

IN THE WAITANGI TRIBUNAL

Wai 2575

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Health Services and
Outcomes Kaupapa Inquiry

**MEMORANDUM-DIRECTIONS OF THE TRIBUNAL REGARDING THE STAGE
ONE INTERIM RECOMMENDATIONS**

26 Here-turi-kōkā 2021

Background

1. On 23 June 2021, the Tribunal directed the stage one claimants and the Crown to provide an update on further progress towards implementing the interim recommendations in the Waitangi Tribunal's report *Hauora, Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (the *Hauora Report*) by 9 July 2021 (Wai 2575, #2.6.50). These interim recommendations related to the possibility of a stand-alone Māori health authority, an assessment of the underfunding of Māori primary health organisations (Māori PHOs) and providers, and the redesign of current partnership arrangements across all levels of the primary health sector.
2. An extension request was subsequently granted via email from the Tribunal's Registrar until 9 August 2021.
3. The Tribunal indicated that it would be particularly helpful if the update could address:
 - (a) The extent to which the stage one claimants will be involved in developing the design principles or framework for the proposed Māori Health Authority (MHA).
 - (b) The provision of continued funding for the stage one claimants in relation to implementing the interim recommendations.
 - (c) The issue of compensation in relation to Māori PHOs and providers still in existence, and the further conversations that would need to take place between the stage one claimants and the Crown once the report on the underfunding methodology is completed.
4. The Tribunal also reminded parties that it reserved the right to review the interim recommendations in the *Hauora Report*, depending on the outcome of the updating process which has been underway since the release of the report.

Update from stage one claimants

5. On 9 August 2021, Karen Feint QC, Roimata Smail, Tara Hauraki and Jamie Ferguson filed a memorandum on behalf of the stage one claimants addressing each of the matters outlined above at [3] (Wai 2575, #3.2.331). Counsel also sought a direction from the Tribunal that the Crown file a memorandum responding to these matters by 9 September 2021. Counsel's submissions on each matter are summarised in the following paragraphs.

Underfunding methodology

6. The *Hauora Report* recommended that the claimants and the Crown work together to agree on a methodology for the assessment of the underfunding of Māori PHOs and providers. The Tribunal indicated that if a final sum could be agreed upon, then this could be used in part to compensate existing Māori PHOs and providers, while also supporting the development of additional ones.
7. Following the *Hauora Report*, an Expert Advisory Group (EAG) comprising of representatives from each of the three claimant groups, independent advisors, and

Ministry of Health (MOH) officials was set up to progress development of the underfunding methodology. However, counsel advise that MOH officials withdrew from the EAG soon after its formation and that following this time, MOH involvement was limited to provision of information requested by the stage one claimants and their advisors. The claimants then engaged the Sapere Research Group to develop an underfunding methodology, which led to the completion of the *Sapere Report* (Wai 2575, #3.2.331(a)).

8. Counsel advise that the *Sapere Report* provides three sets of results:
 - (a) Māori PHOs and providers in a test population have been underfunded between \$394 to \$531 million since 2000.
 - (b) Providing comprehensive by Māori for Māori care to all Māori would cost between \$891 million to \$1.06 billion per year.
 - (c) The cost borne by Māori and the New Zealand economy of not funding by Māori for Māori care has been \$5 billion per year.
9. On 5 August 2021, the claimants presented the *Sapere Report* to Minister of Health Andrew Little and Associate Minister (Māori Health) Peeni Henare and sought their commitment to a process to negotiate compensation for underfunded Māori PHOs and providers. Counsel advise that the Ministers indicated that they needed time to consider the report and obtain advice from their officials before responding. The claimants and the Crown have therefore agreed to further update the Tribunal once the Ministers have had time to formulate their position. Counsel submit that a further month is required before next steps can be determined.

Māori Health Authority

10. Counsel advise that expressions of interest opened for positions on the Māori Health Authority Interim Board (the MHA Interim Board) during May 2021. While the stage one claimants had the opportunity to file an application, counsel note that there was no consultation with the claimants about the appointment process.
11. The stage one claimants wrote to Ministers Little and Henare on 4 June 2012 to express their concerns regarding the alleged lack of engagement. Counsel advise that the claimants also suggested that true collaboration would have included the claimants having a say in deciding steering group members and the ability to directly nominate and appoint members of the MHA Interim Board. The claimants wrote to the Ministers again on 18 June 2021, nominating three of the claimants for the MHA Interim Board. A response was then received from Minister Henare, advising that Tā Mason Durie and the steering group are in the process of finalising advice on recommended appointments. Counsel advise that the claimants who applied for positions on the MHA Interim Board through the public application process are yet to receive further information as to whether their applications will be progressed.
12. The stage one claimants have been invited to nominate one representative to work with the Health and Disability Review Transition Unit on changes to health legislation and policy.

However, counsel advise that the claimants are concerned that one representative is insufficient to develop the policies in partnership, as the Tribunal envisaged. Counsel advise that the claimants have expressed these concerns to the Crown and that the claimants have not yet been able to commence their involvement in the legislation and policy work.

Funding

13. In March 2021, funding from the Crown to enable the stage one claimants to engage on the two key stage one interim recommendations came to an end. The claimants advise that they are now having to fund a number of workstreams arising out of the Tribunal's recommendations, including finalising the underfunding methodology and meeting with the Crown to discuss the *Sapere Report*.
14. The claimants have previously advised MOH officials that all the funding provided has been spent. Counsel advise that officials have indicated that no further funding would be forthcoming, despite the fact that the work has taken 'significantly longer' and has 'cost significantly more than had been anticipated' (at [21]). Counsel submit that increased costs have been as a result of the Crown's refusal to engage fully with the stage one claimants on the Tribunal's two key recommendations and the resulting need for the claimants to engage external advisors to assist them in completing the work required.
15. On 3 June 2021, the claimants formally applied to the MOH for additional funding, but this was declined. The stage one claimants submit that the MOH should refund the costs for preparing the *Sapere Report*.

Update from the Crown

16. On 11 August 2021, Geoff Melvin filed a memorandum on behalf of the Crown in response to the stage one claimants' memorandum (Wai 2575, #3.2.333). Counsel note that the Crown intended to file a joint memorandum with the stage one claimants, however, they did not receive a draft until 8 August 2021 and therefore had insufficient time to consider and discuss the memorandum with claimant counsel. Crown counsel's submissions are summarised as follows.
17. In regard to the request from the stage one claimants that the Crown file a memorandum responding to their progress updates by 9 September 2021, the Crown submits that significantly more time is needed to analyse and consider the *Sapere Report* in the context of the wider health reform implementation programme and that any decisions taken will be 'communicated through the usual government processes' (at [29]). Counsel submit that the Crown's consideration of the *Sapere Report* will include officials meeting with the stage one claimants 'as soon as practicable' and that the amount of time required will depend on the 'claimants' willingness to engage' (at [30]). The Crown proposes to update the Tribunal further at a date to be agreed with the stage one claimants.

Māori Health Authority

18. The Crown worked with the stage one claimants on a draft terms of reference for a MHA as part of responding to the interim recommendation. This work was shared with Ministers

and officials in January 2021, which then influenced the Government's response to the Health and Disability System Review Final Report. The Crown submit that this influence is evident in the 'emphasis on the *Hauora Report*' and the 'legislative and structural changes enabling transformation to a Te Tiriti-based health and disability system in the health reform announcements' (at [10]).

19. The Health and Disability Review Transition Unit in the Department of the Prime Minister and Cabinet (DPMC) is tasked with setting up interim bodies for the MHA and Health NZ. The Crown note that interim bodies for the MHA and Health NZ will be established under existing legislation and that legislation, which is intended to come into force in July 2022, will establish the new bodies that will take over operations commenced by the interim bodies. A steering group chaired by Tā Mason Durie sits within the DPMC with responsibility for nominations to the interim MHA and will also provide 'Māori specific advice and guidance across all new entities and structures' (at [11]).
20. The Crown submit that opportunities for the stage one claimants to influence and shape the health reform implementation programme continue through existing relationships with the Crown and that the Crown 'expects stage one claimants to be key participants in the mahi to bring the MHA into being' (at [12]). As outlined in the claimant memorandum, the Health and Disability Transition Unit has invited the claimants to nominate a representative to be appointed to the MHA Interim Board, however, a nomination has not been received.

Underfunding methodology

21. Counsel note that the MOH engaged with the EAG and Sapere to provide support and information to progress the development of the underfunding methodology. The Crown submits that the claimants' request for additional funding to meet the 'significant costs of their consultancy contract with Sapere' was declined on the basis that the additional work the claimants contracted from Sapere went 'beyond both the interim recommendation of the *Hauora Report* and the scope agreed between MOH officials and claimants within the Heads of Agreement and service contracts' (at [20]). Counsel state earlier in the memorandum that these service contracts were 'paid out fully' in January 2021 (at [9]).
22. Counsel advise that Ministers Little and Henare and MOH officials met with the claimants on 5 August 2021 and presented a copy of the *Sapere Report*. The Crown is currently considering the report and intends to respond to the stage one claimants 'in due course' (at [21]).

Tribunal determination

23. The Tribunal has decided that it is time to finalise the interim recommendations contained in the *Hauora Report*. This finalised report may also consider:
 - (a) what parties have advised the Tribunal to date about progress towards fulfilling the stage one interim recommendations;
 - (b) the underfunding methodology, including consideration of any submission parties may provide in response to this memorandum-directions; and

(c) the health reforms announced in April 2021, including the intention to establish the MHA.

24. We direct the Crown to file its response to the *Sapere Report* on the underfunding methodology by no later than **midday, Monday 27 September 2021**. The Tribunal considers that this is sufficient time to respond and we are unlikely to accept any late filing on this matter. As noted in the Crown's memorandum dated 11 August 2021, Ministers and officials received copies of the report on 5 August 2021. Moreover, the Crown's statement that the 'Ministry engaged with the EAG and Sapere to provide support and information to progress the development of the methodology' indicates that the Crown contributed to this work to some extent, even though we do not know exactly when its engagement ended, or what it comprised.

The Registrar is to send this direction to all those on the notification list for Wai 2575, the Health Services and Outcomes Kaupapa Inquiry.

I HAINATIA i Te Whanganui-ā-Tara i te 26 o ngā rā o Here-turi-kōkā 2021



Judge Damian Stone
Presiding Officer



Associate Professor Tom Roa
Panel Member



Tania Simpson
Panel Member



Professor Linda Tuhiwai Smith
Panel Member

WAITANGI TRIBUNAL