation defence continues to influence legal reasoning, particularly in cases involving violence against gay men.

The New Zealand Law Commission’s report, *The Partial Defence of Provocation*, found that a significant number of successful section 169 defences involved allegations of unwanted advances from gay men.⁴⁴⁵ Palmer observed that the provocation defence had been used “all too frequently” in the killings of gay men.⁴⁴⁶

Palmer added:⁴⁴⁷

When we reviewed a sample of homicide cases over a five-year period, we found that fifty percent of the cases in which provocation was successful were so-called homosexual advance or homosexual panic cases.

⁴⁴³ “Provocation defence still being used” *The New Zealand Herald* (online ed, 27 April 2016).

⁴⁴⁴ “Provocation defence still being used”, above n 443.

⁴⁴⁵ Law Commission *The Partial Defence of Provocation* (NZLC R98, 2007).

⁴⁴⁶ Law Commission, above n 445, at 7.

⁴⁴⁷ Law Commission, above n 445, at 7.

The Law Commission questioned whether the “loss of self-control” phenomenon was real, and if it was, argued that a reasonable person would not lose control to the extent of committing homicide, especially under the circumstances in which provocation defences had succeeded.⁴⁴⁸ The report concluded that only the most extreme individuals would respond to provocation with homicide.

The report clearly stated the provocation defence served heterosexual men to the disadvantage of gay men.⁴⁴⁹ The Commission noted:⁴⁵⁰

The provocation defence has been expanded to take into account subjective considerations with the best of intentions, but the inevitable effect is its exposure to claims that, ironically, undermine those same liberal values that have led to the expansion of its scope. The way in which it tends to operate against both women and gay men, and thereby serves the interests of heterosexual men, is one example in relation to which there is a substantial literature, documenting the way in which provocation has acted as a shield for men to react with murderous violence to threats to their sexual identity. The thesis is that the defence is overwhelmingly used by men, and often used in situations where they deem their masculinity to be fundamentally threatened (when their partner leaves them for another, or they are propositioned by another man); the defence also offers sympathy to a reassertion of that masculinity by violence, so that from start to finish it operates as a defence that protects and reaffirms a male way of thinking. Furthermore, an acceptance that such reactions are those of the ordinary person (as the provocation defence explicitly does, when it succeeds) implies that it is natural and excusable to feel revolted and violently outraged by the gay men and the former partners who have done no more than exercise their freedom of choice and expression.

Heterosexual men weaponised the provocation defence, deeming it reasonable, or at least excusable, to respond with lethal violence to perceived sexual advances from gay men.⁴⁵¹ Even if heterosexual men did not personally believe the killing was justified, they could rely on society, and juries, to sympathise with them, reinforcing a culture where violence against gay men was excused.

⁴⁴⁸ Law Commission, above n 445, at 88.

⁴⁴⁹ Law Commission, above n 445, at 96.

⁴⁵⁰ Law Commission, above n 445, at 85-86.

⁴⁵¹ Law Commission, above n 445, at 85-86.

Juries over time set that precedent by accepting that heterosexual men were provoked enough to kill gay men even by having as little as a hand put on their thigh by another man. The fact that it was deemed that a reasonable person would be so affected that they would lose the power of self-control to the extent of committing homicide in these situations demonstrated the explicit influence and endorsement of homophobia in the law. The application of the law sympathised with heterosexual men's homophobia and rewarded them by protecting them from necessary consequences and further enabled other heterosexual men to have assurance to behave in a similar manner.

Some have argued that the provocation defence enabled juries to exercise and legitimise their homophobia within the legal system. Jurors with prejudices expressed their disapproval of gay men by upholding the provocation defence, allowing perpetrators of anti-gay violence to receive lenient sentences.⁴⁵²

It is implausible that a jury would find it reasonable for a woman to kill a man who merely placed his hand on her thigh. Nor would judges likely have instructed juries to consider provocation in such circumstances.⁴⁵³ Judges treated alleged homosexual advances with disproportionate seriousness compared to similar heterosexual encounters, as though homosexuality was the differentiating factor that triggered the provocation defence.

Judges ignored the insignificance of the alleged provocation, while endorsing disproportionate violence against gay men, consistently favouring violent heterosexual men, and overlooking the safety of gay men. This reinforced the harmful notion that gay men were inherently threatening, justifying fear of them, and by extension, violence against them.

Where clear harm is being caused to takatāpui, as in this case, the Crown's duty of active protection should compel immediate intervention to uphold Māori interests.⁴⁵⁴ Yet despite

⁴⁵² Gary Comstock "Dismantling the Homosexual Panic Defense" (1992) 2 Law and Sexuality: Rev 81 at 100 and 117; Christina Pei-Lin "Provocation's Privileged Desire: The Provocation Doctrine, 'Homosexual Panic', and the Nonviolent Unwanted Sexual Advance" (2000) 10 Cornell JL & Pub Pol 195 at 212; and Annie O'Connor "Sentencing the killers of gay men since the abolition of provocation in New Zealand: Have the courts reflected community concerns?" (LLB (Hons) Dissertation, Victoria University of Wellington, 2013) at 13.

⁴⁵³ Adrian Howe "More Folk Provoke Their Own Demise (Homophobic Violence and Sexed Excuses – Rejoining the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)" (1997) 19 Sydney LR 336 at 340.

⁴⁵⁴ *New Zealand Māori Council v Attorney-General*; above n 279; and Waitangi Tribunal, above n 303, at 77.

clear evidence of discriminatory use against takatāpui and gay men, the provocation defence remained in law for over a century.⁴⁵⁵ During that time, heterosexual men killed takatāpui and gay and bisexual men and often escaped full accountability by invoking a defence that succeeded, in part, due to societal prejudice. The Crown was obliged to act to the fullest extent practicable. Yet for over a century, it did nothing, leaving takatāpui and gay men in danger, with no assurance of justice.

The Crown did not abolish the provocation defence in response to its homophobic misuse. The murder of Sophie Elliot and the backlash at her murderer raising the provocation defence were larger drivers of the abolition of the provocation defence. The Crown only acted after a heterosexual man invoked the defence after the killing of a heterosexual woman. This goes to show that the Crown had no intentions of abolishing the defence to safeguard takatāpui and gay and bisexual men and had the murder of Elliott and her trial not played out as it did, the provocation defence likely would have remained on the books even longer. The Crown's failure to address the homophobic misuse of the provocation defence further compounds its breach of the duty of active protection owed to takatāpui.

4 Conversion therapy

In 2022, Aotearoa New Zealand banned gay and gender conversion therapy by passing the Conversion Practices Prohibition Legislation Act 2022. The Act banned:⁴⁵⁶

... any practice, sustained effort, or treatment that is directed towards an individual because of the individual's sexual orientation, gender identity, or gender expression; and is done with the intention of changing or suppressing the individual's sexual orientation, gender identity, or gender expression.

Prior to the ban on conversion therapy, conversion therapy took many forms. In the past, hospitals conducted electroconvulsive therapy. Hospitals administered electric shocks to "cure" people of their sexuality or gender identity. Other practices included administering nausea-inducing drugs while forcing individuals to watch same-sex pornography.

⁴⁵⁵ Law Commission *Battered Defendants Victims of Domestic Violence Who Offend* (NZLC PP41, 2000) at [85]-[86]; and Alison Laurie "'Homosexual panic' defence must go" *The New Zealand Herald* (online ed, 14 August 2004).

⁴⁵⁶ Conversion Practices Prohibition Legislation Act 2022, s 5.

Modern forms include aversion therapy, where takatāpui and queer people are encouraged to inflict pain on themselves whenever they experience a queer thought or feeling so that their queerness becomes associated with pain. This can include snapping oneself with a rubber band or pinching oneself. Accepting one's queerness therefore becomes a punishment itself.

Others experience this harm in therapeutic settings, where counsellors, therapists, or psychologists suggest that sexuality or gender identity can, and should, be changed.

Conversion therapy in the medical field also includes reparative therapy. Reparative therapy typically focuses on exploring past experiences such as sexual abuse, childhood trauma or poor parental relationships that the therapist suggests are responsible for the individual's sexuality or gender identity, with the aim of "repairing" them.⁴⁵⁷

Some are pressured into adopting a lifestyle of abstinence, as an alternative to embracing their identity.⁴⁵⁸

The most common place where conversion therapy thrives is in religious groups and churches. Countless takatāpui and queer people have been told to pray for healing, to deny themselves in pursuit of salvation. Takatāpui and queer people are often threatened with excommunication or being outed and disowned by their family and community.⁴⁵⁹

There is no shortage of stories of conversion therapy that ended with the victim questioning whether it is still worth living. Anecdotal evidence shows that takatāpui and queer people who have been through conversion therapy have suffered immense harm and carry trauma after leaving conversion therapy.⁴⁶⁰

⁴⁵⁷ "The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity" Human Rights Campaign <www.hrc.org>.

⁴⁵⁸ "'Pray the gay away' – Homosexual conversion therapy happening in NZ" *I News* (online ed, 18 June 2018).

⁴⁵⁹ Mandy Te "Mr Gay New Zealand 2021: Wellington finalist hopes to be positive influence in LGBTQIA+ community" *Stuff* (online ed, 13 February 2021); Trinity Browne "Surviving conversion therapy as a young, Māori, takatāpui, autistic person" (online ed, 17 February 2021); "'There was no fix for me': A conversion therapy survivor speaks out" *Tangata Pasifika* (online ed, 6 March 2021); and Shaneel Lal *One of Them* (Allen & Unwin, Auckland, 2023).

⁴⁶⁰ Te, above n 459; Browne, above n 549; "'There was no fix for me': A conversion therapy survivor speaks out", above n 459; and Lal, above n 459.

San Francisco State University found:⁴⁶¹

- Rates of attempted suicide by young queer people whose parents practised conversion therapy were more than double (48%) the rate attempted suicide by young queer people who reported no conversion therapy experiences (22%);
- Suicide attempts nearly tripled for young queer people who reported experiencing conversion therapy by parents and conversion therapy by therapists and religious leaders (63%);
- High levels of depression more than doubled (33%) for young queer people whose parents practised conversion therapy compared with those who reported no conversion therapy experiences (16%); and
- High levels of depression more than tripled (52%) for young queer people who reported experiencing conversion therapy by parents and conversion therapy by therapists and religious leaders.

Conversion therapy has disproportionately harmed takatāpui. The Counting Ourselves report found Māori participants were more likely than non-Māori to report experiences of conversion practices. Māori were more likely to be shamed or coerced into conforming to gender norms (42% vs 33%), taught to reject their transgender or non-binary identity (42% vs 30%), made to believe their gender identity or expression was a defect (37% vs 25%), pressured to pretend they were not transgender or non-binary (33% vs 22%), and told they must suppress their identity to continue practising their religion (16% vs 7%). Māori were nearly twice as likely as non-Māori to report experiencing conversion therapy from a religious or faith-based organisation or person.⁴⁶²

Conversion therapy serves one purpose: to convince takatāpui and queer people that something is wrong with who they are, and that they must change. At its core, conversion therapy seeks to erase takatāpui and queer identities, coercing people to live cisgender and heterosexual lives. The Crown prioritised British norms and imposed them on Māori society, disregarding te ira takatāpui.

⁴⁶¹ “Conversion ‘Therapy’ Begins at Home: ‘Change’ Efforts Linked with Double and Triple Rates of Depression, Suicide Attempts, Decreased Self-Esteem, Social Support, Education & Income in Young Adulthood” (8 November 2018) San Francisco State University <www.sfsu.edu/>.

⁴⁶² Ash Yee and others *Counting Ourselves: Summary of findings for Māori the 2022 Aotearoa New Zealand Trans and Non-binary Health Survey* (University of Waikato, Hamilton, 2025) at 4.

The principle of active protection mandates that the Crown take affirmative action to protect Māori interests. It is not a passive duty to tolerate takatāpui, nor does it grant the Crown licence to deny their rightful place in te ao Māori. The introduction of conversion therapy and then failing to outlaw it for decades was the denial of the place of takatāpui. It stripped many takatāpui of their mana and the right of Māori to control their lives according to their cultural preferences. There are substantial records affirming takatāpui as integral to Māori society, as a taonga from the atua to the people.

The practices used in conversion therapy have been horrific, life-threatening in some cases, and fatal in others. Conversion therapy has endangered takatāpui and queer lives through physical violence, emotional torture, and increased rates of severe depression and suicide.

Conversion therapy places a violent burden on takatāpui to sever te ira takatāpui, and cut ties with whom they are, who they come from, and where they come from, and conform to a colonial understanding of gender and sexuality. This process has been carried out through through verbal, emotional, and physical violence, shame and coercion, prayers, and false teachings that frame te ira takatāpui as defective or wrong, instructions to stop being takatāpui, coercion to conceal their identity, and excommunication or ostracism. These practices collectively make takatāpui feel that something is wrong with being takatāpui and that they must reject being takatāpui, embracing, by any means, a life devoid of te ira takatāpui.

Conversion therapy remained legal in Aotearoa New Zealand until 2022. Conversion therapy over the decades chipped away at takatāpui undoing te ira takatāpui. The Crown had an obligation to protect takatāpui from harm, however, in the many decades leading to the ban of conversion therapy, the Crown took no action to protect takatāpui from conversion therapy. Its legal abolition does not erase the immense harm suffered by takatāpui, or the Crown's breach of its obligations.

D Mental Health

The Crown's actions and inactions in relation to conversion therapy have also profoundly impacted the mental health of takatāpui and queer people. The cumulative result of the Crown's harmful actions and failures to act has been significantly detrimental to the

wellbeing of takatāpui and queer people. This can be evidenced by the heightened levels of mental health problems suffered by takatāpui and queer people and the heightened levels of suicide. Being takatāpui does not increase the likelihood of one being mentally unwell, however, how people treat takatāpui for being takatāpui does. The lack of acceptance and sense of belonging, the discrimination in society and unequal treatment in law, the harassment and bullying and the violence cumulatively add to the negative mental health statistics for takatāpui and queer people.

The queer community has heightened levels of mental health problems and suicide rates. Decades of discrimination, hatred and bigotry and violence in law and society has created a modern-day society where queer people do not feel safe or comfortable to be themselves, and genuinely and rightfully fear that if they choose to live as their authentic selves or express themselves in unconventional ways, there will be unwarranted repercussions. The fear of consequences and the denial of one's identity can lead people to a dark place resulting in poorer mental health and increased likelihood of suicide.

In 2012, the University of Auckland conducted a national survey on the health and wellbeing of secondary school students and found that queer youth were five times more likely to attempt suicide than non-queer youth.⁴⁶³

Suicide statistics corroborated with bullying statistics. Queer youth were three times more likely to experience bullying every week than non-queer youth.⁴⁶⁴ Half of queer youth who experienced bullying were physically hit or hurt at school in 2011.⁴⁶⁵

In 2019, the Youth 19 survey, a survey of students Years 9 to 13 in Auckland, Waikato, and Northland, found that:⁴⁶⁶

- 46.9% of gay, lesbian, and bisexual young people had serious thoughts of suicide compared to 19.0% of cisgender and heterosexual young people;

⁴⁶³ Sarah Harris “Break The Silence: Rainbow suicide rates five times higher than mainstream” *The New Zealand Herald* (online ed, 2 August 2017).

⁴⁶⁴ Harris, above n 463.

⁴⁶⁵ Harris, above n 463.

⁴⁶⁶ John Fenaughty and others *Te Āniwaniwa Takatāpui Whānui: Te Aronga Taera Mō Ngā Rangatahi | Sexual Attraction and Young People's Wellbeing in Youth19* (University of Auckland and Victoria University of Wellington, 2021) at 24-25.

- 30.5% of gay, lesbian, and bisexual young people made a suicide plan compared to 12.7% of cisgender and heterosexual young people;
- 13.0% of gay, lesbian, and bisexual young people had attempted suicide compared to 5.7% of cisgender and heterosexual young people;
- 37.8% of gay, lesbian, and bisexual young people had attempted suicide requiring treatment by doctor or nurse compared to 26.5% of cisgender and heterosexual young people;
- 53.1% of gay, lesbian, and bisexual young people reported significant depressive symptoms as measured by the Short Form of the Reynolds Adolescent Depression Scale compared to 21.4% of cisgender and heterosexual young people; and
- 66.8% of gay, lesbian, and bisexual young people reported they felt depressed for 2 weeks in a row compared to 36.4% of cisgender and heterosexual young people.

In 2022, the University of Auckland published the Identify Survey, Aotearoa New Zealand's largest-ever national study of queer youth aged 14 to 26. The findings were bleak: young queer people faced elevated risks of bullying, mental distress, and suicidal ideation.⁴⁶⁷

One in eight secondary students felt unsafe or very unsafe at school. One in six tertiary students reported feeling unsafe at their place of study.⁴⁶⁸

Over half of participants had self-harmed, nearly two-thirds had experienced suicidal ideation, almost one-third had made a suicide plan, and one in ten had attempted suicide.⁴⁶⁹ Rates of self-harm were significantly higher among transgender and non-binary youth than among cisgender youth. 70% of transgender and non-binary youth had self-harmed, compared to 44% of cisgender youth.

Among transgender and non-binary youth, 70% had experienced suicidal ideation, 30% had made a suicide plan and 14% had attempted suicide. Among cisgender youth, 54% had experienced suicidal ideation, 20% had made a suicide plan and 6% had attempted suicide.⁴⁷⁰

⁴⁶⁷ John Fenaughty and others *Identify survey: Community and advocacy report* (University of Auckland and University of Waikato, 2022).

⁴⁶⁸ Fenaughty and others, above n 467, at 13-14.

⁴⁶⁹ Fenaughty and others, above n 467, at 15.

⁴⁷⁰ Fenaughty and others, above n 467, at 72.

The latest statistics for transgender and non-binary people come from the Counting Ourselves, a report that gathered data from a comprehensive national survey of the health and wellbeing of transgender and non-binary people aged 14 to 86. The authors of the report say the report gives us “very strong data about a range of trans and non-binary people living in Aotearoa New Zealand”.⁴⁷¹

The report found that in the last 12 months 50% of the participants “had deliberately injured themselves”, with 19% of the participants doing it more than five times and more than 53% of the participants had “seriously considered suicide at least once”, with 10% having attempted suicide in the past year and 33% having made a plan to attempt suicide. The attempted suicide rate was higher among Māori, at 16%.⁴⁷²

Further, “77% of participants reported high or very high psychological distress, compared to only 12% of the general population”.⁴⁷³

The Counting Ourselves report also found that transgender and non-binary people experienced higher levels of loneliness. 34% of the participants felt lonely “most or all of the time”, nearly nine times the general population rate. While 86% of the general population felt lonely none or a little of the time, only 38% of the participants felt lonely none or a little of the time.⁴⁷⁴

A participant said their loneliness was primarily related to not feeling a sense of belonging to the communities they are a part of. They said:⁴⁷⁵

They are largely related to my mental health, often in all of the communities that I belong to (LGBT+, Te Ao Māori) I do not feel welcome simply for being part of the other communities I belong to. It makes me feel alone on a daily basis as part of me genuinely does not believe that I can find community, even in those who have the same intersectionality as me.

⁴⁷¹ Yee and others *Counting Ourselves: Findings from the 2022 Aotearoa New Zealand Trans & Non-binary Health Survey* (University of Waikato, Hamilton, 2025) at vi.

⁴⁷² Yee and others, above n 471, at 83.

⁴⁷³ Yee and others, above n 471, at 89.

⁴⁷⁴ Yee and others, above n 471, at 86.

⁴⁷⁵ Yee and others, above n 471, at 86.

The report found Māori consistently experienced worse outcomes across all measures. Māori were more likely than non-Māori to report they had seriously considered suicide at least once in the last 12 months (63% vs 53%) and they had attempted suicide in the last 12 months (16% vs 10%).

Māori participants were more likely than non-Māori to experience rejection after coming out. This included being insulted (52% vs 37%), denied gender-affirming clothing (43% vs 26%), ignored (36% vs 26%), excluded from family events (25% vs 15%), subjected to sexual comments (20% vs 11%), and experiencing violence (13% vs 7%).⁴⁷⁶

The surveys and reports for over a decade have consistently shown that takatāpui and queer people have poorer mental health outcomes than cisgender and heterosexual people. The outcomes are especially dire for Māori transgender, and non-binary people compared to non-Māori and cisgender gay, bisexual, and lesbian people. The staggering poor mental health data and suicide rates demands a swift and comprehensive plan to reduce these statistics, however, while takatāpui and queer people have heightened mental health problems and suicide levels, the government cut funding for OUTLine Aotearoa, a mental health support provider for takatāpui and queer people, their friends and family. The cessation of government funding to OUTLine Aotearoa creates a vacuum in mental health support providers for takatāpui and queer people in a time it is most needed.

Where there is funding, the Identify Survey found that the young people seeking support found themselves in even discriminatory circumstances. One in six participants had not been able to access healthcare and nearly one in 10 had been treated unfairly by a healthcare professional because of their queer identity.⁴⁷⁷ Transgender and non-binary people were 3.5 times more likely to be treated unfairly by healthcare professionals than cisgender people.⁴⁷⁸ The survey warned the deficits in healthcare for queer people were “alarming” and the “Problems with healthcare provision are apparent, including fair treatment and basic rainbow competency by some healthcare professionals.”⁴⁷⁹ The heightened risk of poor mental health

⁴⁷⁶ Yee and others, above n 462, at 4.

⁴⁷⁷ Fenaughty and others, above n 467, at 15 and 75.

⁴⁷⁸ Fenaughty and others, above n 467, at 75.

⁴⁷⁹ Fenaughty and others, above n 467, at 15.

and suicide with the lack of support is a recipe for more preventable deaths of takatāpui and queer people.

E The Crown's Failure to Afford Takatāpui the Same Rights as Cisgender and Heterosexual People

While there were instances where the Crown's actions and omissions directly made takatāpui unsafe, there were also Crown actions and inactions that disadvantaged and set takatāpui back. These were instances where the Crown failed to afford takatāpui the same rights as cisgender and heterosexual people, and by failing to do so, enabled cisgender and heterosexual people to receive benefits that privileged them. Practices such as marriage had economically advantages for married heterosexual. It also had advantages in the health system and the justice system.

There were also instances in which takatāpui were required to partake in invasive, and unwanted procedures to be able to identify as themselves, subjecting takatāpui to significant costs and delays. While the Crown created processes that imposed burdens on takatāpui while extending rights and benefits to heterosexual people for participating in acts such as marriage. This created an unequal society, advancing cisgender and heterosexual people through life with lesser hurdles while hindering takatāpui. Two examples of this include self-identification laws and same-sex marriage.

1 Self-identification

Prior to 15 June 2023, if anyone wanted to change their gender or sex marker on their birth certificate, they had to apply to the Family Court for a declaration authorising the change of the sex marker on their birth certificate.⁴⁸⁰ Births, Deaths, Marriages and Relationships Registration Act 2021 which came into effect in 2023 allows people to change the sex shown on their birth certificate to align with their gender identity through a self-identification administrative process. The applications are received by Register General of Births, Deaths and Marriages by submitting a statutory declaration, removing the need to apply to the Family Court. There is no requirement to provide evidence of medical transition

⁴⁸⁰ "Change the Sex/Gender on a Birth Certificate" (14 June 2023) Ministry of Justice <www.justice.govt.nz/>.

to align their sex with their gender identity, which may be unwanted, unnecessary, difficult to access and intrusive.⁴⁸¹

2 Civil union and same-sex marriage

In 2004, the Civil Union Act 2004 gave same-sex couples the legal right to enter civil unions. In 2005, the Relationships (Statutory References) Act 2005 provided same-sex couples the same legal rights as heterosexual couples, including in areas such as superannuation, benefits, and inheritance.⁴⁸²

It was not till nearly a decade later that same sex couples were afforded the right to marriage upon passing of the Marriage (Definition of Marriage) Amendment Act 2013. The law changed the meaning of marriage to “the union of 2 people, regardless of their sex, sexual orientation, or gender identity”.⁴⁸³

By the end of 2015, 2,958 same-sex civil unions had been entered into, and 2,112 same-sex couples had married in Aotearoa New Zealand. Following legal recognition of same-sex marriage, civil union numbers declined significantly, demonstrating the preference for equal status under marriage.⁴⁸⁴

Throughout history, marriage has been considered socially valuable.⁴⁸⁵ Marriage or civil union provides legal recognition for companionship, family, and shared life. Same-sex couples were unable to have legally recognised families. The lack of recognition of marriage of same-sex couples in law was hurtful. It said to same-sex couples that their relationships were morally inferior and unworthy of being treated as the relationships of heterosexual couples.

Regardless of legislators’ views, the law prohibited consenting adults from marrying, despite causing no harm. It stopped many takatāpui and same-sex people who loved each other the

⁴⁸¹ “Parliament unanimously passes bill allowing change to birth certificates” *Radio New Zealand* (online ed, 9 December 2021).

⁴⁸² Laurie and Evans, above n 328, at 97.

⁴⁸³ Marriage (Definition of Marriage) Amendment Act 2013, s 5.

⁴⁸⁴ Megan Cook “Marriage and partnering – loosening rules, expanding choices: partnering from the late 1960s” (1 May 2017) *Te Ara – The Encyclopaedia of New Zealand* <teara.govt.nz>.

⁴⁸⁵ Cook, above n 484.

right to be recognised as spouses, like everyone else. That is reason alone for why the denial of marriage to same-sex couples was wrong.

There were material benefits to marriage. From 1900 to the 1960s, many rights and benefits were afforded to spouses that were not afforded to unmarried people even if they had sexual relations. Denying people the right to marry disadvantaged them across many areas of life. The privileges of marriage extended to areas of immigration, the justice system, next-of-kin status, matrimonial property and social welfare.

For example, a joint family home between spouses was exempt from gift duty, stamp duty and death duty and could not be seized by creditors.⁴⁸⁶ In social welfare, family benefits were only available to married women, and men were often paid higher wages on the assumption they would marry and support a family.⁴⁸⁷

Marriage also conferred advantages in the criminal justice system. A wife who assisted her husband after the commission of a crime could not be charged as an accessory to the crime.⁴⁸⁸ Until 2006, spousal immunity allowed spouses to refuse to testify against each other. The Evidence Act 2006 abolished spousal immunity meaning a defendant's spouse can now be compelled to give evidence.⁴⁸⁹

Widowed heterosexual people also had rights after the passing of their partner. These mostly pertained to property rights. Before 2001, same-sex couples had virtually no legal rights over their deceased partner's estate unless it had been spelt out clearly in a will, meaning where there was no will, surviving same-sex partners were unable to make claims to their deceased partner's estate. If the deceased partner did not have any relatives, by blood or legal arrangement, to claim the deceased's person estate, the Crown could have a stronger claim than the deceased's partner.

The Administration Act 2001 changed the status quo and afforded same-sex partners the same rights and entitlements as widowed partners to the estate of a deceased partner where there

⁴⁸⁶ Cook, above n 484.

⁴⁸⁷ Cook, above n 484.

⁴⁸⁸ Cook, above n 484.

⁴⁸⁹ Evidence Act 2006, s 71; and "Criminal & traffic law" (2025) Community Law <communitylaw.org.nz/>.

was no will and the Family Protection Amendment Act 2001 gave standing to same-sex partners to contest a deceased partner's estate.

Despite this, more sentimental rights remained withheld. Before same-sex civil union, a same-sex person whose partner had died did not get automatic next-of-kin status even if they were in a de facto relationship under the Property (Relationships) Amendment Act 2001. The Property (Relationships) Amendment Act gave same-sex couples the same property rights as married heterosexual couples on the breakdown of a relationship but this did not equate to full next-of-kin status.

Same-sex partners had no authority to make medical decisions or manage arrangements after their partner's death. There were a number of consequences to this. It meant that the same-sex partner could not see or be with the body of their deceased partner without the consent of the next-of-kin. It also meant that if the deceased person's next-of-kin did not approve of the deceased person's same-sex relationship, they could shut out the living partner, never allowing the living partner to see the body or attend the death ceremony, causing profound emotional distress for the surviving partner.

By failing to afford takatāpui and queer people the same legal rights as cisgender and heterosexual individuals in relation to marriage, the Crown deprived them not only of the institution of marriage but also of a broad range of material privileges, such as next-of-kin status, inheritance rights, and legal recognition. These legal protections safeguarded the rights and entitlements of cisgender and heterosexual people, while structurally disadvantaging takatāpui and queer people.

The Crown's prolonged failure to extend marriage equality and thereby the rights emanating from it to takatāpui perpetuated discrimination and inequality. The Crown's failure to act in the face of known and sustained harm amounts to an endorsement of that harm. The Crown's inaction entrenched structural disparities, sending a damaging message that takatāpui relationships were morally and legally inferior.

While equality of treatment in law regarding marriage has now been largely achieved, contemporary legal equality does not negate the historical breaches of the duty of active protection. The sustained failure to recognise and remedy the unequal treatment of takatāpui

and queer people contributed to material disadvantage, emotional harm, and institutional discrimination. The systemic exclusion of takatāpui from accessing privileges tied to civil and marriage and the Crown's tolerance of sustained harm over decades exacerbates the Crown's breach of its duty to actively protect takatāpui.

This thesis began by establishing that takatāpui were an integral to te ao Māori. Takatāpui were accepted and celebrated within pre-colonial Māori society, demonstrated through, stories, language, and carvings. This thesis argues that te ira takatāpui is a distinct strand of whakapapa that embodies and expresses cultural, spiritual, and ancestral belonging of takatāpui in te ao Māori. That strand, te ira takatāpui, connects takatāpui to their tīpuna, atua and whenua. It is this strand of whakapapa that meets both cultural and jurisprudential criteria to be recognised as a taonga under Article II of te Tiriti. The Crown, therefore, has an enduring and active obligation to protect te ira takatāpui. The principle of active protection imposes a proactive duty on the Crown to protect taonga, including intangible cultural expressions such as te reo Māori, mātauranga Māori, and whakapapa. The courts and Tribunal have affirmed that the Crown breaches this duty not only by acts of harm, but also by failing to prevent harm or provide protection where it is needed.

Applying the principle of active protection to te ira takatāpui, this section demonstrates that the Crown, rather than actively protecting this taonga, undertook deliberate actions and tolerated systemic inaction that resulted in severe harm to takatāpui. Through criminalisation, discriminatory laws and policies, and the failure to intervene during periods of social and medical crisis, the Crown contributed to the alienation, persecution, and erasure of takatāpui. The government criminalised expressions of gender and sexuality fundamental to te ira takatāpui, treated takatāpui people as deviant, and permitted police abuse, employment discrimination, denial of rights, and systemic exclusion. It failed to protect takatāpui from violence, poverty, social stigma, and state-sanctioned conversion practices.

These actions and omissions were an abdication of the Crown's obligation to actively protect one of Aotearoa New Zealand's most vital taonga. They prevented takatāpui from living authentically and thereby disrupted the transmission of knowledge and broke the continuity of te ira takatāpui. In doing so, the Crown not only failed to uphold its obligations, but it also directly undermined the very whakapapa it is required to protect. Te ira takatāpui is taonga. The Crown's actions and omissions significantly harmed that taonga. That harm constitutes a

clear breach of the principle of active protection. The restoration of that taonga, and redress for the harm caused, remains a necessary step in the fulfilment of the Crown's obligations.

VII Principle of Redress

Breaches of the principles of the Treaties give rise to a right of redress. Addressing these breaches involves restoring Māori mana and ensuring that the Crown prevents future violations.⁴⁹⁰

In the *Lands case*, Cooke P held that the principles of the Treaties included an obligation on the Crown to remedy or redress Māori for breaches. While he accepted that the Crown was obliged to provide redress, he limited the scope of this obligation.

He noted that:⁴⁹¹

... if the Tribunal finds merit in a claim and recommends redress, the Crown should grant at least some form of redress, unless there are grounds justifying a reasonable Treaty partner in withholding it – which would be only in very special circumstances, if ever. As mentioned earlier, I prefer to keep open the question whether the Crown ought ordinarily to grant any precise form of redress that may be indicated by the Tribunal.

Somers J in the *Lands case* took a different approach but arrived at a similar conclusion. He likened the Treaties to a contract: a breach gives rise to a right of redress.⁴⁹²

Somers J noted that:⁴⁹³

... 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 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.

⁴⁹⁰ “He Tirohanga o Kawa ki te Tiriti o Waitangi”, above n 308, at 103.

⁴⁹¹ *New Zealand Māori Council v Attorney-General*, above n 279, per Cooke P at 664-665.

⁴⁹² *New Zealand Māori Council v Attorney-General*, , above n 279, per Somers J at 693; and Waitangi Tribunal *The Ngawha Geothermal Resource Report* (Wai 304, 1993) at 101.

⁴⁹³ *New Zealand Māori Council v Attorney-General*, above n 279, per Somers J at 693; and Waitangi Tribunal, above n 492, at 101.

However, Somers J placed the principle of redress outside the jurisdiction of the courts, stating that the right to redress is “not justiciable in the courts” but a claim to be submitted to the Tribunal.⁴⁹⁴

Bisson J emphasised the importance of recognising the spiritual connection Māori have with their land and the surrounding environment. He stated that “compensation in monetary terms is not a satisfactory recompense” for the disruption or destruction of that intangible cultural connection.⁴⁹⁵ The Tribunal agrees that redress must be adapted to acknowledge and remedy various forms of loss and harm.⁴⁹⁶

The Taranaki Report considered the Crown’s failure to protect rangatiratanga, which led to the destabilisation and destruction of Māori culture, people, and society. It concluded that to redress the harm suffered, the Crown’s compensation would need to go well beyond a monetary payment. The discussions in the Taranaki Report go to the heart of this thesis, as they explore how breaches of the principles of the Treaties tore the fabric of te ao Māori and left Māori in a state of spiritual homelessness. It transformed a society where diversity was celebrated into one constrained by colonial British norms. The Tribunal wrote: “A vibrant Māori society was broken ... [therefore] it is group compensation that is most needed for future cultural survival.”⁴⁹⁷

The Tribunal noted:⁴⁹⁸

The extent of property loss is of course relevant but is not solely determinative. It appears that compensation should reflect a combination of factors: land loss, social and economic destabilisation and the consequential prejudice to social and economic outcomes, for example.

Redress must go beyond restoring the Crown’s honour. For it to be effective and meaningful for Māori, the Crown must, even where reparations “pay off for the past”, take “steps

⁴⁹⁴ *New Zealand Māori Council v Attorney-General*, above n 279, per Somers J at 693; and Waitangi Tribunal, above n 492, at 101.

⁴⁹⁵ *New Zealand Māori Council v Attorney-General*, above n 279, per Bisson J at 717.

⁴⁹⁶ “He Tirohanga o Kawa ki te Tiriti o Waitangi”, above n 308, at 103.

⁴⁹⁷ Waitangi Tribunal, above n 314, at 312.

⁴⁹⁸ Waitangi Tribunal, above n 314, at 276.

necessary to remove outstanding prejudice and prevent similar prejudice from arising; for the only practical settlement between peoples is one that achieves a reconciliation in fact.”⁴⁹⁹

Bisson J in the *Lands case* opened the possibility of redressing breaches in creative ways that, depending on context, best address the harm done.⁵⁰⁰ Cooke P, in *Tainui Māori Trust Board v Attorney-General (Coals case)*, warned the Crown not to prematurely rule out forms of redress or render itself incapable of offering available remedies without Māori agreement.⁵⁰¹ The Tribunal has long supported diverse remedies to properly reconcile relationships between the Crown and Māori.⁵⁰²

In the *Broadcasting case*, Cooke P held the Crown must take “active and positive steps to redress past breaches.”⁵⁰³ In the Manukau Report, the Tribunal noted that breaches had to be “put right, in a practical way”.⁵⁰⁴ In some cases, the Crown cannot restore what existed before the breaches occurred, and must instead provide a practical alternative.⁵⁰⁵ The Crown should not abandon the goal of remedying wrongs simply because it cannot reinstate pre-breach circumstances. Durie CJ, in the Waiheke Island Report, observed that where the Crown cannot fully redress a breach, it should “provide at least a part of those endowments that it ought to have guaranteed, and to ensure that proper policies to that end are maintained”.⁵⁰⁶

VIII Potential Redress for Breaches of Principle of Active Protection

This thesis establishes that the criminalisation of takatāpui and the subsequent prejudicial treatment they endured constituted breaches of the principles of the Treaties. In the interests of completeness, it briefly outlines potential avenues the Crown could pursue, alongside takatāpui, to provide redress. While not an exhaustive analysis, this discussion sketches some

⁴⁹⁹ Waitangi Tribunal, above n 314, at 314-315.

⁵⁰⁰ *New Zealand Māori Council v Attorney-General*, above n 279, per Bisson J at 717.

⁵⁰¹ *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA) per Cooke P at 530.

⁵⁰² Waitangi Tribunal *The Ngai Tahu Report* (Wai 27, Vol. III, 1991) at 1054; and Waitangi Tribunal *The Wananga Capital Establishment Report* (Wai 718, 1999) at 53.

⁵⁰³ *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 (CA) per Cooke P at 583.

⁵⁰⁴ Waitangi Tribunal, above n 175, at 99.

⁵⁰⁵ Waitangi Tribunal, above n 175, at 99.

⁵⁰⁶ Waitangi Tribunal *Report of the Waitangi Tribunal on the Waiheke Island Claim* (Wai 10, 1987) at 40-41.

possibilities for Crown action, recognising that any ultimate determination must rest with takatāpui claimants and the Tribunal.

Should the Tribunal find breaches of the principles of the Treaties have occurred, it may recommend redress to the Crown. This claim would be classified as a thematic kaupapa inquiry, examining systemic prejudice against takatāpui as a collective, analogous in scope and structure to the Mana Wāhine Kaupapa Inquiry. What sets such claims apart is that it is not tied directly to a specific parcel of land, resource, or individual iwi. As such, it will likely require the Tribunal to consider recommendations that go beyond traditional forms of redress.

While the Tribunal may still make iwi-specific recommendations, particularly where takatāpui within certain iwi have been distinctly affected, its broader obligation is to propose redress that benefits takatāpui regardless of iwi affiliation or geographic location. This may involve a mix of iwi-specific and universal remedies, but consistency and fairness across recommendations will be essential.

The settlement usually includes three types of redress:

1. historical account, acknowledgement, and apology of breach;
2. financial and commercial redress; and
3. cultural redress.

While not all settlements include all three, they provide a framework through which tailored redress for takatāpui could be developed.

A Historical Account, Crown Acknowledgements of Breach and Apology

In 2017, Minister of Justice Hon Amy Adams moved a motion for Parliament to “apologise to those homosexual New Zealanders who were convicted for consensual adult activity” and to “recognise the tremendous hurt and suffering those men and their families have gone through, and the continued effects the convictions have had on them.”⁵⁰⁷

⁵⁰⁷ (6 July 2017) 723 NZPD 19394.

The apology placed on the record:⁵⁰⁸

... that this House deeply regrets the hurt and stigma suffered by the many hundreds of New Zealand men who were turned into criminals by a law that was profoundly wrong, and for that we are sorry.

The Crown's apology addressed a specific group of people and a specific set of wrongdoings. The apology was to homosexual men convicted for consensual adult activity under various provisions of the Crimes Act. While limited in scope, the apology marked a positive step toward acknowledging the harm caused by unjust laws.⁵⁰⁹

1 Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act

The state apology was accompanied by the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Bill, which expunged the convictions of men who had been convicted of five offences that criminalised homosexual acts. The five sections were:⁵¹⁰

- section 141 (indecentcy between males), Crimes Act 1961;
- section 142 (sodomy), Crimes Act 1961;
- section 146 (keeping place of resort for homosexual acts), Crimes Act 1961;
- section 153 (unnatural offence), Crimes Act 1908, but only to the extent that it covers committing buggery with any other man; and
- section 154 (attempt to commit unnatural offence), Crimes Act 1908, but only to the extent that it covers attempting to commit buggery with another man, assault with intent to commit buggery, and indecent assault on another man.

At the time, it was deemed impossible to determine how many men would be eligible to have their conviction expunged. However, “based on analysis of conviction data published by the then Department of Statistics on people convicted of indecentcy between males”, it was “estimated that around a thousand people may be eligible to apply under the scheme.”⁵¹¹

⁵⁰⁸ (6 July 2017) 723 NZPD 19394.

⁵⁰⁹ (6 July 2017) 723 NZPD 19394.

⁵¹⁰ Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018, s 5(2).

⁵¹¹ (6 July 2017) 723 NZPD 19395.

Both living individuals and families of those who had passed away could apply for expungement.⁵¹²

The government noted:⁵¹³

If the application is successful, the conviction will not appear on a criminal history check, and the person will not be required to disclose information about the expunged conviction for any purpose. It will be as if they were never convicted.

Though convictions were legally erased as though they never happened, their social and personal consequences persist, deeply affecting takatāpui and the wider queer community. The Crown's actions and inactions entrenched anti-takatāpui and anti-queer rhetoric into the fabric of Aotearoa New Zealand for decades. While significant efforts have been made to undo that social conditioning, many still hold anti-takatāpui and anti-queer views. The resulting discrimination affects the reputation and status, freedom and safety, employment and career opportunities, housing, and health of takatāpui and queer people. It also impacts their relationships with family, friends, and communities. The issues faced by takatāpui are real and significant.

(a) Failings of the state apology

The state apology had many shortcomings. The apology failed to provide any comprehensive background on the criminalisation and prejudicial treatment of takatāpui and queer people, or on its ongoing effects. It narrowly focused on criminalisation, ignoring broader discriminatory laws such as the marriage ban and the Crown's inaction during the AIDS crisis.

(i) Transgender people

The apology failed to acknowledge that transgender New Zealanders were also criminalised.

⁵¹² (6 July 2017) 723 NZPD 19397.

⁵¹³ (6 July 2017) 723 NZPD 19395.

Importantly, for the purposes of this thesis, the government failed to acknowledge the harm it inflicted on takatāpui and Māori by criminalising homosexuality and transgender people. It failed to recognise the specific harm suffered by takatāpui and the profound cultural erosion caused by that criminalisation. The Crown did not acknowledge that it had a duty to protect te ira takatāpui. Instead, it actively undermined whakapapa by criminalising it. The apology was not made in the context of a breach of the principles of the Treaties and therefore omitted any reference to the Crown breaching its promises to Māori.

(ii) Acknowledging breach of the principles

If an apology is to adequately acknowledge the harm suffered by takatāpui, it must be made in the context of a breach of the principles of the Treaties. An adequate state apology must acknowledge that the government's actions in criminalising homosexuality and transgender people had the effect of criminalising takatāpui. It must also recognise that, alongside decades-long prejudicial treatment of takatāpui and queer people, these actions constitute a breach of the Treaties' principles.

A state apology for a narrow but similar group does not preclude a more comprehensive apology. It must go further.

It must include a historical account of the place of takatāpui in te ao Māori. As discussed earlier, takatāpui were integral to whānau, hapū, and iwi. They were not discriminated against on the basis of their sexuality, gender identity, or expression in any meaningful way.

Takatāpui and their modes of being were normative in te ao Māori, and in some instances, they were seen as a blessing or saving grace. The historical account should also describe how colonisation, Christianity, and the imposition of English law eroded their place and led to systematic erasure and entrenched discrimination. This is necessary to ensure the government understands and acknowledges that takatāpui were a fundamental part of pre-colonial Aotearoa New Zealand and te ao Māori, and that any future erosion of their rights may constitute further breaches of the principles of the Treaties.

The apology must also include an account of the harm suffered by takatāpui, not only in the past but also the ongoing harm they experience today. It must acknowledge the loss suffered by Māori from takatāpui being displaced from their place in te ao Māori. Takatāpui and queer

people, as a result of Crown actions, suffer from poorer mental health and higher suicide rates. They face discrimination, bullying, and harassment in schools and workplaces, are subjected to hate-motivated crimes, and are often estranged from their families and communities.

An apology is only the beginning of redressing harm. The government explicitly refused to redress any of the harm it caused, stating there would be no entitlement to compensation for men whose convictions were expunged under the legislation.⁵¹⁴

B Financial and Commercial Redress

An apology, in the absence of meaningful action, is inadequate. Takatāpui and the wider queer community have suffered extensive emotional, mental, physical, cultural, and spiritual harm. While a formal apology may acknowledge this harm and contribute to the process of healing, it does little to address the significant financial and commercial harm arising from criminalisation and systemic discrimination.

Historical evidence demonstrates that takatāpui and queer individuals were denied access to tertiary education and employment due to structural exclusion and the Crown's failure to intervene. Many transgender women were pushed into sex work, exposed to high levels of violence, and denied access to benefits. These forms of marginalisation, compounded by rejection from family, frequently resulted in poverty and homelessness.

Crown action and inaction rendered takatāpui and the queer community disproportionately vulnerable to unemployment, poverty, and housing insecurity. These challenges, combined with discrimination, violence, and estrangement from family and friends, created a community of people who were lonely, depressed, and suicidal. For many, substance use became a mechanism of survival.

These intersecting factors placed takatāpui and queer individuals at a sustained economic disadvantage. While non-queer New Zealanders could access education, employment, and secure housing without interference based on their sexuality, gender identity, or expression,

⁵¹⁴ Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018, s 23.

takatāpui and queer people were excluded from the same opportunities. The resulting harm has been enduring and intergenerational, entrenching trauma, addiction, and poor mental health.

The Crown bears a responsibility to redress this harm. In the Deed of Settlement, financial and commercial redress refers to the economic components of a settlement and is generally paid in the form of cash or the transfer of assets. That is easier done when the government is dealing directly with an iwi and the cash or assets can be transferred directly to one or more iwi. However, kaupapa inquiries raise new complexities. Unlike district inquiries, kaupapa inquiries concern nation-wide issues that are not confined to a particular iwi.⁵¹⁵

This raises fundamental questions of allocation: who should receive redress, and who should not? Attempts to distribute redress in this manner risks undermining the kaupapa nature of the inquiry and may generate tension among affected groups.

Accordingly, in the context of kaupapa inquiries, financial and commercial redress may be most appropriately directed towards organisations and institutions that serve takatāpui communities collectively. Such an approach recognises the nation-wide character of the claim and provides an opportunity to develop solutions that support takatāpui wellbeing across Aotearoa New Zealand. Where specific iwi have already established successful programmes or initiatives that support takatāpui, the Tribunal may recommend that those initiatives receive additional funding. If existing iwi-led responses have demonstrated effectiveness, there is little reason not to enhance their impact through further investment. However, such targeted support must be balanced with the need for national consistency in redress. All takatāpui, regardless of iwi affiliation or geographic location, must have equitable access to the benefits of redress.

1 Funding

One of the most straightforward solutions the government can pursue is funding, or increasing the funding of, pre-existing organisations that serve takatāpui and rainbow communities. Often, these organisations are charities with limited funding. Some, such as

⁵¹⁵ “Kaupapa inquiries” The Waitangi Tribunal <www.waitangitribunal.govt.nz>.

OutLine Aotearoa, face the risk of shutting down due to financial shortfalls.⁵¹⁶ As there are a limited number of funded organisations serving takatāpui and queer people, the shutdown of any one of them creates a significant gap in services for a community with heightened needs, particularly in mental health and housing.

A lack of funding often limits organisations' ability to provide services and restricts their outreach beyond major cities. With increased funding, they could employ more staff, especially well-trained professionals with relevant expertise, expand both the quantity and quality of their services, support more takatāpui and queer people and their communities, and extend their reach into regional Aotearoa New Zealand.⁵¹⁷

2 Ministry for Rainbow People or an Intergovernmental Executive Board

The government can establish a dedicated body to address the adversities faced by takatāpui and queer people. This thesis outlines two options: a Ministry for Rainbow People or an Intergovernmental Executive Board.

(a) Ministry for Rainbow People

A Ministry for Rainbow People would operate in line with other population ministries in Aotearoa New Zealand. There are approximately six such ministries: the Ministry for Ethnic Communities, Ministry for Pacific Peoples, Ministry for Women, Ministry of Disabled People, Ministry of Māori Development, and the Ministry of Social Development and the Office for Seniors.

These ministries serve as the government's principal advisors on the wellbeing, inclusion, and advancement of their respective communities. Their overarching aim is to ensure that the communities they represent are supported to thrive in Aotearoa New Zealand.

For example, the Ministry for Women addresses issues affecting women and girls. It works to improve their social and economic wellbeing, safety, and participation through initiatives

⁵¹⁶ OutLine Aotearoa "A financial update and plea to the government to do more, urgently" (press release, 17 January 2025).

⁵¹⁷ "Rainbow Organisations" Te Ngākau Kahukura <www.tengakaukahukura.nz/>.

such as closing the gender pay gap, enhancing public sector representation, and coordinating the Crown's response to the Mana Wāhine Inquiry.

Population ministries typically employ policy and cultural advisors, communications staff, and community engagement specialists. As the Public Service Commission notes, "The populations and communities sector works to ensure New Zealand is a country that values diversity and respects human dignity and rights."

A Ministry for Rainbow People would serve a comparable function. Its core mandate would be to ensure Aotearoa New Zealand is inclusive and equitable for all queer people, with a specific commitment to takatāpui and to addressing disparities between Māori and the general population.

As the government's lead advisor on issues affecting takatāpui and queer communities, the Ministry would coordinate cross-agency efforts on matters such as discrimination, employment, housing, health, and hate-motivated crime.

The Ministry could also be tasked with producing research to inform necessary law reform. Legislation aimed at protecting takatāpui and queer communities, such as hate speech and anti-discrimination laws, have previously been proposed but deferred. Enacting such laws would foster a safer, more inclusive Aotearoa New Zealand.

While legislative change ultimately sits with relevant ministers, the Ministry for Rainbow People could be resourced to administer targeted supports, such as for unemployment, homelessness, gender-affirming healthcare, mental health services, and responses to victimisation.

(b) Intergovernmental Executive Board

An alternative to establishing a Ministry for Rainbow People is the creation of an Intergovernmental Executive Board. This Board would work across key ministries, such as Health, Education, Business, Innovation and Employment, Justice, Housing and Urban Development, and Social Development, to ensure the needs of takatāpui and queer people are addressed within each portfolio. These issues require coordinated action from agencies that

already hold resources and mandates, guided by the expertise of takatāpui and queer communities.

The Intergovernmental Executive Board would comprise experts on issues affecting takatāpui and queer people. Each ministry already contains policy and subject-matter specialists. Combining their knowledge with the Board's community-driven expertise would help produce solutions that are more effective.

Many of the challenges faced by takatāpui and queer people are interconnected. Addressing them in isolation is ineffective. For example, someone experiencing homelessness may also require support for addiction and unemployment. But recovery from addiction is unlikely without a safe home and stable income. The Board would be responsible for aligning ministry work to close gaps and build holistic, integrated solutions.

To strengthen its impact, ministries could set aside tagged funding for the Board to allocate toward initiatives that address these systemic issues. Control over such funding would distinguish the Board from a typical advisory group, empowering it to take concrete action beyond offering recommendations. While population ministries primarily act as the government's principal advisors, an Intergovernmental Executive Board could provide similar strategic direction at a lower administrative cost, while directing funds toward addressing these challenges.

3 Human Rights Commissioner

The New Zealand Human Rights Commission is the country's national human rights institution, established under the Human Rights Act 1993. It is empowered to advance human rights by promoting and advocating for them through strategic projects, education, and public engagement. The Commission also supports individuals who have experienced discrimination.

The Commission may have up to five Commissioners at any time, including the Chief Human Rights Commissioner, Race Relations Commissioner, Equal Employment Opportunities Commissioner, and Disability Rights Commissioner.

According to the Ministry of Justice, Commissioners are responsible for setting the Commission's strategic direction and leading efforts to promote and protect human rights within their respective portfolios. They may investigate breaches, publish reports, advocate for affected communities, and push for stronger legal protections. A Rainbow Rights Commissioner would perform these same functions, with a focus on the rights of rainbow communities.

C Cultural Redress

For some takatāpui, a claim before the Tribunal may be less about the outcome and more about the process itself. Once a claimant is registered, they become eligible for legal aid to help meet the costs of progressing their claim. The Mana Wāhine Kaupapa Inquiry offers a compelling precedent. Through that process, Māori, particularly women, have uncovered histories of wāhine who held leadership roles within te ao Māori and within their whānau, hapū, and iwi. The inquiry has brought visibility to stories of wāhine who were chiefs and leaders, and how colonisation, alongside the Crown's prejudicial treatment of Māori women, dismantled the matriarchal structures that once existed in te ao Māori.

The evidence gathered by the Tribunal in that inquiry has helped restore vital knowledge about the status and treatment of Māori women, supported arguments for their equitable treatment today, and challenged the colonial narrative that Māori society was inherently patriarchal or regressive. In doing so, it has redirected blame to the actual causes of inequity: colonisation and systemic discrimination.

In the same way, the process of bringing a claim focused on takatāpui may itself be transformative. What is uncovered through research and testimony can be a reward. The investigative and evidence-gathering process revitalises histories that have long been marginalised or erased. It would bring visibility to takatāpui ancestors, allowing takatāpui to locate themselves in whakapapa and reconnect with a lineage that affirms their place in te ao Māori.

By examining the evidence in support of the claim advanced in this thesis, the Tribunal, alongside the claimants, can remember and restore te ira takatāpui: acknowledging the harm inflicted, the healing still required, and advancing the Crown's duty to actively protect

taonga. The restoration of cultural knowledge and practice is a vital part of this claim. It marks the beginning of reclaiming the rightful place of takatāpui in te ao Māori and helps foster a climate in which takatāpui are embraced once more within their whānau, hapū, and iwi.