

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 D STONE REGARDING THE
REQUEST FOR A FURTHER HEARING IN RELATION TO THE STAGE ONE
INQUIRY**

15 Whiringa-ā-nuku 2021

Request for a further hearing in relation to the stage one inquiry

Background

1. On 26 August 2021, the Tribunal confirmed that it would now finalise the interim recommendations contained in the Waitangi Tribunal's report *Hauora – Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (the *Hauora Report*) (Wai 2575, #2.6.55). These interim recommendations related to the possibility of a stand-alone Māori health authority, an assessment of the underfunding of Māori primary health organisations (PHOs) and providers, and the review of current partnership arrangements across all levels of the primary health sector.
2. The Tribunal, in issuing the above direction, also indicated that the finalised report may consider:
 - (a) what parties have advised the Tribunal to date about progress towards fulfilling the stage one interim recommendations;
 - (b) the proposed methodology for assessing the extent of underfunding of Māori PHOs and providers outlined in the *Sapere Report* (Wai 2575, #3.2.331(a)), including consideration of any submissions filed in response; and
 - (c) the health reforms announced by the Crown in April 2021, including the intention to establish the Māori Health Authority.
3. The Tribunal directed the Crown to file a response to the *Sapere Report* on the underfunding methodology by 27 September 2021 and indicated that any late filing was unlikely to be accepted on this matter.
4. On 2 September 2021, the Tribunal also granted leave for the Raukura Hauora o Tainui Trust (the Trust) to file submissions in response to the *Sapere Report* by 27 September 2021 (Wai 2575, #2.6.57). This leave was granted on the basis that the Trust has a direct interest in the underfunding of Māori primary health organisations and providers.
5. On 27 September 2021, submissions in response to the *Sapere Report* were filed on behalf of the Crown (Wai 2575, #3.2.344) and the Trust (Wai 2575, #3.2.343). The Trust also filed affidavits and exhibits on behalf of Teresa Wall (Wai 2575, #B36 & #B36(a)), Terina Moke (Wai 2575, #B37 & #B37(a)), and Jacqueline Cumming (Wai 2575, #B38 & #B38(a)–(c)).
6. The Crown submits that it is not yet in a position to provide a substantive response to the *Sapere Report* and that the report requires 'in-depth consideration, in particular by those with policy and technical expertise in primary care funding methodologies' (Wai 2575, #3.2.344 at [5]). The Crown also submits that any substantive financial decisions, including decisions about the quantum and recipients of payments, would need to be made by Cabinet, in line with the Crown's annual budget cycle.
7. On 6 October 2021, Karen Feint QC, Roimata Smail, Jamie Ferguson and Tara Hauraki filed a joint memorandum on behalf of the stage one claimants requesting a two-day hearing regarding the underfunding methodology on the basis that the claimants have not been able to resolve this issue with the Crown (Wai 2575, #3.2.352). The stage one claimants submit that, in order to finalise the interim recommendations, the Tribunal needs to hear evidence on the *Sapere Report* and make targeted findings and recommendations concerning compensation for historical underfunding of Māori PHOs and providers.
8. In particular, counsel submit that a further hearing is necessary because:
 - (a) compensation for Māori PHOs and providers is required on the basis of widespread underfunding over some decades, which continues to threaten their ongoing survival;

- (b) there is a need for the methodology of the *Sapere Report* to be tested and its reliability confirmed, particularly in light of the fact that the Crown did not participate in the project and has not endorsed the *Sapere Report*;
- (c) the issue of compensation for historical underfunding is separate from the current health reforms and is therefore not barred by the impending consideration of legislation; and
- (d) the Crown has not committed to engage on the issue of compensation. It is therefore warranted for the Tribunal to go beyond its interim recommendation concerning the development of a methodology for estimating underfunding, to consider and make findings on the methodology that has been developed, and any related recommendations for compensation.

Tribunal decision

9. I confirm that the panel has considered the above submissions. We have decided to decline the request from the stage one claimants for a further hearing due to the following reasons:
- (a) The Tribunal does not consider that testing the merits of the underfunding methodology outlined in the *Sapere Report* is necessary in order to finalise our interim recommendations. In making our interim recommendation that the parties agree on a joint methodology, our underlying aim was to stimulate future-focused and actionable work in this area, which we consider key to an equitable and Treaty-compliant primary health system. Although that work is not yet complete, we believe that the *Sapere Report* represents a sound beginning. The parties now have some useful information about how to calculate underfunding that they did not have in 2019.
 - (b) The Tribunal has already concluded that the stage one claims are well-founded and therefore the findings in the original report are final.
 - (c) Any hearing would likely impact on preparations for the stage two hearings. The Tribunal has already indicated it is not willing to delay the stage two inquiry if this can be avoided (Wai 2575, #2.6.56).
 - (d) This request was sought a month and a half after the Tribunal confirmed that it would finalise the stage one interim recommendations.
10. Further, I am not convinced that such a hearing can be conducted in two days, particularly if targeted findings and recommendations are sought. Even if only two hearing days are required, it would be difficult to hold that hearing this year given issues with panel availability and the number of Tribunal events scheduled throughout the remainder of the year.

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 15 o ngā rā o Whiringa-ā-nuku 2021



Judge Damian Stone
Presiding Officer

WAITANGI TRIBUNAL