

IN THE WAITANGI TRIBUNAL
HEALTH SERVICES AND OUTCOMES KAUPAPA INQUIRY

Wai 2575

IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

Health Services and Outcomes Kaupapa Inquiry
(Wai 2575)

AND

IN THE MATTER OF

a claim by Maraea Katene for and on behalf of
herself and her whanau (Wai TBC)

MEMORANDUM OF COUNSEL

Dated this 13th day of 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 Maraea Katene for and on behalf of herself and her whanau (“the Claimants”).
2. The purpose of this Memorandum of Counsel is to respond to the Memorandum–Directions of the Presiding Officer regarding next steps in the inquiry, dated 21 December 2016 (“the Directions”).¹
3. A Statement of Claim was filed with the Waitangi Tribunal on behalf of Maraea Katene and her whanau on 18 January 2017. Counsel notes that the Statement of Claim is yet to be registered and given a Wai number.

Preparatory groundwork for Inquiry

4. In the Directions, Judge Clark requested all claimants wishing to participate in the Health Services and Outcomes Kaupapa Inquiry file written submissions concerning:
 - (a) Which claimants wish to have their health grievances heard in the Tribunal inquiry; including any questions of eligibility;
 - (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; and

¹ Memorandum Directions of the Presiding Officer regarding next steps, dated 21 December 2016 (Wai 2575, #2.5.2, para 14-15)

- (e) Whether any other organisations wish to participate as interested parties and on what basis.
5. Furthermore, the Tribunal wishes to consult with the claimants and the Crown on how they consider the inquiry might best be conducted, in particular:
- (a) What existing evidence is likely to be available and what additional evidence from the claimants, expert witnesses and technical research may be required; and
 - (b) What inquiry process the Tribunal should adopt in preparing the evidence, setting the issues, and hearing and reporting on the claims.
6. Counsel will address each matter separately.

Health Grievances to be heard and eligibility

7. It is the intention of the Claimants to have their health grievances heard in the Health Services and Outcomes Kaupapa Inquiry.
8. The Claimants understand that while this inquiry is open to all claimants who wish to be heard on their outstanding health grievances, not all claims will be eligible to participate. The principal exclusions are:
- (a) Health-related grievances that relate to Crown acts or omissions prior to 21 September 1992 and form part of claims fully addressed in one or more historical Treaty settlements with the Crown.

- (b) Health-related grievances that have previously been fully heard and reported on by the Tribunal.
 - (c) Claims whose remaining health-related grievances have already been fully consolidated by Tribunal direction into district or kaupapa inquiries that are currently under way.
9. The Statement of Claim of Maraea Katene on behalf of herself and her whanau is a contemporary claim. The claim has not been consolidated in to any Waitangi Tribunal inquiry and their contemporary claim is not covered by any historical Treaty settlement with the Crown. It is submitted that this claim is eligible to participate in the Health Services and Outcomes Kaupapa Inquiry as none of the exclusions set out in the Directions apply, and there is nothing further which excludes it.

Principal issues

10. The Directions state that the Waitangi Tribunal needs to know what principal issues the claimants wish to bring.
11. The principal issue that the Claimants wish to bring before the Waitangi Tribunal relate to the failure of the Crown to provide for the Healthcare of Māori in respect to smoking. This includes the failure of the Crown to follow all the Māori Affairs Select Committee 2010 recommendations for addressing tobacco related harm.

Readiness to Proceed

12. Judge Clark has asked whether the claimants and the Crown are ready to proceed.

13. The Claimants have instructed that they are ready to proceed with the Health Services and Outcomes Kaupapa inquiry.
14. Counsel notes that as the Statement of Claim of Maraea Katene for and on behalf of herself and her whanau has not yet been registered with the Waitangi Tribunal, Legal Aid administered by the Ministry of Justice is yet to be granted. The ability to brief evidence and progress the claim in this situation is hindered. Counsel respectfully requests the Statement of Claim be entered on the register of claims, be given a Wai number and a Legal Services Act 2011 s49 report be forwarded to the Legal Aid Services of the Ministry of Justice.
15. As a preliminary step the Claimants suggest that, after the Judicial Conference held in early May, the Waitangi Tribunal commission an independent pre-casebook research review of what existing evidence is available (including evidence held by the Crown) and what additional evidence may be required.
16. The Health Services and Outcomes Kaupapa Inquiry, although separated out from other Kaupapa Inquiries, is still quite extensive in its subject matter. Counsel is of the view that the Waitangi Tribunal would need to commission a research programme to address the issues fully. A research programme for this inquiry would not need to be as extensive as a district inquiry, which would usually involve a full investigation of the history of individual land blocks, political, social and economic issues as they affected iwi, hapū and whanau and so on. However, research on certain topics is necessary in order for the Waitangi Tribunal's report to address the issues fully.
17. The Claimants envisage the next 18 months will likely include:

- (a) three months for a review into existing evidence (with a bibliography completed),
 - (b) three months to confirm issues that need to be researched, receive feedback on project briefs and then commission researchers, and
 - (c) one year for the technical research to be completed, reports drafted and feedback hui held.
18. Counsel is aware that during this time there may be theses completed by masters students and dissertations completed by doctorate students on some of the issues raised by claimants that could form part of the casebook. These students are likely to be called as Technical tangata whenua witnesses with summaries of their studies contained in Briefs of Evidence with their full study filed as an appendix.
19. Accordingly, the Claimants will be ready to proceed to the interlocutory phase of the inquiry in 18 months and subsequently to hearings.

Matters that should have priority

20. The Directions seek claimant feedback on whether there are any matters that should have priority.
21. The Claimants have suggested that time sensitive issues be given priority. Priority should particularly be directed to claimants that have a need to have their evidence heard urgently.

Other organisations wishing to participate

22. Judge Clark has asked whether any other organisations wish to participate as interested parties and on what basis.
23. At this point the Claimants are not opposed to other organisations participating as interested parties. However, they seek leave to make further submissions on this issue once the other organisations are identified.

Existing evidence

24. The Tribunal wishes to hear from claimants on what existing evidence is likely to be available and what additional evidence from the claimants, expert witnesses and technical research may be required.
25. As mentioned above, Counsel is aware that there may be masters and doctorate students that could research some of the issues raised by claimants in this inquiry. The Claimants hope that their dissertations and theses will form part of the casebook.
26. Select committees have reviewed health related issues, Government departments' complete regular evaluations and reports on themselves and their portfolios, other Health related Non-Government Organisation's (such as the Cancer Society) have completed research – the Claimants hope this information could be made available for the Waitangi Tribunal Inquiry.

Inquiry process

27. The Tribunal also wishes to hear from claimants on what inquiry process the Tribunal should adopt in preparing the evidence, setting the issues, and hearing and reporting on the claims.
28. The Claimants suggest a similar process to that followed by the Military Veterans Kaupapa Inquiry be followed in the Health Services and Outcomes Kaupapa inquiry. That is:
 - (a) The completion of an independent pre-casebook research review;
 - (b) Evidence that may be lost due to the poor health of Claimants' or will be of great assistance to technical researchers (tikanga with regard to health, tohunga, rongoa and customary health care) can be presented to the Waitangi Tribunal in an Oral Hearing/Nga korero Tuku Iho;
 - (c) Confirmation of issues to be researched, feedback on project briefs and commissioning of researchers;
 - (d) The completion of technical reports;
 - (e) An Interlocutory stage where claimant counsel and the Crown draft a preliminary Statement of Issues then the Waitangi Tribunal finalise the Statement of Issues;
 - (f) Amended Statements of Claim filed;
 - (g) Then full hearings with hearing weeks running 6-8 weeks apart with tangata whenua Briefs of Evidence filed 2 weeks before the hearing in which they are presented and Technical tangata

whenua Briefs of Evidence filed 4 weeks before the hearing in which they are presented.

29. Additionally, Counsel is instructed that, in terms of tikanga, Judicial Conferences and hearings should be held as much as possible on Marae.

Judicial Conference

30. Counsel will be prepared to elaborate on the matters discussed above in the Judicial Conference to be held in early May 2017.
31. In addition to the matters discussed above, in Counsel's submission, the issue of funding claimant activity and costs needs to be discussed at the Judicial Conference. Ordinarily the Crown Forestry Rental Trust funds claimant costs. However, as revealed in the Military Veterans Kaupapa Inquiry, Crown Forestry Rental Trust does not include Kaupapa Inquiries as inquiries that would lead to the settlement of claims and as such has made a decision not to fund Claimants participating in Kaupapa Inquiries.

DATED this 13th day of March 2017



Eve Rongo

Claimant Counsel