

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
APPROACH TO BE TAKEN TO STAGE ONE INQUIRY

29 March 2018

Introduction

1. This memorandum-directions responds to recent requests from parties who seek to participate in stage one of the Health Services and Outcomes Kaupapa Inquiry (the Health Inquiry), and follows the judicial conference held to address these matters in Hamilton, on 15 March 2018.
2. In these directions, I further:
 - (a) Confirm the approach to be taken in the stage one proceedings;
 - (b) Provide an amended filing date in respect of feedback following the forthcoming national health hui;
 - (c) Confirm arrangements for parties who may seek interested party status in the stage one proceedings; and
 - (d) Provide an amended timetable.

Background

3. On 8 March 2018, I issued a memorandum-directions confirming arrangements for a judicial conference, to be held at the Māori Land Court, in Hamilton, on 15 March 2018.¹ The purpose of the judicial conference was to hear from counsel with claimants who wished to be heard on stage one matters, for whom leave had not already been granted.
4. In my directions of 8 March 2018, I instructed any such counsel to file submissions, prior to the 15 March 2018 fixture, seeking leave to participate. I directed that counsel were to outline the reasons for which participation was sought, and further instructed counsel to focus on those matters for discussion at the judicial conference as outlined at paragraph 22.
5. On 12 March 2018, via an e-mail sent by the Tribunal Registrar, I duly granted leave to the following counsel to participate in the forthcoming judicial conference:
 - (a) Season-Mary Downs, Chelsea Terei, and Heather Jamieson, on behalf of Wai 682;
 - (b) Gerald Sharrock, on behalf of Wai 121, Wai 884, Wai 1460, Wai 1841, Wai 2108, Wai 2179, Wai 2191 and Wai 2309;
 - (c) Dr Bryan Gilling and Josey Lang, on behalf of Wai 1670 and Wai 2619;
 - (d) Charl Hirschfeld, Tony Sinclair, and Barney Tupara, on behalf of Wai 2685, Wai 2681, Wai 1732, Wai 2006, Wai 2682, Wai 2380, Wai 2072, Wai 2244, Wai 862, Wai 861, Wai 87, and others;
 - (e) Annette Sykes, Rebekah Jordan, and Jordan Bartlett, on behalf of Wai 2713; and
 - (f) Donna Hall and Daniel Kleinsman, on behalf of 14 named claimants and the New Zealand Māori Council.
6. On 15 March 2018, together with Tribunal panel member Dr Tom Roa, I heard submissions from the above parties, counsel for the Crown, and counsel for the Wai 1315 and Wai 2687 claimants, and those others for whom leave to participate had already been granted.²

¹ Wai 2575, #2.5.24.

² Ibid.

7. Due to the recent appointment of claimant counsel, Peter Andrews, to the role of Associate Judge of the High Court, Wai 1315 was represented at the judicial conference by Roimata Smail, while Wai 2687 was represented by Phillip Cornegé. I further granted leave, in the course of these proceedings, for Eve Rongo, counsel for Wai 2647 to participate and address the Tribunal on matters pertinent to her client's interests.
8. A full list of counsel who participated at the 15 March 2018 judicial conference is **attached as Appendix 1**.

Position of parties

9. Parties have now had an opportunity to file submissions on the above matters and to make oral submissions during the judicial conference.
10. A high-level summary of parties' positions is set out below, organised by order of appearance at the 15 March 2018 judicial conference.

Counsel for Te Ohu Rata o Aotearoa – Māori Medical Practitioners Association (Te ORA) (Wai 2499)

11. Counsel for Te ORA, Paranihia Walker and Kate Tarawhiti, seek directions from the Tribunal granting leave for the Wai 2499 claimants to participate, present evidence and make submissions as a claimant in stage one of the Health Inquiry. Counsel also seeks clarification of the claim issues intended to be addressed in these proceedings, in order that the parties might assess 'how their respective claims and claim issues may be affected or prejudiced by the Stage One inquiry'.³ Counsel consider Te ORA to have a 'distinct interest' in these proceedings that is apart from an interest in common with the public, and a right to be heard on that basis.⁴
12. Speaking at the 15 March 2018 judicial conference, Ms Walker further submitted that the Wai 2499 claim remains broad owing to Te ORA's active involvement in planning and roundtable discussions on inquiry design matters which remain ongoing. Counsel noted that Te ORA supported the decision to focus on primary care as the 'gateway of health'. Counsel confirmed that her clients considered this to be an appropriate starting point for the Tribunal's inquiry, and confirmed that Te ORA was ready to prepare and give evidence on 'system issues' as part of a targeted inquiry into the structural underpinnings of primary care.
13. In terms of their prospective involvement in stage one, Ms Walker indicated at the judicial conference that Te ORA would require up to a week of hearing time beyond that currently scheduled. Counsel indicated that, while her clients would be able to meet the current timetabling for the stage one inquiry, any additional time needed for hearing purposes would be useful to the Tribunal, and would provide a broader perspective of the health system than might otherwise be the case.

³ Wai 2575, #3.1.113 at [32].

⁴ Wai 2575, #3.1.113 at [23].

Te Mata Law

14. David Stone and Catherine Leagua, who represent a number of claimants, request:⁵

- (a) Clarification from the Tribunal as to what it considers to be ‘system issues’;
- (b) That Dr Heather Came, an expert on institutional and interpersonal racism in New Zealand, be permitted to file and present evidence at the stage one hearing; and
- (c) Clarification as to the scope of ‘primary care’ intended to be addressed by way of the stage one inquiry.

15. At the judicial conference, Ms Leagua confirmed that the claimants for whom she represents did not, at this stage, seek to participate in the stage one inquiry. Counsel instead reiterated her request that Dr Came be allowed to present evidence relevant to these proceedings. Counsel submitted that Dr Came’s evidence could be helpful, particularly in informing the Tribunal’s stage one report. Ms Leagua also sought confirmation that a lack of participation at stage one would not cause ‘downstream prejudice’ to their future participation at stage two or thereafter.

Tamaki Legal

16. Darrell Naden, Stephanie Roughton, and Nancy Dhaliwal, who represent a number of claimants in these proceedings seek clarification of:⁶

- (a) The scope of primary care issues to be determined in the stage one inquiry;
- (b) Whether the Tribunal considers it will report on the claims of Wai 1315 and Wai 2687 prior to the hearing of other claims into primary health care; and
- (c) How the Tribunal intends to inquire into Wai 2499, and any others with primary health care-related claim issues.

17. Counsel submits that the focus on two claims, to the exclusion of others, risks ‘real prejudice to other claimants’, and argues that the right to be heard in these proceedings is enshrined in law. In respect of Te ORA, counsel argues that Te ORA’s right to participate has been removed without ‘any guarantee’ of when their claim might be heard, and that the Tribunal, and not the Crown, should be ‘the arbiter of claimant participation’.⁷

18. Mr Naden orally submitted:

- (a) The nature of the evidence to be heard during the stage one inquiry remained unclear;
- (b) Participation of his clients at stage one, as full claimants, was needed in order to protect their interests;
- (c) Further hearing time would be required to effectively support the participation of parties at stage one beyond that currently envisaged;
- (d) Hearing time could be maximised by taking some evidence as read, and ensuring the nature of evidence submitted was not repetitive;
- (e) Research should be commissioned as soon as possible (counsel noted an apparent lack of data collection within the health sector); and
- (f) His intention to file further submissions on the nature of the relief sought, for the benefit of the Tribunal’s consideration.

⁵ Wai 2575, #3.1.114 at [14].

⁶ Wai 2575, #3.1.115 at [16] and [17].

⁷ Wai 2575, #3.1.115 at [5] and [15].

19. On 21 March 2018, counsel filed further written submissions covering the points Mr Naden had made during the judicial conference. As leave had not been granted to file further submissions on these matters, I instructed Tribunal staff not to place this material on the Wai 2575 Record of Inquiry.

Phoenix Law

20. Janet Mason, in claim-specific submissions filed on 6 March 2018, submits that Wai 2720, the Health Services (Tamihere) Claim meets the criteria set out in my memorandum-directions dated 8 December 2018 for participation in the stage one inquiry. Counsel submits her clients should be granted claimant status on that basis.⁸ The claim, which is brought by a number of urban claimants, including the Waipareira Trust, exemplifies – Ms Mason states – a range of system issues, particularly in regard to funding. Counsel states, to support this point, that the Trust is one of the ‘largest recipients of Crown funding’ in the primary care space.⁹

21. In generic submissions filed on 7 March 2018, Ms Mason registered broad support for the submissions of parties filed at that stage on matters of participation, and noted that her clients had supported a comprehensive inquiry, that would have been held over three years, on both historical and contemporary health issues.¹⁰ Counsel further suggested that the Tribunal consider an approach to inquiry planning that would depart from ‘majority-centred decision-making’ in favour of parties’ filing individual submissions that could be assessed by the Tribunal on their merits.¹¹

22. Ms Mason, in the course of the 15 March 2018 judicial conference, spoke to both sets of submissions, further submitting:

- (a) Difficulties of assuring adequate participation of her clients at stage one, given their particular case theory, and the absence at this stage of a confirmed Statement of Issues (SOI) for the inquiry;
- (b) An intention to work cooperatively with other parties to these proceedings, in order to formulate a draft SOI at an earlier date; and
- (c) The Wai 2720 claimants would require a maximum of two days’ hearing time, subject to the nature and extent of the evidence intended to be called by the existing stage one claimants.

Morrison Kent

23. In their memorandum filed on 12 March 2018, counsel for Wai 1619 and Wai 2619, Dr Bryan Gilling and Josey Lang, seek:¹²

- (a) Clarification of what the Tribunal considers to be ‘system issues’;
- (b) Confirmation of the scope of ‘primary care’ to be addressed in stage one; and
- (c) A direction granting limited participation to the Wai 1670 and Wai 2619 claims in the stage one proceedings.

⁸ Wai 2575, #3.116 at [9].

⁹ *Ibid.*

¹⁰ Wai 2575, #3.1.117 at [8] and [9].

¹¹ Wai 2575, #3.1.117 at [21].

¹² Wai 2575, #3.1.122.

24. Ms Lang, who represented her clients' interests at the recent judicial conference, further confirmed that:

- (a) The aforementioned claims would provide insight into the experiences of health users for which the health system was not adequately serving;
- (b) Their participation would require no more than 1.5 hours per witness (counsel submitted this would therefore have limited impact on the Tribunal's total hearing time); and
- (c) Amended pleadings could be filed to further particularise the claims in light of the Tribunal's intended focus for stage one, should that assist the Tribunal.

Ranfurly Chambers

25. Charl Hirschfeld, Tony Sinclair, and Barney Tupara, on behalf of a number of claimants, submit that the Tribunal should pause the current stage one proceedings in favour of a broader and more inclusive inquiry process. This, counsel states, would also enable feedback to be received from the forthcoming national health hui scheduled for April 2018.¹³

26. In respect of their clients' participation at stage one, counsel:¹⁴

- (a) Confirms that their clients are not ready to proceed but may, in addition to cross-examining some stage one witnesses, seek to file rebuttal evidence where relevant;
- (b) Indicate that their clients consider the current health system should be replaced by one which is whānau-based and compliant with tikanga Māori; and
- (c) Draw the Tribunal's attention to ongoing issues around funding and legal aid assistance.

27. These submissions were largely reinforced by Mr Sinclair during in-person submissions at the 15 March 2018 judicial conference.

Annette Sykes and Co

28. Annette Sykes, Rebekah Jordan, and Jordan Bartlett, who act for Te Rūnanga o Aotearoa Tōpūtanga Tapuhi Kaitiaki o Aotearoa (Wai 2713), seek the inclusion of the Wai 2713 claimants in the stage one inquiry on the basis that the claim issues cover a number of system issues that, counsel says, leave 'Māori disproportionately vulnerable and those Māori nurses working in the frontline communities unfairly disadvantaged'.¹⁵

29. Counsel intends to, if granted leave to participate, provide evidence at stage one highlighting perceived system deficiencies from the perspective of frontline Māori nurses. Her clients will also demonstrate problems around the allocation of funding and associated funding policies.¹⁶ Counsel further submits that:

- (a) The claimants have a significant body of relevant research, including material drawn from a presentation delivered to the United Nations;
- (b) No further research is required to support their claim;
- (c) The claimants are ready to proceed, and intend to file a further particularised statement of claim; and

¹³ Wai 2575, #3.1.123 at [6] to [9].

¹⁴ Ibid.

¹⁵ Wai 2575, #3.1.124 at [5].

¹⁶ Wai 2575, #3.1.124 at [6] to [13].

(d) The Tribunal's stage one inquiry should be mindful of the health system's impact on Māori nurses.

30. Ms Jordan, who represented Wai 2713 at the judicial conference, further submitted that her clients:

- (a) Would require no more than one day of hearing time beyond that already set down for stage one purposes;
- (b) Intend to rely on the research of Dr Came for the purposes of understanding alleged structural barriers apparent in the health system; and
- (c) Should be granted leave to participate, given the contribution of nurses at every level of the health system, including within primary care.

31. I additionally granted leave for myself and Dr Roa to be addressed at the judicial conference by Kerri Nuku, Kaiwhakahaere for Tōpūtanga Tapuhi Kaitiaki o Aotearoa, who further outlined the grounds sought for her organisation's participation within the stage one inquiry. Ms Nuku also noted various structural issues confronting the Māori nursing workforce. Ms Nuku has subsequently confirmed her comments by way of an affidavit.¹⁷

Counsel for Wai 682

32. Season-Mary Downs, Chelsea Terei, and Heather Jamieson, who act for Te Rūnanga o Ngāti Hine (Wai 682), seek their client's participation on the basis of their close relationship to the Ngāti Hine Health Trust. Counsel submit that the Ngāti Hine Health Trust is the largest Māori health provider in Te Tai Tokerau and operates two primary health organisations (PHOs).¹⁸ Counsel submits their client's participation is justified given the:¹⁹

- (a) Diversity of communities served in the region, and their evident level of deprivation;
- (b) Need for Ngāti Hine to 'speak for itself'; and
- (c) National significance of Ngāti Hine's claims, given the community's population and size, and Ngāti Hine's role in providing health services to Māori.

33. Ms Downs further confirmed at the judicial conference, that:

- (a) Her clients would require up to two days' of hearing time beyond that currently confirmed for stage one;
- (b) Her client's intention to work cooperatively with the Manaia and Te Tai Tokerau PHOs to advance Ngāti Hine's kaupapa health claim; and
- (c) An intention to file an amended statement of claim by 23 March 2018.

Right Law

34. Gerald Sharrock, who represents a number of urban claimants, submits that the Tribunal would benefit from the inclusion of his clients in the stage one inquiry. Counsel submits that:²⁰

- (a) Stage one, as it is currently formulated, risks being confined to a 'narrow set of opinions';

¹⁷ Wai 2575, #A4 and Wai 2575, #A4(a).

¹⁸ Wai 2575, #3.1.130 at [10].

¹⁹ Wai #2575, #3.1.130, at [14] and [17] to [19].

²⁰ Wai 2575, #3.1.127 at [6] to [7] and [13].

- (b) The existing stage one claimants form part of the current health system and therefore cannot speak to a 'more thorough consumer based approach'; and
- (c) His clients' contributions to the stage one inquiry cannot and will not be replicated by the existing stage one claimants.

35. Mr Sharrock further submitted at the judicial conference that:

- (a) The evidence proposed by his clients would focus on the structure and delivery of health services, as well as the outcomes sought;
- (b) The Tribunal should ensure there is a sufficient diversity of claims at stage one to provide adequate insight into customer experiences of the health system; and
- (c) The Tribunal should consider how the structure and performance of the primary care sector can be improved.

Counsel for Wai 2647

36. Ms Rongo seeks leave for the Wai 2647 claim to participate in the stage one inquiry, with a view to addressing systemic issues around racism in the 'cancer continuum'. Counsel submits that her client's participation is needed to ensure the Tribunal is given a comprehensive picture of primary care as it pertains to Māori cancer sufferers and their whānau. She additionally submits that her clients have valuable expertise to offer as experts in the cancer research sector.²¹

37. Ms Rongo was given leave to file submissions after the conference. In them she submits that:²²

- (a) The possibility that stage one witnesses may not be able to participate in stage two or later stages of the Health Inquiry, to the detriment of those claimants;
- (b) Her client's support for the inclusion of Dr Came as a key witness at stage one, and her intention to liaise with certain counsel to achieve 'efficiencies' at hearing to that end; and
- (c) Her clients are able to file an amended statement of claim for stage one purposes before the end of March 2018.

Counsel for Wai 1315 and Wai 2687

38. Counsel for the Wai 1315 and Wai 2687 claimants filed a joint submission on 12 March 2018, concerning the matters raised in relation to stage one participation, and other matters arising in relation to wider inquiry planning. In summary, counsel submitted that the decision to hold a stage one inquiry into aspects of primary care:²³

- (a) Was a reasonable exercise of the Tribunal's powers to regulate its own procedure;
- (b) Was made after extensive submissions from all claimants, both in person and in writing;
- (c) Would complement a more broad-ranging inquiry to be held at stage two; and
- (d) Would not prejudice the broad ranging claims of other claimants not participating at stage one.

39. Counsel does not, in principle, object to the participation of Te ORA at stage one, but notes a lack of clarity in regard to their position on the Primary Health Framework (the

²¹ Wai 2575, #3.1.134 at [16].

²² Wai 2575, #3.1.134 at [14]-[19] and [30].

²³ Wai 2575, #3.1.128 at [2].

Framework) and its operation.²⁴ With regards to the Framework, counsel is also given to understand that the Crown will soon initiate a review of the Framework, and therefore requests that the Tribunal:²⁵

- (a) Direct the Crown to advise the content, timeframes, and current progress of that review;
- (b) Recommend to the Crown that the Ministry of Health engage fully in the stage one hearing process; and
- (c) Request that 'any deliberation or decision making on its review' remain deferred pending the Tribunal's stage one report.

40. Speaking at the judicial conference on behalf of Wai 1315, Ms Smail further submitted that:

- (a) Wai 1315 had been first filed in 2005, and that the claimants had at that time sought an urgent hearing;
- (b) The claim is fully particularised, including an amended statement of claim filed this year to reflect the current health landscape;
- (c) Participation of other parties now risks diverting the Tribunal's current focus from the Primary Health Framework and its policy and legislative underpinnings;
- (d) The Wai 1315 claimants have made approaches to Te ORA and the Wai 2720 claimants, and do not seek to exclude their involvement in this stage of the inquiry; and
- (e) There is a need for timeliness to ensure the Tribunal's recommendations can be implemented, or at least considered, by the current government.

41. Mr Cornegé, speaking on behalf of the Wai 2687 claimants, noted that the National Hauora Coalition remained open to working with other parties in respect of evidence and the availability of expert witnesses. However, in respect of their broader participation at stage one, counsel suggested three criteria for the Tribunal's consideration, namely that:

- (a) The scope of issues for inquiry should not be materially expanded;
- (b) Any claimants granted leave to participate must be able to comply with the current stage one inquiry timetable; and
- (c) The time set down for hearing purposes should not be materially enlarged.

Counsel for the New Zealand Māori Council

42. Donna Hall and Daniel Kleinsman, counsel for 14 named claimants and the New Zealand Māori Council (NZMC), submit broadly in support of the Tribunal's current stage one programme. In particular, counsel is in favour of a stage one inquiry brought by organisations with a 'well substantiated stake in the provision of Māori health care services and in Māori health care policy'.²⁶ Counsel argues that the Tribunal should give priority to Māori kauapa institutions, such as the Māori Primary Health Organisations and Providers, and the National Hauora Coalition, with individuals to be heard at a stage thereafter.²⁷

43. These points were largely reinforced by counsel at the judicial conference.

²⁴ Wai 2575, #3.1.128 at [7].

²⁵ Wai 2575, #3.1.128 at [10].

²⁶ Wai 2575, #3.1.125 at [15].

²⁷ Wai 2575, #3.1.125 at [18] and Wai 2575, #3.1.132 at [13].

44. On 19 March 2018, Ms Hall and Mr Kleinsman filed further supplementary submissions in relation to the above matters, and an affidavit prepared by George Ngatai. As leave had not been granted to file further submissions on these matters, I instructed Tribunal staff not to place this material on the Wai 2575 Record of Inquiry.

Crown

45. In their submissions filed in advance of the judicial conference, Crown counsel, Craig Linkhorn, Geoff Melvin, and Abbey Lawson, note that most intending stage one claimants have yet to file particularised pleadings. Counsel considers this to be a necessary prerequisite to their participation, but notes that, should leave be granted for these parties to participate, the current stage one inquiry programme would need to be consequently recalibrated to ensure both sufficient hearing and preparation time.²⁸

46. As an alternative, the Crown suggests the Tribunal could maintain its current stage one hearing programme but agree to 'broaden the reach of stage one of the inquiry to include an agreed set of issues, comprising a further tranche of generic and system level issues' raised by the above parties. Counsel suggests that such a proposal could be discussed at forthcoming roundtable discussions and then brought back to the Tribunal for consideration at the June 2018 judicial conference.²⁹

47. In oral submissions made at the judicial conference, Mr Linkhorn noted that the nature of the Crown's proposed review of the Primary Care Framework had not yet been finalised; however, officials anticipated the initiative would focus on the sustainability of the primary care system, and barriers of care. Counsel noted that no fixed timeframes for the review had yet been announced, but that officials would be mindful of the Tribunal's forthcoming inquiry. On behalf of the Crown, Mr Linkhorn undertook to further update the Tribunal, and liaise with officials as required, in order to ensure the Tribunal remained abreast of any relevant developments.

48. In relation to the possibility of an enlarged stage one inquiry, Mr Linkhorn raised concerns as to the potential for 'lookalike' pleadings, and the likelihood of delay caused to the current stage one timeframes. The Crown also signalled possible constraints to its ability to respond to further pleadings in the timeframes currently envisaged for stage one, and the impact that could arise from any slippage of claimant evidence.

Discussion

The initial decision to proceed with stage one

49. I issued my first memorandum-directions as Presiding Officer of this inquiry on 21 December 2016.³⁰ In it an early indication was sought from the claimants of the principal issues they wished to bring and whether there were matters that should have priority.³¹

50. In the lead-up to the first judicial conference, Tribunal staff prepared and circulated a pre-judicial conference discussion paper.³² After reviewing the claims then filed, nine broad sets of issues were identified.

²⁸ Wai 2575, #3.1.133 at [4].

²⁹ Wai 2575, #3.1.133 at [5].

³⁰ Wai 2575, #2.5.2.

³¹ Ibid at [14].

³² Wai 2575, #2.8.1.

51. Prior to the first judicial conference, counsel were asked to focus their submissions on four matters, two of which were:
- (a) Whether the Tribunal should identify, hear and report on broad themes, rather than proceed on a claim by claim basis; and
 - (b) Were there any priority matters which warranted an early or expedited hearing process. If so, what were they?³³
52. We heard from counsel on those and other issues at the first judicial conference which took place on 11 and 12 May 2017. In a subsequent memorandum-directions, on the question of scope, focus and priorities for the hearing, we recorded that no clear consensus had emerged.³⁴
53. Nevertheless, we noted a will amongst claimants, counsel and the Crown to work together. To that end we directed that roundtable discussions should be held and be reported back to us by 4 September 2017. Issues we asked counsel to specifically report back on were priority issues, a statement of scope and a proposed hearing programme.³⁵
54. Roundtable discussions were held in August 2017. The timeframe for reporting back to the Tribunal was also extended until 10 November 2017.³⁶
55. By mid-November 2017, the Tribunal had received 16 submissions concerning inquiry design, including several joint submissions. On 27 and 28 November 2017, the Tribunal panel met to consider all submissions which had been made about the scope, priority and approach to the Health Inquiry. Subsequently on 8 December 2017, we issued a memorandum-directions proposing that this Tribunal proceed in three stages addressing:
- (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.³⁷
56. In our considerations, we considered submissions from parties that identified claims that appeared 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 stated they are ready to proceed.³⁸

³³ Wai 2575, #2.5.7 at [11].

³⁴ Wai 2575, #2.5.8.

³⁵ Wai 2575, #2.5.8 [12] and [13].

³⁶ Wai 2575, #2.5.11 at [8].

³⁷ Wai 2575, #2.5.17 at [6].

³⁸ Ibid at [9].

57. We identified the Māori Primary Health Organisations (PHO) and Providers (Wai 1315) and the National Hauora Coalition (Mason and Royal) (Wai 2687) claims as meeting those criteria.³⁹
58. On 22 December 2017, the Tribunal received a memorandum from Te Ohu Rata o Aotearoa – Māori Medical Practitioners Association (Te ORA) (Wai 2499) seeking a direction that they be added to the claimants to be heard during stage one.⁴⁰ In a memorandum-directions dated 19 January 2018 I indicated that I was not persuaded that Te ORA should be added to stage one because:
- (a) Their statement of claim had not particularised any substantive claim issues relating to primary care and was of a relatively generic nature; and
 - (b) Their request for inclusion did not align with a joint memorandum of 7 September 2017 in which they reserved their position in respect of a proposed initial inquiry into primary healthcare.⁴¹
59. Having said that, I went on to acknowledge the critical expertise of Te ORA and suggested that counsel for Te ORA liaise directly with counsel for Wai 1315/2687 and Crown counsel to see if, and/or how Te ORA's expertise could meaningfully be drawn upon during the stage one inquiry. I suggested that if that happened, details should be included in a memorandum which was due to be filed by 9 February 2018 concerning stage one planning matters.⁴²
60. A joint memorandum for counsel for the Crown and Wai 1315/2687 was filed on 9 February 2018 along with a proposed timetable. In it counsel for Wai 1315 and Wai 2687 indicated that an initial approach had been made to counsel for Te ORA but there had been little opportunity to discuss what involvement Te ORA might have.⁴³
61. On 28 February 2018, the Tribunal confirmed that it would proceed to hear the claims of Wai 1315 and Wai 2687 as stage one of the Health Inquiry. Attached to that memorandum-directions was an appendix outlining the timetable and hearing programme.⁴⁴
62. Later the same day, Te ORA filed a memorandum seeking that the Tribunal reconsider its decision concerning their participation in stage one of the Health Inquiry.⁴⁵ Subsequently a number of other claimants also sought to participate in stage one, the details of which are outlined earlier in this memorandum-directions.
63. The decision we made to proceed with a three-stage inquiry, and to hear the claims of Wai 1315 and Wai 2687 as a first stage, were not made in a vacuum. In arriving at that

³⁹ Ibid at [10].

⁴⁰ Wai 2575, #3.1.109.

⁴¹ Wai 2575, #2.5.20 at [12].

⁴² Ibid at [13].

⁴³ Wai 2575, #3.1.111.

⁴⁴ Wai 2575, #2.5.22.

⁴⁵ Wai 2575, #3.1.113.

decision, we were informed by directions issued by the Chairperson on 1 April 2015 and 30 November 2016.⁴⁶ In his direction of 1 April 2015, the Chairperson stated that:

The kaupapa inquiry programme is designed to provide a pathway for the hearing of nationally significant claim issues that affect Māori as a whole or a section of Māori in similar ways. These thresholds – national significance, Māori widely affected, similarity of experience of the Crown policy or action complained of – must normally be met for a kaupapa inquiry to be constituted.⁴⁷

64. In his memorandum-directions of 30 November 2016, the Chairperson stated:

Claimants wishing to have their health-related claims heard should bear in mind that kaupapa inquiries are designed to address issues of national scale and significance. Claims with specific or local grievances may serve as case studies or examples, but will otherwise be eligible to participate in the standing panel process for remaining historical claims now in preparation or for a future contemporary claims process.⁴⁸

65. We also wanted to receive input from the claimants. That is the reason why we were prepared to wait for close to six months for the claimant community to have roundtable discussions to provide input into the design of the hearing programme. Submissions were subsequently filed and we were informed by them in the lead-up to our panel meeting on 27 and 28 November 2017. As indicated in our memorandum-directions of 8 December 2017, we took particular note of those issues raised in two joint memoranda on 6 September⁴⁹ and 7 September⁵⁰ 2017.

66. We were entitled to make a decision about the design of the hearing programme for this Inquiry and what matters should be initially heard. We do not have to nor is it practically possible to agree with every submission or point made by the parties. We made a decision as to what we considered to be a reasonable way forward, which we are entitled to do. As clause 5(9) of the second schedule to the Treaty of Waitangi Act 1975 provides, the Tribunal has statutory authority to regulate its own procedures:

Except as expressly provided in this Act, the Tribunal may regulate its procedure in such manner as it thinks fit...⁵¹

67. It is also important at this juncture to reiterate a number of matters stated in the memorandum-directions of 8 December 2017, they being:

- (a) That stage one would be a discrete and targeted inquiry into areas of primary care;⁵²
- (b) We acknowledged that there may be some claims that might meet some of the criteria. However, in our view an early inquiry into key matters relating to primary

⁴⁶ Memorandum of the Chairperson concerning the kaupapa inquiry programme, 1 April 2015 and Wai 2575, #2.5.1.

⁴⁷ At [11].

⁴⁸ Wai 2575, #2.5.1 at [12].

⁴⁹ Wai 2575, #3.1.81

⁵⁰ Wai 2575, #3.1.85.

⁵¹ Treaty of Waitangi Act 1975, Schedule 2, Regulation 5(9). See also the Waitangi Tribunal Practice Note – *Guide to the Practice & Procedure of the Waitangi Tribunal* (May 2012) – 2.1.

⁵² Wai 2575, #2.5.17 at [10].

- care would support the Tribunal's ability to report in a timely and effective manner whilst also providing a pathway to a broader stage two inquiry process;⁵³
- (c) Both the Wai 1315 and 2687 claimants were ready to proceed;⁵⁴
 - (d) No research needed to be commissioned by the Waitangi Tribunal; and
 - (e) We specifically indicated that we did not intend, *at stage one*, to embark on a comprehensive inquiry into primary care. We said that an intended aim of stage one was to distil the structural dimensions of New Zealand's health system as they inform (or otherwise) contemporary health services and outcomes for Māori.⁵⁵ (emphasis added)

Reconsideration of our decision

68. In reconsidering our decision, we have taken into account the following:

- (a) Our initial decision of 8 December 2017, confirmed on 28 February 2018;
- (b) All written memoranda of counsel filed in the lead-up to, and at the judicial conference held at Hamilton on 15 March 2018;
- (c) The oral submissions made at the judicial conference held on 15 March 2018;
- (d) The Wai 1315 and Wai 2687 pleadings,⁵⁶ and
- (e) The pleadings of those claimants which appeared before us at the judicial conference on 15 March 2018.

69. In considering that material, we acknowledge that the Wai 1315 statement of claim has been amended. The latest iteration is dated 1 February 2018. Whilst that was not available to us when the initial decision was made on 8 December 2017, we consider that we are entitled to take it into account given that we have been asked to reconsider all aspects of our decision to proceed to stage one.

Denial of a right to be heard?

70. One theme that emerged from the written and oral submissions was that by hearing Wai 1315 and Wai 2687 at stage one we were denying claimants their statutory right to be heard pursuant to s 6 of the Treaty of Waitangi Act 1975.

71. We do not see how in deciding to initially hear the claims of Wai 1315 and Wai 2687, that somehow constitutes a denial of a right to be heard. There are currently 181 claims before us, that number grows on a weekly basis. No decisions have been made yet as to eligibility because, as we have repeatedly stated, we first want to identify themes for investigation and inquiry which warrant priority. The mere fact that a claim may be heard later in this inquiry or in another inquiry process,⁵⁷ does not constitute a denial of a right to be heard.

72. We also reject the submission made by some that a suggestion that counsel for Te ORA should liaise directly with Crown counsel, and counsel for Wai 1315 and Wai 2687, concerning their participation during stage one somehow delegated the role of 'arbiter' to the Crown. The suggestion was made in the context of trying to achieve agreement on

⁵³ Ibid at [11].

⁵⁴ Ibid at [13].

⁵⁵ Ibid at [16].

⁵⁶ Wai 1315, #1.1.1 and Wai 1315, #1.1.1(a) and Wai 2687, #3.1.1.

⁵⁷ The Standing Panel Process.

possible Te ORA involvement, when we had already stated that we would hear the Wai 1315/2687 claims. That did not mean that we would not otherwise hear from Te ORA. It did not mean that the Crown would decide whether or not Te ORA would participate. What we thought it meant is that counsel and the parties concerned should liaise and co-operate to see if and how Te ORA could be involved. It appears those discussions have not happened which represents a lost opportunity.

Prejudice

73. A number of claimants submitted that they would be prejudiced if they could not be heard at stage one. The alleged prejudice seemed to fall into two categories, they being:

- (a) They will have to wait to be heard until a latter stage of this Inquiry; or
- (b) That there is a danger the Tribunal may make interim recommendations which will be difficult to later overturn.

74. The alleged claims to being prejudiced were faint. If evidence later comes to light which persuades the Tribunal to make or change its recommendations we see little difficulty in doing so. Any alleged problem in this regard can be ameliorated by the Tribunal making its recommendations at the conclusion of stage one on an interim basis only.

National v local focus

75. We acknowledge that some claimants, other than Wai 1315 and 2687, have filed pleadings which relate in part to the structural dimensions of the New Zealand primary healthcare system. By way of example, the Waipareira Trust, at paragraph 15 of their statement of claim, specifically plead issues concerning the national framework for primary health.⁵⁸ Likewise in a claim filed by Māori living in Canterbury, that claim is framed in part about the New Zealand Public Health and Disability Act 2000.⁵⁹

76. We acknowledge that some claimants may be able to and intend to make claims which allege flaws in the framework of the primary healthcare system.

77. However, the point should be made that the Wai 1315 and Wai 2687 claims have, as their sole focus, the New Zealand primary healthcare framework and its alleged flaws. The first statement of claim had as its focus 'statute and policy' relating to the New Zealand primary healthcare framework, including:⁶⁰

- The New Zealand Public Health and Disability Act 2000; and
- The Primary Healthcare Strategy 2001 and various policy documents.

78. The amended statement of claim filed in relation to Wai 1315 starts with the New Zealand Public Health and Disability Act 2000. It then goes on to plead various contractual and policy arrangements which they say constitutes the architecture of the primary healthcare framework. Specific matters they refer to are the following:

- The Crown funding agreement;

⁵⁸ Wai 2720, #1.1.1.

⁵⁹ Wai 2645, #1.1.1 at [2].

⁶⁰ Wai 1315, #1.1.1.

- The operating policy framework;
- The New Zealand Health Strategy;
- The New Zealand Primary Healthcare Strategy;
- The PHO minimum requirements;
- The PHO services agreement;
- Additional services contracts;
- The New Zealand Disability Strategy and
- He Korowai Oranga – Māori Health Strategy.⁶¹

79. The Wai 2687 claim, as currently pleaded, is briefer. However, at paragraph 7 it reiterates that its focus is on the Crown's primary healthcare framework. It refers specifically to:

- The New Zealand Public Health and Disability Act 2000;
- The New Zealand Health Strategy 2000 (refreshed in 2016);
- The Primary Healthcare Strategy 2001;
- The funding of PHOs by District Health Boards (DHBs) on a population-based formula known as capitation; and
- The negotiation for funding of primary healthcare between DHBs and representatives of primary healthcare through a process known as PHO service agreements and amendment protocol.⁶²

80. We reiterate that these two claims are national in scale and have as their sole focus the legislative and policy framework of New Zealand's primary healthcare system as a whole and its alleged flaws. These are the issues we will be considering in stage one.

81. In contrast those seeking to also participate in stage one:

- (a) Have filed broad health-related claims which refer in part only to the primary healthcare framework and its impact on a local level; or
- (b) Seek to participate but have yet to file any claims which relate to the primary healthcare framework; or
- (c) Seek to participate but have yet to file any health-related claim.

Broader inquiry into stage two?

82. A number of counsel made submissions that they could amend pleadings to specifically allege deficiencies in the primary healthcare framework, that they were ready to proceed and there would be little impact upon the current hearing timetable. To that extent, it was suggested that stage one could possibly expand to allow parties full party status and/or be broadened into an inquiry focused on primary healthcare in its entirety. The difficulty with that suggestion is that at the recent judicial conference we only heard from those claimants who wished to participate in stage one. There will be many other claimants, who did not appear at that judicial conference who also consider they have priority issues which should be considered by the Tribunal. It would be unfair and improper, without allowing those claimants an opportunity to be heard, to make a decision now to expand stage one into a broad primary healthcare inquiry.

⁶¹ Wai 1315, #1.1.1(a).

⁶² Wai 2687, #3.1.1.

83. We are also conscious that we have already indicated some potential priority matters for stage two which are (in no intended order):

- (a) Mental health (including suicide and self-harm);
- (b) Māori with disabilities; and
- (c) Alcohol and substance abuse.

84. In providing those indications we did so in order to assist the parties in their further discussions in relation to inquiry design matters for stage two.⁶³

85. If there is a feeling amongst the claimant community that an expanded inquiry into primary care is warranted as a priority matter, that could be accommodated at stage two. However, at this stage we are wanting to hear from the claimant community on those matters that warrant an early exploration at stage two. Whilst we have given some initial indications, we await feedback from the claimant community.

Stage two discussions

86. We note that there is a forthcoming national health hui scheduled for 6-8 April 2018 at which we urge that consideration is given towards the identification of priorities moving forward. If priorities can be identified, parties should propose interlocutory steps to implement those priorities.

87. Currently, we note that counsel are due to report back to the Tribunal advising the outcome of the hui and associated planning matters by 16 April 2018. Given that the national hui concludes on 8 April 2018, we consider that it is appropriate to give further time for the provision of that feedback. That feedback should now be provided no later than **midday, Friday 27 April 2018**.

88. In making these planning decisions we reiterate that we are genuinely interested in trying to map a pathway forward with as much buy-in from the claimant community as possible. We recognise that there are multiple competing demands. On the one hand, s 6 of the Treaty of Waitangi Act 1975 provides claimants with the right to be heard. They should only be deferred or delayed in those circumstances set out in s 7.

89. Balanced against that are the directions previously issued by the Chairperson emphasising that the kaupapa inquiry process is designed to concentrate upon nationally significant issues. Practically speaking, there are currently 181 claims before this kaupapa inquiry with a multiplicity of health-related claims. All of these competing demands means that practically speaking we have to try and, at least in the initial stages of planning, focus on areas that warrant a priority focus.

Decision

90. We confirm that stage one of the Health Services and Outcomes Kaupapa Inquiry will be restricted to hearing the claims of Wai 1315 and Wai 2687 only.

⁶³ Wai 2575, #2.5.17 at [17] and [18].

Interested parties

91. We anticipate that there will be some claimants who consider that they should participate at the forthcoming stage one hearings as an interested party. We direct that any memoranda of counsel seeking to participate as interested parties must be filed with the Tribunal no later than **midday, Thursday 21 June 2018**. By then, counsel for the proposed interested parties will have been in receipt of the Crown's early acknowledgements, agreed statistics, the Tribunal's statement of issues and the Wai 1315 and Wai 2687 evidence.
92. In considering whether claimants should be granted interested party status, counsel will need to highlight how the proposed participation of their claimants relates to the legislative and policy framework of the New Zealand primary healthcare system. We expect that counsel will highlight for us any relevant pleadings filed and the extent and scope of the participation sought at the stage one hearings. The Tribunal will need to know whether interested parties propose to participate by a watching brief only, whether they propose to cross-examine witnesses, present submissions and/or any evidence and the nature of that evidence. We reiterate that we will not hear matters outside the legislative and policy framework for the primary healthcare system nor any evidence which duplicates that filed by the Wai 1315 and Wai 2687 claimants.

Hearing timetable

93. In anticipation that there will be some applications for interested party status, we have amended the hearing timetable. In doing so, we have tried to ensure that there is minimal disruption to the previous timetable whilst allowing for the possibility of interested party participation.
94. Owing to problems of member availability, hearing week one will now take place from 15 to 19 October 2018. Hearing week two will take place from 23-26 October. As signalled in my memorandum-directions dated 28 February 2018, the majority (but not all) of the Tribunal panel may be present during those hearing weeks.⁶⁴ The amended hearing timetable is attached as **Appendix Two**.
95. Therefore, nine hearing days are currently set aside for stage one. I have also asked Tribunal staff to confirm member availability for 1-2 November. If so I am anticipating up to 11 hearing days which will need to accommodate the Wai 1315 and 2687 claimants, any interested parties and the Crown evidence. I have also asked the Tribunal staff to inquire into member availability in the week commencing 17 December to hear closings. I anticipate setting down two days for closing submissions. I will confirm additional dates by further memorandum-directions shortly.
96. It appears that there has already been some slippage with the current timetable. I expect all parties to adhere to the timetable outlined in Appendix Two.
97. I also attach an amended **Appendix Three** which sets out filing dates for the wider inquiry programme.

⁶⁴ Wai 2575, #2.5.22 at [5].

Final remarks

98. This memorandum-directions has been circulated to all members in draft prior to its release. All panel members agree with its content.

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 29th day of March 2018

A handwritten signature in black ink, appearing to be 'S. Clark', written in a cursive style.

Judge Stephen Clark
Presiding Officer
WAITANGI TRIBUNAL