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IN THE WAITANGI TRIBUNAL **WAI 2374**

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND a claim by SIR GRAHAM STANLEY LATIMER for and on behalf of himself and the hapu of TE PAATU

AND a claim by HAAMI PIRIPI on behalf of himself and the IWI OF TE RARAWA

AND a claim by DAVID POTTER and ANDRE PATERSON for and on behalf of themselves and hapu of NGATI RANGITIHI

AND a claim by MICHELLE MARINO and ERROL CHURTON for and on behalf of themselves and the descendants of Tāringa Kurī (Te Kaeaea)

AND a claim by RUSSELL ROSS KEMP, for and on behalf of himself and the hapu, marae and whanau of TE URI O HAU

AND a claim by CLETUS MAANU PAUL, on behalf of himself and the MATAATUA DISTRICT MAORI COUNCIL and NGAI MOEWHARE.

CLAIMANTS' MEMORANDUM ON STATEMENT OF ISSUES

17 July 2013

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Waitangi Tribunal
17 July 2013
Ministry of Justice
WELLINGTON

May it please the Tribunal

1 Purpose and Approach of Memorandum

1.1 This memorandum responds to the Tribunal's direction in its Memorandum-Directions of 28 June 2013 (Wai 2374, #2.5.21) that the Claimants file a proposed Statement of Issues ("SOI") following the judicial conference of 27 June 2013.

1.2 As noted at the judicial conference, and in the Memorandum-Directions, the SOI for the Latimer and Piripi urgent inquiry needs to contain enough specificity to enable the particular issues of concern to be properly considered in the context of an urgent hearing and enough of a principled framework to enable the Tribunal to consider the issues consistently with the principles of te Tiriti o Waitangi/the Treaty of Waitangi.

1.3 The Claimants' proposed SOI endeavours to balance these requirements of specificity and principle. The Crown has advised that it does not agree with the proposed SOI. One of its objections is to the length of the draft memorandum. The Claimants consider that properly considering this SOI involves considering the nature of the claim and the principles and approach of the Tribunal's decisions to date.

2 Tribunal's Urgency Decision

2.1 As discussed at the judicial conference the Claimants' starting point is the Tribunal's Memorandum-Directions of 19 March 2013 (Wai 2374 #2.5.18).

The Issues identified by the Tribunal

2.2 In that decision the Tribunal identified the issues as they had now developed in the Claim to be:

(a) Whether, under present legislation and policy, legal aid for Waitangi Tribunal proceedings is, or is likely, to be unreasonably declined in breach of Treaty principles with sub-issues being:[1]

[1] Memorandum-Directions Wai 2374 #2.5.18 at paragraphs19a and 20.

(i) Whether legal aid and pre-mandate and negotiation funding should be granted by an independent authority rather than through Legal Aid Services ("LAS") or the Office of Treaty Settlements ("OTS").

(ii) Whether there is an inconsistently-applied policy with regard to provision of legal aid for Tribunal inquiries for "interested parties" (parties who are not primary claimants in a Tribunal inquiry but who have related issues which ought to be heard).

(iii) Whether there is insufficient provision of funding to ensure an 'equality of arms' in Tribunal proceedings between the Crown and Maori, as shown by, for example, reductions in legal aid rates for secondary providers.

(b) Whether the day to day administration of legal aid in respect of Waitangi Tribunal proceedings is unsatisfactory in that there are:[2]

(i) unreasonable delays in approving legal aid;

(ii) unreasonable requests for further information in relation to legal aid applications;

(iii) inconsistent or wrong applications of policies by staff of LAS;

(iv) inadequate remedies for breach of the provider contract by LAS;

(v) reductions in the legal aid rates for items such as administration costs, travel expense and similar disbursements.

The Tribunal's Concerns

2.3 The Tribunal considered individual examples given by the Claimants as instances where significant or irreversible prejudice may be incurred and concluded:

[2] At paragraph 19b.

(a) Something that amounts to more than issues with the day-to-day administration of a government agency is required before the Tribunal will grant an application for an urgent hearing.[3] It is the cumulative effect of the legal aid polices and their implementation by LAS which are of concern.[4]

(b) That it acknowledged claimant counsel's submission that it is the cumulative effect of legal aid policies and their implementation by LAS which are of concern and considered that the pattern of refusal of legal aid applications by Te Rarawa is troubling and that the Tribunal is left with questions about what principles are driving LAS' decisions.[5]

(c) There is no significant or irreversible prejudice for the Ngati Rangitihi claimants in Wai 996 but that question would re-open if legal aid funding were denied where the CNI Tribunal reconvenes for stage 2 or a remedies hearing.[6]

(d) There is no impending significant and irreversible prejudice to the Claimants in Wai 377.[7]

(e) Where the Tribunal has found there is no significant and irreversible prejudice that does not mean it accepts that the legislation and policies underpinning LAS decisions to deny legal aid are not correct or not in breach of Treaty principles.[8]

(f) The Tribunal is left with "real unease about applications for legal aid being denied where LAS, as part of the Ministry of Justice, has determined that:[9]

    (i) The claim is statute barred, having already been settled;

    (ii) The claim is totally unmeritorious.

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3 At paragraph 32.
4 At paragraph 36.
5 At paragraphs 36 and 37.
6 At paragraphs 42 and 43.
7 At paragraph 51.
8 At paragraph 52.
9 At paragraph 53.

(iii) The essential points of the claim are being adequately presented by other claimants.

(iv) The claimants have access to significant resources and so, can present the claim without access to legal aid.

(g) The Tribunal considers that the examples given by counsel "raise issues about the current policies, principles and practices that LAS operates under".[10]

(h) The Tribunal is also concerned that "there is the clear possibility that if legal aid policy is not Treaty compliant that significant and irreversible prejudice may be incurred by future claimants. It would be better to ensure that legal aid policy is Treaty compliant as soon as possible for the sake of future applicants."[11]

(i) The denial of legal aid to Te Uri o Hau "clearly raises an important issue as to whether and to what extent hapu and iwi are required to use settlement assets, paid to them as compensation for historical grievances, to fund proceedings before the Tribunal in regard to contemporary breaches. What does the ongoing Treaty relationship between Crown and Maori in the modern post-settlement era require? In this particular claim the question is: what requirements should apply to legal aid funding where hapu and iwi are engaged in litigation with the Crown in relation to contemporary claims?".[12] The Tribunal considered that if Mr Kemp and Sir Graham Latimer were required to rely on funding their Wai 2196 Claim from Te Uri o Hau settlement funds there may well be significant and irreversible prejudice to Te Uri o Hau.[13]

The Tribunal's Decision

2.4 On the basis of the above concerns the Tribunal concluded that it was satisfied that the requirements for an urgent hearing have been met in respect of some of the issues. It particularly noted circumstances where claimants have settled and LAS expects them to

[10] At paragraph 58.
[11] At paragraph 60.
[12] At paragraph 72.
[13] At paragraph 73.

use settlement assets to fund litigation.[14] They also noted important issues in relation to decisions by LAS determining whether to grant legal aid where the claim may test the boundaries of Tribunal jurisprudence and/or where it is debateable whether a party needs to appear before the Tribunal or not.[15] The Tribunal considered further evidence and research may be required "in order to proceed to hearing on this claim in terms of the issues as they have now developed".

3 Analysis of the Tribunal's Concerns

3.1 The Claimants suggest that the Statement of Issues logically derives from the issues identified by the Tribunal above, informed by their concerns.

3.2 As identified by the Crown, Claimants and Tribunal members at the judicial conference, an issue which should be inquired into is the Tribunal's concern (at para 2(3)(i) above) about whether and to what extent hapu and iwi are required to use settlement assets to fund proceedings before the Tribunal, or litigation with the Crown, in regard to contemporary breaches.

3.3 The Tribunal's conclusion that it should not be concerned with issues of day-to-day administration of legal aid but rather with the cumulative effect of the legal aid policies and their implementation by LAS (para 2.3(a) above) suggests that research into the administration of legal aid applications should be within the scope of the urgent inquiry. The generic statistics provided to the Tribunal and used in the Tribunal's decision[16] have been instructive, however, further analysis into the overall situation ought to be available.

3.4 The claimants acknowledge that specific provider issues are separate and ought to be kept outside the scope of this enquiry. However, the Tribunal has clearly been assisted by considering the Claimants' examples of particular instances of those issues that are of concern to the Tribunal. Consequently, specific examples of the issues of concern to the Tribunal, should not be outside the scope of the inquiry.

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14 At paragraph 79.
15 At paragraph 79.
16 At paragraphs 58 and 59.

3.5 The Tribunal is clearly concerned about what principles are driving LAS (para 2.3(b) above). It has "real unease" at applications for legal aid being denied in four identified circumstances (para 2.3(f) above). It considers there are issues about the "current policies, principles and practices that LAS operates under" (para 2.3(g) above). And it considers that legal aid policy should be made Treaty compliant as soon as possible (para 2.3(h) above). These concerns should be within the scope of the urgent inquiry.

3.6 The Claimants consider that the Tribunal's concerns require a reformulated version of the first issue it identifies – whether legal aid for Waitangi Tribunal proceedings is, or is likely, to be unreasonably declined in breach of the Treaty – and its sub-issues.

(a) The first sub-issue lies at the heart of the claim and, the Claimants believe, lies behind the disturbing patterns identified by the Tribunal: the question of whether delivery of legal aid, pre-mandate and negotiation funding should be delivered through LAS or OTS or independent agency. The Tribunal's identification of four specific concerns about decisions (paragraph 2.3(f) above) by "LAS, as part of the Ministry of Justice" support that.

(b) The second issue, the provision of legal aid for interested parties, is also clearly a subject of Tribunal concern.

(c) The third issue has not been explicitly traversed by the Tribunal. However, the claimants submit that it is clear that insufficiency in the provision of legal aid must impact on the quality of representation available to the legally aided. In disputes between the Crown and impecunious claimants, paying for inadequate representation of claimants, pitted against QCs employed by the Crown, does not discharge the Crown's obligation to enable breaches of te Tiriti/the Treaty to be redressed. Addressing all the other problems identified by the Claimants would count for nothing if claimants' representation before the Tribunal was impaired. Given that the claim as a whole has been granted urgency, the Claimants submit that this discrete aspect must also be inquired into.

4 Analysis of the Tribunal's Concerns

4.1 On the basis of the above analysis the Claimants offer the following as a draft Statement of Issues for the consideration of the Tribunal:

(a) What principles of Te Tiriti o Waitangi/ the Treaty of Waitangi ("te Tiriti/ the Treaty") are relevant to, and how do they determine, the obligations of the Crown under te Tiriti/the Treaty in relation to the provision of financial assistance for legal costs for Waitangi Tribunal proceedings for historical claims and contemporary claims?

(b) Under present legislation and policy, are applications for legal aid for Waitangi Tribunal proceedings likely to be unreasonably declined, in breach of te Tiriti/Treaty principles, for historical and contemporary claims, and in particular:

(i) Are, and to what extent are, hapu and iwi required to use settlement assets to fund proceedings before the Tribunal, or litigation with the Crown, in regard to allegations of contemporary breaches of te Tiriti/the Treaty?

(ii) Is there an inconsistently-applied policy with regard to the provision of legal aid for Tribunal inquiries for "interested parties" (parties who are not primary claimants in a Tribunal inquiry but who have related issues which ought to be heard)?

(iii) Is there insufficient provision of funding to ensure an 'equality of arms' in Tribunal proceedings between the Crown and Maori, as shown by, for example, reductions in legal aid rates for secondary providers.

(c) What principles underlie LAS decisions on the administration of legal aid in respect of Waitangi Tribunal proceedings and is the resulting pattern of administration consistent with the principles of te Tiriti/the Treaty?

(d) If the responses to issues (b), (c) and (d) above demonstrate a breach of Te Tiriti/ the Treaty, what recommendations should be made as to a Tiriti/Treaty-compliant regime for legal aid, and in particular should legal aid and pre-mandate and

negotiations funding be granted by an independent authority rather than through Legal Aid Services ("LAS") or the Office of Treaty Settlements ("OTS") in the Ministry of Justice?

4.2 A draft of this Memorandum was provided to the Crown's counsel for comment and consultation to see whether agreement could be reached. The Crown advised that it considers that the Claimants' proposed SOI attempts to broaden the scope of the urgent hearing because the Tribunal's Memorandum-Directions of 19 March 2013 (Wai 2374 #2.5.18) granted urgency only in respect of three specific issues.

4.3 The three specific issues to which the Crown refers are presumably those in paragraph 79 of the Tribunal's Memorandum-Directions of 19 March. However, the issues there summarised must be read in context with the Tribunal's reasoning which leads to its decision. That reasoning is analysed above. The Claimants submit that the Tribunal's reasoning supports the SOI proposed above. However, if the Tribunal agrees with the Crown on this matter then it would only have to delete paragraph (c) of the proposed SOI.

4.4 The Claimants' counsel are available to attend a further judicial conference to discuss these matters should the Tribunal so wish.

Dated this 17 day of July 2013

Dr Matthew S R Palmer/Janet Mason
Counsel for the Claimants