

TE ROOPUU WHAKAMANA I TE TIRITI O WAITANGI

Wai 2575

E PAA ANA KI
CONCERNING

te Treaty of Waitangi Act 1975

AA,

The Health Services and
Outcomes Kaupapa Inquiry

AND

**MEMORANDUM-DIRECTIONS OF THE HEALTH SERVICES AND OUTCOMES
KAUPAPA INQUIRY PANEL**

8 Mei 2024

Background

1. On 16 February 2024, the Tribunal issued memorandum-directions confirming its intention to hold an urgent hearing into the disestablishment of Te Aka Whai Ora, the Maaori Health Authority, scheduled for 29 February 2024 and 1 March 2024 (Wai 3307, #2.5.6).
2. On 27 February 2024, the House of Representatives introduced the Pae Ora (Disestablishment of Maaori Health Authority) Amendment Bill (the Disestablishment Bill), to disestablish Te Aka Whai Ora. This meant that the urgent hearing regarding the disestablishment of Te Aka Whai Ora could not precede, because s 6(6) of the Treaty of Waitangi Act 1975 precludes the Tribunal from inquiring into Bills that have been introduced into the House of Representatives. On 28 February 2024, the urgent hearing was vacated. The Disestablishment Bill was passed under urgency on 5 March 2024.
3. Once the Disestablishment Bill was enacted, claimant counsel filed a joint memorandum dated 6 March 2024 requesting that the urgent hearing be reconvened and set down for hearing. If an urgent hearing was not granted, claimant counsel sought a priority hearing. By memorandum-directions of 7 March 2024, I invited claimants to file amended pleadings by 15 March 2024 to account for this change in circumstances. In the same memorandum-directions, I invited the Crown to file its response by 28 March 2024 to the request to reconvene the urgency hearing (Wai 2575, #2.6.166).
4. In terms of the alternative request of claimant counsel for a priority hearing, I invited parties to submit memoranda by 28 March 2024 addressing (Wai 2575, #2.6.166 at [23]):
 - (a) whether priority inquiry into the disestablishment of Te Aka Whai Ora should be granted in the context of the wider Wai 2575 inquiry;
 - (b) the scope of any priority inquiry; and
 - (c) how a priority inquiry should be accommodated within the Wai 2575 inquiry programme, including when and how hearings should take place.
5. I directed the Crown to respond to memoranda regarding a priority inquiry by 12 April 2024.

Applicant and interested party submissions

6. The Tribunal received a number of submissions on behalf of claimants and interested parties regarding the directions listed above at [4].

Submissions on granting a priority inquiry

7. Counsel for Wai 3307, Wai 2619, Wai 682 and Wai 1464/1546 submit claimants continue to seek urgency, but support a priority hearing into the disestablishment of Te Aka Whai Ora (Wai 2575, #3.2.1023, #3.2.1024 & 3.2.1026).
8. Counsel for Wai 1196, Wai 2063, Wai 2377, Wai 2382, Wai 3069 and Wai 861 submit they support a priority inquiry, even if there is a delay to the disability and mental health and addictions phases of the Wai 2575, Health Services and Outcomes Kaupapa inquiry (Wai 2575, #3.2.1033 & #3.2.1028).
9. Counsel for Wai 762, Wai 1531, Wai 2206, Wai 2894 and Wai 2890 that claimants do not support a priority inquiry, due to the impacts on the disability and mental health and addictions phases of the general Health Kaupapa inquiry (Wai 2575, #3.2.1030 & #3.2.1027).

10. Counsel for Wai 2109 express concern that a priority inquiry into the disestablishment of Te Aka Whai Ora may delay the disability and/or mental health and addictions phases of the Wai 2575, Health Services and Outcomes Kaupapa inquiry (Wai 2575, #3.2.1034).

Scope of a priority inquiry

11. Counsel for Wai 3307 submit the scope of a proposed priority inquiry into the disestablishment of Te Aka Whai Ora should include the process which led to the Disestablishment Bill being introduced, and whether it is Te Tiriti o Waitangi compliant (Wai 2575, #3.2.1023).
12. However, counsel for Wai 1531, Wai 2206, Wai 2894 and Wai 2890 submit a “targeted” approach to a priority inquiry would be preferred, focusing on the impact the Disestablishment Bill has on primary healthcare and where the plans and policies will apply generally to all health sectors (Wai 2575, #3.2.1027). Counsel submit the Crown should provide specific and targeted evidence on the alternative policies and plans to commission and deliver disability, mental health and addiction supports and services in each relevant phase of the inquiry (Wai 2575, #3.2.1027).

How a priority inquiry should be accommodated within the Wai 2575 inquiry

13. Counsel for Wai 2619 submit a priority inquiry could occur on the papers, as the Tribunal has already inquired into these issues in previous Tribunal reports, the *Hauora* and *Haumaru* reports (Wai 2575, #3.2.1024). Many counsel support kanohi ki te kanohi hearings but also support processes which would truncate the inquiry process, such as taking evidence as read and an inquiry on the papers (Wai 2575, #3.2.1028 & #3.2.1027).

Crown submissions

14. Counsel for the Crown submit that neither an urgent nor priority inquiry is warranted. Counsel suggests that it is misplaced to rely upon the commencement date of legislation as a determinant of urgency, particularly when the Crown has made it clear that implementation work is already occurring under the Health Sector (Transfers) Act 1993 (Wai 2575, #3.2.1010).
15. Counsel submit the Crown does not consider that the matters raised by the claimants warrant a priority inquiry, as they have already been inquired into and reported on in Stage One of the Tribunal’s inquiry and are well understood (Wai 2575, #3.2.1010).
16. Crown Counsel submit the Crown opposes any attempts by the claimants to broaden the scope of the inquiry as it would not be a good use of the Tribunal’s limited resources.
17. Counsel submit the Crown considers it particularly important that completion of the current phase of the Health Services and Outcomes inquiry not be delayed further. If dates for the next week of Crown evidence are pushed out further, this may affect witness availability and create timetabling difficulties for closing submissions to be heard by December 2024.

Discussion

Urgent hearing

18. When the application for an urgent hearing was originally granted on 16 February 2024, the grounds for an urgent hearing were clearly made out. However, since the enactment of the Disestablishment Bill, including the disestablishment of Te Aka Whai Ora scheduled to take place by 30 June 2024, the circumstances on which urgency was granted have materially changed.

19. The Tribunal's *Guide to Practice and Procedure* states the following with regards to applications for an urgent hearing:

In deciding an urgency application, the Tribunal has regard to a number of factors. Of particular importance is whether:

- The claimants can demonstrate that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
- There is no alternative remedy that, in the circumstances, it would be reasonable for the claimants to exercise; and
- The claimants can demonstrate that they are ready to proceed urgently to a hearing.

Other factors that the Tribunal may consider include whether:

- The claim or claims challenge an important current or pending Crown action or policy;
- An injunction has been issued by the courts on the basis that the claimants have submitted to the Tribunal the claim or claims for which urgency has been sought; and
- Any other grounds justifying urgency have been made out.

Prior to making its determination on an urgency application, the Tribunal may consider whether the parties or the take or both are amenable to alternative resolution methods, such as informal hui or formal mediation under clause 9A of schedule 2 to the Treaty of Waitangi Act 1975.

20. Urgency was granted for the claims regarding the disestablishment of Te Aka Whai Ora on 19 January 2024. At that stage, the claimants pointed to the Coalition Government's 100 day plan (ending on 8 March 2024), which signalled the legislative disestablishment of Te Aka Whai Ora within that timeframe. This was the primary reason for which urgency was sought – that it would enable the Tribunal to report on the claims within the 100 day timeframe and before the legislative disestablishment of Te Aka Whai Ora. That primary reason no longer exists, because the Disestablishment Bill is now law. Matters are not as urgent as they were when urgency was first granted. The proposed policy is now law. There is no longer a pressing need to deal with these claims urgently.

21. Accordingly, the disestablishment of Te Aka Whai Ora is not currently of an urgent nature. The grounds for urgency are no longer made out.

Priority inquiry

22. How and when a priority inquiry occurs is at the discretion of the relevant Tribunal inquiry panel. In determining whether to grant priority to claims that raise a particular issue, pursuant to the Tribunal's *Guide to Practice and Procedure* at [3.16], the Tribunal may have regard to:

- (a) the readiness of claimants to proceed;
- (b) the time that a claim has been outstanding on the register;
- (c) the availability of hearing time allowed by gaps in the hearing of active inquiries; and
- (d) any other relevant factors.

23. The Tribunal will grant priority inquiries or hearings only in exceptional cases.

24. The claimants indicate that they are ready to proceed, on the basis that a priority hearing will focus on the process to disestablish Te Aka Whai Ora. In this regard, the claimants were ready to proceed to a hearing on those issues in February 2024. The Tribunal notes that the claimants had taken all necessary steps to prepare for hearing at that stage, only for the hearing to be vacated because the Disestablishment Bill was introduced into the House of Representatives two days before the hearing was to begin.
25. The claim regarding the disestablishment of Te Aka Whai Ora is necessarily a new one, given that Te Aka Whai Ora was only established in 2022. As such, it cannot be said that it has been outstanding on the register of claims for any length of time. However, the broader context is relevant here. The establishment of Te Aka Whai Ora is at least in part in response to the Tribunal's *Hauora* report in Stage 1 of this Wai 2575 inquiry. Stage 1 itself was initiated to focus, as a matter of priority, on high-level structural issues within Aotearoa New Zealand's health system. Claims of that nature are long-standing. The disestablishment of Te Aka Whai Ora is a high-level structural issue of the type that have already been prioritised in this inquiry. It is consistent with these pre-existing inquiry priorities to treat this issue with priority as well.
26. We are mindful of the timeframes associated with the current Disabilities phase of the Wai 2575 inquiry. Although the majority of claimants support a priority inquiry even if that causes delays to the Stage 2 phases of the broader Wai 2575 inquiry, some claimants and the Crown are concerned about any such delays. In this regard, the Tribunal notes that the second Crown hearing week in the Disabilities phase of the inquiry is scheduled for August 2024, with closing submissions scheduled for December 2024. Accordingly, there is a gap in the hearing of this inquiry that would be available for a priority hearing. This will mean that a priority hearing should not cause significant delay to the broader Wai 2575 inquiry.

Decision

Priority inquiry granted

27. For the reasons given, a priority hearing into the disestablishment of Te Aka Whai Ora (the Māori Health Authority) is granted within the Wai 2575 inquiry.

Scope of priority inquiry

28. The Tribunal is minded to include, within the scope of this priority inquiry, the Crown's alternative proposals to improve Māori health in lieu of a Māori health authority. The priority inquiry will therefore examine both the processes and steps taken by the Crown to disestablish Te Aka Whai Ora, as well as the Crown's proposed alternative plans to address Māori health outcomes following its disestablishment.

Further information on Crown alternative plans

29. In its decision on the original application for urgency in January 2024, the Tribunal sought further information from the Crown on its proposed alternative plans to address Māori health following Te Aka Whai Ora's disestablishment (Wai 3307, #2.5.3). At the time, the Crown submitted it was premature for it to articulate the full detail of these plans when these have not yet been worked through by Cabinet (Wai 3307, #3.1.39).
30. During the first Crown hearing for the disability phase of the Wai 2575 inquiry, the Tribunal sought a further update from the Crown on when further information on alternative plans could be provided (Wai 2575, #2.6.168 at [21]). The Crown responded on 24 April 2024 advising that the topic is the subject of a law reform process currently underway, and timeframes for final Cabinet decisions and introduction of amendment legislation to the House of Representatives had not yet been decided. The Crown intends to proactively

release these Cabinet decisions once an amendment Bill is introduced (Wai 2575, #L17(k)).

31. Now that the Tribunal has granted a priority inquiry into these issues, it would be helpful for the Crown to provide timeframes for when relevant Cabinet decisions and the introduction of relevant legislation will likely be finalised. Crown counsel are directed to file a memorandum updating the Tribunal on this matter by **5pm, Monday 27 May 2024**. If any information regarding the substance of the Crown's alternative plans are available by this date, the Tribunal would be ready to receive this information then.

Timetabling and hearing planning

32. The priority hearing is likely to be scheduled October 2024, in light of the Tribunal panel's availability to convene within this calendar year and subject to resourcing.
33. Filing milestones ahead of the priority hearing will likely be influenced by the ability of the Crown to articulate its alternative plans following the disestablishment of Te Aka Whai Ora, which may be dictated by the timeframes advised by Crown counsel per [27] above. Once the Crown provides this information, it may be necessary to convene a judicial conference to discuss timetabling for this priority inquiry. However, I signal now that the Tribunal may itself finalise timetabling matters for this priority inquiry, in the interests of expediency and depending on the Crown's ability to provide any substantive update in relation to its alternative plans.

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

WHAKAPŪMAUTIA ki Whanganui-a-tara i te 8 o te Mei 2024



Kaiwhakawaa Damian Stone
Presiding Officer

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI



Tania Simpson
Tribunal Member

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI



Professor Linda Tuhiwai Smith

Tribunal Member

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Professor Tom Roa

Tribunal Member

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI

Handwritten signature of Professor Susy Frankel in black ink.

Professor Susy Frankel

Tribunal Member

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