

IN THE WAITANGI TRIBUNAL

Wai 2575

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Health Services and
Outcomes Kaupapa Inquiry

MEMORANDUM-DIRECTIONS OF JUDGE D STONE ON THE TE AKA WHAI ORA
URGENT APPLICATION

16 Huitanguru 2024

Purpose

1. This memorandum-directions addresses the Te Aka Whai Ora urgency applications and associated next steps.

Background

2. The Wai 3307 urgent claim was lodged on 8 December 2023 by Janice Kuka and Lady Tureiti Moxon, on behalf of the governors, managers, staff and Māori cared for by Māori-owned Primary Health Organisations and Māori Providers with General Practitioner clinics.¹
3. The application concerns the Crown's intention to disestablish Te Aka Whai Ora, the Māori Health Authority, as outlined in the 100-day plan released by the coalition Government on 29 November 2023. The applicants seek findings that the disestablishment of Te Aka Whai Ora is likely to prejudicially affect Māori and is inconsistent with the principles of the Treaty of Waitangi. They ask the Tribunal to recommend that the Crown do not disestablish Te Aka Whai Ora.
4. The Crown are opposed to the application (Wai 3307, 3.1.43).
5. On 19 January 2024, the panel confirmed the grounds for urgency are made out. However, the panel noted that the implications of the disestablishment of Te Aka Whai Ora should be properly ascertained and evaluated by reference to the coalition Government's alternative plans. Accordingly, the final decision on the application for urgent hearing was adjourned pending the receipt by the Tribunal of a Crown memorandum with particular further information by 31 January 2024 (Wai 3307, #2.5.3, at [49]).

Further information from the Crown

6. On 1 February 2024, the Crown responded confirming that the Government plans to introduce a Bill to the House of Representatives by no later than 8 March 2024. If the Bill is passed, it is expected Te Aka Whai Ora will be formally disestablished by 30 June 2024 although practical achievement might occur earlier (Wai 3307, #3.1.39 at [3]).
7. Crown counsel submit the Pae Ora Healthy Futures Act 2022 will continue to promote the exercise of tino rangatiratanga by hapū and iwi towards achieving health equity for Māori and the active protection obligations owed by the Crown are expressly provided for (Wai 3307, #3.1.39 at [4] & [14]).
8. Crown counsel also submit that it would be premature for the Crown to articulate the full detail of the Government's plans when the details have not yet been worked through by Cabinet. Counsel indicates that the details will be released at an appropriate point in the future.
9. Counsel further submit much detailed work will be undertaken concerning the Pae Ora Healthy Futures Act 2022. That work, and the legislative engagement processes, continues. Counsel argues that the evaluation of that work against Treaty principles, the Tribunal's *Hauora report* and the legislation in force should not occur in the context of a narrow urgent inquiry.

¹ Wai 3307, #1.1.1, #1.1.1(a), #3.1.1), #A1, #A1(a), #A2, #A2(a), #A2(b), #A3 & #A3(a).

10. The Crown also raise that the non-interference principle means the Tribunal should allow the legislative process to finish.

Decision

11. The Tribunal has already granted urgency to these claims but adjourned them to receive further information from the Crown. Having now received a response from Crown counsel, the Tribunal must now decide how to proceed.

Non-interference Principle

12. Non-interference is the principle that courts should not allow their processes to inhibit the free functioning of other branches like Parliament. The Crown contends the non-interference/comity principle means the Tribunal should await the conclusion of the legislative process before deciding whether an urgent inquiry is warranted.² Crown counsel cite a range of cases supporting this position.
13. The applicants submit the non-interference principle applies to the Courts, but not the Waitangi Tribunal.³ A Bill starts with a policy which must be approved by Cabinet. Section 6(1)(c) of the Treaty of Waitangi Act 1975 confers jurisdiction on the Tribunal to examine any proposed policy. That jurisdiction ends when the Bill is introduced to parliament.
14. This is a common argument by the Crown. While we acknowledge the principle, we consider the applicant's argument to be correct. Our jurisdiction remains up and until the introduction of a Bill. Judge Isaac's directions in the Freshwater Inquiry comprehensively discuss this issue and the same approach is adopted by this panel. Our legislation is clear on its face that pursuant to section 6(6) of the Act our jurisdiction remains up and until a Bill is introduced to the House.⁴ This position is supported by the Court of Appeal in *Attorney General v Mair*.⁵ We are therefore not prevented from continuing to exercise our jurisdiction here.

Smokefree Act Repeal Applications

15. On 29 January 2024 and 2 February 2024, the Tribunal received two urgency applications concerning the intention to repeal the Smokefree Environments and Regulated Products Amendment Act. Both applications have been referred to this panel for determination together.⁶
16. All filing has been received from the Wai 3315, Smokefree Aotearoa Urgent and Wai 3324, Smokefree Aotearoa (Te Huia) Urgent claims.

² Wai 3307, #3.1.39 at [10].

³ Wai 3309, #3.1.43.

⁴ Wai 2358, #2.6.79. Examples where the Tribunal has undertaken inquiries where legislation was being developed or to be introduced were the Oranga Tamariki Urgent Inquiry (Wai 2915), the Foreshore and Seabed Urgent Inquiry (Wai 1071), claimants is the Reform of Te Ture Whenua Māori Act 1993 Inquiry (Wai 2478) and many settlement urgent inquiries particularly the Wairarapa Urgent Settlement Inquiry (Wai 3058) and the Whakatōhea Settlement Process (Wai 1750).

⁵ [2009] NZCA 625.

⁶ Wai 3315, #2.5.3 & Wai 3324, # 2.5.1.

17. The panel considers these applications should be dealt with separately from the Te Aka Whai Ora applications as they concern two separate issues. These applications will be determined in a separate determination to be released in due course.

Urgent hearing

18. The Tribunal will hold an urgent hearing to inquire into the urgency claims on **Thursday 29 February and Friday 1 March 2024**, at the Tribunal Offices in Wellington (**Level 2, 141 The Terrace**). An audio-visual link (AVL) will be provided for those who wish to participate in the hearing remotely.
19. The focus for this inquiry will be “whether the disestablishment of Te Aka Whai Ora / Māori Health Authority is in breach of the principles of the Treaty of Waitangi?”
20. Given the timeframes here, the Tribunal can only focus on the proposed disestablishment of Te Aka Whai Ora / Māori Health Authority. Accordingly, the Tribunal will not focus on the operations or the effectiveness of Te Aka Whai Ora or any issues arising from the proposal to disestablish it.

Inquiry procedure

Timetable and attendance

21. The confirmed timetable for the urgent inquiry is now **attached** as **Appendix B**. Given the short timeframes and the necessity for the Tribunal to issue its report on or before 8 March 2024, it is imperative that these deadlines be adhered to. Extension requests for late filing cannot be accommodated and will not be granted.
22. Parties should confirm their intention to participate at the urgent hearing via an e-mail to the Tribunal’s Registrar (WT.Registrar@justice.govt.nz) by **5pm, Thursday 22 February 2024**. Parties should also indicate whether they wish to attend in person or remotely via AVL.

Participation

23. There are several parties to this application. Four claims have filed pleadings and will be the only full claimants to the inquiry. All the other parties will be interested parties. **Appendix A** outlines the relevant claims, their counsel and status in this inquiry.
24. Given our timeframes much of the evidence will be taken as read. Claimant and Crown counsel should indicate if there is particular evidence that should be tested and heard at the hearing. The Tribunal will confirm which evidence will be heard and timetabling.
25. Submissions by Claimant and Crown counsel will also be taken as read and with oral submissions being a synopsis of the salient points of their positions.
26. Given our timeframes evidence and submissions by interested parties will be taken as read, unless it becomes apparent that we should hear from particular witnesses.

Hearing protocols and cross-examination

27. Any further claimant and interested party evidence, along with claimant and interested party opening submissions, should be filed by **5pm, Tuesday 20 February 2024**. I strongly encourage counsel to liaise with one another and to file jointly on any shared positions or submissions where possible, to prevent any duplication of material. Crown evidence and opening submissions are due by **5pm, Friday 23 February 2024**. Claimant and interested party reply evidence, if any, should be filed by **5pm, Wednesday 28 February 2024**.
28. To ensure the effective use of limited hearing time, opening submissions will be filed prior to hearing and taken as read, with any questions arising to be raised at the hearing. Closing submissions and claimant and interested party submissions in reply will be submitted orally at hearing, and should be filed in writing by no later than **midday, Monday 4 March 2024**.
29. Counsel for the claimants, interested parties, and the Crown should agree to a draft hearing timetable. The draft hearing timetable, which should include cross-examination indications and sufficient time for Tribunal questions, is due by **5pm, Tuesday 27 February 2024**. Cross-examination documents should also be filed by this date.
30. Counsel for the claimants and interested parties should work together to minimise any duplication of cross-examination. We are amenable to approaches that would allow this, such as the nomination of lead counsel, or for the Tribunal to begin questioning prior to counsel cross-examination (as was conducted in the Priority Inquiry into the Crown's COVID-19 Protection Framework (the COVID-19 Priority Inquiry) (Wai 2575, #2.6.75 at [17] – [19])). We expect such arrangements to be reflected in the joint draft hearing timetable.

Application of the Wai 2575 accessibility protocol

31. On 21 September 2021, the Tribunal confirmed an accessibility protocol for phase one of stage two of the Health Services and Outcomes Kaupapa Inquiry (the disability inquiry) (the accessibility protocol) (Wai 2575, #2.6.59(a)).
32. During the COVID-19 Priority Inquiry hearing in December 2021, the Tribunal confirmed that it would comply with the accessibility protocol insofar as it was feasible within the tight timeframes of that inquiry (Wai 2575, #2.6.70 at [45]).
33. We note the participation of taangata whaikaha claimants as interested parties in this inquiry, and the relevance of this kaupapa to the taangata whaikaha and whaanau hauaa community. To this end, we confirm this urgent inquiry will adopt accessibility protocol measures to the extent that it is reasonably possible within the urgent timeframes as set out in Appendix B.
34. With the need to commence hearings by 29 February 2024, we indicate now that it will not be possible to translate documents into accessible formats. Accordingly, five-page summaries of key inquiry documents will not be mandatory. That said, to promote the accessibility of materials received, we would welcome five-page summaries of any briefs or submissions longer than 10 pages where possible.
35. Parties should include in their joint draft hearing timetable a roll call at the beginning of the hearing and five-minute breaks throughout the proceedings.

36. Tribunal staff are currently endeavouring to secure accessibility arrangements for the urgent hearing within short notice. Accessibility requirements of hearing attendees should be communicated when parties confirm their attendance. However, given the limited time available between now and the hearing, the Tribunal is unfortunately unable to guarantee that full accessibility arrangements will be possible. The Tribunal will provide an update on accessibility arrangements for the hearing, if any, in due course.

Disclosure of interest

37. Panel member Tania Simpson is a Trustee and Deputy Chair of the Waitangi National Trust Board along with Ngāti Hine applicants Pita Tipene, who is Chair of the Waitangi National Trust, and Waihoroi Shortland, the cultural advisor for the Board.
38. Minister Shane Reti, served as the elected representative of the opposition parties on the Waitangi National Trust Board and Minister Peeni Henare is also a current member of the Board, alongside panel member Tania Simpson.
39. I do not consider this to raise any real conflict of interests but disclose this connection to all parties.

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

I HAINATIA ki Te Whanganui-aa-Tara i te 16th o Huitanguru i te tau 2024.



Kaiwhakawaa Damian Stone
Tumuaki Pakirehua i te Health Inquiry

TE ROOPU WHAKAMANA I TE TIRITI O WAITANGI
/ WAITANGI TRIBUNAL