

IN THE WAITANGI TRIBUNAL

Wai 2575

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Health Services and
Outcomes Kaupapa Inquiry

MEMORANDUM-DIRECTIONS OF JUDGE S R CLARK CONFIRMING NEXT
STEPS IN THIS INQUIRY

8 December 2017

Introduction

1. This memorandum-directions confirms next steps in respect of the Health Services and Outcomes Kaupapa Inquiry. In particular, I:
 - a) Confirm a staged approach to holding this inquiry;
 - b) Outline and seek feedback from the Crown and relevant claimant parties on the Tribunal's intended priority for stage one;
 - c) Set out, and seek feedback jointly from all parties, on the Tribunal's preliminary thinking in respect of further priority areas that should be inquired into by way of stage two;
 - d) Signal a forthcoming judicial conference to be held in April or May 2018 for inquiry planning purposes (stage two);
 - e) Confirm arrangements for initial research proposed in these proceedings; and
 - f) Request further information from certain parties about the operations of New Zealand's health system.

Forward inquiry programme

Background

2. On 2 November 2017, I issued a memorandum-directions indicating that the Tribunal panel would shortly meet to discuss (Wai 2575, #2.5.14, para 7):
 - a) The ideas and submissions filed by parties in relation to the scope, priority and approach to this inquiry;
 - b) An update on parties' continued discussions in relation to inquiry design; and
 - c) The progress of the pre-casebook review and other research-related matters.
3. The Tribunal has now had the opportunity to discuss at length the submissions filed on the above matters and to consider appropriate next steps in these proceedings. In doing so, I wish to acknowledge the considerable investment of time and effort that both parties and counsel have made in developing their views and recommendations for the Tribunal's consideration.
4. Since May 2017, the Tribunal has received 16 submissions concerning inquiry design, including several joint submissions from both Crown and Claimant Coordinating Counsel (CCC). A list of those submissions that deal substantively with matters of inquiry scope, priority and approach is appended as **Appendix 1**. The Tribunal appreciates the continued collaboration evident between parties, and efforts that continue to be made to find common ground in respect of how this inquiry might be best progressed.

Staged approach

5. The Tribunal is aware that a substantial number of counsel support this Tribunal taking a phased and thematic approach to its inquiry into allegations relating to health services and outcomes, with 'big picture issues' to be heard first (Wai 2575, #3.1.81, para 20, Wai 2575, #3.1.85, paras 5 & 8).

6. The Tribunal agrees that this inquiry should take a phased and thematic approach, with health-related issues to be heard in stages according to priority. In particular, the Tribunal is persuaded by the suggestion of the Crown and a significant number of the claimants that the Tribunal proceed in three stages, addressing (Wai 2575, #3.1.85, paras 24-35):
 - a) Priority themes that demonstrate system issues (stage one);
 - b) Nationally significant system issues and themes that emerge (stage two); and
 - c) Remaining themes of national significance, including eligible historical claims (stage three).
7. While it is evident that parties are (at this stage at least) unable to agree on a list of priority issues to be heard first in these proceedings, the Tribunal considers the above framework offers a sound basis for the commencement of this inquiry and a practical means for understanding the broader complexities of New Zealand's health system as it pertains to Māori.
8. We consider that taking a phased approach and identifying key contemporary themes will, as counsel suggest, allow issues within those themes to be examined in context. The Tribunal also agrees that proceeding in a staged manner will assist this Tribunal to address specific and urgent areas of Māori health.

The priority for stage one

Proposed focus

9. In order to decide on its proposed priority for stage one, the Tribunal has considered those submissions from parties that identify claims that appear to:
 - a) Raise urgent and current issues of a significantly discrete nature in relation to Māori health;
 - b) Raise concerns that exemplify 'system issues'; and
 - c) Are brought by claimants who have stated they are ready to proceed.
10. In doing so, the Tribunal has identified the Māori Public Health Organisation (PHO) and Providers (Wai 1315) claim, and the National Hauora Coalition (Mason and Royal) (Wai 2687) claim, as meeting all of the above criteria (Wai 2575, #3.1.85, para 29 & Wai 2575, #3.1.97, para 4). This Tribunal therefore proposes to proceed with these claims, in the context of a discrete and targeted inquiry into areas of primary care, for the purposes of these stage one proceedings.
11. Whilst we acknowledge that there may be other claims that may meet some of the criteria above, it is our view an early inquiry into key matters relating to primary care would best support this Tribunal's ability to report in a timely and effective manner whilst also providing an effective pathway forward to a broader inquiry by way of stage two.

Next steps

12. I acknowledge the draft timetable prepared by the Wai 1315 claimants and filed by way of the Crown's joint memorandum of 7 September 2017, setting out steps for a proposed inquiry into primary care (Wai 2575, #3.1.85, Appendix 1). While this a useful starting

point, I now direct Crown counsel and counsel for the Māori PHO Providers, and the National Hauora Coalition claimants to confer and, if possible, file a joint memorandum setting out a draft agreed inquiry programme for the Tribunal's consideration to be filed jointly no later than **midday, Friday 9 February 2018**. The memorandum is to include indicative dates and time estimates for hearings.

13. In making this direction we have proceeded on the basis that the Māori PHO Providers and the National Hauora Coalition claimants are ready to proceed (Wai 2575, #3.1.52, para 6.8) and there is no need for research to be commissioned by the Waitangi Tribunal (Wai 2575, #3.1.85, Appendix 1). If we are incorrect in that view we need to be informed as soon as possible. If Crown and claimant counsel are in agreement we anticipate that hearings may be able to commence sometime in the latter part of 2018.
14. If counsel for the Crown and the Māori PHO Providers and the National Hauora Coalition claimants are able to reach agreement on an inquiry program it is unlikely there would need to be a judicial conference dedicated to specifically discussing the interlocutory progress of those claims leading up to hearing/s. If there are areas of disagreement concerning the hearing programme then the Tribunal will consider convening a judicial conference in early March to discuss and resolve stage one issues.
15. We also indicate that it is the Tribunal's preference, at this stage, to report back on these claims following the conclusion of the stage one hearings.
16. For clarity, the Tribunal does not intend, at stage one, to embark on a comprehensive inquiry into primary care. In order to achieve our intended aims, stage one of these proceedings will necessarily need to be targeted and selective in its approach in order to distil the structural dimensions of New Zealand's health system as they inform (or otherwise) contemporary health services and outcomes for Māori.

Proposed priorities for stage two

17. At this stage, the Tribunal considers that the priorities for stage two of this inquiry should be (in no intended order):
 - a) Mental health (including suicide and self harm);
 - b) Māori with disabilities; and
 - c) Alcohol and substance abuse.
18. This list should be considered indicative only and is provided to assist parties in their further discussions in relation to inquiry design matters for stage two.
19. We also think it is important to give these indications now, prior to the holding of a proposed national hui, to be held in February or March 2018, as outlined in CCC's joint memorandum of 15 November 2017 (Wai 2575, #3.1.100, paras 6-13).
20. In particular, we wish to confirm the priorities for stage two of the inquiry, and consider suggestions from parties as to how the inquiry might be best progressed. I therefore direct counsel to, if possible, file by **midday, Friday 30 March 2018**, a joint memorandum advising:
 - a) The outcome of the national hui held to discuss inquiry planning matters;

- b) An agreed proposed list of priority issues to be considered for inquiry by way of stage two, including an explanation as to why they ought to be prioritised;
 - c) A proposed statement of scope;
 - d) A proposed hearing programme for the stage two inquiry;
 - e) Any other matters the parties consider to be relevant or that may assist the Tribunal.
21. Following receipt of this memorandum, I intend to convene a one-day judicial conference, in late April or early May 2018, to confirm the inquiry design for stage two, and any specific research requirements that will be needed to inform those proceedings. An exact date and location for this fixture will be confirmed in due course.
22. Should parties remain unable to reach a consensus in relation to the above matters, the Tribunal will need to determine the final priorities, scope, and approach for this inquiry. This is not, however, our preference, and I wish to reaffirm that a collaborative approach remains this Tribunal's preferred method of progressing the inquiry.

Research matters

Pre-casebook review update

23. On 12 September 2017, I issued memorandum-directions directing Tribunal staff to undertake a pre-casebook review for this Inquiry. This review was to include a detailed bibliography prepared by staff which categorises relevant health-related source material by theme, existing health-related research and to identify particular areas where further commissioned research might be necessary (Wai 2575, #2.5.11, para 9). A progress update on the completion of the main pre-casebook review paper is to be filed with the Tribunal by the close of business today. I understand that a preliminary bibliography will be produced by 15 December 2017. Once this bibliography has been received, and I have had an opportunity to review it, I intend to release it to the parties.
24. The Tribunal understands that the main pre-casebook review paper will be completed and distributed to the parties by the end of January 2018. At that time, parties will be invited to consider the paper and its proposals. Submissions on the paper should be included in any memoranda to be filed by **midday, Friday 30 March 2018**, for consideration at the judicial conference I have indicated will take place in April or May 2018.

Proposed Crown-commissioned statistical and historical projects

Background

25. On 15 November 2017, Crown counsel advised that Ministry of Health (the Ministry) officials have now revised the Crown's statistical proposal to further particularise relevant measures, and further noted (Wai 2575, #3.1.98, paras 2-13 & 21):
- a) The rationale for removing two measures (bowel screening, and prison health) based on there being insufficient data;
 - b) That the Ministry is exploring the possibility of a separate project concerning Māori with disabilities;
 - c) A date range of 1990-2015 remains the most viable given the dearth of available data prior to this period;

- d) A non-Māori and non-Pacific comparator group is not considered practical at this time (counsel advises that discussions on this matter continue with Te Ohu Rata o Aotearoa – the Māori Medical Practitioners Association); and
 - e) That the compilation of data for particular measures may be prioritised to accord with any future directions issued by this Tribunal.
26. Counsel similarly advises that a project plan for its independent background report on the history of New Zealand's health system has now been finalised and been subject to a prime contractor selection process. We understand that the Crown proposes to seek nominations from the claimant community for two representatives to sit on an evaluation panel which would then consider the nominations (Wai 2575, #3.1.98, paras 14-17 & 20).
27. The Crown submits that an early indication from the Tribunal as to whether these projects should proceed would assist in progressing matters before the Christmas and New Year period (Wai 2575, #3.1.98).

Decision

28. The Tribunal has reviewed the Crown's submissions and related planning documents (Wai 2575, #3.1.98(a), Wai 2575, #3.1.98(b), and Wai 2575, #3.1.98(c)) and acknowledges the efforts undertaken by counsel and Crown officials to progress these matters.
29. In relation to the Crown's proposed statistical project, I direct that the Crown proceed with this project, but subject to the following provisos, namely that:
- a) Baseline data be provided for all statistics expressed as percentages;
 - b) All reasonable attempts be made to compile and analyse data prior to 1990 where such data exists (in order to support those claims with allegations prior to that period);
 - c) All reasonable attempts are made to utilise a non-Māori and non-Pacific comparator group, notwithstanding the difficulties the Crown has identified in progressing such an endeavour (Wai 2575, #3.1.98, para 11); and
 - d) The Tribunal reserves the right, as indicated by the Crown, to request that particular measures be prioritised, should the need arise as this inquiry progresses.
30. The Tribunal also wishes to record its surprise to learn that measures for bowel screening are not available given the apparent frequency of bowel cancer among Māori and its likely detrimental impact on both individuals and their whānau. The Tribunal similarly wishes to indicate its preliminary view that a separate project concerning Māori with disabilities should proceed given the likely focus of this inquiry going forward.
31. I similarly direct that the Crown proceed with its proposed independent background report on the history of New Zealand's health system, but subject to the following provisos, namely that:
- a) The same panel used for the evaluation of the prime contractor nominations also be engaged for the purposes of quality assurance and review of the report once drafted;

- b) The report be placed on the Wai 2575 Record of Inquiry in the usual way for the purpose of forming part of the overall matrix of evidence that may be relied upon in these proceedings (including any report, or reports, issued by this Tribunal); and
- c) The author/s be available for the purposes of cross-examination, if required, at any future hearing or hearings held in this inquiry.

Further evidence to be filed

Information to be filed by Te Ohu Rata o Aotearoa – Māori Medical Practitioners Association (Te ORA)

32. On 2 November 2017, I granted leave to counsel for Te ORA to file by 15 December 2017 (Wai 2575, #2.5.14, para 2):
- a) A short brief of evidence identifying further aspects of the New Zealand health system not identified in evidence supplied by the Crown; and
 - b) A short presentation (in Prezi format or similar) providing a thematic overview of the New Zealand health system.
33. The Tribunal panel is looking forward to receiving this material but wish also to understand the health system from a Māori perspective and the ways in which Māori encounter the health system in the context of both primary and secondary care. If Te ORA have any diagrams to assist us in our understanding of this issue it would assist us if they are included in the material to be filed.
34. Given the additional request by the Tribunal, I direct that the Te ORA evidence is now filed no later than **midday, Wednesday 20 December 2017**.

Information to be filed by the Crown

35. On 22 November 2017, I issued memorandum-directions granting Crown counsel an extension to file by 15 December 2017 further supplementary evidence on the functioning of the current New Zealand health system, including information on (Wai 2575, #2.5.16, para 3):
- [...] the roles of key organisations in the New Zealand health system, including the Ministry of Health, district health boards (DHBs), non-DHB Crown entities, non-Government organisations, the extent to which these organisations are engaged with Māori, and details about funding flows within and between these organisations.
36. In addition to the above, the Tribunal panel has identified a need – and one likely shared by parties to these proceedings who are not themselves health professionals – to understand the precise status (legal and operational) of these organisations, as well as their organisational relationship to one another.
37. The Crown have provided an overview diagram of the New Zealand Health and Disability System (Wai 2575, #A1, Appendix 1). The diagram is not particularly easy to follow. In providing the additional information above it would be useful to the Tribunal for the Crown to, where possible, provide diagram/s to help in our understanding of the health system. Given this additional request, the Crown should now file its supplementary evidence, together with the additional information requested by the Tribunal, no later than **midday, Wednesday 20 December 2017**.

Other matters

38. In concluding these directions, I record that:

- a) My brother is a radiologist employed by the Waitemata DHB and a former member of Te ORA; and
- b) My wife is a nurse employed by a PHO in Hamilton.

39. I do not consider the above relationships to constitute a conflict of interest in respect of these proceedings, but provide this information simply in the interests of transparency.

The Registrar is directed to send a copy of this direction to all those on the notification list for Wai 2575, the Health Services and Outcomes Kaupapa Inquiry.

DATED at Hamilton this 8th day of December 2017



Judge S R Clark
Presiding Officer

WAITANGI TRIBUNAL

Appendix 1: List of submissions filed on inquiry scope, priority and approach in these proceedings

| Counsel | Filed by | Date | ROI reference |
|---|--|-------------------|---|
| David Stone, Augencio Bagsic, and Catherine Leauga | On behalf of those claimants listed in Appendix A of that memorandum | 6 September 2017 | Wai 2575, #3.1.81 Wai 2575, #3.1.81(a) |
| Donna Hall and Genevieve Davidson | On behalf of the New Zealand Māori Council and 14 other claimants as set out at paragraph 2 of that memorandum | 6 September 2017 | Wai 2575, #3.1.82 |
| Gerald Sharrock | On behalf of Wai 121, Wai 1450, Wai 2108, Wai 884, Wai 1841, and Wai 2179 | 6 September 2017 | Wai 2575, #3.1.83 |
| Mark McGhie | On behalf of Wai 1072 and Wai 2628 | 7 September 2017 | Wai 2575, #3.1.84 |
| Roimata Smail, Paranihia Walker, Bryce Lyall, Craig Linkhorn, Geoffrey Melvin, and Abbey Lawson | On behalf of Wai 1315, Wai 2499, Wai 2655, Wai 421, Wai 874, Wai 1247, and the Crown | 8 September 2017 | Wai 2575, #3.1.85 |
| Linda Thornton and Bryce Lyall | On behalf of Wai 1666 | 8 September 2017 | Wai 2575, #3.1.86 |
| Peter Johnston and Daniel Hunt | On behalf of Wai 2109 | 8 September 2017 | Wai 2575, #3.1.87 |
| Tom Bennion, Lisa Black and Emma Whiley | On behalf of Wai 1775, Wai 1261, Wai 507 | 12 September 2017 | Wai 2575, #3.1.88 |
| Darrell Naden and Stephanie Roughton | On behalf of Wai 2382 | 12 September 2017 | Wai 2575, #3.1.89 |
| Annette Sykes and Jordan Bartlett | On behalf of Wai 558, Wai 864, Wai 2510, Wai 1835, and Wai 2494 | 24 October 2017 | Wai 2575, #3.1.93 |
| David Stone and Catherine Leauga | On behalf of those claimants listed in Appendix A of that memorandum | 30 October 2017 | Wai 2575, #3.1.94 Wai 2575, #3.1.94(a) |
| Peter Andrew, Craig Linkhorn, Geoffrey Melvin, Abbey Lawson, and Bryce Lyall | On behalf of Wai 1315, Wai 2655, Wai 421, Wai 874, Wai 1247, and the Crown | 15 November 2017 | Wai 2575, #3.1.97 |
| Donna Hall and Genevieve Davidson | On behalf of the New Zealand Māori Council and 14 other claimants as set out at paragraph 1 of that memorandum | 15 November 2017 | Wai 2575, #3.1.99 |
| David Stone, Augencio Bagsic, and Catherine Leauga | On behalf of those claimants listed in Appendix A of that memorandum | 15 November 2017 | Wai 2575, #3.1.100 Wai 2575, #3.1.100(a) |

| Counsel | Filed by | Date | ROI reference |
|--|-----------------------|---------------------|-----------------------|
| Peter Johnston and Daniel Hunt | On behalf of Wai 2109 | 17 November 2017 | Wai 2575, #3.1.101 |
| Paranihia Walker and Kate Tarawhiti | On behalf of Wai 2499 | 24 November 2017 | Wai 2575, #3.1.103 |

Appendix 2: Forthcoming inquiry filing dates

| Filing | Party | Date |
|--|--|---|
| Update to the Tribunal on the completion of the pre-casebook review | Richard Moorsom (Tribunal Advisor, Waitangi Tribunal Unit) | 5pm, Friday 8 December 2017 |
| Preliminary bibliography of sources | Richard Moorsom | 5pm, Friday 15 December 2017 |
| Finalised pre-casebook review | Richard Moorsom | midday, Wednesday 31 January 2018 |
| Brief of evidence on aspects of New Zealand's health system not included in Crown evidence, thematic overview presentation, and additional information requested by the Tribunal | Counsel for Te Ohu Rata o Aotearoa – Māori Medical Practitioners Association (Te ORA) | midday, Wednesday 20 December 2017 |
| Further supplementary evidence on the functioning of the current New Zealand health system, and additional information requested by the Tribunal | Crown counsel | midday, Wednesday 20 December 2017 |
| Agreed Stage One inquiry programme | Crown counsel, counsel for the Māori PHO Providers (Wai 1315) and the National Hauora Coalition (Mason and Royal) (Wai 2687) claimants | midday, Friday 9 February 2018 |
| Joint memorandum advising outcome of forthcoming national hui, and associated matters | All parties | midday, Friday 30 March 2018 |
| Any submissions in response to pre-casebook review | All parties | midday, Friday 30 March 2018 |