OFFICIAL

IN THE WAITANGI TRIBUNAL **WAI 2374**

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	a claim by Sir Graham Latimer on behalf of himself and the hapū of Te Paatu; Mr Haami Piripi on behalf of himself and the iwi of Te Rarawa; Mr David Potter and Mr Andre Paterson on behalf of themselves and hapū of Ngāti Rangitihi; Ms Michelle Marino and Mr Errol Churton for and on behalf of themselves and the descendants of Tāringa Kuri (Te Kaeaea); and Mr Russell Kemp on behalf of himself and the hapū, marae and whānau of Te Uri o Hau

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MEMORANDUM OF COUNSEL RESPONDING TO CROWN SUBMISSIONS IN RESPONSE TO URGENCY APPLICATION

3 August 2012

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WELLINGTON

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. This Memorandum of Counsel ("MoC") responds to the submissions of the Ministry of Justice ("MoJ") on behalf of the Crown in response to the urgency application, dated 27 July 2012 ("the MoJ Submissions").[1] This MoC ought to be read alongside the detailed submissions and accompanying Affidavit filed by Counsel on 9 July 2012[2] setting out the substantive grounds under which urgency ought to be granted.

BACKGROUND

2. On 1 June 2012, Counsel filed a Statement of Claim ("the SoC") and an application for an urgent hearing ("the Application") on behalf of Sir Graham Latimer on behalf of himself and the hapū of Te Paatu; Mr Haami Piripi on behalf of himself and the iwi of Te Rarawa; Mr David Potter and Mr Andre Paterson on behalf of themselves and hapū of Ngāti Rangitihi; Ms Michelle Marino and Mr Errol Churton for and on behalf of themselves and the descendants of Tāringa Kuri (Te Kaeaea); and Mr Russell Kemp on behalf of himself and the hapū, marae and whānau of Te Uri o Hau ("the Claimants") in relation to the administration of legal aid in the Waitangi Tribunal jurisdiction ("the Latimer and Piripi Claim").[3]

3. On 22 June 2012, counsel for Te Rarua McClutchie-Morrell, Pouri Harris, Ani Taniwha, Justyne Tetana, Vivienne Taueki and William Taueki, Ms Kathy Ertel and Ms Linda Thornton, filed a Memorandum supporting the Latimer and Piripi Claim ("the Wai

[1] Wai 2374, #3.1.15 and Wai 2378, #3.1.3.
[2] Wai 2374 # 3.1.10.
[3] Wai 2374, #1.1.1 and #3.1.1.

2375 Claimants")[4] in addition to a Statement of Claim and an application for an urgent hearing regarding legal aid for Waitangi Tribunal claims ("the Wai 2375 Application").[5]

4. Other parties who filed Memoranda seeking leave to participate in the Latimer and Piripi Claim proceedings as interested parties included:

a. the New Zealand Maori Council (who advised, inter alia, that they supported the Latimer and Piripi Claim in principle);[6]

b. claimants for Wai 764;[7]

c. claimants for Wai 1147;[8] and

d. claimants for Wai 972.[9]

5. By way of Memorandum-Directions dated 5 June 2012,[10] Her Honour Deputy-Chairperson Milroy directed the Crown and interested parties to respond to the Application by midday, Friday 22 June 2012.

6. On 22 June 2012, Counsel instructed on behalf of MoJ, filed submissions, together with accompanying affidavits, opposing the Latimer and Piripi Claim.[11]

7. On 29 June 2012, Counsel filed an unsworn Affidavit of Haami Piripi, dated 29 June 2012.

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[4] Wai 2374, #3.1.6.
[5] Wai 2375, #1.1.1, and #3.1.1.
[6] Wai 2374, #3.1.7.
[7] Wai 2374, #3.1.3.
[8] Wai 2374, #3.1.3.
[9] Wai 2374, #3.1.5.
[10] Wai 2374, #2.5.1.
[11] Wai 2374, #3.1.7 ,#A1, # A2.

8. On 2 July 2012, Her Honour Deputy Chairperson Judge Milroy issued Memorandum-Directions advising, inter alia, that given the similar nature of the Latimer and Piripi Claim and the Wai 2375 Application, they would be determined together. Her Honour further advised that presently neither application addressed the Tribunal's urgency criteria to a sufficient degree.[12] Her Honour accordingly directed Counsel and counsel for the Wai 2375 Claimants to:

a. file further information clearly addressing the urgency criteria by midday, Monday 9 July 2012; and

b. to file all evidence relating to their applications no later than midday, Monday 9 July 2012.

9. By way of an MoC dated 9 July 2012,[13] Counsel filed submissions in response to Her Honour Deputy Chairperson Judge Milroy's directions of 2 July 2012.

10. Counsel also filed the following evidence on 9 July 2012:

a. Sworn Affidavit of Michelle Marino, sworn 9 July 2012;

b. Unsworn Affidavit of David Potter dated 9 July 2012;

c. Unsworn Affidavit of Russell Kemp dated 9 July 2012.

11. On 10 July 2012, Counsel sought an extension to file the sworn affidavits of Mr Piripi, Mr Potter and Mr Kemp on Monday 16 July 2012[14] on the basis that an extension sought on behalf of the Wai 2375 Claimants to file their further information and evidence until midday, Monday 16 July 2012, had been previously granted by Her Honour Deputy Chairperson Milroy.

[12] Wai 2374, 2.5.2, Wai 2375, #2.5.1.
[13] Wai 2374, #3.1.10.
[14] Wai 2374, #3.1.13.

12. On Monday 16 July 2012, the following sworn affidavits were filed by Counsel:

a. Sworn Affidavit of Haami Piripi, sworn 12th July 2012;

b. Sworn Affidavit of Russell Kemp, sworn 10th July 2012;

c. Sworn Affidavit of David Potter, sworn 10th July 2012.

13. On Monday 16 July 2012, the Wai 2375 Application was withdrawn. Counsel for the Wai 2375 Claimants advised that due to Counsels' continuing participation in the Wai 2358 Urgent Inquiry – The National Fresh Water and Geothermal Resources Inquiry ("the Fresh Water/SOE Urgent Inquiry"), and consequent difficulties associated with finalising the evidence for the Wai 2375 Inquiry, they were withdrawing, without prejudice, their application for urgency.[15]

14. Also on 16 July 2012, Her Honour Deputy Chairperson Milroy subsequently dismissed the Wai 2375 Application by way of Memorandum-Directions dated 16 July 2012[16] without prejudice to the right of the claimants to file an application in future, if necessary.

15. On 16th July 2012, Counsel for Apihaka Mack of Ngatiawa ki Kapiti, Diane Hollaway of Ngai Tahu, and Gina Mahara of Ngati Te Wehi ("the Wai 2378 Claimants"), Mr David Stone, filed a Statement of Claim[17] and Application for Urgent Hearing.[18] A Memorandum of Counsel was also filed by Mr Stone supporting the Latimer and Piripi Claim.[19]

16. On 27 July 2012, Counsel for MoJ filed the MoJ Submissions, as well as accompanying affidavits, responding to the Latimer and Piripi Claim as well as to the Wai 2378 Application.[20]

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[15] Wai 2375, #3.1.5.
[16] Wai 2375, #2.5.2.
[17] An amended Statement of Claim was filed on 26 July 2012 and that is recorded as Wai 2378, #1.1.1.
[18] Wai 2378, #3.1.1.
[19] Wai 2378, #3.1.2 and Wai 2374, #3.1.14.
[20] Wai 2374

CROWN RESPONSE

17. The Crown's response essentially is that:

a. There is no evidence that the claimants are suffering or are likely to suffer significant and irreversible prejudice as a result of the matters that the claimants now complain about;

b. The claimants have not demonstrated that they are ready to proceed urgently to a hearing. They singularly failed to meet their own timetable for filing evidence;

c. To the extent that the individual claimants have been affected in relation to their particular legal aid applications (not accepted) they have other remedies.[21]

18. Each of these issues is addressed in turn.

RESPONSE TO ISSUE A: SIGNIFICANT AND IRREVERSIBLE PREJUDICE

Evidence of Significant and Irreversible Prejudice

19. The MoJ Submissions state that there is currently no adequate evidence before the Tribunal that any prejudice is being suffered. Counsel refers to paragraph 5.2 of the MoJ Submissions that "There is currently no adequate evidence before the Tribunal that any prejudice is being suffered, let alone significant and irreversible prejudice".

[21] Wai 2374, #3.1.15 and Wai 2378, #3.1.3.

20. It is clearly misleading and incorrect for Counsel for MoJ to submit that there is no evidence when ample evidence has already been submitted to the Tribunal. The evidence provided in the Affidavits of Mr Haami Piripi, Ms Michelle Marino, Mr Russell Kemp and Mr David Potter clearly demonstrate that the Claimants are suffering and are likely to continue to suffer significant and irreversible prejudice.

21. Details in relation to the actual prejudice suffered are clearly articulated in paragraphs 43 – 51 of Counsel's submissions dated 9th July 2012,[22] in particular at paragraph 46.

22. Moreover, the support of a nationally important representative body, namely the New Zealand Maori Council, is a clear indication that the concerns are widespread and systemic.

23. Counsel for MoJ then goes on to say at paragraph 5.3 of the MoJ Submissions that:

> The nearest evidence is that some land is potentially being sold being the AgResearch Centre at Wallaceville, Upper Hutt. But… The land is not being sold as it has not been discharged from the Crown's obligations to protect Māori interests so the disposal for sale cannot commence;26
>
> **26**: Second Affidavit of Michelle McCreadie, Para 7.7.

24. Counsel refers the Tribunal to the Affidavit of Michelle Marino filed concurrently with this MoC, setting out that the statement of Ms McCreadie that the land is not being sold is "at best misleading and at worst an outright lie". Ms Marino has received a letter from the Crown (attached as Annex A to Ms Marino's Affidavit) stating:

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[22] Wai 2374, #3.1.10.

This letter outlines key messages discussed at our meeting dated 24 April regarding the former AgResearch Wallaceville Centre site, Upper Hutt (the Wallaceville site).

Decision to release the Wallaceville site from the Protection Mechanism

The Minister for Treaty of Waitangi Negotiations and the Minister of Maori Affairs **agreed for the vendor agency to release the Wallaceville site for disposal on the open market**, for the following reasons:

- the site has significant fiscal implications to the Crown; and
- landbanking would place further cost pressure on the Landbank maintenance budget and hinder the Crown's ability to improve the overall condition of properties in the Landbank over time.

……

Next steps

The property will now be disposed of by the vendor on the open market. If you would like to seek protection of any waahi tapu on Wallaceville site prior to its disposal, you are able to submit an application under Te Puni Kokiri's Sites of Significance process….

Given that Wallaceville site **will be made available for sale on the open market** you are free to pursue whatever purchase arrangements you have. I understand Mr Garlick may seek to purchase the site to pursue his project. He has advised that he is keen to include and work with Maori on the project [emphasis added].

25. Not content with misleading the Tribunal by stating that land is not being sold, the MoJ Submissions then go on at paragraph 5.4 to state that:

> To the extent that the claimants use the possibility of sale of land as a potential prejudice, most former Crown land will have a s27B memorial registered against the title. The existence of a s27B memorial over the relevant land provides adequate protection for claimants so that significant and irreversible prejudice justifying urgency does not exist [sic];[27]
>
> **27:** Waitangi Tribunal, memorandum of directions, 12 June 2006, Wai 848 (Tokoroa Post Office Site), Paper 2.3.

26. It is extraordinary that Counsel for MoJ can proffer such an argument without even checking the facts. If he had done so, he would be availed of the fact that there is no section 27B memorial over the Wallaceville Property.[23]

27. This example provides clear evidence of significant and irreversible prejudice.

Legal Aid Affects Providers Rather Than Claimants

28. The MoJ Submissions state that there is no evidence that the **Claimants** are suffering or are likely to suffer irreversible prejudice. Although the Agency concedes that there have been delays in payment, they contend that it is the **legal aid providers** rather than the Claimants who are affected.

29. It is quite simply preposterous to suggest that in the face of substantial delays in payments and other practices and policies which have the consequence of frustrating the provision of legal services to the claimant community, that such actions would not

[23] See Affidavit of Michelle Marino, sworn 3 August 2012.

affect the Claimants. The Affidavit of Mr Haami Piripi, amongst others, provides evidence of the numerous examples by which significant prejudice is being suffered. Mr Piripi specifically states, for example, that "increasing prejudice is caused to Te Rarawa given the restriction on the ability of Pacific Law to undertake substantive legal work to progress our claims."[24]

30. Counsel refers to the following statement at paragraph 1.5(f) of the MoJ Submissions:

> Although there have been delays in payments, those are being overcome and, again, affect providers rather than claimants.[25]

31. Counsel for MoJ also states at paragraph 1.6 that:

> **It is important to focus on the position of the claimants rather than the legal aid providers** [our emphasis]**.** Even if the Crown has treated legal aid providers unfairly (not accepted) this would not be a breach. It only potentially becomes a breach if the rights of Māori Treaty claimants to bring Treaty claims are materially and irreversibly affected and they have no other remedy which it is reasonable for them to exercise.[26]

32. Ironically, Counsel for MoJ then however goes on to expend significant energy attacking providers.

33. Counsel for MoJ states at paragraph 8.2(e):

> The only things that could possibly qualify as policy changes are…The consistent application of standard secondary provider rates across all types of claims (criminal, civil, family, Waitangi

[24] Affidavit of Haami Piripi sworn 12 July 2012, Wai 2374, #A3, para 98.
[25] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 1.5(f).
[26] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 1.6.

> Tribunal). **Again this is hardly a major item and it only affects providers rather than claimants** [our emphasis].[27]

34. Counsel for MoJ states at paragraph 8.5:

> Relevantly, in relation to the claims about the operation of legal aid, there are still many lawyers willing to appear in the Tribunal on legal aid.46 Currently there are 134 such providers.47 **It has to be assumed that they will not reduce their standards just because the level of remuneration is not as high as they would like.**48 **There is no erosion of access to the Waitangi Tribunal** [our emphasis].[28]

> **46:** This is an important indicator. See McLean v Buchanan [2007] 1 WLR 2425 (PC).
>
> **47**: 1 Michele McCreadie (A1) para 8.10.
>
> **48**: See *McLean* at para 21.

35. Just because there are many lawyers currently registered as providers, it does not necessarily follow that they are all willing to appear before the Tribunal. The cumulative effect of the policies and practices of the Crown in relation to legal aid will eventually drive the best providers out, such that the claimant community will be deprived of quality legal services.

36. Counsel refers to the oral opening statements of Counsel for the claimants in the Fresh Water/SOE Urgent Inquiry, Mr Felix Geiringer, in relation to the circumstances under which Mr Geiringer undertook the work for the claimants in that Inquiry.[29] Other senior Treaty bar counsel including Ms Donna Hall and Ms Annette Sykes also participated in that discussion. A copy of the relevant parts of

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[27] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 8.2(e).
[28] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 8.5.
[29]Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012.

the transcript is included as **Annex A**. Some excerpts from that transcript are set out below:

> MS HALL:
>
> I understand the point of why I have come in at this stage, is that for the Māori Council and 16 co-claimants it goes to equity between the parties to bring this claim. And that is an issue that I can put before this Tribunal because effectively a case of this size should have had the benefit of Queen's Counsel, that was declined. Mr Geiringer picked it up, he is sole counsel, I was not able to instruct two barristers, so he has had the carriage of a major file that ought to have had the benefit of exactly the same quality and level of representation as the Crown has. We have senior counsel here and the Crown's had the benefit of that and I don't think senior counsel here would be getting $92 an hour, which is what my barrister is getting. So working 15 hour days and being paid half the rate that was expected and then the final straw was that we weren't even paid that because the new regulations we've had to devise an entire project to manage this claim. It is large on any basis and the urgency caused the crisis to hit a peak. And so I think that if I can just make the point that it does go to the equity between – the ability of the parties to be able to present properly and that we have been seriously hampered.
>
> Now, this is not over because this is only part 1 of a three stage hearing. And it's not only run my barrister ragged but it's run my team ragged and we are used to running big cases. This, it's been dealing with the huge hours required to bring a case of this

size into the requirements of legal aid for the purposes of Waitangi Tribunal claimants.[30]

….

MR GEIRINGER:

Sir, I'm not going to quite leave it, I'll leave it very soon, but I don't accept that there's no role for the Tribunal, there's a serious role for the Tribunal. I, Sir, seriously considered not turning up today. I do not see myself as having any ethical or legal obligation to be here giving you these submissions. It's quite clear that any obligation I have is contingent on my fee, a reasonable fee being paid. I never expected a reasonable fee. I just expected a fee that covered costs, and when I was told that I wasn't even going to get that, I very seriously considered not turning up. And I was told it before I had prepared, before I had worked non-stop on these closing submissions. Sir, this makes it essentially impractical for the claimants to be bringing this claim. We're manufacturing a claim out of no resources and in those circumstances it would be quite proper if this Tribunal were to say simply because the Crown through its actions have made it impractical for the claimants to bring their claim, we are going to give the claimants the interim relief that they request until such a time as the Crown provides the claimants with the necessary resources so that the hearing can continue. That would be quite a proper action from this Tribunal.[31]

….

[30] Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, pages 1118 – 1119.
[31] Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1120.

MR GEIRINGER:

It's utterly unacceptable. And it's not the Tribunal's fault, and it shouldn't get in the way of the submissions but it does get in the way of the submissions. I am impeded in my ability to give these submissions today and it is the Crown's fault and how can we have that, how can we have a hearing where the Crown is on one side of the hearing and through its actions it's impeding the ability of the other side.[32]

….

MS HALL:

Sir, can I just ask this – I have a difficulty in terms of your proposal. Our legal aid ceases as from Monday. We have only eight hours of paid time approved to respond to the Crown's submissions and I had – I've been very careful to keep that time within your directions. If you are to give us that extra time and extra material then my participation will be subject to a further grant of legal aid and I know that that's certainly for all the third parties. They are being very difficult, Sir. They won't even meet with us at the moment so I just raise that as a practical difficulty for myself.[33]

….

MS SYKES:

I've attempted to put a lot into a submission. I know it's long, I don't propose to talk to all of it. It's been very difficult I have to endorse the submissions from my friend Mr Geiringer this

[32] Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1121.
[33] Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1458.

> morning. Without the legal aid resources it's just almost impossible to do a proper submission to be frank. We had no typists available to us, Sir, we've had very little photocopying facilities available to us and so we've tried to do this as well as we can in those limited resources.[34]

37. The above excerpt is telling in that it demonstrates the clear and significant prejudice occurring to claimants as a direct result of the policies and practices of the Agency. Proprietary interests in water and the proposed sale of the power generating SOEs are of critical interest to the claimant community. The prejudice caused to them as demonstrated in this excerpt above is beyond doubt.

38. It is noticeable and worth mentioning that the submissions of Counsel for MoJ and the information in the accompanying Affidavits do not actually address the evidence or the issues before the Tribunal but instead constitute a wholesale attack and vilification of the individual providers who have done no more than act on instructions from their claimant clients. These very personalised attacks contained in the MoJ Submissions ought to be seen for what they are.

39. A handful of the comments are as follows:

a. Moreover the obligations owed by the Crown are owed to the Māori people, not to lawyers per se. In the context of the present application it is important to distinguish between matters that may affect the lawyers and matters that may affect Māori claimants. Many of the claims made are, in reality, gripes by the

[34] Transcript of Wai 2358 National Fresh Water and Geothermal Resources Inquiry Hearing 9 – 20 July 2012, page 1234.

legal providers rather than truly by their clients, which gripes refuse to recognise the short comings of those legal providers. [35]

b. The information contained in paragraph 2.13 of the Second Affidavit of Ms Michele McCreadie[36] setting out the amounts paid to Counsel for the Wai 2378 Claimants, Mr Stone, and Counsel. These details do not have any relevance whatsoever to the proceedings – they are meaningless without any break-downs as to the work that was actually undertaken, the numbers of clients the figures relate to, and how many providers undertook the work.

c. The very confidential information in relation to Mr David Stone's IRD issues, as set out in paragraph 35 of the Affidavit of Ms Sarah Kalmakoff.[37]

Give The Agency A Chance?

40. The MoJ Submissions concede and accept that there have been unreasonable delays in the administration of legal aid. Counsel refers to a number of statements below:

a. Although it is accepted and regretted that the Legal Aid Services has experienced delays in processing applications for legal aid and processing invoices, strenuous efforts have been and are being made to overcome these delays and put streamlined systems in place[38]

b. The Crown accepts and regrets that there have been delays in administering of Waitangi Tribunal legal aid for which it is responsible. But… The delays that are the responsibility of Legal

[35] See paragraph 4.2 of MoJ Submissions.
[36] Wai 2374, #A8 and Wai 2378, #A4.
[37] Affidavit of Sarah Catherine Kalmakoff, affirmed 28 July 2012.
[38] See paragraph 1.5(c) of MoJ Submissions.

Aid Services are in part delays inherited from the old Legal Services Agency and in part "bedding down" issues arising from new systems and the new Operational Policies introduced in 2011. Given a chance, they will be overcome. [39]

c. In these circumstances, the Tribunal should give Legal Aid Services that chance and give it time for these remedial steps to bear further fruit.[40]

d. The Crown accepts that there have been some delays in processing Treaty legal aid applications and invoices. It regrets such delays. However, the Legal Aid Services is working very hard to overcome those delays… [41]

e. Even since the first set of affidavits were filed, further remedial steps are being taken by the Ministry of Justice. [42]

41. Changes to the policies and practices of the Crown in relation to the provision of legal aid has caused significant prejudice to the Claimants for most of last year but got to a crisis point towards the end of last year. Eventually, an Agency/Counsel Working Party ("the Working Party") was established in an attempt to work through these issues. At that time, Counsel understood that late payments to providers amounted to in excess of $3 million.

42. Counsel respectfully submits that, in relation to its practices, the Agency has already had ample time to work with the Working Party to improve matters but has not done so. Almost a year on, matters have not improved. In fact, there is anecdotal evidence to suggest that Agency practices have worsened. The Claimants have already indicated in previous submissions that they will be calling evidence

[39] See paragraph 1.7(b) of MoJ Submissions.
[40] See paragraph 1.8 of MoJ Submissions.
[41] See paragraph 5.13 of MoJ Submissions.
[42] See paragraph 5.14 of MoJ Submissions.

from a representative of Te Hunga Roia Māori, who will be Mr Tavake Afeaki, who was also on the Working Party. Mr Afeaki will address these matters in more detail at the hearing.

43. Counsel refers again to the oral statements of Mr Geiringer during the Fresh Water/SOE Urgent Inquiry as set out at paragraph 36 above. Clearly the claimant community is still suffering significant prejudice.

44. The assurances of the Agency to "improved turnaround times" and delays in payments being "overcome" are simply not accurate in the Claimants' experience. Turnaround times remain largely outside of the standard 20 working day timeframe for response (which previously was a 15 working day timeframe). The Agency also hypocritically continues to attempt to strictly penalise the Claimants by rigidly enforcing limited timeframes for responses or further information when such is requested. Yet the Agency continues to breach its own agreed timeframes for responding to Claimants.

45. Moreover, even if it is accepted that practices are improving, which the Claimants deny, then giving the Agency a chance may possibly only address its practices and does not in any way address the policies and the legislative changes that have been made.

Access to Legal Aid Is a Treaty Duty of Active Protection

46. The Claimants express concern at the comparisons that the MoJ Submissions make between Treaty legal aid and criminal legal aid. Counsel refers to paragraph 4.4 of the MoJ Submissions:

> At best for the claimants their right has to be a right to be heard which right the Crown is obliged to protect. That right cannot be

higher than the similar right of those charged with a criminal offence.[43]

47. Counsel rejects outright the proposition that the rights of the Claimants cannot be higher than the similar rights of those charged with a criminal offence.

48. The rights of the Claimants stem from Te Tiriti o Waitangi/the Treaty of Waitangi which is the constitutional foundation of this country. It is well accepted that great injustices have been perpetrated against the Maori people, such injustices forming the very basis for the establishment of the Waitangi Tribunal. The Tribunal's key function is the difficult job of reconciliation.

49. The Tribunal must be vigilant to ensure that the injustices of the past are not perpetuated. It is unacceptable that in the resolution of widely accepted injustices, an inequality of arms be allowed to pervade proceedings and any attendant negotiations. This is particularly so when there are very well documented and recognised long-standing abuses and grievances. The Crown has carte blanche access to the deep pocket of the taxpayer as it can utilise whatever funds it wishes to utilise in defending whatever proceedings it wishes, as has been so clearly demonstrated in the Fresh Water/SOE Urgent Inquiry. Counsel refers again to the excerpts from the Fresh Water/SOE Urgent Inquiry set out in paragraph 36 above.

50. The fact of the engagement of a QC in the current proceedings, as opposed to MoJ using their own internal lawyers, or other Crown lawyers, speaks for itself.

51. Counsel further rejects the argument that the Treaty protects land and other taonga but not representation. Paragraph 4.6 of the MoJ Submissions state:

[43] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.4.

> Even if some claimants do not receive the legal aid they hoped for and that does impact on their ability to be represented at a hearing that still does not establish a breach of the Treaty, which Treaty protects land and other treasures and requires remedies rather than representation.[44]

52. This is inconsistent with earlier statements at paragraph 4.4 of the MoJ Submissions which state:

> At best for the claimants their right has to be a right to be heard which right the Crown is obliged to protect. That right cannot be higher than the similar right of those charged with a criminal offence.[45]

53. One of the principles of the Treaty necessary to give effect to the Articles of the Treaty, is the duty of active protection and good faith. As set out above and in Counsel's previous Memoranda, a substantial "inequality of arms" is a breach of these duties.

Allegations of Bad Faith On The Part of Claimants

54. Counsel refers to paragraph 4.8(a) of the MoJ Submissions which states that:

> It cannot be acting reasonably and in good faith towards the Crown for Māori…To double or triple dip funds for negotiations. Note, it is not being said that the present Claimants are doing this but it must be legitimate for the Crown to take steps to prevent this from occurring generally especially when an independent investigator has raised that as a major concern;[46]

[44] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.6.
[45] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.4.
[46] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.6.

55. These submissions make reference to double or triple dipping as referred to in the Report of Dame Margaret Bazley, however no examples are provided in the MoJ Submissions and accompanying Affidavits of such behaviour on the part of Waitangi Tribunal claimants.

56. These wild allegations do not withstand scrutiny.

57. Counsel for MoJ does not even provide a reference for where exactly in the Bazley Report the alleged double or triple dipping is contained.

58. In relation to Mr Russell Kemp, Counsel for MoJ states that:

> ….It implied that the claimants were now restricted to Sir Graham Latimer, Russell Kemp and Esther Gray. The reasons for this change were not made clear but it may have been an attempt to distance the claimants from the Settlement Trust so as to avoid the assets of the Settlement Trust being brought into consideration..,…[47].

59. Counsel submits that the reasons for this **were** made clear. This was because Sir Graham Latimer and Mr Russell Kemp were no longer trustees.[48]

60. The comments of Counsel for MoJ are misleading as the sentence quoted above is clearly inaccurate. Sir Graham and Mr Kemp were no longer at that time Trustees of the Te Uri o Hau Settlement Trust ("the Trust") and Counsel no longer acted for the Trust.

61. Counsel for MoJ then goes on to say that:

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[47] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 9.8.
[48] Refer to Affidavit of Russell Kemp, sworn 10 July 2012, Wai 2374, #A4, paras 17, 18 and 24.

> Mr Kemp at paragraph 24 of his affidavit of 10 July 2012 now states (in effect) that the Trustees of the Settlement Trust are still involved in the claim. **Why then does he require legal aid?** [our emphasis] No evidence has been provided to Legal Aid or in his affidavit that either he or Sir Graham Latimer have an interest that could not be properly represented by the Settlement Trust.[49]

62. Counsel submits that these questions have not been asked of Mr Kemp. This is the first time that these issues have been put to him. If this was an issue, why was this not raised at the time?

63. Counsel submits that historical Treaty settlements are in recognition of the serious injustices perpetrated by the Crown against the Maori claimants. It would be improper for these funds to be used for legal representation in resolving fresh or contemporary grievances.

64. We refer to paragraph 9.12 of the MoJ Submissions where Counsel for MoJ states:

> Relevantly, that comment was made in an affidavit sworn 18 days after the first Jasmine Thompson affidavit dealing with the Kemp application and a similar period after the Crown's memoranda of 22 June 2012 which contained paragraphs similar to paragraphs 9.6 to 9.8 above. **That is, the rather inflammatory statement in paragraph 26 of Mr Kemp's affidavit was made ignoring the facts that were already before the Tribunal**. [our emphasis]

65. Counsel submits that the matters that were in Jasmine Thompson's Affidavit were already known to Mr Kemp even before Ms Thompson's Affidavit – they did not arise by virtue of Ms Thompson's Affidavit.

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[49] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 9.9.

66. There is no denial of the delay that occurred as a result of changes made to the trustees of the Trust and the attendant state of flux. This does not alter the fact of the **unacceptable delays on the part of the Agency**, including taking 89 working days to respond to Mr Kemp at a critical time.

Ability of Crown To Regulate

67. Counsel refers to the MoJ Submissions at paragraphs 4.9 and 4.12 setting out extracts of fairly benign statements and principles of trite law around the ability of duly elected governments to follow their chosen policy.

68. There is no corresponding analysis of the applicability of these principles to the facts and evidence before the Tribunal.

69. Counsel refers to paragraph 4.19 of the MoJ Submissions which states that:

> Moreover, it cannot be a breach of the Treaty to allow Legal Aid to scrutinise with care the applications made to it and to seek proper explanations before parting with public money….[50]

70. The Claimants do not challenge the fact that scrutiny should be applied – that is not the issue. The issue is the policies and practices of the Agency which are significantly and irreversibly prejudicing the Claimants in the settlement of Treaty breaches.

Transfer of Legal Funding from Legal Services Agency to Office of Treaty Settlements

71. In relation to the transfer of legal funding from the Agency to the Office of Treaty Settlements, paragraph 5.5 of the MoJ Submissions

[50] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 4.19.

state that because no immediate application was made by Maori claimants at the point at which the transfer of funding came into effect, then these matters were not seen as urgent.[51]

72. Counsel for MoJ appears to not want to appreciate that it is the **cumulative effect** of the range of policies and practices that is having significant prejudice on the claimant community. The definition of cumulative is as follows:

> increasing or increased in quantity, degree, or force by successive additions: the cumulative effect of two years of drought[52]

73. These proceedings have been brought on the basis of the cumulative effect of the practices and the policies of the Crown which have now reached a crisis stage.

74. Counsel for MoJ further states that "no examples of prejudice have been put forward in respect of either policy"[53].

75. However, it is submitted that it is a well accepted principle of access to justice that the dispensation of legal aid ought to be independent of the very agency who is likely to be on the other side of the proceedings. In this case, lawyers are expected to be, without fear or favour advancing the interests of their clients. Sitting across the negotiating table is the other party to the dispute, namely OTS on behalf of the Crown. The other party to the dispute is then directly responsible for providing funding to the claimant for legal aid. This could hardly, in anybody's language, be seen as independent and neutral dispensation of legal aid.

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[51] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 5.5.
[52] http://oxforddictionaries.com/definition/english.
[53] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 5.6.

76. No information has been provided in relation to what the policies of OTS are in relation to the distribution of legal aid funding. Counsel understands that it is made on a "case by case" basis. It is a system designed to reward and provide incentives for lawyers for claimants to be more obliging in relation to Crown demands at the negotiating table.

RESPONSE TO ISSUE B: READINESS TO PROCEED

77. Counsel refers to the MoJ Submissions alleging that "there is no evidence that the claimants are ready for a hearing".[54]

78. It appears that Counsel for MoJ is concluding that Counsel's earlier request for an extension in relation to the Affidavits in support somehow lead to the conclusion that the Claimants are not ready to proceed to a hearing. Such an approach, devoid of any sort of deductive reasoning, implies that somehow the Claimants, as a result of the seeking of this extension, would not be prepared for a hearing. Put simply, it is far-fetched to conclude that the Claimants are not ready to proceed merely because an extension for the filing of Affidavits was sought, which extension was granted.

79. There were various valid reasons for the delay in filing the Affidavits. For instance, there was uncertainty as to other claimants joining the proceedings or filing applications for urgency in their own right. The matters dealt with in the Latimer and Piripi Claim are not isolated incidences – they reflect widespread policies and practices that have had the consequence of significant prejudice to the claimant community. Counsel had been liaising with and discussing matters with Counsel for other claimants who have similar grievances.

[54] Wai 2374, #3.1.15 and Wai 2378, #3.1.3, para 6.1.

80. Counsel has also been fully immersed in other proceedings before the Tribunal, as well as other private client work, one of these being the Fresh Water/SOE Urgent Inquiry.

81. Moreover, Counsel was also somewhat reluctant to press "full steam ahead", spending large amounts of limited time working on the Latimer and Piripi Claim prior to the granting of legal aid as a result of the consistent pattern encountered by the Claimants in relation to various Agency practices.

82. Counsel advises that there will be **no** difficulty in preparing for an urgent hearing in relation to the Latimer and Piripi Claim, if granted. Counsel points out that the Claimants and Counsel were able to prepare for and participate in Phase 1 of the Fresh Water/SOE Urgent Inquiry, which dealt with novel and polarising national issues and involved complex legal arguments and analysis on various issues.

83. The Claimants **are ready** to proceed to an urgent hearing.

RESPONSE TO ISSUE C: NO ALTERNATIVE REMEDY

84. Counsel refers to the arguments contained in the MoJ Submissions that there are other alternative remedies available for the Claimants to pursue.

85. The MoJ Submissions state:

> The Claimants do have alternative remedies. In particular they can:
>
> (a) apply for a "reconsideration" under s51 of the Legal Services Act 2011 which reconsideration has to be by a person other than the one who made the original decision;

(b) appeal to the Legal Aid Tribunal. For that purpose a "decision" is defined to include a failure or refusal to make or reconsider a decision with a further right of appeal to the High Court.**41** [55]

41: S52(4).

86. Counsel respectfully submits that these are **not** sufficient alternative remedies. They **do not** enquire into breaches of the Treaty. The Tribunal is the only specialist body able to inquire specifically into breaches of the Treaty. Counsel refers to the fact that the joint Agency-Treaty Lawyer Working Party referred to in paragraph 41 above, which was established to work through many of these issues, has not made much progress. Mr Tavake Afeaki will be providing evidence directly on this point should a hearing be granted. Good faith efforts have been made by senior members of the Treaty bar on behalf of the claimant community for some substantial period of time now, to no avail.

87. With all due respect, reconsideration applications and review applications deal with isolated and piecemeal matters on an ad-hoc basis – they do not address the issue of the widespread prejudicial effects of Crown policies and practices in the dispensation of legal aid in the Treaty sector and any associated Treaty breaches.

88. The cumulative effect of these practices and actions is demonstrative of a concerning systemic failure on the part of the Agency which has had a detrimental impact on:

a. the timely and effective provision of quality legal services to the Claimants in relation to the progression of their claims before the Waitangi Tribunal; and

[55] Wai 2374, #3.1.15, Wai 2378, #3.1.3, para 7.7.

b. the erosion of access to justice for the Claimants in this important and vital Treaty sector; and

c. the consequent breaches of the Crown's obligations to Maori under Te Tiriti/the Treaty;

d. ultimately giving the Crown the upper hand in all of its dealings with Maori before the Tribunal and in the negotiation of Treaty settlements.

89. The Claimants are at risk of losing experienced and capable lawyers, thus prejudicing Maori in the long term and the Claimants' rights of access to and utilisation of legal representation have now been constrained substantially.

90. In light of these factors, Counsel reiterates that there is no alternative or adequate remedy that would be reasonable for the Claimants to exercise. The actions and omissions of the Crown giving rise to the significant and irreversible prejudice are far-reaching and affect the Claimants in relation to all of their claims before the Waitangi Tribunal. The Latimer & Piripi Claim goes to the heart of the provision of access to justice for Claimants who wish to pursue claims in the Waitangi Tribunal in relation to Crown actions or omissions that are in breach of the principles of Te Tiriti/the Treaty.

91. As Counsel has previously submitted, the Crown has introduced and implemented a framework of policies, legislative changes and decision-making that has had the end result of barring the Claimants from being able to participate in proceedings before the very body set up to hear and determine their long-standing Te Tiriti/the Treaty claims against the Crown. Given the special and unique role of the Tribunal in this regard, and the widespread impact of the Crown's actions and omissions on all claimants in the Waitangi Tribunal

jurisdiction, an urgent inquiry by the Tribunal is the only appropriate remedy in the circumstances.

92. The only remedy available to the Claimants, therefore, is to bring this claim before the Tribunal for urgent determination.

93. Counsel reiterates the relief sought as set out in paragraph 76 of Counsel's submissions dated 9 July 2012.[56]

Dated 3 August 2012

Janet Mason
Counsel for the Claimants

[56] Wai 2374, #3.1.10.