

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 CONCERNING NEXT
STEPS IN THE TE AKA WHAI ORA PRIORITY INQUIRY**

1 Oketopa 2024

Purpose

1. This memorandum-directions confirms next steps regarding the priority inquiry into the disestablishment of Te Aka Whai Ora (the Maaori Health Authority) within the Health Services and Outcomes Kaupapa Inquiry (Wai 2575).

Background

Procedural history

2. On 8 May 2024, the Wai 2575 Tribunal panel granted a priority inquiry into the disestablishment of Te Aka Whai Ora (the Maaori Health Authority) (Wai 2575, #2.6.171). The Tribunal determined that the scope of the priority inquiry would include the Crown's alternative proposals to improve Maaori health in lieu of a Maaori health authority. The priority inquiry would accordingly examine both the processes and steps taken by the Crown to disestablish Te Aka Whai Ora, as well as the Crown's proposed alternative plans to address Maaori health outcomes following its disestablishment (Wai 2575, #2.6.171 at [28]).
3. On 4 June 2024, I confirmed the priority hearing would be held in the week of 7 October 2024, and released a provisional inquiry timetable (Wai 2575, #2.6.173). I confirmed the timetable for the priority inquiry on 1 July 2024 (Wai 2575, #2.6.177 & #2.6.177(a)).

Crown update on alternative plans following disestablishment of Te Aka Whai Ora

4. On 12 August 2024, counsel for the Crown filed a memorandum providing an update on the Crown's alternative plans for Maaori health in lieu of a Maaori health authority (Wai 2575, #3.2.1094).
5. Counsel advised that Cabinet had agreed to progress the Minister of Health's plans for Maaori health over the next 12 months following the disestablishment of the Maaori Health Authority (Wai 2575, #3.2.1094 at [2]).
6. Counsel advised that the Minister's Cabinet Paper, with the associated Cabinet minutes and related briefings, had been proactively released by the Minister. Counsel further advised that the Crown intends to refer to much of this material in its evidence for the priority hearing (Wai 2575, #3.2.1094 at [3]).
7. On 14 August 2024, and in light of the Crown's update, I informed parties via an e-mail from the Waitangi Tribunal's Registrar (the Registrar), that the filing date for claimant and interested party evidence and opening submissions for the priority hearing (then 19 August 2024) was deferred until further notice.

Memorandum-directions of 21 August 2024

8. On 21 August 2024, I issued a memorandum-directions that responded more fully to the Crown's 12 August 2024 update (Wai 2575, #2.6.183).
9. I noted that the Tribunal did not consider that the Cabinet paper released on 12 August 2024 provided the substantive information necessary to proceed to hearing on the Crown's alternative plans in October 2024. I further noted how the disestablishment of Te Aka Whai Ora, which occurred on 30 June 2024, was no longer a matter that required urgent or immediate Tribunal inquiry.
10. I accordingly confirmed that the priority hearing scheduled for the week of 7 October 2024 would be deferred. I indicated that the hearing would instead take place when the Crown

has more information on its alternative plans to address Maaori health in lieu of a Maaori health authority (understood to be no earlier than the second quarter of 2025).

11. I signalled that the Tribunal was open to reporting separately on claims regarding the disestablishment of Te Aka Whai Ora. I indicated that that the Tribunal only had sufficient resourcing to hold one hearing this (2024/2025) financial year on issues associated with Te Aka Whai Ora. I therefore indicated that, if agreed to, a separate report on the disestablishment issues would need to be completed on the papers.
12. I directed parties to file submissions by 3 September 2024 on whether issues concerning Te Aka Whai Ora's disestablishment should be reported on as a separate standalone issue, with relevant evidence and submissions heard and tested on the papers.
13. I also directed Crown counsel to file by 26 August 2024 a copy of the Cabinet Paper released on 12 August 2024.

Proactively released documents on the disestablishment of Te Aka Whai Ora

14. On 23 August 2024 Craig Linkhorn, counsel for the Crown, filed the following materials in response to my directions at [13] above (Wai 2575, #3.2.1115 & #M40):
 - (a) Cabinet paper: Vision and priorities to address Maaori health need.
 - (b) Minute: Disestablishment of the Maaori Health Authority – Next Steps on Maaori health (SOU-24-MIN-0073).
 - (c) Minute: Report of the Cabinet Social Outcomes Committee: Period Ended 28 June 2024 (CAB-24-MIN-0234).
 - (d) Aide-memoire: Invitation to meet with the Hauora Maaori Advisory Committee on Monday 12 February 2024 at 5:00pm (H2024035780).
 - (e) Aide-memoire: Invitation to speak at the Iwi Maaori Partnership Board National Hui on Wednesday 6 March 2024 (H2024036736).
 - (f) Briefing: Opportunities to improve Maaori health outcomes across your priorities (H2024037412).
 - (g) Briefing: Delivering your vision for Maaori health – progress update (H2024039643).
 - (h) Briefing: Next steps for Iwi-Maaori Partnership Boards (H2024039006).

Submissions on whether disestablishment issues should be heard and reported on as a separate standalone issue on the papers

15. On 2 September 2024, Mr Linkhorn filed a memorandum on behalf of the Crown responding to my directions at [12] above (Wai 2575, #3.2.1128).
16. On 3 September 2024, the Tribunal received memoranda from the following claimant counsel in response to my directions at [12] above:
 - (a) Roimata Smail and Sepora Cassidy on behalf of counsel named in Appendix A of this memorandum (Wai 2575, #3.2.1133 & #3.2.1133(a)).
 - (b) Ms Smail and Ms Cassidy (Smail Ltd) on behalf of the Te Aka Whai Ora (Maaori Health Authority) Urgent (Wai 3307) claim (Wai 2575, #3.2.1132).

- (c) Dr Season-Mary Downs, Chelsea Terei-Tipene and Emma Jackson (Tukau Law) on behalf of the Ngaati Hine Lands, Forests and Resources (Wai 682), Te Kapotai and Ngaati Pare Hapuu (Wai 1464), Waikare Inlet (Wai 1546), and the Te Ruunanga nui o Te Aupoouri and Witana (MACA Act) (Wai 2831) claims (Wai 2575, #3.2.1130).
- (d) Kelly Dixon and Komal Singh (Dixon & Co) on behalf of the Ngaati Korokoro, Ngaati Wharara and Te Pouka (Turner and Others) Resource Management (Wai 2003) claim (Wai 2575, #3.2.1131).
- (e) Dr Bryan Gilling and Rox Soriano (Mahony Horner) on behalf of the Maaori Disabled (Wai 2619) claim (Wai 2575, #3.2.1134).
- (f) Stephanie Roughton and Luke Redward (Tamaki Legal) on behalf of the Waimiha River Eel Fisheries (King Country) (Wai 762), Tai Tokerau District Maaori Council (Wai 861), Ngaati Tai Lands (Cotter-Williams) (Wai 2063), Children of Te Taitokerau (Broughton) (Wai 2217) and the Ngaa Wahapu o Mahurangi – Ngati Whaatua Ngaapuhi (Wai 2206) (Wai 2575, #3.2.1136).
- (g) Ms Roughton and Mr Redward (Tamaki Legal) on behalf of the Land Alienation and Wards of the State (Harris) (Wai 1531), Emma Gibbs & Whaanau (Bay of Islands) (Wai 1477), the Mental Health (Huirama) (Wai 2890), the Health Services and Outcomes (August) (Wai 3096), the Disability and Rehabilitation Support Services (Kingi) (Wai 2894), The Disability and Rehabilitation Support Services (Kingi) (Wai 2778), the Ngaati Pahaki (Aldridge) (Wai 2377), the Housing (Kearns) Whaanau (Wai 2747), the Mental Health Services (Stevens) (Wai 2671), Tahawai (Aldridge) (Wai 2382) and the Mental Health Services (Taylor) (Wai 2729) claims (Wai 2575, #3.2.1135).

17. The Tribunal received further memoranda from the following counsel responding to my directions at [12]:

- (a) Annette Sykes, Maia Te Hira and Te Maiora Rurehe (Sykes & Co) on behalf of the Taumanu Land (Wai 1194), Ngaa Uri o Ngaa Tokotoru o Manawakotokoto Lands & Resources (Wai 1212), Racism against Maaori (Wai 2494) and the Maaori Nurses (Wai 2713), filed 4 September 2024 (Wai 2575, #3.2.1137).
- (b) Tom Bennion, Emma Whiley and Kudrat (Bennion Law) on behalf of Te Roopu Waiora Trust (Wai 3073) and Muauupoko Lands & Resources (Greenland) (Wai 2139) claims, filed 6 September 2024 (Wai 2575, #3.2.1138).
- (c) Janet Mason (Phoenix Law) on behalf of the Ngāti Kuta Ki Te Rawhiti (Wai 1307), Whangaroa Lands (Wai 2580), Opuia Lands and Waterways (Wai 120), Maaori Affairs Act and Burials and Cremations Act (Wai 179), the Health Services and Outcomes (Lawrence) (Wai 2849), and the Waitaha (Te Korako and Harawira) (Wai 1940) claims, filed on 17 September 2024 (Wai 2575, #3.2.1139). I note that this memorandum was filed significantly out of time and without reasons supplied for the delay. I have however approved the memorandum for the record of inquiry.

18. I now summarise these submissions below.

Crown memorandum (Wai 2575, #3.2.1128)

19. The Crown does not support the Tribunal considering and reporting on issues regarding Te Aka Whai Ora's disestablishment as a separate standalone matter.

20. Crown counsel submits that ‘the Crown’s actions in disestablishing Te Aka Whai Ora are inextricably linked’ to its proposed alternative plans to address Maaori health. Counsel submits that splitting the issues risks the Tribunal considering disestablishment in isolation from vital context. In particular, counsel submits that assessing whether the disestablishment has caused prejudice to Maaori will ‘necessarily involve evidence comparing the position prior to, and after disestablishment, which requires examination of the Crown’s alternative plans’ (Wai 2575, #3.2.1128 at [4]).
21. Counsel further submits that addressing disestablishment issues separately risks duplication of effort or inefficiencies. Counsel says this is particularly so given disestablishment issues are no longer a matter requiring immediate or urgent Tribunal inquiry. It would also mean, counsel argues, that the Tribunal’s and parties’ resources could be focused on completing other aspects of the Wai 2575 inquiry.

Joint memorandum (Wai 2575, #3.2.1133)

22. Counsel in support of the joint memorandum submit that the Tribunal should proceed to report on disestablishment issues separately and on the papers. Counsel submit it is important that the disestablishment matters do not remain unexamined until mid-2025 considering what counsel says amounts to ‘the Crown’s failure to have an alternative plan to replace it’ (Wai 2575, #3.2.1133 at [3]).
23. Counsel submit the Tribunal already has significant evidence and legal submissions filed on the disestablishment of Te Aka Whai Ora. They contend that it appears the Crown could file no further evidence or submissions other than that already filed in March 2024, and that the Crown has conceded that Te Aka Whai Ora’s disestablishment was a ‘unilateral political decision ... in breach of the Treaty principles’ (Wai 2575, #3.2.1133 at [6]). Counsel request that any further time for the Crown to file further evidence and submissions be limited so that a report can be issued ‘as soon as possible this year’ (Wai 2575, #3.2.1133 at [6]).
24. Counsel therefore submit it is appropriate for the Tribunal to issue two separate reports on the disestablishment of Te Aka Whai Ora and the Crown’s alternative plans.
25. Finally, counsel agree with the Tribunal’s proposal that the hearing deferred to the second quarter of 2025 should examine the Crown’s alternative plans to Te Aka Whai Ora.

Small Ltd memorandum (Wai 2575, #3.2.1132)

26. Counsel for Wai 3307 filed a covering memorandum that supplied updated opening submissions for the priority proceedings, and briefs of evidence for the following witnesses, in response to my directions at [12] above:
 - (a) Lady Tureiti Moxon (Wai 2575, #M1(b));
 - (b) Janice Kuka (Wai 2575, #M2(c));
 - (c) Neil Woodhams (Wai 2575, #M42);
 - (d) Dr Peter Crampton (Wai 2575, #M43);
 - (e) Rev Dr Johnathan (Hone) Te Rire (Wai 2575, #M44);
 - (f) Robert Campbell (Wai 2575, #M6(a)); and
 - (g) Janice Kuka and Lady Tureiti Moxon (Wai 2575, #M36(b)).

27. I have approved the above documents for the record of inquiry.

28. I note that counsel made no further submissions in response to my directions at [12] above.

Tukau Law memorandum (Wai 2575, #3.2.1130)

29. Counsel support the joint memorandum noted above. Counsel additionally seek a further opportunity to file further evidence and closing submissions should an inquiry into disestablishment issues occur on the papers as proposed.

30. Counsel suggest that closing submissions on disestablishment issues should be due on 14 October 2024. Counsel note this is in line with the deferred date for closing submissions that counsel had already been working towards.

Dixon & Co memorandum (Wai 2575, #3.2.1131)

31. Counsel support the joint memorandum noted above and additionally ask that timetabling directions also be given for evidence and submissions relating to the Tribunal's inquiry into the Crown's proposed alternative plans.

Mahony Horner memorandum (Wai 2575, #3.2.1134)

32. Counsel also support the joint memorandum. They further advise that they have been briefing a number of taangata whaikaha / whaanau hauaa Maaori witnesses intended to participate in priority inquiry. Counsel therefore seek a 'one week extension' to file evidence and submissions to ensure their koorero sufficiently addresses disestablishment issues only (Wai 2575, #3.2.1134 at [4] – [5]).

33. Counsel say they 'sympathise with the Crown's argument' that an assessment of prejudice should ideally be made in the context of the evaluation of the Crown's alternative plans. However, counsel submit that the Crown has 'itself created the situation in which the disestablishment issue should be heard separately' given what counsel say has been a unilateral decision to disestablish Te Aka Whai Ora without first obtaining 'detailed analysis or advice' or engaging with affected Maaori. In these circumstances, counsel submit that the preferred path forward is for the Tribunal to proceed with its inquiry into disestablishment issues. Counsel submit the Crown could then benefit from the Tribunal's analysis and recommendations on this issue whilst the Crown continues to develop its alternative arrangements (Wai 2575, #3.2.1134 at [7] – [8]).

Tamaki Legal memorandum on behalf of Wai 762, Wai 861, Wai 2063, Wai 2217 and Wai 2206 (Wai 2575, #3.2.1136)

34. Counsel for the above claims state they were not signatories to the joint memorandum. However, their clients support the proposal to inquire into the two issues separately, and for the disestablishment issue to be heard on the papers.

35. Counsel additionally submit that adequate time should be allowed at the 2025 hearing for parties to evaluate evidence on the Crown's alternative plans. They further suggest that the hearing be held kanohi ki te kanohi.

Tamaki Legal memorandum on behalf of Wai 1531, Wai 1477, Wai 2890, Wai 3096, Wai 2894, Wai 2778, Wai 2377, Wai 2747, Wai 2671, Wai 2382 and Wai 2729 (Wai 2575, #3.2.1135)

36. Counsel for the above claims submit their clients support the hearing and reporting of both issues together, and for these issues to be heard in a kanohi ki te kanohi hearing in 2025.

37. Counsel advise that their clients wish to see the Crown held publicly accountable on issues arising from Te Aka Whai Ora's disestablishment, and that such a hearing is of equal importance to that of a report on these issues themselves.
38. Counsel advise that their clients are concerned that releasing two reports on the same issue may prove less impactful, with potentially 'more than a year separating them'. Their clients further consider that separate reporting risks a 'disconnect' in the hearing of two issues occurring without proper context. Counsel submits this may result in only 'half of the picture' being addressed (Wai 2575, #3.2.1135 at [6]).
39. In this regard, counsel contend there would be 'no material detriment to delaying proceedings until both issues can be heard together' (Wai 2575, #3.2.1135 at [8]).
40. Counsel submit that there can be 'no progress in this space' until the Crown provides information about its proposed alternative plans. They observe that relevant information may arise after the release of the Tribunal's report on the disestablishment issue. Counsel therefore consider it preferable that the Tribunal release a single comprehensive report covering both issues (Wai 2575, #3.2.1135 at [9]).

Sykes & Co memorandum (Wai 2575, #3.2.1137)

41. Counsel support the joint memorandum above. They additionally assert that the disestablishment of Te Aka Whai Ora arises 'largely from processes and decisions being developed unilaterally' and with 'little if any engagement with the claimants' (Wai 2575, #3.2.1137 at [6]). Counsel say they lack confidence in current health policy settings established under the current government which they consider to be 'non-compliant Te Tiriti processes' (Wai 2575, #3.2.1137 at [7]).
42. Counsel submit that the Tribunal should conduct this inquiry in 'two clear stages' so that all parties have the benefit of the Tribunal's analysis and recommendations while the Crown's alternative plans are developed (Wai 2575, #3.2.1137 at [8]).

Bennion Law memorandum (Wai 2575, #3.2.1138)

43. Counsel support the joint memorandum above. Counsel say that the disestablishment of Te Aka Whai Ora and the Crown's alternative proposals are intertwined, but that this should not prevent the Tribunal from making a 'strong finding of breach in respect of the first matter'. In their submission, the fact that Te Aka Whai Ora has been disestablished without alternative proposals in place, requires strong finding and recommendations 'as a matter of priority' in and of itself (Wai 2575, #3.2.1138 at [6]).
44. Counsel additionally filed a second brief of evidence from Tania Kingi, which I have approved for the record of inquiry (Wai 2575, #3.2.1138).

Phoenix Law (Wai 2575, #3.2.1139)

45. Counsel support the joint memorandum above, and seek leave to file seven further briefs of evidence by 4 October 2024.

Decision

Disestablishment of Te Aka Whai Ora to be inquired into separately and on the papers

46. I thank parties for their submissions, which I have duly considered.
47. I confirm that the Tribunal will proceed to inquire into and report on the processes and steps the Crown has taken in the disestablishment of Te Aka Whai Ora as a standalone

and separate issue. Inquiry into the disestablishment of Te Aka Whai Ora will be conducted on the papers.

48. I note in particular the strong support expressed from a number of parties, including a majority of claimant counsel. I also agree that there is merit in the Crown receiving the Tribunal's views on the matter of Te Aka Whai Ora's disestablishment while it continues to develop its alternative plans.
49. With this in mind, and to ensure the Crown has the benefit of the Tribunal's findings and any possible recommendations at the earliest opportunity, I signal that the Tribunal intends to release its report on issues concerning Te Aka Whai Ora's disestablishment before the end of 2024.

Inquiry procedure

50. To meet this timeframe, it is imperative that this inquiry remains focused and targeted in scope. It is also essential that parties strictly adhere to all relevant inquiry deadlines.
51. The Tribunal has already received a significant amount of evidence and submissions regarding the disestablishment of Te Aka Whai Ora either prior to or in response to my directions of 21 August 2024 (Wai 2575, #2.6.183).
52. Upon examining this material, I consider that the Tribunal will be able to proceed with its inquiry into Te Aka Whai Ora's disestablishment without receiving additional evidence. I therefore decline the requests seeking to file further evidence.
53. Further, I do not consider it necessary to test the evidence received. These proceedings are necessarily truncated and, as noted by counsel, the Crown has already made several acknowledgements.
54. I therefore confirm that evidence and submissions relevant to the disestablishment of Te Aka Whai Ora will not be subject to a hearing, nor will we conduct a process for written questions and answers. Instead, and as signalled in my memorandum-directions of 3 September 2024, evidence and submissions will be heard on the papers.
55. I now direct that:
 - (a) Claimant and interested party closing submissions should be filed by **5pm, Monday 14 October 2024.**
 - (b) Crown closing submissions should by **5pm, Monday 21 October 2024.**
 - (c) Any claimant and interested party reply submissions should be filed by **5pm, Friday 25 October 2024.**

Balance of the priority inquiry

56. Planning for the balance of the priority inquiry concerning the Crown's alternative plans to address Maaori health in lieu of a Maaori health authority will be addressed in due course.

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-aa-Tara i te 1 o ngaa raa o Oketopa 2024.

A handwritten signature in black ink, appearing to read 'Damian Stone', with a long horizontal stroke extending to the right.

Judge Damian Stone
Presiding Officer

WAITANGI TRIBUNAL