

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 CONCERNING
PRIORITIES FOR STAGE TWO INQUIRY AND RESEARCH**

28 June 2018

Introduction

1. This memorandum-directions:
 - a) Confirms the priority issues for stage two of the Wai 2575 Health Services and Outcomes Kaupapa Inquiry;
 - b) Confirms that the Tribunal will commission three separate overview reports into the priority issues for stage two;
 - c) Clarifies the content of and filing date for part two of the pre-casebook discussion paper; and
 - d) Sets out the Tribunal's current thinking on how we might progress the stage two inquiry.

Priority issues for stage two

2. On 8 December 2017, I issued an indicative list of potential priority issues for stage two of this inquiry to assist parties in their further discussions in relation to inquiry planning matters.¹ These were (in no particular order):
 - a) Mental health (including suicide and self harm);
 - b) Māori with disabilities; and
 - c) Alcohol and substance abuse.
3. In those directions, I advised parties that, should they remain unable to reach a consensus in relation to stage two, the Tribunal would need to determine the final priorities, scope, and approach for this inquiry.²
4. The panel has now received several written submissions concerning the proposed scope, priorities and approach for stage two.³ We heard oral submissions on this issue at the recent judicial conference held in Wellington on 11 June 2018.
5. Following the judicial conference, I granted leave to Kahui Legal and Tamaki Legal to file further submissions concerning stage two.⁴ Those submissions were filed on 25 June 2018 and they have been taken into account.⁵
6. The panel has decided that for stage two of this inquiry we will consider the three priority issues identified above. For clarity, I also confirm that alcohol and substance abuse includes claims relating to tobacco.
7. Given that stage one of this inquiry concerns matters of high-level primary health policy, it is fitting that stage two considers how this policy has translated into practice. Furthermore, I note that the issues we are confirming for stage two are of national significance and have been consistently identified as priority areas by parties in these proceedings.
8. A number of counsel submitted that stage two should commence with primary health matters not heard in stage one.⁶ Te Mata Law in their joint memorandum dated 11 May 2018 submitted that this would include:

¹ Wai 2575, #2.5.17 at [17]

² Wai 2575, #2.5.17 at [22]

³ Wai 2575, #3.1.149, #3.1.150, #3.1.152, #3.1.164, #3.1.165, #3.1.166, #3.1.168, #3.1.171, #3.1.174, #A7

⁴ Wai 2575, #2.5.28 at [17]

⁵ Wai 2575, #3.1.183 and #3.1.183(a), #3.1.185

⁶ Wai 2575, #3.1.164, #3.1.183 and #3.1.183(a)

- a) System issues, including legislation, policy, structure, budget, procedure, historical, contemporary and intergenerational outcomes, and Whānau Ora; and
 - b) Inequities, including institutional racism and discrimination, stigmatisation, economic and social determinants of health, access to health care, health services, age, pay and gender disparities, work for development, contribution of non-clinical staff and whānau, visibility of rongoā Māori, diet, and lifestyle related issues.⁷
9. Kahui Legal clarified that counsel proposed that stage two commence with additional foundational issues in primary health care, including:
- a) Outstanding system issues, such as process and procedure, budgets, whānau and Whānau Ora, and foundational historical or contemporary background to these issues; and
 - b) Inequities, including economic and social determinants of health, institutional racism, access issues, and rongoā Māori.⁸
10. Given the nature of the stage one claims and our statement of issues,⁹ I anticipate that some of the issues listed above will be inquired into during stage one. It would be extremely disappointing if, for example, we had to inquire into the legislation and policy again in stage two when we have said repeatedly that this is the focus of stage one.¹⁰
11. When we hear and begin reporting onstage one issues, we and the parties before us will have an opportunity to consider again whether there are still outstanding primary health care issues which need to be further inquired into.

Additional evidence for stage two

Tribunal commissioned research

12. I note the Crown agreement to provide an historical overview and selected health data, the existing evidence identified by counsel and Dr Crocker's pre-casebook discussion paper and recommendations, and the submissions and discussion at our recent judicial conference.
13. I also take into account that part one of the pre-casebook discussion paper recommended that the Tribunal commission two overview reports: one on Māori with disabilities, the other on mental health and alcohol and substance abuse. I further note that at the 11 June 2018 judicial conference, parties were broadly supportive of these recommendations. However, some counsel submitted that mental health, and alcohol and substance abuse, were sufficiently different so as to justify their separation.
14. Taking all of this into account, I now confirm that the Tribunal will commission three separate overview reports, one for each of the priority issues for stage two. The three reports need to begin soon so as to be prepared in time for our stage two inquiry. Commissions directing the research will be issued shortly.

Crown evidence

15. The Tribunal is expecting to receive three pieces of Crown-funded research in 2019, namely:
- a) Māori Health Trends 1990-2015 Report, due 28 February 2019;
 - b) Māori Disability Statistical Status Report, due 30 June 2019; and

⁷ Wai 2575, #3.1.164(b)

⁸ Wai 2575, #3.1.183(a)

⁹ Wai 2575, #1.4.1

¹⁰ See for example Wai 2575, #2.5.25 at [80] and Wai 2575, #1.4.1 at [1.1]

c) Historical Health Overview Report 1840-1992, due 12 July 2019

16. I note that in their memorandum dated 25 June 2018, Tamaki Legal made a number of submissions concerning the Crown provision of health statistical data. They have sought leave to provide further submissions by 4 July 2018.¹¹ I grant the leave sought. Counsel should file their submissions by no later than **midday, Wednesday 4 July 2018**.

Completion of the pre-casebook discussion paper

17. I previously indicated that part two of the pre-casebook discussion paper would address remaining claim issues, taking into account feedback received from the national hui and any submissions filed regarding part one of the pre-casebook discussion paper.¹²

18. Given the confirmed priorities for stage two, and as signalled above, I consider that part two of the pre-casebook discussion paper should now provide an assessment of the evidential base concerning claim issues relating to tobacco in order to inform an expanded definition of substance abuse. Part two of the pre-casebook discussion paper will be filed and distributed to parties no later than **midday, Tuesday 31 July 2018**.

19. I also confirm that further staff assessment of evidence required for remaining issues for this inquiry will now occur after the completion of the commissioned research for stage two at which time some reports of the government inquiries into health will also be available for consideration.

Indicative stage two timetable

20. I am hopeful that the three Tribunal-commissioned reports will be completed by the end of April 2019. I have noted that the Crown reports are due to be submitted by mid-July 2019. I will be monitoring the progress of the Tribunal-commissioned and Crown-funded research and intend to release a progress update regarding that research either later this year or in early 2019.

21. Following the completion of research for stage two issues, final amended statements of claim for the three priority areas will need to be filed. Thereafter, an eligibility, aggregation and consolidation exercise for stage two will also need to be undertaken. I anticipate final statements of claim being filed by the end of May 2019, with the eligibility, aggregation and consolidation exercise being completed by the end of June 2019.

22. I anticipate holding a judicial conference possibly in late July 2019 to discuss more detailed planning for stage two hearings. That planning process would need to include, among other things, a refinement of the claims, the identification of themes and issues which the Tribunal should inquire into, a prioritisation of the claims and an assessment of parties' readiness to proceed.

23. It is also anticipated that the government inquiry into Mental Health and Addiction will be completed, and its report publicly available by late this year. The interim report of the Review of the New Zealand Health and Disability Sector should also be publicly available by late July 2019.

Current Government Health Inquiries

24. I am aware that the government currently has three inquiries under way which have the potential to overlap with the Tribunal's Health Services and Outcomes Kaupapa Inquiry. Those government inquiries include a ministerial health review, a review into the New Zealand Health and Disability Sector, and an inquiry into Mental Health and Addiction.

25. During the judicial conference on 11 June 2018, a number of submissions were made concerning those government inquiries, including concerns about access to the evidence

¹¹ Wai 2575, #3.1.185 at [11]

¹² Wai 2575, #2.5.20 at [8]

and research generated by those inquiries. Submissions were also made, particularly by Crown counsel, about myself (as Presiding Officer of this inquiry) establishing contact with the respective Chairs of those inquiries.

26. I note that the draft terms of reference for the review of the New Zealand Health and Disability Sector and the inquiry into Mental Health and Addiction make reference to this Tribunal inquiry and expect some 'interface' between the inquiries.¹³
27. I will keep a note of progress with those inquiries. However, I do not at this stage propose to meet with the Chairpersons of either inquiry. It is important that this inquiry retain its independence as it is possible that any amended statements of claim may call upon this Tribunal to inquire into the actions of one or more of those inquiries.
28. I expect that publicly available evidence prepared for these inquiries that is relevant to this inquiry, and the inquiry reports, will be added to the record of inquiry for the Health Services and Outcomes Kaupapa Inquiry.

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

DATED at Hamilton this 27th day of June 2018



Judge S R Clark
Presiding Officer

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¹³ Wai 2575, #3.1.176(a) at 2 and Wai 2575, #6.2.2 at 4