

IN THE WAITANGI TRIBUNAL

Wai 3060

CONCERNING

the Treaty of Waitangi Act 1975

AND

the Justice System kaupapa
inquiry

**MEMORANDUM-DIRECTIONS OF THE CHAIRPERSON
COMMENCING A KAUPAPA INQUIRY INTO
CLAIMS CONCERNING THE JUSTICE SYSTEM**

5 August 2021

Introduction

1. The purpose of this memorandum-directions is to commence a Tribunal inquiry into claims concerning the justice system. It appoints a presiding officer to conduct the inquiry, outlines its scope, briefly identifies some of the issues raised in statements of claim, and considers factors affecting the eligibility of claims to participate.

Commencing an inquiry into claims concerning the justice system

2. The Waitangi Tribunal's kaupapa inquiry programme is designed to provide a pathway for the hearing of nationally significant claims that affect Māori as a whole or a section of Maori in similar ways. In my memorandum of 1 April 2015 outlining the programme, I indicated that it would comprise 11 inquiries and set out the order in which they would commence.
3. An inquiry into the justice system was included in the kaupapa programme. Both in 2015 and in my memorandum of 27 March 2019 updating the programme, it was listed late in the order of inquiries. In my 2019 memorandum, however, I indicated that the emerging stronger focus on contemporary kaupapa issues would require the Tribunal to be flexible and responsive in reordering the inquiry programme should claimant and Crown priorities change.
4. For a number of years, justice sector issues have been the subject of applications to the Tribunal for an urgent hearing. Since 2000, four urgent inquiries have been held, each concerning specific claim issues of national scope. They resulted in the following reports:
 - (a) Wai 1024: Offender Assessment Policies (2005);
 - (b) Wai 2417: Whaia Te Mana Motuhake (2014), concerning the Crown's review of the Māori Community Development Act 1962, including Māori wardens;
 - (c) Wai 2540: Tu Mai Te Rangi! (2017), concerning Crown actions to reduce disproportionate Māori reoffending; and
 - (d) Wai 2870: He Aha I Pērā Ai? (2019), concerning Māori prisoner voting rights.
5. In addition, in recent years a number of issues for which an urgent hearing has been sought, several involving multiple claims, have yet to be inquired into. In some cases, urgency has been declined, including for claims concerning:
 - (a) access to legal aid;
 - (b) the prosecution of Māori offenders;
 - (c) the Criminal Proceeds (Recovery) Act 2009 and the confiscation of Māori land in multiple ownership; and
 - (d) police armed response teams and the use of firearms and tasers.
6. Several further applications are currently under consideration. They concern:
 - (a) claimant funding in Tribunal kaupapa and urgent inquiries;
 - (b) the Bail Amendment Act 2013 and Māori held in prison on remand; and
 - (c) issues raised by Māori prisoners involved in the Waikeria prison protest.

7. Decisions on whether to grant urgency are procedural and do not determine claims. The Tribunal sets a high bar for granting urgency and if declined, the claim remains to be heard at a later time. In several recent decisions declining urgency, Deputy Chairperson Judge Savage or I have signalled that the claim or a broader issue to which it relates would best be heard in the future justice systems kaupapa inquiry, and in some cases that the claim appears to raise or relate to pressing contemporary issues that may be appropriate to prioritise within that inquiry. If any of the applications currently before us are declined, the same considerations are likely to be relevant.

Appointment of an inquiry panel

8. I am satisfied that the number and range of applications for urgency in recent years concerning justice sector issues indicates a weight of claimant concern sufficient to merit an early start to the Tribunal's inquiry into justice sector claims. Accordingly, I now formally initiate the Justice System kaupapa inquiry.
9. Pursuant to clause 5(1)(a)(ii) of the Second Schedule to the Treaty of Waitangi Act 1975, I appoint Judge Carrie Wainwright, a judge of the Māori Land Court, as presiding officer for the kaupapa inquiry into claims concerning the justice system.
10. I will be appointing the remainder of the Waitangi Tribunal panel in the near future.

The scope of the inquiry

11. The thematic focus of the inquiry will be on the administration of justice. The justice-related issues raised in registered claims are wide-ranging. The 2015 and 2019 kaupapa programme memoranda summarised them as concerning:
 - (a) criminal justice and corrections;
 - (b) the civil courts, including legal aid, barriers to accessing courts, the colonial justice system, and the abolition of appeals to the Privy Council; and
 - (c) the Māori Land Court, including Māori land law, succession, court procedure and costs.
12. A preliminary analysis has been undertaken by Tribunal staff of registered claims with justice-related grievances that have not been fully settled, heard or otherwise disposed of, and that have not been consolidated into a current inquiry. Justice system issues arising from the claims that meet the kaupapa test of national scope and significance include allegations relating to:
 - (a) a lack of recognition of tikanga Māori as a source of law in the common law regime;
 - (b) discrimination against Māori in the statutory and institutional framework for the administration of justice in colonial and modern times;
 - (c) institutional racism and bias in the policy and practice of justice sector organisations;
 - (d) access to justice, including legal aid in civil court and tribunal cases and claimant funding for progressing Treaty-based claims and rights;
 - (e) discrimination against Māori in policing policy and practice; and
 - (f) prison conditions and the treatment of Māori remand and sentenced prisoners.

13. Some historical justice system issues reach far back into the Maori experience of colonisation and settlement. However, only a minority of the claims have historical grievances, while all claims have grievances that are contemporary (arising on or after 21 September 1992) and many raise issues that are alive today.
14. There are potential areas of overlap with claim issues being addressed in several other kaupapa inquiries that, to the extent that they arise, will lie outside the scope of the Justice System inquiry. They include, amongst others:
 - (a) Māori over-representation in the criminal justice and corrections system as a prejudice resulting from alleged non-justice Treaty breaches rather than failings of the system itself;
 - (b) the justice system being invoked to deal with alleged failings in other fields of policy and services, for example the treatment of addiction in the health sector; and
 - (c) constitutional issues such as sovereignty and the legitimacy of Crown institutions and statute law, which will be addressed in the Constitution, Self-government and Electoral System kaupapa inquiry.
15. New issues and further areas of possible overlap will no doubt emerge as other claimants seek to participate in the Justice System inquiry and its kaupapa issues are refined in consultation with the parties. In so doing, I am of the view that maintaining a consistent focus on the justice system itself and clarifying potential issue overlaps with other kaupapa inquiries are likely to assist the inquiry in achieving timely and relevant results.
16. The same consideration applies to claims that raise pressing contemporary issues. Amongst others, these may include justice-related claims awaiting a decision on applications for urgency, which are now before the Deputy Chairperson. The applications will be determined on their merits. Should any be declined, the claims will fall within the ambit of the Justice System inquiry. It will be for that Tribunal to decide whether these and any other participating claims should be prioritised for early hearing and reporting.

Eligibility to participate in the inquiry

17. The inquiry is open to all claimants who wish to be heard on their grievances concerning the justice system that have not been disposed of or are not currently under inquiry, as further outlined below. Claimants wishing to have their justice system claims heard should bear in mind that kaupapa inquiries are designed to address issues of national scale and significance. Claims with specific or local grievances that relate to shared experience of such issues are also eligible to participate.
18. Not all justice system claims will be eligible to participate. The principal exclusions are:
 - (a) Justice system grievances that relate to Crown acts or omissions prior to 21 September 1992 and form part of claims fully addressed in one or more historical Treaty settlements with the Crown. Once ratified, the claimants are bound by the deeds of settlement and further inquiry by the Tribunal would serve no useful purpose. When implementing legislation has been enacted, the Tribunal's jurisdiction is usually excluded from further inquiry into the claim.
 - (b) Justice system grievances that have previously been fully heard and reported on by the Tribunal. The Tribunal is not able to hear for a second time claims or parts of claims into which it has completed its inquiry.

- (c) Claims whose remaining justice system grievances are being heard in other Tribunal inquiries that are currently under way. The Tribunal is not able to conduct parallel inquiries into the same claims.
19. Claimants should also be aware that current or future historical Treaty settlement negotiations that include their claims may remove the ability of the Tribunal to complete its inquiry into their pre-1992 justice system grievances once their claims have been settled. This applies in particular to settlements which:
- (a) explicitly list a claim as relating exclusively to the tribal group concerned; or
 - (b) include named iwi or hapū on whose behalf the claimants say in their statement of claim they are bringing the claim.
20. Claimants whose claims allege grievances on their own behalf as individual Māori or on behalf of non-tribal groups of Māori may also be eligible to participate notwithstanding their actual or implied affiliation with tribal groups that have settled their Treaty claims with the Crown. The Tribunal will consider the eligibility of such claims on a case-by-case basis.
21. Most Treaty settlements with the Crown apply to historical claim grievances that arose, in whole or part, before 21 September 1992. For claims affected by historical Treaty settlements, contemporary grievances continuing or arising on or after 21 September 1992 remain eligible for inquiry.
22. Claimants should note that for any historical grievances, they are entitled to amend their existing claims so as to provide greater detail or to include additional grounds of claim. This includes justice system grievances. Since 2 September 2008, however, the Tribunal has been precluded from registering new historical claims or historical amendments to purely contemporary claims that arose on or after 21 September 1992.
23. Any claimant who wishes to be heard and whose eligibility to participate in this inquiry is in any doubt will be afforded the opportunity to state their case for inclusion.

The claims

24. Tribunal staff have identified approximately 61 registered claims which raise justice system grievances and which appear to be eligible to participate in the inquiry. The claims are listed in **Appendix A** and will be included in the initial notification list for the inquiry.
25. Other claims not yet identified may also raise justice system grievances. There may be claimants who intend to add such grievances to their claims but have not yet done so, or to submit new claims. The Tribunal will hear all claimants who clearly specify eligible justice system grievances in their statements of claim and notify their intention to participate in the inquiry.

Next steps

26. The presiding officer will issue memorandum-directions on the next steps for the inquiry in due course.

27. The inquiry will be known as the Justice System kaupapa inquiry and its combined record of inquiry identifier is designated as Wai 3060.

The Registrar is to send this memorandum-directions to all claimants and the Crown, and to publish it on the Tribunal's website.

DATED at Gisborne this 5th day of August 2021

A handwritten signature in black ink, appearing to read 'W W Isaac'.

Chief Judge W W Isaac
Chairperson
WAITANGI TRIBUNAL

Appendix A. Justice System kaupapa inquiry: preliminary list of claims

Wai	Claim
275	Tahunaroa and Waitahanui Blocks claim
396	Te Ture Whenua Maori Act claim
439	Civil Legal Aid claim
572	Privy Council claim
585	Privy Council (Ngati Te Ata) claim
884	Te Pa O Tahuhu (Mt Richmond, Auckland)
1019	Wairarapa Rohe claim
1052	Ngati Kahungunu ki Wairarapa Supreme Court claim
1079	Maori Land Owners Consultation Forum and Focus Group claim
1284	Ruawaipu Incarceration claim
1319	Ruawaipu Te Whanau a Kahu claim
1320	Ruawaipu Supreme Court Act 2003 claim
1460	Tauhinu ki Mahurangi Claim
1829	Te Whanau-a-Apanui Mana Tane Claim
2065	Te Tai Rawhiti Mana Tane (Tangaere) Claim
2091	Maori Mental Health (Tangiahua) Claim
2123	Effects of Colonisation (McLaughlin) Claim
2166	Nga Tini Uri o Pita Piipii Keepa Effects of Crown Governance Claim
2184	Te Hapuoneone (Rangihuna) Claim
2302	Ngati Uepohatu Social Policies (Walker & Johnson-Haua)
2317	The Te Puranga (Rata Pue) Crown Minerals claim
2374	The Latimer and Piripi Claim
2375	The Legal Aid (McClutchie-Morrell and Others) Claim
2378	The Legal Aid (Holloway, Mack and Mahara) Claim
2386	The Legal Aid in Civil Proceedings Claim
2387	The Wallaceville Property Claim
2494	Racism Against Māori claim
2519	Ruatoki Police Raids (Davies) claim
2524	The Te Puranga Tino Rangatiratanga Claim
2537	The Ngā Uri o Tamatakutai, Rongomaiwahine, Kahungunu and Ruawharo claim
2599	The Suicide and Self-Harm in Prison and Policy Custody Claim
2608	The Prosecution of Māori Offenders (Morrison) Claim
2615	The Māori Children placed in State care claim
2641	The Hastings Mongrel Mob Health claim
2738	The Mental Health and Addiction (Fergusson-Tibble) Claim
2783	The Māori Criminal Justice System (Mason) Claim
2866	The Destiny Church Prisoners Rehabilitation claim
2901	The Mana Tāne (Kemara) Claim
2906	The Northland Prisoners' claim
2944	The Police's Armed Response Team claim
2949	The Police Firearms Claim
3006	The claimant funding for Kaupapa and urgent inquiries (Te Kapotai) claim
3007	The Criminal Proceeds (Recovery) Act claim
3008	Bail Amendment Act (Mita) Claim
3016	The Mia Joyce claim
3030	The Waikeria Prison (Maori District Communities) Claim
3031	The Waikeria Prison (BP) Claim

Wai	Claim
3032	The Waikeria Prison (BK) Claim
3033	The Waikeria Prison (AT) Claim
3034	The Waikeria Prison (CR) Claim
3035	The Waikeria Prison (GH) Claim
3036	The Waikeria Prison (HR) Claim
3037	The Waikeria Prison (IL) Claim
3038	The Waikeria Prison (LH) Claim
3039	The Waikeria Prison (MC) Claim
3040	The Waikeria Prison (MM) Claim
3041	The Waikeria Prison (PT) Claim
3042	The Waikeria Prison (PTH) Claim
3043	The Waikeria Prison (TRT) Claim
3044	The Waikeria Prison (TS) Claim
3045	The Waikeria Prison (NUMA) Claim