IN THE WAITANGI TRIBUNAL

WAI 2575
WAI 1315

IN THE MATTER The Treaty of Waitangi Act 1975

AND

IN THE MATTER of a claim to the Waitangi Tribunal by Taitimu Maipi, Tureiti Moxon, Janice Kuka, Hakopa Paul, Henare Mason and Simon Royal in respect of the objectives, funding and administration of Primary Health Organisations.

MEMORANDUM CONFIRMING CLAIM TO BE HEARD AS PART OF HEALTH SERVICES AND OUTCOMES KAUPAPA INQUIRY DATED 10 APRIL 2017

BRAITHWAITE & SMAIL LIMITED
PO Box 13 243
Onehunga
AUCKLAND 1643
Telephone: 021 061 7085
Solicitor: RN Smail
Counsel: PJ Andrew

BRAITHWAITE & SMAIL LIMITED
Lawyers & Mediators

RECEIVED
Waitangi Tribunal
10 Apr 2017
Ministry of Justice
WELLINGTON

MAY IT PLEASE THE TRIBUNAL:

1. This Memorandum is filed in response to the Memorandum-Directions of the Presiding Officer dated 21 December 2016 (#2.5.2).

2. Counsel filed the following memorandum in substantially the same form on 13 March 2017 as directed.[1] However, on 27 March 2017 Tribunal staff advised that it could not be added to the record of inquiry because we had sought amendment to the list of claimants and that this would need to be sought through the filing of an Amended Statement of Claim. Counsel and claimants are working on an Amended Statement of Claim which will be filed before the May 2017 Judicial Conference. Counsel has already filed a written consent from Elaine Tapsell to be removed as a claimant and the Amended Statement of Claim will be signed by the other original claimants as well as two new claimants, Henare Mason and Simon Royal.

3. We seek leave to file out of time and submit that there is no prejudice to any party in the delay as counsel served on the email distribution list on 13 March 2017. Crown counsel and other parties are therefore aware of the contents of this memorandum.

4. The claimants confirm that they wish to have the Wai 1315 claim heard as part of the Wai 2575 Health Services and Outcomes Kaupapa Inquiry. We do not consider that there are any issues as to eligibility to be heard.

5. The Wai 1315 Statement of Claim (#1.1.1) broadly outlines the principal issues the claimants wish to advance. However the claim was filed twelve years ago, and the Statement of Claim needs significant amendments to update the Tribunal on the changes to the objectives, funding and administration of Primary Health Organisations during that time. Counsel is currently working with the claimants on the Amended Statement of Claim and will file an amended claim in advance of the May 2017 Judicial Conference.

---

[1] Except for paragraphs 2-3 which relate to advice from Tribunal staff

6. Counsel makes the following initial submissions on priority, evidence/research and the inquiry process:

6.1. The Crown's current legislation, policy and practice in terms of health services and outcomes is prejudicially affecting all Māori. Counsel submits that the Inquiry should have a forward looking approach that has an ultimate objective of providing constructive, practical and positive recommendations to the Crown for changes to the current legislation, policy and practice which the Crown can implement as a matter of urgency to improve Māori health status.

6.2. It is submitted that in order to achieve this objective, the Tribunal should prioritise hearing evidence of the current Māori health status, legislation, policy and practice.

6.3. While some historical background is required in order for the Tribunal to understand the current situation, it is submitted that this background evidence should not detract from the forward looking approach counsel advocates. While there have been past Treaty breaches in terms of health services and outcomes, these have in many cases been canvassed to a greater or lesser degree in previous historical Tribunal inquiries and historical Treaty settlements. Evidence which leads to constructive, practical and positive recommendations to the Crown for changes to the current legislation, policy and practice is far more likely to contribute to positive change for Māori than evidence of past breaches.

6.4. Counsel respectfully submits that this Inquiry is fundamentally different in nature to the first Kaupapa Inquiry (Wai 2500). The Military Veterans Kaupapa Inquiry is unusual in that it was appropriate and important that the evidence of the elderly and infirm veterans, a small section of the Māori population, was recorded for posterity.

6.5. By contrast, as every Māori is affected by health services, we do not consider that it is necessary or a good use of Tribunal time to have multiple hearings of evidence of prejudice alone and/or historical

reasons for this. The health inequalities for Māori are well documented. Both the fact that prejudice exists and data and statistics of prejudice may be able to be agreed with the Crown at an early stage, meaning hearing time will not be required to establish this.[2] If so, then evidence at hearing can be targeted to demonstrating how the Crown's current legislation, policy and practice create that prejudice, which will be of use to the Tribunal in formulating recommendations for change.

6.6. It may be appropriate for claimant counsel to select representative case studies from iwi hapū and whānau which illustrate how the Crown's policies are giving rise to prejudice. We submit that it is more important that the Inquiry proceed at a pace that allows a report to issue without undue delay than all kōrero is recorded for posterity. It is important that the Crown receives the Tribunal's recommendations as soon as possible so that it can make changes.

6.7. By way of summary of the above, counsel submits that the key issues for this Inquiry are:

6.7.1. What is the Crown's current legislation, policy and practice in relation to Māori health and health services?

(a) Including background only in so far as it helps to illuminate the current situation;

6.7.2. Is that current legislation, policy and practice in breach of the principles of the Treaty of Waitangi?

6.7.3. Is that current legislation, policy and practice causing prejudice to Māori – what are the outcomes for Māori?

(a) The parties may be able to agree that Māori are prejudiced and provide agreed data and statistics;

---

[2] For example in the Wai 2540 Department of Corrections and Reoffending Prisoners claim, the Crown and claimant agreed relevant statistics for convictions and reoffending (#3.1.31(a)). A timeframe could be set for updating the data/statistics, after a year for example, if the Inquiry was not yet completed.

(b) This would allow evidence to focus on how legislation, policy and practice causes that prejudice;

(c) It may be appropriate for claimant counsel to select representative case studies from iwi, hapū and whānau which illustrate this, rather than recording every kōrero; and

6.7.4. How should the current legislation, policy and practice be changed to improve health services and outcomes for Māori?

(a) Constructive, practical and positive recommendations to the Crown for changes to the current legislation, policy and practice which the Crown can implement as a matter of urgency to improve Māori health status.

6.8. The Wai 1315 claimants have long institutional knowledge of the objectives, funding and administration of Primary Health Organisations from working within Crown legislation, policy and practice, and are ready to present evidence to the Tribunal. This will include expert evidence to support constructive, practical and positive recommendations. The Wai 1315 claimants are currently considering potential expert witnesses who would assist the Tribunal.

7. The claimants are ready to proceed and support priority being given to the Health Services and Outcomes Kaupapa Inquiry.

8. Counsel can discuss these matters in further detail with the Tribunal at the Judicial Conference.

Date: 10 April 2017

RN Smail
Counsel for the applicants