

**IN THE WAITANGI TRIBUNAL**

Wai 2575

**CONCERNING**

the Treaty of Waitangi Act 1975

**AND**

the Health Services and  
Outcomes Kaupapa Inquiry

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**MEMORANDUM-DIRECTIONS OF JUDGE S R CLARK REGARDING THE  
PARTICIPATION OF STAGE ONE INTERESTED PARTIES**

10 August 2018

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## **Introduction**

1. This memorandum-directions responds to requests by interested parties to participate in stage one of Wai 2575, the Health Services and Outcomes Kaupapa Inquiry, and associated matters relating to the stage one hearings.

## **Background**

2. I have previously set out the approach I would take regarding the participation of interested parties in stage one, in memoranda-directions dated 29 March 2018<sup>1</sup> and 5 July 2018.<sup>2</sup> In my most recent memorandum-directions I directed any interested parties to file memoranda of counsel no later than 4pm, Friday 27 July 2018. These memoranda were to address the following matters:

[27] In the memoranda, counsel must clearly identify the following matters:

- a) The party who wishes to participate in stage one and (where relevant) their Wai number;
- b) Where relevant their statement of claim and which part of it specifically pleads an issue identified in the stage one statement of issues;
- c) Whether they rely upon s 4A(1) or s 4A(2) tests set out in the Commissions of Inquiry Act 1908;
- d) The level of participation that is sought during stage one. That is whether:
  - i. They seek a watching brief only;
  - ii. They seek to file submissions only; or
  - iii. They seek to file evidence and make submissions during stage one
- e) Those parts of the Wai 1315 and Wai 2687 claims and/or the statement of issues which the evidence is responding to
- f) An assurance that any of the proposed evidence does not duplicate that which has already been filed by the Wai 1315 and Wai 2687 witnesses;
- g) Why the proposed evidence is not best left to be addressed in stage two or three of the broader inquiry; and
- h) If a party proposes to participate in reliance upon the test set out in s 4A(2) of the Commissions of Inquiry Act 1908, how and in what way their interests are adversely affected by any evidence which will be given during stage one.

[28] For any evidence filed, it must be obvious, on the face of it, which parts of the Wai 1315 and Wai 2687 claims and/or the statement of issues the evidence filed relates or responds to. If this discipline is not adhered to, then the risk is that:

- a) The brief of evidence will not be placed on the record;
- b) The brief of evidence will be redacted; or
- c) Leave will be refused to participate in stage one.

[29] I reiterate that stage one is not an opportunity for interested parties to attempt to broaden its scope into issues which we will not inquire into or report on at this stage. All proposed submissions and evidence must have a specific focus on the legislative and policy framework of the primary healthcare system.

## **Approach**

3. The requests for participation as interested parties in stage one fall into three categories, they being requests:
  - a) To participate on a watching brief basis;

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<sup>1</sup> Wai 2575, #2.5.25 at [91]-[92].

<sup>2</sup> Wai 2575, #2.5.30.

- b) To file submissions; and
- c) To file evidence and submissions.

4. I propose to respond to the requests under each of those headings.

#### **Requests to participate on a watching brief basis**

- 5. Leave to participate on a watching brief basis is granted to the following interested parties:
  - a) Wai 2655 – Lyall & Thornton;<sup>3</sup>
  - b) Wai 2719 and Wai 2723 – Te Mata Law Ltd;<sup>4</sup>
  - c) Wai 2003 – Dixon & Co;<sup>5</sup>
  - d) Wai 2634, Wai 2643, Wai 2647, Wai 2650 and Wai 2688 – Oranganui Legal;<sup>6</sup> and
  - e) Wai 144 – Zwaan Legal.<sup>7</sup>
- 6. Zwaan Legal made a request on behalf of Wai 1758,<sup>8</sup> which is a comprehensive Upokorehe hapū claim. The claim is wide-ranging and includes pleadings regarding inter alia landlessness, raupatu, confiscation, the operation of the Native Land Court, Crown purchase policy and practice, and public works takings. The statement of claim<sup>9</sup> makes only one reference in its 23 pages to any health-related claim. The reference appears at paragraph 77, which alleges a denial to Upokorehe tohunga of a right to practise traditional Māori medicine and wairuatanga. That pleading is unrelated to the issues under consideration in stage one. Furthermore, I do not consider that claim meets either of the tests set out at s 4A(1) or (2) of the Commissions of Inquiry Act 1908. Therefore, leave is not granted to participate on a watching brief basis.
- 7. Zwaan Legal have made a request on behalf of Wai 375,<sup>10</sup> which is a claim filed by Anaru Kira on behalf of the Whakarara Māori Committee. The registered claim<sup>11</sup> relates to the loss of Whakarara mountain and surrounding lands and does not refer in any respect to health-related matters. The Registrar has drawn to my attention that an amended statement of claim was filed on behalf of the Wai 375 claimants on 11 May 2017, which is yet to be registered. That claim has been filed in relation to the housing inquiry and there is only one minor reference to health in it. This comes in the context of a pleading that inadequate housing results in “Māori suffering from worse health outcomes including a lower life expectancy.” Neither the registered or unregistered claim provide any specifics about health-related claims, nor any allegation in relation to the legislative and policy framework of the primary healthcare system. Therefore, I do not consider that it meets either of the tests set out in s 4A(1) or (2) of the Commissions of Inquiry Act 1908 and leave is not granted to participate on a watching brief basis.
- 8. Zwaan Legal have also made a request on behalf of Wai 1787.<sup>12</sup> The initial claim, dated 28 August 2008,<sup>13</sup> was subsequently amended on 3 May 2016.<sup>14</sup> The claim is brought on behalf of Rongopopoia Ki Upokorehe. Both the initial and amended statements of claim

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<sup>3</sup> Wai 2575, #3.1.222.

<sup>4</sup> Wai 2575, #3.1.198 and #3.1.199.

<sup>5</sup> Wai 2575, #3.1.238.

<sup>6</sup> Wai 2575, #3.1.240.

<sup>7</sup> Wai 2575, #3.1.241.

<sup>8</sup> Above n 7.

<sup>9</sup> Wai 1758, #1.1.1.

<sup>10</sup> Above n 7.

<sup>11</sup> Wai 375, #1.1.

<sup>12</sup> Above n 7.

<sup>13</sup> Wai 1787, #1.1.1.

<sup>14</sup> Wai 1787, #1.1.1(a).

are lengthy and wide-ranging. There is no specific pleading relating to any health-related allegations in the 18 page long amended statement of claim. At best, there is a general allegation at paragraph [8(i)] that there has been an ongoing failure by the Crown to protect and support the spiritual, cultural, social, environmental and economic wellbeing of Rongopopoia, which includes their health. The allegations are so generalised that I do not consider that they meet the tests set out at s 4A(1) or (2) of the Commissions of Inquiry Act 1908. Therefore, leave is not granted to participate on a watching brief basis.

### **Requests to file submissions**

9. A number of parties have sought to file only submissions during stage one. In the absence of filing evidence, I do not see any reason why the parties who fall into this category also need to file opening submissions. Where leave is granted, interested parties are to file closing submissions no later than **4pm, Wednesday 5 December 2018** in accordance with the stage one timetable.
10. My decision concerning the various requests is set out below:
  - a) Ranfurly Chambers – Wai 1732.<sup>15</sup> Leave is granted to file closing submissions on the Tribunal's Statement of Issues 4.1, 4.2, 9.1 – 9.3 inclusive and 11;
  - b) Morrison Kent – Wai 2619 and Wai 1670.<sup>16</sup> Leave is granted to file closing submissions;
  - c) Wackrow Williams & Davies – Wai 1813.<sup>17</sup> Leave is granted to file closing submissions responding to the Tribunal's Statement of Issues 2 – 5 inclusive;
  - d) Phoenix Law – Wai 2720.<sup>18</sup> Leave is granted to file closing submissions in response to the Tribunal's Statement of Issues;
  - e) Phoenix Law – Wai 2623.<sup>19</sup> Leave is granted to file closing submissions concerning the Tribunal's Statement of Issues 2 – 4 inclusive and 6 – 10 inclusive;
  - f) Phoenix Law – Wai 179.<sup>20</sup> Leave is granted to file closing submissions concerning the Tribunal's Statement of Issues 2 – 7 inclusive; and
  - g) Phoenix Law – Wai 996.<sup>21</sup> Leave is granted to file closing submissions in relation to Tribunal's Statement of Issues 2 – 7 inclusive.
11. In making the above decision, I have reviewed the statements of claim in relation to each of the Wai numbers. It is fair to say that in some respects the statements of claim are wide-ranging and have other issues as their central focus. In some instances, the legislative and policy framework of New Zealand's primary healthcare system is only lightly referred to. Counsel must take responsibility to ensure that they respond to the questions posed in the Tribunal's Statement of Issues. In doing so, counsel must also remember that the context in which those questions are posed is an inquiry into the Wai 1315 and Wai 2687 claims and a focus on the legislative and policy framework of New Zealand's primary healthcare system. I reiterate that participation does not provide a convenient segue into hearing the substantive claims of the interested parties.<sup>22</sup>

### **Requests to file evidence and submissions**

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<sup>15</sup> Wai 2575, #3.1.225.

<sup>16</sup> Wai 2575, #3.1.194.

<sup>17</sup> Wai 2575, #3.1.228.

<sup>18</sup> Wai 2575, #3.1.193.

<sup>19</sup> Wai 2575, #3.1.192.

<sup>20</sup> Above n 19.

<sup>21</sup> Above n 19.

<sup>22</sup> See above n 2 at [20]-[21].

*Afeaki Chambers – Wai 2738*<sup>23</sup>

12. I direct that the brief of evidence by Kahurangi Fergusson-Tibble be added to the Record of Inquiry. Mr Fergusson-Tibble will need to attend the hearing, to confirm his evidence and be available to answer any questions from counsel and/or the Tribunal. Afeaki Chambers have leave to file opening and closing submissions in accordance with the timetable for stage one. The submissions are confined to addressing issue 4.2 in the Tribunal's Statement of Issues.

*Woodward Law – Wai 2644*<sup>24</sup>

13. I direct that the briefs of evidence by Sir Edward Taihākurei Durie and Teresa Wall be added to the Record of Inquiry. Both witnesses will need to attend the hearing, to confirm their evidence and to answer any questions. Woodward Law have leave to file opening and closing submissions in accordance with the current timetable for stage one.

14. In their memorandum, Woodward Law have submitted that:<sup>25</sup>

The New Zealand Māori Council (“NZMC”) wishes to participate in stage one. It also registers its wishes, (to so participate as part of a coalition body formed at the National Health Hui at Ihenga Marae, Rotorua, 6 – 8 April 2018) ...

15. I understand that resolutions were put at the National Health Hui on 8 April 2018 to the effect that an interim coalition body be established to “expedite the hearing process and to lead claims for Māori in the Waitangi Tribunal Health Inquiry.”<sup>26</sup> In a subsequent memorandum, counsel for the New Zealand Māori Council again referred to an interim body which they say has been established to help lead the inquiry and simultaneously front negotiations with the Crown.<sup>27</sup>
16. In contrast, I note that counsel for Wai 2687, the National Hauora Coalition (Mason and Royal) Claim, made a submission that they did not understand that an interim body had been mandated at the National Health Hui to participate in stage one.<sup>28</sup>
17. The short point is that apart from the references made by Woodward Law to a desire to establish some form of coalition to assist in expediting claims and negotiations, no further detail has been provided. None of the parties, other than the New Zealand Māori Council, have independently expressed support for the establishment of that body. There are no joint memoranda, for example, on behalf of those claimants and/or entities whom the New Zealand Māori Council say make up that coalition expressly seeking leave to participate as an interested party. I also note resolution 5 from the National Health Hui that a legal entity would be established. No details have been filed in relation to the establishment of any such legal entity. At this stage I am not convinced that any coalition has been established and indeed the memorandum filed on behalf of the Wai 2687 claimants suggests otherwise. Without any proper details, it is impossible to consider any such application.
18. I also note that in their memorandum of counsel, Woodward Law refer to 13 other claims in addition to the Wai 2644 New Zealand Māori Council claim. I have examined each of the statements of claim filed on behalf of those claimants. All of them without exception support and adopt the claim filed by Sir Edward Taihākurei Durie on behalf of the New Zealand Māori Council.<sup>29</sup> In reality, the party that is seeking to participate in stage

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<sup>23</sup> Wai 2575, #3.1.236.

<sup>24</sup> Wai 2575, #3.1.239.

<sup>25</sup> At [3].

<sup>26</sup> Wai 2575, #3.1.152(a).

<sup>27</sup> Wai 2575, #3.1.191.

<sup>28</sup> Wai 2575, #3.1.214 at [4].

<sup>29</sup> The only exception is counsel's submission makes reference to a claim by Derek Huata King on behalf of Ngāti Kapekape Hauora. There is no detail provided in relation to that claim.

one as an interested party is the New Zealand Māori Council, as represented through their overarching claim – Wai 2644. I have accepted that their Chairperson Sir Edward Taihākurei Durie's evidence is to go on the Record of Inquiry. Therefore, to clarify matters the interested party who has leave to participate in stage one is the New Zealand Māori Council – Wai 2644.

*Kahui Legal – Wai 2499*<sup>30</sup>

19. I direct that the briefs of evidence by Teresa Wall, Dr Suzanne Crengle and Dr Papaarangi Reid be added to the Record of Inquiry. As above, all three witnesses will need to attend the hearing, to confirm their evidence and be available to answer any questions. Kahui Legal have leave to file opening and closing submissions in accordance with the timetable for stage one.
20. I note that Teresa Wall is also being called on behalf of the New Zealand Māori Council – Wai 2644. Counsel for the Wai 2644 and Wai 2499 claimants have both given assurances that there is no duplication in relation to the two briefs of evidence filed. I note that there is some repetition, chiefly on the topics of funding and the primary healthcare strategy. I direct that counsel will need to work towards co-ordinating Ms Wall's appearance. It is the Tribunal's preference that she appear on one occasion before the Tribunal.

*Tamaki Legal – Wai 762, Wai 1196, Wai 1531, Wai 1957, Wai 2063, Wai 2165 and Wai 2382*<sup>31</sup>

21. I direct that the briefs of evidence by Amy Downs and Mana Hape be added to the Record of Inquiry. Both witnesses will need to attend the hearing in order to confirm their evidence and respond to any questions. Tamaki Legal have leave to file opening and closing submissions in accordance with the timetable for stage one.

*Te Mata Law Ltd – various claimant groups*<sup>32</sup>

22. I direct that the joint brief of evidence by Dr Heather Came and Professor Tim McCreanor be added to the Record of Inquiry. Te Mata Law Ltd have leave to file opening and closing submissions in accordance with the timetable for stage one. Both witnesses will need to attend the hearing, to confirm their evidence and respond to any questions from counsel and/or the Tribunal.

*Te Mata Law Ltd – Wai 2702*<sup>33</sup>

23. I direct that the brief of evidence of Patricia Tuhimata be added to the Record of Inquiry. Leave has been sought for her brief to be taken as read and for any questions to be submitted and responded to in writing post-hearing. I direct that Ms Tuhimata will need to attend the hearing, to confirm her evidence and respond to any questions from counsel and/or the Tribunal. Counsel have leave to file opening and closing submissions in accordance with the timetable for stage one.

*Bennion Law – Wai 507*<sup>34</sup>

24. I direct that the brief of evidence of Owen Lloyd be added to the Record of Inquiry. Mr Lloyd will also need to attend the hearing to confirm his evidence and answer any

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<sup>30</sup> Above n 23.

<sup>31</sup> Wai 2575, #3.1.227.

<sup>32</sup> Wai 2053, Wai 2173, Wai 2046, Wai 2051, Wai 2684, Wai 2599, Wai 2723, Wai 2641, Wai 1622, Wai 2633, Wai 2697, Wai 2626, Wai 2695, Wai 2686, Wai 2635, Wai 2645, Wai 2683, Wai 2689, Wai 2672, Wai 2725, Wai 2703, Wai 2714, Wai 1959, Wai 2673, Wai 2719, Wai 2638, Wai 2240, Wai 2627, Wai 2701, Wai 2624, Wai 2702, Wai 827, Wai 2654, Wai 2145, Wai 2121, Wai 1804, Wai 2183, Wai 2642 and Wai 1832; Wai 2575, #3.1.232.

<sup>33</sup> Wai 2575, #3.1.234.

<sup>34</sup> Wai 2575, #3.1.230.

questions from counsel and/or the Tribunal. Bennion Law have leave to file opening and closing submissions in accordance with the timetable for stage one.

*Annette Sykes & Co – Wai 2713*<sup>35</sup>

25. I direct that the affidavits and briefs of Margaret Hand, Waiharakeke Winiata, Tracey Morgan, Maria Briggs, the Bay of Plenty and Tairawhiti Nurses (joint brief), Kelly McDonald-Beckett, Dr Heather Came and others (joint brief), Nola Tanner and Keelan Ransfield be added to the Record of Inquiry. Counsel have leave to file opening and closing submissions in accordance with the timetable for stage one.
26. One of the briefs filed is a joint one on behalf of eight nurses, all of whom work in the Bay of Plenty and Tairawhiti rohe.<sup>36</sup> In approving this brief of evidence to go on the Record of Inquiry, I direct that all proposed witnesses will need to attend the hearing to confirm their evidence and respond to any questioning. Practically speaking, the logistics of that are for counsel to arrange.
27. Counsel have also filed a joint brief of evidence on behalf of Dr Heather Came, Professor Tim McCreanor, Kerri Nuku and Leanne Manson. All four witnesses will need to attend the hearing to confirm their evidence and be available to answer any questions. Again, the practical logistics of arranging for those witnesses to attend is the responsibility of counsel.
28. I direct that briefs received from Kerri Nuku, Helen Garriock and Mere Brooks not be added to the Record of Inquiry.
29. Kerri Nuku seeks to file an affidavit. In it, she proposes to make a number of personal observations regarding changes for nurses that concern policy and training since the 1980s. The subject matter is a focus on nurse education, that is not within the scope of this inquiry. Furthermore, there is no link between that subject matter of the proposed brief and health outcomes for Māori specifically as framed in the Tribunal's Statement of Issues.
30. Helen Garriock and Mere Brooks seek to file affidavits in relation to their experiences as nurses working within the prison system. In their memorandum of counsel, counsel submit that "prisons are providers of primary health and given the disproportionate number of Māori in prison, it is a significant issue that should be included in stage one".<sup>37</sup> I understand that the responsibility for healthcare in prisons falls upon the Department of Corrections pursuant to s 75 of the Corrections Act 2004. Responsibility for prisoners' healthcare does not rest with District Health Boards and Primary Health Organisations. The claims we are inquiring into at stage one do not plead or refer to primary healthcare within the prison context. As such, I do not consider that the proposed evidence relates to the scope and purpose of this inquiry.
31. I note that Te Mata Law Ltd have also filed a joint brief of evidence in the names of Dr Heather Came and Professor Tim McCreanor. Te Mata Law Ltd and Annette Sykes & Co will need to work together to ensure that if possible Dr Heather Came and Professor McCreanor are able to give their evidence on a single day rather than be recalled on separate days before the Tribunal.

**Cross-examination requests**

32. In many of the memoranda filed, counsel have indicated that they may wish to cross-examine various parties. In my memorandum-directions dated 5 July 2018,<sup>38</sup> I indicated

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<sup>35</sup> Wai 2575, #3.1.235.

<sup>36</sup> Liz Harland, Nichola Awatere, Amelia Waaka, Laura Costello, Julia Cowley, Mihi Kuka, Mairi Lucas and Jessica Tamihere.

<sup>37</sup> Above n 36 at [24].

<sup>38</sup> Above n 2 at [31]–[36].

those issues which counsel for interested parties will need to address in making requests to cross-examine claimant and/or Crown witnesses and for memoranda to be filed no later than **midday, Friday 14 September 2018**. In that respect, this memorandum-directions does not respond to any cross-examination requests filed thus far. Counsel will need to follow the process previously outlined.

#### **Filing of reply evidence by interested parties**

33. Clarification has been sought by some counsel on the issue of filing reply evidence by interested parties.<sup>39</sup>
34. As I have previously indicated, we are inquiring into and reporting on the Wai 1315 and Wai 2687 claims. We will not be inquiring into or reporting on the claims of any interested party.<sup>40</sup>
35. One assumes that the Crown's evidence will have as its primary focus a response to the evidence filed on behalf of Wai 1315 and Wai 2687. Therefore, the need for interested parties to file reply evidence should be minimised.
36. However, if evidence filed by the Crown directly addresses evidence filed by the interested parties, for which the interested parties consider a response is required and/or the evidence adversely affects the interested parties' interests as set out in s 4A(2) of the Commissions of Inquiry Act 1908, in those circumstances interested parties can file reply evidence. Any such reply evidence must be filed and circulated in accordance with the timetable, that is by **midday, Thursday 18 September 2018**.

#### **Miscellaneous matters**

37. Two of the proposed briefs of evidence which I have directed to be added to the Record of Inquiry are unsigned. These are the briefs filed by Woodward Law on behalf of Teresa Wall and Sir Taihākurei Durie. Counsel are directed to make arrangements for the filing of signed briefs of evidence as soon as possible.
38. For clarity, I direct that all witnesses for stage one, whether called for by the Wai 1315, Wai 2687 claimants, the Crown or interested parties need to personally attend to confirm their evidence and answer any questions from counsel and the Tribunal.
39. I accept the possibility that there may be some witnesses whom no counsel wishes to cross-examine. That is something that needs to be ascertained. Currently, the timetable provides that counsel for interested parties must signal their requests to cross-examine witnesses by filing memoranda-counsel by midday, Friday 14 September 2018. I am going to impose a similar discipline upon counsel for the Wai 1315 and 2687 claimants and the Crown. To clarify, the Wai 1315 and 2687 claimants and the Crown do not need to seek leave to cross-examine, however what I am directing is that they file memoranda by **midday, Friday 14 September 2018** providing indications of the following:
  - a) Which witnesses they wish to cross-examine; and
  - b) An approximation of how much time is required.
40. Those indications should assist in two respects. First, it should assist with the identification of those witnesses whom no counsel wishes to cross-examine. That raises the possibility that their briefs of evidence and/or affidavits may be able to be taken as read without those witnesses needing to personally attend the hearing. In those circumstances, any such witnesses wishing to be excused from attending the stage one hearings should seek leave to be excused by **midday, Tuesday 2 October 2018**. This of course is subject to whether

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<sup>39</sup> Wai 2575, #3.1.226 and #3.1.229.

<sup>40</sup> Above n 2 at [19].

or not any Tribunal panel members may have questions for such witnesses. Secondly, it should also assist counsel in the preparation of the hearing timetable.

41. In preparing any hearing timetable, counsel for Wai 1315, Wai 2687 and the Crown need to take into account the following:

- a) On Monday, 15 October 2018 proceedings will start with a pōwhiri at 8.30am at Tūrangawaewae Marae;
- b) The hearings will conclude with hākari and poroporoakī on Friday, 2 November 2018;
- c) There will be no pōwhiri on 23 October and 1 November 2018 but proceedings will commence with a mihi whakatau;
- d) Hearing days will commence at 9am and conclude at 5pm with the exception of Day 1, for reasons outlined above; and
- e) All briefs of evidence and affidavits placed on the Record of Inquiry will be taken as read. Therefore, other than mihihi and personal introductions we are not expecting any witnesses to provide a summary of their evidence.

42. As a result of these directions, some minor adjustments have been made to the timetable for stage one. An amended timetable for stage one is attached as **Appendix One**. The timetable for the wider inquiry programme is attached as **Appendix Two**. A list of those interested parties who are granted leave to participate in the stage one proceedings is attached as **Appendix Three**.

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 10<sup>th</sup> day of August 2018



Judge S R Clark  
Presiding Officer  
**WAITANGI TRIBUNAL**