TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGI

Wai 2575

E PAA ANA KI *CONCERNING*	the Treaty of Waitangi Act 1975
AA, *AND*	the Health Services and Outcomes Kaupapa Inquiry

HE PAANUI WHAKAHAU O TE KAIWHAKAWAA JUDGE DAMIAN STONE

MEMORANDUM-DIRECTIONS OF JUDGE D STONE CONCERNING NEXT STEPS FOR THE TE AKA WHAI ORA PRIORITY INQUIRY

8 Aaperira 2025

Purpose

1. This memorandum-directions addresses next steps for stage two of the Priority Inquiry concerning the Crown's alternative plans to address Maaori health in lieu of a Maaori health authority (the stage two priority inquiry).

2. In particular, I confirm that this Tribunal will proceed with its priority hearing set down for **Monday 26 May 2025 to Friday 30 May 2025.**

3. The confirmed inquiry timetable is now **attached** as **Appendix A**.

Procedural background

Memorandum-directions dated 6 March 2025

4. In my memorandum-directions of 6 March 2025, I addressed a number of planning matters for the stage two priority inquiry, including (Wai 2575, #2.6.201):

   (a) the scope of the stage two priority inquiry;

   (b) an indicative timetable ahead of the priority hearing then-tentatively set down for 26 to 30 May 2025 (Wai 2575, #2.6.201(a)) and

   (c) associated hearing procedures.

5. I also addressed a 3 March 2025 memorandum filed by Roimata Smail on behalf of the Te Aka Whai Ora (Maaori Health Authority) (Wai 3307) claim (Wai 2575, #3.2.1239 at [8] – [12]). In response, I directed Crown counsel to respond to the Wai 3307 memorandum by 12 March 2025 (Wai 2575, #2.6.201 at [23]).

Crown memorandum dated 12 March 2025

6. On 12 March 2025, Crown counsel filed a memorandum seeking leave to respond to the Wai 3307 memorandum by Wednesday 19 March 2025, and to provide submissions related to the indicative timetable and scope of the stage two priority inquiry. Counsel advised that more time was needed to determine whether the matters and information sought in the Wai 3307 memorandum were relevant to part two of this inquiry (Wai 2575, #3.2.1243).

Crown memorandum dated 19 March 2025

7. On 19 March 2025, Crown counsel filed a memorandum providing an update to the Tribunal and responding to the Wai 3307 memorandum (Wai 2575, #3.2.1241).

<u>Scope of the stage two priority inquiry</u>

8. Crown counsel submit that the scope of the stage two priority inquiry – being the Crown's alternative plans to address Maaori health – should focus on 'institutional and system-level settings for Maaori health that are directly and expressly consequential on the decision to disestablish Te Aka Whai Ora' (Wai 2575, #3.2.1241 at [6]). Counsel submit that, to keep the inquiry within manageable bounds, 'ongoing operational programmes' and 'operational matters' should fall outside its scope (Wai 2575, #3.2.1241 at [7]).

9. Counsel submit that the Wai 3307 memorandum dated 3 March 2025 contains attempts to broaden this scope.

Hauora Maaori Strategy and High Court proceedings

10. Crown counsel have been instructed that the Hauora Maaori Strategy is anticipated to be released by June 2025. Counsel submit this strategy is 'required from the Minister of Health under existing legislation and will reflect institutional and system-level settings following the disestablishment of Te Aka Whai Ora' (Wai 2575, #3.2.1241 at [8]).

11. Counsel indicate that evidence on this strategy, and on other matters including the Hauora Maaori Advisory Committee and Iwi-Maaori Partnership Boards (IMPBs), 'will likely be relevant to this priority inquiry' (Wai 2575, #3.2.1241 at [9]).

12. Crown counsel further advised that there is ongoing litigation in the High Court about the disestablishment of Te Aka Whai Ora, which may have bearing on next steps for this inquiry.

Submissions on timetabling and request to hear from the inquiry participants

13. The Crown requested that the Tribunal provided an opportunity to hear from inquiry participants via joint memorandum on the practicality of the indicative timetable in light of two matters:

    (a) The Hauora Maaori Strategy is set for release after the proposed May 2025 hearing. Crown counsel submit that inquiry participants will likely want to be heard on how it contributes to the stage two priority inquiry.

    (b) The High Court proceeding's timetable has discovery due by 17 April 2025 and it will not be possible to complete it earlier, including the subset of information expected to be disclosed in due course (expected to be in the weeks following 17 April 2025). Counsel note that work on this discovery and disclosure is occupying all available resource for officials working on this inquiry and the High Court case.

Response to the Wai 3307 memorandum dated 3 March 2025

14. With one exception concerning the community health plans, the Crown does not accept that the matters raised and information sought in the Wai 3307 memorandum dated 3 March 2025 are within the scope of this inquiry.

15. Further, the Crown asserts there are no grounds to suggest that any sanction should be contemplated concerning provision of information and suggests that claimant counsel have 'acted irresponsibly in alleging there have been breaches of the Commissions of Inquiry Act 1908' (Wai 2575, #3.2.1241 at [17]).

16. Crown counsel submit an appropriate path forward is through a disclosure process whereby relevant documents will be disclosed to inquiry participants in due course (following 17 April 2025). Counsel submit this may include community health plans developed by IMPBs that are part of the planning settings in the health system, as set out in the Wai 3307 memorandum of 3 March 2025 at [2.5]. The Crown does not otherwise accept claimant counsel's characterisation of these plans.

17. Crown counsel further assert that other matters referred to in the Wai 3307 memorandum of 3 March 2025 are 'beyond scope as operational matters', including settings that Te Whatu Ora might have in place or matters about primary health care and Primary Health Organisations (PHOs).

Further submissions related to the May 2025 hearing

18. Crown counsel submit the Crown is not attempting to 'force the abandonment' of the hearing scheduled for May 2025, and that it is for the Tribunal to decide whether it is the best use of resources to proceed then or reschedule to allow inquiry participants to make use of the expected Hauora Maaori Strategy and disclosure of relevant information (Wai 2575, #3.2.1241 at [20]).

19. Crown counsel also suggest the Tribunal may consider whether some or all of the remaining part of this priority inquiry would be best heard on the papers.

20. Finally, Crown counsel propose that inquiry participants have an opportunity to make submissions on these matters by 26 March 2025.

Email from the Registrar on 24 March 2025

21. By an e-mail from the Registrar on 24 March 2025, I directed any claimants who wished to make submissions in relation to the Crown memorandum of 19 March 2025 to do so, jointly where possible, by no later than 28 March 2025.

Crown memorandum dated 26 March 2025

22. Crown counsel filed a further memorandum on 26 March 2025 ahead of the claimant response due on 28 March 2025 (Wai 2575, #3.2.1245). Counsel reiterate the submissions in their 19 March 2025 memorandum, including their view that the Hauora Maaori Strategy 'is likely to be relevant to this part of the priority inquiry' (Wai 2575, #3.2.1245 at [5.1]).

23. Crown counsel advise that the Crown is responding to three requests under the Official Information Act 1982 (OIA) from Ms Smail, Bennion Law and Tamaki Legal, all of which are broader than the disclosure the Crown had planned to make by late April for this priority inquiry (Wai 2575, #3.2.1245). Crown counsel submit the resources required to address these requests diverts work from this priority inquiry and the parallel High Court proceeding.

24. Should the Tribunal decide to progress with the May hearing, the Crown propose to proceed without a separate disclosure exercise for this part of the inquiry, instead responding to the OIA requests received and provide supporting documents in a common bundle with its own evidence that the Tribunal has indicated it wishes to receive by 21 April 2025 (Wai 2575, #3.2.1245).

25. If the Tribunal were to reschedule the priority hearing, Crown counsel suggest that (Wai 2575, #3.2.1245 at [8.2.4]):

    (a) the Crown could provide disclosure by late April 2025 following the completion of High Court discovery and the responses to the OIA requests;

    (b) the usual order of filing evidence should be followed (claimant evidence to be filed first, followed by Crown evidence);

    (c) more information will be available on alternative plans, including the Hauora Maaori strategy; and

    (d) the inquiry would 'benefit from synergy with the parallel High Court litigation which is timetabled through to a late August 2025 hearing'.

26. Crown counsel indicate that in either case, the Crown may apply for confidentiality orders from the Tribunal for information provided by the Crown.

27. Crown counsel request that, if the Tribunal considered having some or all of the remaining part of this priority inquiry heard on the papers, the Crown be heard on steps to timetable this.

Wai 3307 memorandum of counsel dated 28 March 2025

28. On 28 March 2025, the Tribunal received a memorandum filed by Ms Smail on behalf of the Wai 330 claim, with support from claimant counsel listed at Appendix A of the memorandum (Wai 2575, #3.2.1245 & #3.2.1245(a)).

Scope of the stage two priority inquiry

29. Counsel rejects the Crown's 'constrained definition' of 'alternative plans'. Counsel submits that such phrasing suggests the Tribunal can only inquire into matters explicitly referencing Te Aka Whai Ora and excludes any changes that impact Maaori health unless they are expressly labelled as such (Wai 2575, #3.2.1245 at [4]).

30. Counsel submits the Crown does not deny certain matters raised in claimant counsel's 3 March 2025 memorandum, such as the establishment of a new Funding Board or consultation about Hauora Maaori Services. Counsel states that these developments relate to the distribution of functions previously carried out by Te Aka Whai Ora. Counsel further submits the Crown does not deny the proposal to allow PHOs to expand outside their geographical boundaries, which is a significant change to the public health system settings and is a major risk to the survival of Maaori-owned PHOs.

31. Counsel also submits that what the Crown characterises as 'operational' is the 'real life consequences of institutional and system level settings' (Wai 2575, #3.2.1245 at [7]).

Hauora Maaori Strategy and High Court proceedings

32. Regarding the Crown's proposal to defer the priority hearing until after the release of the Hauora Maaori Strategy in June 2025, counsel opposes this delay and submits that the Tribunal does not need to wait for the strategy for the following reasons (Wai 2575, #3.2.1245 at [10]):

    (a) Strategies do not change legislation. For example, counsel note, the Pae Ora (Healthy Futures) Act 2022 will not be changed in any way by a Hauora Maaori Strategy.

    (b) Any new strategy will be just one among many (including those written by or with Te Aka Whai Ora) and have no effect on institutional and system level settings.

    (c) Strategies are not 'self-executing'.

    (d) The 'hostile environment already being experienced by Maaori PHOs and providers belies whatever words are written into the strategy'.

33. Counsel submits there is no need to delay the stage two priority inquiry due to ongoing litigation in the High Court. Counsel submits that (Wai 2575, #3.2.1245 at [11]–[15):

    (a) Given the High Court deadline for discovery is 17 April 2025, this could be provided to claimants shortly after to assist with planning.

(b) Counsel understands the 17 April 2025 discovery tranche would be the second tranche of discovery, and suggests that if this (second tranche) is relevant to this priority inquiry, then the first tranche is likely relevant as well and ought to be provided to claimants and the Tribunal.

(c) Discovery is not a substitute for evidence. Counsel notes that given it is almost four years since Minister Reti's first announcement of his intent to disestablish Te Aka Whai Ora, the Crown should be able to articulate what its alternative plans are.

(d) In response to the Crown's proposal to not provide a separate disclosure process for this priority inquiry, counsel notes that it was the Crown that proposed sharing its High Court discovery with the claimants (counsel notes that this was not requested by claimants, nor was it a direction from the Tribunal) – a step that requires no additional resourcing beyond simply forwarding the relevant files on 17 April 2025.

(e) The claimants also reject the suggestion that OIA requests must compete with the Crown's litigation obligations.

Post-hearing process on the papers

34. Counsel submits that the claimants oppose a post-hearing process on the papers, and that they have no confidence that anything material will emerge after the hearing if it has not already. Counsel suggests that even if no evidence of credible alternative plans is provided, the Tribunal should make findings and recommendations accordingly.

Tribunal indicative timetable

35. Counsel advises that the claimants support the timetable proposed by the Tribunal (Wai 2575, #2.6.201(a)). They consider there is no prejudice to the Crown and that the deadlines merely reinforce longstanding directions for the Crown to produce relevant information.

Decisions

Scope and the Hauora Maaori Strategy

36. As previously confirmed, the stage two priority inquiry will assess the Crown's alternative plans to address Maaori health in lieu of a Maaori health authority (Wai 2575, #2.6.201 at [13]).

37. The Tribunal's preference is for the stage two priority inquiry to examine the Crown's alternative plans at a high level – that is, the principles driving the policies designed to address Maaori health in lieu of a Maaori health authority. However, ultimately, it is for the Crown to specify to the Tribunal and parties what these alternative plans are, and to establish whether these plans are Tiriti-compliant. In this regard, it is perhaps unhelpful to compartmentalise the Crown's alternative plans or attempt to distinguish aspects of those plans as structural or operational responses. The Crown has clearly and consistently argued in this priority inquiry that there are a number of ways in which it can satisfy its te Tiriti obligations in this area, and that its proposed alternative plans constitute a better way of satisfying those obligations. Therefore, it is for the Crown to detail its alternative plans to address Maaori health in response to Te Aka Whai Ora's disestablishment and establish that those plans are Tiriti-compliant. Indeed, this reflects the confirmed scope for this priority inquiry. When considered in this light, what is within scope for this inquiry is self-regulating: the Crown ought to put in evidence those policy responses that it considers necessary to show that the alternative plans in response to the disestablishment of Te Aka

Whai Ora are Tiriti-compliant, whether they are categorised as structural or operational responses.

38. That said, the Crown has indicated that the Hauora Maaori Strategy is '*likely* to be relevant' to this priority inquiry, and with that, suggests there may be benefit in deferring the priority hearing set down for May until the strategy has been released. It is perhaps axiomatic that the Hauora Maaori Strategy will be relevant here. The real question is whether its relevance is sufficient to defer our May 2025 hearing pending its release.

39. The Crown's own submissions on the relevance of the Hauora Maaori strategy are informative. The Crown has indicated its *likely* relevance. It has put it no higher than that. It is also illustrative to consider what the Crown has not said. For example, the Crown has not argued that significant planks of its alternative plans will be set out in the Hauora Maaori Strategy. In this regard, the Crown's submissions do not provide enough certainty about the relevance of the Hauora Maaori Strategy on which to defer the May 2025 hearing.

40. Furthermore, as noted by claimant counsel, the development of the Hauora Maaori Strategy is an existing requirement under the Pae Ora (Healthy Futures) Act 2022. It is a high-level strategy document created out of the Minister of Health's existing statutory obligations. Of course, when the Pae Ora Act was enacted, this high-level strategy document was intended to exist in parallel and in addition to Te Aka Whai Ora. There is a question, therefore, as to whether (and, if so, how) the Hauora Maaori Strategy, as an existing high-level strategy document, could adequately address the effects of the significant structural shift of disestablishing Te Aka Whai Ora, particularly given the Crown's reasonably muted submissions as to its relevance. Certainly, these factors point against the deferral of the May 2025 hearing.

41. Therefore, the May 2025 priority hearing will not be deferred in anticipation of the Hauora Maaori Strategy.

Hearing and inquiry timetable

42. The priority hearing, set down for 26 to 30 May 2025, will proceed. The Tribunal's inquiry timetable is now **confirmed** as **Appendix A**.

43. As noted, the focus of this priority inquiry is to examine whether the Crown's alternative plans to address Maaori health in lieu of a Maaori health authority is Tiriti-compliant. The onus is therefore on the Crown to provide details of its alternative plans and establish whether those plans are Tiriti-complaint. For this reason, I consider it appropriate for the Crown to first provide evidence outlining its alternative plans, and establish in submissions whether these plans are Tiriti-compliant. The order of filing evidence and submissions therefore remains as initially proposed by the Tribunal.

Discovery and disclosure

44. The Crown has referred to the parallel High Court proceedings on the disestablishment of Te Aka Whai Ora. The Tribunal has insufficient information about the nature of those proceedings to determine their relevance to this part of the inquiry. It does appear, however, that the High Court proceedings will consider the disestablishment of Te Aka Whai Ora. We have already considered that issue, meaning that part of the High Court proceedings will not be relevant to our stage two priority inquiry.

45. That said, it appears likely that at least some of the Crown discovery documents in those parallel High Court proceedings will be relevant to this inquiry. It is the Crown's duty to make the relevant documents available in this inquiry.

46. At this stage, I do not consider it is necessary for the documents disclosed by the Crown in the parallel High Court proceedings to be added to our record of inquiry. However, I encourage claimant and Crown counsel to work together to coordinate documents that may be relevant to the alternative plans for Te Aka Whai Ora, as I have previously directed in past memoranda. Any relevant documents arising out of that process should be filed in evidence.

47. Therefore, I confirm that, rather than requiring a discovery process or requiring the documents discovered by the Crown in the High Court proceedings to be added to our record of inquiry, the Crown may file, alongside its evidence due on **5pm, Tuesday 22 April 2025,** a supporting bundle of documents which may draw from the High Court discovery documents. The claimants, in filing their evidence due on **5pm, Monday 12 May 2025,** may also file a supporting bundle of documents in support.

Inquiry on the papers

48. Finally, as to whether part of this inquiry should be dealt with on the papers, it remains to be seen whether this will be necessary. Indeed, it is not clear at this stage what is actually meant by the suggestion that parts of the inquiry proceed on the papers. The Tribunal will consider this matter again once evidence has been received and, if needed, will seek further submissions from parties on this point.

Me tuku atu te Kaireehita i teetehi kape o teenei whakahau ki eeraa ki te raarangi whakamoohio moo Wai 2575, the Health Services and Outcomes Kaupapa Inquiry.

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

WHAKAPUUMAUTIA ki Pooneke i te 8 o Aaperira 2025

Kaiwhakawaa Damian Stone
Tumuaki Pakirehua | Presiding Officer
TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGI