

IN THE WAITANGI TRIBUNAL

Wai 2700

CONCERNING

the Treaty of Waitangi Act 1975

AND

Kaupapa inquiry into claims
concerning Mana Wāhine

**MEMORANDUM-DIRECTIONS OF PRESIDING OFFICER CONCERNING NEXT
STEPS FOLLOWING JUDICIAL CONFERENCE**

22 July 2020

Introduction

1. On 27 May 2020, I convened a judicial conference to discuss the scope and structure of the inquiry, as well as issues concerning research, claimant funding and overlap with other inquiries, including the Wai 2915 Oranga Tamariki Urgent Inquiry (“the judicial conference”).
2. I gave parties the opportunity to file follow-up submissions in writing after the judicial conference (Wai 2700, #2.5.20). Submissions were received from Right Law (Wai 2700, #3.1.216); Tamaki Legal (Wai 2700, #3.1.219); Mahony Lawyers (Wai 2700, #3.1.220); Te Mata Law, Dixon & Co Lawyers, Kāhui Legal and Annette Sykes & Co (Wai 2700, #3.1.221); Tukau Law (Wai 2700, #3.1.222); Woodward Law (Wai 2700, #3.1.223); Te Mata Law (Wai 2700, #3.1.224; #3.1.225); Te Nahu Legal (Wai 2700, #3.1.226) and Phoenix Law (Wai 2700, #3.1.230).
3. This memorandum-directions addresses:
 - (a) the scope for the inquiry;
 - (b) the proposal for tūāpapa hearings;
 - (c) the proposal for research and coordinating committees;
 - (d) a forthcoming judicial conference to take place on 5 October 2020;
 - (e) the proposal for an urgent tamariki wāhine stage one;
 - (f) the process for claim eligibility;
 - (g) the issue of claimant and research funding;
 - (h) representation of the Wai 381 claim; and
 - (i) confidential claims filed by Phoenix Law.

Inquiry scope

4. In a memorandum filed on 20 December 2019, the Crown identified a list of themes as recurring in a number of claims (Wai 2700, #3.1.171).
5. Following submissions filed by parties prior to the judicial conference (Wai 2700, #3.1.188; #3.1.193), this list was slightly amended in a memorandum filed by the Crown on 1 May 2020 (Wai 2700, #3.1.208) to include the alleged:
 - (a) erosion of the rangatiratanga of wāhine Māori caused by colonial laws and political, economic and social systems;
 - (b) undermining of leadership and governance capability of wāhine Māori;
 - (c) failures of the Crown in relation to domestic and sexual violence;
 - (d) institutional racism by Crown departments including the justice system, incarceration and child protection services;

- (e) failures by the Crown in relation to justice, education, health, social development, employment and equal pay; and
 - (f) failures of the Crown to protect mātauranga Māori and particularly the unique identity of wāhine Māori.
6. Although the claimants broadly agreed that these were the themes to be inquired into, counsel indicated at the judicial conference that this list did not quite capture all the issues and undertook to file a joint memorandum addressing this matter following the judicial conference.
 7. On 5 June 2020, Season-Mary Downs and Heather Jamieson of Tukau Law filed a joint memorandum on behalf of claimants represented by Hockly Legal, Loader Legal, Manaia Legal, Ranfurly Chambers, Lyall & Thornton, Wackrow Williams & Davies, Phoenix Law, Tamaki Legal, Kāhui Legal, McCaw Lewis and Te Mata Law (Wai 2700, #3.1.222). Amongst other things, counsel indicated that they would file a paper outlining options for the scope of the inquiry by 19 June 2020.
 8. This paper was then filed by Natalie Coates and Tara Hauraki of Kāhui Legal on 19 June 2020, with support from McCaw Lewis, Tamaki Legal, Annette Sykes & Co, Te Nahu Legal Ltd, Wackrow Williams & Davies, Hockly Legal, Loader Legal, Lyall & Thornton, Te Haa Legal, Te Mata Law, Oranganui Legal, Afeaki Chambers, Te Aro Law Ltd, Tukau Law, Dixon & Co, Mahony Horner Lawyers and Ranfurly Chambers (Wai 2700, #3.1.227(c)). Counsel advised that this was filed in draft due to ongoing discussions with the Crown and that a joint position was hoped to be achieved within a week from the filing date of 19 June 2020.
 9. The claimants submit that the central question is the alleged denial of the inherent mana and iho of wāhine Māori and systemic discrimination, deprivation and inequities experienced as a result. They submit this will require inquiry into both alleged historical and contemporary breaches of Te Tiriti o Waitangi and that a chronological and thematic approach would assist in developing a full picture that connects the issues and demonstrates the impact over time.
 10. The paper identifies four proposed pou to frame the inquiry:
 - (a) Rangatiratanga: The iho of ngā wāhine and how the position of wāhine Māori has been excluded from decision-making, from the time of the signing of Te Tiriti o Waitangi.
 - (b) Whenua: The way that wāhine Māori have been treated in relation to whenua.
 - (c) Whakapapa/whānau: The oranga and intergenerational wellbeing of wāhine Māori and their whānau.
 - (d) Whai rawa: The way that wāhine Māori have been treated in relation to the economy and enterprise.
 11. Counsel submit that the proposed themes should be considered holistically and that it is important for the inquiry to highlight the connection and interrelatedness of the themes to the overall experience of wāhine Māori.
 12. On 30 June 2020, the Crown filed a memorandum advising a preference to first consider the exploratory scoping report (the Chief Historian's 'pre-casebook discussion paper') before responding to the paper outlining the claimants' proposed scope for the wider inquiry (Wai

2700, #3.1.228). The exploratory scoping report is due to be completed by the end of July 2020 (Wai 2700, #2.5.23).

13. On 3 July 2020, I issued memorandum-directions advising that I do not consider it necessary for the Crown to wait for the exploratory scoping report before responding and directed the Crown to respond to the issue of scope as proposed by claimant counsel by 10 July 2020 (Wai 2700, #2.5.23).

Crown response

14. In the memorandum of 10 July 2020, the Crown broadly agreed to the scope as proposed by the claimants (Wai 2700, #3.1.229).
15. The Crown did however, raise the issue of overlap with other kaupapa inquiries and reiterated the need to explore ways to manage this overlap and minimise duplication. The Crown anticipates that this issue will need to be considered further as the claimants develop their proposed approach and suggests that the issue could be addressed in part through sequencing.

Tribunal response and decision

16. I have considered all submissions relating to the scope of the inquiry. The finalised scope for the Wai 2700 Mana Wāhine Kaupapa Inquiry is attached to this memorandum-directions as **Appendix A**.
17. While I have directed a broad inclusive approach to scope, I agree that the parties will need to work together to manage the issue of potential overlap with other kaupapa inquiries as the inquiry progresses.

Proposal for tūāpapa hearings

18. A number of the submissions filed prior to the judicial conference expressed a preference for this inquiry to commence with an exploration of the tikanga of mana wāhine and the pre-colonial understanding of wāhine in te ao Māori (Wai 2700, #3.1.197; #3.1.188; #3.1.193; #3.1.194; #3.1.205). The Crown also expressed support for this proposal (Wai 2700, #3.1.208).
19. This was discussed further at the judicial conference and was addressed in subsequent submissions (Wai 2700, #3.1.222; #3.1.220; #3.1.221; #3.1.223; #3.1.224; #3.1.226; #3.1.230). I agreed that this is the appropriate way to begin the inquiry and indicated support for a timetable that would bring us to commencing contextual hearings before the end of the 2020 calendar year.
20. On 19 June 2020, Mses Coates and Hauraki also filed a paper setting out the proposed approach to tūāpapa or contextual hearings (Wai 2700, #3.1.227(b)). Counsel proposed these hearings should cover:
 - (a) atua Māori;
 - (b) relationality and balance (including te ira wāhine and the balance and complementarity of wāhine and tāne);

(c) rangatiratanga, whenua, whānau, mātauranga and whakapapa; and

(d) te mana o te wāhine in Māori society.

21. The claimants support an approach that combines the presentation of formal briefs of evidence with less formal kōrero and suggest that this be followed by a mana-enhancing pātai session where the Tribunal, claimant counsel and the Crown would have the opportunity to pose questions to the witnesses in a non-adversarial way. The claimants do not consider that Crown evidence is needed for the tūāpapa hearings.
22. The claimants propose that these hearings be held across the motu at signatory sites including Waitangi and Kaitaia; Waikato Heads; Whanganui; Kāpiti, Waikanae and Rangitoto. Whāngārā Marae or Hauiti Marae was also suggested. Claimant counsel also put forward Waipatu Marae as a possible venue at the judicial conference.
23. In its memorandum of 30 June 2020, the Crown advised that it is still considering the paper on tūāpapa hearings and intends to respond by 10 July 2020 (Wai 2700, #3.1.228).

Crown response

24. On 10 July 2020, the Crown confirmed that it is broadly supportive of the proposal for tūāpapa hearings, as well as the suggested hearing locations, logistics and principles including inclusivity, supporting regional/hapū/iwi variances and the maintenance of a non-adversarial approach (Wai 2700, #3.1.229).
25. However, the Crown does not envisage that the Tribunal will determine “substantive historical breaches of Te Tiriti o Waitangi” as is suggested in the claimants’ proposal. The Crown also wishes to reserve the ability to file evidence.

Tribunal response and decision

26. I support the proposal regarding the tūāpapa hearings. However, unfortunately due to issues with panel availability, it appears that these will not be able to commence until February 2021.
27. Paragraph 9 of **Appendix A** states that the tūāpapa hearings will “form the baseline against which Crown breaches of Te Tiriti can be considered for the balance of the inquiry.” I do not envisage that the Tribunal will determine or make recommendations concerning allegations relating to pre-1840 Crown actions, but such evidence will provide context to allegations of later breaches of Te Tiriti by the Crown.
28. Regarding the issue of Crown evidence, my preferred approach is for the Crown to seek leave to file evidence in reply following any particular tūāpapa hearing if it considers that such evidence is required.

Research and coordinating committees

Research committee

29. The suggestion of a research committee was first raised in a memorandum filed by Annette Sykes on 20 March 2020 (Wai 2700, #3.1.193). Ms Sykes submitted that representation on this committee should include claimant representatives, Crown officials, Tribunal research staff, as well as claimant and Crown counsel.

30. Crown counsel indicated at the judicial conference that it was open to the formation of such a committee.
31. This proposal was also supported in a number of the submissions filed following the judicial conference (Wai 2700, #3.1.219; #3.1.221; #3.1.222; #3.1.226). The joint memorandum filed by Mses Downs and Jamieson on 5 June 2020 indicated that counsel would file a project brief outlining the structure, purpose and processes for this committee (Wai 2700, #3.1.222).
32. Mses Coates and Hauraki then filed detailed draft terms of reference for a joint claimant research committee on 19 June 2020 (Wai 2700, #3.1.227(d)).

Crown response

33. In its memorandum of 10 July 2020, the Crown agreed to the draft terms of reference for the research committee, subject to the following comments (Wai 2700, #3.1.229):
- (a) the Crown has offered a Joint Roopū member to provide secretariat support and would also like to nominate a Crown representative to be on the committee;
 - (b) there may be additional requirements of the committee (accountability mechanisms or processes) for the purposes of the Crown's financial reporting obligations; and
 - (c) the figure of \$402,360 identified at [1.3] of the terms of reference is incorrect. Approximately \$320,000 has been allocated for Crown engagement in the inquiry across four years.
34. It also noted that after the tūāpapa hearings it may be appropriate to expand the composition, structure and/or purpose of the research committee to steer the proposed shared research agenda and support the sourcing of additional funding for research.

Tribunal response and decision

35. I support the proposal filed by the claimants. Regarding the proposals made by the Crown, these are matters for claimant counsel and the Crown to resolve. Having said this, I have no opposition to the addition of a Crown representative to the proposed research committee or the provision of secretariat support, which is not dissimilar to the original proposal by Ms Sykes.
36. Parties are to confer and file a final version of the terms of reference for the research committee by **12pm, Wednesday 5 August 2020**.

Coordinating committee

37. During the judicial conference claimant counsel raised the question of whether there would be coordinating counsel for this inquiry.
38. Following the judicial conference, counsel representing the various Wai 381 claimants filed a joint memorandum expressing support for the establishment of a coordinating counsel's committee (Wai 2700, #3.1.221). They suggested that such a committee should be led by one of the counsel for the Wai 381 claimants, given the significance and history of this claim. The role of the committee would be to coordinate counsel and input from claimants and would not substitute the primary role of claimants or their respective counsel.

Tribunal response and decision

39. I support the proposal for establishment of a co-ordinating committee for claimant counsel. I agree this is a useful mechanism to co-ordinate counsel and input from claimants and to ensure the inquiry runs smoothly.
40. I agree that the Māori Women's claim (Wai 381) should play an integral role in how the inquiry develops and proceeds, and that there should be specific membership of counsel for the Wai 381 claimants on the co-ordinating committee. The issue of who is to lead this committee will be for the claimants to resolve amongst themselves.
41. Parties are to confer and confirm to the Tribunal in due course how the committee is constituted and intends to operate.

Judicial conference

42. In the proposed timetable appended to the joint memorandum filed by Mses Downs and Jamieson on 5 June 2020, counsel suggested that a judicial conference be convened in July 2020 to discuss tūāpapa hearing planning, filing dates and locations (Wai 2700, #3.1.222(b)).

Tribunal response and decision

43. I agree that such a judicial conference should be convened. However, I am of the view that this should be held following the completion and distribution of the exploratory scoping report which is due to be completed at the end of July 2020. This will allow time for parties to consider the scoping report and file any submissions in advance of the judicial conference.
44. I now confirm that a judicial conference will be convened on **Monday 5 October 2020** at the Waitangi Tribunal Offices in Wellington, commencing at **10am**. Further details will be communicated closer to the time, including whether parties will be able to participate remotely.
45. The judicial conference will address:
- a) the exploratory scoping report and any proposals made for additional research to fill major gaps in evidential coverage;
 - b) the joint research committee and funding for claimant research;
 - c) tūāpapa hearing planning, including proposed hearing dates, filing deadlines and hearing locations and venues; and
 - d) any other matters raised by counsel.
46. If possible, it would be helpful if a representative from the research committee could make a submission on behalf of the committee regarding points (a) and (b) above.
47. Parties are to file written submissions on the topics listed above by **12pm, Monday 21 September 2020**.

Urgent tamariki wāhine stage one proposal

48. In submissions made prior to, during and following the judicial conference, Janet Mason advocated for an urgent stage one inquiry into the current legal framework that allows the state

to directly intervene into all matters related to whānau, including the forced removal of tamariki, care of children, custody and guardianship, and all policies and legislation which undermine Māori self-determination over matters related to their whānau (Wai 2700, #3.1.204; #3.1.230). Ms Mason submits that this stage could run in parallel with the tūāpapa hearings.

49. Ms Mason has filed a suggested timeframe and requested that a judicial conference be convened to discuss how an urgent tamariki wāhine stage one could proceed.

50. This proposal is not supported by other claimants and counsel in this inquiry.

Tribunal response and decision

51. I have carefully considered what is being sought and decline this proposal. There is potential and capacity for many of these issues to be addressed under the confirmed scope for the inquiry (**Appendix A**), and it is my preference that issues which fall within the scope are heard as we move through the inquiry, rather than prioritise them in an urgent stage one hearing.

52. I also note that Ms Mason is yet to file sworn versions of the affidavits that accompanied the memorandum of 10 June 2020 (Wai 2700, #3.1.230). These are to be filed by **12pm, Monday 27 July 2020**.

Claim eligibility

53. As a matter of process, the eligibility of claims seeking to participate needs to be assessed before the inquiry can proceed to hearing. The principal exclusions are as follows:

- a) claim/s issues that fall outside the scope of this inquiry (confirmed in **Appendix A**);
- b) mana wāhine grievances that are included in historical claims fully addressed in one or more Treaty settlements with the Crown. Once the settlements have been legislated, the Tribunal's jurisdiction is excluded from further inquiry into the historical allegations of that claim;
- c) where a claim has mana wāhine grievances that have previously been fully heard or reported on by the Tribunal. The Tribunal is not able to hear for a second time grievances in relation to which it has made a recommendation or finding; and
- d) claims whose remaining mana wāhine grievances have already been fully incorporated by Tribunal direction (consolidated) into other Tribunal inquiries that are currently under way. The Tribunal is not able to conduct parallel inquiries into the same claims.

54. It was noted by claimant counsel at the judicial conference that some submissions regarding eligibility had already been filed alongside statements of claim in 2018. Attached as **Appendix B** is a list of claims that have already filed submissions on eligibility.

55. I now direct parties to file any remaining submissions concerning the eligibility of their claims by **12pm, Wednesday 19 August 2020**. Parties who have already submitted on this matter, as listed in **Appendix B**, may file supplementary submissions on eligibility if required. The Crown is then to file submissions responding to the eligibility of each individual claim **by 12pm, Wednesday 16 September 2020**. Following this, the Tribunal will issue a final list of eligible claims that will be aggregated or consolidated into the inquiry. This process is largely in

accordance with what was proposed in the Crown memorandum of 10 July 2020 (Wai 2700, #3.1.229).

56. Despite a several opportunities, there are still a number of parties that are yet to confirm their intention to participate despite having filed statements of claim; as well as a number of parties that are yet to file statements of claim, despite having previously signalled an intention to participate. These claims are identified in **Appendix C**.
57. These parties have until **12pm, Wednesday 19 August 2020** to file any statements of claim, amended statements of claim or memoranda seeking to participate. Any amendments to the list of claims seeking to participate, including any requests to be removed should also be advised by way of memorandum by the same date. This will be the final opportunity to file as a matter of course and following this date any parties who wish to participate will be required to seek leave.

Claimant and research funding

58. The issue of claimant and research funding is a significant concern for many of the claimants and was discussed at length during the judicial conference.

Research funding

59. In a memorandum filed on 1 May 2020, Crown counsel advised that of the \$6.172 million funding package announced by the Ministry for Women to progress the Crown's engagement with this inquiry, \$400,000 of this would be allocated to claimant research funding over a period of four years (Wai 2700, #3.1.208). A further memorandum was filed on 26 May 2020 advising a change to this funding allocation and that the entire appropriation of the \$400,000 was being brought forward to be available in the 2020/2021 financial year (Wai 2700, #3.2.13).
60. In questioning during the judicial conference, counsel for the Crown, Matewai Tukapua, confirmed that this was currently the total amount available for claimant research.
61. I, the panel and claimant counsel all raised the fact that, while welcome, this allocation appears modest considering the scope and significance of the inquiry and in comparison with the wider funding package. I questioned how this decision had been reached, as well as how fixed this allocation was. Ms Tukapua replied that there may be an opportunity to reconsider and that the Crown could potentially look for contributions from other agencies.
62. In its memorandum of 10 July 2020, the Crown signalled that it intends to explore mechanisms and funding for research relating to the broader scope of inquiry and would like to work with claimants on a shared research agenda for the substantive hearings into the claims (Wai 2700, #3.1.229). Counsel noted that the Crown has a collection of research, data sources, experts and specialists in research across government agencies that it can access to support and enable the research being undertaken by parties in this inquiry.

Claimant funding

63. In the joint memorandum filed by Mses Downs and Jamieson on 20 March 2020, counsel submitted that the issue of claimant funding in kaupapa inquiries remained a significant concern of the claimants and that counsel considered an urgent resolution was necessary (Wai 2700, #3.1.197). They advised that although the Crown had previously indicated a

detailed proposal would be drafted to address this issue, with consultation to occur with claimants and claimant counsel in the first quarter of 2020, no such consultation had occurred.

64. In the Crown memorandum filed on 1 May 2020, counsel advised that this issue had been identified by the Crown and that work was currently underway (Wai 2700, #3.1.208). At the judicial conference, Ms Tukapua indicated that this work had been delayed as a result of COVID-19 and that the Crown accepted the need for engagement with the claimants on this issue.
65. At the judicial conference, panel member, Kim Ngarimu, questioned whether there was a timeframe for work on this issue. Ms Tukapua responded that she was not able to give an indication of timeframes at this stage and would need to seek further instructions.
66. This issue was then addressed further in submissions following the judicial conference (Wai 2700, #3.1.219; #3.1.221; #3.1.222; #3.1.226), with claimant counsel reiterating that funding was needed not only for research, but for travel, accommodation and the preparation of evidence for hearing. A number of counsel indicated a desire to engage with the Crown directly on this issue (Wai 2700, #3.1.221) and sought that work on the new funding scheme for claimants be revived (Wai 2700, #3.1.222).

Tribunal response and decision

67. For an inquiry of this scope and significance, I am frankly underwhelmed and disappointed with the allocation for claimant research funding. It is important that there is high-quality research to underpin the inquiry and help inform findings and recommendations which will also assist and contribute to future policy outcomes.
68. Further, regarding the issue of claimant funding more broadly, the integrity of the kaupapa claims process and the enduring nature of any findings will be in jeopardy if claimants are unable to adequately represent themselves in this forum.
69. I direct the Crown to engage with the claimants on this issue as it has represented that it intends to do. I accept that COVID-19 has delayed this engagement, but it is crucial that the Crown now engages with the claimants in a meaningful way to come up with the detailed proposals that the Crown has previously referred to. It is my expectation that the Crown will have consulted with claimants concerning their proposals which are to be filed by **12pm, Monday 21 September 2020**.

Wai 381 representation

70. In memorandum-directions dated 4 May 2020, I directed counsel representing the five Wai 381 claimants to file a memorandum of understanding outlining agreed protocols and procedures for the progression of the Wai 381 claim (Wai 2700, #2.5.18). Counsel had previously indicated that such a memorandum was being developed (Wai 2700, #3.1.185).
71. This was subsequently filed on 15 May 2020 (Wai 2700, #3.1.211(a)).
72. In the joint memorandum filed on 5 June 2020, counsel requested that I confirm acceptance of arrangements outlined in previous memoranda in forthcoming memorandum-directions (Wai 2700, #3.1.221).

Tribunal response and decision

73. I thank the Wai 381 claimants for providing the memorandum of understanding and accept and approve the proposed agreements as set out between the parties.

Confidential claims

74. On 8 November 2019, Ms Mason filed 14 statements of claim, along with accompanying affidavits and a joint memorandum of counsel on behalf of the claimants. Ms Mason sought leave for this material to be granted blanket confidentiality in order to protect sensitive information belonging to the claimants.

75. The Chairperson declined this request in memorandum-directions dated 17 April 2020 and this decision was subsequently added to the Wai 2700 Record of Inquiry (Wai 2700, #2.5.19). Instead, Ms Mason was directed to file two versions of the statements of claim and associated memoranda, one in full and the other redacted or anonymised.

76. On 24 April 2020, Ms Mason filed the redacted and anonymised versions of the statements of claim as directed.

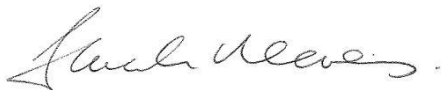
77. In memorandum-directions dated 4 May 2020, I provided parties the opportunity to make submissions regarding this matter by 15 May 2020 (Wai 2700, #2.5.18). No submissions were received. I also gave parties the opportunity to address this issue at the judicial conference.

Tribunal response and decision

78. Registry staff have analysed both the confidential and anonymised versions of the statements of claim and have confirmed that all claims meet registration guidelines. These claims have now been registered (Wai 2988, #1.1.1; Wai 2989, #1.1.1; Wai 2990, #1.1.1; Wai 2991, #1.1.1; Wai 2992, #1.1.1; Wai 2993, #1.1.1; Wai 2994, #1.1.1; Wai 2995, #1.1.1; Wai 2996, #1.1.1; Wai 2997, #1.1.1; Wai 2998, #1.1.1; Wai 2999, #1.1.1; Wai 3000, #1.1.1; Wai 3001, #1.1.1).

The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel and all those on the distribution list for Wai 2700, the Kaupapa Inquiry into claims concerning Mana Wāhine.

DATED at Wellington on this 22nd day of July 2020



Judge S F Reeves
Presiding Officer

WAITANGI TRIBUNAL