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**KEI MUA I TE AROARO O TE RŌPŪ WHAKAMANA  
I TE TIRITI O WAITANGI**

**BEFORE THE WAITANGI TRIBUNAL**

**WAI 2575**

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

**AND**

**IN THE MATTER OF**                      the Health Services and Outcomes  
Kaupapa Inquiry

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**MEMORANDUM OF CROWN COUNSEL REGARDING  
INTERLOCUTORY TIMETABLING FOR STAGE TWO: MĀORI WITH  
LIVED EXPERIENCE OF DISABILITY**

**15 April 2020**

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**MAY IT PLEASE THE TRIBUNAL**

1. The Tribunal directed claimants and the Crown to file (preferably jointly) an agreed inquiry timetable for the stage two inquiry into disability issues by 9 April 2020.<sup>1</sup>
2. This memorandum sets out the Crown's position on timetabling and responds to the three memoranda that have been filed by claimant counsel on this issue.<sup>2</sup>

**Claims not clearly set out and are insufficiently particularised**

3. As set out in the Crown's initial statement of response, many (possibly the majority) of the claims are not sufficiently particularised. That is, the claims are not described in a way that is sufficiently clear. Clearer allegations and further particularisation is crucial in order to identify what exactly is going to be in issue in this inquiry and, therefore, what discovery and evidence will be required.
4. Until this occurs the Crown submits that neither the Tribunal nor inquiry participants are in a position to begin to identify the live issues for inquiry, begin discovery or make detailed plans for hearings.
5. As an immediate next step, the Crown legal team will approach claimant counsel about the claim/s they act for in order to discuss the current state of the pleadings and to better understand why claimant counsel consider these are in an acceptable state. The Crown suggests that this can occur over the weeks beginning 14 and 21 April 2020.
6. If some claimants do not accept that their claims should be refined by further pleadings work, then whether the state of the pleadings is acceptable for those claims will fall to the Tribunal to decide. This will require a timetable for submissions on this issue and to hear from parties. In itself, this could be a laborious step for the Crown if there are more than 40 claims to make submissions about so some time will need to be allowed for this process. A timetable for this could be set to begin from May 2020.

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<sup>1</sup> Wai 2575, #2.6.22(a).

<sup>2</sup> Memorandum filed by Woodward Law Office, dated 9 April 2020; Joint memorandum filed by Smail Legal Ltd, dated 9 April 2020; Joint memorandum filed by Tukau Law and Consultancy, dated 9 April 2020.

**Consolidation and aggregation**

7. Final decisions on which claims are consolidated and which are aggregated should be made once the final form of the pleadings is determined) rather than be taken in advance. The Tribunal inquires into claims that have been made.<sup>3</sup> It cannot inquire into issues generally or act on forms of self-reference.
8. This step is intertwined with the step below about scope and jurisdiction. At this point, no particular timetable suggestions are made about when to decide these matters.

**Scope of inquiry and jurisdictional issues**

9. At the same time as it is deciding on consolidation and aggregation and possibly proposing a preliminary and draft list of live issues, the Tribunal should follow a process to hear from parties in order to determine contested issues about scope and jurisdiction.
10. With respect to scope, it is apparent that a number of claimants would encourage the Tribunal to go beyond the lived experience of the health sector by those with disability and into other areas – for example the claims seeking an inquiry into accident and injury systems, including ACC operations, rather than lived experience of disability,<sup>4</sup> or those claims seeking inquiry predominantly into the experience of disability service providers, rather than the core focus being on those to whom such services are being provided. Further subject areas include education, housing and income support, amongst others. While any discussion about determinants of health touches on these further areas, that does not mean that claims into those areas should also be inquired into in this kaupapa inquiry into health services and outcomes. There is a risk of a domino effect if the Tribunal does not act to decide the scope of this inquiry so that it remains manageable for the Tribunal and for inquiry participants.
11. Determining the scope of this part of the inquiry is very important as it will determine the scale of the inquiry being attempted. This will, in turn,

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<sup>3</sup> See the Treaty of Waitangi Act 1975, ss 5(1)(a) and 6.

<sup>4</sup> See for example the memorandum of counsel for the New Zealand Maori Council dated 9 April 2020.

impact the Crown's work in responding to the claims and the Tribunal's work in inquiring into and reporting on the claims.

12. With respect to jurisdiction, issues include:
  - 12.1 whether some claims have been or are being inquired into in other inquiries of the Tribunal;
  - 12.2 whether some claims have been settled;
  - 12.3 whether some claimants are trying to make historical Treaty claims when they are statute-barred from doing so; and
  - 12.4 whether some of the pleadings go beyond events within jurisdiction (acts, omissions, policies and practices by or on behalf of the Crown) because they involve actions by actors not acting on behalf of the Crown.

#### **List of issues and consolidated and aggregated claims**

13. The Tribunal should not finalise a list of issues, or a list of the consolidated claims and a list identifying the parts of the aggregated claims that will be inquired into, until determinations of the issues discussed above have been made and after hearing from the parties on a draft list of proposed issues.

#### **Hearings**

14. The Crown considers it is not possible at this time to estimate how much hearing time will be required or when hearings might occur. This depends on the scale and extent of the live issues and how much work is involved in giving discovery and briefing evidence. At this point the Crown submits the most important task is to understand more clearly what exactly is the subject of claims and how this might be refined to make the most efficient and effective use of hearing days ultimately allocated.
15. Tranches of evidence might be appropriate if the hearing of claims can be sensibly divided in the way proposed by the claimants. However, the Crown notes that the proposal advanced by Ms Smail sees three claimants, whose claims are proposed at this point to be part-heard (aggregated), take seven days of hearing time. At first blush, this appears to be a

disproportionately large amount of the total hearing days the Tribunal has in mind for this first part of stage two of the kaupapa inquiry.

**Other important matters**

16. The Crown appreciates that claimant counsel have taken steps to appoint co-ordinating counsel and have given thought to what accessibility requirements are necessary for Tribunal hearings on lived experience of disability.
17. It is premature to timetable steps for discovery given the uncertainty over the scale of any required discovery and its associated costs to all inquiry participants. In all the circumstances, the Crown submits the Tribunal would be right to be cautious about the potential burden of discovery on inquiry participants and a realistic amount of time required for it to occur if discovery is not targeted to address precise allegations that remain in contention after the pleadings process.
18. Finally, the Crown notes that the COVID-19 pandemic will impact on timetabling for this inquiry. Aotearoa will be occupied in responding to the pandemic for a considerable time even when the alert level drops below level four. It is possible that the significance of the mobilisation within the public sector that has occurred to respond to the pandemic might not be appreciated or reflected in the timetable steps that claimant counsel have proposed. Health sector agencies, especially the Ministry of Health and DHBs, are fully occupied with responding to the pandemic. So are Ministers and other senior decision-making officials.
19. This will almost certainly affect the Crown's ability to respond quickly to further particularised claims, provide discovery, and brief evidence. Further, due to the fluidity of the present situation, the Crown suggests timetabling will need to be regularly reviewed and any timetable settled on should provide for this.

15 April 2020



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C Linkhorn / G Melvin / A Lawson  
Counsel for the Crown

**TO:** The Registrar, Waitangi Tribunal  
**AND TO:** Claimant Counsel