IN THE WAITANGI TRIBUNAL **WAI 2575**

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of the Health Services and Outcomes Kaupapa Inquiry

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MEMORANDUM OF COUNSEL

DATED 16 MARCH 2017

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MAY IT PLEASE THE TRIBUNAL

1. This Memorandum of Counsel is filed on behalf of a number of claimants represented by Tamaki Legal ("the Claimants"). On 30 November 2016 His Honour Chief Judge Isaac, in his capacity as Chairperson of the Waitangi Tribunal issued a Memorandum-Direction to commission the Health services and outcomes inquiry ("the November Direction").[1] Paragraphs 11-18 of the November Direction contain directions on eligibility.

2. On 21 December 2016, His Honour Judge Clark issued a Memorandum-Direction ("the December Direction") advising that he had been appointed as Presiding Officer and directing Counsel to file submissions by 13 March 2017 in relation to:[2]

    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;

    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.

[1] Wai 2575, #2.5.1
[2] Wai 2575, #2.5.2

3. In response to the December Direction, we file these submissions. We apologise for the late filing of the Memorandum of Counsel but we ask nevertheless that the submissions are placed on to the Record of Inquiry.

Claims to be heard and eligibility

4. Of the claims listed in Appendix '**A**' of the December Direction, the following claimants have instructed that they wish to have their grievances heard in the Health Services and Outcomes inquiry ("the Health inquiry"):

   a. Te Whanau O He Putea Atawhai, Tarati Birks (Wai 433);

   b. Pākowhai Hapu and Whakatohea Māori Trust Claim, Wairata Te Oneone, also known as Peter Wairata Warren (Wai 2008);

   c. The Hatu Whanau claim, William Hatu (Wai 2049);

   d. The Papuni Whanau claim, Takaparae Papuni (Wai 2066);

   e. The Hillman Whanau claim, John Kahui Hillman (Wai 2097); and

   f. Te Taura Here O Ngati Porou ki Tamaki Makaurau Lands claim, Joseph Naden, (Wai 2165).

5. Numerous other claimants and claimant groups have indicated that they have an interest in having their grievances heard in the Health inquiry.

6. The historical Treaty claims of Messrs Warren (Wai 2008), Hatu (2049), Papuni (Wai 2066) and Hillman (Wai 2097) ("the Whakatohea claimants") were filed for hearing in the North Eastern Bay of Plenty Inquiry District ("the NEBOP Inquiry"). The NEBOP inquiry has not yet commenced and it is possible that the inquiry may not be proceeded with because on 14 December 2016, the Crown approved the mandate of the Whakatohea Pre-settlement Claims Trust to enter into direction negotiations with the Crown for the settlement of, inter alia, the Wai 2008, 2049, 2966 and 2097 claims. That having been said, the Whakatohea claimants have, in

conjunction with a number of other claimants with claims in the NEBOP inquiry, filed an urgent hearing application to the Waitangi Tribunal in opposition to the Crown's approval of the aforementioned deed of mandate. We will keep the Tribunal abreast of developments with regard to the commissioning of the North Eastern Bay of Plenty Inquiry. Despite the circumstances referred to above, at this point in time, it is understood that the health claims of the Whakatohea claimants are eligible for hearing in the Health inquiry.

7. We have been instructed by Mr Tane Wharewera that the Wai 2002 claimants do not wish to participate in the Health inquiry. As such, we hereby notify the Tribunal of their formal withdrawal from the Health inquiry.

8. We refer to the historical Treaty claim filed by Mr George Kiwara (Wai 1998). We note that this claim was filed for hearing in the East Coast inquiry (Wai 900). We further note that the Wai 1998 claim is listed in the First Schedule to the Ngati Porou Settlement Act 2012 as being settled by that Act and is therefore ineligible for hearing in the Health inquiry.

9. We no longer act for Ms Priscilla Sandys, the principal claimant for the Wai 2006 claim.

Claimants seeking leave to have claims aggregated

10. In addition, the following claimants wish to have their health-related grievances aggregated into the Health inquiry:

    a. Nuki Aldridge, for an on behalf of himself and his whanau ("the Wai 2382 claim"). The Wai 2382 claim appears to be eligible for hearing in the Health inquiry. Presently, the Wai 2382 claim is being heard by Te Paparahi o Te Raki Tribunal (Wai 1040). That inquiry is not yet completed and it will be some years before Te Paparahi o Te Raki Tribunal will issue its report on the Wai 2382 claim. Furthermore, we note that the Wai 2382 claimants have not pleaded a health-related cause of action in Te Paparahi o Te Raki inquiry. Accordingly, we hereby seek the leave of the Waitangi

Tribunal to file an Amended Statement of Claim for the aggregation of the Wai 2382 claim into the Health inquiry

b. Reuben Porter, for and on behalf of himself and his whanau ("the Wai 1968 claim"). The Wai 1968 claim appears to be eligible for hearing in the Health inquiry. Presently, the Wai 1968 claim is being heard by Te Paparahi o Te Raki Tribunal (Wai 1040). That inquiry is not yet completed and it will be some years before Te Paparahi o Te Raki Tribunal will issue its report on the Wai 1968 claim. That having been said, we note that the Wai 1968 claimants have not pleaded a health-related cause of action in Te Paparahi o Te Raki inquiry. On behalf of himself and his whanau, Mr Porter had the Wai 1968 claim aggregated into the Maori Military Veterans Kaupapa inquiry (Wai 2500). In that inquiry, Mr Porter has raised health-related claims concerning the proficiency of rehabilitation services for two World War I veterans who were wounded and who suffered from post-traumatic stress disorder. The veterans referred to were whanau members. Given that the Wai 1968 claimants will plead health claims in the Health inquiry that relate to matters other than the proficiency of rehabilitation services for returned servicemen, and given that the Wai 1968 claim being heard by Te Paparahi o Te Raki Tribunal does not raise any health-related Treaty claims, we submit that the Wai 1968 claim is eligible for hearing in the Health inquiry. Accordingly, we hereby seek the leave of the Waitangi Tribunal to file an Amended Statement of Claim for the aggregation of the Wai 1968 claim into the Health inquiry;

c. Wiremu Reihana, for and on behalf of himself and his whanau ("the Wai 1957 claim"). Presently, the Wai 1957 claim is being heard by Te Paparahi o Te Raki Tribunal (Wai 1040). That inquiry is not yet completed and it will be some years before Te Paparahi o Te Raki Tribunal will issue its report on the Wai 1957 claim. That having been said, we note that the Wai 1957 claimants have not pleaded a health-related cause of action in Te Paparahi o Te Raki inquiry. On behalf of himself, his whanau and other claimants, Mr

Reihana had the Wai 1957 claim aggregated into the Maori Military Veterans Kaupapa inquiry (Wai 2500). In that inquiry, Mr Reihana and other claimants have raised health-related claims concerning the proficiency of rehabilitation services for Maori returned servicemen. The veterans referred to were whanau members. Given that the Wai 1957 claimants will plead health claims in the Health inquiry that relate to matters other than the proficiency of rehabilitation services for returned servicemen, and given that the Wai 1957 claim being heard by Te Paparahi o Te Raki Tribunal does not raise any health-related Treaty claims, we submit that the Wai 1957 claim is eligible for hearing in the Health inquiry. Accordingly, we hereby seek the leave of the Waitangi Tribunal to file an Amended Statement of Claim for the aggregation of the Wai 1957 claim into the Health inquiry;

d. Te Enga Harris, for and on behalf of herself and her whanau ("the Wai 1531 claim"). Presently, the Wai 1531 claim is being heard by Te Paparahi o Te Raki Tribunal (Wai 1040). That inquiry is not yet completed and it will be some years before Te Paparahi o Te Raki Tribunal will issue its report on the Wai 1531 claim. The Wai 1531 claim relates principally to the treatment and lack of care that the Wai 1531 claimants received as wards of the State during the 1960s and 1970s. In addition, the Wai 1531 claimants have included a cause of action that concerns the Crown's mental health system and the prejudice it caused unto members of the claimant's whanau as a result of misdiagnosis and medical misadventure. The mental health-related Treaty claim is related to and was raised in the context of the wards of the State Treaty claim. We advise that we have been instructed to withdraw the mental health claim from the Wai 1531 claim that is being heard in the Te Paparahi o Te Raki inquiry. The withdrawal memorandum of counsel has been prepared and it will be filed with Te Paparahi o Te Raki Tribunal shortly. In the event that the health-related claim of the Wai 1531 claim is withdrawn from being heard in Te Paparahi o Te Raki inquiry, we will seek the leave of the Waitangi

Tribunal to file an Amended Statement of Claim for the aggregation of the Wai 1957 claim into the Health inquiry;

11. We submit that in order to effect the aggregation of claims that is sought above, the procedure set out in paragraphs 10 and 11 of the Presiding Officer's Memorandum-Directions in the Maori Military Veteran's Kaupapa Inquiry dated 15 July 2016 could be employed here, namely:[3]

> *. . . [t]hat the Presiding Officer in the Northland Inquiry, Judge Coxhead, could be asked to issue a Direction instructing that where those claims that are consolidated in the Northland Inquiry desire that their Health claims be heard in this inquiry, that the status of the affected claims be changed to "aggregated" and the claims then aggregated to this inquiry.*

Principal issues the Claimants wish to raise

12. The over-arching issue will clearly be, in our submission, the long-standing and continuing disparity between Maori and non-Maori life expectancy and health outcomes.

13. The Claimants' issues are likely to concern aspects of physical health impairment and the provision of primary health care. There will be claim issues concerning the provision of mental health services, dental health services, disability services, access to or the delivery of backup health services such as physiotherapy or occupational therapy, old-age health-related services, maternity care, child health care, traditional health services and services for the treatment of addiction.

14. Other claim issues should relate to health service training including the recruitment of Maori in to the medical and allied professions, analysis of the cultural responsiveness of Crown agents when administering medical services to Maori, the adequacy or not of the incorporation of tikanga Maori into the delivery of medical services to Maori, the adequacy of the funding of health services that were provided to Maori in rural areas and in areas

[3] Wai 2500, #2.5.15

where there is a high Maori population, and discriminatory practices in relation to the delivery of health services to Maori.

15. The Health inquiry should consider the extent of the Crown's consultation with Maori regarding the development of the healthcare legislative regimes, policies and practices. There should be inquiry into

16. The significant decline in the Maori population during the 19th Century as a result of the contraction of infectious European diseases is well documented. Prior to the colonisation of Aotearoa by the British, the indigenous populations of other British colonies were decimated by the same diseases. We submit that an important area for inquiry would be the extent to which the Crown knew or ought to have known about the harmful effects of infectious diseases on the Maori population and the Crown's failure to take effective measures to prevent such harm.

Claimants are ready to proceed

17. The Claimants are ready to proceed in the sense that they are anxious for the Health inquiry to get underway and for hearing preparation to begin as soon as possible.

Existing evidence and additional evidence

18. Maori health-related claim issues have arisen in many of the historical Treaty claim district inquiries that have been completed or that are in the throes of being completed, and research was carried out accordingly. We are aware of health-related research being completed for the East Coast, Taihape, Urewera, Whanganui, Te Rohe Potae[4] and for the Te Paparahi o Te Raki inquiries. No doubt there is health-related research on the records of inquiry for other district inquiries. We submit that the relevant research should be accessed and placed on the record of inquiry for the Health inquiry. The Napier Hospital Services inquiry report (Wai 692) is likely to be instructive as is the Ko Aoteroa Tenei inquiry report (Wai 262).

[4] For example, the research reports of Dr Helen Robinson—Wai 898, #A31: *Te Taha Tinana: Maori Health and the Crown in Te Rohe Potae Inquiry District, 1840-1990*, and, Wai 898, #A88: *Te Rohe Potae: Twenty-first century socio-demographic status*.

19. The medical commentaries of numerous academics and other health experts will be of undoubted assistance. We would refer by way of example to the work of Associate Professor Paparangi Reed of the University of Auckland, the Health Services Research Centre at Victoria University of Wellington, the Eru Pomare Centre at the University of Otago, Massey University's Centre for Public Health Research, Te Pumanawa Hauora and School of Maori Art, Knowledge and Education, and the Health Services Assessment Collaboration at the University of Canterbury.

Inquiry process for preparing evidence, setting the issues, and hearing and reporting on the claims

Preparing the evidence

20. It is anticipated that overview or generic research will be carried out for the parties' purposes. Typically, such evidence is drafted in relation to broad time periods and numerous topics are covered. Legislative regimes are invariably the focus. Concerns and issues with higher level Crown policy and the administration thereof are usually traversed. Of note is that other than research that is carried out in relation to selected case studies, generic research is seldom concerned with the particular claim issues of individual claimants. In fact, unless a claimant's claim is selected as a case study, it seems unlikely that a Health inquiry claimant will get adequate probative assistance from any overview-type, generic research programme. We elaborate on this below.

21. We submit that the national kaupapa Maori inquiries are distinct from historical Treaty claim inquiries in that claimants in the former inquiry are not purporting to represent hapu and/or iwi interests. Rather, the claimants in a kaupapa Maori inquiry have applied to be heard as individuals, and/or on behalf of whanau, and/or on behalf of entities such as trusts or incorporated societies.[5] As a result, we submit that there are different research needs for claimants partaking in a kaupapa Maori inquiry from the needs of claimants partaking in a historical Treaty claims inquiry, where generic research was the norm.

[5] Wai 2500, #2.5.15, paragraphs 65 to 76.

22. With any given historical Treaty claim inquiry, much of the casebook was geared towards satisfying the research needs of iwi and/or hapu because most historical Treaty claims were filed for and on behalf of iwi and/or hapu. As a result of the predominance of these kinds of claimant group entities, overview or generic research with supplementary case studies may have been appropriate ("overview research"). Although overview research is also appropriate for kaupapa Maori inquiries, the predominance of individual or whanau claims means, in our submission, that an overview research approach alone is inappropriate even if some supplementary case studies are completed as well. Due to the distinctive, individual claimant entities before a kaupapa Maori Tribunal, it is appropriate that, in effect, supplementary case studies be completed for most if not all claimants ("individual research"). That having been said, it is obvious that the cost of conducting research on this scale is prohibitive.

23. The concern we raise is not satisfied by way of the preparation of a few supplementary case studies. Although some assistance from case studies performed for other claimants may be of some assistance to claimants who are without case study research in support, we do not see how a claimant without specific evidence in support of their particular claim interests will 'get home' with their claims.

24. We acknowledge that claimant witness briefs of evidence will go some way towards satisfying an individual claimant's evidential needs. Typically, such evidence will be comprised of eye-witness accounts and publicly available documents and the claimants' own private health records. Some medical evidence may also be available for presentation. We do not denigrate the probity of such evidence in any way. And in some instances, in conjunction with the overview evidence that is being prepared, such evidence may well suffice for the purpose of holdings of well-foundedness from the Tribunal. Nevertheless, concerns remain in relation to the adequacy of overview research to support the claimants' claims.

25. We take, for example, a Treaty claim that involves a claimant who has sought elective surgery at the local public hospital. It is alleged that the criteria for the elective surgery is such that the claimant's prospects for the

timely provision of elective surgery are compromised because they are Maori. To 'get home' with such a claim, it is essential that the claimant provides evidence that the elective surgery criteria are prejudicial and that the local hospital's administration thereof is also prejudicial. Whilst the overview research may assist if it can be concluded therefrom that Crown policy in relation to elective surgery is prejudicial to Maori, that does not necessarily mean that on the balance of probabilities, the particular Crown agent administering the elective surgery policy in the claimant's case is acting in a prejudicial manner. The best that can be drawn from the overview research on elective surgery policy, assuming that such research is carried out and made available, is a general finding that does not translate into an actual finding viz a viz the claimant's claim. Whether or not such evidence is available to one side for the moment, we submit that evidence of the very ranking criteria employed by the particular Crown agent involved and specifically in relation to the claimant's application for elective surgery is required ("the Crown evidence"). Unless the claimant's claim becomes a case study for the purposes of the overview research and in light of the clear funding constraints that afflict the operation of the Waitangi Tribunal, the claimant will have to access, analyse, compile and present the Crown evidence themselves.

26. We turn to another example. A claimant may allege that one of their parents was misdiagnosed by Crown agents under the mental health legislative regime and that their parent was wrongfully committed to a mental institution. As a result of that committal, the claimant was made a ward of the State and then physically and sexually abused by State-appointed caregivers. In their evidence, the claimant will relay their eye-witness account of the committal and related events and provide some of their personal medical evidence in support. Perhaps there is evidence in relation to the committal event from the claimant's siblings and other family members. However, evidence surrounding their parent's committal will be essential if the claim is to be made out. Such evidence may consist of the Court Order that effected the committal, records pertaining to any related Court proceeding, the file records of the Crown agent or agents that carried out the committal, and the records of the Crown agent or agents that administered the committal. Related mental health-related medical records

from any mental health professionals involved with the committal would be essential. We submit that unless the claimant's claim is a case study for the purposes of the overview research, it will be incumbent upon the claimant to access, analyse, compile and present the Crown agency-related evidence themselves.

27. If it is accepted that individual research in the nature of that which is described above is required for the proper hearing of the Health inquiry Treaty claims, we submit that the onus falls on counsel to assist the claimants with their legal research and evidential needs. In these circumstances, it would assist greatly if the Waitangi Tribunal could commission the preparation of a research tool and associated advice to guide counsel and the claimants as to the availability of relevant Crown records, the location thereof and any access-related criteria to be fulfilled. Advice could be included in relation to missing and/or destroyed Crown records as well. In the event that such a research tool was commissioned, additional features would undoubtedly be added to ensure its usefulness and applicability.

28. Where the abovementioned approach to the preparation of evidence is inapplicable for some reason, the claimants may approach the Tribunal for the commissioning of research. In the event that the research cannot be commissioned, we would ask the Tribunal to set its position out in writing so that other potential funding sources can be approached.

Hearing process

29. We refer to the Nga Korero Tuku Iho process first developed by Judge Ambler for the purposes of Te Rohe Potae inquiry. We note in particular how Judge Ambler ensured a relative degree of informality such that the Te Rohe Potae Nga Korero Tuku Iho did not entail the filing of briefs of evidence, exhibits, speaking notes, Power Point displays or the opening submissions of counsel. We note that a similar, informal approach to Nga Korero Tuku Iho was adopted by His Honour Judge Harvey recently in the Taihape inquiry. In the event that the Health inquiry Tribunal should adopt the Nga Korero Tuku Iho process, we submit that the undocumented

approach initiated by His Honour Judge Ambler and adopted by Judge Harvey is to be preferred.

30. When preparing the Tribunal Statement of Issues, we would prefer that the document was completed once the research for the Health inquiry has been completed. This is the approach taken in all district inquiries to date. In this way, the Tribunal Statement of Issues can be prepared on a much more informed basis.

Dated at **Auckland** this **16th day of March 2017**

Eoin Lawless
Counsel Acting