TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Wai 3350

E PĀ ANA KI
CONCERNING

Te ture o te Tiriti o Waitangi 1975

ME TE
AND

te pakirehua oho-tata o Oranga Tamariki (Wehenga 7AA)

The Oranga Tamariki Urgent Inquiry (Section 7AA).

HE PĀNUI WHAKAHAU NĀ KAIWHAKAWĀ DOOGAN

MEMORANDUM-DIRECTIONS OF JUDGE M J DOOGAN

11 Paenga-whāwhā 2024

Hei tīmatanga kōrero

Introduction

1. These directions respond to the memorandum of Crown counsel dated 10 April 2024 concerning evidence from the Minister.

2. Crown counsel confirm that it will not call the Minister nor will the Minister produce a written statement. The Crown relies upon reasons set out in its memorandum of 5 April 2024 (Wai 3350 #3.1.39). Crown counsel also argue that the Tribunal should not issue a summons against the Minister to compel attendance or a written statement, as to do so is against both authority and constitutional practice and principle. A concern is also raised over the potential to breach constitutional principles of Cabinet confidentiality and collective Cabinet responsibility (Wai 3350, #3.1.56 at [3]-[5]).

3. In light of these matters, Crown counsel advised that, were the Tribunal to issue a summons, the Crown will initiate urgent High Court judicial review proceedings seeking invalidation of the summons, together with interim orders (Wai 3350, #3.1.56 at [6]).

Kōrerorero

Discussion

4. By memorandum of 5 April 2024 (Wai 3350, #3.1.39), Crown counsel set out a number of reasons as to why it did not intend to call the Minister to respond to the questions set out in directions dated 28th of March 2024 (Wai 3350 #2.5.3). The reasons were that the matters raised in our questions were all canvased in the now available Cabinet papers and Regulatory Impact Statement. In addition, evidence is to be provided by senior officials who will speak further to some of the matters addressed to the Minister. Crown counsel also noted that Cabinet has now made the policy decision to repeal section 7AA and in accordance with usual conventions, the record of the information placed before the executive are the Cabinet papers, which will be available to the Tribunal. Officials will be able to speak to the process that led to the finalisation of the Cabinet papers. The Crown therefore saw no reason to depart from the orthodox approach of not calling a Minister to give evidence before the courts, commissions and tribunals.

5. I issued further directions on the 9th of April 2024 noting the panel did not agree that evidence from the Minister was not necessary to inform the Tribunal of relevant information (Wai 3350, #2.5.5). I indicated that it would greatly assist the inquiry if the Minister was able to provide evidence not only in response to the questions posed in directions of 28th of March 2024 but also to provide more detail for the basis of the opinions recorded at paragraphs 12 to 17 of the Cabinet paper (Wai 3350, #2.5.5 at [6]-[7]).

6. I went on to note that although the Tribunal has the power to issue a summons requiring the attendance of a witness, we were nonetheless of the view that rather than do so we should invite the Minister to reconsider her position and provide evidence voluntarily. The directions went on to say (Wai 3350, #2.5.5 at [14]):

> We take this approach because it is the Minister and her cabinet colleagues that we must persuade if we have recommendations to make at the end of our inquiry. We would prefer constructive engagement voluntarily given as it is more likely to advance our inquiry and its outcomes.

7. Crown counsel say that the government's decision to repeal section 7AA is not based on an empirical public policy case, and the Minister's concerns expressed in the Cabinet paper regarding a conflict of duties between the section 7AA duties and the best interest of a child reflect a political or philosophical viewpoint are not reducible to empirical analysis (Wai 3350, #3.1.56 at [31]). We see it differently and are of the view that we are entitled to ask the Minister for information. In my directions of 9 April I said (Wai 3350, #2.5.5 at [9]-[10]):

> Departmental advice annexed to the Cabinet paper notes the limited nature of the options considered because the problem definition is premised on the assumption that section 7AA is the cause of various of instances of poor practice. Officials note the lack of robust empirical evidence to support that problem definition and say that departmental evidence demonstrates the problem more likely stems from flaws in the practice of individual staff. Officials also record concern with the constrained timeframe within which the proposed repeal is taking place which means there has been no public consultation with affected stakeholders, giving rise to significant risk of eroded trust and relationships between the department and whānau and hapū.
>
> We see as significant the fact that the Minister has been able to convince cabinet to proceed with the proposed repeal of section 7AA notwithstanding this advice, and within a timeframe that forecloses the possibility of reasonable consultation with effected parties including those iwi and Māori organisations that having existing agreements with the Chief Executive pursuant to section 7AA.

8. Our inquiry must focus on the question of the Treaty consistency of the government's decision to repeal section 7AA. Claimant counsel and claimant evidence so far filed raise issues of both process and substance concerning the Treaty consistency of this policy.

9. We noted the fact that the Minister appeared to have convinced Cabinet to proceed because when the now-Minister Chhour introduced a private member's bill to repeal section 7AA last year the position of the National party was that they did not support a repeal but would consider amendment.[1]

10. That observation should not be taken to mean that we expect the Minister to breach Cabinet confidentiality, it is simply an inference from the evidence available. It also reinforces our view that the Minister as the primary mind behind this policy is in the best position to explain it to the Tribunal. As we see it, it would assist our inquiry to have the opportunity to hear from the Minister, to better understand the reasons for the policy, and, as appropriate, test both the philosophical and empirical premises for the policy against consistency with the Treaty and its principles.

11. Crown counsel may be correct that the Minister will not be able to add significant additional information from that already available to us from the documents, or

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[1] See Hansard speeches of Hon. Tama Potaka and Harete Hipango (Wai 3350, #3.1.24(a))

otherwise available from the evidence to be given by the senior officials. We simply do not know at this point, but I believe we are entitled to ask. I accept that legal privilege remains a legitimate reason to withhold, unless the privilege is waived. The broad ranging questions we have asked of the Minister arise largely from the fact that this is an unusual policy development process in which officials appear to have had a purely instrumental role. In such circumstances their ability to speak for the Minister concerning the rationale for the policy is likely to be constrained.

12. While I believe we have the power to summons a Minister in a case such as this, whether we should do so is a different question. As I made clear in directions of 9 April 2024, the preferred approach was to invite the Minister to reconsider her position and provide evidence voluntarily (Wai 3350, #2.5.5).

13. That remains our preference, but the response now provided suggests that the Minister is not providing evidence because to do so would be contrary to legal principle and constitutional conventions.

14. This raises an important question as to the proper scope of our jurisdiction. We are a standing commission of inquiry tasked with inquiry into claims by Māori that they have been or are likely to be prejudicially affected by Crown legislation, policy, practice, act, or omission that are inconsistent with the principles of the Treaty of Waitangi.

15. Pursuant to clause 8 of schedule 2 of the Treaty of Waitangi Act 1975 the Waitangi Tribunal is a commission of inquiry under the Commissions of Inquiry Act 1908. The Tribunal has the power under schedule 2, clause 8(2)(b) of the Treaty of Waitangi Act 1975 to "issue summonses requiring the attendance of witnesses before the Tribunal, or the production of documents".

16. As a commission of inquiry, the Tribunal is also empowered under s 4C of the Act 1908 (Act) to:

    (a) inspect and examine any papers, documents, records, or things;

    (b) require any person to produce for examination any papers, documents, records, or things in that person's possession or under that person's control, and to allow copies of or extracts from any such papers, documents, or records to be made; and

    (c) require any person to furnish, in a form approved by or acceptable to the Commission, any information or particulars that may be required by it, and any copies of or extracts from any such papers, documents, or records as aforesaid

17. The Tribunal may also of its own motion under s 4D of the Commissions of Inquiry Act, issue a summons requiring any person to attend at the time and place specified in the summons, to give evidence and to produce any papers, documents, records, or things in that person's possession or under that person's control that are relevant to the subject of the inquiry

18. While the scope of our jurisdiction is very broad, our powers are not. If we find Treaty breach and prejudice we may make recommendations to the government. We have no power to determine matters of fact or law conclusively. We are not sitting as a court

of law and have no power to prevent the government from implementing its chosen policies.

19. For reasons set out in our directions of 28th of March and 9th of April (Wai 3350, #2.5.3 and #2.5.5) we believe the Minister holds information relevant to our inquiry.

20. It is for this reason that I question the extent to which Crown counsel are correct to rely on the authorities and constitutional principles invoked.

21. I acknowledge that I could be wrong in the view I take of the legal and constitutional principles at play. I also acknowledge that Crown counsel have acted professionally and appropriately in clearly communicating the Crown's position and also through the early provision of the Cabinet paper and the Regulatory Impact Statement. By taking a different view on the jurisdictional issues, I do not mean to imply criticism of the conduct of Crown counsel.

22. Taking all of these matters into consideration I believe there is an important question that needs to be clarified and resolved if possible. I will accordingly issue a summons requiring the Minister to give evidence in response to the questions raised in my directions of 28 March and 9 April 2024. A copy of the summons is **annexed** to these directions.

23. In order to allow time for the Crown to refer the issues to the High Court, I will not require the Minister to attend or respond pending the outcome of any High Court proceedings. This is on the basis of the indication that the Crown propose to initiate judicial review proceedings on an urgent basis.

24. For now I have nominated a return date of Friday 26 April 2024 for the summons. This reflects the fact that we must conclude our inquiry and report before the middle of May when the government intends to introduce a bill at which point we will lose jurisdiction.

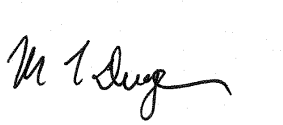
25. If judicial review proceedings cannot be concluded within this timeframe I will adjust or set aside the summons as appropriate and we will conclude our inquiry and report on the evidence available to us.

26. I direct the Registrar to liaise with Crown counsel concerning service of the summons at a time and place convenient to the Minister.

27. We will otherwise continue with our inquiry in accordance with the timetable scheduled. Once the path of any judicial review proceedings is clearer, I will consider what further directions will be necessary to accommodate the outcome, including if necessary provision for the hearing or receipt of evidence from the Minister. If, either voluntarily in response to our earlier or pursuant to direction, the Minister is to provide evidence, we remain open to considering how that evidence should be provided (in person or in writing). If there are any confidentiality concerns regarding aspects of that evidence then we can adjust our procedure as appropriate to accommodate that.

The Registrar is to send this direction to all those on the notification list for this inquiry.

WHAKAPŪMAUTIA ki Te Whanganui-a-Tara i te rā 11 o Paenga-whāwhā i te tau 2024.



Kaiwhakawā Doogan
Te Mana Whakahaere
TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI