

IN THE WAITANGI TRIBUNAL

WAI 2575

UNDER

**The Treaty of
Waitangi Act 1975**

CONCERNING

**The Health Services
and Outcomes
Kaupapa Inquiry**

MEMORANDUM OF COUNSEL
Dated: 13 March 2017

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Waitangi Tribunal

13 Mar 2017

Ministry of Justice
WELLINGTON

MAY IT PLEASE THE TRIBUNAL

1. This Memorandum of Counsel is filed on behalf of the following claimants:
 - a. Wai 874, a claim by Rawiri (David) Donald Brown on behalf of himself, his whanau, and on behalf of the Ngariki Kaiputahi Tribal Authority;
 - b. Wai 1247, A claim by John Rameka Alexander (deceased), Te Iwi Ngaro Rameka, Cynthia Rameka, Piki Te Ora Mitchell and others;
 - c. Wai 421, 593, 869, 1383 and 1890: the combined claims of Te Waimate Taiamai ki Kaikohe Alliance; and
 - d. Wai 1666, a claim by Ani Taniwha on behalf of herself and Te Uri o Te Pona, Ngati Haiti, Ngati Kawau, Ngati Kawhiti, Ngati Kahu o Roto Whangaroa, Ngāi tupango, Te Uri o Tutehe, Te Uri Mahoe and Te Uri Tai and Te Uri o Te Aho.

2. In the memorandum of directions dated 21 December 2016 the Presiding Officer directed that claimants and claimant counsel were to file submissions no later than midday, Monday 13 March 2017 on the following:
 - a. Which claimants wish to have their health grievances heard in the Tribunal inquiry; including any questions of eligibility;

¹ *Memorandum-directions of the Presiding Officer regarding next steps in Inquiry*, 21 Dec 2016 Wai 2575 #2.5.2 [14]-[15]

- b. What principal issues the claimants wish to bring;
 - c. Whether the claimants and the Crown are ready to proceed;
 - d. Whether there are matters that should have priority;
 - e. Whether any other organisations wish to participate as interested parties and on what basis;
 - f. What existing evidence is likely to be available and what additional evidence from the claimants, expert witnesses and technical research may be required; and
 - g. What inquiry process the Tribunal should adopt in preparing the evidence, setting the issues, and hearing and reporting on the claims.
3. This Memorandum of Counsel is filed to answer those questions.

Which claimants wish to have their health grievances heard?

- 4. The claimants set out at paragraph one all wish to have their grievances heard as a part of the 2575 Inquiry.
- 5. We wish to indicate at this point that instructions are pending on two further claims. We therefore seek leave to make any further submissions arising following instructions at the upcoming judicial conference.

Eligibility

General Principles

6. In the Memorandum Directions dated 30 November 2016 the Chairperson addressed eligibility to participate in this inquiry.² The main criteria for inclusion are as follow:
- a. Claims will be eligible where their health-related grievances are a primary concern rather than consequences of grievances about other matters;³
 - b. That claims address issues of national scale and significance;⁴
 - c. Health-related grievances that relate to Crown acts or omissions prior to 21 September 1992 and form part of claims fully addressed by historical Treaty settlements with the Crown are excluded.⁵
 - d. Health-related grievances that have previously been fully heard and reported on by the Tribunal are excluded;⁶
 - e. Claims whose remaining health-related grievances have already been fully consolidated by Tribunal direction into district or kaupapa

² *Memorandum-directions of the Chairperson commencing a kaupapa inquiry into health services and outcomes*, 30 Nov 2016, Wai 2575 #2.5.1 from [11]

³ Wai 2575 #2.5.1 at [11]

⁴ Wai 2575 #2.5.1 at [12]

⁵ Wai 2575 #2.5.1 at [13(a)]

⁶ Wai 2575 #2.5.1 at [13(b)]

inquiries that are currently under way are excluded;⁷

f. Any claimant who wishes to be heard and whose eligibility to participate in this inquiry is in any doubt will be afforded the opportunity to state their case for inclusion.⁸

7. None of the above prevent the claimants we represent from being heard as a part of this inquiry.

Ability to Amend Claims

8. As the ability of claimants to amend claims has been a contentious issue in the past we wish to raise it at the outset of this inquiry.

9. In the Memorandum of Directions dated 30 November 2016 the Chief Judge stated:

*“Claimants should note that for any historical grievances, they are entitled to amend their existing claims so as to provide greater detail or to include additional grounds of claim. For the avoidance of doubt, that would clearly include grievances in respect of health services and outcomes”.*⁹

10. This confirms the position adopted in the Wai 2500 Military Veterans’ claim (“**Wai 2500 Inquiry**”), where the subject of eligibility to amend claims in ‘kaupapa’ inquiries has been thoroughly dealt with.

⁷ Wai 2575 #2.5.1 at [13(c)]

⁸ Wai 2575 #2.5.1 at [18]

⁹ Wai 2575 #2.5.1 at [17]

11. In Wai 2500 Inquiry the Chief Judge dealt with this issue in the memorandum directions dated 1 April 2016 stating:

“In my view, the plain wording of s 6AA(1) does not give grounds for limiting the ability of... claimant(s) to add historical grievances to ... existing historical claim(s)”.¹⁰

12. The Chief Judge reaffirmed the position in a following direction stating:

“In memorandum-directions dated 1 April 2016, I set out my views in respect to s 6AA of the Treaty of Waitangi Act 1975. In brief, I found that the plain meaning of the section is that claimants may amend a pre-deadline historical claim ‘in any way’; that is, no restrictions as to grounds of action are placed on the ability of claimants to amend their historical claims so as to add new historical grievances (Wai 2500, #2.5.29). This view has not changed”.¹¹

13. The claimants we represent seek to amend claims to add new historical grievances. All claims were filed prior to the Crown’s deadline. In line with the Chief Judge’s directions in the Wai 2500 Veteran’s Inquiry, s6AA is not a bar to the allegations being added.

¹⁰ *Memorandum-directions of Chief Judge Wilson Isaac addressing the ability of the Tribunal to inquire into the claim of Donna Awatere-Huata as amended on 7 December 2015 (Wai 2494, #1.1.1(a)), 1 Apr 2016, Wai 2500 #2.5.29 at [11]*

¹¹ *Memorandum-directions of Chief Judge W W Isaac addressing the eligibility of claims to participate in the inquiry, 14 Dec 2016, Wai 2500 #2.5.53 at [26]*

Principal issues the claimants wish to bring

14. We note that at this point of the Inquiry we can only give an indication of the issues that claimants wish to have heard. With the Tribunal's leave, further allegations and issues will be added as further research is received.
15. We note a common theme among claimants is the impossibility of divorcing health from the impacts of colonisation and resulting land loss. Another issue that arises is that of privilege within the health system historically and today.

Wai 874

16. The Wai 874 claimants focus is set out in the statement of claim dated 12 January 2017 at paragraphs [8] and [9].

Te Waimate Taiamai Claimants

17. The focus of the Te Waimate Taiamai Claims Alliance is set out from page 106 of the Amended Statement of Claim filed 23 January 2017.

Wai 1247

18. The Amended Statement of Claim for Wai 1247 was filed 15 September 2016, however it is yet to be registered.
19. The focus of this claim is the Crown's legislative regime regarding the practice of retaining, without parental permission, the organs of deceased children and the law regarding the handling of the deceased.

20. This claim concerns the national health framework, the suppression of Māori medicine and treatments, and the mental health regime.

Whether the claimants and the Crown are ready to proceed?

21. We are instructed that the claimants wish to be heard as soon as is possible. We anticipate that some further research will be required prior to hearings, but it is appropriate that the inquiry move into the casebook phase at this point.

Whether any other organisations wish to participate as interested parties and on what basis?

22. We have no submission to make on this point.

What existing evidence is likely to be available and what additional evidence from the claimants, expert witnesses and technical research may be required?

23. It seems that until recent years the history of Māori health care has been a neglected topic.¹² We would like to see the Tribunal conduct a review of available evidence, such as that undertaken by Ms. Marr for the Wai 2500 Inquiry.¹³ It may be that an academic from within the healthcare system could assist with such a review.

¹² See D. Dow, *Māori Health and Government Policy 1840-1940* (Victoria University Press, 1999) at 214

¹³ C Marr, Pre-casebook research discussion paper for Māori Military Veterans Inquiry, 19 Apr 2016 Wai 2500 #6.2.1

24. Following such a review the Tribunal, claimants, and the Crown will be in a better position to access any further research that needs to be commissioned prior to the hearings beginning.
25. Such a step will be of greater importance to claimants than has been the case in the past, as Crown Forestry Rental funding is not available for claimants to commission their own research for kaupapa inquiries.
26. The following useful works have been identified by the claimants in preparation of claims:
 - a. R. Lange, *May the People Live, A History of Māori Health Development 1900-1920* (Auckland University Press, 1999);
 - b. D. Dow, *Māori Health and Government Policy 1840-1940* (Victoria University Press, 1999);
 - c. B. Borell and A. Gregory, *The Politics of Privilege Scoping Project* (Ngā Pae o te Māramatanga, 2007); and
 - d. Dr. L Russell, K. Smiler and H. Stace, *Improving Māori Health and Reducing Inequalities Between Māori and Non-Māori: Has the Primary Health Care Strategy Worked for Māori? An Evaluation of the Period 2003-2010* (Ministry of Health, 2013).
27. Additionally, there are several helpful reports on the records for various district inquiries which will be of assistance to this Tribunal. These include:

- a. R. Lange, *The Provision of Health Services to East Coast Māori* (CFRT, 2009) Wai 900 #A25;
- b. H. Robinson, *Te Taha Tinana: Māori Health and the Crown in Te Rohe Pōtae district inquiry, 1840 – 1990* (Waitangi Tribunal, 2011) Wai 898 #A31;
- c. G Berghan, *A review of the administrative and procurement processes of the public health group* (Whariki Research Group, 2015) Wai 1040 #P7(d);
- d. *Indexed Document Bank on Access to Education, Health Services, and Housing Assistance in the Whanganui Inquiry District c.1880-1930* Wai 903 #A165; and
- e. T. Hearn, *Social and Economic Change in Northland c.1900 – c.1945: The Role of the Crown and the Place of Māori* (CFRT, 2006) Wai 1040 #A3.

28. As a part of the Rohe Potae Inquiry the Claimant Counsel Coordinating Committee and the Crown prepared a joint memorandum setting out previous Tribunal findings on topics including health. The findings on health are set out in document Wai 898 #3.1.526(j), and this may be a useful starting point for parties.

29. We note that due to the subject matter of this inquiry it is likely that confidential documents will need to be accessed. We anticipate that this can be handled by way

of directions setting out how this information is to be handled, and appropriate precautions.

30. Additionally, access will be required to the files of the Colonial Secretary's Office files, and the Department of Public Health files. We ask that the Tribunal inquire of the Crown the most efficient way of identifying and obtaining access to relevant files.

What inquiry process the Tribunal should adopt in preparing the evidence, setting the issues, and hearing and reporting on the claims?

31. It will be difficult to set the issues until a final list of claimants has been prepared. With this in mind we suggest that a reasonable deadline be set early in the process, accompanied by appropriate public notice.
32. It may be that some claimants wish to be heard first, in much the same fashion as the Wai 2500 Inquiry, due to age or health issues. We would not oppose that approach, but submit that preparation of research should continue while this is underway if that approach is adopted.
33. Due to the sensitive nature of some of the evidence that will no doubt be heard the Tribunal ought to make provision for closed hearings, or the protection of identities in some cases. These are all issues that can be addressed as the inquiry progresses.
34. Following production of any technical evidence, by both the Tribunal and claimants, we suggest that hearings be held in the districts around New Zealand, rather than a central location.

35. This is important to the claimants to allow them to show the Tribunal their manākitanga, and from a logistical point of view in the absence of funding from the Crown Forestry Rental Trust.

Conclusion

36. We thank the Tribunal for the opportunity to provide submissions at this stage. We look forward to the upcoming judicial conference.

37. The claimants wish to see this Tribunal make bold, practical recommendations to ensure that Māori get the same outcomes from the healthcare system as all New Zealanders.

Dated: 13 March 2017



Bryce Lyall
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Linda Thornton