

**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 THE PRESIDING OFFICER CONCERNING  
RESEARCH REQUESTS, ELIGIBILITY MATTERS, AND NEXT STEPS IN THE  
STAGE TWO INQUIRY**

17 April 2020

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## **Introduction**

1. This memorandum-direction addresses:
  - a) requests for further research;
  - b) the consolidation, aggregation, eligibility and pleading exercise currently underway; and
  - c) an interlocutory process for stage two of the Health Services and Outcomes Kaupapa Inquiry (the Inquiry) relating to disabilities.

## **Research requests**

2. In a recent memorandum-direction I directed the Chief Historian to undertake discussions with Tamaki Legal and Bennion Law about proposed further research for stage two relating to disability.<sup>1</sup> The Chief Historian has advised me that she has undertaken those discussions and that the proposals have merit. She considers that subject to them being completed by the beginning of 2021 they would make a useful contribution to the research currently on the record for hearings into disability. I accept that advice.
3. However, I reiterate that, due to a heavy demand for research requests across the various district, kaupapa and urgency inquiries, the capacity of the Tribunal, both human and financial, to commission new research is considerably stretched.<sup>2</sup> That advice to me has not changed. Therefore, I suggest that counsel continue to take steps to define the scope of the proposed research, keep the Chief Historian advised of steps being taken to commission that research, and to make inquiries as to alternative sources of funding such as the Legal Services Agency.

## **Consolidation, aggregation, eligibility and Crown statement of response**

4. The Crown's initial statement of response was filed on 8 April 2020.<sup>3</sup> In it they responded to the claims filed thus far, particularly those cited by this Tribunal for consolidation. In their response, the Crown raised concerns about:
  - a) a lack of specificity in the pleadings filed by the claimants;
  - b) the scope of the Tribunal's inquiry into disability matters; and
  - c) jurisdiction and eligibility to inquire into certain claims.
5. On 9 April 2020 three memoranda of counsel were filed outlining proposals for the timetabling of interlocutory steps and hearings for the next stage of the Inquiry.<sup>4</sup>
6. On 15 April 2020 Crown counsel filed a further memorandum referring to claimant pleadings, consolidation and aggregation, scope of the inquiry, jurisdiction and hearing issues.<sup>5</sup>
7. The Crown submit that many of the claims are 'not described in a way that that is sufficiently clear' and that clearer allegations and particularisation are required. They say that, until that happens, all concerned are unable to identify the live issues or properly plan

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<sup>1</sup> Wai 2575, #2.6.22 at [13].

<sup>2</sup> Wai 2575, #2.6.22 at [12].

<sup>3</sup> Crown memorandum of counsel 8 April 2020. Note that recent filings are yet to be entered on the Wai 2575 Record of Inquiry and will not be until Waitangi Tribunal staff are able to return to their normal work duties, because of the COVID19 pandemic crisis.

<sup>4</sup> Joint memoranda of counsel filed by Tukai Law and Smail Legal Limited respectively and memorandum of counsel filed by Woodward Law.

<sup>5</sup> Crown memorandum of counsel 15 April 2020.

for an interlocutory and hearing process. Crown counsel have indicated that they are approaching claimant counsel to discuss these matters over the weeks beginning 14 and 21 April 2020.

8. I encourage the discussions that are or about to take place. My suggestion is that they could also usefully include discussions around jurisdiction particularly:
  - a) whether some claims have been or are being inquired into in other inquiries;
  - b) whether some claims have been settled; and
  - c) whether some claimants are trying to make historical Treaty claims when they are statute-barred.
9. The more detail that can be settled between counsel the better. If not, the Tribunal will have to receive submissions on the state of pleadings, scope and jurisdiction. That will necessarily involve the timetabling for the filing of those submissions, consideration of them and then a decision by the Tribunal. These steps in the interlocutory process will need to be finalised before the Tribunal can seriously consider and determine any additional interlocutory steps such as discovery, developing a statement of issues, the filing of evidence, allocation of hearing dates, and any practical decisions around the holding of hearings. Simply put, the more decisions the Tribunal has to decide now will inevitably lead to a delay in timetabling for the next stage of the Inquiry.
10. As an interim step, I direct the Crown to update the Tribunal by **midday, Wednesday 29 April 2020** on the outcome of the discussions that are currently being held. Thereafter I will consider what further steps are needed.
11. I note that the Crown have taken the position that some claims filed encourage the Tribunal to go 'beyond the lived experience of the health sector by those with disability and into other areas'.<sup>6</sup> They cite claims relating to ACC as an example. Presupposing that some of the discussions around scope will not be settled amongst counsel it would be useful to be updated by the Crown where there are areas of agreement and disagreement.

#### **Other matters**

12. In a memorandum-direction dated 18 October 2019 counsel were directed to file a memorandum by 29 April 2020 outlining suggestions as to how to proceed in designing an interlocutory stage for the balance of the stage two inquiry.<sup>7</sup> Given that we have yet to settle issues relating to the pleadings, consolidation and aggregation, scope, and jurisdiction for the disability part of stage two it seems premature to ask for those submissions at this stage. They are no longer required to be filed by 29 April 2020. I anticipate that when the Tribunal has worked its way through deciding the interlocutory stages for the disability phase of stage two it will call for those further submissions.
13. I acknowledge receipt overnight on 15 April 2020 of a memorandum filed by the National Hauora Coalition attaching a copy of a Heads of Agreement between the Ministry of Health and the stage one claimants, dated 20 March 2020. I direct that those documents along with all memoranda of counsel recently filed are to be added to the Wai 2575 Record of Inquiry, when possible. I remind the Crown and stage one claimants to file a joint memorandum by **midday, Monday 1 June 2020** updating the Tribunal on the work agreed to be undertaken towards implementing the interim recommendations made in *Hauora – the Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry*.<sup>8</sup>
14. In their memorandum of counsel dated 8 April 2020 the Crown state that they have not been served with two claims that are cited for aggregation, those being Wai 745 and Wai

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<sup>6</sup> Crown memorandum of counsel 15 April at [10].

<sup>7</sup> Wai 2575, #2.6.17 at [17].

<sup>8</sup> Wai 2575, #2.6.20 at [6].

1308. I direct the Registrar to send a copy of those claims to Crown Law as soon as possible.

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 17<sup>th</sup> day of April 2020

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

Judge S R Clark  
Presiding Officer

**WAITANGI TRIBUNAL**