BEFORE 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

CROWN SUBMISSIONS IN ADVANCE OF THE FIRST JUDICIAL CONFERENCE

13 April 2017

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MAY IT PLEASE THE TRIBUNAL:

1. These submissions are filed in response to memorandum-directions dated 21 December 2016 of the Presiding Officer, Judge Clark, directing the Crown to file submissions in response to claimant submissions on a number of preparatory matters for the inquiry.[1] Judge Clark also requested that the Crown give a preliminary indication of its likely approach to the inquiry.[2]

2. Counsel will be able to speak to these submissions at the judicial conference scheduled for 11 and 12 May 2017.

Crown's approach to the inquiry

3. The Crown looks forward to a constructive inquiry and wishes to work positively with claimants and the Tribunal to design an appropriate inquiry process.

4. The Crown's key interests in this inquiry are to ensure that:

   4.1 the claimants receive a fair hearing of their claims and grievances;

   4.2 the process is undertaken in a timely manner; and

   4.3 the process assists and informs future Crown policy development, decision making in relation to health services and outcomes for Māori and supports Māori participation in the health sector.

5. To that end, the Crown would benefit most from Tribunal findings that will help it improve settings for the delivery of health services to Māori and thus improve health outcomes for Māori in the future, rather than historically-focussed findings.

6. The Crown intends to present evidence that will explain how it is currently addressing disparities in health services to Māori and in Māori health outcomes. The Crown will play its usual role in testing evidence and adding to the evidential base where appropriate.

7. There are a number of matters that the Crown can address at this early stage about the planning of this inquiry, but the Crown anticipates that further

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1 Memorandum-Directions of the Presiding Officer regarding next steps in inquiry, 21 December 2016, Wai 2575, #2.5.2 at [14]-[18]; see also Memorandum-Directions of Judge Stephen Clark regarding extension requests for Crown submissions, 23 March 2017, Wai 2575, #2.5.5.

2 Memorandum-Directions of the Presiding Officer regarding next steps in inquiry, 21 December 2016, Wai 2575, #2.5.2, at [18].

submissions from the Crown and claimants will be required as the structure of this inquiry unfolds over the coming months, claimants particularise their claims fully, and the issues for inquiry are settled and researched.

Eligibility of claims

8. The Tribunal has released a list of Wai claims it has identified as raising health-related grievances and which it has stated appear to be eligible to participate in this inquiry.[3] In addition, the Tribunal directed all claimants wishing to participate to file written submissions.[4]

9. Since those directions were issued, claimants for approximately one hundred registered Wai claims have indicated their desire to have their health grievances heard in this inquiry. In addition, a number of memoranda have been filed on behalf of groups and individuals seeking to have new health-related claims heard in the inquiry.

10. At this stage, the Crown is aware that two organisations, the Raukawa Settlement Trust and Hāpai Te Hauora, have signalled that they would like to be involved in the inquiry as interested parties.[5] The Crown anticipates that other organisations and individuals may wish to participate as interested parties once wide notice of the inquiry is given and the scope of the inquiry is settled.

11. The Tribunal has properly noted that there will be eligibility issues to determine in settling which claims may participate in this inquiry.[6] These issues arise because of limitations on the Tribunal's jurisdiction, both general and specific.

12. General limitations include factors such as the Tribunal's requirement to inquire into claims about acts or omissions of the Crown or bodies acting on behalf of the Crown. Specific limits flow from comprehensive settlements of claims given legal effect by Parliament.

13. At this design stage of the inquiry, a principal submission of the Crown is that while the Tribunal must observe its jurisdictional limits, a future-focused inquiry

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3 Appendix A to Memorandum-Directions of the Chairperson commencing a kaupapa inquiry into health services and outcomes, 30 November 2016, Wai 2575, #2.5.1.

4 Memorandum-Directions of the Presiding Officer regarding next steps in inquiry, 21 December 2016, Wai 2575, #2.5.2, at [15].

5 Wai 2575, #3.1.47; Wai 2575, #3.1.48.

6 Memorandum-Directions of the Chairperson commencing a kaupapa inquiry into health services and outcomes, 30 November 2016, Wai 2575, #2.5.1, at [11]-[18].

will mean that it is unlikely that those limits will prevent the Tribunal from inquiring into the most significant health issues affecting Māori at a national level.

14. With that in mind, the Crown nevertheless submits that there must be a process timetabled to rule on contested questions of eligibility to participate in this inquiry to avoid expending resources on particular claims that are already settled or otherwise beyond the Tribunal's jurisdiction.

15. In general, claimants seeking to participate in this kaupapa inquiry have not provided detailed submissions on eligibility issues that may affect them. In addition, some claimants, possibly the majority, are yet to fully particularise their claims.

16. The number of persons with registered claims acting on behalf of groups who want to participate is large. Many claimants have just recently made submissions signalling their intention to participate. The Tribunal's own record of proceedings is not yet available to participants in an up to date state.

17. The Crown proposes that a timetable be set for the Tribunal panel to determine contested questions of eligibility. Depending on the Tribunal's preference, this could be done in advance of or parallel to the design of a research programme about the likely issues that will be selected by the Tribunal for its final statement of issues in this inquiry. The Crown submits the following process might be adopted:

    17.1 Claimants should be offered an opportunity to submit how, if at all, they are affected by eligibility issues. While it is understandable that claimants may wish to take the broadest view of questions of jurisdiction, it will be important to signal how their claims may be affected by existing settlements or other limits on the Tribunal's jurisdiction. All parties having a clear understanding of these issues as early as possible in the inquiry will assist the inquiry's design and avoid jurisdictional barriers.

    17.2 The Crown submits in response its view of whether claims or parts of claims are affected by eligibility issues and whether, on the Crown's analysis of the intending claims, the same health issues will still be before the Tribunal by reason of other participants' claims in this inquiry. The Crown seeks a sufficiently lengthy period to prepare these submissions in

light of the extensive analysis that will be required of existing settlements, the large number of claims seeking inclusion in this inquiry, and the desirability of affording time for dialogue with claimant counsel or unrepresented claimants about these issues before submissions are filed.

17.3 Affected claimants file submissions in reply.

17.4 The Tribunal panel convenes to hear argument on contested questions of eligibility before it makes determinations on those issues.

18. Subject to discussion at the judicial conference, the Crown submits this process should take place over four months.

The principal issues the claimants wish to bring before this inquiry

19. In the memorandum-directions commencing this inquiry, the Chairperson made a number of statements concerning the scope of kaupapa inquiries. In particular, His Honour stated:[7]

> Unlike a district inquiry, which embraces all claim issues that arise within its area of coverage, a kaupapa inquiry will usually focus on a single core issue of national scope. In this inquiry, the thematic focus is on health services and outcomes. ...
>
> Claimants wishing to have their health-related claims heard should bear in mind that kaupapa inquiries are designed to address issues of national scale and significance. Claims with specific or local grievances may serve as case studies or examples, but will otherwise be eligible to participate in the standing panel process for remaining historical claims now in preparation or for a future contemporary claims process.

20. In light of these statements, it is therefore necessary to consider whether the claims the claimants are seeking to be heard in this inquiry properly fall within the scope of a national health services and outcomes inquiry. This involves consideration of the following questions:

20.1 Are the claim issues related primarily to health services and outcomes; and

20.2 If so, are they claim issues that should be inquired into in a kaupapa inquiry?

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7 Memorandum-directions of the Chairperson commencing a kaupapa inquiry into health services and outcomes, 30 November 2016, Wai 2575 #2.5.1 at [7] and [12].

21. The Crown notes that many claimants are yet to fully particularise their claims. Nevertheless, the Crown submits that a number of the issues the claimants seek to have heard in this inquiry are not primarily related to health services and outcomes and the Crown queries whether these issues are properly within the scope of this inquiry. These issues are set out in the appendix **attached** to these submissions. The Crown notes that some of the issues will be covered by other kaupapa inquiries to be held in due course.

22. In addition, some of the claims concern individuals' experiences with the health service. While the Tribunal has stated that such claims may serve as case-studies, the Crown understands that it would be more appropriate for those not selected to be heard by the standing panel for remaining historical claims, or in a future contemporary claims process.

23. The Crown submits that opportunity for further submissions and consideration as to whether these claims are within the scope of the inquiry needs to be built into the interlocutory process.

Readiness to proceed

24. The Crown agrees with claimant counsel that a research programme and other interlocutory steps, including determination by the panel in this inquiry of the eligibility of specific claims, will need to take place before the parties (including the Crown) will be ready to proceed to hearing. The suggested steps are described in more detail below.

Matters of priority

25. As the Tribunal has noted, the nature of the issues in its kaupapa inquiry programme are such that they are likely to be "of a general nature, affecting most or all of Māoridom and requiring present-day solutions, often in the field of government policy".[8]

26. As noted above, the Crown would benefit most from Tribunal findings that will assist the Crown to address Māori health issues in the future so that the Crown, and those acting on its behalf, can improve the delivery of health services to Māori, improve health outcomes for Māori, and support Māori participation in

[8] "The Kaupapa Inquiry Programme" in *Te Manutukutuku: Issue 68* (Te Rōpū Whakamana i to Tiriti o Waitangi, June 2015) at 3.

the health sector. The Crown therefore submits that the inquiry should focus predominantly on current issues rather than take a predominantly historical focus. In saying this, the Crown accepts that some historical matters will form appropriate context for current issues before the Tribunal, on which the Tribunal will be deciding whether to find that Treaty principles have been breached causing prejudice to claimants.[9]

Other organisations wishing to participate as interested parties

27. The Crown notes that a number of claimants have suggested other organisations that may wish to participate as interested parties.

28. The Crown submits that it is important that public notice should be given so as to ensure, as far as is reasonably possible, all health-related organisations and interest groups are aware of the inquiry, its subject matter and broad timeframes and have the opportunity to consider whether they wish to be involved. With that in mind, the Crown considers standard newspaper notices may not be a sufficient mechanism for giving public notice of the inquiry. The Crown respectfully submits the Tribunal should give consideration to giving notice via a broader range of fora, including, for example, notice in relevant health-related publications.

29. The Ministry of Health will be able to disseminate information about the inquiry through formal relationships it has with health sector organisations.

30. Crown entities, such as District Health Boards and the Health Quality and Safety Commission are likely to have an interest and may wish to be involved in one form or other.

Existing evidence that is likely to be available and additional evidence from the claimants, expert witnesses and technical research that may be required

31. The Crown agrees with claimant counsel that there are likely to be a number of publicly available reports, including research reports produced for Tribunal district inquiries, that should be considered by the Tribunal and can be placed on the Wai 2575 record of inquiry. The Crown suggests that a timetable be set for

[9] Inclusion of historical matters for context will still be subject to the Tribunal's remaining jurisdiction to consider and report on historical claims.

the parties to produce a list of suggested publications for consideration by the Tribunal.

32. At this preliminary stage, the Crown notes the following available evidence:

32.1 District Health Board Māori Health Plans, Profiles, and Summaries;[10]

32.2 *Tautau Kahukura: Māori Health Chart Book 2015*;[11]

32.3 *Annual Update of Key Results 2015/16: New Zealand Health Survey*;[12]

32.4 *Te Ohonga Ake: The Determinants of Health for Māori Children and Young People in New Zealand: Series Two* (April 2016);[13] and

32.5 The LiLACS NZ research programme.[14]

33. The Crown submits that a qualified researcher should be commissioned to identify what relevant research already exists, recommend what further research ought to be undertaken and propose a detailed research programme. The parties should then make comments on these proposals before the Tribunal makes a final decision on the research programme.

34. The Crown notes that, in the military veterans kaupapa inquiry, the Crown held a conference with Crown agencies holding relevant records following the completion of the pre-casebook research discussion paper. The Crown will

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10 District health boards are required to improve the health of Māori and reduce health disparities for Māori compared to other population groups in New Zealand. Māori Health Plans, DHB Māori Health Profiles and DHB Māori Health Profile Summaries for all DHBs can be found at: http://www.health.govt.nz/our-work/populations/Māori-health/dhb-Māori-health-plans-profiles-and-summaries.

11 These statistics present a snapshot of the health of Māori compared with non-Māori in the early 2010s. The chart book presents key indicators relating to the socioeconomic determinants of health, risk and protective factors for health, health status, health service use and the health system: http://www.health.govt.nz/our-work/populations/Māori-health/tatau-kahukura-Māori-health-statistics.

12 This report provides a snapshot of the health of New Zealanders through the publication of key indicators on health behaviours, health status and access to health care for both adults and children: http://www.health.govt.nz/publication/annual-update-key-results-2015-16-new-zealand-health-survey

13 This report, which focuses on the underlying determinants of health for Māori children and young people, aims to: provide a snapshot of progress in addressing many of the determinants of health including child poverty and living standards, housing, early childhood education, oral health, tobacco use, alcohol related harm, and children's exposure to family violence; and assist those working in the health sector to consider the roles other agencies play in influencing child and youth health outcomes related to these determinants: http://www.health.govt.nz/publication/te-ohonga-ake-determinants-health-Māori-children-and-young-people-new-zealand-series-two

14 LiLACS NZ is a research programme intended to improve the amount of information and evidence about New Zealanders of advanced age. The aims of the research are to: describe the health status of Māori and non-Māori of advanced age; explore the different factors that have an effect on older people's health; explore the factors that can help older people maintain their independence; explore how health and social services can better support older people; and provide information for people on how to stay healthy, well, and independent as they get older: http://www.health.govt.nz/our-work/life-stages/health-older-people/lilacs-nz-research-programme

consider convening a similar conference with Crown agencies once this stage is reached in this inquiry.

35. Although the Crown will produce some evidence, it is not able to say at this preliminary stage what the nature and detail of any such evidence will be. The evidence the Crown will produce will depend on an assessment of the existing evidence, development of a research programme, and discussions with claimants, as well as the ultimate scope of the issues to be heard within the inquiry. A clearly defined and limited statement of issues will assist in commissioning targeted and timely research, for both the claimants and the Crown.

36. At this stage, the Crown's preference is to present evidence after the evidence of the claimants and any third parties (as it has in other inquiries). This will enable the Crown to consider all the claimant evidence presented and prepare appropriate evidence in response.

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

37. The Crown agrees with claimant counsel that a process similar to the process in the Wai 2500 military veterans kaupapa inquiry should be adopted in preparing the evidence and setting the issues. In terms of initial process, the Crown submits the steps should include:

    37.1 Determination by this panel of the eligibility of specific claims, as discussed above;

    37.2 Identification of, and agreement on, the key issues for inquiry (insofar as they can be identified and agreed upon before all research has been done);

    37.3 Determination of which claim issues are outside the scope of the inquiry, as discussed above;

    37.4 Development of a research programme with regard to these key issues:

        37.4.1 Identification of existing research. For instance a process similar to the pre-casebook research discussion paper commissioned by the Tribunal in the military veterans kaupapa inquiry to identify the research and other evidential material

already in the public domain and available to the inquiry, assess what further technical research is needed in light of the issues raised by claimants and suggest options for further technical research reports that would be required for hearings to start;

37.4.2 Commissioning of research identified as required;

37.4.3 Review of evidence and gap-filling research undertaken as necessary;

37.5 Full particularisation of claims; and

37.6 The development of a statement of issues.

38. The Crown anticipates that these steps are likely to take approximately 18 months to two years to complete. Some steps could occur concurrently.

39. As noted earlier, the Crown anticipates that further submissions from the Crown and claimants concerning the process for hearing and reporting on the claims will be required as the structure of this inquiry unfolds over the coming months, claimants particularise their claims fully, and the issues for inquiry are settled and researched.

13 April 2017

C R Linkhorn / G L Melvin
Crown Counsel

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel

Appendix A

Claim	Issues that appear to be outside scope of Wai 2575 inquiry	Relevant kaupapa inquiries (if applicable) [1]
Wai 874	assimilation policies; state housing, housing overcrowding, and the provision of papakainga housing; poverty; alienation from lands; entry into trade agreements and other obligations; and flooding[2]	identity and culture; social services, social development and housing; and natural resources and environmental management.
Wai 421, 593, 869, 1383 and 1890	assimilation policies; the forced removal of children; state housing, housing overcrowding, and the provision of papakainga housing; poverty; alienation from lands; entry into trade agreements and other obligations; and flooding[3]	identity and culture; social services, social development and housing; and natural resources and environmental management.
Wai 1247	retention of the organs of deceased children and the handling of the deceased[4]	identity and culture, including coronial law and practices
Dr Huhana Hickey, Wai 1341, 1670, 605, 246, 972, 1940, and 1843	abuse of Māori in institutions such as residential care facilities; prisons; and special education schools; and poverty[5]	social services, social development and housing; education services and outcomes; and the justice system.
Wai 1813	social development[6]	social services, social development and housing
Wai 121, 1450 and 2108, Wai 884 and 1841, and Wai 2179	the abuse of Māori in institutions such as residential care facilities; prisons; and special education schools; poverty; and housing[7]	social services, social development and housing; education services and outcomes; and the justice system.
Wai 1072	taking and desecration of wāhi tapu[8]	identity and culture
Wai 88 and 89, Wai 966, and Wai 2257	housing[9]	social services, social development and housing

1 Refer appendix A of the Memorandum of the Chairperson concerning the kaupapa inquiry programme dated 1 April 2017; see also "The Kaupapa Inquiry Programme, indicative scope of issues in current registered claims" in *Te Manutukutuku: Issue 68* (Te Rōpū Whakamana i to Tiriti o Waitangi, June 2015) at 5.

2 Amended Statement of Claim for Wai 874, dated 12 January 2017.

3 Amended Statement of Claim for Wai 421, 593, 869, 1383 and 1890, dated 23 January 2017.

4 Wai 2575, #3.1.1.

5 Wai 2575, #3.1.9.

6 Wai 2757, #3.1.10.

7 Wai 2575, #3.1.11.

8 Wai 2575, #3.1.12.

9 Wai 2575, #3.1.13.

Claim	Issues that appear to be outside scope of Wai 2575 inquiry	Relevant kaupapa inquiries (if applicable) [1]
Wai 87, 861, 914, 1794, 2244, 2306, 1877, 2072, 2006, 1629, 2380	poverty and housing[10]	social services, social development and housing
Wai 1821	social policies[11]	social services, social development and housing
Wai 1536	to access to resources; and the recognition of kaumātua and kuia as taonga; education and understanding of Māori culture and tikanga [12]	natural resources and environmental management; and identity and culture; education services and outcomes
Marion Wilkie and Mike Pehi	coronial practices[13]	identity and culture, including coronial law and practices
Wai 2109	socio-economic factors and institutionalism[14]	social services, social development and housing; economic development; and identity and culture.
Wai 619, 2059, 1479, 774, and 1028	socio-economic factors	social services, social development and housing
Wai 2060	Puhipuhi mines	

The Crown accepts that issues relating to housing, alcoholism, poverty and some other matters may well have areas of overlap with the health services and outcomes kaupapa inquiry.

10 Wai 2575, #3.1.19.

11 Wai 2575, #3.1.28.

12 Wai 2575, #3.1.32.

13 Wai 2575, #3.1.37.

14 Wai 2575, #3.1.45.