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**Submission on Proposals re Legal Aid for Waitangi
Tribunal Proceedings by Te Hono ki Raukawa**

19 July 2011

1. Submitters

This submission is made by:

Sir Edward Taihakurei Durie KNZM, of Wellington, a member of the Council of Te Hono ki Raukawa Historic Claims Management and Settlement Trust ("Te Hono");

on behalf of Te Hono

with the assistance of Woodward Law Offices, PO Box 30-411, Lower Hutt 5040, (04) 560 3680, info@mokola.co.nz (to whom any correspondence should be sent).

Te Hono supports the Legal Services Agency in undertaking a review of Waitangi Tribunal Legal Aid. We acknowledge with gratitude the process adopted by the Agency which allows entities like Te Hono, representing tribal groups which stand to benefit from the provision of legal aid, to give their views on how legal aid can be delivered so as to best achieve access to justice for the Maori groups they represent.

We acknowledge also that those making submissions are not obliged to use the form which the Agency has provided. We choose not to use the form because it does not cater for all of our concerns. However, we do have regard to the important questions raised in the form and will seek to address each of those questions on which we have a particular view.

There are no parts of this submission which we ask be kept confidential.

2. Statement of Primary Concern

We agree with the opinions that others have expressed, as cited in the Legal Services Agency Consultation Document at page 2, that legal aid funding has tended to promote lawyer participation at the expense of claimant participation and tend to support the continuation of disputes between claimant groups.

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This is the major issue for Te Hono. The above passage and others suggest that the Agency is aware of the issue; but the Agency may not be aware of the extent of the concern that it has raised amongst the iwi.

Our concern of lawyer involvement as a result of legal aid has three aspects that unless properly managed:

- a) it threatens to take away, and has in fact taken away in some cases, the rights of iwi, supported by the Treaty of Waitangi and by human rights law, to manage their own affairs, determine their own future and uphold their own customary institutions, processes and culture;
- b) It threatens to detract and has in fact detracted in some cases, from the cathartic processes which the Waitangi Tribunal maintained prior to the introduction of legal aid, and which provided relief for Maori in managing the grievances which they have borne as a result of historic policies and practices of governments; and
- c) It has led to an inordinate and avoidable burden on the taxpayer for which Maori are frequently blamed as though Maori were the cause.

It is submitted that the proposals in the Legal Services Agency Consultation Document could justifiably go further in managing this concern. For Maori it does not entirely achieve the implicit goal of the Agency of "helping people access justice" but inhibits the access to justice for the customary institutions of the iwi and thus for Maori generally.

3. Overview of Submission

To manage our concerns, we submit that where an iwi group has an entity in place, established in accordance with customary practice and with appropriate support and capacity, to represent the interests of all the sub-groups on whose behalf claims have been made, the primary legal aid for the overall administration of claims should pass to counsel for that entity. Legal aid to counsel for component sub-groups and individuals should be limited to appearing for those sub-groups and persons on specified, allocated days.

We submit that this gives effect to the process originally adopted by the Tribunal before legal aid was introduced and before the Tribunal became swamped by lawyers. That process was acceptable to Maori and achieved wide support and acclaim. Amongst other things it maintained the integrity of the tribal structures, gave practical effect to the principle of rangatiratanga in the Treaty, the principle of self-determination now affirmed in the UN Declaration on the Rights of Indigenous Peoples and the principle also affirmed in the Declaration that indigenous peoples should be dealt with through institutions of their own choosing.

We submit that this structure is provided for by law, and indeed is contemplated by law, and in particular, by s6 Treaty of Waitangi Act 1975, which enables claims to be brought on behalf of groups (so that these groups may be seen as the true owners of those claims) and by s7, Second Schedule of Treaty of Waitangi Act 1975 (in which the right of lawyers to appear before the Tribunal is only by leave) and by the further provision that such leave may be given on such terms as the Tribunal thinks fit. By that means the Tribunal may for example, limit the right of counsel to appear to a specific time and place rather than to appear at each and every hearing.

4. Illustration of Overview

Te Hono is active in the Porirua ki Manawatu inquiry of the Waitangi Tribunal, on behalf of Ngati Raukawa. Ngati Raukawa, whose hapu are represented in 25 marae, is the largest tribal group in the inquiry district. The other two groups are Te Atiawa of one marae and Muaupoko of two marae.

Te Hono was established to manage and co-ordinate the claims as a whole in accordance with tradition while still allowing each of the hapu to present their local claims and to present any submissions alternative to that of the Council in respect of the generic issues affecting the people as a whole.

After three years of consultations with the people at Hui a Iwi, and subsequent Hui a Hapu, Te Hono has developed a Strategic Plan by which the claims will be managed. It has wide tribal approval. The essence of this Plan is that Te Hono Council will present the primary generic issues affecting everybody. It will limit legal appearances in that process to each of the three primary components of Raukawa that is Raukawa proper, Reureu and Kauwhata.

It is proposed that the Tribunal will then travel to the various hapu districts where the lawyers for those particular hapu will present local claims. They may also make submissions on the generic issues. Those submissions may challenge the approach which Te Hono has taken. The core research data and the Te Hono submissions, and all other material, will be available to all counsel through a cyberspace library.

Where the Tribunal finds it necessary to hear further argument after having gone through that process, then and then only, may it be necessary for counsel as a whole to be heard but limited to the specific issues identified by the Tribunal as in serious contention.

It is further proposed that the submissions will be led by the people themselves, with the legal commentary to follow after.

We submit that this process is substantively that which the Tribunal adopted in the initial historic claim hearings pre-legal aid, including: Ngati Whatua of Orakei, Muriwhenua Land and Fishing claims, Ngai Tahu claim, the preliminary stages of the Waikato Raupatu claims (later concluded by direct negotiations), Taranaki Raupatu claim, Ngati Awa Raupatu Claim

and the several contemporary claims during the founding period including Te Atiawa Reefs, Manukau Harbour, Kaituna River, Whanganui River and Waiheke Island.

We now refer to the questions in the Submission Document.

5. Principles for the Review

Principle a)

“Legal aid funding should be available to ensure that Treaty of Waitangi claimants have access to legal advice and representation.”

Comment: It should be made clear that ‘Treaty of Waitangi claimants’ embraces any groups on whose behalf the claims have been made, that the group opinion may be more important than the opinions of the individuals recorded as claimants, and that priority may need to be given to those who bring claims for a large tribal group rather than, for example, a small family.

It is submitted that for Indigenous people, the primary claimant is indeed the group, that is in this case, the whanau, hapu and the iwi. Given the absence of a corporate identity for customary whanau, hapu and iwi groups, the Treaty of Waitangi Act specifically recognised, and still does recognise, that the claims must be filed by individuals but they may do so on behalf of the group (s6). In reality it is the group that is the primary beneficiary, not the individuals, as the government has consistently recognised. We are not aware of one claim that has been settled by government for the benefit of the individuals. The settlements are invariably with entities established for the group and the priority is invariably given to the groups that represent the largest natural groupings. It is submitted that the Agency should take cognisance of this cultural reality and that the Agency might note in that context that the primacy of the group right in Indigenous peoples contexts is provided for in the first article of the UN Declaration on the Rights of Indigenous Peoples.

Principle b)

“Legal aid should be used to fund the provision of high quality legal services.”

Comment: Accepted.

Principle c)

“Legal aid should encourage different claimant groups to work together and it should support a constructive approach to resolving disputes between claimant groups.”

Comment: Agree. The Te Hono proposal is a practical example of how Maori groups can work together. The major problem confronting Te Hono has been the lawyers who by proposing alternative arrangements whereby they would manage the claims, severely compromise the tribal right to manage its own affairs.

The Te Hono Strategic Plan has a built in Dispute Resolution process.

Principle d)

“Legal aid should be managed in such a way that it supports the smooth and efficient running of the Waitangi Tribunal”.

Comment: Agree and submit that our proposed arrangement does that and that, in those cases where a representative entity has in fact been established with an appropriate mandate and capacity, that it does so more effectively than the alternative process of counsel co-ordination.

Principle e)

“Legal aid services should reflect an efficient use of taxpayer funding”

Comment: Agree and submit that our proposal achieves the efficiency sought.

Other Principles

Principle f)

Legal aid funding in the Waitangi Tribunal should respect and be consistent with the Treaty of Waitangi and with the rights of indigenous peoples and distinctive cultural groups, including minorities, recognised in human rights law and in appropriate international instruments.

We submit that the principles of self-determination, of respect for indigenous peoples institutions, and of respect for group rights could be better provided for in the Agency's proposals, and that our proposals may offer some assistance in moving in that direction.

6. Proposals

The proposals of the Legal Services Agency commence in the second column of the second page of the Agency's consultation document.

The Agency sets out several proposals for co-ordinating counsel.

We submit that the proposals for co-ordinating counsel cut across the capacity and the right of tribal authorities to take control of their claims and fulfil that co-ordinating role themselves where they have developed appropriate structures for that purpose.

It is submitted that:

- a) Counsel co-ordination as proposed should proceed only in the absence of a tribal entity recognised by the Tribunal as being an appropriate body to undertake that role.

To illustrate that from our own situation, Te Hono has been established to manage the Raukawa claims. Should its mandate and capacity to do so be recognised by the Tribunal, then legal aid funding for claim co-ordination and overall management should be through counsel approved to act for that body. Funding for sub-groups should be limited to the presentation of cases for those specific sub-groups.

However, the Raukawa iwi confederation is not the only iwi group in the district. There are also claims for the distinctive groups of Muaupoko and Te Atiawa. We understand that they have not established a similar structure. It may be that they have not been able to agree upon one. Should they fail to do so then the Agency should implement the structure for co-ordinating counsel as set out in the Consultation Document.

- b) The Legal Services Agency should encourage iwi authorities to establish appropriate entities and structures for the management of claims within the iwi confederacy.

7. Other Proposals to Avoid Duplication and Unnecessary Work

Other proposals to avoid duplication and unnecessary work are set out on the third and fourth pages of the Agency's Consultation Document. We refer to only the first of those proposals, that "Treaty lawyers must be well versed in Treaty jurisprudence (law and practice)."

We submit that in addition, Treaty lawyers must be well versed in Maori protocols, customs and tikanga. Our concern here is that some of the lawyers in our district are making proposals that we consider lack an adequate comprehension of our culture. For example

they make proposals on behalf of a few individuals for whom they act which in custom are matters for the tribe as a whole to resolve; and show no awareness they are stepping across customary decision making when they do so and are interfering in domestic affairs.

The question is how that in practice can be managed. We do not expect that the Agency would be able to make an assessment of cultural competency or would even wish to do so. However, we consider that one of the questions that might be posed to the Tribunal in its reports to the Agency is whether the Tribunal has had complaints on the cultural competency of any lawyer, whether the Tribunal considers the complaint to be justified and whether the Tribunal would withdraw or otherwise limit the appearance of counsel as a result.

Some analogy might be made with the expectations of appropriate conduct amongst Counsel appearing for children in domestic cases.

8. Section 49 Report (Legal Services Act 2011)

The question is how to give effect to our proposal for the management of claims through tribal entities where appropriate entities have been put in place. We refer in this context to s49 of the Legal Services Act 2011, which provides for the Waitangi Tribunal to supply the Legal Services Commissioner with certain information prescribed by regulations before determining an application for legal aid, or where the circumstances of an applicant or the application have changed.

It is submitted that the information which the Commissioner should receive from the Tribunal should include the following:

Whether an entity has been established to represent a tribal group whose members have claims to the Tribunal, whether the Tribunal recognises that entity as appropriate to manage the claims for the general benefit of the iwi or in accordance with any approved plan, and whether, and if so, how the role of counsel should be constrained as a result.

The Tribunal might also be asked to advise whether the Tribunal itself has developed a plan by which the role of counsel might be constrained to better serve the Tribunal's inquiry.

9. Other relevant matters:

Counsel Representing Iwi from Outside the District

We submit that a practice has arisen in proceedings before the Tribunal in which lawyers purport to act for tribes from outside the district who claim to have interests inside the district on account of some historical association. An example is, that in our district, there are groups who have filed claims in the districts in which they are normally associated,

whose claims do not in fact make any reference to claims in our district but who nonetheless purport to have a right to be heard in our inquiry. It appears to us that the primary purpose of this arrangement is to allow the lawyers concerned to appear at each and every hearing in our district at the cost of legal aid, even to the point of serving as lead co-ordinating counsel.

We submit that this and other similar problems might be dealt with by the Agency requesting information from the Tribunal under s49, on whether the groups from other districts in fact have viable claims in the district under inquiry and whether that issue can be isolated off as an issue to be heard and determined prior to any further participation in the Inquiry by that group.

Counsel Representing Individuals of a Hapu Which is Already Represented in the Proceeding

In our district there are hapu with established leaders to represent the hapu and who have the benefit of legal aid. However, a mere handful of individuals, all or many of whom have not succeeded in being elected to hapu leadership positions, are able to engage counsel and through those counsel, challenge the tribal leadership and presume to act as leaders themselves. Here again the effect is to dismember the tribe and to undermine the strength of its internal democratic institutions. We submit that in such cases the question should be whether these individuals have an interest distinct from the co-members of that hapu, an interest requiring independent representation and if so, whether counsel should be limited to being heard on that single issue.

The Agency has noted as criteria for the selection of co-ordinating counsel "the extent to which the lawyer represents substantive iwi and/or hapu interests." However, we submit that the practice of lawyers acting for a few individuals when those individuals ought properly to be working through their own tribal institutions and the democratic processes of those institutions should be specifically drawn to the Tribunal's attention by some reference to it in the regulations governing s49 reports.

10. Concluding Comment

If there is an opportunity for submitters to be heard in person, then we wish to be so heard. This is for two reasons:

- This submission proposes a departure from the process that has existed over the last 10 years, we therefore anticipate questions from the Agency and we would like to make ourselves available to respond to them;

- We would also like to respond to the lawyers, in the interests of transparency, in view of our proposals which may be seen as adverse to their interests.

Thank you again for the opportunity to make submissions.

A handwritten signature in black ink, appearing to read 'Sir Edward Taihakurei Durie', written over a horizontal line.

Sir Edward Taihakurei Durie KNZM
Member of Te Hono ki Raukawa Council