

**IN THE WAITANGI TRIBUNAL**

**WAI 2575**

**IN THE MATTER** of the Treaty of Waitangi Act 1975

**A N D**

**IN THE MATTER** of the Health Services and Outcomes Kaupapa Inquiry (Wai 2575)

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**JOINT MEMORANDUM OF COUNSEL**

**Dated this 9<sup>th</sup> day of April 2020**

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**RECEIVED**

Waitangi Tribunal

**9 Apr 2020**

Ministry of Justice  
WELLINGTON



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## **MAY IT PLEASE THE TRIBUNAL:**

### **Introduction**

1. This Joint Memorandum of Counsel (“JMOC”) responds to his Honour Judge Clark’s Memorandum-Directions dated 18 October 2019 (“Direction”).<sup>1</sup>
2. The Direction asked claimant and Crown counsel to confer in order to outline, preferably jointly, an agreed inquiry programme that sets out the following:<sup>2</sup>
  - (a) Identification of co-ordinating counsel;
  - (b) Arrangements for the preparation and finalisation of an agreed statement of issues;
  - (c) A suggested discovery process;
  - (d) A timetable for the filing of witness statements;
  - (e) An estimation of the number of hearing weeks required;
  - (f) A hearing timetable; and
  - (g) Identification of suitable locations for hearing.
3. Claimant counsel have had preliminary discussions with the Crown however a joint position could not be reached in the time available. The main point of contention appears to be that the Crown considers further amendment of claims needs to occur. Claimant counsel disagree that the inquiry programme needs to pause to enable further particularisation of claims. Claimant counsel note that this matter has previously been raised and addressed by the Tribunal in its Memorandum-Direction dated 5 March 2020.<sup>3</sup> The Claimants agree with the Tribunal that any issue the Crown wishes to raise in response

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<sup>1</sup> Wai 2575, #2.6.17, *Memorandum-Directions of Judge S R Clark* [18 October 2019].

<sup>2</sup> At [16].

<sup>3</sup> Wai 2575, #2.6.22, *Memorandum-Directions of Judge S R Clark* [5 March 2020].

to the claims as pleaded can and should form part of its statement of position and response. The matter will then be before the Tribunal for further action, as required. Accordingly, this JMOC is filed on behalf of those claimant counsel listed at **Appendix A**.

4. Counsel propose to address the matters outlined in the Direction as well as other relevant points as follows:
  - (a) COVID-19;
  - (b) Co-ordinating counsel;
  - (c) Statement of Issues;
  - (d) Discovery;
  - (e) Hearing timetable, including filing dates, estimated hearing weeks and locations; and
  - (f) Special assistance.
5. Separate memoranda may be filed to address the matters outlined below.

#### **COVID-19**

6. As a preliminary matter, counsel acknowledge the uncertainty created by COVID-19. Despite the difficult environment, counsel are committed to progressing the inquiry including any procedural steps as far as possible in the circumstances.
7. Counsel note that COVID-19 restrictions have been factored into the inquiry planning outlined below however recognise that amendments may be required as the pandemic unfolds.

#### **Co-ordinating counsel**

8. Tukai Law have been identified as co-ordinating counsel for the disability phase of stage two. Counsel recognise that as we progress to the hearing phase of the inquiry, other claimant counsel may be

better placed to assist with co-ordination in terms of hearing venue, timetable and other matters arising.

### **Statement of Issues**

9. Counsel propose to work collaboratively with the Crown to draft the statement of issues before the Tribunal confirms and finalises the issues.
10. Counsel propose the following process:
  - (a) Claimant counsel prepare the first draft;
  - (b) Crown counsel respond with feedback/amendments;
  - (c) Claimant and Crown counsel engage in discussions to reach agreement on the issues, before filing what issues are and are not agreed with the Tribunal; and
  - (d) The Tribunal determine the final statement of issues.
11. Counsel indicate that they have formed a committee of claimant counsel to initiate the development of a statement of issues and will be looking to progress the document in the coming weeks.

### **Discovery**

12. Counsel propose to work collaboratively with the Crown to reach agreement on the provision of documents through discovery.
13. Counsel suggest the following discovery process:
  - (a) Claimant counsel identify what matters are discoverable within the scope of the inquiry and make a request to the Crown;
  - (b) The Crown review and respond to the request outlining what matters are agreed and those in contention;
  - (c) Crown and claimant counsel seek to reach agreement on matters in contention; and

- (d) If unable to reach agreement, counsel file submissions with the Tribunal for final determination (on outstanding matters only).
- 14. Additionally, counsel suggest that a discovery protocol be developed. The purpose of the protocol would be to set expectations for discovery to ensure it remains fit for purpose. The protocol would cover matters such as timeframes, format for listing discovered documents and the use of documents in proceedings.
- 15. Counsel propose drafting a protocol for the Crown to review. Following engagement and eventual agreement, counsel would file the protocol with the Tribunal to ensure the discovery process is focused and useful for the inquiry.

**Hearing timetable, including filing dates, estimated hearing weeks and locations**

- 16. A draft timetable is attached at **Appendix B**.
- 17. The Tribunal will see that a pre-hearing judicial conference is proposed for September 2020. The purpose of the judicial conference would be to discuss hearing planning including how the hearings will be structured and what can be expected at each hearing.
- 18. Counsel indicate that they are considering ways in which the hearings can be efficiently run whilst providing for the diverse needs of the witnesses and will provide submissions on these at the judicial conference.
- 19. Counsel also note the following:
  - (a) An estimate of six hearing weeks is sought for claimant evidence;
  - (b) Four locations have been tentatively identified: Wellington, Northland, Auckland and Central North Island/Bay of Plenty. Further planning will be required to confirm these as well as the venue;

- (c) A staggered approach to filing evidence depending on the week claimants are presenting evidence; and
  - (d) That all claimant evidence is presented, before the Crown presents its case.
20. Counsel propose that claimant hearings take place in three tranches, with the Crown presenting their evidence afterwards:
- (a) The first round of hearings in November/December 2020;
  - (b) The second round of hearings in February/March 2021;
  - (c) The third round of hearings in April 2021; and
  - (d) The Crown's hearing week in June 2021.
21. Claimant reply evidence can be addressed on the papers as necessary.

### **Special assistance**

22. Counsel are undertaking an inventory of special assistance requirements for the witnesses to attend and participate in the hearings. Some early indications about the types of special assistance include, consideration of appropriate facilities and venues for claimants with disabilities, and possible support services to provide appropriate care and support for claimants. Once canvassed, counsel seek further discussions with the Crown and Tribunal to determine how these needs can be met.

### **Conclusion**

23. Despite COVID-19 restrictions, counsel reiterate their support for the continuation of this important inquiry and the claimants' readiness to proceed as soon as practicable.

24. Counsel welcome the opportunity to further discuss the matters outlined in this JMOC and will continue to work collaboratively with all participating parties.

**DATED** at Auckland this 9<sup>th</sup> day of April 2020



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Chelsea Terei/Huhana Rolleston  
**On behalf of claimant counsel**