WAI 2575 - THE HEALTH SERVICES AND OUTCOMES KAUPAPA INQUIRY

JUDICIAL CONFERENCE
HELD AT PIPITEA MARAE, WELLINGTON
11 - 12 MAY 2017

Tribunal:	Judge S R Clark Dr Angela Ballara Dr Thomas Roa Miriama Evans Tania Simpson
Crown Counsel:	Craig Linkhorn Geoffrey Melvin
Claimant Counsel:	Peter Johnston Tavake Afeaki Annette Sykes Emma Whiley Peter Andrew Kelly Dixon Alisha Castle Paranihia Walker Dr Rawiri Jansen Bryce Lyall Mark McGhee Jerome Burgess Dr Bryan Gilling Eve Rongo Charl Hirschfeld Janet Mason Gerald Sharrock Paul Harman Eoin Lawless Augencio Bagsic Season-Mary Downs Coral Linstead-Panoho Donna Hall Robyn Zwaan

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WAIATA (MĀ WAI RĀ)

VARIOUS SPEAKERS (INAUDIBLE 12:30:10 – 12:45:00)

JUDGE CLARK:

Kia ora tātou. Tuatahi ka tuku e au tētahi mihi ki a koe e Tame, nāhau te karakia i taki i te ahiahi nei, nāhau anō hoki i whakatakoto tētahi karakia hei whāriki mō te hui e tū mai nei.

Taranaki whānui, Te Ātiawa, te mana whenua me ngā tūtohu whenua o tēnei wāhi, Te Upoko o te whenua, ka mihi ake rā. Ka mihi ake rā ki te Tūhoro Whare, Tane Whakapiripiri, te Te Whakapiringa o te tāngata, te whakairinga o te kupu, tēnā koe.

Ngā mātā waka, kua tatu mai ki kōnei, ki Te Whanganui-a-Tara i tēnei rā, ka kai tonu i waenganui i a koutou, ngā māngai mō ngā kaitono, arā, te hunga rōia i te taha o te Karauna, koutou katoa, tātou katoa, ngā kaimahi o te Rōpū Whakamana me ngā mema o te rōpū nei, tēnā koutou, tēnā koutou, tēnā koutou katoa.

My name is Stephen Clark. I am a Judge and a presiding officer of this inquiry. Can I just introduce the other members of the panel who are here today. To my right is Dr Angela Ballara, to my left is Dr Tom Roa. Unfortunately today other members couldn't be here, that is Tania Simpson, she will be here tomorrow and Miriama Evans was not available today.

I will just briefly introduce those Tribunal staff who are currently assigned to this inquiry, perhaps if you could just raise your hand and indicate where you are. That is Leanne Boulton who is the inquiry facilitator, Rauhina Scott-Fyfe, who is an inquiry facilitator, Joanna Morgan who is the claims co-ordinator, where is Joanna? She's down the back, Joanna and Rebekah Fistonich our assistance registrar.

Now housekeeping matters. We have a representative from the marae here who is just going to just briefly talk to us about housekeeping matters, emergency, evacuation procedure matters.

UNIDENTIFIED MALE SPEAKER (12:47:40) – HOUSEKEEPING

JUDGE CLARK:

One of the claimant groups that is here today is Ngāti Kāpō represented by Mr Johnson. They are the Blind Māori Vision Impaired and Deaf Blind Persons Association. There has been a request in order to assist them that when you are speaking if you could identify yourself and identify where in the room you are just in order to assist them to orientate themselves.

One of the issues that may arise today just to update the lawyers is the issue of registration of claims. I've been informed that all new statements of claim have been registered. The amended statements of claim are ready for registration and should be completed next week. I am also informed that all section 49 reports for the new statements of claim have been prepared or are in the process of being completed.

1250

On the 2nd of May I issued a memorandum direction indicating matters which I thought would be useful for lawyers, counsel and parties to address the

Tribunal on today. Because there are a large number of claimant counsel, what we have decided to do is hear from you in the order as it appears in appendix 2 to that memorandum, unless you have made your own arrangements, that's the order we propose to hear from counsel in.

You can take it as read, counsel, that we have read the memoranda that you filed in response to a direction issued on the 21st of December last year. We have read those. We have read the briefing paper which was made available on the 21st of April. What we are interested in hearing from counsel today is rather than dive into the finer points and detail of your respective claims, is to assist us in attempting to develop a process moving forward.

We're all a bit daunted by this inquiry because of the, not simply the number of claims, but the breadth and scope of it and we need some assistance on how we tackle this. So that is what we are interested in hearing from you about and in that recent memorandum of the 2nd I had suggested some topics on which we would find it useful that you addressed us on, for example do we need to provide greater notice to ensure that all possible claimants are aware of the inquiry, raise the possibility of a cut off date for the filing of claims and amended statements of claim, questions availability. The scope of this inquiry will be very important moving forward, what are the priority issues, where do we concentrate our efforts on initially, do we proceed on a thematic basis, et cetera. There is questions of research and there is some work being carried out at the moment by Tribunal staff in identifying bibliographies, research available on existing records of inquiry, but we are well aware that there must be research or is research out there that may assist the Tribunal moving forward and that further research will need to be commissioned as we move along.

Okay, I think that is all from me at this stage. So we will turn to the lawyers, we will have a break at 2.30 and then we propose to close today at five.

(12:53) PETER JOHNSTON:

Excuse me Sir, Peter Johnston here Sir for Ngāti Kāpō. Sir, there is just one other housekeeping matter if I could raise with your leave. When I arrived earlier today I spoke with the communications person who advised me that in order for – there is a hearing loop in place, so some of the Ngāti Kāpō members are also hearing impaired Sir and in order for those using those hearing aids to hear proceedings, if counsel could speak closely to their mic. I understand that the range of the mic is very limited so that in order to pick it up for the hearing loop, counsel are required to be quite close to the microphone Sir, so I just raise that point for counsel.

JUDGE CLARK:

Thank you Mr Johnston. Now can I just ask counsel when they come forward to address the Tribunal, if you could move forward to the lectern, there is a number of you here, so it is a little difficult to see who is who, so if you could move forward to the lectern, thank you. You do not need to tell us all your Wai numbers. We know them, they are recorded. You don't need to tell us if you're representing multiple claimants. You can identify them if you wish, but you do not have to tell us all of them. We are aware or the staff are certainly aware of who the claimants are. So I think we are starting with you Mr Afeaki.

(12:54) TAVAKE AFEAKI:

Tēnā koe e te Rangatira, te kaiwhakahaere, my name is Tavake Afeaki. I am sitting, standing just to the left behind you whānau. Nō reira, kua mihia ngā mihi, he mihi anō, he mihi poto, tēnā koutou katoa.

Yes, I still appear for the same claimants that we registered interest with Your Honour and one of the issues that I've encountered in taking instructions is that there are another five claimant groups with whom we're looking to take instructions and to confirm instructions, but there is a resourcing issue about

that. So with your leave Your Honour I will talk about that a little bit later on and I think that is an issue for many of my learned friends as well.

I am most pleased to see representatives of the Ministry of Justice here, Mr Howden (inaudible 12:55:52) and another colleague here to observe and assist as well today Sir.

I just wanted to declare at this stage a potential conflict of interest Your Honour and the Tribunal and the Crown I think. Since 2002 I have been a panel member of the Mental Health Review Tribunal and I have in that capacity sat on panels on that Tribunal for the review of compulsory care orders under the Mental Health Compulsory Care Orders legislation whereby people under those orders are entitled, by law, to apply for a reconsideration of the status of those care orders. But I just wanted to say that for the record Sir. I don't believe that is going to conflict me out of appearing within this inquiry but I needed to say that Sir.

Did Your Honour have a whakaaro about that Sir?

JUDGE CLARK:

Well off the top of my head I couldn't see it's a conflict, but that's off the top of my head, but that's really for you to –

TAVAKE AFEAKI:

Āe, just to navigate but I wanted to flag it to the Tribunal and to the Crown. So I'm most obliged for the very comprehensive work that has gone in by the Tribunal and their workers and their kaimahi into the directions and the scoping paper which was circulated to us. I am not going to traverse all these other issues Your Honour, but going first is a little bit of a disadvantage and I just wonder if I might be able to pop in later if other things come up. I may be at the end if other things come up during the discussions that I might need to address as well Sir.

I'm interested in page 8 where there are discussions about hot issues, the interconnection of issues and overlap of issues.

JUDGE CLARK:

That's page 8 of the briefing paper?

TAVAKE AFEAKI:

Yes, yes, Your Honour. Page 8 of the briefing paper document #2.8.001 and there are key topics which are ranked helpfully in a table as to how frequently they appear and the hot issues emerging, one of them is mental health and they are interconnected concerns. One is mental health, one is suicide/self-harm a related aspect and then there is illegal drugs and addiction dependence and they are, as is rightly pointed out, have a strong contemporary focus, but I'm also advised and this is far be it for me to give evidence from the Bar, but that youth suicide amongst Māori is reaching very, very frightening levels and look, there is high youth suicide amongst Pasifika and Pākehā youth as well, but I would tautoko Your Honour that that is a hot issue. It's an issue that we need to be having a conversation about as society, as Māori, as whānau, but at this level I am very happy to support that being a hot issue for consideration as priority before te aroaro o koutou te Taraipiunara.

One page 9 of the discussion paper was a section entitled, number 3.4, is discussing the scope and focus of the inquiry. One of the proposals there by my learned friends, counsel for 1315, it appears to say that we should really not focus too much on the historical context and the back stories, per se, as the contemporary issue so that we can get on with I think "constructive, practical and positive recommendations to the Crown for changes to the current regime." So with the second part of that I agree. We actually need to be looking at how we can put these issues and clarify and hone down the

Treaty duty relationship of the Crown with hapū and whakaminenga iwi, right down in to the taonga of our people and our own selves and our own health.

1300

But I disagree with limiting too much and I will work on this a little bit in a moment Sir, but limiting too much the historical back story for two reasons. One is I think that we have to be careful not to de-contextualise how we got to this stage, 177 years into our relationship i raro i te Tiriti, our relationship as Māori with the Crown. So the de-contextualisation concerns me, but also if we just skim over that, I don't think we will allow the Crown and the public to have insights into how things got this bad and why these things got this bad and I think part of the role of the honourable Tribunal is to provide a public forum whereby these things would be ventilated and hopefully discussed and hopefully that the discussions of our history and reasons why we got to this stage would be put out there into the public.

So if I go to 3.5 on page 10, the question is posed, is it desirable or not to decide in favour of a largely contemporary focus for the inquiry and if not what steps should be taken. A couple of things come to my mind in answer to that. It's incumbent upon this Army of lawyers here, with all respect to my learned friends, to adduce focused evidence, focused historical evidence which provides context to the modern issues that we face, the modern health issues that we face, that our clients face, that people face, to establish a chain of causation, again the focused legal arguments and evidence to establish a causation chain and so if they are briefing that evidence, we are briefing that evidence, then it should be briefed to be relevant to those two points, to provide context of the historical facts causing these issues and what we need to do about it now and this will take focus, in my submission Your Honour, this will take focus and discipline of all parties and of counsel in particular.

And so the next bullet point under 3.5 talked about the extent of the inquiry and the impacts of factors such as land loss, colonisation, poor housing and living conditions as contributors to Māori health outcomes and I would submit poor health outcomes at present. Again I think it's important to establish the context by which the historic breaches of the Treaty, by the Crown, the breaches of its duties under the Treaty caused or contributed to the current prejudice which Māori are experiencing.

Your Honour, under the last bullet point, talks about maternal health, maternal services and maternal wellbeing. Waiho i ēna ki ōku whakaaro, waiho i ēna ki ngā mana wāhine, mā ngā whaea, ngā whaea o rātou kōrero e kī.

On page 11 of the scoping paper Your Honour, section 4, there's discussion about jurisdiction and I don't really have any thoughts about that but the question at 4.2 is posed, what claims are eligible with supporting reasons from counsel? So generally the claims we represent are all from unsettled rangatira. Unsettled in terms of settlement, negotiated settlement legislation. The other claims to come are also from unsettled rangatira. Some might say unsettled natives, but the claimants have substantive allegations of Te Tiriti breaches and they will seek to adduce evidence thereof, and so in terms of the eligibility I think, with respect, our Tribunal jurisdiction commences with Te Tiriti o Waitangi and the guarantees under that and that comes from mana whakahaere, mana motuhake o ngā hapū and that tino rangatiratanga aspect as an overarching principle should be guiding us and that if people are to be, if parties are applying are to be restricted or if the Crown seeks to restrict their eligibility, then my submission would be that a large liberal interpretation of their rights to lay claims under the Treaty of Waitangi Act 1975 be applied. Koia mō tēnā.

Helpfully also moving onto section 5, this is very groovy flow chart, colour coded which was – actually made it very easy for me and I'm grateful for that.

My dyslexia catches up on me fairly often, so these flow charts worked and of the option A, B and C, my submission is that option B flow chart for that process resonates with me Your Honour. It was having this initial judicial conference and going through amending statements of claim and then determining eligibility and then preliminary claims list be formed and then a final claims list be formed and then conjointly oral hearings be heard with a pre-casebook review of what evidence is out there and I'm just saying that for the benefit of our whānau here as well and then an agreed research programme, a research phase, preparing and refining the statement of issues and then having technical hearings, so tautoko –

JUDGE CLARK:

Why do you suggest oral hearings at that stage?

TAVAKE AFEAKI:

The oral hearings, just in the last couple of inquiries that I've been involved in Your Honour in Te Rohe Pōtae and then in the Māori Military Veterans' Inquiry, I found that the, in my view, I found that the oral hearings have firstly given a chance for those, pēnei ko ngā koroheke me ngā kuia, for our pakeke to have their say, to have their say about kaupapa that are often very dear to their hearts and their people before they pass on, is to have their day in Court as it were. That was particularly important in Te Rohe Pōtae. It was also important in the Veterans' Inquiry because of those witnesses that we had in that inquiry, since last year 10 of them have passed away.

So that was one reason and he mea tikanga tēnā. He aroha ki aua pakeke. While we have them, can we afford them a chance to have their say, but secondly I thought Your Honour to add onto that, I thought it would be a more efficient use of time because I also, in my experience of those two inquiries where we did that, actually and we're also doing it in Taihape, sorry, so there were three. So the oral, the kōrero tuku iho hearings gave the whānau and hapū and those marae and those whakaminenga o ēna, the chance to

wānanga together and they talked, they were able in that process to refine what the issues were that were most salient and that also was helpful to inform the technical witnesses who were commissioned as a result of that. So it was a catchment, as it were, and it become a funnel by which those really important issues from those people were able to inform the next stage of the technical research which was then, you know, in commissioning stage and research stage. So those are my reasons for supporting, having them run conjointly and not having a delay in the casebook refinement and research process because I think there would be a synergy of those oral hearings to be running in train with the refinement of the focus of the inquiry issues and commissioning of research.

1310

Just on the final point on that page as well, final bullet point under 5.2, in respect of claimants wishing to be heard first, you know, there's this priority issue and I think that we can work that out on a case by case Your Honour, engari tautoko i tēnā.

In respect of page 15, at the top of that page there were some points also about some of the legal counsel opposing early oral hearings on the grounds that are listed there and broadly one of those broad arguments is that the cases have already been heard and there's been lots of Waitangi Tribunal inquiries all around the country and there have been findings made on those issues but what I can say is there are still thousands of people, possibly more, 10s of thousands who have things that are impacting, health issues that are impacting on them who have not been heard and whose issues have not been investigated and so I wouldn't wish to lump them all in a generic basket of health issues already dealt with when their particular issues which might be individual to that particular hapū, whānau or individual should be dealt with. So it might be suitable for some but it might not be suitable for others and I'm

interested to support, finding out who have the kōrero and the issues and bringing that evidence before yourselves.

In respect of section 5.4 Your Honour the dastardly interlocutory phase, if I start maybe with .3 in our submission, having a statement of issues developed after the final casebook I think is going to be problematic and I think that will take a long time. I was quite interested in having the parties get together being claimant counsel, the Crown, with some assistance from others, perhaps of the Tribunal, to help us all sit together and wānanga, and particularly after this conference and the directions which will come out of this wānanga that we're having today. But to try and refine amongst ourselves and have those debates and discussions to get to a point where we can have a list of things we agree on and then we can have a list of things we do not agree on and then bring that back ki mua i te aroaro o koutou e Te Rōpū Whakamana i Te Tiriti.

At section 5.5 there is a discussion about the hearing process, Your Honour, tautoko i tēnā. E tika ana kia whāia i ngā hui nei i runga marae, i roto i ngā kawa, i ngā tikanga o tēnā, o tēnā, o tēnā hapū, o tēnā whakaminenga. In respect of filing briefs before, if we were going to have oral kōrero tuku iho hearings which I do support, them. Filing briefs of evidence before are maybe doable. We've had some success with doing that in other inquiries with kōrero tuku iho. Importantly though, in that process, you know, it's everybody's role to have some focus about the evidence they will be adducing.

In terms of that process, just another thing to add to that Sir. When we had the kōrero tuku iho hearings we haven't had legal counsel cross-examining tāngata whenua witnesses. The Tribunal have, you know, been able to engage in questions of tāngata whenua witnesses but it is only by leave of the Judge and the Tribunal that cross-examination, that was the protocol worked

out now, I support that Your Honour. There will be hopefully time enough to cross-examine technical witnesses but the lay witnesses I don't believe should be subjected to scrutiny and run the gauntlet of Ngāti Rōia and perhaps that's a better role for the Tribunal to do and we know that will be done with dignity to protect our claimants, in particular our pakeke.

So paragraph 5.6, in terms of oral hearings Your Honour as I have said, I support having kōrero tuku iho and oral hearings for the reasons already outlined. The interesting point, at what criteria should we set on who the oral hearing should be for and whose testimony should wait for, you know, the full hearings later. I think that should be determined in some sort of priority from age, possibly infirmity, ability to actually you know be at a venue to appear before a Tribunal and adduce their evidence and Your Honour's paper asks how such criteria would be enforced. I would hope that we would be doing, making those sorts of decisions hopefully that counsel would be able to wānanga amongst ourselves and one of the things I was going to propose was possibly claimant counsel co-ordinating kōmiti to help to facilitate such discussions as how we are going to run these things and hearing time, timetabling and helping to provide the Tribunal with cogent submissions for you to consider and we could do that by consent and if people did not consent to a memorandum by consent and then ask for judicial direction on those sorts of things. In that process I would also be interested in engaging with learned Crown counsel, you know, where we need to, to facilitate, to facilitate progressing the hearings in the inquiry.

On page 19 of the paper Your Honour there are issues for further discussion about sensitive issues or claims regarding individuals. One of the bullet points under 6.3 asks what processes might be required for health challenged claimants to participate in the inquiry. A couple of points came to me and we've seen Ngāti Kāpōhia and it's wonderful to have our whānau here, but we need to make sure that it is safe for them, that a safe environment, respectful

environment, that their privacy and dignity are protected as necessary. He tikanga tēnā and we just have to put that in place in my submission Sir and then another issue raised was what process would be required for sensitive health information. The Privacy Act and privacy itself i raro i te ture Pākehā, i raro hoki i te tikanga o tātou. We need to be looking at protecting our people, our witnesses in respect of the processes. So those are my whakaaro on that Your Honour.

Very grateful also for the sources of information, the research sources and proposals in terms of the next stages of research, I think they are going to be complicated but they are going to be guided by the focus that hopefully we will be able to arrive at in our wānanga today and our wānanga tomorrow and perhaps ranking or rating, prioritising in some way, a very big challenge indeed, but I'm pleased that so much work has gone into this already.

1320

In terms of funding for claimant participation, sadly there are no trees in the health sector, so the CFRT, kāore anō he pūtea kia tautoko i te kaupapa nei, so I might be looking sideways at my learned friends for the Crown to take instructions upon whether or not there might be alternative funding resources for the running of the inquiry and really would be happy to hear from learned Crown council about his instructions on that matter. A vexed issue that comes up again and again is resourcing and the legal aid resourcing – again I'm just happy to see some senior management from the legal services division of the Ministry of Justice are here and if they, and I'd be interested to hear any kōrero that they have as well. But they've told me that they're here to listen and to learn and look at the process and hunga rōia have a hui with them tomorrow at the end of this judicial conference to look at engaging in some discussions with them.

We definitely seek resourcing at the Tribunal's level from the Crown to source, to resource the Tribunal staff, very hardworking and often thankless task of trying to co-ordinate with Ngāti Rōia armies here and to, so we're very interested in having good resourcing of the Tribunal and also resourcing of the tāngata whenua, the resourcing of the counsel. I didn't mean to put down my learned friends by calling them hoards of Ngāti Rōia, but we all have a role to play and we're seeking to do it as best we can, looking for efficiencies, but looking for quality and effectiveness in my submission.

Your Honour, hei whakakapi i aku kōrero before my voice disappears. Our claimants, the six who we represent, are looking to adduce evidence but in terms of what they're looking for, they're actually looking for their day in Court. They're looking for findings of breaches of Te Tiriti and findings of prejudice to them, their people and their tīpuna. They want to avoid further breaches to their tamariki, mokopuna, so they're looking for recommendations to remove the prejudice that they will adduce evidence on and they are also just seeking that the Crown understand what those Treaty duties are and they honour the Treaty.

So Your Honour koia nei aku kōrero mō tēnei wāhanga. Mēnā he pātai, he taupatupatu pea…

JUDGE CLARK:

I'm just going to ask you Mr Afeaki about your thoughts on a wider process being employed in terms of notice for potential claimants and the claims cut off date.

TAVAKE AFEAKI:

Yes Sir, in terms of notice itself and getting the word out there, I think it's important that we get some resourcing in place so that that can happen, for lawyers, legal aid but also at a wider level for the claimants themselves and if that entails having wānanga and getting some resourcing for wānanga for the

claimants o tēnā, o tēnā, o ia rohe, o ia rohe, I don't know if the District Health Boards will be happy about having wānanga about these things in their takiwā, but definitely we need to get some awareness widely into the communities and I think that's going to take some time. But there definitely is going to need some resourcing Sir, and possibly some radio programmes and stuff. I don't know if there's anybody here in radio, Radio Waatea or anybody.

But some resourcing and some airing of some of the kaupapa to engage people's thinking about it and hopefully you know get people proactive. In respect of my chambers and our claimants, we as I was just saying, we need some resourcing to do that and so we'd be looking to amend pleadings and get some direction and some clarity from the Tribunal about it so that we can proceed to getting ourselves resourced to help our clients. Did that answer your question Sir or were you looking wider than that?

JUDGE CLARK:
Thank you Mr Afeaki.

TAVAKE AFEAKI:
Koia nei, nō reira ngā mihi ki a koutou e te Tēpu, huri noa tō tātou whare, Te Papa, tēnā tātou katoa.

WAIATA TAUTOKO

(1:25) ANNETTE SYKES:
Kia ora e te Whare, koutou mā o Ngāti Kāpō, kei kōnei au i tū ana ki tō taha mauī, ana i runga i taua tūāhuatanga, kei te mihi atu au ki a koutou. E te Tēpu, te Rōpū Whakamana i Te Tiriti, tēnā koutou. I pai ki te tūtaki i a koe, e te rangatira, te tohunga a Tame. Ko koe tonu tētahi o ngā tino tohunga e whawhai ana mō tō tātou nei Tiriti i te wā kei Te Whare Wānanga māua, i runga i taua tū āhuatanga, kei te mihi atu au ki a koe. Ana, ki a koe hoki te tohunga o te kōrero pūrākau, Angela, kei te mihi atu au ki a koe. Kei te mōhio

au ko koe tētahi o ngā māreikura o tō tātou nei Taraipiunara, ana, i runga i taua tū āhuatanga, e mihi anō ahau ki a koe. E te Kaiwhakawā nō Ngāti Manawa, Tainui, ana, kei te mihi atu au ki a koe hoki. Kei te pai te whakahaere o ngā whakaaro, ana, ka huri atu au ki tērā o ngā reo, engari tēnei taku inoi, he hae pēnei ai kāore i kōnei tētahi tāngata i whakaMāori, whakaPākehā mai a mātou nei kōrero.

Ko te nuinga o te rōpū nei, mōhio ai i te reo Māori, engari ko te nuinga o ngā rōia, kore e mōhio, koinā i te rerekētanga. Ana, i runga i taua tū āhuatanga, kei te huri atu au ki tērā o ngā ture o te Pākehā, e pā ana ki te whakamana o tō tātou nei reo rangatiratanga, pēhea te whakahaere o tēnei o ngā Kōti mēnā kāore i kōnei te reo rangatira hei ora ai. Koinei tētahi o ngā kaupapa e pā ana ki te hauora o te ao Māori. Anei, ka huri atu au ki tērā o ngā reo engari kei te āwangawanga tonu au i runga i taua tū āhuatanga.

Sir, I don't, I think we should set some limits. My friend went too long and Te Arawa wants to keep it very ordered. If we keep going like this we'll be here until next week and I want to go home for the weekend. So I think every counsel should be told they have got 10 minutes and then somebody should boo or ding or do something, that's my view, so that we can really get some focused discussions and build on issues rather than repeat.

So I'd like to take us to document #2.8.001 page 13 and I'd like to focus my discussions on the possible inquiry process, but first of all the notice question you've raised with my friend is fundamental. In this room there are no tribal groups other than one, I see, who have had a settlement, who actually run Whānau Ora and who are at the moment the ringa raupā for te kanohi Māori i tēnei o ngā whakaaro e pā ana ki te tū motuhaketanga o te hauora. So I think we need to be really clear that there are two aspects of the Treaty, one is the independent voice which enable Māori pedagogies with respect to health and wellbeing and social wellbeing as part of a definitional framework and

Kāwanatanga responses to that obligation and their failure or omission to that obligation. So in terms of your notice it worries me that it seems now that the settled iwi hardly participate once they get settlements on key issues and I'm wondering how we can encourage them to participate and I understand that their biggest concern is what my friend highlighted, resourcing.

So like him I'm very grateful that the legal aid team is here and I hope that this ripples through to the Minister of Courts and the Minister of Justice as well, because if we are to try and devoid the plethora of urgencies which I see has arisen directly as a result of what you've described as hot issue, I think they're urgent issues in the vernacular of the Tribunal, just exponentially growing then we need to find a process of participation as is required, I think by section 27 of the Bill of Rights Act, that right at the beginning people are aware and put on notice that they have a right of participation, that right of participation should be encourages and there should be some way to resource it.

But how is that to occur? I need to raise now that the Marine Area Costal applications process which is shambolic, there is an Office of Treaty Settlements fund doing regime available for those that participate with the Crown but if you elect to participate in a High Court process there is no funding available for claimants, and where they are the unsettled group they either fund themselves, or they come unrepresented, or they just don't participate, which of itself is a breach of the Treaty.

So I commend the Tribunal of raising the issue. I highlight it as a fundamental issue. I think your reach needs to be more than just the kinds of claimants that are here. We need to be actively encouraging the Whānau Ora groups and those settled iwi. I don't like the iwi leaders 'cos some of them I don't think lead at all, but the settled groups. We should have them participating in this group or in this process. As was highlighted as your report quite rightfully

points out to in the Wai 262 hearings, and we don't want to repeat that, so that's one of my other cautionary matters.

Now if you go to Option A, Option B, Option C, I don't like the SOC's and ASOC's happening until we've had Kōrero Tuku Iho. Now I'm a proponent of Kōrero Tuku Iho, mainly because once you get people up – and I act for a lot of old claimants too so if they don't give evidence in the next two years they may not be here to give evidence. So the Kōrero Tuku Iho has the benefit of having knowledge keepers who are fundamental in Te Ao Māori setting the pedagogical framework of claims, and if you look at what happened in Veterans, I am going to highlight there.

I did a claim for an elderly gentleman about repatriation of bodies overseas. The Crown has actually agreed to that and we didn't need a recommendation but I'm sure the evidence that was brought forward by the numbers of Veterans was then instrumental in remedy. And if justice is anything it must not just be about having findings, there must be remedial action following from those findings. So that is the other benefit that I see from Kōrero Tuku Iho.

In that Kōrero Tuku Iho process you set out in your discussion paper, themes. We should be encouraged to talk about those themes, and you know I act for Ms Donna Awatere-Huata, whose claim is about institutional racism in health and the denial of – and how the process of colonisation contributes both in the historical and modern context to the disparities between Māori and non-Māori. In that process we should be looking for the kinds of issues that need to be focused in, one of them for instance that she will focus in on, is the Pharmac Funding formula and the disparities in the funding formulas there as opposed to the funding privatisation of service contract available to tohunga who deliver hauora services. Most of them have been shut down. So you know, so those kinds of issues I think we can explore. So I would like Kōrero Tuku Iho, whether you put it in A, B or C.

I think eligibility to participate is something the Crown's just trying to focus a lot of energy on, and I don't think, to be frank, anybody is here to trying to rip off the system to get Legal Aid, they want to participate. Seriously, because that's what that's about. What we are seeking here is a process to be designed for all those that have claims arising from health disparity or lack of access to health or the denial of Māori health initiatives. And everybody should be encouraged to do that and the eligibility criteria should accordingly, I think, be simple rather than complex, and should not be a contexted tested thing in a long drawn out interlocutory phase which is more about lawyers than anything.

There was a gentlemen who put a memorandum in, I don't know him, he's a colleague at the bar, he's from Auckland, he suggested a way to manage that, maybe to have a mediator facilitate where there was a – so if the Crown is opposing, for instance, Donna Awatere-Huata from coming in, I'll use my own client, then we go to a mediated process, not with this panel but a Registrar from the Tribunal or an appointed mediator to determine whether in fact that eligibility barrier that the Crown is complaining about has merits and hopefully we can mediate that out. So that way I think we stop the problems of getting tied up about who has the right to be heard. I again come back to section 6 and section 9 of the Bill of Rights Act, everyone should have a right to be heard on this issue.

You've already done the preliminary claims list and so the oral hearings part is where I think they are calling them Kōrero Tuku Iho. There's quite an interesting approach that's emerged from different judicial responses. I think there's a much more formalised approach by the Veterans of cross-examination, whereas with Judge Ambler it was a wānanga and everyone asked questions. I think that's a matter for the Tribunal to have some consideration. I don't find the formal cross-examination helpful but the

sharing of knowledge keepers about issues I have found very helpful, particularly in the Veterans case.

I agree with my friend's submissions on the case book, that must come after we've had that Kōrero Tuku Iho, the scoping or the confirmed scoping of that, and then I would ask that at that point we have amended statements of claim, we have a co-ordinating counsel or committee who augments this very helpful paper, document #2.8.1 is the bible of this Tribunal at the moment, and I believe that we should just be adding to it. I don't think – I take – personally don't take any difficulty with it.

In the research phase the Crown seems to suggest that only one or two people, and in this room there are people here who I have long admired as the tohunga in this health field, Dr Tipene and Dr Jensen for example. They are groundbreakers in the way that they established the Eru Pomare Research Centre, you know, all of those areas that highlighted the differences in health so somehow that research phase should really draw, not from lawyers, many of whom who haven't been around as long as some of the people and the claimants perhaps facilitating a case book of already existing material. So I would be in favour of a research committee of the kind that was established in the CNI process.

In the CNI process there was five regions, a significant number of hapū and a significant number of themes. The research committee was not made up of lawyers. I think there just happened to be one person there, Dr Richard Boast, both lawyer and researcher but that's my approach for the research phase. And that if there is to be new research commissioned then they would target what would be the most prioritised thematic matters. It seems to me if people are dying that has to be a massive priority. So if suicide is escalating to the numbers that we have, people dying every year,

Māori, the same numbers that die in car accidents, then we need to prioritise that in the research phase and in the way we hear it.

I am really concerned about aged care and lack of facilities for elderly people in remote areas like Te Urewera, East Coast, Tairāwhiti, and Te Whakatōhea, so I would like to see some sensitivity to how we provide a solution for those elderly people who cannot seem to access immediate care, and are finding it, at this time of extreme poverty even more difficult to get particular health needs met by the Ministry of Health or its various contracted agencies.

1340

Now the phase between the draft statement of issues and the final statement of issues, it's Your Honour's statement of issues but in the Veterans Kaupapa Inquiry and in the Northland one, what happened was groups were formed to look at drafting statements of issues and then we had arguments Sir, big arguments. The radical Annette Sykes view on tino rangatiratanga is not necessarily the same view that's shared by others. So rather than have a dominant view by one counsel we opted to put two or three issues available, two different approaches, and then the panel themselves determined how they would frame the issue to cover the spectrum of perspectives being promoted, particularly in terms of Treaty breach. So I think that the draft statement of issues phase, yes council but the final statement of issues is really a Tribunal matter alone with the assistance of your staff.

In the formal hearings with technical evidence you have to prioritise. I mean health is just such a difficult area and I haven't given much thought on to how I would prioritise but it seems to me that mortality has to be a factor taken into account, but also access to justice or equitable outcomes has to be a priority as well otherwise you are entrenching the gaps between Māori and non-Māori, and the others is just the normal approach Your Honour.

The other matters that I wish to raise was just Your Honour's comment at page 18. I absolutely enjoy listening to people's testimony. We are an oral people. What I have found helpful is large briefs being summarised and then PowerPoint presentations being the norm, and as long as we can be assured that the Tribunal members have read the substantive documents I am in favour of shorter presentations. So you file your documents one month out or two weeks out, you file on the day your presentation summary and your PowerPoint and you may be asked questions of clarification or cross-examination by Crown on the earlier brief, and I would ask that we adopt that process here. I'm not in favour of having things taken as read. It just doesn't seem to work.

And in terms of the existing material, I think that's a project in itself. When I was looking at this I remember in the Te Reo Māori claim which was my first appearance nearly 40 years ago, there was issues relating to hauora there, about the loss of the language and the diminishment of mana and its impact on the tinana. So there's a huge volume of material that we could resurrect for some of those early inquiries, and there was voluminous amount of effort put into Wai 262 which brings me to my last point. Why are we doing all of this? Somebody has got to be ready to negotiate some outcomes. And in Wai 262 we waited for eight years for the report and I've been waiting since the report's being implemented for a process of engagement with the Crown by somebody or a group of somebody to facilitate an outcome. And my biggest cautionary comments here is, it's all very well to spend all this analysis but if we haven't, at the end of the day, got to a position where we have a process – and it may be like this, we mandate hapū from that area and iwi from that area to deal with it or we may mandate the tohunga of Te Ao Māori in hauora, I don't want to prejudge, but that needs to be given some thought of as part of this process. And that needs to be resourced by the Crown because they suddenly think, when the reports come out, that we're all going

to be having this millions of dollars available to us to have hui after hui after hui when there's no actual practical support for how the recommendations can be given force, either in the negotiated agreement with the Crown or in some other way.

So those are the comments that I wish to make in addition to the matters that I've raised in my fore–memoranda, and I apologise for my claimants not being here today, I told them to stay home because it was too wet Sir. I am sorry. It was just too hard to come from Te Urewera and other places with rain like it is. And I'm in my 10 minutes so I can get a boo.

JUDGE CLARK:

I don't think we've got any questions Ms Sykes. Just to respond to a couple of points you raised, the translation issue, you are right. I take some responsibility for that because that was something which we simply overlooked, but I do take your point and we'll see if we can arrange something overnight, but I take the point. Okay, thank you.

ANNETTE SYKES:

Thank you Sir. I will be here today but I have to be excused part of the morning tomorrow but I'll be back by about 11, thank you.

JUDGE CLARK:

Thank you. Mr Bennion, I think, is next. No sorry.

(1:46) EMMA WHILEY:

Miss Whiley Your Honour. *Ngā mihi nui ki a koutou e ngā mana whenua o tēnei rohe, Ngāti Toa, Te Ātiawa, tēnā koutou. E Te Rōpū Whakamana i te Tiriti o Waitangi, me mihi ka tika ki a koutou. E ngā kaikerēme kua haere mai nei ki tēnei hui, he mihi tēnei ki a koutou. E ngā mate, e rere aku kupu mihi ki a koutou, haere, haere, haere ki te pō, piata mai i te pō, rātou ki a rātou, tātou ki a tātou, tēnā tātou katoa.*

Kia ora, counsel's name is Ms Whiley, from the offices of Bennion Law. Mr Bennion is present. He has to run off to a lecture shortly so I will be presenting on behalf of Bennion Law.

JUDGE CLARK:

Just before you go on, can I just – for the benefit of Te Kāpō claimants, all of the lawyers thus far are speaking from the same place so they don't need to identify that which is the lectern immediately to your left okay.

EMMA WHILEY:

We represent five claims before this kaupapa inquiry. We've recently received instructions on behalf Muaūpoko Tribal Authority and we will be filing submissions in respect to them seeking to be a part of this inquiry shortly.

Really going straight to the jugular of the issues here, and that is the scope of the inquiry and really the meaning of health, and you're right to be overwhelmed. It is a huge kaupapa and just to give you an example of where we're sort of grappling with these issues is how do environmental issues relate to those of health, how does the degradation of the ngahere and Papatūānuku relate to heath issues that affect Māoridom today. And of course there's going to necessarily need to be a line in the sand in relation to those issues but we say that it can't be a hard and fast one and it can't be a Eurocentric one, and the net for this health inquiry necessarily needs to be cast wide in order to really see health in that context. And this being a kaupapa inquiry it required full comprehensive coverage, and that's not to take away from what is essentially a contemporary Māori health crisis. What we're saying is that there is another process, there is an urgency process that is also available and this in fact is a kaupapa inquiry, and that further leads onto our other primary submission Your Honour, members of the Tribunal, is that historical health issues should not be sidelined in this process. And in fact, to divert focus from these significant claims is counter intuitive.

1350

Historical health issues have a direct whakapapa to the current health crisis and in fact there are significant historical health issues that remain and are eligible according to the criteria that has been issued, and a number of these claims were set out in the Tribunal's preliminary list, and that appendix A. So there's a number of claimants who have been waiting, perhaps decades to have their health issues heard, and they should not be sidelined in this process.

An example of that is our Ngāti Patumoana clients, their a principal hapū of Whakatōhea. They have significant health issues that arose out of the war and raupatu that happened in that area, and then being confined to the reserve at Ōpape, and those are significant issues that remain for investigation.

This will necessarily require some sort of collaboration with the district inquiries that are currently running. What does spring to mind is Porirua ki Manawatū and Taihape, and a process maybe required similar to that which occurred in Te Paparahi o Te Raki where the presiding officer there was able to delegate Veterans Inquiry to that Veterans' Kaupapa Inquiry so that there's not a parallel process running investigation into the similar issues at the same time.

On the issue of whether the Tribunal needs to hear the claims on a claim by claim basis, our submission on that point is that the legislative regime does require the Tribunal to look at claims and obviously there are some key thematic issues that are arising, and perhaps claims could be heard on a thematic sort of – in a thematic way. But still, claims do need to be the focus there.

Looking to the structure, and we adopt the submissions of my learned colleagues that the Kōrero Tuku Iho process can be really useful and possibly important for those historical claims because of the obvious reason that we are losing key claimants, key witnesses, key evidence in relation to those historical issues.

In our experience with the Military Veterans Inquiry, oral hearings can be very useful where they are focused, and in the Veterans Inquiry there was a thematic framework that was released prior to the oral hearings. Sticking to it is another question but it's helpful to have some sort of framework that we can then really direct our witnesses and our clients in relation to, and even the Tribunal yourself is able to make sure that we're sticking to those key issues.

In relation to notice as well and oral hearings, our experience in the Military Veterans Inquiry was actually being on the ground at these oral hearings and having people coming together to wānanga in that way in fact was a very useful and effective means of getting awareness of the inquiry out there. And it wasn't until the fourth of fifth oral hearing, Kōrero Tuku Iho, in the Military Veterans process that we had some very significant claimants approach us to progress their issues, an example being the Nepata brothers, they only heard about the inquiry through others being involved in the process and they have two brothers from the same whānau significantly injured in their service with the New Zealand Defence Force, and it would have been really unfortunate for them to miss out on that process.

And this takes us to our other point, developing off the discussion paper that was very helpfully prepared by Tribunal staff. That we again adopt the submissions of Ms Sykes in the respect of having a very rigid cut off, that final claims list, would helpfully be after the oral hearing process. So if it's possible to have still a framework whereby it's not just open slap at oral hearings,

whereby the evidence is still directed and relevant but that final claims list actually being after that process because of the effect of the kūmara vine essentially, that is instigated through that oral hearing process.

In relation, just briefly, a few final points, to the research and case book, again oral hearings help to focus what the issues and what the research needs, what the needs indeed are. And we also adopt the submissions, I think it was, Braithwaite and Smail, they mentioned throughout the Prisoners Reoffending claim it was really helpful to have an agreed set of statistics prior to going into the hearing process, and that also again helps to really streamline the valuable hearing time that we do have.

And just finally tautoko that – the submission that the Crown does really need to get involved in assisting claimants to be part of this process. A lot of time and energy and resources are needed for claimants to be involved, that's travelling, that's developing briefs, that's being at hearings and so on and so forth, and the claimants are the ones with the knowledge that really do need to be involved in this process.

So I think those are all of my submissions Your Honour, members of the Tribunal, unless there are any questions?

(1:57) DR ANGELA BALLARA TO EMMA WHILEY:

Q. Ms Whiley, how do you lawyers get to hear of these hearings?

A. It was the directions that were issued, yes.

Q. But how does the public get to hear about them? I mean I know that we advertise hearings and so forth in the newspaper, but I mean how many people read the Public Notices? What would be the best way to alert the Māori world that this is happening?

A. I don't have an easy answer, myself, to that question. I'm sure others in the room might do but our experience with the Military Veterans was – I mean they have a great network of RSA's and so on and so forth so it

was really getting the word out and everyone meeting together that people became aware of that kaupapa inquiry. And it was, there was – further down the track in the oral hearings process, people coming to us quite shocked really that this was happening and they hadn't been aware of it. And we had to say, "Well yes there was notice in the paper and so on and so forth, " but you're right, not everyone is reading that.

Q. Sounds like we need to make another list of health organisations.

A. Mmm.

Q. Mmm. Okay, thank you.

JUDGE CLARK:

Thank you Ms Whiley.

(1:59) PETER ANDREW

Sir, I am conscious it is 2 o'clock, do you wish to take the break or do you think we will schedule –

JUDGE CLARK:

No.

PETER ANDREW:

Sorry did I…

JUDGE CLARK:

I think we are going through to 2.30 Mr Andrews.

PETER ANDREW:

My apologies.

Tēnā koe Sir. Kia ora koutou. Peter Andrew appearing with Roimata Smail for the Wai 1315 claimants, which includes the National Hauora Coalition.

The focus on the Wai 1315 claim Sir is on contemporary primary health care legislation, policies and practice and how this is prejudicing Māori today. Many of the claimants that we represent are professionals with significant experience in the Primary Health Sector. We emphasize in our claim that primary health is a fundamental element of healthcare services provided and funded by the Crown. It should be a priority issue for the hearing, it's truly of national scale and significance. And perhaps self evidently, primary health care and access to it is of particular importance for deprived populations.

1400

I want to turn to address the issue of scope Sir at paragraph 11 of your memorandum. We say that the Tribunal should not hear every claim on a claim-by-claim basis. It is essential that a Tribunal inquiry be both timely and relevant. There are – I think my friends agree with this that there are a number of key and pressing priority issues that you should focus on. We say the Tribunal inquiry should be forward looking with a view to addressing present day inequity and inequality of outcomes.

There is in my submission a real risk with a claim by claim approach of an open ended and an unwieldy inquiry, and one that is all too easy for the Crown to ignore. It's probably obvious to you but Ministers might well say, "Oh, there's the Tribunal ploughing old ground again. We can basically ignore it if we have an unwieldy process with too great of focus on historical and well understood claims."

In my submission, the statutory obligation of the Tribunal to inquire into every claim doesn't preclude you from determining matters of priority and focussing on truly important issues. A further risk, again this is obvious to you, with a claim by claim approach is that we may be delayed and trapped by arguments

about eligibility. It's our submission that this claim really should be treated as a contemporary one.

As to question 11(b) in your memorandum, yes we say the Tribunal should report on broad contemporary themes rather than the case-by-case basis. And as I said, I am emphasising we say a key theme is the contemporary primary health care legislation policies and practices claims.

As to (c) – these questions are interrelated of course, 11(c), should the Tribunal focus on current Māori health status and current issues? Clearly yes is the answer and my submission, it is strikingly obvious I would say that these should be the focus, they are simply too important and too relevant.

Based partly on recent experience with the Department of Corrections Inquiry, we say that the Crown and the party should be able to agree on a whole range of contemporary health statistics, there are plenty that are published. And coupled which is – with what is now well established Treaty jurisprudence on contemporary Crown Treaty obligations to address inequality and inequities, we should be able to have in theory at least a relatively efficient and focused on inquiry on the truly outstanding issues which might involve a reasonable amount of time on solutions for very pressing contemporary problems.

As I've said, a focus on the contemporary issues will avoid unnecessary debate about eligibility. On that issue, and I accept what Ms Sykes said, is that there's a vary in experience between iwi on whether they've settled or not, but the Crown – the Crown imposed cut off date as you know is 1 September 1992, that is nearly 25 years ago now so it's hard to see that it should become relevant to this, a contemporary inquiry.

I would also say Sir, my submission that you should see this inquiry as quite different from the Military Veterans' Inquiry. That had a very clear historical dimension, the focus was on the treatment of soldiers when they returned home after historical wars. This claim should be different.

We accept that some case studies that demonstrate wider themes might involve an historical grievance dimension but that would be to demonstrate the ongoing and current prejudice which remains a Crown Treaty duty to address. There are in my submission many, many historical Tribunal Reports which have addressed socio-economic issues, and that includes health. There are a lot of findings and research already done, already dealt with.

As to issue 11(d), priority matters, it's important in my submission to bear in mind the Crown health policy is not static. It will be important for the Tribunal to prioritise matters to avoid findings and recommendations that are overtaken by changes in policy. And as I said before, the Crown can conveniently ignore them, it can say, "Well we've changed our position and the Tribunal findings are now of historical interest only."

Turning to another couple of the other matters you've raised Sir as to notice of claims. Good question from Dr Ballara as to the most efficient way to do this, but it seems to me probably is a matter of natural justice, the Tribunal is obliged to take further steps. As to a cut off date, yes, in my submission there should be a cut off date.

I note in your memorandum you referred to the Tribunal staff working on a bibliography of secondary sources, the *Wai 1315* claimants support that. My briefly dipping my toes into the area would suggest as a vast body of literature and research and science and we may need to be very disciplined, I mean, focussed on the truly relevant reports.

Finally Sir, we have drafted an amended statement of claim and we'll do our best to file that as soon as we are reasonably able to do so. So those are the matters Sir I wish to address, unless you have any questions?

(2:07) JUDGE CLARK TO PETER ANDREW:

Q. Is there any utility do you think Mr Andrew in the Tribunal asking claimant counsel to work on in a committee form or otherwise to try and identify amongst yourselves what you might consider to be the priority matters, other than of course what you would say, "Your claim"?

A. In theory it's a nice idea Sir. I'm not hugely confident that that's a wise way forward. I am happy to try but, I mean, I would support Ms Sykes' submission on this, at the of the day the Tribunal should be driving the statement of issues. There is a sense of priority, I mean, there are some competing, you know, tensions between us. I mean, we'll try and iron those out obviously but I think the Tribunal should take a lead on identifying some of the priority issue.

Q. Well if one only needs to look at the media and there's issues reported on a daily basis about youth suicide, mental health, the 'P' epidemic, et cetera, those are issues which are identified by the media.

A. Mmm.

Q. I ask myself, "Are those the priority health matters for Māori?" I suppose what I'm saying is, "I am a lawyer, I haven't worked in this area, neither have many of this panel." How are we to identify what are the priority matters if that's the approach we adopt?

A. Well I think you start with the pleading Sir, what are the particular claims that are brought before you raised by lawyers representing Māori? I've obviously made a submission about half of my clients today that primary health legislation policies et cetera, is a very important hot topic, a priority topic. Mental Health, Mr Afeaki's raised that – Tavake. So the pleadings clearly provide some focus for that, some understanding of the priority issues, the publications, the – what's happening in terms of contemporary Crown policy is also obviously an important source of – I

mean, we are challenging Crown policies. What are the key current Crown health policies that you know are having the greatest impact on Māori or omissions, polices or omissions. That obviously gives you some understanding of what should become a priority issue. I mean I think already Sir from some of the pleadings, there is probably some checklist you can make as to what the priority issues are.

(2:10) DR ANGELA BALLARA TO PETER ANDREW:

Q. Mr Andrew, can you think of ways in which we can usefully restrict the scope of this Inquiry? I mean to say, you want us to concentrate on contemporary issues but contemporary issues come out of the past. For example, housing –

A. Mhm.

Q. – and the history of, you know, Crown engagement in that as far as it did in the 1930s and so forth. The results of that impinge on present day Māori, and not just Māori everybody. How are we going to ring fence the issues that we should be concentrating on from the original causes back in the past out of poverty and housing and lack of employment and urbanisation and so forth? Have you got any answers on that kind of thing?

A. Well I think you can draw a lot of inspiration and support from existing Tribunal reports and jurisprudence which have –

Q. Yes.

A. – the Whanganui Report for example and I know you are familiar with it –

Q. Indeed, yes.

A. – you know these matters have been looked into. You can't ring fence them. I mean our argument is that the contemporary prejudice and disadvantage does have a link, a clear link with the past.

Another route through for you is the present day statistics. In my submission, they speak for themselves the disparities are extreme.

They are deeply regrettable. They clearly have a historical dimension. It really should be undisputed.

Coming to your housing example, I mean with the benefit of your expertise you might draw upon that to make a forward looking recommendation. You might say, "This was a policy that worked in the past in the '30s or it didn't work and the lessons from that are this and we'll apply them for a future looking recommendation."

Q. Mmm.

A. I accept there is tension. I accept it is difficult. But that I suppose –

Q. They are pretty clear statistics. They have a background, you know, they come from somewhere. They have arrived out of past –

A. That's right.

Q. – problems. So that if we concentrate on those we are going to have to still go behind them. It is going to depend on what claims there are and what they –

A. Yes sure.

Q. – think. But –

A. I'm not saying you could ignore the past, but I suppose it is a question of emphasis. You know there is a vast you know area for Inquiry in the past and I just – the Inquiry should be timely and relevant that is my client's concern so that we don't get trapped by a sort of open ended very long process when, as I said, health policies are not static. Things are happening and we need to keep abreast of Crown developments and have a Tribunal report which really does become relevant and contributes to solutions.

Q. Mmm. Right, thank you.

(2:13) JUDGE CLARK TO PETER ANDREW:

Q. What do you say to the possibility of a Tribunal reporting in stages?

A. Well that's a possibility which I think you need to consider in my submissions Sir. I mean it could be that you identify a particular theme, maybe it is mental health, maybe it is you know contemporary health

policy in terms of primary health organisations which my clients are very concerned. I can see it quite conceivable that you would report on issues like that. Particularly, if there was an upcoming development of Crown policy which is really important that you wanted to feed into, or the claimants felt it was important to feed into. That is entirely possible.

Q. Okay.

(2:14) DR ANGELA BALLARA TO PETER ANDREW:

Q. Perhaps we could reverse the situation and do a historical report last having concentrated on the contemporary issues first and statistics and their present status.

A. Mmm.

Q. But speculation.

A. Yes. Well it's a worthy idea that should be you know seriously considered.

(2:14) JUDGE CLARK TO PETER ANDREW:

Q. Thank you Mr Andrew.

A. Thank you.

JUDGE CLARK:

Next on our list we have Dixon and co, is that right?

(2:14) KELLY DIXON:

Āe tēnā koutou te Rōpū Whakamana i te Tiriti, ā, tēnā koe e te Kaiwhakawā.

JUDGE CLARK:

Kia ora. Can you just keep your voice up please.

KELLY DIXON:

Counsel's name is Kelly Dixon appearing today for the claims Wai 745, Wai 1308. The amended statement of claim for Patuharakeke Trust Board was filed yesterday. My apologies for the delay in filing that.

A lot of the matters have already been traversed by my friends. However, in terms of the statement of issues, we support the submissions that have been made by my friend Mr Afeaki in terms of yes this being a contemporary or this Inquiry dealing with contemporary issues. However, the historical issues that surround the current health outcomes can't decontextualised at this point.

For our clients in the North, an example for them is the environmental impacts that come the discharges that go into waterways and into air that have for generations now had an impact on their health.

In terms of limiting the scope, therefore, of the issues there, we support the submissions that were outlined in the memorandum of Ms Thomas, document #3.1.53 in relation to the preparation of a scoping report in order to better refine the issues and look at where the gaps are occurring in the research.

Just moving to the options that are outlined at page 13. Our clients are supportive of Option B. However, we do see some merit in perhaps moving the draft statement of issues up above an oral hearing programme just in order for counsel to have these discussions and help our clients define the issues, where their issues are going to fit within that oral hearing programme.

We support the need for a oral hearing process and likewise my friend Ms Sykes, would support the cut off date of the filing claims list being moved further down the process in order to help bring out any other evidence that we need to within that hearing stage.

We support the resourcing for the Tribunal to provide claimants or potential claimants with better notice. From my experience in the Wai 1040 Inquiry, a lot of the claimants found benefit from having Tribunal staff attend the different taiwhenua. How that works within a huge district – an Inquiry such as this one I can't say at this stage. But there was benefit for the claimants to hear from Tribunal staff in terms of how they do get involved and have that personal contact. My friend Ms Castle has other submissions that she will make after me on this particular point, but suffice to say that we support further resourcing for the Tribunal to progress that.

1420

Most of the other issues have been already canvassed by my friends and those are the submissions that I have Sir.

JUDGE CLARK:

Thank you Ms Dixon, thank you. I think we have got time to hear from another counsel before afternoon tea. We have got Kāhui Legal.

(2:21) ALISHA CASTLE:

Tēnā koutou katoa. Counsel's name is Ms Castle and I appear with my learned friend Ms Dixon for the Wai 2003 claimants. That claim is brought on behalf of Ngāti Korokoro, Ngāti Wharara and Te Pouka hapū. I will just briefly make a couple of submissions in addition to those made by Ms Dixon for the Wai 2003 claimants.

The first is in respect of the Scope and Focus of the Inquiry which is raised on page 9 of the discussion paper. Although the Wai 2003 claims set out in the amended statement of claim of the 9th of May 2017 are largely of a contemporary nature.

We adopt the submissions given earlier by my friend Afeaki. We submit that the scope shouldn't be limited to a contemporary focus as the historical te Tiriti breaches provide the context for these contemporary issues and will in our submission assist this Tribunal in undertaking a full and comprehensive inquiry into the issues before it.

We accept, however, that it is for counsel to ensure that historical evidence is focused and directly correlates to the current issues being raised.

The second is in respect of the process to be adopted by the Tribunal and of the three options provided on page 13 of the discussion paper, the 2003 claimants also particularly support Option B. Although they don't themselves have evidence that should be heard urgently, they support those claimants that do, and we submit that oral hearings are important in order for that evidence to be heard by the Tribunal while those witnesses are able to present it.

Lastly, in terms of the Tribunal giving broader public notice. In addition to the suggestions that have been made today by my learned friends, I just want to highlight the benefit of using social media given the high level of access to it and use by the public today. This is also a relatively cost effective method.

JUDGE CLARK:

Well tell me more how that might look?

ALISHA CASTLE:

Perhaps Sir particular pages could be set up that are focused on this kaupapa that could be circulated by counsel, claimants. I understand that Facebook in particular is quite widely used and yes there is a high level of public access to that forum.

DR ANGELA BALLARA:

I have to say widely used by the young people what about the elder?

ALISHA CASTLE:

Perhaps those young people could put the word out to their whānau Ma'am.

JUDGE CLARK:

Okay. Now just to check Ms Castle, you are also from Dixon and co are you?

ALISHA CASTLE:

Yes Sir.

JUDGE CLARK:

Okay, okay. Right. Kāhui Legal.

PARANIHIA WALKER

Sir I'm in your hands. I note there is five minutes before the break and –

JUDGE CLARK:

How long were you –

PARANIHIA WALKER:

How long is a piece of string Sir?

JUDGE CLARK:

It’s five minutes.

PARANIHIA WALKER:

No I mean I could – possibly 10 to 15.

JUDGE CLARK:

You can start. Start now.

(2:24) PARANIHIA WALKER:

A e te tēpu tēnā koutou, a, e ngā rangatira o te Taraipiunara, a, otirā e te whare ngā rangatira o ngā iwi kua tae mai i tēnei rā anei te mihi ki a koutou. Ko Paranihia Walker tōku ingoa, a, e tū ana hei māngai rōia i tēnei rā mō te kerēme o te ora Te Ohu Rata o Aotearoa, a, ko te nama rua whā iwa iwa.

A ka huri ki te reo Pākehā, e te Kaiwhakawā i runga i ngā āhuatanga kua whakahuatia mai e taku hoa a Ms Sykes.

Tēnā koe Sir, counsel's name is Ms Walker. I appear with my friend Ms Tarawhiti. We are acting for Te Ohu Rata o Aotearoa, the Māori Medical Practitioners Association.

That is probably better if I speak like that.

So we have got today here Sir, you already saw, Dr David Tipene-Leach. We also have Dr Rawiri Jansen. They are both claimants Te Ora claim. We are in the process of amending the statement of claim to add further members, Sue Cringle, Professor Pāpārangi Reid, Dr Rhys Jones, Sir Mason Durie, Dr Rees Tapsell and Dr Elana Curtis and we hope to do that in the coming days.

So just on the administrative matters Sir. Public notice, I will defer to my younger colleagues about social media. It is not my area of expertise but I do note that my clients are active Twitter users and that that might be a useful and cost effective method along with your other social media.

Can I just say in terms of public notice and participation because I think they are interlinked. I think participation in this process will be assisted or encouraged by the Crown response, I say that with all due respect to this Tribunal.

I think Ms Sykes' comments about Wai 262 illustrate I guess the concerns of many within an inquiry like this that, we have a beautiful well written Tribunal report that captures the Treaty breaches that we are all here to demonstrate and then it disappears into the mists of the Crown. Last week I actually a Crown official, I can't recall which agency now, but I did ask them what their response to Wai 262 was and when they were proposing to do that and they said, "Oh we're still in the process of that."

So there is no urgency it appears within the Crown to respond to these sorts of Tribunal inquiries and so I think it would be useful if Crown counsel could take – I know that in the Crown's submissions they have indicated the sort of approach that they propose to take and what benefit they see deriving from Tribunal findings. But it would assist I think if the Crown could publicly support or indicate some level of interest in perhaps that it will take steps to consider and respond to any findings of this Tribunal.

Because I think if you have a statement like from the Crown, in my submission Sir, you will encourage the various iwi, hapū, Māori health organisations to participate because they will see that there is merit and that the Crown is actually going to listen and provide a response. So I think I would encourage the Tribunal to consider seeking some kind of response from the Crown on that.

We do think notice should be given directly to iwi, hapū, other Māori organisation and not working just through district health boards and similar organisations because they are obviously Crown agencies and some of our people don't engender positive responses from some of our people, I will put it like that. So that's really it on the public notice point.

1430

I'm just continuing with the administrative matters, Sir. Setting a final date for the filing of any further, new or amended statements of claim. Our clients agree with that, they'll abide the Tribunals decision. But generally, the overarching concern of our clients is to ensure that this inquiry proceeds with haste. We've talked about urgency, we had an inters – round table discussion with our clients last week about whether there were any particular issues of urgency, it was difficult to identify just one because the health of our people across the board is poor. So the general point on timetable was, "Let's move with haste and with focus."

JUDGE CLARK:

I suppose the question arises, to focus on what?

PARANIHIA WALKER:

And I'll – yes, so I will get into the substantive point. For our part, and I think I share your – I probably share your, not fear, but it is an overwhelming kaupapa for us lawyers, this is not our area of expertise. And we received instructions a couple of months ago and probably, like many of my friends, frantically trying to get my head – again, because we covered it briefly in *Wai 262* but it was as a subset of the broader range of issues. To get our heads around what the health system currently looks like, I mean, most of us generally have a vague idea but the intricacies of the monolith that is the Ministry of Health and its various policies and programmes we're all probably struggling to grapple with.

One thing that did occur to me – well the first point I will say is we should – I think we should take the advice of our experts in this area, so our Māori medical or health experts in all its forms. We know who those people are, they can help guide this Tribunal and provide, I think, an appropriate framework for this inquiry because it's tempting to just approach it as lawyers, myself included, in the way that we're used to but that might not actually make

sense from the point of view of improving – of Hauora and improving health outcomes for Māori.

It may be that there's a better way to frame this inquiry and it's not quite clear to us yet because we're approaching it and I – actually I should – your panel has many wise heads on it and they're not all lawyers and so they probably have this all in their heads already. But let's listen to the experts, I think, in framing the inquiry because they can see more clearly than us I suspect the appropriate narrative, the appropriate – I've heard someone use whakapapa, it's kind of the Matua. If you start with the Matua and progress in the appropriate order the outcome will be more worthwhile and I think that our health experts are the appropriate ones to help the Tribunal determine that approach.

Of course it's our role as counsel to assist and we're obviously working with our clients to do that but they're new to the Tribunal process so there's a challenge there, there's a bit of a two way information exchange going on at a frantic rate because everybody appreciates the importance of this kaupapa.

So filing dates for submissions concerning eligibility, we defer to the Tribunal on that. In terms of suggested publications and the preparation of a research discussion paper, our clients support that. They are – at the moment we have a draft list of relevant research and publications that is being compiled and we expect to file that with the Tribunal in due course, so we expect that the Tribunal will find that helpful.

And before I get into the scope of the inquiry, I did want to briefly just go back, and without picking on my friends from the Crown, but the Crown approach to this inquiry is critical. And I note that my friends from the Crown have made submissions to the effect that the Crown looks forward to a constructive inquiry and wishes to work positively with claimants and the Tribunal to design

an appropriate inquiry process. And they've talked about, this is the Crown's submissions #3.1.54, they've talked about what the Crown would benefit from in terms of Tribunal findings that will help it, and I quote, "Improve settings for the delivery of health services to Māori and thus, improve health outcomes for Māori."

What would – I think what would improve both – well assist the Tribunal's reporting in this inquiry and improve outcomes from this inquiry would be if the Crown could at an early stage indicate the extent to which it proposes to acknowledge health and equities for Māori, the social determinants of health as major contributors to poor health and particularly to poor Māori health, and more generally the link between Crown Acts, omissions, practices and policies, and current Māori health outcomes. And I say this because recent Crown expressions in the Tribunal space about the link between the determinants of health and poor Māori health outcomes and the link between Crown Act submissions, policies and so on, and Māori health outcomes have tended to, and I will quote from the Rohe Pōtae Crown Closing Submissions which is, the Tribunal will have it, Wai 898 #1.3.001 is the document number, at paragraph 12.26 of those submissions – of that Crown statement of position in concessions noted, "It is very difficult to obtain evidence that can support causative links between Crown Acts, omissions, practices or policies in health outcomes." And then later on at paragraph 12.34, the Crown went on to say that it was well informed of the contemporary health needs of Māori.

So my submission is that as we proceed through this interlocutory phase, I think it would be – my submission is that the Crown should be pressed for an early response as to the approach it tends to take – it intends to take. What acknowledgements and concessions it is prepared to make at this stage of the inquiry because if the Crown was prepared to concede on some of those basic points or acknowledge some of those basic points about health and equities for Māori, the social determinants of health is a major contributor to

poor health, it would avoid the need for the Tribunal to hear an expansive body of evidence on those sorts of things. They are well established in health literature, they are – there is a scientific basis – Te wā? I will finish up so that we can take the break Sir and I'll come back to the scope of the inquiry.

But in short, what I am saying is it would be useful if the Crown could indicate at an early stage its general position on health and equities for Māori, the social determinants of health is a major contributor to poor health, and whether or not its current approaches are Treaty compliant in that sense. So I will pause there Sir perhaps, and we take the break, I've probably got another – my clients will "boo" if I take too long, maybe another 5 to 10 minutes?

JUDGE CLARK:

Okay. We will take the break now and we'll come back at 3 o'clock.

PARANIHIA WALKER:

Kia ora.

JUDGE CLARK:

Thank you.

HEARING ADJOURNS: 14.39 PM

HEARING RESUMES: 3.06 PM

JUDGE CLARK:

We're back with you Ms Walker.

PARANIHIA WALKER:

Thank you Sir. So I think I was just getting into the scope of the inquiry, but before I do that I did have a brief chat with my clients in the break and we did wonder whether or not the Tribunal would be open to having a sort of a one-day information session, I suppose, on the current health system framework policies, the place of Māori health providers within the system and all that sort of thing which could be organised quite quickly.

I'll leave that in your hands Sir as to whether you think the Tribunal would be open to something like that, but we could have, you know, the appropriate Māori health academics and practitioners to give the Tribunal sort of a health 101 without suggesting Sir that you don't have that background. But if the Tribunal was minded or was open or are wanting that kind of session then that could be something that could be arranged. Well of course the Crown is able to attend and ensure that –

JUDGE CLARK:

So it would cover what Ms Walker?

PARANIHIA WALKER:

Well just an introduction overview of what the system currently does, how it operates and where, because I think one of the things we tend to do within these inquiries is we proceed to hear claims prior to understanding what we're – what – the system that we're grappling with. In particular – obviously within the particular kaupapa that we're dealing with, so rather than get to the end and figure out the system does and what it looks like and whose important

and where the most meaningful change might be made, that we proceed as an inquiry, as a body, with the Tribunal, counsel, claimants with that understanding from Day One. My submission, it might assist everybody in this room with better focusing on the outcomes. We'll understand what the system does, who inputs where and how meaningful change might be made if indeed the Tribunal finds that how it currently operates is a breach of the principles of the Treaty. So I will just leave that for your consideration Sir.

So turning to the scope of the inquiry, our clients would prefer obviously to focus on the contemporary delivery of – contemporary health outcomes for Māori, the inequity of health outcomes for Māori, which is indisputable and the extent to whether the Crown's conduct currently has been and is Treaty compliant, and then following on from that, obviously what the remedies are or where this can go to improve those health outcomes for Māori. And our clients say that, "Critical to this examination will be identifying and understanding the major determinacy of full Māori health as a consequence of Crown action.

1510

There is some extent to which you have to look back to understand these things but our clients are also focused on ensuring that this inquiry proceeds with haste. It is urgent as a kaupapa hauora (health). The health of Māori people is urgent and you only have to look at the difference in life expectancies between Māori and Pākehā currently. Without giving evidence from the bar, somewhere around seven years. So the inquiry as a whole is urgent.

So I won't go through the issues identified in the Wai 2499 claim but I will briefly go through what the claim proposes to advance as a broader narrative because it is essential to understanding where Māori are today within the

health system to understand the broader narrative of how we got here on an evidential basis. And so the Wai 2499 claim in terms of issues it will contend that health inequities are socially produced, unjust and avoidable.

There is scientific basis for this; that prior to contact Māori enjoyed good health; Māori expected to benefit from health science and knowledge and the application of health technology; that colonisation has dramatically affected Māori in the inequities of health outcomes for Māori are indisputable; and that the philosophical basis of western health models (including our health model) disadvantage Māori and result in poor health outcomes for Māori. Our clients will provide evidence and case studies to support that.

And so, of course, the test then for this Tribunal is: Has the Crown's conduct in this sense been Treaty compliant? We would like to focus on whether the Crown's exercise of its governance (kāwanatanga) has been Treaty compliant in terms of hauora.

On this point Sir I just want to note an example of relevant – I'll come back to that point actually. But basically, where we are driving to is resolution will require reorientating the health system towards reducing inequities and producing a Treaty compliant framework for health. It requires Māori participation and decision in policy making and implementation. So that is where our clients would like to go to Sir in terms of the inquiry in terms of a report.

Turning to the issue of whether the Tribunal should hear every claim. On a claim by claim basis, our clients consider that each claim should be heard but we should look at the most efficient way to do this. It is important that whānau, hapū and iwi have the opportunity to put their claim issues before you Sir. It is part of, and I think now Justice Williams has referred to the

Tribunal's role, that truth and reconciliation role that is essential for some of our people.

And so in that respect I think we have heard today this dual process that's come up time and again and that is Option A or B, probably more Option B in your paper. It may even be a variation on Option B the Tribunal's discussion paper whereby, in order for this inquiry to proceed as efficiently and urgently as possible we have the oral hearings concurrently with building the technical base and the issues base to proceed on that side of things. So our clients support that kind of approach, provided that it happens urgently and quickly because every year that passes without these issues being addressed by the Tribunal, these issues being addressed by the Crown, the health outcomes for Māori there is a cost on people, resources across the board and our clients would be able to produce to that effect.

In terms of whether or not the Tribunal should identify here and report on broad themes? We think the Tribunal should report on broad themes. But again, I go back to my original point, my submission is that those themes should actually be determined or crafted by those with the appropriate knowledge of health, what leads to the health outcomes that we have and the current system.

I am sure collectively counsel could identify or propose some names for that group. Perhaps a sort of claimant collective in additional to counsel who can create the framework for the inquiry because approaching themes in the way that perhaps we normally do in the Tribunal is probably not the most effective way for this inquiry to proceed.

I think I have covered existing evidence. But our clients did note that further and more robust research might be required, in particular in the areas of Māori mental health and disability health. In respect of disability health, there is a

focus currently on death related determinants but not on the quality of life determinants for those with disabilities. And of course, in due course we will be providing a publication list from Te Ora to assist the Tribunal.

I think I have probably covered everything Sir except just to touch on one of the matters that was raised earlier about staged reporting and our clients certainly agree with that approach. They support that. They think that that kind of approach would be useful, it would assist with engagement with the Crown sooner rather than later to make meaningful change to the current framework.

And depending on, as I said earlier, the Crown's response to the issues raised by the claimants, report one could perhaps cover whether or not the health inequities currently faced by Māori are a breach of the Treaty as a sort of a stage one inquiry because that is critical. Acceptance of that point is critical to moving into solutions and what a better system might look like.

So those are really my submissions Sir. I did have one further point that my clients have been – I will get in trouble if I don't raise it. In terms of locations (and I know we are a fair way from that "venues" and the table will appreciate this), Tūrangawaewae Marae might be an appropriate place for a first hearing given that it is the original intention of Te Puea was for Tūrangawaewae to be a Māori hospital and then of course she was obstructed/blocked by the Crown from that coming to fruition. So as we move more towards the hearing stage that is something that our clients will be raising again, Sir. Obviously, with appropriate discussion with te haukāinga.

So those are my submissions for now Sir. I will provide an overview of these submissions in writing.

(3:19) JUDGE CLARK TO PARANIHIA WALKER:

Q. Ms Walker, the draft research list would be available when?

A. Probably in a couple of weeks Sir.

Q. You talked before and after the break about potential design of the hearing programme moving forward. I assumed (and it sounds like I'm wrong) that your clients were going to make some suggestions around that, but then after the break you are suggesting a wider group of people, including your clients and others -- alas some sort of claimant co-ordinating committee something like that?

1520

A. Yes, so I am in your hands on that Sir. I don't necessarily have instructions on that particular point but what I do have instructions on are that there is a core or identifiable people within the Māori health space who have the expertise required to craft a framework for the inquiry that is efficient that can proceed quickly but that covers all the necessary issues that need to be covered. My submission is you know the inquiry looks daunting but it shouldn't be because we have trained people in te ao Māori who deal with these issues on a daily basis and who could craft a framework for inquiry that was efficient and that could proceed, you know, quickly.

Q. Why does it need a direction from us?

A. Because it is your forum Sir. I am conscious that you know there may not be consensus amongst counsel and claimants –

Q. Mmm.

A. – and so it is not for me as one counsel to say, "My clients suggest we do it this way and we should proceed this way." However, I could speak to my colleagues and we could probably get some kind of consensus about that point.

Q. Well you know I reiterate that we would really appreciate some assistance on this. What is this inquiry to look like? I would have thought from amongst your client group who better to make those suggestions.

A. Yes that is something we could do probably quite reasonably quickly Sir. I am just looking over – it might be that Dr Jansen could come up and speak to you, but we could get a group together to suggest a thematic approach which makes sense from the view of health professionals. Because it is without a doubt that there is – it is not a process but – I have lost my – early start this morning with sick children excuse me.

ANNETTE SYKES:

Your Honour if you would believe but I would support the approach that has been suggested by my friend. Can I suggest this, they develop a skeletal framework that is distributed within two weeks and we be given a week to respond? I am saying that so that we can get things moving Sir but I like the group that I heard mentioned before. They are tohunga in te ao Māori. And then what their framework would be, consulted with by me with my claimants, and then I could respond to add or dis-consent to what is approached, Sir.

PARANIHIA WALKER

And probably another, if we do run the dual track Sir with the oral hearings (and my clients are coming over to give instruction which is great, or kōrero which would probably be more appropriate), but if we proceed with the dual track with the oral hearings for those claimants that wish to that would probably avoid or mitigate some of those things I have talked about. Would it be helpful to hear from Dr Jansen, or I am in your hands Sir?

JUDGE CLARK:

I am happy enough to hear from him, unless there is any objections by anyone? No? I mean I must stress we are really at the start of this. We are just trying to bounce some ideas around to try and find a pathway through it.

(3:23) DR RAWIRI JANSEN:

Kia ora. Ka mihi ki te tēpu ka mihi ki a tātou tēnei kaupapa e whakawhaiti nei i a tātou. We'd be really pleased to provide some assistance in the way that is

described albeit that we won't have deep knowledge of how Tribunal matters go. What I think we would try and organise is around making sure that the people who want to have voice to their claims get to be able to do that and coherently, we also have a technical way of addressing the broad range of health issues as they arise. But also I think reasonably we can predict how those can be grouped together. Somewhat, it is whether or not the Crown stipulates that health inequities are a breach of the Treaty otherwise, we will have to drive really hard about exactly how the current situation in terms of health inequities how we reached that point. If the Crown is going to give up that ground and acknowledge, then we can really drive hard on getting timely around that piece of work.

JUDGE CLARK:
Okay, thank you.

JUDGE CLARK:
Anything else Ms Walker.

PARANIHIA WALKER:
Kāo Sir. Except just to reiterate that to a large degree the focus and direction of this inquiry turns on the Crown's response to those core issues. Thank you Sir.

JUDGE CLARK:
Okay, thank you. Now do we have someone from Lyall and Thornton?

(3:25) BRYCE LYALL:
Yes Sir, Bryce Lyall for the claims listed in #2.5.7(b) as well as a new claim that has been filed on behalf of ngā kaiārahi "Nannies against P" claim.

I will just jump right in. I begin with notice. We would support the idea of social media approaches. I am not quite sure if the Waitangi Tribunal has a

Facebook page or a Twitter account but it may be time for that to happen; I know the Nanny's do have a Facebook page even if it does have three likes; it is a project that has begun. But I would say that it can't just be notice.

In the Military Veterans Inquiry, for instance, notice was put out and it just announces that there an inquiry happening. I think we need to provide more guidance to people who may be new to this process about the Tribunal does, what they need to do specifically to participate and what they might be able to get out of process. Without that it can all be a bit opaque.

I do notice that lots of the people involved in this have appeared before the Tribunal in other areas and so once you get acquainted with the system, the process then it is easier to take that step. But if you are busy with family, busy with life, busy with your job and you see this new process and you are not quite sure what it is going to lead to, then it might just be something to turn the page over and go back to reading *Stuff.co.nz* or something.

So that would be all I have to say about notice.

Dates for final filing statements of claim. I don't see that as the most pressing issue. I know in Northland we have already had Crown closing submissions but we are still able to file amended statements of claim. I think that as research is received and the claims evolve it can be quite helpful to have really detailed and particularised statements of claim coming in but it is very difficult to do that at the beginning so something to keep in mind.

On eligibility. We would support the proposal for some form of mediation where there is a dispute about a claim being eligible. That would prevent any sort of I think gate keeping is the only term I can think of on behalf of the Crown who have already said in their memo a lot about what should not be

part of this inquiry without as much comment, in my opinion, on what should be a part of this inquiry.

I'll move on to scope. I don't see much difference between a claim by claim approach and a theme by theme approach. I think a claim by claim can be accommodated within a thematic approach without too much trouble so long as when it comes time to report the claims are addressed individually. People need to be sure in the knowledge that their particular concerns will be acknowledged and dealt with at the end of this process.

I have some submissions about the 2.8.001 discussion document and I see our submission #3.1.001 has been quoted in there so kia ora you clearly have read it. We would agree that you cannot divorce the past from the present. Contemporary claims are important, the prejudice is real, its within living memory. But for example some of our Northland claimants they see this whole inquiry through the lens of the Waitangi Tribunal Stage One Report which concluded they didn't cede sovereignty. The development of health systems in the North since then they say is, "Prejudicial as the Crown hasn't taken that into account," and how we can address those sorts of issues without bringing in a historical element to it I just don't know.

1530

Historical claims or issues could well be left till last. That's something that hadn't occurred to me till it was raised today but I think they still must be covered and that's what the legislation demands.

What claim issues are outside of the inquiry? That's a difficult one I think because this is all fairly arbitrary, dividing things up into health or housing or environmental issues but to an extent the Tribunal has to do it and that's accepted. But using one of the claims I represent, the 1247 claim for

instance, is about the retention of body organs for scientific testing by Greenlane Hospital and then the Coronial practices. So do you then say to the claimant, "Okay, you can have this part of your claim heard here but you've got to come back in a few years and have the rest heard as a part of a different Tribunal inquiry," how does that work and is that prejudicial in of itself.

My final point, on the discussion document, is the point about whether pregnancies should be dealt with in this inquiry and issues associated with that or as part of mana wahine, and that's something that we're still taking instructions on, but I did want to flag that it has been seen and is being discussed.

Finally, alternative structure, it's accepted that age or infirmity is important, and we accepted that in our #3.1.001 submission. It's not something that my clients have raised with me as being of particular concern but they would support those that do wish to present with urgency.

A bigger issue for my clients is that important themes should be heard first. For instance, the issue of P and the health related effects, that's something that I think the Tribunal could usefully offer findings and recommendations on as soon as possible to help the communities that are being affected by that.

Other important issues, for my Northland clients, Northland Māori die nine years before other people in New Zealand and they die the youngest out of any Māori population within New Zealand. They have a threefold higher rate of avoidable mortality from things such as cardiovascular complaints, diabetes and cancer, and those are all things that would respond well to medicine if we could work out how to deliver it better.

So again those themes are something that should be prioritised we would say. I guess it's easy to say that but we need to work out how to do that and that's something that we'll continue to working on.

We'd support a phased inquiry, one part could be heard and the report could be worked on and issued while the next part progresses if the Tribunal's funding allows for that. I think that would be a positive development.

And my final submission is if this Tribunal does opt for a thematic approach it could be beneficial for almost a wananga style approach or a final hearing after evidence has been heard to focus on solutions. The Crown claimants and claimant counsel could come together with the Tribunal. The Crown, that would require a lot of good faith on behalf of all parties of course, but if the Crown made clear what resources were available and in what timeframes the Tribunal wouldn't just be a – I guess yelling into the dark on this when making recommendations. If we're going to make pragmatic and useful recommendations then they need to be able to be implemented.

Now those are my submissions Sir.

JUDGE CLARK:
Thank you.

BRYCE LYALL:
Thank you.

JUDGE CLARK:
Mr McGhee.

(3.34) MARK McGHEE:

Tēnā koutou katoa. My name is Mark McGhee. I represent two claims in this inquiry, Wai 1072, most of the issues in that claim are historical, and a recently registered claim Wai 2628 where most of the issues are contemporary.

Looking at the discussion documents, the key topics, most of our issues are there. I agree with what Mr Afeaki said about hot topics. I think youth suicide is certainly one and Māori mental health.

Our clients, it's an important issue for our clients. They come from a small town, Raetihi, where youth suicide has been a major concern. It seems to be a topic that really affects small towns in the Eastern Bay of Plenty, there's Kawerau, Ōpōtiki, much the same of Raetihi.

There's some issues there, we raised the cost of drugs, the cost of health care is a thematic issue but the cost of drugs is not specifically there.

Eligibility, on page 11, now all claimants shall be able to participate. It seems unreasonable that claimants who iwi have settled and have real health issues cannot bring them to the Tribunal. We have Wai 1072 which is in Whanganui, it might be settled before this inquiry finishes, and I'm not sure what happens there, the Crown routinely oppose claims participating where they have been settled. What happens if they are settled while the inquiry is under way?

Inquiry process, on page 13, we support the proposal under number B there. It seems to provide continuity and process. A also has the same number of parts to it but there seems to be a two stage process like with Military Vets. We prepared our claimants for the oral kōrero hearings, now there's a big gap until the substantive hearings, but with the overlap there in number B there's some continuity.

The reasons for oral hearings, in 14, agree with most of them. It seems to be a less formal process, there's no cross–examination by lawyers, more tikanga involved.

With the hearing process at 17 there seems to be some value in having thematic topics but the issue with no funding from CFRT it's going to be difficult for claimants to travel if their theme is outside their area so funding might affect that.

With notices we'll submit – we'll suggest that – I mean notices could be printed, they could be sent to DHBs, put up in all the hospitals, the Māori health providers provide medical health counselling to local tangata whenua and they would have a lot of contacts. Not sure about social media. It seems to be focused on young people, whether they are going to participate in the health inquiry would be an open question. But certainly like my friend who spoke last, any notice should sort of – should have how to participate, who to contact and what to do if people want to take part.

The section on claim issues which are outside the scope of the inquiry, the Crown have objected to one of the issues in Wai 1072 which is desecration of wāhi tapu. I've spoken to our client on this and he said, "Well this is directly related to Māori mental health and youth suicide." The Crown suggests it is more related – it should be put under culture and identity, but identity is – the loss of identity is a major factor in youth suicide and Māori mental health issues. So we see some overlap there and some benefit in claims – in issues like that, being able to participate in health, even if they are not solely concerned with health.

As for Stroke, we agree the focus should be on contemporary issues and recommendations should be looking at what changes could be made on the

ground. The historical issues, which we have some, certainly provide a background to where things are at now. And those are my submissions Sir.

JUDGE CLARK:

Okay, thank you Mr McGhee. McCaw Lewis. Mr Burgess?

(15:39) JEROME BURGESS:

Tēnā tātou katoa. Counsels' name is Mr Burgess appearing on behalf of Wai 1089 claim on behalf of Ngāti Mahuta and a new claim on behalf of Jack Rifle for Ngāti Te Wehi Sir. There's not much counsel can add further than to what has already been said today. There are a couple of matters which we'd like to bring to the Tribunal's attention.

1540

Firstly, thank you Sir for clarifying the section 49 matter, our clients were wondering when those were going to come through so we're looking forward to receiving those. And secondly, just looking at the discussion document #2.8.1, issue 3.4 on page 9, "*Scope and Focus of the Inquiry",* we acknowledge that this is a broad inquiry into a wide range of historical and contemporary claim issues. There have been calls for focus to be on current, contemporary Māori health issues, status, legislation, policy and practice. However, we agree with submissions from my learnered friends that historical breaches have indeed contributed to current health issues and shouldn't be all together discounted.

Just to flag at this stage Sir, that if the Tribunal were to entertain the idea focussing specifically on contemporary issues then the claims that we represent in this instant would definitely be affected on the basis that they include historical grievances, historical element, as part of their Statement of Claim. I'm certain that this is, as we've heard today, true for other claimants as well, however in saying that I also agree that it is up to

claimant counsel to refine and ensure that historical matters form appropriate context for current issues.

The next matter we wanted to raise Sir is issue 5, "*Process of Inquiry".* Our claimants support submissions raised by other counsel to adopt the process similar to that which has been used in the Military Veterans' Kaupapa Inquiry, and we see merit in an expedited oral hearing programme, specifically for the benefit of those with health or infirmity issues. And we also see merit in casebook phase following these oral hearings. Sir those are my submissions, happy to take questions.

JUDGE CLARK:

Thank you Mr Burgess. Mr Gilling?

(15:43) DR BRYAN GILLING:

Tēnā koe e te Kaiwhakawā. Tākuta Ballara, Tākuta Roa, tēnā kōrua. Sir, as has just been said many of the issues have been covered and covered well by previous counsel and when I pick out something that I say I agree with, that is not at all to say that I don't agree with everything else that has been said, is pretty much – pretty much everything that has been said so far I support.

Your first issue about notice, again, this should not be a matter of just notice it is a matter of getting information out. And as one of the youth of the day I am an avid Facebook follower and I'm hooked in too many Māori organisations and groups, and I support the development of use of social media. I don't know whether the Tribunal still has a communications officer as they used to many years ago before I thought the position was disestablished, but somebody must have some clue about how to set up pages, accounts, and so on and link them into many of the Māori organisations and groups that are out there. Māori Television, Māori Radio, press releases I think, I reach those groups immediately. And if they provided more information than simply pānui

that an inquiry was happening would help those groups to maybe cotton on to it and broadcast items about that.

I agree with Ms Sykes about the involvement of settled groups, mostly, that are developing their Hauora Programmes. Because again, many of the – certainly the current issues that are being addressed or will be addressed in this inquiry are very applicable to them and they may be involved perhaps as claimants in one way or another but also as sources of useful information, they are people who are having to deal with the Crown systems at present.

In terms of getting the information out to Māori health providers Sir, I wonder if the Crown might be able to assist with that. The material that we dealt with in Northland, the Crown evidence about health, it became apparent that there is two not all together closely meshing systems; one is the Ministry of Health, the other is the various District Health Boards. And I think only the Crown has access to communication with both of them and the Districts Health Boards then seem to have the responsibility for dealing with the numerous local Māori health providers of various sort. And therefore, I can make the suggestion it's obviously up to my friends from the Crown to respond and/or seek instructions, but possibly getting further Crown involvement at that level at least to provide information but maybe even to identify conduits ways of communicating.

This I think Sir is going to be a problem with all of the Kaupapa Inquiries which is an issue for Kaupapa Inquiries rather than regional Inquiries. You could rely on the kūmara vine a whole lot better in a region where everybody's whanaunga and everybody's neighbours and so on, than you can for a national issue.

Regarding the filing of the statement of claim – filing of the final statements of claim, we also would support a later final date and don't see the need for a

finalisation of them, particularly since there's obviously going to be ongoing movement around the issues that are being tackled and also if our Veterans Inquiry experience is anything to go by and as Mr Lyle mentions, Northland, there's ongoing research material trickling in and that can require a re-jigging of a claim along the way. So later rather than earlier a prelimin – a date perhaps for preliminary statements of claim by all means because that will be necessary for you in setting the parameters of the inquiry but with the finalisation further down the track.

1550

The eligibility issue. Sir, again, we would echo the comments made by my friends about this needing to be as broader range as possible and not to limit those who participate right from the outset. I think that this is crucial to the integrity of the process but also so that it does capture the breadth of the issues which, as you have identified, is already potentially terrifying. But we don't want to exclude anything because this is people's last chance, they don't have another way of bringing it up in a district inquiry or something going forward.

The Crown's proposed process regarding eligibility I mean the sequence and so on, we would support this. I think the initial identification of eligibility issues or a lot of them are could be done instantly. I mean I can inform the Tribunal right now that none of our clients are affected in any way by any settlements. The Crown has issues with some of the substance of some of the claims and appears to have also decided that some of our claims are ineligible without them actually having filed anything but those can be dealt with later on. But I think it would be a very quick process to identify eligibility issues and deal with them. The Crown of course will have to go through all of them so of course they will need more time.

The Tribunal panel or some other mediation process is probably a good idea. Given the way in which these are often intensely personal issues that are being talked about, it is probably better to be dealt with by people rather than simply on the papers. I think is the approach that certainly the claimants are likely to feel happier about.

Now many elements about the scope of the inquiry. My inclination is naturally to go to hearing on a claim by claim basis, but then any of the options that we have before us doesn't fit that all that well. It doesn't assist greatly with a thematic reporting which we would also support, but we also see the difficulty that I think exists, which is that unlike the regional inquiries where the claims had to have a well-founded claim so that they preserved their position going forward for possible remedies hearings and so on, that doesn't seem to me to apply in this sort of environment. So of course, as one of my friend's mentioned, the claimants need some assurance that they are being heard in terms of the Tribunal's report but I don't think that we need a claim by claim report in the same way that a regional inquiry might. My friends may well have different views on that but it seems to me that there is arguments on both sides.

So your second point about, "Should the Tribunal identify, hear, and report on broad themes?" I think the identification of themes we have talked about a lot already today with regard to, for example, the group that Ms Walker mentioned. The Tribunal's prioritisation of things that are on the statement of issues when that emerges and so on.

I have issues with some of my friend Mr Andrew's submissions about the need to focus on contemporary matters. A word he used frequently was 'relevant' and my query, "Would be relevant to what?" The issues from the past still have great relevance in the lives and thinking of many of our clients and arguably on health issues.

There are other questions about the pakeke evidence versus priority issues. If we are going to have oral evidence first how does that fit with prioritising issues for example when we need to have old and infirmed people prioritised in terms of actually giving the evidence.

I think as has also been submitted that the historic issues must be included in this inquiry. They have again no other option if this Tribunal doesn't deal with them. We can't then try and shovel them into identity or housing or something further down the track, they are health issues.

And I support the submissions that several counsel have given about the danger of decontextualising things that are important in the present day because things reach further back and that we have clients who are dealing with health issues now from events that happened 50 years ago, well before September 1992. That is on a personal level let alone on a bigger scale.

And I also support Mr Lyall's submissions just before about not only including the historical issues in saying that they must be included, but having them dealt with last is in my view an acceptable way of dealing with it.

The other point that I had a slight disagreement with my friend Mr Andrew over is the use of the existing Tribunal reports and it has already been raised about the lack of Crown engagement with Wai 262. Again going back to our Northland Crown evidence at the end of last year, it was apparent that the Crown witnesses from a number of major departments dealing frontline services with Māori hadn't got a clue. We actually struggled to get them to identify the Treaty principles that they thought they were implementing in their highfalutin policies let alone actually dealing with the issues that had been raised by such a thorough going, and as was mentioned well written report as Wai 262.

In our experience Sir seldom does the Crown simply accept what a Tribunal finds or recommends. And as part of our support for Ms Walker's submissions about early Crown concessions, part of that could perhaps be that the Crown would need to indicate what it does accept from those previous Tribunal reports. That of course would help move this particular inquiry along.

Coming back to the issues that are to be included or excluded. Again, we would support a broad view rather than reading it very narrowly. Several counsel have made submissions about this. Mr McGhie just made perhaps a less obvious one, the connections between health and housing for example are obvious. But the affect on Māori mental health, of destruction of wāhi tapu and a number of those cultural issues, to exclude them wholly from this inquiry would be an extremely Eurocentric approach and in my submission Sir a harmful on. This perhaps is where Ms Walker's group could be helpful too in terms of providing an expert Māori view of the elements that contribute to, in fact. A Māori view of health rather than simply relying on a document, however, it has been formulated/produced by the Ministry of Health.

1600

Also just finally on this particular point, there are historical issues out there that are issues on their own and exist in their own right, they're not just context to what is happening in 2017. There are for example historical issues about the provision of health services in Māori communities in such which affected people directly 50 years ago but which are not strictly speaking context to what is happening now.

Regarding the selection from the three options in the discussion paper, we also would support option B. We also like the fact that it keeps the process moving and that while we are having oral evidence we can also have people

doing background work to make sure that the second half of the inquiry keeps moving. I think this has been a problem with the Veterans where, for one reason or another, this was only partly done with the production of Ms Mars' report but then we stall for a year while the actual reports that fall out of that are actually written. So keeping both streams moving along is also important.

I think Sir too, it is important to keep the designation as oral evidence rather than kōrero tuku iho because the kōrero tuku iho has been used more in the district inquiries talking about traditional history, pre-European history, extensive whakapapa setting out tribal connections and all sorts of valuable material to assist the Tribunal in its evaluation of what's going on in a district. The material in this inquiry Sir, I suggest, is going to be rather different. It is going to be oral evidence and coming back to my point earlier, if it is for example older folks talking about their experiences and their childhood, it's their kōrero, it's not something that's been handed down from the tūpuna. So some of it will no doubt be the more traditional kōrero tuku iho but I think most of it is likely to be oral evidence.

The suggestion of Dr Ballara's about following on from yours Sir about writing more than one report of having the historic report comes second, I think is a very good one and helps to meet a lot of the concerns that counsel have in terms of both expediting things and dealing with current issues, but also making sure that all Māori health issues are addressed, I wonder and this is your probably part of what concerns the Tribunal, I wonder about how much time is involved in all of this and having a Tribunal both hearing and reporting at the same time would be I think stretching a little far. But then that is something that you need to work out for yourselves I suggest Sir, with respect, and making sure that you look after yourselves also as well as keeping this kaupapa moving.

Another issue around that will be resourcing of course and I'll come back to that shortly.

I think Sir that counsel could draft an initial draft statement of issues and someone suggested having it only finalised after the oral evidence we'd support that also, have the draft statement of issues prepared prior to the oral hearings and then obviously Tribunal input into your views as to how things should be prioritised and dealt with.

I support Mr Afeaki's suggestion of having a co-ordinating counsel, we're not just dealing with people all in one area here. We're dealing with people scattered across the country, so a committee has worked pretty well in several inquiries now and I think could again. It also helps to get a bit of focus, because typically one counsel takes responsibility for one aspect or one area or something or a hearing week or such.

Just with regard to Ms Walker's suggestion about a group of Māori tohunga and the way in which they would proceed, I assume, I may have missed it, but I assumed that was being talked about in terms of identifying issues, themes and priorities more than the technical organisation of the hearing. Maybe not, maybe there's an input to be had there as well, but I just wasn't quite clear on that.

Moving onto research, we're grateful that the Tribunal staff have already started on this. It was very valuable to have in Veterans Ms Mars' production or identification of research and the gaps in the research and therefore the need for additional research as earlier on as possible, so it came late in Veterans for one reason or another, but the earlier that could be done, the better. Because of course if you then have to sit and wait for another year while historians or other researchers are given a proper amount of time to do a decent job, everything grinds to a halt.

It's not just research also, it's gathering resources and perhaps that's something else that Ms Walker's group would be able to help us with, identification of all manner of materials that are out there, which won't necessarily be on an academic library's database.

The matter of funding cuts across this all in several different ways. Obviously legal aid is the primary concern for those of us on this side of the room and tēnā koe Mr Howden, but there are other big issues, funding for claimants has been mentioned and in these inquiries there is a lot of travel involved because they will typically be held in maybe half a dozen different centres around the country which mean that someone may have to, for example, travel from Gisborne to Tauranga or down into Hawke's Bay and so on. There's the accommodation cost, a whole raft of costs around that. There are claimant hui to be had and a whole raft of things that people normally have had funded by CFRT but which of course will not now be coming from them.

The Tribunal were well aware it does not have the resourcing to do anything more than fund hearings and so the Veterans have done an awful lot of self-funding which has been something of an issue and we don't want that to be repeated. It's going to be once again an ongoing problem for all kaupapa inquiries, where is that, the wherewithal coming from to be able to do these things.

And I guess at this point we look back to our friends from the Crown behind me and say, well there should be some thought given to at least two directions here. One is does the Tribunal actually have the budget to do its job and with no reflect at all on the Tribunal or its staff, our observation is that over the last year it hasn't. There is a whale of a lot of things going on which the Tribunal just doesn't seem to be able to keep up with and then there are all these demands on its time, the members to attend urgencies and so on. This is

going to be a big inquiry, it's going to require quite a number of weeks of hearings and a lot of background work, of the sort we've already talked about, and that's going to need money from somewhere and the obvious source is of course within its increase in its budget from Vote Justice or whatever it's called these days. And then as I say there's the resourcing for the claimants.

1610

And perhaps the – we'd have to figure out how this could be managed actually amongst the claimants but maybe a certain amount of funding available for claimants within a given hearing week or something like that. I really don't have much clue as to how – since we have no organisation in place as to how that could be organised but perhaps a co-ordinating counsel inquiry committee is a first step forward with that.

The outcomes from this inquiry have been raised by several of my friends and this is, I think, far more difficult for a kaupapa Tribunal than perhaps a regional one where land and resources and the like are obviously in view, Crown resources generally and such.

Now obviously there should and must be an impact of Crown policies and processes in the present day and I absolutely support Mr Andrew's submissions heading down that track.

There should however also be redress and or restoration for past problems, many of which haven't been properly addressed and will not be addressed in the districts because the older inquiries didn't in fact include socio-economic issues and even when such issues were concerned those sorts of things have not necessarily been part of the settlements.

I agree with Ms Sykes about the difficulty of formulating a group for negotiations and proceeding thereafter, but I'm not sure that that's a matter this Tribunal needs to add to its workload. I think that's something that needs to be worked out amongst the claimant group, however that shapes up in the future.

And my final submission Sir, is to support My Lyall in his proposal for perhaps ending the inquiry with some sort of wananga to get input on solutions and things which may feed into your recommendations at the end. So those are my submissions Sir.

JUDGE CLARK:
Thank Mr Gilling.

DR BRYAN GILLING:
Thank you Sir.

JUDGE CLARK:
Now do we have someone from Oranganui Legal?

(4.13) EVE RONGO:
Tēnā koe Sir, members of the Tribunal, counsel's name is Ms Rongo and you already have details of the claims I represent.

JUDGE CLARK:
Just keep your voice up Ms Rongo. Just keep your voice up.

EVE RONGO:
Okay, sorry. I'd also like to highlight, I filed a memorandum of counsel, must be after a certain deadline because it hasn't been included in the pre–judicial conference review. Wai 2425 was originally included in the preliminary list of

historical claims from the direction #2.5.1. I've recently got instructions for the claimants and they've asked to be included in this inquiry as well.

JUDGE CLARK:
What's the Wai number again?

EVE RONGO:
2425. All right, turning to the submissions, looking at notice. As counsel, my email distribution lists are growing everyday with people wanting to be updated on what's happening in the inquiry, and they're not just claimants, they're people that are looking forward to being witnesses as well. Perhaps that's one way that we can do it.

I also know, just looking at the advice I was given from Moana Jackson when I was a Law Student, that we're not just lawyers who happen to be Māori, we are Māori that happen to be lawyers, and as such we have roles within our own iwi, hapū and whānau to inform them of also what's happening in the Tribunal. That's one role I've been given, being part of Ngāti Koata, Ngāti Toa, and I've approached them, just to let them know what's going on in this inquiry, and perhaps that's things that claimants and counsel and others can do as well. I've also, as you do, spoken with friends at kōhanga, rugby, at church, just spreading the word on the kūmara vine.

Now with regards to social media, I think my 60 – 86 year old grandmother would dispute that social media was just for the young, and yeah, she uses Facebook. I think it's a very good way to spread the news.

Looking at resourcing, I support the submissions that were given by Dr Gilling concerning claimant funding in Te Paparahi o Te Raki. The claimants organised themselves into Taiwhenua which are regional based groups and CFRT funding has been used to assist them in that organisation.

The claimants in this inquiry of course have yet to form groupings, I'm not sure what form it will take, whether it be issue based or regional, I'm not sure, whatever they decide, but they will need resourcing at that time. And it would be good if the Tribunal could support the co–ordination and efficiencies that these groups bring, whatever shape it maybe in and perhaps the Crown will be able to assist in this as well.

I'm looking at the inquiry process. The claimants that I represent support Option B on page 13. It appears to be the most efficient time and resource savings. Claimants supports the oral hearings for prioritised claims, and after the discussions with our claimants of Wai 2643 her request is that mental health and suicide be actually included as one of the issues that should be given priority and be heard during oral hearings.

I have noticed the draft statement of issues being a lot further down after the oral hearings are held. It may be beneficial to bring them up just so people know what is being covered. Perhaps not a draft statement of issues but a preliminary overview of the claims that the claim issues include in the inquiry.

I've also noticed that – like Ms Walker pointed out, that the Crown statement of position and concessions which you would normally find in a process during a district inquiry is absent from this process. And being different from a district inquiry it may be beneficial if the Crown could feed in throughout the whole process as research comes to light or as evidence is shared any concessions or acknowledgements that they recognise and they are prepared to offer. Specifically, before the oral hearings are heard in the early stages before research is done.

Also with regards to the oral hearings it was beneficial in the Te Paparahi o Te Raki – oh sorry in the Te Rohe Pōtae hearings to have researchers attend those oral hearings as well, like Dr Gilling said they were

mostly Ngā Kōrero Tuku Iho so they were whakapapa and how the iwi associated with each other, so it was very important for the researchers to attend that.

We're also looking at the submissions that Ms Walker made, we support a one–day information session on a health 101 as she put it, looking into basically an overview of the system. I think that would be beneficial to not only the Tribunal but also us counsel.

Turning to the scope, the claimants that I represent view is that they want an inclusive process where all the claimants in this inquiry, whānau, hapū, individuals have an opportunity to progress their claims. Their experience in the district inquiries is that through these foreign processes that they have to go through, it's historical, it's the Native Land Court, it's the Waitangi Tribunal, it's a foreign environment. Some iwi, some whānau members have experienced conflict within their own whānau and this is something that the claimants don't want to see ever. They made a claim as a Māori. They want all the claims to progress together. They would like to manaaki and manaaki other claimants as well and move forward together. They do acknowledge that some issues will need to be given priority such as mental health and suicide and they're fine with that as long as the rest of the claims are following out the back.

1620

The Wai 2425 claim is a historical claim and would fall within – would be at risk of not being heard if the Tribunal was to focus solely on contemporary issues. So they are asking for historical issues to have a place in this inquiry. Just looking at the submissions that were made by Mr Johnston in his written submissions concerning the Ngāti Kāpō claimants. The claimants that I

represent fully support any processes that may assist the health challenge to fully participate in this inquiry and I think it may also assist them as well.

With regards to sensitive issues, sensitive health information, we do have a claim that concerns mental health and suicide as said earlier and it was difficult enough for my claimant to come and sit down with me and talk to me and open up and draft a Statement of Claim, let alone stand up in a foreign environment such as this and to talk to you all about her experiences with mental health and suicide. So it is our submission that perhaps in that sort of circumstance a closed Court process be developed where perhaps it's just the Tribunal, witnesses and their counsel and perhaps a representative of the Crown sit together and share that information. But of course my claimant has given me instructions that that submission may need to be reversed because her whānau who support her and herself, see that there will be merit in sharing their experiences with everyone else but that is something they will look at, at the time.

With regards to research, we welcome the inclusion of research reports that were presented in previous Tribunal inquiries, historical inquiries and giving consent perhaps in select briefs of evidence as well and perhaps a process can be set up where counsel can serve these on others and then we have an opportunity to read them and file submissions on whether they're filing on the Record of Inquiry for this inquiry have merit.

With regards to legal aid, it's good to see that legal aid have come today and we acknowledge the registration of the new claims by the Tribunal and the section 49 reports that have been drafted and we look forward to that being sent to the Legal Aid Service.

We also support the co-ordinating counsel committee suggestion that has been raised. It has been very beneficial in the Rohe Pōtae and Northland

Inquiry and is of assistance here. Those are the submissions that I have, unless there are any questions I will sit down.

(4.23) JUDGE CLARK TO EVE RONGO:

Q. I just have one question. In terms of the oral hearings, people have used that phrase, it seems almost interchangeably with taonga tuku iho hearings that have occurred for example in the Te Rohe Pōtae inquiry. I was going to ask this question of Mr Gilling, but I'll ask it of you since you mentioned it as well, do you differentiate between the two types of oral hearings? Ie, I can well imagine that a lot of people will say certain people need to be heard urgently because of their state of health. Now I, off the top of my head, would suggest that's a different category of persons than just your normal claimants who might give evidence in the normal way. Do you differentiate between the two or what are you suggesting?

A. Yes, it has worked differently in the Rohe Pōtae Inquiry for example, like Dr Gilling stated, it's been mostly where the Tribunal have been able to hear about what connects all the iwi and hapū of that area and what's their whakapapa order there, their historical stories that has been passed down from generation to generation. It was brought about because a lot of our pakeke at the time were waiting a long time for the inquiry to actually start and once it did we wanted to ensure that their voices were heard, so that's the background behind the development of that oral hearing, of that Ngā Kōrero Tuku Iho. In the Military Inquiry, it was used mostly the same reasoning to have those voices heard but mostly for those that had ill health that needed to be heard soon because they might not be here later on, as my learned counsel Mr Afeaki stated, there were 10 people that had presented evidence as witnesses in the Military Inquiry that are not now here with us, so that process definitely has merit. In this inquiry, I do see a difference between oral hearings and ngā kōrero tuku iho. Of course you won't be hearing kōrero passed down from generation to generation, although

there may be stories of the state of health, like my claimants 2425 when they migrated from their home in Northland to Auckland, she's got evidence concerning the state of the health system then, but certainly not from five generations back for example. But with regards to the oral hearings, I see that as in this inquiry as making sure that those with ill health are heard first.

Q. So not everyone that wants to be heard? That's what I'm trying to understand. You see as I understand it in my discussions with the Chief Judge and the Chair, for obvious reasons the Veterans Inquiry, there were certain persons who needed to be heard urgently. I suspect the same, there may be people in this inquiry that need to be heard fairly quickly. Otherwise they won't be around to give evidence in a year or two. I contrast that to witnesses who are fit and healthy and alive and have all their faculties. Are you suggesting or are other counsel suggesting we should hear them orally fairly early on, because some people seem to be suggesting that.

A. That is not my submission Sir. My submission follows that the oral hearings be set aside specifically for our pakeke, for those that may not be here to give evidence in the more substantial – the hearings later on where everyone will be participating with cross-examination and technical reports included. The oral hearings are just for the elderly.

Q. I don't think it would be necessarily limited to the pakeke, I mean those who for whatever reason it could be their particular illness, disease.

A. Yes, yes, I agree with that and how that also could be where the prioritised hearing issues can be heard as well.

Q. Okay. Okay, thank you.

A. Thank you Sir.

JUDGE CLARK:

Phoenix Law, do we have someone from Phoenix Law?

CHARL HIRSCHFELD:

May it please Your Honour, Sir, Hirschfeld. I have instructions from Ms Mason. She is unable to be here today and tenders her apologies. She's made it known to the Tribunal that she does wish to address and seeks Your Honour's leave to address tomorrow.

JUDGE CLARK:

Okay. Do you know whether she'll be here tomorrow when we commence?

CHARL HIRSCHFELD:

First thing.

JUDGE CLARK:

Okay, thank you. Mr Johnston?

(4.29) PETER JOHNSTON:

Yes, may it please the Tribunal. I am speaking from the lectern to the left of the audience. Counsel's name is Johnston. I have the privilege of appearing for Wai 2109, Ngāti Kāpō. Now this is a claim by Maaka Tauranga Tibble for and on behind Kāpō Māori Aotearoa New Zealand Incorporated, also known as Ngāti Kāpō and on behalf of all Kāpō Māori, that's Māori blind, vision impaired and deaf blind persons and their whānau.

1630

Sir, members of the Tribunal, as indicated earlier on today in the whakatau regrettably the named the claimant for the claim Mr Tibble is unable to attend this first judicial conference due to health reasons and he has asked that I note his apologies. Sir I do note, however, that the Board for Kāpō Māori Aotearoa have been present since early this morning and I acknowledge in particular the presence of the President Mr Nigel Ngahiwi.

Sir, members of the Tribunal, the Wai 2109 claimants, the Ngāti Kāpō claim is a national claim involving significant national health issues that have not previously been considered or inquired into by the Waitangi Tribunal. The Wai 2109 Ngāti Kāpō involves the marginalisation of a group whose story has collectively remained untold. Unlike for research Māori health generally, the health and inequalities for kāpō Māori are not well documented. Indeed, the health and wellbeing, plight of kāpō Māori appear to have fallen through the gaps. Sir, in my submission it is a story that needs to be told and to be given priority in this Health and Outcomes Inquiry.

Sir I have filed a detailed submission which is document #3.1.45 and I don't propose to speak to that today. Instead, I would like to focus, with your leave, on matters raised in the May direction and that is #2.5.7(a).

Sir if I could first turn to the issue of notice. Sir, the Ngāti Kāpō claimants will abide by the Tribunal's decision in relation to public notice. However, they do note the extent and breadth of claims and claimants that have already expressed their interest to participate in this very important inquiry.

If I can now turn to the claims and the dates for filing new or amended statements of claim. Sir, members of the Tribunal, the principle claim issues that the Ngāti Kāpō claimants wish to bring are to be set out more fully in a further particularised statement of claim. Given the derth of national data and/or comprehensive research regarding the health and wellbeing of kāpō Māori, Ngāti Kāpō ask that they be provided the opportunity to fully and finally particularise their statement of claim following the completion of targeted research.

Sir, and in my submission, this is different to the matters raised by my learned colleague Mr Andrew when he referred to a number of inquiries having evidence relating to the health and wellbeing of claimants within those

inquiries. That is definitely not the case for kāpō Māori or indeed, other Māori generally who may be suffering from other forms of impairment such as you know hearing or other disability.

If I can now turn to the issue of eligibility. Sir, members of the Tribunal, the kāpō claimants agree that a timetable and process for filing of submissions concerning eligibility needs to be determined.

Regarding the question of eligibility, the Crown has indicated its view that a number of issues claimants' seek to have heard in this inquiry are not primarily related to health services and outcomes. Sir, in the submissions we filed in March and referred to earlier, we noted that socio-economic factors such as education, participation in work, poverty, standards of living and housing have directly contributed to the poor health and wellbeing of kāpō Māori and their whānau.

The Ngāti Kāpō claimants wish to raise the socio economic factors as issues in this inquiry on the basis that poor health and high mortality rates are generally associated with a low socio-economic status. They are in my submission intimately interwoven.

Sir, we submit that a comprehensive and full inquiry, taking into account the specific needs of Māori suffering from poor health and/or disability, is needed. Influences outside the home system, including home environments, overcrowding, housing conditions, the ability to participate in work, access to transport and welfare services and institutionalisation have a strong influence on the health and wellbeing particularly of kāpō Māori.

Sir, in my submission also is that the Ngāti Kāpō claimants are particularly vulnerable to these outside influences. In my submission, the Ngāti Kāpō claimants' health and wellbeing have been disadvantaged on many levels and

it is important that the Tribunal be provided with a complete picture of how kāpō Māori health and wellbeing is being disadvantaged.

In my submission, limiting the Tribunal's inquiry to health services and outcomes will result in serious prejudice to a particularly vulnerable group. In my submission, it is crucial that the Tribunal be provided with a complete picture.

Sir, if I can now turn to the scope of the inquiry. Sir, in my submission it is appropriate for the Tribunal to adopt a mixed approach to this question. In our submission, filed in March, Sir, members of the Tribunal, we highlighted some of the unique features of the Ngāti Kāpō claim and those are set out in paragraphs 20 to 22 of that document.

In my submission, the unique features of the Ngāti Kāpō claim and claimants would make it appropriate for the Wai 2109 claim to be heard on a claim basis. This would help ensure that kāpō Māori and their whānau could properly and fully participate in this inquiry. Sir, in my submission it would also enable a more effective use of Tribunal resources.

Sir, members of the Tribunal, the next issue I would like to turn to involves whether or not the Tribunal should focus on current Māori health status, current issues, legislation, policy and practice. In my submission, much of the poor health outcomes suffered and currently suffered by kāpō Māori claimants have their causes in historical acts and omissions of the Crown. The evidence currently being prepared by Ngāti Kāpō claimants will show this.

And I reiterate Sir, members of the Tribunal that these claim issues have not been previously heard by the Tribunal or settled. Accordingly, in my submission it would be inappropriate for an inquiry of this nature and importance to limit its focus to predominantly contemporary matters,

particularly where issues such as those experienced by kāpō Māori have not been articulated or inquired into by any other Tribunal.

If I can turn now to the issue of priority matters and the expedited hearing process. Sir, the Ngāti Kāpō claimants request the Tribunal inquiry process proceed as soon as possible. Many of the claimant witnesses are elderly and are unwell. And as mentioned in the whakatau this morning, we were deeply saddened to hear of the recent passing of Ngāti Kāpō kaumātua Mr Jim Morunga and our thoughts are with his whānau at this sad time.

There is a word of caution with expediting the process though Sir. The Ngāti Kāpō claimants would ask that any early or expedited hearing process not be undertaken in a manner that forgoes the ability of Ngāti Kāpō claimants to properly participate in this inquiry. That includes practical issues, Sir, such as the time it takes to potentially brief witnesses and also to obtain the necessary targeted research.

1640

Sir, there has also been the discussion with my learnered colleagues about the oral history or taonga tuku iho process and I'd like to make a few submissions in that regard. Sir, in relation to the Ngāti Kāpō claim it is important that any hearings, be they oral or otherwise, enable evidence to be presented from a wide range of Kāpō Māori witnesses to cover the full range of issues experienced by them, and this is including from pakeke through to rangatahi.

And now the experience is not necessarily the same from region to region or within region, so the experience of the Kāpō Māori living here in Wellington central versus one living up the coast is not necessarily the same. And so

Ngāti Kāpō are concerned that those full range of experiences are placed before this Tribunal.

Another issue, and it's tied in with funding as well, is just the resourcing that's required to enable Kāpō Māori to properly participate in the inquiry. Today's a prime example Your Honour, the Tribunal has gratefully included a hearing loop which has enable almost all of the pakeke Kāpō Board members to be able to engage in the process, but I understand that one of our pakeke has not been able to pick up that sound loop so has not had the benefit of the discussions today. And there were all sorts of issues associated with Kāpō Māori and their ability to access events. Indeed, I had a discussion with a Tribunal staff member a few weeks ago and their observation to me was that they had, in all their years in the Tribunal process, it never actually observed Kāpō Māori being present at a Tribunal hearing. And I must say that that comment resonated with me.

And so when it comes to resourcing Sir, members of the Tribunal, their issues such as travel and accommodation needs, the witnesses propose to be called by Ngāti Kāpō reside across the country. Many of them have multiple impairments, some are wheelchair bound, some are bedridden. So there is a whole array of conditions and experiences which this claim can provide important context to this Tribunal. And those factors Sir, members of the Tribunal, in my submission need to be considered when any resourcing issues are discussed.

Sir if I can now turn to "Research", and as I've already noted the Ngāti Kāpō claimants have significant concerns of the health and equalities of Kāpō Māori are not well documented. Accordingly Sir, Members of the Tribunal, in my submission Ngāti Kāpō claimants believe that it'll be useful for the Tribunal to commission a suitably qualified researcher to prepare a scoping report which collates the available data and all available research regarding not only Kāpō

Māori but also Māori suffering from some form of general disability. This scoping report could identify any research perhaps that may require further, targeted, expert, or technical research.

Sir, just with a concluding comment, one of the main factors of this claim involves marginalisation and marginalisation of a significant group of Māori who reside across the length and breadth of Aotearoa. And the comment from the claimant – the lead claimant Mark Tibble which resonates with me at the moment was that he was concerned that any process moving forward did not result in further marginalisation, and he was very concerned that the story of Kāpō Māori not be lost because it's been remained untold for too long. Your Honour, those are my submissions.

(4.35) JUDGE CLARK TO PETER JOHNSTON:

Q. Just on the question of resourcing Mr Johnston, so let's just take it as a given that resourcing is an issue. But what are you specifically asking of the Tribunal – what are you specifically asking of the Tribunal in relation to you clients?

A. The Ngāti Kāpō claimants to battle to participate, in my submission it would help if their claim could be heard as a separate claim. That resourcing and time being made in the timetable to ensure that the Ngāti Kāpō claimants could have their issues heard. In my submission, that would help in a number of ways to ensure the smooth running of this inquiry and would also result in savings to the Tribunal. So instead of having to – and also for the claimants as well, instead of having to appear numerous times across the country if that's how this process is going to play out, it would help if they could appear one time to present their claim.

Q. Is there a geographical preference?

A. There is, and that would be Tūranga, Gisborne. The primary reason for that is that is where the lead claimant Mr Tibble resides, the Ngāti Kāpō head office is in Hawkes Bay and it would be a lot easier for them to

resource people to go to a venue such as that than to travel to numerous venues. The lead claimant is not well and the Board are concerned that his ability to participate is given a priority.

Q. Okay. Okay, thank you.

A. May it please the Tribunal -

(4.37) DR ANGELA BALLARA TO PETER JOHNSTON:

Q. Would that that be together with Ngāti Turi – would that be together with deaf or just kāpō?

A. Sorry, I heard the last part of your sentence.

Q. Would you want disabled and deaf to be included in that one session or not, would you rather have just one for kāpō?

A. I have not taken instructions in that regard, I can see some – I'd need to obtain instructions. One of the difficulties is is that the number of potential claimants, witnesses that we have would be very significant.

Q. Right.

A. And so on its own I think it would be quite a significant undertaking.

Q. Mmm.

A. The database for Ngāti Kāpō is substantial for its organisation and given the paucity or dearth of research, they're very keen that the Tribunal be provided with the life experiences of a number of their members to ensure that a full picture can be provided.

Q. Mmm. You might need to provide us with numbers and where are they coming from because Tūranga is quite hard to get to isn't it, in terms of –

A. Well there is a plane that flies in their Dr. Yes, it is isolated, it's not –

Q. I'm thinking for people from Auckland for example, I mean, there are probably more of them than there would have been – is it easier to Tūranga from Auckland?

A. My discussions with the committee yesterday were that it is less of an issue to get them to one event and that Tūranga was very much preferred and that it would make it – that that could be done.

Q. Okay, thank you.

A. Sorry, can I just – sorry, the other matter just been raised is that, in relation to Toi, Ngāti Kāpō board are not aware that they've filed a claim or are involved in these proceedings.

JUDGE CLARK:

Okay.

PETER JOHNSTON:

So I hope that answers that point.

JUDGE CLARK:

Thank you.

PETER JOHNSTON:

May it please the Tribunal.

JUDGE CLARK:

Mr Hirschfeld.

(4.50) CHARL HIRSCHFELD:

May it please Your Honour, Hirschfeld. I appear at the lectern. I appear with my learned friend Mr Tennant today on behalf of Wai 87 and 16 other claimants.

The state of play there Sir is that most have Wai numbers. One has appending ASOC, amended statement of claim, the others are in the pipeline likely to be ready within the month on our schedule.

I took the opportunity to file a memo, that's #3.1.19, which articulates particular interest issues and so on that have been identified for and on behalf of the claimants that I represent. Broadly speaking they are to do with Māori

children's health, Māori mental health, there are issues related to mortality and poverty being a big issue, and the case study mentioned there is specifically in the Bay of Plenty.

That important question raised about historical contemporary is fundamental to this inquiry and it is because as some have said before me those who do not learn from history and condemned to repeat the failures of the past. There has been no comprehensive historical inquiry of the nature envisaged here before and if this opportunity is no taken the chance maybe lost for such an investigation for another generation.

I'm talking about generations, it is about generations and the intergenerational figure is high in the Māori health aspect. We all know that already. So we owe it to past generations to enquire into their stories and the historical narrative there. There is an urgent need for a historical record which is comprehensive and above all accurate, credible and embracing of the broad subject matter here. But it also has a practical turn to it as well.

Many policy reports and policy reports which contain analysis and proposals contain a historical introduction, and it is thus important that such introductions in policy documents is accurate and well resourced as possible, and of course the Tribunal's reports rank amongst the most historically important records that we now have in this country, especially concerning Māori of course. And they now routinely provide information every day of the week for various and important reasons, and ultimately we are looking here towards policy formation in the future which can improve a bad situation. So it's likely to be a valuable governmental and societal resource, the historical side of this investigation and that is why I speak so strongly to the topic. It will have a very long shelf life indeed. Of course the contemporary side is important, that goes without saying, and there is much work to be done.

Now just going to the aspects of stages being spoken about, it was suggested at one point that the historical could be later in the piece. My submission which I prepared for today in advance was that both a historical and contemporary inquiry can occur at the same time so those two stages can happen, it will take adroitness on the part of all concerned to achieve that goal, but this is an experienced Tribunal bar and we are capable, I submit, of being able to rise to a task, difficult but as I submit achievable. So the historical and the contemporary can be done at the same time is my submission.

Looking at page 13, Option A is what is favoured. In my submission, for those whom I represent, a few points there in looking at Option A. On cut off for statements of claim and ASOCs, in my submission the simple way of dealing with that, so it's all fair, there is no abuse of process and everybody has a chance and the ends of justice can have be served, is that there be a leave limitation on it which means yes, there is a cut off point but you can apply for leave to get into the ball park, and that's a fairly simple jurisprudential test.

On the oral hearings, yes we need them sooner than later, in my submission. There are those ones who won't survive long into the future, they need to be heard, but for that it's possible process wise to sever the oral hearings process on a needs basis, so that the first portion of oral hearings can take place sooner rather than later as suggested, and that it serves a real purpose, there's utility in it and everybody understands. Much has been learned from the Military Inquiry and that institutional knowledge passes on here.

On the publicity point I support the view that social media be exploited. It's the way of the future, we know that, and it would be helpful. It's helpful, not just in terms of the sheer publicity but the ongoing connection, so social media serves a greater purpose than on the face of it, just notifying is a keep in contact proposition.

On legal aid and resourcing generally, can I go back to that very helpful discussion document of the Tribunal, the 21st of April, it's bullet point penultimate on page 10. That is an important issue there that's about – I am sorry, the – I correct myself, it is the second bullet point, Land Loss Colonisation and so on. That's an old matter really because there is causation in there as the deep issue that that land loss long ago coming back to haunt now in terms of health outcomes. How do you do that? Not easy is the answer to that.

1700

That will require in my submission a special kind of expert evidence which may not necessarily be available just in New Zealand. I am thinking of that because the expert will probably be someone whose familiar with such things as the Cherokee displacement and the Scottish clearances and what affects 200 years later those catastrophic events have on contemporary health issues. So there will be a resource issue getting a certain range of expert for a very complex topic.

While I am on page 10 limitations. I don't think we're going to find out about limitations until we are down the track a little at least. But I just wanted to say in respect of the second to last bullet point there, that prison health issues are something that certainly I want in being a lawyer who practices criminal law and sees what has happened to Māori men in prisons. They have significant health issues which require profile and such a inquiry as this.

Just one last point on resourcing. It is about getting claimants to hearings. What happened in the Military Inquiry was that a lot of veterans found it really difficult getting to venues and, in fact, lawyers paid for their clients, claimants, other witnesses to be there. We seek no praise, I just draw it to the Tribunal's

attention that it is an issue and it needs to be addressed. It is not going to go away and it is going to be a big deal, I would imagine, in this inquiry.

May it please Your Honour those are my submissions.

(5:03) JUDGE CLARK TO CHARL HIRSCHFELD:

Q. Mr Hirschfeld just on the prison health issues.

A. Yes.

Q. I mean it has been a little while since I have read your memorandum, but is that an issue that will be incorporated into the amended statements of claim?

A. Your Honour yes it will be.

Q. Okay.

(5:03) DR ANGELA BALLARA TO CHARL HIRSCHFELD:

Q. Will it not dealt with in the *Corrections* report? I haven't read it yet. I haven't got a copy yet. Isn't that one –

A. I haven't read the *Corrections* report yet myself.

Q. No.

A. If it has I may have cause to be corrected in the extent that I have –

Q. I don't know I haven't read it yet but I haven't got the copy yet.

A. Yes. Well –

Q. It seems like the issue that should have been.

A. – it's going to be pleaded by me and we'll see what happens then. Thank you Sir.

JUDGE CLARK:

We have come to the end of our scheduled day but I just wanted to check from amongst the lawyers if there is anyone who cannot be here tomorrow, otherwise we will stop now? There is no one, okay. Okay, mahau e whakakapi.

KARAKIA WHAKAMUTUNGA (NĀ DR THOMAS ROA)

HEARING ADJOURNS: 5.08 PM

HEARING RESUMES FRIDAY 12 MAY 2017 AT 9.05 AM

KARAKIA TĪMATANGA

JUDGE CLARK:

Mōrena koutou. We will start shortly I think with Ms Mason. Just before we do so, for those counsel that were not here yesterday the process that we adopted yesterday was to ask you to focus particularly on the memorandum of directions of the 2nd of May and the issues identified in there that the Tribunal particularly want to hear about at stage in and around notice, claims, eligibility, the scope of the inquiry, research and any other matters in order to assist us in attempting to develop a process moving forward. We would find that most useful.

So as counsel come forward if you could identify yourselves, your name. You don't need to list all your Wai numbers we know what they are. And then just identify where you are for the benefit of the Ngāti Kāpō people who are here in the front row.

So starting with you I think Ms Mason. Is Ms Mason here? Just before you start Ms Mason, can I just indicate that we have been joined today by Tania Simpson, one of our other panel members.

(09:07) JANET MASON:

Tēnā koe Sir and tēnā koe panel members. Counsel's name is Mason and I represent a number of claimants which I won't go through. But Sir some submissions were filed this morning and in it there are submissions on a number of issues, but the most important one being the scope of the inquiry.

So Sir paragraphs 1, 2 and 3 merely set out what the submission will address and the scope of the inquiry submissions start at paragraph 5 and the

essential submission is that there be a historical focus as well as a contemporary one. And so I will start at paragraph 6.

READS #3.1.056 FROM PARAGRAPH 6

"That this inquiry should focus on all factors that have contributed to poor Māori health outcomes since 1840. The claimants do not agree to a contemporary focus only for the inquiry because it is important that previous Crown conduct be fully analysed and explored in order to ascertain what Crown conduct was in breach of the Treaty, and to be able to properly remedy the conduct that has been inconsistent with the Treaty. Māori and the Crown cannot move forward in any kind of enlightened manner unless they are able to examine the detail of those events and that conduct that led to the current poor outcomes in relation to Māori health. Those unable to catalogue the past are doomed to repeat it.

And Sir in the context of the rest of the submissions, this point is quite important for the claimants because there is the risk and danger that if one just looks at contemporary issues the hidden underlying causes, which relate to tino rangatiratanga and the autonomy of Māori to decide what health even means for them outside of the current system and then to put in place those measures will be lost.

0910

Paragraph 7. It is also important in this context to start historically with the meaning of te Tiriti and what the principles of the Treaty are. Counsel submits that the first issue to be examined should be a constitutional issue, looking at the nature of the partnership which was envisaged under te Tiriti and in particular, to refer to the Ngā Puhi claimants and the finding and conclusion that they received from the Tribunal in its Stage One Report.

So at paragraph 8 it sets out what the Tribunal concluded. I emphasise that that conclusion was a milestone in the jurisprudence of Treaty matters in New Zealand. That Tribunal said that:

> …the rangatira did not cede their sovereignty in February 1840; that is, they did not cede their authority to make and enforce law over their people and within their territories. Rather, they agreed to share power and authority with the Governor. They and Hobson were to be equal, although of course they had different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis. But the rangatira did not surrender to the British the sole right to make and enforce law over Māori.

As such, the Treaty was not a treaty of cession. The Tribunal also held that:

> In drawing this conclusion, we say nothing about how and when the Crown acquired the sovereignty that it exercises today. Our point is simply that the Crown did not acquire that sovereignty through an informed cession by the rangatira who signed te Tiriti at Waitangi, Waimate, and Mangungu.
>
> What does this mean for treaty principles? Given we conclude that Māori did not cede their sovereignty through te Tiriti, what implications arise for the principles of the treaty identified over the years by both this Tribunal and the courts?

And then the Tribunal went on to state that this was a matter that would be the subject of stage two of the Te Paparahi o Te Raki Inquiry, which hasn't

finished and which are some months, probably at least a year, before there is a conclusion from the Tribunal on that.

But at paragraph 10 that closing submissions have just been completed in relation to this very issue about what the consequences for the principles of the Treaty are on this finding that cession wasn't, or that sovereignty wasn't ceded. Paragraph 10, and this is from the submissions that were made recently.

The word "Partnership" is used in a different way now by counsel and by the claimants. It is used to mean the Partnership envisaged under the Treaty which was elucidated by the Tribunal in the stage one, as comprising three distinct spheres of "Sovereignty":

a. the British Crown governing its subjects over land legitimately acquired by it or them ("British Authority");

b. Māori tino rangatiratanga over Māori peoples, lands and other taonga ("Māori Authority"); and

c. a partnership, to be discussed and agreed where Māori and English populations intermingled ("Shared Authority").

So Sir if one starts from this basis where actually the Treaty means something different from what it had meant and what it had been interpreted as previously, then the remedies and the consequences that follow are quite different. So the idea is not that we're just patching up the current framework and providing more consultation or more funding from DHBs, this is really not what the claimants are after which is why it is important that there be a historical exposition of Crown conduct.

What they are wanting to do is to go to the heart of the matter and to look at: What effect someone's autonomy or tino rangatiratanga would have overall on the health of an entire population or peoples? That requires that the historical issues be examined. And Sir, I won't go into this, but attached to this in annex A are the submissions that were made to the Tribunal recently in the Paparahi o Te Raki Inquiry.

Paragraphs 13 and 14 refer to some recent urgency reports, the first one was on the TPPA and the second one was on the Re-offending, Māori Re-offending rates report and these similar arguments, submissions that I am now making were put before those Tribunals and both of those Tribunals concluded that it was pre-emptive to look at different Treaty principles and to accept that sovereignty hadn't been ceded and counsel distinguishes those two because they were urgent inquiries and there was a need to make an urgent decision, but at the same time to actually question that decision, but that decision has been made by those Tribunals. But in this inquiry it's a kaupapa inquiry. It is meant to delve much deeper into issues and especially for the Ngā Puhi claimants who are involved in this inquiry, they have already received a finding that sovereignty wasn't ceded, so surely there must be consequences that followed from that, in relation to the way that the principles are interpreted, for them at the very least.

And at paragraph 15, talks about the reason why those two reports ought to be distinguished, basically because they were urgent inquiries and this kaupapa inquiry isn't an urgent one.

Then in paragraph 16 counsel sets out the remedies that are sought by the claimants and in particular that findings that they collectively exercised mana and tino rangatiratanga over their peoples and other taonga and that the exercise of mana and tino rangatiratanga includes the responsibility for ensuring the health and wellbeing of their own peoples in accordance with

their own extensive body of regulatory laws or tikanga and that under article 2 they retained the full exclusive and undisturbed possession of their taonga and taonga includes their people and the health services and that this tino rangatiratanga over their peoples and the health services was never ceded under article 1, so right from the outset the Crown had no authority to impose its health system over Māori.

And then the ultimate remedy in paragraph 16(c) is the transfer, of course, of the provision of these services along with the requisite funding and technical support where that is deemed necessary to Māori and that the claimants along with iwi authorities and Māori Women's Welfare League and others to establish a Māori Health Commission.

So these, paragraph 17, these remedies rest upon the view that neither the claimants' tino rangatiratanga nor their kāwanatanga over their lands, taonga and peoples was ever ceded or delegated in any way to the Crown. It is therefore important that the historical context, under which the Crown illegitimately subsumed Māori into their health systems, institutions, policies and practices are explored and assessed against what was required under Te Tirti.

Sir, paragraph (b) again talks about the focus to include all relevant factors and it's been very helpful, the discussion document that the Tribunal put out in terms of organising the issues into the various topics and counsel has attempted to build on that and in annex (b) sets out a preferred order. Should the Tribunal be minded to accept the submissions that the historical context is important and that the meaning of the Treaty that has been concluded by the Paparahi Tribunal be the starting point.

So annex (b) sets out, just reorders the key topics and puts constitutional matters first.

JUDGE CLARK:

Ms Mason, I don't think we've got an annexure (b).

JANET MASON:

Sir, is it not the last two pages?

JUDGE CLARK:

No, we've got (a), which ends at para 3.3, anyway, that can come…

0920

JANET MASON:

Is it in none of the – it is my apologies.

JUDGE CLARK:

Has anyone got that?

UNIDENTIFIED SPEAKER (09:20:20):

No.

JUDGE CLARK:

Oh well, just move on, we don't have –

JANET MASON:

So there's a reordering of the topics and the first one to include, the constitutional one, and the topics there are to look at the meaning of te Tiriti/the nature of Treaty Partnership; and in particular the Principles of the Treaty in relation to health. Who has responsibilities in the Treaty Partnership for the health system, including setting national health policy and for health service delivery for Māori as a distinct population? And then who has responsibility for the shared areas?

And Sir, in this regard also a point to be made is that the Māori health system is quite different from the current system in New Zealand, and so one of the topics ought to be Customary Māori Health Systems, including, knowledge, policies and practices. What are they?

And then to move on then to the next topic which looks at the initial establishment of the core State Health System, and how the infrastructure was set up, how to policies covering everyone were established, the institutions and service delivery. And then to look at whether these included Tikanga Māori and whether customary Māori Health Systems and policies were included at that early stage or whether they were considered even?

JUDGE CLARK:

Ms Mason, I don't think you need to go through them because they are set out in writing, but the question arises in my mind why this particular order? I mean I can understand your submission that you start with Treaty Principles, you start with a historical focus, but why have you ordered it or reordered it in this particular way? Is there a particular reason?

JANET MASON:

Yes Sir, some of the things are not – all of the initial things were there so the reordering was primarily because of the finding of the Stage One Report of the Tribunal which significantly changes what the Treaty Principles are. So the first step would be if those – if that finding is accepted, that sovereignty wasn't ceded, then we're starting from a very different starting point, so in assessing whether conduct was in breach of the Treaty then the imposition of a National Health System which was quite foreign one and which Māori weren't consulted on, if that was the case, would be contrary to the principles of the Treaty.

And I think one of the main things is that the view, and this is covered in paragraph 20, the view of Māori in terms of the norms of their health system

are holistic, they are much wider than currently, and they incorporate spiritual aspects. So if we are looking at health are we only looking at physical conditions? Are we looking at the effect of autonomy on a person's well-being, on their wairua, are we examining all those things and which health system are we looking at because the two health systems are quite distinct.

So that was part of the reordering Sir but if the submission that historical matters shouldn't be included then of course it would look different, so that order is based on two assumptions, one, historical context is important and two, that the actual meaning of the Treaty and the Treaty principles are up for discussion and for determination.

JUDGE CLARK:

I haven't heard anyone say that historical context is not important but what some of your colleagues have said is are there matters which we should focus on as a matter of priority or initially.

JANET MASON:

Yes Sir, and the submission is that the establishment of a National Health System over Māori is critical. The establishment of institutions which then worked in the other side of the coin was the prevention of their own practices in terms of health, and they think, in paragraph 21, here it says that secondly there is already a substantive body of work internationally that looks into the that looks into the deleterious effects of colonisation on the mental, physical and spiritual health of indigenous peoples. It would be remiss of this Inquiry to preclude an examination of the causes of Māori ill health, and in particular, the intergenerational effects of colonisation, including; the takings of land and other natural resources crucial to Māori health and wellbeing; assimilationist policies which broke down Māori social and cultural structures and organisation; and the removal of social and cultural frameworks and values.

So the whole – the way it's been reordered there really goes back to are we examining a health system that is the current one which is of course quite different to the Māori health system, and that's, Sir, why the reordering and the looking at the initial institutional setup is important.

JUDGE CLARK:

Okay. Okay, where to now Ms Mason.

JANET MASON:

Sir, all the other things were just fairly straight forward that I don't really need to go into except the only other point really was to say that the submission is that it would be important to have at least a draft statement of issues before the research programme begins.

And again, part of the reason for that is if there was general agreement about the inclusion of historical and about the need to relook at the principles and the siding point then I suppose we could carry on with the research programme, but it appears that there are some contentious matters – well there appears in Crown's submissions anyway, that there would be some contentious matters in relation to scope, and therefore it would be useful to work through all of those and get some general agreement first before the research programme starts.

And so those are my submissions. The rest of them don't need to be mentioned.

JUDGE CLARK:

I'm interested in your comment about oral hearings because my recollection is yesterday, virtually all claimant counsel or many claimant counsel urged us to have early oral hearings, particularly for the aged infirmed persons under extreme disability. Now you've got quite a different submission here so –

JANET MASON:

Yes, so the problem, without meaning to be disrespectful to those people, is that that situation is ongoing. It's different from the Military Veterans where there were certain specific events but the claimants view is that the breaches of the Treaty started in 1840 and they are ongoing, so they are not located to specific events like 1943 where there might be some people still alive. And so then the more important thing in terms of priorities was to get an agreed statement of issues and that people could begin drafting or getting their evidence together so at least if something happened that there would be some written briefs of evidence for the record.

(09:28) TANIA SIMPSON TO JANET MASON:

Q. Tēnā koe, thank you. Just wanted to – if you could help me with a clarification, you talk about the Stage Two Te Raki Report, looking into some of the constitutional issues in terms of what that means and it sounds like you're asking us to start in that space, but I'm trying to understand the crossover I guess and timing of that around, you know – what we don't want to do obviously is duplicate anything that is kind of under way at the moment, and so I am just trying to understand how you see that fitting there?

A. Well I mean that's essentially the problem and that's the problem that the TPPA Tribunal had to get over and then the Reoffending Report, and where they got to was to say, "We can't intervene." The submission from the claimants is that there has been a finding for the Ngā Puhi claimants at least, that sovereignty wasn't ceded, and so that ought to be the starting place for them anyway. There are consequences for the principles and may be the Tribunal in an urgent inquiry wouldn't have to turn their minds to it, but certainly I don't see that this inquiry would be under the same restrictions in terms of timing. And then, perhaps if it were set up as "an issue" as one of the issues to be determined, given that finding from the Paparahi o Te Raki Inquiry, what then follows for the principles of the Treaty, in particular in relation to health. And so

then that would mean there would be some time and then the stage two report might be out before this Tribunal makes it final, you know, this inquiry comes to an end.

(09:30) DR ANGELA BALLARA TO JANET MASON:

Q. You have outlined a programme which is heavily weighted towards the historical as the first problem. You don't think that there might be a danger that *"Ko Aotearoa tēnei"* it would be the model for the Crown reaction to the report? That, in fact, if we leave the crucial modern current health problems which come out of it which come out of the past to the latter end as it were of the report and do it and starting with 1840 that the whole report might be ignored?

A. Well there is a tendency for the reports to be ignored and the Crown has a responsibility to take them into account and to look at the recommendations. But from the claimants point of view these problems that they have and ongoing health problems have gone on for 170 years.

Many of the claimants are under no great illusion that there will be some magic outcome in five years or two years and would rather have that exploration of what has actually gone on than some remedies that, as I started with, are about more consultation or a little bit more funding from the DHB. Those are not the sorts of remedies they are after.

There is a fundamental inconsistency with their views of health and what it means, in particular the health and wellbeing of a person and how that relates to the environment and how that every person has a wairua. That is inconsistent or at odds with some of the current health practices which don't look at those things as spiritual or other aspects first, but instead the focus is on ambulances at the bottom of the cliff. So in order to have something that will actually work for them and their populations, they feel it is important to go and relook at this.

This comment is made in light of the recent media coverage of the removal of children from their families and the investigation and the

petition that was signed by Susan Devoy and many others who actually want an exploration of what has gone on and to go into detail and to have a Commission Inquiry because they feel strongly that unless that is done the problems don't appear. You know unless you go back and look at every situation does it become clear to people. They can see patterns. They can see what has happened. But if you're just pulling out occasional things then, we will end up with more band aids, fixing a problem and no real solution for the claimants.

(09:34) JUDGE CLARK TO JANET MASON:

Q. Thank you Ms Mason.

A. Thank you Sir, thank you.

JUDGE CLARK:

I think next we have Mr Sharrock.

GERALD SHARROCK:

Yes Sir. Tēnā koe Sir.

JUDGE CLARK:

Kia ora.

(09:34) GERALD SHARROCK:

Counsel's name is Gerald Sharrock. I am here with co-counsel Mr Paul Harman. I am taking that precaution partly due to my health that was reminded by my clients who said I should continue to take my medication.

Sir, we are intending to divide our claims our emphasis into two parts. Mr Harman will be concentrating on mental health, rural Māori and drug victim services. My emphasis will be more on a generalised examination of health outcome disparity and in particular, I wish to look at that in the context of

First Nations people and their loss of self-esteem and economic and power and the way that it has had effects on health.

I would also like to consider the Australian Māori population in terms of its health outcomes because it is a large substantial population which potentially have a distinct environment and different attitudes. There has been some work on Māori health in Australia particularly in Queensland and that I would submit bears further examination.

I also want to look quite distinctly at the issues of drug policy in this country because Mr Harman and I both agree that the impacts of drugs on the health of Māori and all New Zealanders is going to be very considerable over the next two decades and a challenge to the infrastructure of health in this country. And I would also like to look at the potential for self-governance in implementing a future health policy.

Now on the broader issue of submissions, we believe that there is a need for some contextual historical understanding of what happens. Now there is also Mr Harman and I are still debating this issue with some rigor but in my opinion there is intergenerational issues. The health outcome of a population is not borne in 10 years or 15 years, it is borne over multi generations and that comes from education levels of the parents, housing standards of the children et cetera, et cetera.

In basic terms, I see this hearing in two parts: causation and solutions. We have to determine what has happened to cause our existing health outcomes. Now this is going to be a very difficult process. If you take as an example a study in the academiology of a particular disease it very frequently has five, six or seven causative factors. If you consider the health outcomes of a population that is likely to be many times that number. It is my submission, however, that one of the crux issues in health is the socio-economic condition

of the population and that comes in everything from education, to housing standards, to diet, to income, employment and you know then on to issues of self-worth, self-esteem, domestic violence, domestic structures and breakdown and substance and drug abuse.

On the issue of whether we should have early personal hearings, yes I believe they should but I think they should be limited. The reason I believe we need them is to humanise this inquiry. As Joseph Stalin said, "The death of one is a tragedy, the death of a million is a statistic."

(09:40) JUDGE CLARK TO GERALD SHARROCK:

Q. Well he would know.

A. Sorry?

Q. He would know.

A. He would know.

Q. Mmm.

GERALD SHARROCK:

But it is that if we stare face to face with the human consequences of some failure or deficiency, or even just practice of our current health services I think it brings the reality home.

From my own personal experience I thought one of the most telling pieces of evidence I heard in the Northern Inquiry was where one of my witnesses said, "The health issue to me is that I enjoyed my Pākehā grandparents for 30 years longer than I enjoyed my Māori ones," and in one simple phrase that to me encompassed many of the issues.

As I have said, the parallels with First Nations peoples in first world countries such as Australia, Canada and the United States I think bare examination in terms of seeing the health outcomes that are common in terms of depression, substance abuse, suicide, et cetera. There appears to be, in all of these

instances in my submission, issues going to self-esteem and self-worth, and in a New Zealand context tino rangatiratanga.

In the issue of resourcing, I believe that would be appropriate to suggest that the Ministry of Health may wish to assist because this inquiry is looking at their issues from a broader context. I believe it is one of the challenges of this inquiry to be broadened inquiry and I will use this analogy. Our health services could be seen as an anti-flooding programme and at the moment our anti-flooding programme concentrates on building dykes down on the flat lands to control the flow of the water. It is not to say that we do not need dykes on the plains but we perhaps also need to consider planting trees in the hills to slow the flow of water on to the plains.

In terms of that metaphor Sir, I am reminded of a statement by Dr Chamberlain, who is the Chair of the Northland DHB, when he felt that the biggest impact on health in the North could be the provision of more good quality jobs. So in other words to broaden the aspect and see ways that Government policy could address the deprivation and the social disadvantage of Māori as being a way to address the health outcome.

In a more microcosm example, Northland is attacking its rheumatic fever by very aggressive approach of monitoring, testing and treatment. It doesn't have the power to address the issue of overcrowded and poor quality housing. It is not within the ambit of a District Health Board to do that, so the only way they can address that issue is the way they had. But the fundamental cause generally recognised by clinicians is poor housing and overcrowding.

My clients are from the North, Sir. I think this Tribunal has got to examine health issues for Māori both nationally but also regionally. There are material disparities and health outcomes on a regional basis and there is a set of papers by Otago University group who has done studies on health disparity in

Māori and it appears to reflect a preliminary conclusion that where economic outcomes are in line with the base population, health outcomes tend to follow. The issue is compounded in places like the North, the East Coast and the Central North Island where the delivery of rural health services particularly impacts Māori.

As to the question of notification and publicity. I believe the District Health Boards should be notified. I think the various Māori Health Trusts would be a good place to notify. And I think the District Māori Councils would also be a worthy recipient of notification. They provide good networks down to marae level in all the communities in the country.

I think with that Sir I will pass the lectern over to Mr Harman.

(09:46) PAUL HARMAN:

E ngā mema o te Tribunal tēnā koutou, te haukāinga tēnā koutou, tēnā koutou, tēnā koe.

(09:46) JUDGE CLARK TO PAUL HARMAN:

Q. Just keep your voice up Mr Harman.

A. Sorry.

Q. Just keep your voice up.

A. Sorry.

PAUL HARMAN:

Sir, Gerald approached me to come on board – call me junior, call me co, call me privately funded, call me whatever you like in my legal capacity and I have agreed – in particular, the two areas. I want to focus on the options for process, the lessons I believe we can learn from the Military Veterans Kaupapa Inquiry that I have been involved in and the oral hearings.

One of the overarching issues that my clients and Gerald and I have arguments and disagreement is, “So where is this Kaupapa Inquiry going?” So going back to Dr Ballara’s statement, “Are we going to end up with a gigantic door stopper that the Crown just throws in the basket?”

Sir, when the Kaupapa Inquiry was started (and I revisited the memorandum of the Chief Judge that launched the Kaupapa Inquiries), there was a change of emphasis from the historical inquiries to the contemporary. But I think I included it. I wrote it down from paragraph 9 of one of the directions there:

> Kaupapa grievances may include both historical (i.e. the artificial pre-1992 borderline) and contemporary issues.

The experience that I have had to date in the Military Veterans hearings is that when you have a single issue, such as in my clients with Vietnam Veterans and Agent Orange intergenerational war damage, we are getting lost in the noise of the Kaupapa Inquiry. My clients are deeply concerned that a topic that some of them have been carrying for 30 odd years is getting lost. So that is a kind of a caveat to you about what you decide.

After hearing the counsel yesterday and Gerald and I having a debate this morning, I was given license to voice strong support for what Mr Andrew had said. That to be of some relevance should be a catch-cry for this inquiry. I don’t mean any disrespect to the people who are suffering from the effects of different diseases in the past but there is a relevance priority.

In that case when the counsel or a client bring before this Tribunal say “a single issue”, I want you to consider in the process making provision for even though the train left the station with, “We support option B,” and it has gone through. I will just find that beautiful coloured diagram. We get through to the option B, you get through to the oral hearing and the concurrent pre-casebook

review of existing evidence, agreed research programme and you get research phase. When you get to that junction I want you to consider adding a spur line to the train journey you are on, and that spur line takes a diversion out to a lock, set, load, hearing report back onto the main line. And as an example I want to give you – let's take P.

I've seen some of the statements of claims and I was thoughtfully exposed to a seminar at Flaxmere College on Wednesday night from Dr Amber Logan, and I think it's Dr Joseph Stone, a – forgive me I don't know the indigenous tongue, but black feet Indian. And it was run from the Taiwhenua, from Dr Tipene's organisation, and I've been following P very closely in this country for five years and I have a very personal reason for it. And I'm not going to go into that I use P because I don't.

But what I want to say is we've got a tsunami of P coming, and I saw on these diagrams it's like a – say when alcohol first arrived, when waipiro arrive to the indigenous people of this country. I don't know if they were drinking rotten corn water in those days but when alcohol hit their blood systems and their human bodies it did terrible things to people. P, on this chart of these doctors, pumps – does it to the synaptic nerve contacts, 11,000 times more impact – alcohol 100. And there isn't any method owned treatment like there is for Heroin, and we have in this country a mental health system, a Court system, a prison system, where the council and the doctors who see these crims are saying 70% of their crime in for which they were in jail is P related.

So I am putting to you if halfway down Option B, and the train is leaving the station we've got a single issue where there's enough generic evidence. I mean we could all use Mason Durie's published text, is Brandeis briefs to give us the historical context as to causation and colonisation. I mean, I mean no disrespect to the membership that's in front of me but I don't see any medical qualifications, so why not take Brandeis brief approach or even adopt his

amicus curiae or assisting parties, someone say of – I don't know, Dr Tipene over there or Dr John Broughton or the Head of The Royal College of Social Medicine in this country. Ramp up the credentials of the Tribunal, allow staggered reporting and make yourselves more relevant than the Cabinet could even see you coming from and then we might end up with some relevance for why we have, by my count, 26 lawyers. I'm not concerned about the Legal Aid budget. I've sat through pre–'88 Tribunal hearings where the counsel turned up and did it for nothing. I've been doing a lot of things on a social justice equity basis myself and I know another number of counsel funded their own clients through the Military Veterans thing because the justice demands it.

But if your inquiry goes down the Option B pathway, when you get to the oral hearings, this is my second thing that Gerald agreed I could raise is I do not agree with no cross–examination. And I think that was a mistake I think in the Military – all due regard Dr Ballara, she is a member of that Tribunal. What I am saying is my clients, in that hearing, according to their tikanga wanted to be cross–examined on their issues. In fact, we ended up with an open letter from Wira Gardiner which criticised to the Tribunal this lack of cross-examination, the fact that it goes to the credibility of the issues being debated and he CCd it to the Attorney General in the Cabinet Table and we ended up with a very public shit fight. And what I'm saying to Your Honour is don't foreclose the options for those parties who wish to present themselves and give evidence and be cross-examined on it, because that goes to the credibility and the issue of whatever report your write. And my submission Wira got it right.

There was a call on the statement of issues that you's drive it and I'm hearty in favour of that. We got lost in a lawyer versus – not just lawyers but clients and lawyers arguing over whether we should have the constitutional issues, we should have the Agent Orange issues or in the Military Veterans. At the

end of the day be the captain, steer the ship and tell us lawyers where to jump, how high to jump and when to jump over what issues.

Those are my submissions Sir, if you have got any questions, happy to take them.

(09:55) TANIA SIMPSON TO GERALD SHARROCK:

Q. Ā, tēnā kōrua. I just have a question for Mr Sharrock if I may around the oral. Your suggestions around the oral hearings, and you talked about those being limited, but you talked about them having evidence that is around personal –

A. Experience?

Q. – circumstances.

A. Yes.

Q. And those two things are, you know, how do you – I mean I guess there's a couple of things, one is that it's very hard for anybody not to be touched by people who you know, have suffered health difficulties and so we all have empathy, appreciation, personal experience, with that and I just wondered that the oral hearings are an opportunity for people to give their evidence to the Tribunal in oral form and often it's Kōrero Tuku Iho and that's the best sort of way that that can be presented and I just wondered, how do you do that and limit it?

A. I would suggest that counsel produce summaries of briefs, you know, perhaps a page long or half a page generally outlining the evidence to be given, they be submitted to the Tribunal and the Tribunal would make a selection of those that they wish to hear from. I think that is a fair approach and the Tribunal could measure the number that they would wish to hear from against the amount of time and the particular area of delivery of health services that are of interest to the Tribunal as they see the inquiry moving.

Q. Okay. I'd imagine that would be quite a task to –

A. The other alternative would be that the counsel would sit down – Tribunal would say, “We’re going to give you three days or four days for this type of evidence,” and then there would be meetings between counsel working out who would appear and how much time they would get, which is essentially what happened in the Veterans Inquiry.

Q. All right, thank you.

A. There is just one other thing I forgot to mention, I believe it would be useful if earlier on the Crown could establish the nature of their concessions and agreed facts or accepted reports so that, you know, we could move forward more clearly on the areas of contention. Okay, sorry.

(09:58) JUDGE CLARK TO GERALD SHARROCK:

Q. Just one issue Mr Sharrock, your reference to the state of Māori living in Australia?

A. Yes.

Q. Just anticipating a submission by the Crown that the duties on them may not extend to those who have – living in or exited New Zealand.

A. Yes that is a – I think the Treaty was made with Māori. Where they happen to be is not in itself eliminate the Crown’s duties. In fact it certainly can be argued that Crown policy has been a causative factor and now probably one in four Māori are now living in Australia. However, I think on the other hand Māori in Australia could be instructive of how Māori operate outside the environment of New Zealand.

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I would – just as an interesting example, Māori children of Māori families in Australia have educational outcomes equivalent to white Australia. Now the question is, how does that happen? No one has addressed themselves to that question but that is a matter of statistical record. So I'm saying that the existence of a substantial Māori population in a

different environment may allow us to shed light on the health outcomes in this country.

JUDGE CLARK:

Okay, thank you Mr Sharrock, thank you Mr Harman. Now, do we have somebody from Tamaki Legal?

(10:01) EOIN LAWLESS:

Yes thank you Sir, if the Tribunal pleases, Lawless for the Tamaki Legal claimants. Sir, I will be brief, much has been covered by others. On the issue of notice, notification of the inquiry, we found recently with advertising that many of the older generation that newspaper is still the preferred medium and we did get quite a good uptake from newspaper advertising. Other avenues we would suggest letters to marae, DHBs, Māori health providers as others have said. We are aware Sir that with the recent Marine and Coast area activity the Office of Treaty Settlements did a mail out. If they did that then there must be a database in existence and perhaps the –

JUDGE CLARK:

Who did you say did the –

EOIN LAWLESS:

The OTS, the Office of Treaty Settlements with the (inaudible 10:02:04) mailed out to marae and organisations and did a bit of a road show. We thought perhaps about a poster to go on GPs and hospital waiting rooms. We also thought perhaps circulating bodies that were not exclusively Māori, such as Kidney Society, Cancer Society, orders of New Zealand, IHC, CSS, Cancer Society. We may need to give some guidance there as to what extent the Tribunal may be prepared to listen to organisations that focus not exclusively on Māori whether it is for differences and how Māori experience, with those conditions, experience the health system, whether it is disproportionate as in something like gout or you know, if everybody with a

particular disease is treated badly and 10% happen to be Māori whether the Tribunal would be prepared to inquire into that, but it's at least getting the notice of inquiry up there.

In terms of contemporary historical split, we as with most, don't believe that it can be exclusively contemporary, otherwise the past issues and the grievances just get lost. If I could look, I think there's perhaps two areas of the history, there's the recent past, so somebody who suffered or their parents suffered from – or have a complaint about the health system that goes back to maybe the 1960s. They're still alive, they're still here, this is still relevant to them and it's not fair to say, "Sorry, it's pre-1990, you're out, we're not going to listen."

There's also the more remote past and I'm particularly thinking here of the impact of infectious diseases since European contact and the effect that that had and I compare that to something like the Black Death in Europe in the 14th Century. On the best figures we have we believe that that was about a third of the population died. When we bring that to the much closer in time and here in our own country, experience 60% of the Māori population had died by the end of the 19th Century and that's, if we still have a popular imagination, the effects of the bubonic plague way back we should at least have, as part of our cultural understanding that this is some terrible thing that has happened and we need I think to explore the reasons that that happened, what could've been done and to at least bring it to the surface so that we address it and can move on from it.

However, we do believe that current problems that we can do something with must take priority. We'd suggest a staged approach, focusing firstly on current serious life-threatening conditions that we can do something about. The next stage coming down to current conditions that seriously impact on

quality of life and then move onto less serious current concerns and historical grievances.

In terms of things like colonisation, land loss, poor housing, we think these should be considered as contextual, but to the extent that they contributed to poor health but we don't want to focus on individual cases of poor housing, poor education, there are other inquiries for that.

Maternal health, we see that primarily as a health issue that should be dealt with in this inquiry. Eligibility issues, in our submission counsel can address any areas of eligibility where there is a potential dispute by way of memorandum when they file a Statement of Claim or amended Statement of Claim as some of my colleagues have said, there shouldn't be that many and it shouldn't be that difficult to deal with.

The hearing process, likewise, we favour option B but we'd just like to modify that a little bit, with the oral hearings being contemporaneous with all three of those pre-casebook agreed research and research phase, so that simply, we visualise the drawing, the orange box comes down a little bit and the three purple boxes sit alongside it.

The question of a cut off date for statements of claim or amended statements, we'd actually like to see two dates for filing new or amended statements. First date could be around late November and that will determine eligibility and allow for an early casebook programme to be developed. Second date, we'd like to see after the case book research programme where new claims could be included or new claims in an amended statement for existing claimants. This should be a back stop in our submission for a situation where research brings out new material that wasn't originally anticipated when somebody filed the claim.

Oral hearings, yes, we're in favour of that, we suggested that in our memorandum, but we do also want the opportunity to put evidence in a more formal structured way, if it's going into the record and like my friend to test that evidence, if it were appropriate.

The inclusivity issues, yes, we certainly agree with that. We wondered if video linking may be helpful. It could be available from the local District Court perhaps. That may be easier for the sick and elderly than travelling. We'd also like to speak about confidentiality issues. I'm informed that with the Veterans' Inquiry that there was a bit of a conflict in one case with marae protocol where those said, "We can't leave," we wondered there whether perhaps a supplementary closed hearing at the Tribunal or a Court or by video link, so perhaps the Tribunal sits a day in Wellington and all those who want to be heard on a confidential basis video link into that, or attend obviously if they can attend.

Evidential material on the Record of Inquiry, we are a bit concerned that this could become quite unwieldy and we'd suggest that perhaps anything that was publicly available, such as statistics, reports, thesis, books, needn't necessarily be placed on the Record of Inquiry but could be referred to. Now maybe within those, some documents the counsel think should be on the record and could submit to Your Honours that that be done.

The date for providing or requesting material to be placed on the record, we think should be contingent on other milestones. If including the material is to inform the research programme then obviously that needs to be filed early at the same time as the amended statements of claim but with the option of perhaps adding more material discovered later.

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Researchers. We believe it is preferable that the research effort be led by someone with experience in these inquiries. Certainly a health researcher can have some useful input. We are a little bit concerned with a suggestion that someone who is actually appearing as an interested party in the inquiry becomes a Tribunal researcher and we may have misread that. But if that is case we are concerned about conflicts of interest and the appearance and actuality of independence.

Moving on to legal aid, financing and resourcing. We submitted in some detail in our memorandum that the claims in this inquiry are necessarily going to be more personal than they have been in the district inquiries. That it is going to be about my experience with the health system, my mother's experience, my brother's, my children. And while it may well be of some use that someone else had a similar experience, it is still going to be about someone telling their own personal story and bringing their own personal grievance of claim so to that extent it is going to require more individual research.

For example, a claimant has a grievance against something that happened to them in hospital. We need to get into that hospital record to find out what actually happened, even if it is accepted that there was a common problem here it doesn't prove that this happened to this client. So DHB records, ACC records, PHO records.

Now the Ministry doesn't usually grant legal aid for this type of thing but we need to get it and how are we going to get it? Can we get aid to look at those archives? Can we commission research? If we can, what is going to be the criteria? Does legal aid need the Tribunal to definitively state that the Tribunal is not going to research into that in order for us to get assistance to do our own research?

Thank you Sir for clarifying that the section 49 has been dealt with.

Looking at travel costs for claimants which is another issue that has arisen. Again, perhaps video links would help but there needs to be some assistance for claimants. For example, we cover the costs of experts travelling why not the claimants.

For this inquiry we are anticipating that the hearings won't be held at home, they will have to travel to a main centre. So you may be looking at somewhere from way up the top of the North Island to at least Whangārei or even Auckland, or maybe from Nelson all the way to Christchurch. That is a long distance and a lot of expense for people who are not particularly well off financially and in my submission would impact on access to justice. So there needs to be some funding for that, yes.

(10:13) TANIA SIMPSON TO EOIN LAWLESS:

Q. Kia ora. Sorry, did I understand that you are suggesting that there would be a multiplicity of individuals personal health cases that would be looked into as part of this inquiry and that you would expect access to all of the personal records for those?

A. Yes.

Q. I'm sorry I just wanted to clarify that.

A. Yes.

(10:14) DR ANGELA BALLARA TO EOIN LAWLESS:

Q. I do not really have a question but I hope that you are all considering that the Tribunal has limited means and limited staff and the kind of thing you are talking about is probably outside our purview. Authority for example to go to DHB records and so forth –

A. Mmm.

Q. – I doubt that we will get it. They will plead privacy and that sort of thing.

A. Mmm.

Q. Mmm.

A. Mmm.

Q. So I don't know what you have to say about that. We are relying on you people to inform us who are the people we should be hearing personally –

A. Yes.

Q. – and perhaps to organise examples of different kinds of problems hearing from people that way.

A. Yes. Examples. Well in terms of the Privacy Act we will of course have authority from the people concerned. In terms of examples yes it can be helpful as I said to have examples of similar things happening but it doesn't help if it doesn't have either the evidential basis for somebody who says, "This happened to me. This happened to one of my family." It also doesn't have even the cathartic basis of somebody being able to stand up and say, "This is what happened to me." The simple fact that somebody else says then outside of that they can say, "Well yes it happened to me too."

Q. That you know you have several examples of the same kind of problem –

A. Yes.

Q. – amongst your clients –

A. Yes.

Q. – then it is possible that you could –

A. Two.

Q. – select one as the most informed or the most relevant –

A. Yes.

Q. – to the inquiry.

A. Yes, yes it maybe.

(10:16) JUDGE CLARK TO EOIN LAWLESS:

Q. I suppose one of the issues that concerns me as we move forward is you talk about deeply personal individualised claims and I contrast that

against perhaps what I understood the scope of the kaupapa inquiries as set by the Chief which was we were to focus on issues which raised nationally significant issues affecting Māori as a whole –

A. Mmm.

Q. – and there is a tension between those two I think.

A. Yes.

Q. Would you like to comment on that? I mean it really –

A. Yes.

Q. – builds on what Dr Ballara says which is, do we have the resource as a Tribunal to hear every health related claimant or claim?

A. If they can't bring it here Sir where can they bring it?

Q. Mmm.

A. It is as you said it is a tension.

Q. Mmm.

A. Perhaps not everybody will want to bring their claim. But in my submission Sir those who do bring a claim it is important enough for them to do that. In my submission Sir simple justice demands that they at least get a hearing. They get, as others have said before me, their day in court.

Q. Yes.

A. It may not be much of a day in Court it may be part of a day in Court. But this is something that has been important to them and for a very long time they need to be able to get it out and have it heard. Yes.

Q. Okay, thank you Mr Lawless.

A. Thank you Sir.

JUDGE CLARK:

Te Haa Legal.

PETER JOHNSTON:

Your Honour, just before the next counsel presents, may I have leave just to raise a matter Sir?

JUDGE CLARK:

In relation to?

PETER JOHNSTON

Sir, just in relation to the hearing loop and the Ngāti Kāpō claimants present today. My understanding is it is very difficult for the claimants to differentiate between voices so that the voice that they are receiving on the hearing loop sounds the same. So it would be very helpful if speakers including the panel could identify themselves each time they speak so that they could follow the discussions Your Honour.

JUDGE CLARK:

Okay.

PETER JOHNSTON:

As Your Honour pleases.

JUDGE CLARK:

That's fine. So is there anyone here from Te Haa Legal? We got a message yesterday that I think could not be here yesterday but would be here today. No one here yet? Well we will just wait to see if somebody turns up. Te Mata Law.

(10:19) AUGENCIO BAGSIC:

A tēnā koutou katoa. Counsel's name is Bagsic and I am here Sir on behalf of the claims filed by Te Mata Law.

Going down to the issues Sir concerning eligibility. We support the other counsel submissions about setting a deadline for filing the statements of claim. And second, we understand that the Crown has identified two of our claims as being outside of the inquiry district, specifically the claim filed by Mile Wilkie and Mike Peehi concerning Coroners Act.

Sir, we will be filing with the submissions in the future but just the fact the Tribunal and you Sir –

JUDGE CLARK:

Mr Bagsic, can you just try and get a distance from the microphone whereby it's coming through – It's very difficult to hear you, sorry.

AUGENCIO BAGSIC:

No worries.

JUDGE CLARK:

Yes. That was Judge Clark.

AUGENCIO BAGSIC:

So just going back Sir on the claims filed by Mile Wilkie and Mike Pehi, Sir we submit that these claims are primarily health issues and initially the claims concerned conducts about actions, conduct and policy concerning what the undertaker does which was Mike Pehi's role. But the issues have grown Sir, and include and ask the questions on certain issues like, "Who owns the body, what tikanga is involved, and what happens when the person dies in the hospital," and other issues Sir. And this also raises some on and brings it to light the four aspects of Māori Health self – said by Professor Mason Durie which are te taha hinengaro, te taha wairua among others.

So we submit that the impacts of the Coroner's Act are on impacts on te taha wairua and te taha hinengaro, so these are for Māori health issues. And we further submit Sir that when Māori die these are the last health services that Māori receive from the Crown.

Regarding *"hearing approach"* Sir, we support the (inaudible 10:22:14) approach by other counsel but taking into consideration the difficulty of some

claimants to travel to hearing venues, so we would also support a regional approach wherein it was adopted in the War Veterans Inquiry. Probably Sir, in terms of venue the boundaries set by DHB would be helpful in terms of setting a venue for the hearings, and this also would encourage DHB officials from the Crown to attend the hearings as well Sir.

In terms of priority, at the outset are – we are reluctant to say which issues are important or which issues are more serious but we do acknowledge that there are priority or issues of – that have been discussed Sir, that some have conditions in terms of our mortality rates, so we submit other submissions of the other counsels – we support the submission of other counsel.

In terms of the claim that we have filed in terms of Rex Timu Sir, this just brought to the attention of one of the heart issues filed with the Tribunal. And there was an interview by Paula Bennett on TV about cutting the benefits or the funding to the rehabilitation programmes of the Mongrel Mob. And she just simply said that they are cutting off the funding just because, you know – I just recall her saying Sir, that she said that they think that they can fill up state houses, collect benefits and then deal drugs and then come to the Government to help them with programmes. And her argument is that if they can release a meth intake in their own members and their whānau, and to stop import and manufacture of supply, distribution of meth. So I think this Sir is one clear example of institutional and interpersonal racism that we have filed in our statements of claims.

In terms of contemporary issues Sir, we support other counsel's submissions that historical claims should also be included. Particularly for instance Sir our claimant filed 2145, a health and HIV claim, 15 years ago and he was still by the – she was still by the Tribunal to wait for a half kaupapa inquiry.

Same situation also with four of our Muaūpoko claimants who filed claims with the Porirua ki Manawatū Inquiry and they were told later by the Judge that they should also be included in the half kaupapa inquiry. So we submit Sir, if historical claims should be excluded from this inquiry then justice again will be served to our claimants for not being per 80% of their claims.

In terms of notice we also support what has been discussed previously on having social media and other modes of communication. And also support Dr Gillings submissions that a communications officer should also be appointed to the symmetric information about the kaupapa inquiry.

In terms of sensitive information we also support what other counsels have said regarding protection of the names of the clients or confidentiality of information and I think deleting some of the names of the claimants or clients should also be considered, especially if they don't want to be named or be part of the inquiry, to protect their identity.

And about resourcing Sir, we also submit the same concerns that other counsel have raised in terms of MOJ and Legal Aid.

So unless there are any questions Sir that's the end of my submissions.

(10.27) DR ANGELA BALLARA TO AUGENCIO BAGSIC:

Q. You made – it was difficult to hear you but you made some remarks about the concerns with the boundaries of the DHBs. Could you elaborate on that?

A. Yes, Ma'am, just taking from the experience we have with the War Veterans we're hearing things that were set based on the geographical locations, the companies, that A, B, C and D. So I was thinking of just to consider the difficulty that some of the claimants will be having in travelling to different venues, so probably looking at the boundaries set by DHBs would be one starting point. We are not saying

it will be primarily B, the determining factor, but what we are saying is that it could be one example on how to set venues for the hearings Ma'am.

Q. I see, thank you.

JUDGE CLARK:

Thank you, thank you.

GENE BAGSIC:

Kia ora Sir. Tukau Law?

(10.28) SEASON–MARY DOWNS:

Ā tēnā koutou, counsel's name is Ms Downs and I appear on behalf of Tukau Law alongside Ms Terei. We appear on behalf of Wai 682, a claim by Te Rūnanga o Ngāti Hine in respect of their health claims. Sir, I note that the amended statement of claim is still being prepared for that one.

Earlier this week Ms Terei filed an amended statement of claim for Wai 1544 and Wai 1677, that's filed on behalf of the Ngātiwai claimants. And we're also going to seek leave to participate on behalf of Wai 1464, Wai 1546, a Te Kapotai hapū claim.

Your Honour, we filed a memorandum at #3.1.39 and I don't propose to speak to that, rather I'll address some of the matters that are being discussed in this JC and the matters noted in the research paper.

In respect of the key topics and themes that have been discussed there's been some submissions around creating a thematic document or a statement of issues. I note that we started this process in the Wai 2500 Veterans Inquiry and we did that earlier on while the oral hearings were taking place.

Your Honour that was probably a good place for that to start because what it meant is that there was some focus for the hearings and the preparation of the evidence in that phase. And it also meant that we were able to identify where there was early disagreement with the Crown particularly in relation to constitutional issues and also in relation to the historic matters, and I note that that's been raised a number of times throughout this JC.

1030

In my submission, a preparation of a thematic document in draft form only would be particularly helpful because it will help us identify hot issues in this early phase. I note that some of those are identified in the research paper already.

And at page 527 of the JC research paper there's a list of emerging things. I think that this is a particularly good starting point but that there is some refinement in fleshing out needed and perhaps some ordering of the issues in terms of chronological order as well as thematically.

I that there's a little bit of uncertainty as to whether that process should be lead by counsel or lead by the Tribunal. In my view it should be put back to counsel at this stage because we have a good understanding of the issues within the various statements of claim, and I think that some engagement with Crown counsel at this point will help to identify the Crown position on the issues and also have that debate about what issues are priority and which issues aren't. So in my view we could quite – in a quite timely way start that process of creating a thematic document and counsel could lead that in the first instance. Where there are points of disagreement those can be noted to the Tribunal and ultimately the Tribunal can make a final determination.

At point 3.5 of the research paper there's additional questions and it asks whether or not there should be a largely contemporary focus. A number of parties have made submissions that there should also be an historic focus and our firm is in agreement with that. It shouldn't form the whole inquiry or be the main focus of the inquiry but it definitely needs to be there for contextual points and Ms Sykes raised about ensuring we have the evidence which covers the pedagogy and philosophical underpinnings, and we support that submission.

That same submission applies to question 2 regarding colonisation and poor housing living conditions, and I think in terms of question 3 it's a little bit early to say that those issues don't come within this inquiry just yet, and I think we need to carry out this initial scoping and fleshing out of the issues identified in order to determine what does and doesn't apply.

In terms of issue 4 relating to mental health, maternal services and maternal well–being, the Tribunal has sought an indication of whether they are better heard in the Mana Wahine Kaupapa Inquiry and one of our claimants under the Wai 682 claim, Ms Moe Milne is one of those original claimants. And I contacted her earlier in the week and she said that when they prepared that claim they did envisage that those issues would be heard in that inquiry. So while they don't have a firm view that they not be heard in this inquiry they want to ensure that there is a preservation of the ability to have them heard in the Mana Wahine Kaupapa Inquiry.

In terms of eligibility, this has been quite a significant issue in the Veterans Inquiry and I think that the early cut off hasn't been helpful and it's meant that as the hearings have progressed and as other claimants have sought to be involved they've had to work extra hard to seek participation, and perhaps that's not necessary. Other counsel have submitted that we would

be a bit more flexible in terms of the dates and the timeframes for filing of eligibility, and we would support that.

Also, I think the focus as Ms Sykes raised needs to be on having the appropriate coverage of issues and having evidence to cover all issues in this inquiry so that the inquiry has integrity and that it's robust. If we look at excluding claimants based on historic issues having been settled through settlements we maybe at a loss, and it's unnecessary because there are other ways we can get around it.

One of the things that we did in the Veterans Inquiry that isn't particularly ideal is that when we had claimants who didn't have Wai numbers, we, through the co–ordinated counsel process, assisted those witnesses to participate under other claims. But what occurred there is that it creates an issue with the Tribunal considering whether or not that evidence is in relation to that particular claim or at a generic inquiry level. So there is ways to – sorry there are ways to ensure all witnesses and claimants can be heard but we need to be clear about whether their providing evidence on a particular claim or if their participation is to ensure there is evidence on issues across the inquiry. Obviously there too, there are issues regarding funding and LSA's so there needs to be discussion about that and transcparency there.

In terms of what inquiry process should be followed, it appears that option B is probably the most appropriate option because it allows some duplication of processes at the oral hearing and casebook phase. In terms of the oral hearings we support the submissions of Ms Sykes and others where there is a focus on the elderly but also that there is a possible inclusion of pūkenga or pou kōrero expert-type evidence at that phase, so it sets the foundation for the next phase of the inquiry. I note that this occurred in Wai 1040 in its initial hearings.

Sir, you asked yesterday about whether or not that would also include people who are unwell, I think that would make sense and it should be encouraged. In terms of the formality of the oral hearing phase, I think that there needs to be the ability for it to be less formal. I think there's a tendency now for things to become more prescriptive and that for briefs of evidence to be required when perhaps they should be optional and that's to allow, you know, more flowing kōrero and a more fluent discussion, fluid discussion.

In terms of specific requests I think that the Tribunal has got a really good process in terms of maintaining sensitivity and confidentiality and I don't think that that's something that needs to be laboured at this point, it always seems to address those matters fairly.

In terms of the evidential needs, at this point we defer to Mr Gilling's submissions, he seems to be someone who is particularly knowledgeable on the research programme and he has assisted us a lot in the Wai 2500 inquiry, particularly in respect of preparing a bibliography and I'd like to suggest that a bibliography would be – sorry, a bibliography as well as a chronology would be helpful for this inquiry. An early identification of a chronology is in my view one of the most helpful things because it helps us focus, you know, our evidence on what particular timeframes and issues are a priority and significant. I think it will also help with the fleshing out of the early contextual and historic information.

In terms of funding, I think that funding is one of the biggest issues and I think that it needs to be considered not only at a kaupapa inquiry level but an urgency level as well. One thing that we're finding s that every party is resourced to be and participate except for the claimants and they're the party that are already suffering prejudice. So for all kaupapa inquiry and all urgencies there's no certainty and in fact no funding for their participation. They lose funding that they would have had in district inquiries to hold

wānanga, to ensure claimant co-ordination, to cover their travel costs. There's no briefing expenses covered and for me, in my experience of my claimants, it's particularly difficult and it's becoming unsustainable for them to continue to take the obligation of challenging these Crown actions and not have any support to do so.

Therefore in my view, I think that what is required is a more robust review of how we tackle the kaupapa inquiry programme as well as urgency inquiries going forward, doing it on a case-by-case basis and on a kaupapa inquiry basis isn't working. I don't think that we've had enough clarity come out of the Wai 2500 Veterans' Inquiry to be of any use in terms of the funding matter. What needs to be sorted is what is the policy? What is available to the claimants and what is going to be covered? It can't be the Crown saying, "You tell us what you need on a case-by-case basis," I don't think that that is working.

Just on – and I think that in terms of the funding as a final point, I think we can work that out, if we just sit down and have a bit more of a thorough discussion and we include that as part of the inquiry design and as part of a wider discussion about how the Tribunal is going to tackle kaupapa contemporary and urgency claims going forward.

As a final note on other matters, notice has been raised a number of times and I think like it has been mentioned as we went through the Wai 2500 Veterans' Inquiry, as oral hearings progressed and as we held hearings in more centres more and more people came forward to participate. But we can front foot that a little bit more and I did a quick look on Facebook last night and the Waitangi Tribunal does have a page but that might be a replica or somebody has stolen the Tribunal logo which is not helpful. But it is relatively easy and it is very cheap to do social media advertising. Radio advertising is

also very helpful in terms of iwi radio and obviously making contacts with key health organisations and key Rūnanga and community groups is essential.

1040

If it's going to be oral hearings going forward, the location of those oral hearings is very important as well as the claimant co-ordination that happens in those centres prior to those hearings. We support the construction of a co-ordinating counsel team. In the past it's happened quite fluidly but I think that it's absolutely necessary. It's not a very easy role, but I think that it helps the Tribunal understand where there is broad agreement on issues and if that's necessary in these types of countrywide inquiries and from my experience different counsel come forward at different times, so there needs to be flexibility. We have different senior lawyers with expertise on different issues, so somebody might lead the research programme, somebody might maintain the hearing timetables and the overall co-ordination might rest with somebody else and that's the type of co-ordination that we would promote going forward.

Finally on timing, I think that we need to be realistic about how quickly we hold these inquiries as well as taking into account all of the urgencies and other contemporary claims that need to be heard. Just as a side note I note that there is a JC proposed for urgent inquiries in relation to the Marine and Coastal Area Act and one of those proposals in that inquiry is that it also be given priority along with the Veterans' and the Health Inquiry. So those types of proposals as they are considered by the Tribunal might impact the inquiry programme and we need to be sure that lawyers can do all the work necessary across the board. It's all very well to want to have a fast inquiry, but when it comes down to it, it's actually quite difficult. So my view is that we should just keep all of these factors in mind and have an overall plan.

One final matter is that a lot of counsel are participating in the Wai 1040 inquiry and that's going to wrap up this year, so I imagine that we are all going to have a little bit more time to really get our teeth into these other kaupapa inquiry which will mean that I think that we'll be more focused and we'll be able to ensure the preparation and co-ordination are to a high standard. Those are my submissions Sir.

(10:43) JUDGE CLARK TO SEASON-MARY DOWNS:

Q. Ms Downs, it's Judge Clark speaking, the chronology issue, just off the top of your head, what sort of factors would or matters would list into that?

A. In the past our joint claimant chronologies have included all relevant legislation policy, Crown actions, key developments in particular in relation to those issues that are dealt with in that inquiry. So we've had one in Wai 1040 and we've also had one in Veterans.

Q. Right. The funding issue is one which obviously concerns everyone. I suppose all I can say is that if it is a real issue in terms of the kaupapa inquiries in particular moving forward, that's probably got to be drawn to the attention of the Chief or the Chair and the governance group, rather than on a case-by-case basis at different inquiries, if it's an issue across the board, that's where it needs to be brought to the attention of. I mean we will report obviously, make comments to the Chief about the outcomes of this inquiry, but if it's a consistent theme, that's where I think it needs to be raised.

A. I think too with the conclusion of CFRT funding for the district inquiries as those wrap up, there needs to be a real significant effort put into thinking about how, like you said, the funding issue is going to be sorted for claimants. Because it essentially means that there is no funding for claimants for anything going forward and that isn't sustainable across contemporary urgency kaupapa inquiries, so that would be necessary.

Q. You see, as a practical issue, I mean, others have mentioned the use of AB technology.

A. Mmm.

Q. Which when it works well works very well. You may not know that we don't have it in the Tribunal, nor in the Māori Land Court, that's a decision by Justice. So I agree with you, it could work well in principle persuading the powers to be to give us that technology is another issue.

A. Mmm. In terms of that, I think that there may be space for it in circumstances. And then we'd also need to think about whether it's culturally appropriate in others. But like I said, the Tribunal seems to respond really well practically to the needs and the sensitivities of these things, so maybe a level of it would be appropriate.

Q. Mmm. The claimant coordinating counsel committee, I mean, I'm aware that that happens in a number of different inquiries. I wonder how workable that will be in this inquiry when you've got a very, very broad range of different types of claims, some dealing with very personalised matters, at another – at the other end of the spectrum we've got claims which are truly national in focus.

A. Mmm.

Q. So I don't know you all – because you're all captured by your instructions, how necessarily that will work well?

A. It doesn't always work well.

Q. Mmm.

A. But sometimes it works well. And I think in the times that it does that that can be helpful for the Tribunal to receive one coordinated memo addressing a particular issue with the inquiry. It doesn't often work well in the thematic document statement of issues phase because that issue does arise where everyone's got differing views. But at the very least what it does do is it forces the issue and it forces the identification of difference, and that in itself is helpful. It's not necessarily a nice process for us behind the scenes but what we can do is identify broad agreement and where there's not agreement, and that in itself is useful.

Q. Okay. So I think what you're saying is you – counsel should be afforded that opportunity?

A. We should try.

Q. Mmm.

A. And we do.

Q. Okay, thank you.

A. Kia ora.

JUDGE CLARK:

Wackrow Williams?

(10:47) CORAL LINSTEAD-PANOHO:

Tēnā koe e te Kaiwhakawā.

JUDGE CLARK:

Kia ora.

CORAL LINSTEAD-PANOHO:

Tēnā hoki koutou ngā rangatira o te tēpū rā. Huri noa ki tō tātou nei whare, tēnā tātou katoa kua huihui mai i tēnei rā i runga i tēnei kaupapa tino whakahirahira ko te Hauora.

May it please the Tribunal, counsels name is Ms Linstead-Panoho and I appear today on behalf of four claimants in this inquiry, two of which have been included in the list of claims attached to your memorandum directions document #2.5.7(b). The other two are the Wai 1821 claim by Mr Wikoki Kingi and the Wai 1795 claim by Mr Tawhirimatea Williams who we've just received recent instructions to act on behalf of.

JUDGE CLARK:

Can I just ask you – it's Judge Clark here. Did you have instructions to appear for Mr Kingi?

CORAL LINSTEAD-PANOHO

Yes we do Sir.

JUDGE CLARK:

Okay. Is he – yes, the previous indication was he was unrepresented but that's – so you've now got those formal instructions?

CORAL LINSTEAD-PANOHO

Yes, and we have filed a memorandum earlier this week Sir.

JUDGE CLARK:

Okay. Okay, thank you.

CORAL LINSTEAD-PANOHO:

In respect of those claims I note that we have filed an amended statement of claim for the Wai 2476 claim on the 27th of April which sets out the issues relating to that claim – the key issues relating to that claim. And we're working towards finalising amended statements of claim for the other clients we represent and we will file those as soon as we can.

Memoranda have been filed in respect of all of the claimant – the four claimants that we represent responding to a number of the issues outlined in your earlier directions Sir of the 21st of December, and largely all of those issues have been covered or considered in the discussion paper helpfully prepared by Tribunal staff. Rather than go through those submissions in any detail, if Your Honour pleases, I propose only to speak to a few of the points listed in your memorandum directions.

JUDGE CLARK:

That's our expectation.

CORAL LINSTEAD-PANOHO:

Okay, thank you Sir. All right. The first issue that I'd like to speak to is eligibility, that has been addressed in each of our memoranda. But if I could just make a general comment that none of the claims we represent have been heard by the Tribunal, there's no settlement that would prevent those claims from being heard in this inquiry and there's no current or pending parallel inquiry in which these claims could be heard.

We note that in regard to the Wai 1795 claim, we have requested that a historical inquiry be convened as that claim forms is a claim of Whakatohea – from Whakatohea, and we have requested that a North Eastern Bay of Plenty District inquiry be convened but as yet there has been no indication from the Tribunal. So in my submission, that isn't prohibitive for our client participating in this inquiry.

The second issue that I'd like to speak to is the scope of the inquiry. There isn't much really to add to all the comments that have been made by claimant counsel so far other than we would support that the historical contextual issues be included in this inquiry, so we support that approach, not purely the contemporary issues.

I also submit that until such time as a preliminary cut off date for statements of claim has been set, I'd caution against any definitive limitations being applied to restrict the scope of the inquiry and I think previous counsel from Te Mata Law mentioned that there should be – sorry, I don't think it was Te Mata Law, but that there should be two cut off dates for the amended statements of claim; one pre-casebook and one post, and we'd support that approach.

I'd also expect that following that cut off date for amended statements of claim being set, the Crown's list of issues that has identified as potentially being outside of the scope of this inquiry may also be revised at that time. Finally,

the last matter I'd like to speak to is the issue of research. Our clients generally support a scoping exercise being undertaken by a suitably qualified researcher or researchers to identify what evidence both historical and contemporary is available and where there are any gaps.

Our Wai 1813 claimants, in particular the Woofgrams and the Te Hā Leadership Group which has been noted in the discussion paper, comprising Māori Academics and Researchers in various fields are interested in participating in or assisting with that research process at whatever stage in terms of the initial scoping exercise that we submit should be undertaken. Or even at a later date when the issues have been set, they are qualified and prepared, and noted that they're available to assist with that.

The only limitation really to that occurring is the matter of resourcing which is – yes, is really the only limitation to them being involved in that process should the Tribunal consider that helpful. Those are my submissions Sir.

JUDGE CLARK:

Okay, thank you.

CORAL LINSTEAD-PANOHO:

Thank you Sir.

JUDGE CLARK:

Woodward Law. Is Ms Hall here? She was here. Just before you start Ms Hall, we are due to take a break in about 5 or 10 minutes, 5 minutes or so, so I will get you to start now if you wish?

(10:54) DONNA HALL:

Good morning Tribunal. I am here today on behalf of the New Zealand Māori Council and there are a number of claims that have been filed. If I just go through them quickly; Sir Edward Taihakurei Durie is here for the Council,

then there is Ms Wanda Brljevich who has filed on behalf of Ngāti Huarere ki Whangapāua, Taipari Munroe on behalf of himself, and Whatitiri Māori Reserves Trust, Merete Topanga for herself, and Tahuriwakanui Hapū of Ngāti Kauwhata. Ms Ngaio Te Ua on behalf of herself and as a member of the Te Waipounamu District Māori Council. Sir Edward again for the Raukawa District Māori Council but that claim is soon to be amended so as to replace Sir Edward with Ms Ana Winiata, who is the CEO of the Raukawa Hauora. Hamuera Hodge on behalf of himself and as a member of the Tumahaurangi Māori Committee.

There is a claim by Ms Tina Latimer and others for Māori of Pamapuria and Kaitaia District generally. A claim by Rangi Wade who is the chairperson of the Wāhiao Māori Committee. A claim by John Huka on behalf of himself as a tribal member of Ngaruahine, and he's also the chair of the Aotea District Māori Council. Ms Rangi Easthope who is a co–chair of Ngāti Rangiteaorere Māori Committee, part of the Te Arawa District Māori Council. The Reverend Harvey Ruru, Archdeacon sorry of Nelson who files for himself and as the chairperson of Te Tauihu District Māori Council, and finally a claim by Dennis Emery who is an iwi health advisor at Arohanui Hospice, Palmerston North, and there is also the elected chairperson of Ngā Kaitiaki o Ngāti Kauwhata from Fielding.

These claims Sir have been filed as umbrella claims that is they are intended to hold a position until the hauora of the district in question have had an opportunity to consider the claim and to join into them or to take them over as they so wish. So this leads to the New Zealand Māori Council's opening submission on the issue of notice.

We say all hauora, all hauora, should be given notice and perhaps three months to decide if they wish to join up in this claim. New Zealand Māori Council considers that the hauora claimants should lead

this particular kaupapa inquiry. Council says hauora are the professionals in primary health care services to Māori and Māori in their communities. They operate throughout the country and are at the cutting edge of Māori health care service delivery.

In the very short period of time that I personally have been working on this claim, certain things have surfaced as common to the fore hauora with whom New Zealand Māori Council consulted, and my personal thinking is that it is very likely these themes are likely to be common to all hauora. I have the themes ready to go Sir, is this a convenient time to stop for morning tea?

JUDGE CLARK:

No, well just tell us what the themes are, just broadly.

DONNA HALL:

Okay. A failure to recognise Māori difficulties to access to all areas of health care, and part of access is cost to get to the service and then to pay for it. Medical advice, frequently not understood, especially in relation to serious illness like Cancer. Crown funding for Māori health service providers is not equivalent to the funding for other service providers, and Māori have more onerous compliance requirements.

Line funding versus bulk funding. The Health Department policy of funding according to the numbers who received specified services i s not suited to the Māori holistic method of managing the needs of whānau according to a holistic health package. This is the Whānau Ora method which is best managed by bulk funding. Contract or pay parity.

The registered nurses and kaimahi of the Māori providers are paid less than their equivalence in mainstream. A practice which assumes that the Māori service provider is inferior. The result is that Māori leave for mainstream work

that reinforces the view of a Māori service being inferior because Māori are less able to maintain and hold their staff.

Unequal funding of services, some services are better paid for than others. Leading to providers, adjusting what they do and what is best for their clients in order to go where the money is.

Inequitable allocation, the amount of money for Māori service is far less than a pro–rata allocation based on comparative populations, and there is uncertain support. Service providers consider the department wishes to phase out the Māori health providers because of a belief that they are not doing a good job. Māori in turn seek to work through Whānau Ora, increasing the pressure on that limited fund.

And finally, low comprehension of the Māori circumstance. Hauora kaimahi are on–call seven days a week to meet whānau availability but they are funded only for a five day week.

Now these are common themes that the council found talking to four hauora and the suspicion we have is that these things will be common to all hauora. So the basic problem is that Māori are not trusted to be able to do a good job and Māori are being assessed on the delivery of services according to Pākehā tests of wellness. And that is why the council opens it submissions by saying hauora should be leading this claim.

I can carry on?

JUDGE CLARK:

No, we'll take the break now, thank you.

HEARING ADJOURNS: 11.03 AM

HEARING RESUMES: 11.36 AM

JUDGE CLARK:
Back with you Ms Hall.

DONNA HALL:
So to recap Sir, the basic problems seem to be that Māori are not trusted to do a good job in caring for our own people and we are assessed on the delivery of services according to Pākehā tests for wellness. I'll come back to this if there's time.

So the claims we say should be focused to look forward. Māori needs in the health sector right now, cannot afford for this Tribunal to spend time and scarce resources looking backwards. Māori need this claim to be timely and focused and most of all relevant. This means no to a case-by-case inquiry approach, just no. Individual cases may demonstrate policy shortcomings, but no individual relief should be considered. The rationale for this is to limit the scope of the claim or otherwise it will get out of hand or put another way, its knees will give way under the weight of its own upper body. The Tribunal should not let its attentions be distracted away from the key issues and a forward looking approach and it is hauora who should set that approach.

On the question of dealing in stages we say that's okay, that's okay, but only if a broad holistic approach is settled first, so that the compartments of health are managed according to a single approach. The hauora with whom New Zealand Māori Council has consulted, they seek policies on health that are consistent with kaupapa Māori. That is the framework that they seek to have brought in and by which they should practice.

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Then moving to the issue of research. The Council feels that the research needs should be defined and set by Hauora and the council would support the Hauora research programme and believes that this Tribunal should give that priority recognition. This would help the Hauora to negotiate with Legal Services Agency on the necessary research to progress the issues which Hauora defines as priorities. I am led to believe that Hauora has already itself accumulated significant research of an original and unique nature. It has already collected significant amounts of research and that it would be a sensible thing for this Tribunal to build from that body of research. Hauora is not starting from ground zero. Hauora has put down the framework and the matting by which Māori Health Services have been provided across the country to tribes, to communities, to families and to individuals. It does not start from ground zero and that should be recognised.

The New Zealand Māori council also does not start from ground zero and we believe that it is appropriate to recognise Hauora in a way that will enable Hauora to negotiate with the Legal Services Agency. The Council is the only organisation, the only Māori association in this inquiry that has statutory authority to advocate and present policy in the best interests of all Māori. It has that unique authority and we believe that if we can stand beside and work with Hauora, all Māori will benefit out of this inquiry and out of taking a steer from the people at the frontline.

The Hauora structure by its nature would require an approach which identifies broad issues and keeps the focus on national policy. Now local issues may be relevant but only to demonstrate national policy shortcomings. They don't become a focus in themselves and historical issues, these are irrelevant, but again only to the extent that they inform on current policy. This claim should be forward looking and contemporary in nature. There are no restrictions on eligibility if the claims are treated as contemporary and there is much to be learned from previous and current Tribunal inquiries. For example in the

Water hearings, a paramount rule is that there is no duplication of anything and all cross-examination is limited. Questions must be in writing.

So New Zealand Māori Council seeks, in this submission, a direction from this Tribunal that for the purposes of this Health kaupapa inquiry that it will give priority recognition to the Hauora and the New Zealand Māori Council undertakes to be right there beside Hauora as this inquiry goes through and New Zealand Māori Council and I'm sure Hauora, the Council's here and listening, in turn we would both undertake to work alongside all claimants and interested parties in this very, very significant inquiry. Those are our submissions Sir.

(11:45) TANIA SIMPSON TO DONNA HALL:

Q. Tēnā koe Ms Hall, ko Tania Simpson tēnei. I'm just – just wanting to come back to your focus on contemporary issues and trying to understand if Hauora consider, I guess, to what extent contemporary issues might have the origins and historical matters and – so how they – if so, you know, can we deal with contemporary issues that way?

A. Mmm. If you go to Sir Edward's claim, Taihakurei's claim, he sets that out. But these are links back to historic past, they do take us backward looking, we're going – looking backwards, we're looking the wrong way. The Hauora are right at the front now and what they need is to be supported right now. So the history and the historic background is always important but not at the expense of the frontline team needing fuel and energy and support right now. This needs to be a short, sharp, and focussed inquiry and it can do so much, so much for these organisations that are up and running now, and that is very much what the Māori Council is advocating Ma'am.

(11:46) DR ANGELA BALLARA TO DONNA HALL:

Q. Tēnā koe Miss Hall, Donna. You are talking about the research and perhaps publications that the Hauora have now or that the Council has now. Can a bibliography of this be made available to us?

A. Look Ma'am, that's better for Mr Andrews. But all what I can say is that I spoke to some fairly knowledgeable Māori in the Health area and they told me that the best collation of first hand research in Māori Health Statistics and the provision of how children are dealt with, with glue ear to a stubbed toe is with Hauora sources. What is needed is to have someone come in and take that primary research and put it into a statistical format so it can be tabled before this Tribunal. And what it would show is that there is a lot more money being paid through public health providers for the service of identifying glue ear than what is being provided to Māori health advisors doing the same job in a much more difficult circumstance. If I can just give the example that was put to me, in order for a Māori Health provider to do a test for glue ear where there might be a fee, a sum, I'm not sure how much it is but someone in this room will know, for every glue ear test you get an amount, you must make a visit to a Māori home. It takes you an hour just to talk your way in the door to the Māori home. And then when you get in there, to get to the children, you've got Nana sitting on the couch, she needs home help, care services, and hygiene help services, she's not getting them. And dad's zonked out on the sofa on P. And then you get to the little one and do the glue ear test. A Māori Health provider comes out with a whole picture of that family's circumstances and what its needs are, but they're only funded to report on glue ear. This is a consistent picture which has been given to the Council by first hand providers of Hauora. Anyway, you have them all sitting here today Sir, you can ask.

Q. Isn't that what *Whānau Ora* was designed to deal with?

A. Very much, and that's what I'm told is that Hauora providers are relying on the *Whānau Ora* fund but you see that's pretty limited. So this is one

of the reasons why this claim, this claim right now must go, it must be heard and it must go right to the front of the queue because budget and resourcing is affected right now for all Māori right through the country. And if we could get a good, solid report with significant research behind it showing the disadvantages between the provisional health care for Māori providers as against the Hospital Boards, it would we believe have a significant influence on policy decisions downstream.

A. That is why the New Zealand Māori Council adopts completely the submission of Mr Andrews and the Hauora collective. That's why we say the focus should be at the level of policy development, the legislative timetable, and this report is very necessary and a very, very good place for Māori to pin their position right now.

(11:51) DR THOMAS ROA TO DONNA HALL:

Q. Tēnā koe Ms Hall. Mō te hunga kāpō – Tom Roa tēnei e kōrero nei.

A. I was there when you got your Doctorate, I was part of the adoring fans that tried to come and say congratulations to you and Dr Valmaine Toki. I couldn't get anywhere near you because all your fans were surrounding you. So yes Sir, I understand the Doctorate and congratulations.

Q. *Kia ora, kia ora Donna. Tēnā koe e mihi nei, e whakahau nei, e akiaki nei i te Rōpū Whakamana i Te Tiriti. Kia haere hāngai tonu, kia kaua e kōtiti. Heoi anō, te kupu a – e rua pea aku pātai.* I have two questions. The first question is with the focus on the contemporaneous, other statements around the need to know the whakapapa of how we got to where we are today, what is your position with regard to that argument?

A. I have been briefed by Hauora workers who provide services now Dr Roa to Māori families in need, particularly, I've been into Palmerston North and Raukawa and those families, they're not really asking to be told where their historical ailments come from, what they need is help now. So it's a balancing question. There's always room to be informed on historical whakapapa matters, always. But at what cost to the need

for speed and urgency in the development of policy right now Sir? So the patient's bleeding, and if it takes us five years as against one year to get the bleeding stemmed I say go for one year. That is the position of the Māori Council, right now this case needs to go, be heard, it needs to assess how it is that the Health System has developed service delivery procedures that are integral to the way our Māori Health providers operate. How did those policies get developed in such a way that the Māori Health operators and providers are just – they're just not getting a fair opportunity? And if they don't get a fair opportunity to do their job, Māori families right now aren't getting a fair opportunity. So there's always room for knowledge on whakapapa but these things are a balancing matter.

Q. Thank you and I hope there is a balance. Second question is with regard to an earlier assertion that the Māori Doctors and their organisation could bring assistance to the Tribunal. Somewhat – some of what I hear you saying in terms of the Hauora grouping, not in competition, but is there something in that that the New Zealand Māori Council might find helpful? And as a second part of that, another suggestion earlier was that the legal, the counsel come together, have a committee that might be helpful and again addressing those matters of urgency and stating some priorities for our guidance –

A. I understand, thank you. You reminded me of something I wanted to speak to. On the question of the Māori doctors, I think certainly the Māori doctors should be invited to put an advisor of their selection to sit with you Sir, with the Tribunal, the Māori Doctors' Association I feel would have a great deal to offer this inquiry. So that's what the Māori Council would submit. They sit in with you as amicus, experts in the area. On the wider issue of forming a legal council committee to develop policy, the Māori Council's position is that the ones who should be developing policy and directions in this claim are the Hauora people, that it is for Hauora to bring together their most experienced providers

and that people like the ones that I have spoken to, who really know their stuff and these do not need to have lawyers articulate what the needs are for the claim. One of them for example is Lady Tureiti Moxon. Now she doesn't need a lawyer to tell her what's necessary for this claim and she's right there as a major claimant. You've got – we've got Henare Mason. These are highly knowledgeable, articulate exponents of delivery of health services to Māori and the council would say that the Hauora should be invited to form the committee that drives this claim, not lawyers, not lawyers. This claim comes from out of the ground for Māori people and it is their service providers who should be submitting to you, the Tribunal, how they want their claim run and if they need any help of a legal nature, the Māori Council is there to help them.

JUDGE CLARK:

Thank you Ms Hall, the questions that I was going to raise have been asked by other panel members, so thank you. Next on our list is Zwaan Legal.

(11:57) ROBYN ZWAAN:

Good afternoon Tribunal and claimants. Counsel's name is Ms Zwaan and I am appearing for the claims listed in the (b) appendix. Before I begin I would just like to raise some of the matters that Ms Hall has just spoken to about Hauora possibly leading this claim. It is my submission that that would be inappropriate. This claim is a kaupapa claim for all Māori. It is not a claim where one person or one group has brought the claim to the Tribunal's attention and then others have joined it. It's the Tribunal's claim and all claims should be treated equally within it. It's not an area where we need a leader claim or one body to manage all of the claims. We can manage that with counsel and claims ourselves and therefore I do not think it is appropriate to have a lead group on this.

Also there was a matter raised about possibly the Ministry of Health funding part of the claimant's issues in terms of transport that was raised by one of my friends. Again I think this is inappropriate as the Tribunal and claimants will be aware the Ministry of Health is severely underfunded and to stretch that further to fund this would create more health problems rather than help solve them. I do think that the Crown should assist with the funding but not through the Ministry of Health budget.

In terms of the other matters that have been raised by the Tribunal that they've asked us to speak to, a lot of these issues have already been addressed by the council and going last, listening to the advantage of just basically being able to adopt what a lot of people have already said. So on that matter, in terms of oral hearings, option B is again my preferred process. It makes the most sense and given priority to oral hearings and giving priority to those people that are severely ill or elderly to present first. I think it is also a good idea as my friend Ms Downs raised to develop the draft statement of issues alongside the oral hearings, so that as the oral hearings progress we can see the issues that are coming out of those hearings and develop a statement of issues that coincides with that.

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In terms of the public notification I think social media can be used as has been raised before. It's reasonably inexpensive and has quite a wide reach. In terms with those people that aren't on social media, we can almost guarantee in this day and age that one of their whānau members will be. I also think that providing information outside of just notifying in terms of providing information of how the process works, what it can entail and how people can get involved would be of great assistance. It's easy for us to sit here being involved in the Tribunal for a long time and say, well it's reasonably straightforward, but for those people that have never been involved it's not that straightforward and I

think to give them that information would be of great assistance to many claimants.

The issue about the Statement of Claim final cut off date, I agree in terms of having two different deadlines. One deadline for filing and showing interest and being involved in the hearing in this inquiry, which should be after the oral hearing process and then a further final statement, final deadline for amended statements of claims. That should be well in advance and much later down the process in terms of after research or even after hearings as in the Wai 1040 claim there have been statements of claim being filed this year, amended statements of claim I mean and that allows people – there's a cut off time in terms of the Tribunal is aware of all the claims that are likely to be involved and then there is a further time for us to be able to amend them as the issues develop. I think that there should be a leave arrangement as being mentioned in terms of if claims are filed after this first cut off, there should be a way to figure out whether or not they should be allowed to be accepted rather than a hard and fast rule about it.

This is an area where I think the order of hearing, there should be some priority given to contemporary issues that are really affecting Māori at the moment, such as suicide or drug use or mental health. That doesn't mean that historical issues shouldn't be heard. I think a way around this could be prioritising the order of hearing and releasing the report and chapters similar to Urewera where that was done, but releasing the report while hearings are still happening, so that we can have the urgent or hot topic issues dealt with, the Tribunal reports on it and then we carry on at the same time with hearing the other issues so that all issues are heard but the contemporary urgent ones are also being able to be dealt with at the same time.

In terms of whether or not the hearings progress in a claim-by-claim or a theme-by-theme process, I think a theme-by-theme makes the most sense,

but as has been raised by my friend Dr Gilling I think it was, that runs the issue of different claimants having to travel very far to have their claim heard in a particular theme depending on where the hearings are being held. It may become apparent over time that a particular area has a particular topic that really affects that area that isn't as affected in other areas and so therefore it makes sense to have it there, but I think there should be some leniency about claims perhaps being heard out of their theme area if it's appropriate for claimants to not have to travel as far to have their claims heard. That's something that I think can be developed after the oral hearings and during the interlocutory process. Once we have a better idea of where the claims are coming from and what the issues are that they're addressing and therefore develop the hearings based on that.

Otherwise I think a lot of the issues have already been covered by my friend and I think there was one matter raised by Ms Hall as well about cross-examination only being done in writing. This is happening in the Water Hearing and I think that's inappropriate. I think there's a lot of credit to having viva voce cross-examination as you can engage more with the witnesses and get a better and more in-depth inquiry happening through that process, not just from the Tribunal but from counsel as well and I find it very invaluable in the different inquiries that I've been involved in to have that opportunity to do that and it tests the evidence better then I think written questions can do. If there's no questions those are my very brief submissions.

(12.05) JUDGE CLARK TO ROBYN ZWANN:

Q. What do you say about the possibility of a claimant co–ordinating committee?

A. I don't have an issue with that being developed. I think that in this area where there's a whole bunch of different topics that are going to be covered and everyone's got different instructions I think perhaps the claimant co–ordinating council could be limited in the way that their just

hearing and organisation based roles rather than trying to develop a counsel approach to or opinion of a topic because we're never going to get agreement.

I think as inquiries develop it often comes out that there's clear disagreement amongst counsel and that's interesting to have that conversation but there's no reason that we need to have agreement on those topics or I think we limit it to more organisation and kind of procedural matters rather than a counsel opinion.

Q. Okay, thank you.

A. Thank you.

JUDGE CLARK:

I will just check before we turn to the Crown if there are any unrepresented claimants who have indicated they wish to appear. Mr Lindsay McDonald? No. Okay. And Mr Eru Loach. Okay, well we will now turn to the Crown.

(12.07) CRAIG LINKHORN:

Tēnā koutou katoa. Like to enter an appearance first, members of the Tribunal. My name is Craig Linkhorn, I'm at the lectern to the left of the audience. And in appearing with me over these last two days is Ms Claire Tattersall from the Crown Law Office.

In entering a late appearance at the end of the process I'm in the default of seeking the Tribunal's leave to have our clients sit with us, Ms Gabrielle Baker who is a group manger at the Ministry of Health, and I'm in default on that and I apologise Sir.

JUDGE CLARK:

Leave is granted, that is fine.

CRAIG LINKHORN:

There is no need to go over the material put in the memoranda, I realise, but it is important for the audience to understand that the Crown's looking forward to the constructive inquiry here in wishing to work with claimants in a positive environment and with the Tribunal to design an appropriate process. And so what I'm about to speak to today is not the content so much of health issues as design issues, and I just want that to be understood from the outset.

The key interest is to ensure that the claimants receive a fair hearing of their claims and grievances and that the processes undertaken are in a timely way and that the process assists and informs future Crown policy developments in decision making in relation to health services.

Like to start with the topic of notice and communications, all parties, all participants can take some responsibility for this as a number of other counsel have said, and I respectfully concur with those other submissions that have emphasised that so far as the Tribunal is playing a role in increasing awareness of this kaupapa inquiry, it's not just through the tabulated form of formal public notices in newspapers or even online, it's as much a communications exercise, whether it's through publications such as Te Manu Tukutuku from the Tribunal or on the Tribunal's website or other initiatives.

That's not to put all the responsibility on the Tribunal though. For its part the Crown is prepared to disseminate as widely as it possibly can through its network in the health sector, information about this inquiry from this point on as an awareness raising matter. In my submission, members of the Tribunal, there is time in setting the design of this inquiry to factor in a period of consciousness raising.

The next topic I wanted to address briefly was funding and I agree with respect, with the comments made earlier by the presiding officer, Judge Clark's remarks about this having to be dealt with at a system level rather than through any one inquiry or another is the appropriate response in my submission. And again there is time in the design of this process and the unfolding of this particular kaupapa inquiry to learn whether or not that is emerging as a particular stressor to people's effective participation in this inquiry. So again, the Crown's submission here is this kaupapa inquiry is in our business as usual for the Tribunal as a means of aggregating claims that raise kaupapa level issues. The response for meeting unmet legal need, if we can call it that, is also an evolving one but we've yet to see whether it becomes a problem in this inquiry and it should be dealt with at a system level elsewhere.

The next topic I wanted to address is really one that I've labelled advance planning, and having listened yesterday and today to other contributions on the issue of how to get people to the point where they understand hauora issues in a kaupapa inquiry setting is one that, in our submission, should be addressed upfront by the existing and emerging participants in this inquiry. So what I mean by that is that I would expect that after this conference the Tribunal might issue a document that sets out the current state of its thinking on the direction and design of the inquiry. And that thinking might be expressed in somewhat tentative terms.

I perhaps should also say at this point that I'm uncertain as to whether the Tribunal is anticipating offering parties the opportunity to file in writing after today as a means of replying on having reflected on everything they have heard. I can see arguments both ways. There is a downside to putting more work on people in a written form with the cost and expense and delay that it occasions. It might be that it's unnecessary because the Tribunal might not

intend to issue any definitive response to what you've heard over the last two days, and instead it's an ongoing dialogue perhaps.

So if that were favoured the Tribunal might next issue a document setting out where it's thinking has progressed to and then the participants should engage in advance planning. And I would suggest that this is similar to the points made by my learned friend Ms Downs this morning, but of course there were particular reasons why there were oral hearings progressing in the Veterans Inquiry that meant those things had to be heard then and the planning progressed alongside that. What I am saying here is to design something different for this inquiry and it's to put considerable onus on the participants to discuss and identify what the likely issues are for themselves.

People have mentioned over and again the range of professional expertise that is available, either people who have made claims or who will be advising on claims. And it's not that any one profession or other has capture of this process, it's that together in having a round table on this before they next have to appear before this Tribunal, or several round tables, or possibly months of work on this, they can identify issues with an appreciation of the need to think in a kaupapa framework, with the appreciation of a need to embrace world view questions, and to avoid risks of a Eurocentric approach for instance. All of the warnings that have been issued over the last day or so can be taken account of by the participants in that process.

Now if for whatever reason that were to stall or not be as productive as Craig Linkhorn "the optimist" suggests right now, then the next stage would be to bring in a degree of facilitation from the Tribunal's own research staff. Still not involving you the Panel at that point, I will come to the issue of how the Panel gets up-skilled as it were into the – into the kaupapa. But this would be a process by which there is some "101" I've heard it described as, or some

element of conducting a wānanga among participants as to what their issues are.

I'd like to say at once that should there be any concern by people that this will compromise their later participation as a claimant that that need not be the case at all in the same way that experts are expected to confer these days in advance. There is no harm in participants in this inquiry coming together and exchanging views, even very strongly held views that they fully intend to give as evidence in due course, but in order to also explore areas in common in the building up of a consensus over what the most important issues are. Because of course the Tribunal is well aware now that there's a tension here between participants as to whether the drivers should be the contemporary provision of what is essentially private health care, or more of a population level approach, or more of a starting from our background and our history approach.

So taking time now, and by time I think I mean considerable time, months. Now the Tribunal can confer on the participants the expectation that whichever of options A, B and C is chosen, the cut off date for statements of claim and amended statements of claim would be a very meaningful period in the progress of this inquiry. Will the parties need leave to come to the Tribunal on some matters through that process? Well quite possibly, and the Tribunal may have a role in an interlocutory or planning sense to act as a circuit breaker on some matters. But that would be within the Tribunals discretion to Judge along the way or to merely issue a direction telling the parties to try further or not.

So that – this is signalling obviously members of the Panel, that the Crown's content with the rough order of options A, B and C at this point in the process in the discussion paper, very helpful discussion paper might I add, thank you, so long as the onus is put on participants first to work together in collaboration

on determining what the most important issues are. If there is then the intended date for statements of claim or amended statements of claim to be filed, there would need to be a leave gateway reserved so that if for whatever reason a truly significant issue had been overlooked, someone could apply late for leave for entry into the inquiry.

And I've heard what other counsel have submitted about how in Northland you're allowed to do this, I would urge the Tribunal to take a different design approach here from the outset and clearly signal to everyone that we will be travelling this road once but we're making enough time for our journey. Then that will mean that the issues and the marshalling of priority issues has largely been done by that point of – by the parties themselves, and there is far less risk of the overall Tribunal inquiry timetable being delayed by a late breaking claim.

Eligibility is the next topic as we travel down the table in options A, B and C. And we've raised it in our memorandum, there has been a suggestion in the last day that contested questions of eligibility might be mediated, and I'd just like to signal a note of caution about that. If the issue is a jurisdictional one, no matter the intentions of the parties they can't mediate the Tribunal's jurisdiction in to existence. And I don't need to take that further but it just – that is the note of caution. However, this issue of eligibility as some people have highlighted might be more abstract than real at this stage and we would submit there's actually plenty of time to run on this.

So some people have identified that a principally contemporary focus will mean that there are very few questions of jurisdiction or eligibility around settled claims. There may be some questions around whether the complaint is about a body or person that is acted by or on behalf of the Crown or is an act or remission or a legislative instrument et cetera, et cetera, in terms of section 6 of your Act. But we suggest that there's no need to get anxious

about eligibility at this point, other people have identified that there are settled regions and unsettled regions of the country. And to the extent that this is a kaupapa inquiry taking a national frame of reference, it could well be that you're not going to struggle to find jurisdiction for a historical issue from an unsettled region if that's your want as the Tribunal Panel.

In our submission, "scope" is where the hard yards are. And that's because we expect you'll be asked to hear and report on more than you are able to. And there will need to be some sensible transparent framework set by then as to how the Tribunal's decisions on scope will come to be made so that there's no unseemly scuffle to get into the bus. There's been some suggestion of case studies and those might have to be representative case studies in order to keep the focus upon Kaupapa Inquiry national levels.

We'd also urge the Tribunal in deciding "scope" questions to take a longer term view of its function and its legacy in preparing this report than becoming reactive to every hot issue in the health centre. And it's a difficult point to make because this month's hot issue is going to be hot for a reason; it's going to be important. But a longer term view might be necessary to have the most impact from this inquiry because otherwise there's a risk of being dragged down every rabbit hole as it were. Now in saying that, I want to stress that we're not denying the importance of particular hot issues if we could call it that, but the decisions on "scope" will have to be taken in very measured sense with a holistic whole of sector view kept in mind.

There's a balance to strike also in the contemporary or historic claims being inquired into. And we've said in our memorandum filed in advance of this conference that we expect it might have a largely contemporary focus. And over the last day we've heard that there's some division of opinion on that.

There are a number of routes that the Tribunal could take to deal with this. The Crown is not suggesting that historical claims not be inquired into at all; it's more about the selection of exactly which historical issues you need to inquire into. And so you might take account of work of other panels of the Tribunal and deciding not to go over ground again, or you might take account of secondary sources and other resources and choose to place reliance on those as background without moving on to deciding whether or not to make findings of breaches of Treaty principle causing prejudice.

But having said all that, I probably more than most people in this room, am fully aware of the limitations on the Tribunal's jurisdiction when it chooses to defer or not inquire into a claim. You do have registered claims in front of you and your function is to inquire and report on them. And so in a sense, questions of scope and inclusion in this inquiry are very, very significant because once a claim is in the inquiry you – in my submission you have to effectively address it. And so no matter whether it's the matter, or claim by claim, or district by district, or heard by district basis but reported thematically or what have you, you have an obligation to inquire into and report on the claims that do eventually make the cut for this inquiry.

Now the Tribunal programme through to, I think it is 2025, has other processes for remaining historical claims and a proposed approach of setting up two standing panels for claims yet to be heard. And so those avenues are open to this panel in making decisions about the scope of this Kaupapa Inquiry.

So we're at the point of deciding scope and this might also be at the point at which notwithstanding my notes of caution about not just going for the latest hot issue, this might be the point where the Tribunal says there are some genuine priority issues that should be inquired into distinctly and first and reported on separately in advance of reporting on the rest of the Kaupapa

Inquiry. So for instance, my learned friend Mr Johnston's submissions yesterday about Ngāti Kāpō as it for example, it might be that disability issues and the experience of Ngāti Kāpō is selected by the Tribunal for some form of distinct inquiry perhaps on a priority basis. I'm not saying that to urge that particular outcome but more as an illustration of being able to operate at a number of different levels simultaneously, in other words, the clients that Mr Johnston has might be served best by this inquiry by having their claim heard in a distinctive way and that might be done on a priority basis.

In respect of other claims, it might be that they aggregate either by district or by theme. Again, the dialogue and discussion between participants that I've urged occur before the Tribunal has the cut off date for statements of claim is a place where the participants themselves can explore this. And it might be that if there were some priority topics, that that would deliver on the expectation that is palpable, in my submission the expectation that the Tribunal make a start somehow, even if the research is underway. And that there might be some things that could be heard sooner, even if the research programme for the inquiry as a whole is going to take longer.

So looking at the point reached in options A, B and C here in the Tribunals Discussion Paper, we would urge a note of caution in deciding whether to follow or adapt from other inquiries in relation to Ngā Kōrero Tuku Iho hearings or preliminary oral hearings. I think that everyone will be aware now, after the exchange that was had with Dr Gilling and others about the need for precision in using those terms.

We've been assuming, in the lead up to this stage, that Ngā Kōrero Tuku Iho style hearings probably wouldn't be necessary in the sense of unpacking tribal traditions handed down beyond the lives of people alive today. Now that's not to say that there aren't very important steps to be taken to ensure that

Te Ao Māori view of hauora health is well understood but it's not necessarily through that sort of process.

So then coming to the next category that's been suggested of advance oral hearings, again we're not at all certain that it will be necessary to have those as far up in the process as is suggested in Option B in order to inform the casebook review and the research programme. We would elevate that up to the discussion process between the participants rather than have it be Tribunal driven through the expense and resource of a hearings programme.

Which then makes for a more conventional approach whereby apart from the advance inquiry into priority issues the Tribunal really starts off with the claims fully marshalled for hearing and the research having been done, the indicative briefs of evidence of tangata whenua, witnesses, having been circulated, and expert evidence having been filed along with other technical evidence, and then the Tribunal might commence hearings into the Kaupapa Inquiry proper as it were. I say proper because you might of already had something in relation to a priority topic let's say.

And that looks like Option C, perhaps though on reflection after yesterday and today is a need to draw up something called Option B2 or Version 2 of Option B or something, to take account of everything that's been exchanged in people's critique of Options B and C in particular.

I'm instructed to express that is a preference rather than any hard position. Again it might be that the Tribunal doesn't actually need to decide right now but can articulate its current thinking on the issues and urge discussion between the parties.

We – the Crown is certainly interested in exploring as part of those discussions whether any final hearing inter-solutions is a sensible way to wrap

up the inquiry before final closing submissions, but again it is very early days yet in terms of knowing how the claims will be pleaded and how the claimants will choose to articulate the remedies they seek.

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Before the statement of issues is finalised we're also keen to ensure that the Crown has worked with other parties on issues such as statistics, whether there can be a degree of agreed facts, whether there are appropriately acknowledgements, whether the number of live issues can be sensible winnowed by as a result of discussion between the participants. So the Crown doesn't stand up today to signal that everything is going to be contested, we're optimistic at the prospect of working with people from 2017 onwards in light of everything we've learned over the past however many years it is since Crown Māori relationships have been assisted by the Tribunal's work and by the work of others. The ultimate inquiry need only be if the remaining live issues between the parties are subject of course to the Tribunal's own overriding discretion as a statutory commission of inquiry.

The Tribunal made a specific request of people about maternal health, and in our submission that can definitely be seen as a health issue and so we're supportive of it being heard here. We understand the importance of avoiding unnecessary duplication so we put it no higher than saying no barrier to it being heard here. It definitely can be seen as a health issue, supportive of it being heard here, there's very strong views expressed to the contrary where of course happy to discuss that with those people and see if some other position should be developed jointly for placing before this Tribunal.

Well I've definitely had my 10 minutes Sir. If there are questions of me I'd be very happy to attempt to answer them.

(12.42) TANIA SIMPSON TO CRAIG LINKHORN:

Q. Tēnā koe Mr Linkhorn, ko Tania Simpson tēnei. So your wananga model where participants come together to talk through the issues, when you talk about participants you're talking about the claimants and counsel, and how do you see the Crown's involvement and participation in that process?

A. Yes, I've used the neutral term participants in the inquiry to embrace everyone who is taking a role, so claimants and their advisors, the Crown and its advisors, interested parties and their advisors. And we don't quite know yet how many people will apply or how many organisations will apply for interested party status but it might be relatively high. So an inclusive approach is the short answer Ma'am.

Q. So Crown's participation in that would be – so everyone in together sort of working through that wananga as a group is what you have got in mind?

A. Craig Linkhorn here, yes.

Q. It is not a kind of a too and fro?

A. Not a too and fro. Having said that, if I was getting ready to go and participate, as a lawyer I have to go and take instructions of course and sort things out with my client, and there is of course no barrier to people collaborating, talking amongst themselves in smaller groups before they come to the big occasion as it were.

Q. Right. And your clients maybe – a client or representatives will be participating in that as well?

A. This wouldn't just be lawyers Ma'am, this would be principals supported by their advisors.

Q. Ka pai, thank you.

(12.44) DR ANGELA BALLARA TO CRAIG LINKHORN:

Q. Hello Mr Linkhorn. You will have heard over the last couple of days people talking about the pūtea which is the funding which might be necessary to support claimants taking part in this inquiry. Does the

Crown have any plans to work through the Department of Health, although we've been told they're underfunded, or any other agency to assist the claimants in this matter?

A. The short answer Dr Ballara is that I don't know what plans the Ministry of Justice has as the principal funder of unmet legal need to address that, but I do endorse the comments of the presiding officer with respect that this is a system level issue beyond any one panel dealing with any one kaupapa inquiry.

Q. Mmm. So in the status of counsel for example, having to assist their clients to take part in the Veterans Inquiry doesn't sound very satisfactory or very just and – I don't know what you'd like to comment on that?

A. Well just very briefly Dr Ballara, I think it's probably underestimated how much lawyers contribute to their clients' legal needs on an unpaid basis across all issues. And as for the – as for the justness of what's happened in the Veterans Inquiry at a sort of system level Ma'am, I'd suggest that it's about having illustrated something that needs to be now worked out because Kaupapa Inquiries are a business as usual occasion of the Tribunal's business –

Q. Yes but –

A. – business environment.

Q. Yes, business as usual usually involves the Crown Forestry Rental Trust which it won't of course in any Kaupapa Inquiry. So it looks like there is a lacuna.

A. Ma'am, I probably can't take this issue much further other than to observe that the Crown Forestry Rental Trust is probably a, you know, a long lived but a numinous occurrence in the process of New Zealand Tribunals, some 90 something of them. And it of course had a significant impact on the way that claims relating to forest land were presented, but the Tribunal existed and operated before the Crown Forestry Rental Trust mechanism was devised as a distinct response to

need I accept. And the Tribunal will continue to operate after the Crown Forestry Trust work has finished.

Q. This is true. Thank you.

(12:50) DR THOMAS ROA TO CRAIG LINKHORN:

Q. Kia ora Mr Linkhorn. I've just got a note here in terms of the kaupapa inquiry and the national frame of reference –

A. Mmm.

Q. - and your call that there be a balanced framework. Can you tease that out a little bit more for me please?

A. Thank you very much for that question Dr Roa, it's Craig Linkhorn speaking again. The difficulty I have is that I don't claim to be an expert understander yet of exactly what the Tribunal has done in setting out its initial directions that says, "We're going to move into the business of kaupapa inquiries." But from the material I have read, and this is all published by the Tribunal and the Chairperson, from the material I have read I pick up a deliberate intention to focus on national level issues. And so a claim included in a kaupapa inquiry must have something to contribute to the understanding of appointed at a national level, now that's somewhat circular possibly but that's where we are coming from in stressing that before you members of this panel today.

Q. Thank you, that's very helpful to me.

A. Thank you.

(12:50) JUDGE CLARK TO CRAIG LINKHORN:

Q. Judge Clark Mr Linkhorn. In this inquiry your client will be the Ministry of Health?

A. Well Sir, it's correct that one sense that the Government, Ministry that will pay Crown Law offices, bills will be the Ministry of Health but the client is the Crown. And the Crown has system level oversight of the health sector and as the panel is aware I'm sure there are health sector Crown entities.

Q. You would have heard Ms Walker suggest yesterday that it might be of assistance to the Tribunal to have a 101 overview framework painted for us by her clients. I would've thought if we were to go down that path then the Crown must participate in that exercise as well, you must have that information?

A. Thank you Your Honour. The response at this point would be to encourage every participant to join in on a big 101 and to leave you, the panel, to wait a little with respect, to then be presented at the start of hearings with the 101 – not – and for that process at that point to not be at risk of capture by any one group or any one profession but a true Hauora 101, including the health sector of estate.

Q. If I am candid with you, at this stage speaking personally I simply don't know how—where it all fits; where do the DHB's fit in relation to the Ministry, where do the PHO's fit, are there entities outside the PHO's that will feature, how is it all funded? So even if we allowed for the various sectors to contribute to that picture – painting that picture later on in the process, the Crown must be able to at a fairly early stage give us that framework?

A. That's certainly correct Your Honour. We looked before as to whether there had been a national level report in the *Rangahaua Whānui Inquiry* process for instance into health, and there wasn't. If there had been and it had described the state health sector at that point it would now be out of date. So yes, if through production of discussion material involving Tribunal research or Crown led production of discussion material to circulate early, we see no barriers to sharing information like that even if some of it is later converted into briefs of evidence and tested before the Tribunal in hearing. We just see no barrier at all to sharing intelligence about how the hemisphere operates.

Q. Something similar must be the case in relation to statistics I would've thought. The Crown must have in its possession, I would've thought, statistics that would assist, for example, you must have mortality

statistics, Māori mortality rates, non-Māori, and a whole range of statistics which I would've thought could be provided at an early stage rather than later?

A. Thank you Your Honour, Craig Linkhorn here again. The preliminary and tentative answer that I can give as counsel is that in relation to statistics, the story is not as straight forward as it was for the recent Corrections Inquiry for instance. Yes there are many statistics kept about health issues. This is an environment where a number of the most important statistics are kept, maintained, beyond the Crown by independent organisations including the Tertiary Education sector and places such as the Eru Pomare Research Centre. So this date doesn't claim any monopoly on health statistics. It will have some valuable contributions to make. The Crown can also assist with co–ordinating and improving people's knowledge about the availability and whereabouts of statistics, but the note of caution that's been given to me is to be careful because we are not short of statistics. If anything there might be so may that they require considerable interpretation.

Q. If I recall correctly Mr Linkhorn, I think there was mention in your memorandum that the Crown is in possession of some research which would assist the inquiry. Obviously we have yet to flesh out the scope of the inquiry but is there anything that you can think of that could be available or filed now that would be of assistance to the panel and or claimants?

A. Your Honour, there was some material listed in the memorandum and to the extent that it would be helpful to provide it now there is certainly no hesitancy in doing that or to conduct a brief further literature search or search around current issues and to provide some more material. There is a risk though of this becoming overwhelming for people very quickly and it might be that the Tribunal's own staff, research staff, who are helping to co–ordinate this need to play some gate keeping role in helping participants chose what to proffer at this point.

I am just expressing that carefully because the decision ultimately of what goes on the record of inquiry will be for the Tribunal, but our record could balloon very quickly and it might be that a stronger research methodology is to do that via a Tribunal commission of research that then produces a document that itself references those sources.

Q. Judge Clark again, Mr Linkhorn do I take you to be suggesting on the part of the Crown that even for witnesses who are potentially vulnerable, aged and infirmed that you don't necessarily see much profit to be going from hearing from them early?

A. This is a very difficult issue Your Honour because the personal circumstances of people who are claimants or important witnesses is not something to be trifled with or demeaned, and in making this submission we don't intend to do that at all. The submission is though that a kaupapa level inquiry is probably operating for the most part at a slightly different level, higher up again, than any individuals particular circumstances. And so what we would suggest is that with all due expedition participants or their counsel take steps to capture that evidence but not have the Tribunal involved in the sort of hospital bedside sitting of a person whose about to pass or close to it for instance. I don't mean to sound extreme or dramatic but there are processes in Civil Law to capture, record someone's evidence, and obviously if there was no engagement by other people with that then the reliance that the Tribunal can place on that is affected by the fact that it wasn't tested by cross–examination for instance, so that's a matter that goes to weight. There are other processes though that don't necessarily have to involve the Tribunal panel by which the equivalent of some depositions could be taken about someone's testimony for instance or some adaptation of that kind of thing in order to capture the person's testimony.

Q. More than one counsel, Mr Linkhorn, made reference to the Wai 262 Report and from paraphrasing what they say, "The lack of a governmental or Crown response to that report," and they have questioned therefore the utility of this exercise. Everyone has said this has got to be a relevant exercise but we're still struggling to understand exactly how we design that. Do you want to make a response to that submission?

A. Yes, Your Honour, just very briefly because it is a hard point to respond to in a sense that I'm not entirely clear exactly the basis on which it was advanced to you as members of the Tribunal, to the extent that any product of an independent body that is sent to the state aims to persuade and influence then I see the submission made by those counsel as being to you, as panel members, to keep in mind how to write the most persuasive product you can. To the extent that people are alleging that the Wai 262 Report has been just used to prop open office doors, I'd say the Crown's doing a poor job then in its communications of explaining how influential the Wai 262 Report actually is in a much deeper policy level than is apparent obviously to the people who made those submissions. And they can deliver anecdotes from the lectern about how they cross–examine so and so in the Northland Inquiry and that person didn't know about the Wai 262 Report, but that's certainly not the end of the story from my perspective.

Q. Okay, thank you Mr Linkhorn.

(1.03) TANIA SIMPSON TO CRAIG LINKHORN:

Q. Thank you Mr Linkhorn. Just one more question from me, Tania Simpson here, just about whether – I mean there is a lot of information that is being, you know, research undertaken in relation to Kaupapa – health kaupapa through other Tribunal reports but within the Crown and community. And I just wondered whether the Crown – whether there are areas that the Crown considers it has some

information upon which it would be prepared to make some concessions, or at what point it might think about that?

A. Thank you Ma'am. I might have gone over that point a little bit too quickly in my submission. I was saying, I think, that before the statement of issues is finalised is a point for the Crown to have worked with others and then communicated to the inquiry what it's viewpoint is on what the live issues are and that will include acknowledgements and possible concessions. But I say that as a point in design without knowing exactly where we will get to of course, but in principle it's correct, that there should be process designed to winnow the remaining live issues and for the Tribunal to be able to take an informed decision as to whether there is any merit in pursuing an issue if the parties don't contest it.

Q. Thank you Mr Linkhorn.

A. May it please the Tribunal.

JUDGE CLARK:

Now Mr Howden, I understand that you on behalf of the Legal Services Agency wanted to address the Tribunal and Council?

DAVID HOWDEN:

Tēnā Koutou. Your Honour, yes I am mindful that it's five past one.

JUDGE CLARK:

That's fine, we will hear from you now.

(13:05) DAVID HOWDEN:

Okay, thank you. May it please the Tribunal, my name is David Howden and I am here representing the Legal Services Commissioner in relation to Legal Aid issues in this inquiry, and we've heard a number of counsels have referred to Legal Aid issues in the context of funding. But for the claimants benefit I

would emphasize that the Commissioner is independent from the Crown when making Legal Aid decisions. It may be small consolation but I've heard comments from the Tribunal and counsel that they are grappling with the potential size of this inquiry and I can fully assure everyone that so is Legal Aid. I can however confirm that Legal Aid will be available to fund claimant lawyers on behalf of the claimants in this Kaupapa Inquiry in the usual way. We will however be guided by the Tribunal as to the scope of work that it expects counsel to carry out.

One immediate issue that I need to stress at the beginning is that unfortunately very few of the lawyers appearing in some inquiry before the Tribunal have yet to receive a grant of Legal Aid. This is obviously a very unsatisfactory situation but I can assure counsel and the Tribunal that I am confident this is going to be resolved in the very near future.

I'll perhaps just very briefly explain the background of how this has developed in that legal aids are creature of statute. We can only grant as our Act and Regulations specify. And the important bit is, before we can make any grant of aid we have to get a report from the Tribunal under section 49 of our Act which provides certain information. And until we get that report we can't process any amendments or invoices.

In other areas of legal aid we'd look at making an interim grant in these situations. But for reasons that are completely unclear, our Act, section 16(4) specifically prohibits us making interim grants of aid in relation to Waitangi Tribunal granting. I can advise that we're trying to get the section revoked but it's going to take a little while and it's not an immediate solution to the current problem. There has – it's been coupled with unfortunately some delay in getting section 49 reports from the Tribunal, but I can advise everyone that there's been some very productive discussions taking place – or have been taking place between Commissioner representatives and Tribunal staff to

resolve this issue. We are almost there and I would hope by early next week the matter will be resolved, section 49 reports will then be released and will then be promptly actioned by legal aid and long suffering counsel will start getting paid.

One of the important issues if I just briefly mention Your Honour is the things that Legal Aid grant staff look for in a 49 report is to ensure that the interests of a claimant group are not sufficiently protected by any other claim. And in some respects that's particularly important in this Kaupapa Inquiry, it would considerably assist grant staff and also avoid unnecessary delays and request for further information if counsel could please fully address this issue when making their original application.

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Just briefly on the issues on notification, I would point out that the Ministry currently is developing *YouTube* clips to assist counsel generally in relation to Legal Aid issues and those clips are being prepared by the Ministry of Comms Department or division and at no cost to Legal Aid and I would suggest potentially at no cost to the Tribunal. So if the Tribunal is minded to go down that path I would suggest that is an avenue, and for instance an appropriate video could include a message that the reader should advise the contents while the whānau members who don't perhaps use social media. And I also note that the Ministry currently has an active Twitter account which is another possibility.

And just as a final point, members of the Tribunal, were just to add my voice to the request for early concessions by the Crown where appropriate because it's been my experience, having been around for a little while, that early concessions not only assist the claimants and the Tribunal but in another area perhaps people don't consider it particularly assists in the Legal Aid spend

because if there's early concessions we don't then have to fund counsel to otherwise reinvent the wheel on matters that are being examined in early inquiries and where concessions have been made.

So that was all I had to say at this stage Your Honour.

JUDGE CLARK:

Okay. Mr Howden, I think I may have said yesterday, because it was my understanding, that for those claims that had been registered that the section 49 reports had been completed. I was later informed that is not the case but they are close to being completed.

DAVID HOWDEN:

Very much so Your Honour. I have to resolve that, in fact the issue, this afternoon so we should – it should be resolved very quickly.

JUDGE CLARK:

Okay. Perhaps if this is really just for counsel – when we started to receive a number of new and amended claims it became very apparent in terms of our current resource we did not have enough people simply to register the claims, and so that communication was made to the director and a person has been dedicated – employed to do that in the last three to four weeks to speed up that process. Okay.

DAVID HOWDEN:

And Your Honour we've also worked with the Tribunal to streamline the information we require from the section 49 report which should assist the staff and speed up the process.

JUDGE CLARK:

Thank you.

DAVID HOWDEN:

Thank you.

DR THOMAS ROA:

Tēnā tātou. Kua kī mai te kaiwhakawā kua tae ki te whakapaingia o ta tātou hui, nō reira kei te tukua ki a koutou Ngāti Kāpō tētehi kupu i ta tātou hui. Ka mutu kei Te Rōpū Whakamana i Te Tiriti kei te tepu te kupu, te karakia whakamutunga. Kia ora tātou.

MIHI (NGĀTI KĀPŌ KAIKŌRERO)

MIHI (DR THOMAS ROA)

KARAKIA WHAKAMUTUNGA (DR THOMAS ROA)

HEARING CONCLUDES: 1.22 PM