REPORT ON

WHAKATIKA KI RUNGA,

A MINI-INQUIRY COMMENCING

TE RAU O TE TIKA

REPORT ON WHAKATIKA KI RUNGA, A MINI-INQUIRY COMMENCING TE RAU O TE TIKA

The Justice System Inquiry

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Parliament Buildings
WELLINGTON

16 February 2023

E ngā Minita tēnā koutou

Ko tō mātou reo tēnei e tāpae nei i te pūrongo o Whakatika ki Runga, te wāhanga tuatahi o Te Rau o te Tika. Ka waiho mā ngā kupu a Alana Thomas i āna tohe kia tika te utu i te whakapākehatanga i ngā tuhinga

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MINISTRY OF JUSTICE
Tāhū o te Ture

Māori ki te ruku tatari nei hei wāhi i tā mātou pūrongo. Nō te tekau mā whā o Mahuru, 2022, te rima tekau tau o te Petihana reo Māori, i takina ai e Alana tana waiata ki mua i a mātou:

I ngā tau ki muri kua mana ko te reo,
Hei reo ture, hei reo motuhake,
Hei oranga mō te iwi ki roto i te Kōti.
Ahatia! Kore, kore, kore rawa e ora,
Tō tātou reo Māori ki te pari o te rua,
Raro, raro, kei raro e putu ana.
Karangatia rā ngā manu o te motu,
Rere atu, rere atu
Whakatika ki Runga,
Tau atu, tau atu,
Ki te Whare o te Tika,
Ki te whare o te reo Māori e ora nei.

Kāti kei ngā Minita, kua mānu nei tō koutou waka whakatewhatewha, tō koutou waka whakataratara, ki tōna ararau. Kua tukua ki te ruku, kua tukua ki te tātari i tēnei taonga a 'tika', tōna momo, tōna hanga, tōna hua. Nō nehe rā te waka. Nā petihana, nā reta, nā tautohe, nā pūrongo, nā rangahau ia i tārai. He tini ringaringa o ngāi nui i pātuki, o ngāi roa i pākuru ki ngā reanga o te wā ka riro, ka riro, ka riro i tua whakarere rā anō, whakaoti atu ki te pō. Ko te kupu ka tā ki te pepa, ko ngā reo ka kapo ki te rīpene, ka mau. Ko te kupu ka titi ki te ngākau tangata, ka tōngia, ka tupu, ka hua ngahoro kau i ngā tau. Ko te hunga tēnei e whakaaronuitia ana ki ēnei ruku, e arohaehaengia ki ēnei tātari. Kāti e ngā māngai o Kāwana, ko tō koutou waka kua tere, anga tonu ki tōna ūnga e.

He pūkei kōrero tēnei i te ruku tuatahi o te ruku tātari o Te Rau o te Tika. He ruku tēnei i tapaina ai, ko Whakatika ki Runga. Kei tana kupu whakahau, kei tana akiaki e mea ana, tēnā whakatika ki runga e te iwi e noho taimaha ana, taimaha rukiruki ki ngā aituā, ki ngā mate o nehe, ki ngā aupēhi o nāianei, ki te ao hou o āpōpō e manakohia ana. Whakatika ki runga kia tae ki te paringa tai e hora taupā nei ki te mūmū, ki te ripo, ki te aukume e taratara nei te wai. Ko te ruku tēnei kia wāhia te taratara o haere. Kia wātea atu te aro tahi mai nei ki te takenga mai o tika. Tokonga ake a tika kia whitikia e te rā, kia purea a tika e te hau, kia mātakina a tika e te tini.

Nō reira e ngā ringa raupā, e ngā ringa raupō, tīkina ake te mānuka nei. te rau nei o Te Rau o te Tika. Ehara rā i te rau o patu, te umu pokapoka o patu. He rapu kē ia i te rau o te aroha. Tēnā e te manawa roa o tika, o

pono, o māramatanga, tahuri mai ki ngā huihuinga, ki ngā wetewetenga, ki ngā takitakinga i tēnei waka ki tōna tauranga e. Ko ā mātou kōrero ēnei.

In the late 1980s, Crown and Māori parties settled litigation about transferring Crown assets to state-owned enterprises. The Māori parties negotiated for improvements to the position of claimants before the Waitangi Tribunal. The Crown agreed to extend legal aid to Waitangi Tribunal claimants and establish the Crown Forestry Rental Trust. From the early 1990s, the Crown Forestry Rental Trust developed a comprehensive regime to fund Waitangi Tribunal claimants, paying for their research, communications, claim organisation, and attendance at hearings. It also contributed large amounts to the costs of staging Waitangi Tribunal hearings.

Claimants, their lawyers, and the Waitangi Tribunal itself all came to rely heavily on this funding.

However, the Crown Forestry Rental Trust's deed allows it to fund only claimants whose claims involve Crown forest land. It does not fund Waitangi Tribunal inquiries of the kind held in recent years, where the focus is claims that relate to a particular subject area or kaupapa. Examples are the Health Services and Outcomes Inquiry, the Oranga Tamariki Urgent Inquiry, and the present Justice System Inquiry, Te Rau o te Tika.

This mini-inquiry into claimant funding is the first stage of that larger inquiry into the justice system.

The issue, Ministers, is how to provide a funding system for Waitangi Tribunal claimants in these inquiries where the Crown Forestry Rental Trust cannot assist. The various government agencies attached to the kaupapa inquiries have developed ad hoc arrangements to reimburse some claimant costs. These arrangements are inconsistent and inadequate, and do not fill the gap left by the Crown Forestry Rental Trust. The Crown has acted too slowly and ineffectively to implement a comprehensive system, even though the ad hoc arrangements were widely recognised as deficient. Although some officials sufficiently grasped the situation to advise Ministers why they must get Cabinet to agree to a new system, Ministers did not accept the Treaty imperative to act.

The Waitangi Tribunal is a cornerstone of our constitution and claimants are the cornerstone of the Waitangi Tribunal. Unless they can participate fully in Tribunal processes without hardship to them, and in accordance with Māori cultural norms, the Waitangi Tribunal cannot fulfil the role intended for it. A comprehensive system must be designed that funds claimants to bring and run their claims effectively, so that they can compete fairly against the resources of the Crown. Māori and

the Crown must sit down together in the spirit of partnership to devise a suitable system.

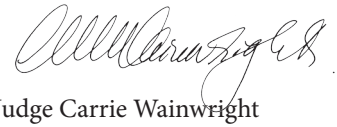
We have recommended that you agree to such a process, and act quickly to get it underway. To cover the period before the new process can be implemented, we recommend that you agree to standardise current arrangements for funding claimants by adopting for all inquiries the protocols that Manatū Wāhine uses in the Mana Wāhine inquiry (with a minor amendment). We also ask you to explore alternatives to funding claimants by reimbursement on production of receipts.

We also recommend that the Waitangi Tribunal Unit within the Ministry of Justice immediately prioritises the provision of resources to enable documents filed in te reo Māori to be translated into English as of right and without cost or inconvenience to claimants or their counsel.

The Crown's response to the circumstances outlined here has been too slow. Claimants are in Waitangi Tribunal inquiries now, and need an urgent response. We ask that you do not delay further but instead implement our recommendations at once.

Kua whakatakotohia te mānuka, arā ko Whakatika ki Runga, tēnā tīkina, hāpaitia ki tōna taumata e tika ana.

Tēnā koutou, tēnā koutou katoa.



Judge Carrie Wainwright
Presiding Officer
Nā Te Rōpū Whakamana i te Tiriti o Waitangi

ABBREVIATIONS

app	appendix
AVL	audi visual links
CA	Court of Appeal
ch	chapter
cl	clause
COVID	coronavirus disease
CFRT	Crown Forestry Rental Trust
CV	curriculum vitae
doc	document
ed	edition, editor, edited by
GST	goods and services tax
LAS	Legal Aid Services
ltd	limited
MACA	Marine and Coastal Area Act
memo	memorandum
MOU	memorandum of understanding
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
p, pp	page, pages
para	paragraph
PC	Privy Council
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
sess	session
SOE	State-owned enterprise
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim
WT	Waitangi Tribunal

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 3060 record of inquiry. A copy of the index to the record is available on request from the Waitangi Tribunal.

CHAPTER 1

INTRODUCTION AND BACKGROUND

Introduction

Parliament enacted the Treaty of Waitangi Act in 1975, so the Tribunal has been conducting inquiries now for the best part of 50 years. The question naturally arises as to why we are only now inquiring into claims concerning the Crown's obligation to fund claimants in this jurisdiction.

The truth is that, while the Crown could theoretically have set up the Tribunal from the outset as a forum that would fund claimants' participation, at that time the Waitangi Tribunal was nothing like it is now, and no one had a sense then of what it would become.

The early years of the Waitangi Tribunal

After the passage of the Treaty of Waitangi Act 1975, the Tribunal got going only slowly.

Under the 1975 Act, the Tribunal had just three members and, under section 4(5), the Department of Maori Affairs was to 'furnish such secretarial, recording, and other services as may be necessary to enable the Tribunal to exercise its functions and powers'. In a schedule to the Act, the only administrative position provided for was a registrar.[1] It was not expected that claimants would be legally represented at Tribunal hearings; any claimant seeking to have counsel appear had first to seek the Tribunal's leave.[2] Only the claimant could appear as of right.

The Tribunal inquired into its first claim in 1978. Joe Hawke was the claimant, and the claim was about fisheries regulations. When the report came out, it was unsympathetic and legalistic. Perhaps unsurprisingly, by the end of 1983 the Tribunal had registered only seven claims.[3] When Paul Temm was invited to accept appointment as a member in 1982, the Attorney-General assured him that the Tribunal 'would sit only one or two days a year and that it wasn't likely to be an onerous task'.[4] In the circumstances, the issue of funding claimant participation simply did not arise.

1. Treaty of Waitangi Act 1975, sch 2, cl 9
2. Treaty of Waitangi Act 1975, sch 2, cl 7
3. Paul Hamer, 'A Quarter-century of the Waitangi Tribunal: Responding to the Challenge', in *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*, ed Janine Hayward and Nicola Wheen (Wellington: Bridget Williams Books Limited, 2004), p 4
4. Paul Temm, *The Waitangi Tribunal: The Conscience of the Nation* (Auckland: Random Century, 1990), p 3; Hamer, 'A Quarter-century of the Waitangi Tribunal' p 4

Then, once its new chairperson Eddie Durie began presiding over inquiries in 1982, the Tribunal 'reinvented itself'[5] and offered Māori claimants an entirely different experience. Hearings were now held on marae, and one witness in our inquiry remembered it as 'a Kaupapa Māori process'.[6] Some claimants were represented by counsel in these hearings, but witnesses recalled that the lawyers acted pro bono, working for weeks without reimbursement.[7]

It was all still low-key and small in scale. The Tribunal then dealt only with contemporary claims, and as we said there were not many. But then there was a more fundamental change.

The huge change of 1985

The Treaty of Waitangi Amendment Act 1985 brought in a slew of important changes, but none as important as the expansion of the Tribunal's jurisdiction. From December 1985, Māori could make claims in the Tribunal about everything the Crown had done and not done all the way back to 1840. Effectively, this legislative change put the whole of colonial history into the Tribunal's work basket.

The Act also expanded the number of Tribunal members to seven, and now made provision not just for a registrar but also for research officers 'or other staff as may be necessary for the efficient operation of the Tribunal'.[8] A new clause in the second schedule provided for the Tribunal to appoint counsel to assist both it (7A(1)) and claimants (7A(2)). Further expansion came in 1988, when the membership was increased to 17[9] and the Tribunal was empowered to appoint a director.[10]

The Tribunal would not appoint a lawyer to assist the claimant under clause 7A(2) unless it was 'satisfied that the matter is of sufficient importance or complexity to warrant such an appointment or that it would be unjust to the claimant not to make such an appointment'. Apparently this happened often, because Tribunal reports give instances in inquiries into Muriwhenua Fishing (1988), Mangonui Sewerage (1988), Ngati Rangiteaorere (1990), Ngai Tahu (1991), Te Roroa (1992), and Pouakani (1993). We are aware also that counsel assisting the claimants were appointed in the Wellington and Taranaki inquiries. However, payments made to counsel did not necessarily meet their full costs. In appointing counsel in the

5. Hamer, 'A Quarter-century of the Waitangi Tribunal' p 4
6. Document A79, para 31(b)
7. Document A79, para 31(c); transcript 4.1.5, p 376
8. Treaty of Waitangi Act 1975, sch 2, cl 9. Such staff have variously been part of business units of the Department of Justice and Department of Courts. After the two merged into the Ministry of Justice in 2003, the Waitangi Tribunal has been supported by the Waitangi Tribunal Unit within the Ministry of Justice (see: Ministry of Justice, *Tāhū o Te Ture: Statement of Intent 2019–2024* (Ministry of Justice, 2020): https://www.justice.govt.nz/assets/Documents/Publications/2019-to-2024-Ministry-of-Justice-statement-of-intent.pdf)
9. Treaty of Waitangi Amendment Act 1988, s 2(2)
10. Provision for the appointment of a director was introduced to the Act by section 6 of the Treaty of Waitangi (State Enterprises) Act 1988. The first director, appointed in December 1988, was Wira Gardiner: 'Tā Harawira "Wira" Gardiner', *Te Manutukutuku*, no 79 (2022), p 8.

Wellington inquiry, for example, the presiding officer remarked that the Tribunal's payment was merely a contribution towards the claimants' legal expenses.[11]

Although the 1985 Amendment Act introduced a mechanism for the Crown to contribute to the costs of paying lawyers for claimants, the possibility of funding claimants themselves still does not seem to have been contemplated. However, it was not long before direct funding of claimants also became a reality – but this change came about through processes that did not emanate from the Crown, as we now explain.

The Advent of the Crown Forestry Rental Trust

The *Lands* case

In March 1987, the New Zealand Māori Council challenged the legality of the Crown's intention to transfer the ownership of Crown land – including Crown Licensed Forests[12] – to Crown-owned companies called State-owned enterprises. The concern was that Crown assets transferred to the State-owned enterprises would be unavailable for the settlement of Māori Treaty claims. The Court of Appeal agreed with the plaintiff's misgivings. It ruled that the transfer of Crown assets to State-owned enterprises would be unlawful unless a system were first established that would protect existing or foreseeable claims concerning the land to be transferred. This litigation is famous because of what the Court of Appeal said about Treaty principles in their judgments. It is called the *Lands* case.[13]

Negotiations between the parties ensued about what kinds of protections for Māori claims would be necessary. They agreed on an arrangement under which the Waitangi Tribunal would have power to order the resumption of the Crown land that was to be transferred to the State-owned enterprises. On every certificate of title there would be a memorial that would say that the land could be resumed to satisfy Treaty claims.[14] Another aspect of the settlement was the introduction of entitlement to legal aid for Waitangi Tribunal claimants.[15]

Settlement of the *Forests* case

Then, in July 1988, the Crown announced its intention to sell its commercial forestry assets. The New Zealand Māori Council, now joined by the Federation of Māori Authorities, challenged the proposed sale as inconsistent with the Court of Appeal's decision in the *Lands* case. In July 1989, they reached agreement to settle the litigation. It is often called the Forestry Agreement. Parliament gave effect to it

11. Wai 145 ROI, memorandum 2.23, memorandum 2.35. In the *Pouakani* report, the Tribunal noted that the claimants' expenses had left them in debt and regretted that it had no jurisdiction to award costs against the Crown. Waitangi Tribunal, *The Pouakani Report* (Wellington: Brooker's Limited, 1993), p 333.

12. Document A77, para 7

13. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641

14. State-Owned Enterprises Act 1986, s 27A (as effected by the Treaty of Waitangi (State Enterprises) Act 1988)

15. Treaty of Waitangi (State Enterprises) Act 1988, ss 13–17

in the Crown Forest Assets Act 1989.[16] The arrangement arrived at was not simple, but for present purposes it is necessary only to focus on the aspect concerning funding of claimants before the Waitangi Tribunal.

The Crown Forest Assets Act established the Crown Forestry Rental Trust. The Forestry Agreement had provided:

> The annual rental payments [for the use of the land beneath Crown Forests] are to be set aside in a fund administered by a trust (to be known as the Rental Trust). The final beneficiaries of the Rental Trust will be the successful claimants and the Crown. Both Māori and Crown interests will appoint trustees to the trust.[17]

The Forestry Agreement provided that where claimants succeeded in establishing their claims before the Waitangi Tribunal, they would receive the accumulated rentals and the Crown Forest land. If claimants did not succeed, the land would revert to the Crown.[18] It was expected at the time that all the forestry claims would be heard and disposed of within a few years.[19]

The Crown Forestry Rental Trust

Under its Trust Deed, the Crown Forestry Rental Trust receives the rental proceeds (accumulated rentals) from the Crown Forestry licences. The Crown Forestry Rental Trust invests the rent, and makes the interest earned 'available to assist Māori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, [Crown Forest] Licensed Land.'[20]

Six trustees run the Trust – three appointees of the New Zealand Māori Council and the Federation of Māori Authorities, and three appointed by the Crown. To the trustees fell the job of establishing a system for funding Waitangi Tribunal claimants, deciding on the criteria for claimants to be eligible to receive assistance, and 'the basis for allocating funds to Claimants'.[21] Anita Miles's evidence before us described how the trustees did this, and the funding system that eventuated.

Ms Miles explained how, under the Trust's funding policies, funding must be distributed to or for the benefit of an Approved Client. Thus, a claimant seeking funding must first become an Approved Client of the Trust. The Trust has established what it calls eligibility and capability criteria, which a claimant must meet.[22] In effect, the Trust takes the view that it cannot afford to fund claimants who are individuals, hapū, or other groups that do not represent a significant proportion of all potential claimants in an inquiry. The practical result is that claimants whose

16. Document A77, paras 10–12
17. Document A77(a), app A, cl 11(i); doc A77, para 13
18. Document A77, para 15
19. Document A77, para 15
20. Document A77(a), app B, cl 2.1(b); doc A77, para 23
21. Document A77(a), app B, cl 10.1
22. Document A77, para 72

claims are not brought on behalf of a significant number of claimants are required to cluster together for the purposes of efficiency.[23]

How much funding the Trustees approve for claimants in an inquiry is not capped, and depends on a number of factors.[24] 'Operations funding' covers all the claimants' costs connected with managing both their own claim and the funding they receive for that purpose. Funding of this description may begin well before hearings begin in any inquiry, 'as claimants are engaged in the interlocutory and research phases of the inquiry'.[25] Funding is also available for research and mapping.[26] Ms Miles says 'the Trust's research contribution is a substantial proportion of the required casebook but not all of it'.[27]

The Waitangi Tribunal is the other funder of historical research for evidence to inquiries. The proportion that the Trust funds varies between inquiries.

Categories of funding

Ms Miles's evidence discloses that the Trust's funding system is broad-ranging. In two tables, she lists what she calls 'fundable activities' under the headings 'Hearings and Judicial Conference Hosting', 'Operations Funding' and 'Research and Mapping'. Because of the claimants' focus in Whakatika ki Runga on the inadequacies of the Crown's system for funding Waitangi Tribunal claimants, and because the Crown Forestry Rental Trust's funding regime is the only comparator, we reproduce here the tables that Ms Miles put in evidence. The tables list the fundable activities, and also comment on what the funding covers (see over).[28]

Other aspects of the Crown Forestry Rental Trust funding regime

The Trust has in place systems and processes to ensure that claimants receive their funding in a timely way. There is a requirement for the Approved Client to exhibit 'capacity, capability, systems and procedures' to manage Trust funding.[29] Entitlement to operations funding is triggered by achieving milestones that are agreed at the outset and set out in a funding contract. The Approved Client must provide monthly financial reports. The Trust will pay some of the funds in advance 'to resource the Approved Client until the first milestone report is due under the funding contract'.[30]

The income the Trust received annually from the investment of the rental payments grew to a high point in 2009 of more than $50 million, but after settlements occurred, dropped to the current level of $2.7 million. The best estimate of the Trust's expenditure to date on its 'approved clients' – claimants before the Waitangi

23. Document A77, para 74
24. Document A77, paras 80–81
25. Document A77, para 81
26. Document A77, para 83
27. Document A77, para 83
28. Document A77, paras 84–85
29. Document A77, paras 99
30. Document A77, paras 100–102

Hearings and judicial conference hosting

Fundable activity	Comment
Judicial conference costs	Funding available for judicial conference costs may include venue hire, catering and/or equipment hire costs.
Judicial conference travel costs	Travel costs for the approved client to get to a judicial conference.
Hearing venue costs	The Trust will consider making contributlons of funding for venue hire, catering, equipment hire (including audio visual equipment), security, and marae accommodation. May include an on-site facilitator role and/or presentation support for tangata whenua evidence.
Hearing site visit	Includes catering, transport costs, pōwhiri, site visit booklet production and printing costs.
Hearing tangata whenua witness costs	Contributions of funding for tangata whenua witness preparation and presentation costs.
Approved client travel to hearings	Travel costs lor the approved client to get to hearings.

Research and mapping – other aspects of the Crown Forestry Rental Trust funding regime

Research fundable activity
Scoping report
Gap-filling research
Full historical report
Oral and traditional history project
Quality assurance or peer review
Expert witness preparation and presentation
Expert advice to claimant counsel

Mapping fundable activity
Mapping scoping project
District overview map book
Imagery and datasets
Approved client mapping project
Mapping for research reports (per report or project)
Gap-filling mapping

Operations funding

Fundable activity	Comment
Office costs	Includes office rent, equipment hire/lease, power, phone, and office supplies. Also includes panui and printing costs, website development/maintenance, and advertising. Travel-related costs.
Project management	The maximum contribution for project management costs per annum could be allocated to any of the following: project management; or claims manager/coordinator; or up to two claims administrators.
Accounting	The maximum contribution for accounting costs associated is based on a monthly amount.
Hearings week coordination	Activities covered include the coordination of and implementng a hearings programme strategy, hearing week presentations, and timetabling for Waitangi Tribunal district inquiries. Activities could be allocated to any combination of the following: project management; and coordination/administration.
Audit	Contribution to an audit of accounts for contracted funding.
Governance hui	Includes a contribution to the approved client's governance board overseeing the preparation and presentation of evidence to the Waitangi Tribunal. These costs may include governance fees or travel costs. Includes venue and catering costs.
Claimant hui	Claimant hui, and may also include management meetings. Includes travel, venue, and catering costs.
Research hui	Hui which could include both oral and traditional, overview, and/or gap-filling research and/or mapping. May include a research facilitator role, travel, venue, and catering costs.

Tribunal that the trustees have judged to be eligible for Trust funding – is $104 million.[31]

A comprehensive funding regime

From all of the information before us about the Crown Forestry Rental Trust's funding of claimants – Ms Miles's evidence including the tables above, and also information the Trust provided later about how much it typically spends on approved clients[32] – we have a good picture of that regime and how it works. We

31. Document A77, paras 40–45

32. The Tribunal sought further information about the Trust's funding after the hearings ended. There was discussion about the terms on which the Trust was prepared to supply information, because the Trust wants to protect the confidentiality of aspects of their funding. Ultimately, they supplied median and expenditure ranges for various categories of spending, but on the basis that the material was confidential to the participants in this inquiry. Because this report will not be confidential, we refer only in general terms to the extra information supplied to the Tribunal and the parties.

can see that in Waitangi Tribunal inquiries where there is Crown Forest land that claimants might potentially have returned to them, the Trust funds what is effectively a wraparound system of support for the participation of claimants and their communities in those inquiries. Its support goes beyond the claimants themselves to providing financial support for staging the hearings, judicial conferences, and site visits of the Waitangi Tribunal. Presumably the Trust funds these costs because it wants to do everything possible to support claimants to 'present' their claims.[33]

The Trust pays for claimants to establish a base in the tribal area that is the focus of the Tribunal's inquiry. The Trust funds 'Office Costs', covering the rent for an office, together with all the equipment required to set it up and money on an ongoing basis to support the claimants' production of pānui, their printing, the running of a website (development and maintenance), advertising, and travel to and from the office. The Trust also funds processes that enable the claimants and their communities to undertake self-management, which includes establishing and/or supporting governance entities to help them run their affairs and hold hui to that end. It pays for claimants to meet and confer and decide on what they need to do to support their claims, including planning what research and mapping they require. It pays for facilitators to help manage these processes. When it comes time for claimants to host the Waitangi Tribunal's hearings, judicial conferences, or site visits, the Trust covers or contributes to the costs of venue hire, catering, equipment, travel costs to get there, security, marae accommodation, a facilitator, and support for tangata whenua witnesses that may include funding for 'witness preparation and presentation costs'. When it comes to evidence, the Trust funds research, quality assurance, expert advice to claimant counsel, and all kinds of mapping to support the case and the evidence.[34] The Trust requires the funded group to be accountable for the funding they receive, and pays for accounting and auditing services for that purpose. It pays for project management to assist approved clients to meet the milestones in their funding contract with the Trust.

All these activities are 'fundable' by the Trust, but may not actually be funded in every case. Where the venue costs are concerned, it appears that the Trust contributes to the costs; its level of contribution varies.

Thus, since the early 1990s when the Crown Forestry Rental Trust funding system really got underway, nearly all Waitangi Tribunal claimants have been eligible for the kind of funding described above. The amount the Trust has spent on this funding attests to the level of funding approved and transferred to claimants, benefiting them and their communities. Their experience of the district inquiries in which they are claimants – and actually also the Waitangi Tribunal's experience of conducting those inquiries – would be very different without such a system in place.

33. Document A77(a), app B, cl 2.1; doc A77, para 23
34. Document A77, paras 84–88

The Waitangi Tribunal's Evolving Approach to Hearing Claims

Inquiries by district

In 1996, the Tribunal implemented its district inquiry system, in which all claims in a geographical area were grouped together in one district inquiry. In the years leading up to that time, however, the Tribunal was in effect moving away from the claim-by-claim single-claimant approach that characterised its early years. As a first step towards a district-wide approach to hearing claims, the Tribunal commissioned a series of reports under the banner Rangahaua Whānui in which historical researchers examined the Māori experience of colonisation in geographical areas around the country and on particular topics. The chairperson of the Tribunal at the time had in mind that the project would create an evidential base that could be used across districts in the future.[35]

For the purposes of district inquiries, the whole country was divided into districts. The initial aspiration was that there would be a more efficient process that would result in the Tribunal getting through all the districts by about 2010. In any year, it would be conducting hearings in three districts, writing three district inquiry reports, and releasing three district inquiry reports. This timeframe was never realised, but district inquiries have been underway now since 1996, starting with Mōhaka ki Ahuriri. District inquiries in Muriwhenua, Porirua ki Manawatū, and the north-eastern Bay of Plenty are still ongoing. Most of the country has now been the subject of a district inquiry report, although in seven districts the Crown and tangata whenua chose to negotiate a settlement of Treaty claims in an area without the Waitangi Tribunal conducting an inquiry first.[36]

Funding in short supply even for basic functions

Part of the reason why some Māori chose to bypass the Tribunal was that the inquiry process – beset by underfunding – moved too slowly. Not only did each Tribunal panel have to deal with complex historical issues, but there had been real limits on the Tribunal's funding ever since it gained its retrospective jurisdiction. In 1995 the Tribunal director resigned in frustration about the lack of resources, and the chairperson remarked that the Tribunal's progress had been slowed by a lack of money. The same year Labour member of Parliament David Caygill claimed the Tribunal was 'starved of resources to do its job well',[37] and in 2001 the National member of Parliament and former Tribunal member Georgina Te Heuheu referred to 'a systematic underfunding of the Tribunal'.[38] Tellingly, a High Court judge observed in giving judgment on an issue arising from a Tribunal inquiry in 2001, that the case 'illustrates the tribunal is not being resourced to

35. Chairperson, Waitangi Tribunal, 'Practice Note', 23 September 1993. This note is appended to every Rangahaua Whānui series report.

36. Waitangi Tribunal, *The Priority Report on the Whakatōhea Settlement Process* (Wellington: Legislation Direct, 2021), p 27. These districts are Central Auckland, South Auckland, Waikato, Waikato Raukawa, East Coast, Wairoa, and Hawke's Bay.

37. *Evening Post*, 20 May 1995 (Hamer, 'A Quarter-century of the Waitangi Tribunal', p 10)

38. *Evening Post*, 26 May 2001 (Hamer, 'A Quarter-century of the Waitangi Tribunal', p 10)

operate, and is not able to operate, in a satisfactory manner. I draw that to the attention of those who carry the responsibility.'[39]

Those with responsibility, however, had been more focused on developing the process to settle Treaty claims directly between Māori and the Crown. In 1994 the Crown calculated the amount it would spend on settling all historical Treaty claims – $1 billion over 10 years – and in 1995 it established the Office of Treaty Settlements to conduct the negotiations. While the so-called 'fiscal envelope' policy was abandoned by 1996, the relativity clauses in the Waikato-Tainui and Ngāi Tahu settlements continued to exert a discipline on how much the Crown was prepared to spend.[40] On that basis, and having developed a standard settlement negotiations process, from the mid-1990s onwards successive governments actively encouraged mandated claimant groups to negotiate settlements directly.[41] Given the political pressure to hasten settlements, the Crown had for a number of years been disinclined to allocate more money to the Tribunal. In 1995, for example, the Minister for Treaty of Waitangi Negotiations, Doug Graham, expressed the view that even giving the Tribunal an extra $10 million a year would not make its process go quickly.[42] In fact, despite the efforts of officials, Ministers, and the Waitangi Tribunal too, hearings and settlement negotiations continue, despite government announcements along the way that it would all be done and dusted first by 2014, and then by 2020.[43]

As with the early part of the Tribunal's history, then, the limits to the Crown's willingness to resource the Tribunal itself hardly allowed for focus in any quarter on direct funding of claimants. Moreover, the Crown Forestry Rental Trust was funding claimants in most inquiries, which meant no one was really thinking about whether the Crown had obligations in this regard.

39. Hamer, 'A Quarter-century of the Waitangi Tribunal', p 10

40. In his 1997 book *Trick or Treaty?*, Minister in Charge of Treaty of Waitangi Negotiations Doug Graham remarked in this regard that 'In reality little therefore has changed': Douglas Graham, *Trick or Treaty?* (Wellington: Institute of Policy Studies, Victoria University of Wellington, 1997), pp 60, 86.

41. Claudia Orange dated this development from 1992: Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004), p 242. Nicola R Wheen and Janine Hayward, 'The Meaning of Treaty Settlements and the Evolution of the Treaty Settlement Process', in *Treaty of Waitangi Settlements*, eds Nicola R Wheen and Janine Hayward (Wellington: Bridget Williams Books with the New Zealand Law Foundation, 2012), pp 20–21; Hamer, 'A Quarter-century of the Waitangi Tribunal', p 11

42. 'Money No Help', *New Zealand Herald*, 25 March 1995. Graham had been encouraging claimants to enter direct negotiations instead of a full Tribunal inquiry since 1992: Claudia Orange, *An Illustrated History of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2004), p 242.

43. 'Treaty of Waitangi Settlements – Time Frame', 27 June 2006, NZPD, vol 632, p 3907; John Key, 'Towards 2014: Speech at Te Kōkiri Ngātahi National Hui to Progress Treaty Settlement', 22 April 2009, https://www.beehive.govt.nz/speech/towards-2014-speech-te-k%C5%8Dkiri-ng%C4%81tahi-national-hui-progress-treaty-settlements accessed 19 October 2022; Leigh-Marama McLachlan, 'Crown Admits it will Miss Treaty Settlements 2020 Deadline', 26 November 2019, https://www.rnz.co.nz/news/te-manu-korihi/404145/crown-admits-it-will-miss-treaty-settlements-2020-deadline

Kaupapa inquiries

From about 2010, the Waitangi Tribunal began to focus on the registered claims that it had not inquired into as part of the district inquiries. The Tribunal is of course under a legal obligation to inquire into all the claims in its registry. As the chairperson put it in launching the kaupapa inquiry programme,

> In the past, claimants with kaupapa grievances have been able to have them heard only under urgency or within the Tribunal's district inquiry programme. From the 1990s, the Tribunal has prioritised the hearing of claims on a district basis in order to assist the Crown and claimants to achieve settlement of historical claims. . . . As a result, some kaupapa claims have been waiting for many years to be heard.[44]

Analysis of the hundreds of remaining claims revealed that many of them alleged breaches of the principles of the Treaty in certain spheres of Crown activity or policy. It was resolved that the next phase of the Tribunal's work would be in inquiries organised by subject matter, with each inquiry dedicated to a particular topic or kaupapa.

Kaupapa inquiries really began from about 2012, but they were not formally identified as such until the chairperson's announcement in 2015. The National Freshwater and Geothermal Resources Inquiry, which commenced in 2012, started as a priority inquiry to hear claimants objecting to the Government's proposed sale of water rights owned by State-owned enterprises. The Military Veterans Kaupapa Inquiry commenced in 2014. Stage 1 of the Health Services and Outcomes Inquiry was initiated as a kaupapa inquiry in 2016, but the Marine and Coastal Area (Takutai Moana) Act Inquiry, which began in the same year, was initiated by an application for an urgent inquiry.

These were all kaupapa inquiries in substance, whether or not they were labelled as such. They had in common this critical characteristic: the Crown Forestry Rental Trust could not fund the direct costs of claimants because no Crown forest land was at issue. Claimants' lawyers remained eligible for legal aid.

What to do in the absence of Crown Forestry Rental Trust funding?

Many parts of the Crown connected to this issue. There were the various agencies whose activities were the focus of the kaupapa inquiries. There was the Waitangi Tribunal Unit within the Ministry of Justice. There was the Ministry of Justice itself, and more latterly the new Office of Crown–Māori relations, Te Arawhiti. Gradually and severally, all the parts came to the realisation that in the absence of Crown Forestry Rental Trust funding, the Crown probably needed to assemble a response to a new set of circumstances. The Crown of course had available to it the example of the Crown Forestry Rental Trust and the sophisticated system it developed through experience as a funder to support claimants before the Waitangi Tribunal. That model was not taken up.

44. Memorandum of the chairperson concerning the kaupapa inquiry programme, 1 April 2015, p 3

And yet we heard from claimants in this inquiry that in order to participate fully in inquiries they need support of a kind which, on close examination, looks remarkably like what Anita Miles told us the Crown Forestry Rental Trust provides.[45] Claimants say they need assistance to meet the costs of meeting together; the costs of establishing administrative structures to gather and share information; the costs of planning and preparing evidence; the costs of travel ā rōpū[46] to attend meetings with counsel; the costs of attending hearings ā rōpū and remaining for the whole hearing (not just when giving evidence or when their claim is being heard); the costs of managing the provision of services to people with disabilities so that they can participate fully; and the costs of arranging the translation of written material from Māori into English.[47] At least some of the assistance would need to be provided as payment in advance, because many claimants do not have the means to pay first and seek reimbursement later.

The Crown has yet to accept or act upon the need to provide comprehensive assistance like this, however. In this report, we describe how the Crown cobbled together various kinds of responses to the need to fund claimants' participation over a period of about a decade.

What claimants characterised as the inadequacy of the Crown's response and its negative effects on them led to an application for an urgent Waitangi Tribunal hearing into claimant funding in September 2020. The Tribunal's deputy-chairperson adjourned his decision on whether to grant an urgent hearing because the Crown assured him that it was actively working to design a solution to the claimant funding problem, and he was minded to see how that worked out. At the end of January 2021, the Crown informed the Tribunal that it was expected that the project team working on claimant funding would report to Ministers in March 2021.[48] Before us the Crown presented evidence of that team's report to Ministers in May 2021.[49] As we will relate later in more detail, the way forward that officials recommended in the paper was stymied when one of the Ministers to whom they reported was not prepared to proceed with the plan they proposed.[50] Officials went back to the drawing board.[51]

The claimants heard nothing of this and told the deputy chairperson in July 2021 that there had been no progress.[52] In August 2021, the deputy chairperson informed claimants that this Justice system inquiry: Te Rau o te Tika was about to get underway and would address the claimant funding issues.[53]

45. Document A77
46. As a group.
47. Ms Miles did say, though, that the Trust has not yet embarked on funding the provision of accessible formats for evidence, nor the translation of witnesses' briefs from Māori to English: doc A77, paras 89–91.
48. Wai 3006 submission 3.1.39, p 2
49. Document A67(a), pp 10–11
50. Document A67, para 27; doc A67(a) (supporting papers of Rajesh Chhana), p 14
51. Document A67, para 31; transcript 4.1.4, p 294
52. Wai 3006 submission 3.1.41, p 2
53. Memorandum 2.5.1

Once we were apprised of this background, we elected to convene a mini-inquiry to inquire into the Crown's obligations to fund claimant participation in Waitangi Tribunal proceedings. We called the mini-inquiry Whakatika ki Runga, a phrase that indicates that this is work we need to do before we embark on the rest of the inquiry.

The Structure of this Report

In chapter 2, we answer the question 'Do claimants before the Waitangi Tribunal have a right to funding to enable their full participation?' We answer that question in the affirmative, and the chapter addresses the sources of the right.

Chapter 3 asks whether the Crown accepts that it has an obligation to fund claimants' participation. As a matter of principle, the answer to this question is 'no', although in recent times the Crown has provided some funding. We track the Crown's approach over time to funding claimants in circumstances where Crown Forestry Rental Trust funding was unavailable. We come to the present, and look at the Crown's stance on the nature and extent of its responsibility to fund claimant participation.

The Crown's own decision-making processes and funding of claimants is described in detail in chapter 4. Here we outline the 'lead agency approach'. This has ended up being how the Crown has funded claimants in kaupapa inquiries. We look at how that has been working, and assess its adequacy as a Crown response. We look too at the officials' attempts to move on from the lead agency approach, and how and why they have not succeeded.

In chapter 5, we investigate the legal aid regime that applies to Waitangi Tribunal claimants, and assess its adequacy. We explain our unusual approach there to findings and recommendations, which arises from two considerations. The first is the fact that we have yet to inquire into legal aid in other jurisdictions, and we are disinclined to recommend legislative change of one area of the Act only before considering the regime overall. Secondly, we do not want to pre-empt the engagement between Māori and the Crown on the topic of claimant funding in the Waitangi Tribunal, which we anticipate will include consideration of legal aid.

We conclude in chapter 6, and set out there our findings and recommendations.

CHAPTER 2

THE SOURCE OF THE RIGHT TO CROWN FUNDING

Introduction

In this chapter, we answer the first question posed in the statement of issues for Whakatika ki Runga:

> Do claimants before the Waitangi Tribunal have a right to funding to enable their full participation? If yes, from what does the right derive? What is the content of the right? What is the Crown's obligation to fulfil the right?[1]

The Treaty of Waitangi Act 1975

The passage of the Treaty of Waitangi Act in 1975 was a landmark in the history of Aotearoa. It gave the Treaty of Waitangi status in law and policy that it had not had from at least the beginning of the twentieth century.

That the statute is about the Treaty of Waitangi, its status, and its principles is captured in its name and its short title:

> An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty.

The Act created the Waitangi Tribunal. This was the means by which Parliament chose to observe and confirm the principles of the Treaty. In doing so, it recognised that the Crown had obligations to Māori under the Treaty, and that the time had come to address alleged breaches of those obligations as they arose. The Act makes the Treaty and its principles law for the purposes of the Tribunal's unique jurisdiction, and empowers the Tribunal to assess Crown action in light of them.

We regard it as a corollary of the creation of the Waitangi Tribunal under the Treaty of Waitangi Act that the Crown also assumed responsibility for making the processes of the Waitangi Tribunal accessible for claimants in a realistic and practical way. That responsibility also arises under the principles of partnership and active protection, of which more later. Simply, if claimants struggle to participate in Tribunal processes, the aspirations of the Act will not be realised. Claimants are less able – or possibly not able – to pursue their claims, and less able to do it in

1. Appendix 2.5.9(a)

a way that is effective and meaningful for them and those whom they represent. Inherent in the responsibility that the Crown has assumed is a duty to understand the cultural and social context within which Māori bring claims to the Waitangi Tribunal, and to work with claimants to facilitate their full participation.

Where the Crown does not provide the means for claimants to participate easily and effectively and in a manner that is culturally appropriate, that in itself both undermines Parliament's intentions in the Act and breaches the principles of the Treaty. The claimants in Whakatika ki Runga allege such breaches.

Other Sources of the Crown's Obligation to Fund Claimants' Participation

Te tino rangatiratanga

Te Kapotai sought an urgent hearing into claimant funding in the Waitangi Tribunal in 2020.[2] In Whakatika ki Runga, counsel for Te Kapotai and Ngāti Hine filed joint opening submissions and said that these claimants

> have been unable to freely and fairly access the Tribunal for the last seven years because the Crown has not had a fair and reasonable claimant funding regime in place for kaupapa and urgent inquiries. Throughout that time the Crown has been on notice that the lack of claimant funding was causing difficulties for the claimants in their participation in the Tribunal. The Crown has failed to work in genuine partnership with the claimants to develop an appropriate funding solution. This failure amounts to a breach of Te Tiriti o Waitangi and its principles as well as an impediment to their access to justice.[3]

She identified taking claims through the Waitangi Tribunal as an exercise of rangatiratanga, laying out a pathway to resolving problems and disputes with the Crown: 'It is an assertion of the collective decision and right of the hapū or tribal group to chart their own course and determine their own outcomes.'[4]

She said that, where the claimants lack the funds to do this, the Crown is under a duty 'to fund the claimants to enable the exercise of rangatiratanga'.[5] Counsel cited passages from a number of Waitangi Tribunal reports in support of the proposition that it is incumbent on the Crown to work with claimants to devise how

2. Wai 3006 ROI, statement of claim 1.1.1
3. Submission 3.3.1, para 1.3 (Wai 1464/3006 claims of Te Kapotai and Wai 862 by Te Rūnanga o Ngāti Hine on behalf of Ngāti Hine)
4. Submission 3.3.1, para 2.3
5. Submission 3.3.1, para 2.3

to do this.[6] It involves engaging with claimants' actual circumstances,[7] not making assumptions,[8] and respecting tikanga:

> If the Crown is to work with Māori communities in a way that allows them to exercise tino rangatiratanga, it must . . . 'be able to identify and understand the customs and cultural preferences of those communities'.[9] This requires the Crown to understand, respect, and engage with the tikanga of the various iwi and hapū it works with.[10]

We saw documents presented in evidence that suggested that the Crown may have taken the view, apropos the creation of Te Arawhiti as the Crown agency charged with managing Crown–Māori relations, that the time had come for the Crown to deal directly with Māori about important issues without the involvement of the Waitangi Tribunal.[11] The question was raised as to whether this view influenced the development of policy for funding Māori claimants, and the long delay in implementing coherent and comprehensive measures. Warren Fraser from Te Arawhiti strenuously denied that the Crown was ambivalent about the participation of claimants in kaupapa inquiries, and asserted that the Government regards as valuable the reports of the Waitangi Tribunal on contemporary issues.[12]

Whatever the Crown's view of the Waitangi Tribunal – a topic we examine in chapter 3 – claimants were unequivocal that how they engage with the Crown is a

6. Counsel cited the stage one report of the Te Raki inquiry, *He Whakaputanga me te Tiriti*, where it said that under te Tiriti the rangatira agreed to share power and authority with Britain as equals with different spheres of influence. How this would work in practice was to be negotiated over time on a case-by-case basis: submission 3.3.1, para 2.4; see Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wellington: Legislation Direct, 2014), p 529.

7. The Tribunal for the inquiry into Māori prisoners' voting rights affirmed the finding of the Ngati Awa Raupatu Tribunal that when 'exercising its kāwanatanga, the Crown needs to be fully informed about, and consider, the likely or unintended consequences of its actions': Waitangi Tribunal, *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Lower Hutt: Legislation Direct, 2020), p 12 (submission 3.3.1, para 2.8).

8. Counsel also referred to the criticism of the Crown in the Marine and Coastal Area (Takutai Moana) Act inquiry stage one report, that it had devised an approach to funding for applications that involved applicants contributing to their application costs, without ascertaining whether and to what extent this would place a financial burden on applicants which could amount to an 'insurmountable obstacle to [their] access to justice': submission 3.3.1, para 2.7, see Waitangi Tribunal *The Marine and Coastal Area* (*Takutai Moana*) *Act Inquiry Stage 1 Report* (Wellington: Legislation Direct, 2020), p 22.

9. Waitangi Tribunal, *The Te Arawa Settlement Process Reports* (Wellington: Legislation Direct, 2007), p 21

10. Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Lower Hutt: Legislation Direct, 2020), p 11; submission 3.3.1, para 2.10

11. Document A81, p 1282; Document A72(a), pp 45, 47, 54, 99; 'Practical Work Programmes for Delivering Te Arawhiti Responsibilities', Cabinet paper from Minister for Māori Crown Relations: Te Arawhiti and Minister for Treaty of Waitangi Negotiations to Chair, Cabinet Māori Crown Relations: Te Arawhiti Committee. https://tearawhiti.govt.nz/assets/Publications/06b6209b89/Proactive-release-Practical-Work-Programmes-for-Delivering-Te-Arawhiti-Responsibilities.pdf accessed 20 October 2022

12. Transcript 4.1.4, pp 115–135

matter for them: 'The claimants consider that the choice to pursue their claims in the Waitangi Tribunal is a decision made under rangatiratanga.'[13] Counsel for Mr Hurimoana Dennis and Ngāi Tamahaua Hapū said:

> The exercise of Tino Rangatiratanga comes in many forms and includes the right for Māori, whānau, hapū and iwi to determine that they will bring a claim in the Waitangi Tribunal in an attempt to hold the Crown to account for its breaches of Te Tiriti and those guarantees. To the extent that there may be barriers to their participation, including a lack of funding and resourcing to participate, there will be a duty upon the Crown to adequately fund and support the claimants who have elected the Waitangi Tribunal as their preferred mode of addressing their claims.[14]

She went further, saying in her closing submissions on the exercise of tino rangatiratanga that the Crown's obligation to provide resources to claimants who elect to go to the Waitangi Tribunal is constitutional in nature. Emphasising the importance of the Tribunal's role in balancing the rights and interests of Māori against the obligations of the Crown, she said that Te Tiriti is a founding document of Aotearoa, establishing a constitutional relationship between Māori and the Crown. Thus, the rights that flow to Māori under Te Tiriti should be seen as constitutional rights.[15]

The principle of active protection

In closing submissions, counsel for several Māori prisoners and other Māori from Northland[16] said:

> the Crown has an obligation to be proactive in its protection of Māori interests. That must surely include facilitating Māori participation in the mechanism specifically constituted to protect those interests. Namely, the Waitangi Tribunal.
>
> . . . Claimants are already on the back-foot in respect of the impacts of colonisation and the loss of land and resources that came with it. Making a claim to the Tribunal is often the only option claimants have for addressing their grievances and claimants are incredibly passionate and motivated to bring their claims. But there is a significant power and resource imbalance between claimants and the Crown. If the purpose of the process is to rectify the prejudice, more resources need to be provided to claimants to enable them to pursue their claims.[17]

13. Submission 3.3.41, para 3.7
14. Submission 3.3.37, para 14
15. Submission 3.3.37, paras 14–15
16. Wai 2906: Edwin Tuterangi Whiu on his own behalf and on behalf of other prisoners from Te Tai Tōkerau; Wai 3081: Brownie Joseph Harding on his own behalf and on behalf of other Māori inmates from Northland; Wai 3128: Akuhata Pereene Hita on his own behalf on and behalf of other Māori from Northland; and Wai 3130: Patrick Halliday on his own and others' behalf.
17. Submission 3.3.42, paras 33, 35

These submissions go on to characterise the Crown's failure to provide funding as breaching the Treaty principles of partnership and active protection.[18] The failure is exacerbated by the fact that the need for funding was raised with the Crown 'consistently by claimants and the Tribunal alike'.[19] This is a quotation not from claimants' evidence but from the evidence of Mr Fraser, a senior official in Te Arawhiti. Mr Fraser's evidence dates the emergence of the issue of Crown funding of claimants from 2015, during the Military Veterans Kaupapa Inquiry.[20] He described how the unavailability of Crown Forestry Rental Trust funding for oral hearings in that inquiry[21] led to the Waitangi Tribunal asking the Crown whether it was prepared to fund the costs of holding hearings and the production of research.[22]

We observe here that Mr Fraser was mistaken when he cited the Military Veterans Kaupapa Inquiry as the first time claimant funding was raised with the Crown. It is in the next chapter that we recount what we know of the history of the call for Crown funding of claimant and Tribunal hearing costs. At this juncture, we simply note that it goes back further than 2015.

It is trite law now to observe that the Crown must exercise a duty of active protection: *active* is the key element. The Crown will not be fulfilling this duty if it does not notice and act upon issues in its Treaty relationship with Māori.

In its inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011, the Tribunal found the Crown in breach of its duty of active protection in a number of ways. Claimant counsel drew our attention to the finding that the Crown failed actively to protect Māori when it did not ascertain whether only partially covering claimants' costs would cause a financial burden that would affect their access to justice. In closing submissions counsel cited that Tribunal's comment on the need for the Crown to ensure access to justice for Māori because '[w]ithout such access, the danger is that Maori interests will become, as they have before, overly susceptible to political convenience or administrative preference'.[23]

Also on the Crown's duty to protect Māori interests actively, claimant counsel referred to the Tribunal's *He Aha i Pērā Ai? The Māori Prisoners' Voting Report*. There, the Tribunal found that when 'exercising its kāwanatanga, the Crown needs to be fully informed about, and consider, the likely or unintended consequences of its actions'.[24]

18. Submission 3.3.42, paras 35–38
19. Document A72, para 13
20. Document A72, para 18
21. Document A72, para 19
22. Document A72, para 20
23. Submission 3.3.1, para 2.5. Counsel quoted from *The Marine and Coastal Area* (*Takutai Moana*) report, which was quoting the *Fisheries Settlement Report 1992*: Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 22; see also Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: GP Publications, 1992), p 9.
24. Submission 3.3.1, para 2.8; see also Waitangi Tribunal, *He Aha i Pērā Ai? The Māori Prisoners' Voting Report* (Lower Hutt: Legislation Direct, 2020), p 12

Thus, we see that a duty of active protection requires the Crown to provide resources for Māori to participate in legal matters affecting them – and this must surely apply at least to their own Treaty of Waitangi claims. The duty of active protection requires the Crown to know what kind of participation is going to work for Māori, and what resources will be required. This speaks of course to the process for developing a suitable regime.

Involving Māori in the development phase of the Crown's policies for funding claimants does not seem to have been contemplated by the government agencies involved. This is surprising.[25] To seek Māori input in the development phase is not only appropriate for a relationship in the nature of partnership, but it is also practical as a means of ensuring that officials know what kind of solution will answer the needs at play. We saw an example before us, where the interim guidelines for claimant funding that various departments used make no provision for funding to be available upfront where claimants themselves cannot afford to carry the cost of the expenses and be reimbursed later. Officials did not think of this issue, although the Crown Forestry Rental Trust's funding regime made provision for payment in advance. Unlike the Crown, the Crown Forestry Rental Trust developed its processes through experience with claimants in the field.

As we shall see, the approach taken – that officials needed to work up a cross-agency proposal, get Ministers' approval, and then put it out to Māori for consultation – was neither effective nor Treaty-compliant.

Three principles relating to access to justice in the Waitangi Tribunal

The Crown's approach, and its justification of its approach in submissions,[26] was far removed from the understanding of the Crown's obligations to provide resources to Māori claimants that Professor Jane Kelsey outlined for us. She derived three principles from Te Tiriti o Waitangi that relate to access to justice in the Waitangi Tribunal:

> *Mana motuhake:* the mana of Māori to control and manage according to their own preferences, which requires the development of a tikanga-based regime for access to justice, especially for the resolution of Crown breaches of its Tiriti obligations. . . .
> *Active protection:* necessitates a process of shared decision-making with Māori in accordance with their tikanga to identify means to ensure the protection and effective exercise of their tino rangatiratanga or mana Motuhake. . . .
> *Equity:* in the third article of Te Tiriti, the principle of equity supplements the rights guaranteed to Māori under the second article, and ensures Māori rights to equal citizenship in a substantive sense. That includes recognising the inherent inequalities Māori face in the Crown's common law system, including at the Waitangi Tribunal.

25. The Crown's engagement spectrum (5 March 2019, Office of the Minister for Māori Crown Relations: Te Arawhiti, *Building Closer Partnerships with Māori* Cabinet paper, 5 March 2019, Cabinet Office MCR-19-MIN-0004 Cabinet Committee Minute)

26. These were usefully summarised in the closing submissions filed by Tukau Law: submission 3.3.41, paras 2.11–2.27.

> . . . [T]he Crown has a monopoly over decisions, including resources, that can deny Māori access to substantive justice. That prejudice is especially profound with the Waitangi Tribunal where the Crown has a conflict of interest in minimising the risks and costs of adverse findings and recommendations.[27]

We like Professor Kelsey's articulation of these access to justice principles. We note and approve the emphasis on mana motuhake and shared decision-making.

International law

Counsel Ms Panoho-Navaja brought to our attention another source of right to Crown funding of Māori claimants in the Waitangi Tribunal: the United Nations Declaration on the Rights of Indigenous Peoples, and its affirmation in the preamble and article 37, of states honouring their treaties with indigenous peoples. New Zealand's endorsement of this Declaration 'means it has further committed to honouring Te Tiriti by taking concrete measures to ensure [its] implantation and promotion'.[28] Because the Waitangi Tribunal is the only forum in which Māori can bring claims regarding policies, actions, and omissions of the Crown that breach the Treaty, Ms Panoho-Navaja argued '[i]t is clear that international law supports the need for claimant funding that promotes meaningful participation by claimants in the Waitangi Tribunal'.[29]

The Crown's own acknowledgement of claimants' right to funding

In the briefing on claimant funding that officials prepared for the Ministers for Māori Crown Relations, Justice, and Māori Development on 6 May 2021, officials said there were four reasons why they considered there was 'merit in seeking Cabinet's agreement to the Crown contributing to claimant costs'.[30] These reasons, which we now summarise, identified important factors that should indeed motivate the Crown to work actively to devise a regime to fund claimants' participation in the Waitangi Tribunal.

First, officials informed Ministers that access to justice principles 'suggest the Crown has a responsibility to ensure claimants' effective participation in a process to investigate and resolve grievances derived from possible breaches of the Treaty'. The paper states that claimants 'struggle' to pay for preparing evidence and attending events, with the problem more acute in some inquiries. The particular difficulties of disabled people are mentioned. Although lawyers are funded through legal aid, 'direct claimant participation is more consistent with tikanga, and can have restorative justice effects'.

Secondly, the paper cites consistency with the Treaty as a reason for funding claimants. It says that claimants identify the Tribunal as the core mechanism for resolving Treaty grievances, and the decision to go to the Tribunal as an exercise

27. Document A79, para 11
28. Submission 3.3.37, para 41
29. Submission 3.3.37, para 42
30. Document A72(a), pp 163–164

of rangatiratanga. It tells Ministers that claimants say that Crown funding is necessary to fulfil the Crown's duties of active protection, including the duty to protect rangatiratanga.

The paper asserts as its third point that the Crown has an interest in ensuring that the Tribunal – and the Crown – have 'the full range of evidence needed to make decisions'. This may not occur '[w]here a lack of funding prevents or severely limits claimants' participation in the Tribunal'.

The final reason offered is consistency in Waitangi Tribunal proceedings with the level of support provided to claimants in historical district inquiries and in direct negotiations with the Crown through the Crown Forestry Rental Trust and 'the Treaty settlement negotiations claimant funding scheme'.

We describe in chapters 3 and 4 how Ministers did not agree to proceed down the track advocated in this briefing paper. However, this paper and other memoranda that preceded it[31] do indicate that the Crown – both officials and Ministers – knew and understood the claimants' arguments. Officials certainly accepted, and advised their Ministers, that there was a basis in law and good government for the Crown to fund Waitangi Tribunal claimants.

The Crown Forestry Rental Trust, claimants' rights, and the Crown

We explained in chapter 1 how the Crown Forestry Rental Trust came to take on the role of funder of Waitangi Tribunal claimants' costs of participation. The Trust's funding policies and practices developed and expanded in the 1990s. Since that time, claimants in nearly all inquiries have received financial support from the Trust. We trace that history in chapter 3.

One of the themes of this report is how the existence and extent of the Crown Forestry Rental Trust's funding has been a large part of why Waitangi Tribunal parties, including the Crown, have only relatively recently addressed the question of the Crown's role as funder of claimants' participation. The record shows that the question addressed in this chapter – the source of claimants' right to funding from the Crown – remains a question that the Crown addresses only obliquely in relation to Waitangi Tribunal claimants. Chapters 3 and 4 describe how the Crown has occasionally agreed to fund claimants' costs when the Crown Forestry Rental Trust's funding was temporarily unavailable for example, or where other particular circumstances apply. But we look in vain for a thread of principle through the Crown's decisions about this. From our examination of the evidence, expedience motivated the Crown rather than acceptance that the claimants have rights.

Having said that, we can see in the internal briefing papers – like the one noted above – that the Crown prepared as it focused in 2020 and 2021 on formulating a policy to deal with claimant funding in kaupapa inquiries that some officials had a very good grasp of the relevant issues. We discuss those documents in chapter 3, and observe how even though officials got close to articulating a way forward, their endeavours were foiled by inter-agency skirmishing about who should take responsibility, and by one Minister's reluctance to grasp the nettle. Also, even the

31. See Te Arawhiti briefing papers at A72(a) pp 82, 89 and 97

best-informed officials conceived the policy challenges as being for the Crown to solve, intending to engage with Māori at some time in the future, but only after the Crown had the plan sorted.

In opening and closing, the Crown identified partnership and active protection as the primary Treaty principles engaged in Whakatika ki Runga.[32] However, the Crown's view of how these Treaty principles and the duty of good faith work in practice accords with how we saw officials formulating policy in those briefings and memos in 2020 and 2021. That is, what to do and how to do it is first and foremost for the Crown to decide. According to Crown counsel, even consultation – by no means the highest expression of engagement with Māori – is

> not an automatic or immutable requirement: the need for it, and the method and degree of consultation, will depend on the facts of each particular case. Where consultation occurs, the Crown is not required to consult with every individual or group who may be affected by a decision. Nor does consultation require the Crown to reach a position that consultees agree with.[33]

There was more in this vein – a description of the Crown's obligations that seeks to depict them as conditional and optional, depending on the subject matter.

We look in vain for acknowledgement from the Crown that the formulation of policy about a funding system for Māori claimants in the Waitangi Tribunal is subject matter that cries out for maximum Māori involvement. Even if the Crown is correct that the application of these principles allows for a range of Crown responses, this is a context where consultation is the very least of what the Crown's duty entails, and would certainly not be optional. In the claimants' view, 'consultation' of any kind would fall short, because what this context demands is co-design of policy from the ground up.[34]

The Crown sees its duty to support claimants in the Waitangi Tribunal as being an access to justice issue. It quotes from various Tribunal reports that link the right to justice to article 3 of the Treaty, the principle of equity, and also to the Crown's duty of active protection.[35] Against that backdrop, the Crown says,

> the Crown's position is that the provision of legal aid, although necessarily subject to certain limitations, is the means by which the Crown protects Māori rights of access to justice. In the context of Waitangi Tribunal proceedings, the Crown does this in a way that significantly relaxes certain criteria that otherwise exist in respect of the provision of legal aid in other types of civil litigation . . . The provision of legal aid in Waitangi Tribunal proceedings is therefore a form of active protection that promotes access to justice.[36]

32. Submission 3.3.23, para 9; submission 3.3.47, para 72
33. Submission 3.3.47, para 76
34. Submission 3.3.11; transcript 4.1.3, p 332
35. Submission 3.3.47, paras 79–81
36. Submission 3.3.47, para 82

In chapter 5, we agree with the Crown that in some important respects the administration of legal aid for Waitangi Tribunal claimants is less exacting than for litigants in other civil jurisdictions. But does the Crown's obligation to support claimants' participation extend beyond paying for their legal representation? The Crown's answer to this question is not entirely clear.

The Crown's closing submissions deal quite fully with the sources of the obligation to furnish legal aid[37] but do not talk about the source of claimants' right to funding to facilitate their participation in Waitangi Tribunal processes. Rather, the submissions move to the heading 'Claimant funding in kaupapa processes', and describe how the Crown 'investigated the issue of claimant funding in kaupapa inquiries'. Crown counsel cites 'the policy development process undertaken to date by the Crown to address the issue of claimant funding on an all-of-Government basis'[38] as evidence of the Crown's Treaty-compliant behaviour. We agree that the documentary evidence of that policy process does show that in recent times certain officials grasped what the Crown needed to do to deliver a claimant funding system that would have gone a long way to meet claimants' needs. However, they could not deliver it. Hearing the Crown's witnesses and reading the supporting papers to their evidence we think there are a number of reasons why an all-of-government approach to this issue remains elusive. Perhaps at base there is a lack of conviction about the need for claimant funding. Or perhaps it was just too hard to get it over the line. Officials were able to articulate good reasons to support it, but neither they nor their ministers really wanted to take ownership of an initiative that is unlikely to be politically popular and involves finding new money. The Treaty imperatives involved were not enough to get past this reluctance. We outline how this played out in chapter 3.

We are very clear that in this jurisdiction – created to give effect to the Treaty of Waitangi – the Crown's duties as a good Treaty partner engaged in good government extend beyond legal aid to ensuring that claimants themselves have the means to participate fully in this process in a way that works for them culturally.

37. Submission 3.3.47, paras 77–90
38. Submission 3.3.47, para 91; #3.3.047 at [91] ff

CHAPTER 3

HAS THE CROWN ACCEPTED ITS OBLIGATION TO FUND CLAIMANTS' PARTICIPATION AND, IF SO, WHEN, WHERE, HOW, AND TO WHAT EXTENT?

Introduction

This chapter asks whether the Crown has accepted it has an obligation to fund claimants' participation in Tribunal processes. Our answer to this question is a qualified 'no'. In this chapter we will explore the extent to which the Crown has accepted in principle that it must fund claimants' full participation in the Waitangi Tribunal, and the ways in which it has not. The problem is that in every way the Crown's response has been partial and inadequate, and in that lies its failure to take on board the imperative of providing claimants with the assistance they need.

The Crown was party to the settlement agreements following the *Lands* case and the *Forests* case that saw the Māori parties negotiating the introduction of legal aid and direct funding to claimants for the preparation and presentation of their Waitangi Tribunal claims. Almost all of the Tribunal's work since 1996 has been district inquiries, and in almost all districts there was Crown forest land that triggered Crown Forestry Rental Trust funding.

Although there were some earlier complaints about the lack of funding for claimants,[1] we say that it was from 2013 that the Crown was on notice that when Crown Forestry Rental Trust funding was not available to support claimants, the situation of claimants and the progress of inquiries would be sorely affected. We say that because in 2013, the Crown Forestry Rental Trust had internal difficulties that meant it was suddenly unable to commence its funding of the second stage of Te Paparahi o Te Raki (Northland) Inquiry. We explain those circumstances later in this chapter, but what happened was that Cabinet approved funding for the Crown to essentially take over the role that the Crown Forestry Rental Trust had played as funder of the claimants' and Tribunal hearing costs. Looking back on those circumstances now, we can see that the Crown's decision to step into the gap as funder was simply a practical response to the need to keep the inquiry going. There is no evidence that it had in mind any Treaty duty to fund claimants. This impression is confirmed by what happened when the kaupapa inquiries came on stream.

As we said in chapter 1, the kaupapa inquiries really began with the National Freshwater and Geothermal Resources Inquiry in 2012, but the inquiry into

1. Waitangi Tribunal, *Te Manutukutuku*, no 39 (December 1996), p 2, https://waitangitribunal.govt.nz/assets/Documents/Publications/Te-Manutukutuku-Issue-39.pdf

Military Veterans was the first one to be called a kaupapa inquiry. The chairperson of the Waitangi Tribunal did that on 1 April 2015.[2]

The kaupapa inquiries involved no claims to Crown forest land. Although the Te Raki situation should have alerted the Crown to the consequences of the absence of Crown Forestry Rental Trust funding in an inquiry, as we said no principled thinking occurred. But now the question was irresistible: without the Crown Forestry Rental Trust, who would fund all those hearing and claimant costs on an ongoing basis?

First, we revisit the Crown Forestry Rental Trust's role in meeting claimants' needs in district inquiries since the mid-1990s. Secondly, we track the Crown's approach over time to funding claimants in circumstances where the Trust's funding was unavailable.

This sets the context for the present, which we come to in the third section. The evidence shows no official Crown endorsement for funding claimants in inquiries without Crown Forestry Rental Trust funding, such as the kaupapa inquiries. Although officials deliberated about this topic extensively from about 2018,[3] there is as yet no formal policy on claimant funding. The only Cabinet decision on the topic of kaupapa inquiries was a Cabinet Office Circular of April 2019, which communicated Cabinet's decision that lead agencies should fund their own participation in kaupapa inquiries from baseline funding. Funding claimants was not mentioned.[4]

Otherwise, there is a document that did not go through Cabinet, but which lead agencies nevertheless refer to, which is the 'Guidance for lead agencies on the interim provision of claimant funding in kaupapa and contemporary inquiries' (which we refer to as 'interim guidance') for claimant funding that Te Arawhiti released in April 2021.[5] This came into existence after different agencies began to standardise what claimant costs the lead agencies should meet. The May 2021 attempt to get Ministers to take to Cabinet a paper on claimant funding did not persuade them to do so.

The Crown Forestry Rental Trust's Funding of Claimants

From the 1990s, the Crown Forestry Rental Trust's role as funder of claimants in Waitangi Tribunal inquiries gradually expanded. In chapter 1, we set out the tables in Anita Miles's evidence about the categories of expenditure that the Trust funds.[6] These indicate that, over many years, the Trust developed a model to substantially meet claimants' need to bring claims in a culturally appropriate way in nearly all inquiry districts over a period of almost 30 years. This continues in the Porirua ki Manawatū and renewed Muriwhenua land inquiries to the present day. As well as

2. Wai 2500 ROI, memo 2.5.1, para 2.1
3. Document A72(a), p 33
4. Document A72(a), p 42
5. Document A72(a), p 154
6. Document A77

covering claimants' costs, the Crown Forestry Rental Trust funded a considerable proportion of the costs of running hearings, judicial conferences, and site visits.

When the Forestry Settlement was negotiated it may have been intended that the Crown Forestry Rental Trust would carry all the costs (apart from legal costs) of supporting claimants to bring their claims. However, we do not think it was anticipated that the Trust would end up funding the costs of running Waitangi Tribunal inquiries to the extent that it has – and actually continues to do, although now only in two district inquiries.

Under the Crown Forest Assets Act 1989, the accumulated rentals that the Trust held would generally go to successful Māori claimants, on whose behalf the plaintiffs in the *Forests* case negotiated the Forestry Agreement. The annex to that agreement set out the main principles under which the parties negotiated. The Māori principles included 'optimise the economic position of Māori', while one of the two Crown principles was 'honour the principles of the Treaty of Waitangi by adequately securing the position of claimants relying on the Treaty'.[7] We wonder whether these principles are consistent with the Trust's paying to stage the very events at which claimants had to try to establish their claims.

As far as we can see, the appropriateness of the Crown Forestry Rental Trust's covering both claimants' costs and Tribunal operational costs has not been questioned. We think it is certainly arguable that the costs of running the Waitangi Tribunal's events sit more naturally as expenses of the Crown. We heard no allegations that reliance on this kind of funding by the Waitangi Tribunal Unit within the Ministry of Justice involved the Crown in any Treaty breach. However, when we posed the questions for this inquiry Whakatika ki Runga, we asked 'Is/was the Crown Forestry Rental Trust's funding role appropriate?' and 'What is the proper relationship between funding that the Crown Forestry Rental Trust provides and funding that the Crown provides?'[8] Thus, we signalled these as topics for our inquiry.

Having looked at these questions, we have decided not to approach them in terms of compliance with Treaty principles. Rather, we draw attention to the contribution that the Crown Forestry Rental Trust has made to Waitangi Tribunal costs in this way: Māori beneficiaries of the Crown Forestry Rental Trust have effectively paid for significant aspects of the costs of running the Waitangi Tribunal processes over many years. Consequently, those costs did not come out of the public purse. In our conception, therefore, Māori claimants (beneficiaries) might be regarded as having a credit with the Crown because their money paid for Waitangi Tribunal costs. This argues in favour of the Crown's approaching more liberally its meeting the costs of claimants' participation in Waitangi Tribunal processes.

7. Document A77, paras 16–17; doc A77(a), p 8
8. Memorandum 2.5.9(a)

When the Crown Forestry Rental Trust Did Not Provide Funding

As we have said, the Crown Forestry Rental Trust's Deed permitted it to fund only those claimants whose claims involved or might involve Crown forest land. There was no funding available for claimants whose claims did not involve Crown forest land. As long ago as 1996, Morrie Love, then Tribunal director, identified this as a funding problem in an editorial in the Waitangi Tribunal's publication *Te Manutukutuku*:

> The Tribunal's district grouping approach to claims often highlights the gaps and inequities in the funding system. The Crown Forestry Rental Trust is the main funder of claims research, but their funding is conditional on the presence of a Crown forest and claim issues related to it. There is an outstanding need for a system to balance up the situation and ensure there are no gaps.[9]

The Waitangi Tribunal's 1996–97 *Strategic Business Plan* echoed this sentiment, stating that because 'CFRT funding is directed at forest claims and does not cover the country uniformly', '[t]here is a need for other forms of funding or having a greater allowance for the Tribunal.'[10] Both the 1997 and 1998 Waitangi Tribunal business strategies emphasised that Trust funding is 'not accessible by all claimants' and suggested another form of funding was required that could take the form of 'a general body equivalent to the trust to cover all other claims'. They both stated that 'Probably the most efficient means of providing more general funding for claims research would be by utilising the resources of the Waitangi Tribunal.'[11]

There is no evidence before us that the Crown turned its mind to addressing these matters. Rather, it created the fiscal envelope for Treaty settlements in 1994, and in 1995 set up the Office of Treaty Settlements. By these means, it advanced its preference for claimants now to engage in what became known as direct negotations to settle Treaty claims without a Waitangi Tribunal inquiry.

When the Crown Chooses to Provide Funding

Before kaupapa inquiries, the Waitangi Tribunal sometimes conducted other inquiries for which there was no Crown Forestry Rental Trust funding. Sometimes the Crown provided funding instead. However, as we will see, it did so as a 'one-off' 'exceptional' measure.[12] This language emphasised the Crown's reluctance to

9. Waitangi Tribunal, *Te Manutukutuku*, no 39 (December 1996), p 2, https://waitangitribunal.govt.nz/assets/Documents/Publications/Te-Manutukutuku-Issue-39.pdf

10. Department for Courts, *Waitangi Tribunal 1996–97 Strategic Business Plan* (Wellington: Department for Courts, 1996), p 13

11. Department for Courts, *Business Strategy 1997: For the Provision of Services to the Waitangi Tribunal* (Wellington: Department for Courts, 1997), p 23; Department for Courts, *Business Strategy 1998: For the Provision of Services to the Waitangi Tribunal* (Wellington: Department for Courts, 1998), p 24

12. Document A94, pp 16–17, 19, 21, 25

take on the responsibility of funding claimants in any way other than paying for legal representation through legal aid.

Here, we look at why the Crown agreed to provide funding in certain inquiries – and, in the section that follows, why in other inquiries it chose not to.

Governments' focus on direct settlement

As we have mentioned already, the Waitangi Tribunal was not the only entity engaged in addressing the Treaty grievances of Māori. We have described how governments came to regard the amount of time that the Waitangi Tribunal took to inquire into claims as a political liability. Politicians sought to fend off voters' intolerance by establishing the fiscal envelope, the government of the day sought to reassure taxpayers that they were acting to limit the cost of Treaty settlements. The Office of Treaty Settlements was created to make things go faster because officials would run negotiations to settle claims on the Crown's behalf without waiting for a Waitangi Tribunal report. The Office of Treaty Settlements was to be resourced to get through the work quickly.

Time was of the essence. Waitangi Tribunal business strategies and strategic plans throughout the 1990s record the government's desire to resolve all major historical claims by the year 2000.[13] In 2006, the Government amended the Treaty of Waitangi Act, inserting a new section 6AA which inserted a cut-off date of 1 September 2008 for the filing of historical treaty claims. At the time, the Minister of Treaty of Waitangi Negotiations considered that this would assist with the completion of all historical settlements by 2020.[14] Upon the election of a new government in 2008, this target was brought forward to 2014.[15] The government that was elected in 2017 returned to the 2020 target, although, according to a news report, this too was abandoned in 2019.[16] In short, successive governments were motivated to bring the historical settlement process to a conclusion as quickly as possible, but the deadlines were not realised.

Groups in seven districts went straight to direct negotiations instead of having a Tribunal inquiry – Central Auckland, South Auckland, Waikato, Waikato-Raukawa, East Coast, Wairoa, and Hawke's Bay. Direct negotiation has remained a major focus for governments, although now most negotiations proceed on the platform of some reporting by the Waitangi Tribunal.

13. Waitangi Tribunal Division, Department of Justice, *Te Kaupapa Huarahi: Management Plan 1993–4* (Department of Justice, 1993), p 40; Waitangi Tribunal Division, Department of Justice, *Te Kaupapa Huarahi*: *Management Plan 1994–1995* (Department of Justice, 1994), p 46; Department for Courts, *Business Strategy 1997: For the Provision of Services to the Waitangi Tribunal* (Wellington: GP Print, 1997), p 23; Department for Courts, *Business Strategy 1998: For the Provision of Services to the Waitangi Tribunal* (Wellington: GP Print, 1998), p 24

14. NZPD, 27 June 2006, vol 632, p 3907

15. John Key, 'Towards 2014: Speech at Te Kōkiri Ngātahi National Hui to Progress Treaty Settlements', 22 April 2009, https://www.beehive.govt.nz/speech/towards-2014-speech-te-k%C5%8Dkiri-ng%C4%81tahi-national-hui-progress-treaty-settlements, accessed 19 October 2022

16. Leigh-Marama McLachlan, 'Crown Admits it will Miss Treaty Settlements 2020 Deadline', *Radio New Zealand*, 26 November 2019, https://www.rnz.co.nz/news/te-manu-korihi/404145/crown-admits-it-will-miss-treaty-settlements-2020-deadline, accessed 19 October 2022

Over the years, the Waitangi Tribunal has often been under pressure to report quickly because otherwise the Crown will settle with the claimants before the Tribunal's report comes out – rendering the inquiry process nugatory. Such pressure strongly affected the production of the reports for the Central North Island, Te Urewera and Te Rohe Pōtae districts for example, which were all published in several parts to try to meet the Crown's settlement timetable.

In more recent years, when there are claimants in a district who want different things – some seeking direct negotiation straight away, and others seeking a Waitangi Tribunal inquiry first – the Crown typically puts resources into backing the groups that want direct negotiations to boost votes in favour of the settlement going forward. This has happened in the north (Ngāpuhi), in the North-eastern Bay of Plenty (Whakatōhea), and recently in Wairarapa ki Tararua (Ngāti Kahungunu).

Waitangi Tribunal funding

Governments' preference for direct negotiation as a means of addressing Treaty claims has had funding implications down the years.

The Waitangi Tribunal's budget allocation has been noted as insufficient on a number of occasions. We gave some examples in chapter 1. Another example is when, in April 1997, the Tribunal faxed a communication to all parties involved in the Mohaka ki Ahuriri, Wellington Tenths, and Turangi Township inquiries with the information that 'due to resource constraints no further hearings in this inquiry will be scheduled until after 1 July 1997'.[17] The Honourable Doug Graham, Minister for Treaty of Waitangi Negotiations, was challenged on the communication the next day in Parliament. He blamed an administrative error and insisted that the Tribunal did have the necessary funds.[18] The Crown intervened, and the Tribunal sent another fax in May 1997 confirming that hearings would recommence for all three inquiries.[19] Opposition member of Parliament Jim Sutton told the *Dominion Post* at the time he was not convinced by the Minister's explanation, and felt the 'debacle has highlighted the Government's lack of commitment to the whole Treaty settlement process'.[20] Indeed, it cannot be imagined that there was no substance to the comments we noted in chapter 1 of politicians,[21] officials,[22] and that High Court judge who commented on the Tribunal's funding deficit.[23]

More recently, we can compare the budget allocations for the work of the Office of Treaty Settlements with those for the Waitangi Tribunal Unit in the Ministry

17. Wai 201 ROI, memo 2.220
18. Hon Douglas Graham, 23 April 1997, *New Zealand Parliamentary Debates*, vol 559, pp 523–524
19. Wai 201 ROI, memo 2.222
20. Hugh Barlow, 'Waitangi Tribunal official cancels hearings', *Dominion Post*, 24 April 1997
21. Labour member of Parliament David Caygill and National member of Parliament and former Tribunal member Georgina Te Heuheu: Paul Hamer, 'A Quarter-century of the Waitangi Tribunal': Responding to the Challenge', in *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi*, ed Janine Hayward and Nicola Wheen (Wellington: Bridget Williams Books Ltd, 2004), p 10
22. Tribunal director Buddy Mikaere resigned in 1995 citing a lack of resources for the Tribunal.
23. Hamer, 'A Quarter-century of the Waitangi Tribunal', p 10

of Justice (see the accompanying table). Once it established the Office of Treaty Settlements and headed down the path of negotiating with claimants directly, the Crown has consistently budgeted considerably more for that work than for the work of the Waitangi Tribunal Unit. The table also shows that the disparity has grown. In 2012–13, when the Tribunal's budget was $11.178m, the Office of Treaty Settlements received $148.742m. We should observe that the Office of Treaty Settlements' work included negotiations and policy advice, the management of property portfolios acquired for potential use in Treaty settlements, and other related matters like the functioning of the Marine and Coastal Area (Takutai Moana) Act 2011.[24]

Often having barely enough money to cover its basic functions, the Waitangi Tribunal Unit no doubt gratefully receives the Crown Forestry Rental Trust's significant contribution to the costs of putting on events in district inquiries. When that assistance becomes unavailable for any reason, the Tribunal is not well positioned to pick up the cost of any expenses that the Crown Forestry Rental Trust usually covers.

We are also aware that quite frequently the Tribunal does not fully spend its annual budget. The panel members are aware of the many external factors that affect whether or not planned events occur. These range from COVID-19 conditions to judicial review of the Tribunal's decisions to the unavailability of researchers to undertake budgeted research. For budgeting purposes, the Waitangi Tribunal is treated as part of a government department rather than part of the judicial system. For that reason Waitangi Tribunal panels lack the autonomy of the courts to determine what hearings they hold and when.

When the Crown Forestry Rental Trust cannot pay

A situation like this occurred in 2013 to 2014.

In 2013, one of the trustees of the Crown Forestry Rental Trust sought a declaratory judgment from the High Court about what to do when a Māori trustee has a conflict of interest in a district. Until the judgment was given and a process was established to deal with trustees' conflicts of interest, the Trust could not approve funding in districts where there was a potential conflict of interest.[25] While the Trust was dysfunctional, the Crown accepted that it needed to take on the funding role in order to keep the inquiries running. This was, however, on a 'one-off' and 'exceptional' basis and lasted only until the Crown Forestry Rental Trust resumed its role.[26]

A Trustee had a potential conflict of interest in Te Paparahi o Te Raki Northland Inquiry, and this was the main inquiry the Crown funded. Three months out from the second stage of hearings starting in March 2013, the Crown Forestry Rental

24. Treasury, 'Vote Treaty Negotiations – Estimates of Appropriations 2012/13 – Estimates 2012/2013', https://www.treasury.govt.nz/publications/vote-chapter/vote-treaty-negotiations-estimates-appropriations-2012–13-estimates-2012–2013-html

25. Document A94, p 33

26. Document A94, pp 16–17, 19, 21, 25

Financial year	Actual annual spend on 'Waitangi Tribunal Services' (Vote Courts) ($)	Annual spend on Waitangi Tribunal legal aid* ($)	Actual annual spend on annual and permanent appropriations in Vote Treaty Negotiations ($)
2017–18	10,089,000	15,754,000	71,394,000
2016–17	11,948,000	15,101,000	67,652,000
2015–16	11,406,000	13,771,000	78,625,000
2014–15	10,221,000	13,824,000	81,368,000
2013–14	No information available.†	12,740,000	100,751,000
2012–13	11,178,000	13,340,000	148,742,000
2011–12	11,001,000	11,532,000	107,740,000
2010–11	10,519,000	No information available.	79,001,000
2009–10	10,415,000	No information available.	134,567,000
2008–09	9,593,000	No information available.	66,794,000
2007–08	9,695,000	No information available.	37,046,000
2006–07	7,965,000	No information available.	30,283,000
2005–06	7,508,000	No information available.	27,575,000
2004–05	6,684,000	No information available.	34,803,000
2003–04	7,487,000	No information available.	31,727,000
2002–03	7,621,000	No information available.	32,490,000
2001–02	6,166,000	No information available.	28,583,000
2000–01	6,272,000	No information available.	29,525,000

* Legal Services Commissioner Tracey Baguley provided total spending on legal aid in the Waitangi Tribunal between the years 2011 and 2018: doc A69(d), p [5].

† The 2014–15 budget did not give a figure for 'Waitangi Tribunal Services' spend in the 2013–14 financial year but instead included the figure in its budget line for 'specialist courts, Tribunals and Other Authorities Services', which had an estimated spend of $92,079,000.

Comparison table of spending on 'Waitangi Tribunal Services' in Vote Courts versus Vote Treaty Negotiations

Trust suddenly announced that funding was not approved for the first seven hearing weeks.[27] It did not explain why at the time, but it later became clear that the High Court application was the reason. Not only would this affect Northland claimants, it would derail the Tribunal's whole hearing and research programme.[28] Presiding officer Judge Craig Coxhead said that without the funding, Te Raki's second stage of hearings could extend into a four- or five-year process. This would

27. Document A94, p 1
28. Document A94, pp 3, 11–13, 16

necessitate 're-planning and re-budgeting' the other inquiries before the Tribunal – Te Rohe Pōtae, Porirua ki Manawatū, and Taihape – and any urgent inquiries.[29]

Faced with this prospect, in February 2013 Cabinet decided to contribute to claimants' costs in the first two weeks of hearing. Crown counsel in the Te Raki Inquiry told the Tribunal this was '[d]ue to the extraordinary circumstances' and an exception 'on a strictly one-off basis' to the Crown's usual policy of funding only groups in direct Treaty settlement negotiations, not those going through Tribunal processes.[30] In the following months, the Crown confirmed additional 'one-off' funding appropriations for the third, fourth, fifth, and sixth weeks of hearings.[31]

By December 2013, the Crown Forestry Rental Trust had in place alternate Trustees for when conflicts of interest arose and took over funding for the remainder of the Te Raki Inquiry.[32]

Publicly available Treasury documents indicate that the Crown ultimately spent $835,000 over the 2012–13 and 2013–14 financial years – averaging around $140,000 per hearing week.[33] The Crown did not disclose exactly what it was funding. Comparing what the Crown spent with figures contained in confidential documents filed by the Crown Forestry Rental Trust in our inquiry, the Crown spent more on those Te Raki hearing weeks than the average amount the Trust spent on a hearing week in two recent inquiries.[34]

When the start of the Porirua ki Manawatū Inquiry was also jeopardised by the Crown Forestry Rental Trust's conflict of interest issue,[35] the Crown made a funding contribution towards the kōrero tuku iho hui for Muaūpoko, which was held on 17–18 February 2014.[36] The Crown described the funding as an 'exception' to its usual policy, not only because it did not fund claimants in Tribunal processes, but also because it was in direct negotiations with one Muaūpoko group and did not usually fund both direct negotiations and Tribunal processes.[37] The Crown did not state the amount or exact form this contribution took. However, based on what the Crown Forestry Rental Trust said it funded in a similar kōrero tuku iho hui in the Te Rohe Pōtae Inquiry, the Crown probably contributed to hui costs like venue hire, catering and security, travel assistance, and preparatory hui.[38]

29. Document A94, p 7
30. Document A94, p 16
31. Document A94, pp 21, 25
32. Document A94(a), pp 7–10
33. Treasury, *The Estimates of Appropriations 2013/14: Vote Treaty Negotiations*, https://www.treasury.govt.nz/sites/default/files/2013-05/est13treneg.pdf, p 287; Treasury, 'Vote Treaty Negotiations – Māori, Other Populations and Cultural – Estimates 2014/2015', https://www.treasury.govt.nz/publications/estimates/vote-treaty-negotiations-m%C4%81ori-other-populations-and-cultural-estimates-2014-2015-html#section-2
34. Submission 3.2.215(f)
35. Document A94(a), pp 29, 49, 54–55
36. Kōrero tuku iho hearings in the Porirua ki Manawatū inquiry were an opportunity for the three iwi groups in the inquiry (Muaūpoko, Te Ātiawa/Ngāti Awa ki Kāpiti, and Ngāti Raukawa and affiliated groups) to present oral and traditional evidence: see doc A94(a), pp 14, 49; *Horowhenua* report, p 5.
37. Document A94(a), p 31
38. Document A94(a), p 52

The Crown's decision to fund these inquiries was not the result of a principled acceptance that it had a duty to assist claimants in Treaty of Waitangi claims, however, nor to increase the budget of the Waitangi Tribunal to cover the event costs the Crown Forestry Rental Trust had paid. In 2013 and 2014, the Crown was still pursuing the goal of resolving all historical Treaty claims by 2020.[39] Delays in the Te Raki Inquiry could scupper this objective. So when the Crown acted to support the inquiry timetable that would otherwise have faltered, it did so because it made sense for the Crown's purposes. Moreover, the Crown was stepping in on a strictly limited basis. Crown counsel was careful to emphasise that the Crown was taking an 'interim measure' to 'allow time for CFRT and the Waitangi Tribunal to determine future arrangements'.[40] The support was always going to be shortlived, so the Crown knew that its financial exposure would be limited.

When the Crown Chooses Not to Provide Funding

It suited the Crown to assist the Waitangi Tribunal and claimants to stay on track with the Te Raki Inquiry in 2013, but there were comparable exigencies where the Crown saw things differently. The lack of principle underlying the Crown's funding decisions has led to inconsistency.

For instance, the Waitangi Tribunal's inquiry into laws and policies affecting Māori culture and identity, often known as Wai 262, was an inquiry where no Crown Forestry Rental Trust assistance was available because no Crown forest land was in issue. In 2000, claimants were concerned that the Tribunal's budgetary constraints were delaying the passage of their claim. In August of that year, counsel for the Ngāti Kahungunu claimants urged the Tribunal to 'issue an interim finding that the continued withholding of the necessary funding to enable the timely completion of the Wai 262 claim is itself a serious breach of the Treaty of Waitangi'.[41] The Tribunal did not do so, but acknowledged counsel's concerns and 'record[ed] its commitment to ensuring that the Wai 262 claim is both heard and reported on in the appropriate manner'.[42] The Crown did not step in to assist these claimants.

Another area where money is lacking is where claimants seek hearings of their claims on the basis of urgency. Crown Forestry Rental Trust assistance is not available except where the urgent hearing affects Crown forest licensed land.[43] This was one of the matters that counsel for Te Kapotai emphasised when she sought an urgent inquiry into claimant funding.[44] The situation is exacerbated because lawyers in this jurisdiction cannot get interim legal aid, so they are not remunerated for their work on applications for urgency unless the application is granted. We revisit this topic in chapter 5. The Crown has not seen it as its role to provide

39. New Zealand Parliament, 'Historical Treaty Settlements', https://www.parliament.nz/en/pb/research-papers/document/00Plibc5191/historical-treaty-settlements
40. Document A94, p 16
41. Wai 262 ROI, doc I28, para 53
42. Wai 262 ROI, memo 2.186
43. Document A77(a), pp 44, 47
44. Statement of claim 1.1.32 (Wai 3006 ROI, statement of claim 1.1.1)

financial assistance when claimants apply for urgent inquiries, even though these applications sometimes address the most pressing issues of the day. The Foreshore and Seabed Inquiry, for example, proceeded as an urgent inquiry.

As recently as 2022, the Crown refused the Tribunal's and claimants' requests to provide funding to claimants in the Waitangi Tribunal's inquiry in the North-eastern Bay of Plenty, where there is no Crown forest land. Crown counsel said that the Crown would not depart from its normal approach of not providing funding for claimant participation in Tribunal inquiry processes, stating that '[t]he Crown's effective role in the inquiry is as a respondent to the claims before the Tribunal and the Crown applies resources to discharge that role.'[45] If the Crown is saying here that it should not fund claimants because it is a party to the inquiry, that is inconsistent with its approach to funding the Te Raki Inquiry back in 2013, when of course it was also a party to the inquiry. It also conflicts with the Crown's approach to legal aid in this inquiry. The claimants argued that the Crown should not be deciding on claimants' legal aid in the Waitangi Tribunal because it is always an opposing a party in those proceedings, and it therefore has a conflict of interest. The Crown insisted that no, it is all right for it to determine the funding available to the lawyers opposing it and there is no conflict of interest.[46]

A 'Treaty Relationship beyond Grievance'

A change in government in 2017 perhaps signalled a different stance towards Waitangi Tribunal processes. In 2019, the Government dispensed with targets for resolving Treaty claims. The new objective was to establish a Treaty relationship beyond grievance. Inspiration for this new state of being derived from the 2011 report of the Waitangi Tribunal on Wai 262.[47] That report, *Ko Aotearoa Tēnei*, said 'Over the next decade or so, the Crown–Māori relationship, still currently fixed on Māori grievances, must shift to a less negative and more future-focused relationship at all levels.'[48] Here lay the opportunity, the report said, to return the Treaty relationship to the 'mutual advantage' the original signatories had intended.

Language in the speech from the throne opening the new session of Parliament in 2017 echoed *Ko Aotearoa Tēnei*. The Governor-General announced it was 'time to start considering what the treaty relationship might look like after historical grievances are settled. To consider how we, as a nation, can move forward in ways that honour the original treaty promise.'[49] The Government immediately moved to create a new ministerial portfolio called Crown/Māori Relations[50] that would

45. Document A94, p 35
46. Submission 3.3.47, pp 71, 79–80
47. Transcript 4.1.4, pp 128–129
48. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), pp 16–17
49. Right Honourable Dame Patsy Reddy, 'Speech from the Throne', 8 November 2017 https://www.beehive.govt.nz/speech/speech-throne-2017 accessed 19 October 2022
50. The name has now changed to Māori Crown Relations: Te Arawhiti.

be separate from the Treaty Negotiations portfolio.[51] In 2019, it also created Te Arawhiti, or the Office for Māori Crown Relations. The new agency, of which the Office of Treaty Settlements now formed part, would 'shift the relationship between Māori and the Crown from one focussed on historical grievance to one focussed on partnerships'.[52]

Te Arawhiti soon led the production of Cabinet-endorsed guidelines on the topics of engaging with Māori[53] and partnership principles[54] as well as Cabinet office circulars on the 'better co-ordination of contemporary Treaty of Waitangi issues'[55] and guidance for officials 'to consider the Treaty of Waitangi in policy development and implementation'.[56]

Ambivalence about the Waitangi Tribunal?

Evidence before us suggests that the new government was ambivalent about whether its 'beyond grievance' aspirations were compatible with the Waitangi Tribunal's process. Perhaps there would be a lesser need for a Waitangi Tribunal in a post-grievance Aotearoa.[57] A 2018 aide memoire to the Minister, Kelvin Davis, noted his 'aspiration to resolve contemporary Treaty issues in a less adversarial and more collaborative way' than via the Tribunal.[58] This aide memoire attached a revised draft of the Cabinet paper on the 'better co-ordination of contemporary Treaty of Waitangi issues'. It included a section entitled 'Institutional settings', which argued that 'a more collaborative approach' to resolving contemporary Treaty claims was inhibited by the provision for individual claims under section 6 of the Treaty of Waitangi Act. This feature of the legislation did not lend itself to 'a broad policy conversation', it said. However, the draft went on, it might 'be possible to design additional alternative approaches to the Tribunal that encourage a

51. The new Minister, Kelvin Davis, conducted an engagement process in early 2018 on 'on how the Crown/Māori relationship should be strengthened', and reported a mixture of optimism and scepticism that 'we can shift the relationship from one focused on historical grievance to one focused on true partnership': *Te Ara Whakamua ā Tātou: Our Path Ahead. Crown/Māori Relations: Summary of Submissions*, Ministry of Justice, 2018, pp 2, 5.

52. Cabinet Office, 'Establishment of the Office for Māori Crown Relations – Te Arawhiti', Cabinet paper, 6 November 2018, p [2] https://www.tearawhiti.govt.nz/assets/Publications/Proactive-release-Establishment-of-the-Office-for-Maori-Crown-Relations-Cabinet-paper_7-May-2020.pdf, accessed 19 October 2022

53. Cabinet Office, 'Proposed Final Scope of the Crown/Māori Relations Portfolio and a Crown/Māori Engagement Frameword and Guidelines', CAB-18-MIN-0456, https://tearawhiti.govt.nz/assets/Publications/Final-Scope-Cabinet-Minute_19-Feb-2020.pdf

54. Minister for Māori Crown Relations, 'Building Closer Partnerships with Māori', MCR-19-MIN-0004, https://tearawhiti.govt.nz/assets/Maori-Crown-Relations-Roopu/cf1e519f93/Proactive-release-Building-Closer-Partnerships-with-Maori.pdf

55. Document A72(a), p 39

56. Department of the Prime Minister and Cabinet, 'Te Tiriti o Waitangi/Treaty of Waitangi Guidance', CO (19) 5, 22 October 2019, https://dpmc.govt.nz/publications/co-19–5-te-tiriti-o-waitangi-treaty-waitangi-guidance

57. The draft Cabinet paper on Crown participation in kaupapa inquiries does contain reference to Ministers not wanting to entirely 'negate' the Waitangi Tribunal's role: doc A72(a), pp 48, 54.

58. Document A81, p 1282

more collaborative forward-looking approach', and officials would report back to Ministers on this.[59] This report-back was confirmed in the Cabinet minute that followed the final paper's consideration,[60] although it does not yet appear to have taken place.

In December 2019, officials from Te Puni Kōkiri and Te Arawhiti provided their Ministers with a draft Cabinet paper setting out a Crown framework for the kaupapa inquiries. This proposed that the Crown's involvement in the inquiries be 'collaborative', 'policy-focused', 'forward-looking', and 'focused on enduring relationships'. It added, though, that 'there are potentially other means, by which consensus can be arrived at on specific kaupapa outside of formal Tribunal processes'.[61] The aide memoire that attached the briefing paper likewise advised that, while the Tribunal's kaupapa inquiries 'may be appropriate for some issues', the Crown could also consider 'a more agile, responsive and collaborative approach'. Minister Mahuta noted in response that the Tribunal itself had a record of 'trying to reconcile grievance or contested perspective'. Nevertheless, she also annotated the aide memoire with the question 'Should we reframe scope of Tribunal for contemporary issues and kaupapa claims?'[62]

Another version of the draft Cabinet paper was developed the following year. It remarked that the Tribunal 'is a litigious setting, focused on identifying whether the Crown has been, or is, in breach of the Treaty', and suggested that 'issues raised at the Tribunal may be better resolved through dialogue directly between the Treaty partners'.[63] An internal Te Arawhiti memorandum in July 2020 referred, cryptically, to 'concerns over the direction the Tribunal is taking'.[64] It seems from these and other comments that officials continued to have reservations about whether Tribunal inquiries were compatible with the Crown's desire for a new collaborative approach to resolving contemporary grievances. There was clearly an implication in these comments that the Tribunal's legislation might need to be amended. The Te Arawhiti workplan for 2019 to 2020, for example, included the following action: 'Explore how the institutional settings of the Waitangi Tribunal can be adjusted to support our approach to addressing contemporary Treaty issues.'[65]

59. Document A81, p 1293
60. Document A72(a), p 54
61. Document A72(a), pp 47, 54
62. Document A72(a), p 45
63. Document A72(a), p 62
64. Document A72(a), p 99
65. Cabinet Office, 'Practical Work Programmes for Delivering Te Arawhiti Responsibilities', p 15, Cabinet paper MCR-19-MIN-0032, https://tearawhiti.govt.nz/assets/Publications/06b6209b89/Proactive-release-Practical-Work-Programmes-for-Delivering-Te-Arawhiti-Responsibilities.pdf, accessed 20 October 2022. It should be noted, in passing, that – on a parallel track – the Tribunal's settings are also being reviewed in a process led by the Department of Internal Affairs under section 36 of the Inquiries Act 2013. This requires 'entities' that continue to operate under powers derived from the Commissions of Inquiry Act 1908 (such as the Tribunal) to have their functions and powers reviewed to identify any legislative changes needed to bring them under the Inquiries Act (thus allowing the Commissions of Inquiry Act to be repealed). Officials advised the Ministers of Justice,

We were interested in this discourse, because it does reveal some ambivalence about the role of the Waitangi Tribunal in the Crown–Māori nexus. We wondered whether that thinking might influence the Crown's willingness to support Waitangi Tribunal claimants in kaupapa inquiries.

Officials' approach to the Waitangi Tribunal

However, when we raised this topic with Crown witnesses, they were adamant about the Crown's support for kaupapa inquiries. Mr Fraser, for example, maintained that 'this mini inquiry is going to be incredibly helpful to the formation of Crown policy'.[66] The kaupapa inquiries 'represent opportunity for the Māori–Crown relationship, not a concern', and 'are a really critical part of taking the relationship forward'.[67] Indeed, he described as 'sinister' any reading of the Crown's supporting papers to suggest that Te Arawhiti might believe that funding claimants in the Waitangi Tribunal could undermine other more collaborative alternatives.[68]

We heard from some Crown officials that they regard Tribunal proceedings as an opportunity to be collaborative with claimants, to hear and act on their concerns, and to come up with solutions for difficult problems facing Māori.[69] They said their policy decisions would be informed by claimant evidence and Tribunal findings.[70]

Yet, others said things that made us wonder whether they understand the role and purpose of the Tribunal. There were comments about Tribunal proceedings being an avenue for consultation or 'feedback' on their policies. Both Rajesh Chhana, the deputy secretary of policy at the Ministry of Justice,[71] and John Whaanga, deputy director for Māori health at the Ministry of Health, used the term 'feedback' when referring to claimant evidence.[72]

While the Tribunal is an important place for claimants to speak to the Crown about their concerns, they are not giving feedback. Rather, they are seeking findings from the Tribunal that the Crown has breached the Treaty in respect of their allegations, that this has caused prejudice to their claimant group, and that the Crown should remedy this prejudice in accordance with the Tribunal's recommendations. Their case might well be, as it was here, that the Crown's whole approach to formulating policy has been misguided when seen through a Treaty lens. They do not want the Crown to regard what they say as feedback on what the Crown considers is an adequate response. They want the process to begin again on a more

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Māori Crown Relations and Māori Development in May 2021 that they believed this 'would require a fundamental review of the Tribunal's operational settings and funding'. Again, it does not appear that this separate review has commenced: doc A72(a), p 167.

66. Transcript 4.1.4, p 116
67. Transcript 4.1.4, pp 121, 125–126
68. Transcript 4.1.4, pp 121, 125
69. Transcript 4.1.4, p 259
70. Transcript 4.1.4, pp 251, 420; transcript 4.1.5, p 128
71. Transcript 4.1.4, p 302
72. Transcript 4.1.4, p 389

sound footing, in which both Treaty partners collaborate to find a different, mutually acceptable approach.

The Crown's Funding of Claimants in Kaupapa Inquiries

In the last eight years, Crown officials from a number of entities, departments and ministries have struggled to answer two critical questions: what are the costs of claimants that it is reasonable for the Crown to fund? Which part of the Crown should pay for them? Some of the lead agencies in kaupapa inquiries did put in place protocols for funding claimants, but these measures were uncoordinated and inconsistent. We describe them in chapter 4. We agree with Mr Fraser, the Deputy Chief Executive, Strategy Policy and Legal, at the Office for Māori Crown Relations: Te Arawhiti when he candidly described the Crown's process for developing policy in this area as 'stuttering and inconclusive'.[73]

The Military Veterans Inquiry

When kaupapa inquiries were formally announced in 2015, the Crown had yet to be convinced that the absence of Crown Forestry Rental Trust funding for claimants was an exigency it should respond to.[74] In 2015, the Crown Forestry Rental Trust confirmed it was unable to provide funding in the Military Veterans' Kaupapa Inquiry.[75] Counsel for the Crown appeared to understand the effect this would have, observing in 2016 that Wai 2500 (Military Veterans) was the first kaupapa inquiry and would occur without the benefit of either a Rangahaua Whānui report or Crown Forestry Rental Trust funding. That realisation did not evoke a sense of the Crown's having responsibility to provide funding though – not even for research. Instead, it promoted the idea that the inquiry should be 'targeted' and that research should be scaled 'to the resources available'. Counsel did footnote the view that, 'if there is a shortfall in funding the Tribunal must address any such matter directly with the Ministry of Justice which administers the appropriation for the conduct of the Tribunal'.[76] We did not receive evidence on whether the Tribunal Unit raised this matter with the Ministry at the time.

The only resources the Crown directed towards the inquiry were ones it already had. The Chief of Defence Force had directed that the Defence Force provide 'logistics and protocol support' to the Wai 2500 oral hearings, including catering support, transport, and the use of Defence facilities as hearing venues.[77] There was, however, no direct funding of claimants' costs.[78]

73. Transcript 4.1.4, p 132
74. As we note in chapter 1, a series of inquiries without claims to Crown forest land began in 2012, with the Freshwater Inquiry, but the title 'kaupapa' inquiry was formally adopted in 2015.
75. Wai 2500 ROI, memo 2.5.16, para 6
76. Wai 2500 ROI, submission 3.1.446, p 12
77. Document A64(a)
78. Document A64, p 2

The Health Services and Outcomes Inquiry

In 2016 when the next kaupapa inquiry launched – the Health Services and Outcomes kaupapa Inquiry – claimants were adamant about the need for financial assistance for claimants. At the inquiry's first judicial conference, many claimant counsel voiced concern, with counsel for Te Kapotai saying:

> I think that funding is one of the biggest issues and I think that it needs to be considered not only at a kaupapa inquiry level but an urgency level as well. One thing that we're finding is that every party is resourced to . . . participate except for the claimants and they're the party that are already suffering prejudice. . . . They lose funding that they would have had in district inquiries to hold wānanga, to ensure claimant co-ordination, to cover their travel costs. There's no briefing expenses covered and for me, in my experience of my claimants, it's particularly difficult and it's becoming unsustainable for them to continue to take the obligation of challenging these Crown actions and not have any support to do so.
>
> Therefore in my view, I think that what is required is a more robust review of how we tackle the kaupapa inquiry programme as well as urgency inquiries going forward, doing it on a case-by-case basis and on a kaupapa inquiry basis isn't working.[79]

Crown counsel agreed that funding issues should be 'dealt with at a system level rather than through any one inquiry', but seemed unconvinced that there really was a need. He said: 'The response for meeting unmet legal need, if we can call it that, is also an evolving one but we've yet to see whether it becomes a problem in this inquiry and it should be dealt with at a system level elsewhere.'[80]

If there was a need that the Crown should meet, it was the responsibility of the Ministry of Justice, according to counsel. He added that he was unaware of the Ministry of Justice's plans.[81]

The Mana Wāhine Inquiry

The topic was raised again at a judicial conference to discuss the Mana Wāhine Inquiry on 13 March 2018. Counsel for Te Kapotai asked if the Tribunal, the Ministry of Justice, and claimant lawyers could meet and 'talk about the possibility of creating a funding system'. She had in mind 'another CFRT' for kaupapa inquiries so that 'claimants have some consistency, some reliability in terms of what they can access, and a clear policy about how they can participate because at

79. Wai 2575 ROI, transcript 4.1.1, pp 132–133. Counsel was Season-Mary Downs.

80. Wai 2575 ROI, transcript 4.1.1, p 156

81. Wai 2575 ROI, transcript 4.1.1, p 166. Crown counsel was Craig Linkhorn. In his subsequent direction, the presiding officer, Judge Stephen Clark, noted that 'the issue of funding for claimant participation is an important and as yet unresolved issue', which could make the Tribunal's preferred thematic inquiry 'less viable'. During the judicial conference itself, he had said that he would draw the attention of the Tribunal chairperson or the Tribunal's Governance Group to the funding issue, but we were not presented with evidence about any ensuing discussion: Wai 2575 ROI, memo 2.5.8, para 11; Wai 2575 ROI, transcript 4.1.1, p 135.

the moment there is nothing'. The chairperson felt this was a 'very sensible argument and submission because we are certainly having similar issues right across the board in relation to . . . the Kaupapa Inquiries before the Tribunal'.[82]

The Housing Policy and Services Inquiry

Later the same day, in a judicial conference to discuss the Housing Inquiry, the chairperson raised the issue of a meeting of the kind that counsel for Te Kapotai had proposed that morning. Crown counsel said she had 'absolutely no instructions' on the issue of claimant funding, but thought a meeting 'sensible' and offered to coordinate attendees. The chairperson said he would 'have discussions with our director and attempt to get these discussions going'.[83] He confirmed in a subsequent direction that he had done this, and on the committee would be representatives of the Crown, Legal Aid Services, the Waitangi Tribunal Unit, and claimant counsel. He noted that '[a]ny further developments will be addressed via memorandum–directions'.[84]

No permanent committee seems to have evolved, but there was a meeting on 11 September 2018. The attendees were four claimant counsel, the Waitangi Tribunal Unit director and two other unit staff, two representatives of Legal Aid Services, and Crown counsel. The meeting appeared to end with agreement that 'the responsibilities previously undertaken by CFRT' should be 'taken up by another body – be that new or existing'. Counsel present considered the matter the responsibility of the Ministers of Justice and Finance, and that it should be addressed urgently.[85]

In fact, before it even occurred the meeting was overtaken by a move by Te Arawhiti. In a briefing paper to the Minister for Māori Crown Relations dated 27 August 2018, Te Arawhiti proposed that each department or entity involved in a kaupapa inquiry should be required to respond to 'absorb kaupapa inquiry costs within baselines'.[86] This meant that funding for inquiry-related costs must be found within existing funding parameters. Te Arawhiti opposed the idea of the creation of any kind of 'generic' fund to replace what had previously been on offer from the Crown Forestry Rental Trust. This was because it was 'important that agencies view the Crown's contemporary Treaty obligations (including participating in kaupapa inquiries) as "business as usual", and a new funding stream does not encourage this'.[87] The subsequent Cabinet Office circular on the 'Better co-ordination of contemporary Treaty of Waitangi issues' (released in April 2019) thus stated that 'agencies will be expected to absorb the costs of participating in kaupapa inquiries within baselines, as they represent the business-as-usual activity of ensuring

82. He added that it would be discussed at the forthcoming Tribunal members' conference: Wai 2700 ROI, transcript 4.1.1, pp [105]–[106].
83. Wai 2750 ROI, transcript 4.1.1, pp [44]–[45], [48]
84. Wai 2750 ROI, memo 2.5.3, paras 2–4
85. Document A67(a), pp 1–2
86. Document A72(a), pp 33–38
87. Document A72(a), p 36

policy is consistent with the Treaty of Waitangi'.[88] The circular set up no expectation that departments were required to meet claimants' costs.

Claimant funding thus remained a problem without a solution.

Inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 (Wai 2660)

On 11 March 2019, with hearings for the Tribunal's inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 about to commence, counsel for Te Kapotai and others sought urgent help from the Tribunal 'in resolving the problem [of claimant funding,] . . . which we understand will be repeated in any future kaupapa inquiries unless and until a solution is found'.[89] Judge Armstrong commissioned a senior legal practitioner to provide evidence 'on the practical experience of differences primarily in process between the CFRT and Legal Aid funding regimes (for Māori claimants in Tribunal inquiries) and the MACA funding regime'. The funding regime he was referring to was that established by the Crown to fund applicants under the Marine and Coastal Area (Takutai Moana) Act 2011. He also sought 'supplementary factual information' from the Crown Forestry Rental Trust and Legal Aid Services on their funding arrangements.[90] The Crown Forestry Rental Trust provided some information on 28 May 2019, and reiterated that it could not fund claimants that did not have claims concerning Crown forest land.[91]

Officials confer

In March 2019 the chairperson of the Waitangi Tribunal wrote a memorandum updating parties on amendments to the overall kaupapa inquiry programme, and did not mention funding for claimants.[92] A lawyer – whose clients in five existing kaupapa inquiries had no access to funding – appealed to him for an urgent fix for this problem.[93] The chairperson appears to have raised the matter (not for the first time) with the Waitangi Tribunal Unit's acting director, Renee Smith. Ms Smith met with Te Arawhiti's acting director-strategy, policy and legal, Emily Owen, in the last week of May 2019. As Ms Smith put it:

> This is one of the most important issues the Tribunal is currently facing and it is beginning to have implications such as to how many hearing weeks are held for an inquiry. This issue is very much live and Chief has asked several times where inter-agency discussions have got to. . . . The key issue for claimants is access to natural justice, in this case the ability to prosecute a claim in the Tribunal. As Chief puts it to 'level a highly uneven playing field'.[94]

88. Document A72(a), p 42
89. Wai 2660 ROI, submission 3.1.276, para 7
90. Wai 2660 ROI, memo 2.6.6, p [2]
91. Wai 2660 ROI, doc A139
92. 'Memorandum of the Chairperson concerning the Kaupapa Inquiry Programme', 27 March 2019
93. Wai 2750 ROI, submission 3.1.138, pp 1–2
94. Document A44(a), pp 1–3

She attached 'the relevant memorandum from Judges', although we did not receive a copy of this in evidence and do not know what it said.

In a portent of later disagreement, the Crown was unsure who should be responsible for the issue. Ms Owen told Ms Smith that more information was needed '[b]efore we would be able to commit that Te Arawhiti is the right agency to lead this work'.[95]

In due course, however, Ms Owen instructed officials to investigate the matter, and, in what finally looked like action, Te Arawhiti began pursuing two streams of work in the latter half of 2019 and early 2020. The first was claimant funding, and the other was the Crown's own participation in kaupapa inquiries, working alongside Te Puni Kōkiri.[96]

On the claimant funding issue, Te Arawhiti officials met with a wide range of Crown agencies, as well as the Crown Forestry Rental Trust and Waitangi Tribunal Unit staff, 'to gather background information on the problem with current arrangements'.[97] In November 2019, Crown counsel told the Tribunal in the Housing Inquiry that officials were preparing a draft Cabinet paper that would contain officials' thinking on the options for a new fund and seek ministerial approval to develop a more detailed paper. It was due to go to Ministers before Christmas. If 'directed to do so', officials anticipated being able to consult with claimants on a new funding scheme in the first quarter of 2020.[98]

Proposed ministerial briefing in March 2020

Mr Fraser of Te Arawhiti included the result of officials' deliberations about claimant funding in his supporting papers. It was a complete draft of a briefing for Ministers Kelvin Davis (Minister for Māori Crown Relations: Te Arawhiti) and Andrew Little (Minister of Justice and Minister for Courts) dated March 2020.[99] There are two observations to be made about this briefing. First, it is a good paper that really nails what the Crown had to do to find a solution to the claimant funding issue – except that it did not conceive engagement with Māori as a first and important step. Secondly, the paper went nowhere and momentum was lost, seemingly as a result of the advent of the COVID-19 lockdown at the end of March 2020.

Paragraph 1 of the paper describes the 'gap in claimant funding for kaupapa and contemporary inquiries' as 'a significant "Access to Justice" issue that risks damaging the Crown–Māori relationship and requires urgent action'. It sought three actions. It asked Ministers to 'Note that the lack of funding for Waitangi Tribunal Kaupapa Inquiry claimants is an emerging issue with significant and immediate risks'. Secondly, it wanted Ministers' agreement to take to Cabinet the question of lead agencies funding 'certain claimant costs out of existing funding as an interim measure'. This would be an extension, in other words, of the earlier April 2019

95. Document A44(a), p 2
96. Document A72, paras 27–28
97. Document A72, para [7]
98. Wai 2750 ROI, submission 3.1.169
99. Document A72(a), p 89

Cabinet decision that agencies absorb their own costs of participating in kaupapa inquiries out of their baselines. Although Cabinet never confirmed agreement for this to happen, it happened anyway. Thirdly, the paper asked Ministers to agree, by June 2020, that 'officials provide further advice on a longer-term solution for Ministerial consideration'. Over the longer term, Te Arawhiti intended to produce another more detailed paper on the establishment of a centralised claimant funding scheme.[100]

After the 2020 lockdown

After the lockdown, officials focused on the other stream of work – the Crown's participation in kaupapa inquiries. In December 2019, a draft Cabinet paper had been sent to the Ministers for Māori Crown Relations and Māori Development.[101] A further draft of this Cabinet paper was finalised on 29 May 2020. Its main objective was to detail the 'collaborative', 'policy-focused', and 'forward-looking' approach the Crown wanted to take towards kaupapa inquiries.[102] Given the separate stream of work on claimant funding was still apparently underway at this point, it only contained a brief reference to the issue in the covering briefing paper to Ministers (but not the draft Cabinet paper itself) – mentioning that claimants had been unable to access Crown Forestry Rental Trust funding, that there were limits on the matters that legal aid could cover, and that the Tribunal director sought action on claimant funding.[103] It proposed no solutions, only to 'report back to Ministers on the Tribunal's settings work' and 'further work on claimant funding and resource'.[104]

Mr Fraser stated that Ministers decided not to take the paper to Cabinet in May 2020 due to 'a prioritisation of issues and the limited Cabinet time then remaining before the 2020 General Election'.[105]

No clear path forward

The Crown had now drifted a long way from finding a solution to claimant funding, and after the lockdown officials remained uncertain even about which agency should be leading policy development. Officials in Te Arawhiti stepped up to try to sort out the situation.

We turn now to a memorandum of June 2020, in which Te Arawhiti's Policy and Legal group briefed the senior leadership team on 'Kaupapa Inquiry claimant funding'. This is another good paper. Its purpose was expressed like this: 'This paper informs you of the issue of kaupapa inquiry claimant funding and seeks your views and agreement on what actions Te Arawhiti should take to help resolve this issue.'

100. Document A72(a), pp 89, 90, 92–93
101. Document A72(a), p 54
102. Document A72(a), pp 60–74
103. Document A72(a), pp 68–69, 77
104. Document A72(a), p 77
105. Document A72, para 31

The writer observed in the following paragraphs that, when the kaupapa inquiries began in 2014, the absence of Crown Forestry Rental Trust funding was identified; that the Tribunal and claimants have continued to raise the issue with the Crown; and that '[t]he Crown has yet to make a considered response.'[106] He went on to say:

> The issue is now dominating judicial conferences across kaupapa inquiries and the Tribunal is becoming increasingly critical of the Crown's lack of response. Lead agencies are now highly concerned about the issue and are looking for guidance, direction and solutions.[107]

Before drafting the memo, Te Arawhiti had conferred with the Waitangi Tribunal, the Crown Forestry Rental Trust, the Ministry of Justice (both its Policy team and Legal Aid Services), Te Puni Kōkiri, and lead agencies (that is, departments involved in kaupapa inquiries) to get an understanding of the issue. It had developed 'five key questions that need to be addressed in order to determine which course of action we take':

5.1 should the Crown provide kaupapa claimant funding, if yes then;
5.2 should a single funding source be established (possibilities are extending existing legal aid of CFRT functions) or leave it to lead agencies to fund according to a set of guidelines/criteria;
5.3 a centralised approach could take 12–18 months to implement, how should claimants be funded in the interim;
5.4 if a decentralised approach is taken, how can the risks of this approach be managed; and
5.5 who within the Crown should take the lead on this issue?[108]

Thus, six years after the Crown 'identified' the problem of claimant funding in kaupapa inquiries it was now posing for itself the essential questions it had to answer.

Failure to engage with Māori

We note that this paper conceived the problem as one to which the Crown must find solutions, and mentioned engagement with Māori parties only once.[109] At one stage, the author mentioned the importance of getting 'buy in' from Ministers to a centralised funding source.[110] There was no recognition, however, that it is Māori claimants who will be the consumers of whatever system is established, that their buy-in might be critical, and, furthermore, that their involvement at an early

106. Document A72(a), p 82
107. Document A72(a), p 82
108. Document A72(a), pp 82–83
109. Document A72(a), p 87
110. Document A72(a), p 85

conceptual stage (rather than in consultation at the end, after the thinking had been done) would be essential. Given that Te Arawhiti is the part of government responsible for managing Māori–Crown relations, we observe that the continued deployment of such a monocultural lens does not bode well for a move to a post-grievance Aotearoa. We saw this same approach in all the Crown's work on this topic. We saw a typical example where, in the Housing Policy and Services Kaupapa Inquiry, Crown counsel informed that Tribunal that officials will draft policy on claimant funding and afterwards consult with claimants.[111]

The memorandum says '[t]here are three substantive reasons' why the Crown should contribute to claimants' costs. First, the Crown has a 'Treaty responsibility' to ensure effective participation in the Waitangi Tribunal; secondly, seeking justice in the Waitangi Tribunal should not materially disadvantage claimants (a point that underpinned provision of funding to claimants negotiating historical treaty settlements); and, thirdly, the funding provided to claimants in settlement negotiations and through the Crown Forestry Rental Trust created a precedent with which the Crown would be acting consistently if it now stepped into the funding role that the Crown Forestry Rental Trust had vacated.[112]

In a section titled 'What are the costs and what will it cost?',[113] the memo assessed the relative merits of leaving it to lead agencies to fund claimants and setting up a single funding source,[114] and discussed 'leadership within the Crown on this issue'.[115]

'Leadership within the Crown'

Under the heading 'Proposed approach', officials recommended the provision of kaupapa inquiry claimant funding, and supported the establishment of a centralised funding unit. They proposed that Te Arawhiti 'initially drives this work forward', with the Ministry of Justice later taking over responsibility and leading the project team,[116] which would comprise representatives from Te Puni Kōkiri, the Ministry of Justice, and Te Arawhiti. The Waitangi Tribunal, the Crown Forestry Rental Trust, and lead agencies would 'contribute in an advisory capacity'. The project team would 'engage with claimants and claimant counsel'.[117]

Next steps were identified, and the stage seemed to be set for action. However, the 'unified and agreed approach across agencies'[118] that the memo promoted proved elusive.

Ministry of Justice officials did not agree with Te Arawhiti's memo where it said that Justice should take the lead in the work on a centralised process for delivery of claimant funding. Justice officials sent a memorandum to their chief executive,

111. Wai 2750 ROI, submission 3.1.169
112. Document A72(a), p 83
113. Document A72(a), p 83
114. Document A72(a), pp 84–86
115. Document A72(a), p 86
116. Document A72(a), p 87
117. Document A72(a), pp 83, 86–87
118. Document A72(a), p 87

the Secretary for Justice Andrew Kibblewhite.[119] They supported further investigation into funding claimants in kaupapa inquiries, observing:

> The Crown provides significant support to mandated groups with which it is negotiating Treaty settlements. It is important from the Crown's perspective to ensure effective participation in all processes intended to investigate and resolve grievances derived from injustices and breaches of te Tiriti/the Treaty.[120]

However, for a number of reasons they doubted whether 'the Ministry is the correct lead agency for this work'.[121] They told him that although the Ministry of Justice 'has strong operational capability and experience in the assessment and provision of funding', other agencies might be more suitable – like Te Arawhiti and Te Puni Kōkiri, which have experience 'implementing discretionary funding models that interact with iwi and hapū'.[122]

The memo really reads as though the Ministry of Justice officials were ducking for cover: they did not want to be saddled with a difficult and potentially expensive lead role like this. They were also reluctant to carry the political risk. Their nervousness about financial and political exposure is revealed in the concluding paragraph where officials say:

> Our preference is that the five key questions are robustly worked through in consultation with relevant Ministers before settling on the solution of Justice as the agency to administer a centralised funding model. Claimant funding requires significant guaranteed resourcing and Ministerial buy-in across a range of portfolios.[123]

This is classic bureaucratic skirmishing. Officials agreed that something had to be done but could not agree on who should do it.

Te Arawhiti officials were unimpressed by Justice's position, and in a further memo to the Te Arawhiti Leadership Group laid out why. Even though the issue lay squarely in Justice's bailiwick as an access to justice issue, the Ministry had taken no steps to advance it, and because it was not on its work programme it now lacked the resources or direction to address it.[124] Te Arawhiti's preference remained for it and Te Puni Kōkiri to support the Ministry of Justice in taking the work forward, obtaining direction from Ministers as soon as possible on their chosen course of action.[125]

However, when a meeting took place between the heads of the Ministry of Justice and Te Arawhiti on 30 July 2020, the decision that emerged was that Te Arawhiti would lead a cross-agency project team with support from Justice, Te

119. Document A67(a), p 3
120. Document A67(a), p 4
121. Document A67(a), p 3
122. Document A67(a), p 5
123. Document A67(a), p 5
124. Document A72(a), p 98
125. Document A72(a), pp 98–99

Puni Kōkiri, Crown Law, and the Treasury.[126] It was formally established in September 2020.[127]

The effect on claimants

While officials wrote memoranda and disagreed with each other about what to do and how to do it, claimants were trying to function in the kaupapa inquiries not knowing what was going on with funding (more of which in chapter 4).

On 5 June 2020, claimant counsel submitted jointly in the Mana Wāhine Inquiry that, although Crown counsel had said on 22 November 2019 that consultation on a new funding scheme may be able to start in early 2020, they had heard nothing more. Counsel requested that 'work on the new funding scheme for claimants is revived'.[128]

At the end of June, the Tribunal released its stage one report on its inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 (Wai 2660). It commented on how the absence of funding for claimants had affected its hearings:

> Unfortunately, the vast majority of the claimants were unable to attend the Tribunal's hearings at Waiwhetū Marae and the Tribunal's offices, in Lower Hutt and Wellington respectively, largely for cost reasons. . . . The Tribunal was disappointed that it was unable to hear from more witnesses in person, given the manifest importance of the issues at stake in this inquiry.[129]

In October 2019, the chairperson had granted urgency to claims concerning the disproportionate rate of Māori children being taken into state care. Inevitably, the issue of claimant funding arose. Oranga Tamariki indicated in May 2020 that it might be prepared to provide some assistance. It then, according to its witness Jane Fletcher, 'worked to develop the details of a potential funding framework', a task made more complicated by the fact that although the Crown had decided that lead agencies were responsible to manage the costs of the kaupapa inquiries they were involved with, there were no guidelines as to claimant funding. Oranga Tamariki did put a funding plan in place in October 2020, which was before the main hearings began, but not before 'contextual hearings' occurred in July and August 2020.[130] This was the first time that such funding was available to claimants in a kaupapa inquiry.

However, although Oranga Tamariki's initiative to fund claimants (we discuss it in more detail in chapter 4) was positive for those claimants, it did not take forward the Crown's development of policy on a system that would benefit all claimants.

126. Document A72, p [9]; doc A67, paras 14–16
127. Document A72, p [9]
128. Wai 2700 ROI, submission 3.1.222, paras 21–22
129. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 11
130. Document A71, paras 1–156

In September 2020, Te Arawhiti's executive team rejected an internal proposal to establish an interim claimant funding scheme for stage two of the Tribunal's inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 (Wai 2660), because they did not want to pre-empt the broader policy work being prepared for Ministers' consideration.[131] Whatever the reason for denying those claimants funding that claimants in other inquiries were getting, the inconsistency is unfair.

Claimants seek an urgent inquiry

On 8 September 2020, counsel for Te Kapotai argued that 'the Crown, in breach of te Tiriti, has failed, and continues to fail to provide a sustainable and fair regime for claimant funding for their claims in kaupapa and urgent inquiries'. Te Kapotai had been seeking a response to this problem since 2015, and counsel argued that 'the core failing of the Crown is that despite notice, correspondence and engagement, the Crown has neither developed nor implemented a robust funding model for claimant funding for kaupapa and urgent inquiries'.[132]

The Crown opposed the granting of urgency on the basis that an 'alternative remedy' existed in the form of the project team, which planned to engage with claimants on the funding issue shortly. As such, an urgent inquiry would be 'premature'.[133] Ms Owen from Te Arawhiti told the Tribunal that the Crown expected agencies to cover kaupapa inquiry costs within their baselines (as per the April 2019 Cabinet Office circular), but that a lead agency could decide to fund claimant participation out of its budget.[134] In reply to the Crown's submissions, claimant counsel said the existence of the project team was no answer. Claimants had no idea where that process might lead: the Crown had committed only 'to investigate the issue'.[135]

While the Tribunal was considering the application, the project team began to take steps. On 9 October 2020 it circulated an invitation to counsel of kaupapa inquiry claimants to provide written submissions on claimant funding and held an online question-and-answer session on 23 October 2020.[136] In late 2020 and early 2021 officials also worked on a briefing paper for Ministers as well as a draft Cabinet paper.[137] In December 2020 the Tribunal's deputy chairperson – who was deciding the urgency application – asked the Crown for an update on progress.[138] Crown counsel responded at the end of January 2021 that the expectation was that the briefing would be provided to joint Ministers in March.[139]

In the meantime, Te Arawhiti distributed interim guidance for lead agencies on how to fund claimants on 29 April 2021. It was in draft form pending approval by

131. Document A72, para 66
132. Wai 3006 ROI, statement 1.1.1, paras 1.7, 4.32–4.33
133. Wai 3006 ROI, submission 3.1.8, paras 11–14
134. Wai 3006 ROI, doc A4, para 7
135. Wai 3006 ROI, submission 3.1.37, paras 2.2–3.2
136. Document A72, para 40
137. Document A72, para 43; doc A67, para 19
138. Wai 3006 ROI, memo 2.5.8
139. Wai 3006 ROI, submission 3.1.39, para 4

Cabinet of longer-term arrangements.[140] We revisit this interim guidance in chapter 4.

The joint briefing paper of May 2021

The Crown did not achieve its objective of briefing Ministers in March, but there was a briefing on 6 May 2021.

In April 2021, Mr Chhana told us the Ministry of Justice was working on internal approval of the project team's plan. The united preference of the various agencies was for centralised delivery of funding within the Ministry of Justice. Cabinet would need to authorise an estimated $4 million of annual spending, following which 'a new funding system could be established by mid-2022'.[141]

This proposal, although a long time coming, was the closest the Crown got to a comprehensive policy initiative. Its proposals aligned broadly with many aspects of the approach that claimants have asked us to recommend in this inquiry.

The joint briefing paper was submitted to the Ministers of Justice, Māori Crown Relations, and Māori Development on 6 May 2021. Although officials advised Ministers that there were 'Treaty and access to justice reasons, and policy and practice precedents, for the Crown to support claimant participation in these inquiries', the paper did not advance the arguments in favour of the policy as confidently as, for example, in the Te Arawhiti memoranda we quote above. The centralised funding model was identified as the option supported by claimants, the Tribunal Unit, and all lead agencies involved in kaupapa inquiries. This option was also 'the most Treaty-consistent, speedy and cost efficient method', with the latter two justifications ultimately being central to the Ministers' decisions (as we develop later).[142] The paper was animated by the spectre of an urgent Tribunal inquiry into claimant funding and the potential 'finding of a Treaty breach.'[143]

Ministers' response critical

This time, Ministers' different perspectives stymied a coherent response. The Ministry of Justice provided a separate aide memoire for its own Minister. This pointed out that the Ministry itself would likely soon be a lead agency in two kaupapa inquiries, and that new money would need to be sought to meet the costs. If the proposed recommendations to Cabinet were approved, however, the centralised funding system would cover the expense.[144] They encouraged him to support the proposal.

On 10 May 2021, the Minister for Māori Crown Relations, Kelvin Davis, agreed to the recommendation to submit a paper to Cabinet the following month, as apparently did the Minister for Māori Development, Willie Jackson, at around the

140. Document A72, para 45
141. Document A67(a), pp 10–11
142. Document A67(a), pp 10, 13, 15
143. Document A72(a), p 165
144. Document A67(a), pp 27–28

same time.[145] On the same day, the private secretary to Minister of Justice Kris Faafoi contacted officials to say that the Minister wanted more information about funding before making a decision. The private secretary said: 'Specifically he doesn't think there's enough here to give an understanding of the current levels of spending that would give him confidence that this option is *the* option' (emphasis in original). The Minister wondered whether 'an MOU on current baselines where agencies agree to put funding aside' might be a better approach.[146] An official, Jennie Marjoribanks, responded with as much detail as she could, based on a series of assumptions of how many inquiries the Tribunal would be holding each year, how many claimants would be involved, and what their likely costs would be. But the Minister remained sceptical and would not agree to the recommendations in the briefing paper. In his annotations on the paper he wrote:

- Not convinced yet that a joint [*sic*] up approach is not a MOU possibility.
- I'd like to see another effort toward that as the amount is material but not significant.
- I am not comfortable setting up a system that will be a clear avenue for more funding where I think that there is still opportunity for a co-ordinated approach as opposed to a separate funding stream.[147]

Minister Faafoi subsequently met with Minister Davis about the matter on 21 May 2021, and seems to have convinced him of his doubts about a centralised scheme. Mr Chhana told us that 'the Ministers had concerns about adopting a centralised approach, and confirmed their preference for a coordinated agency-led MOU approach to be considered against other funding delivery options.'[148]

On 28 May 2021 Justice official Ms Marjoribanks tried to explain to colleagues across government that the 'co-ordinated approach' the Minister favoured meant:

- a framework covering exactly what is funded, the levels and what is not funded etc
- all lead agencies (and/or possibly Cabinet) sign up to it, and
- agencies fund and deliver claimant funding individually (from their own baselines or by seeking new funding).[149]

On 9 June 2021, she told fellow Justice and Te Arawhiti officials:

> We understand that one reason Minister Faafoi [is] unconvinced is that he is reluctant to be the sole Minister responsible for securing the funding that would be needed

145. Document A72(a), pp 160–161. We received in evidence copies of the responses of the Minister for Māori Crown Relations and the Minister of Justice, but not – presumably because there was no witness from Te Puni Kōkiri – that of the Minister for Māori Development. A Ministry of Justice official noted on 12 May that Minister Jackson had agreed to the recommendations: doc A67(a), p 30.
146. Document A67(a), p 32
147. Document A67(a), p 14
148. Document A67, para 9
149. Document A67(a), p 34

> to actually deliver centralised claimant funding, given the new mechanism would be addressing cross-government costs that aren't sole Justice responsibility.[150]

As a result of Minister Faafoi's objections to the centralised funding proposal, the paper did not go forward to Cabinet.

Things were now in a real pickle. Minister Faafoi's officials supported the proposal going to Cabinet, and they had told their Minister in an aide memoire about the benefits for his portfolio because he would dodge a lot of lead agency costs (in this inquiry, and the forthcoming constitutional inquiry) if there were a central fund instead. It seems that no one really understood the Minister's reservations, because their explanations do not articulate his position any more clearly than he did. The annotations he made on the paper, and officials' later efforts to decode them, are all equally mystifying. We cannot at all discern good reasons for failing to go down the path that all the officials and Ministers Davis (at least initially) and Jackson favoured.

It appears that the Minister wanted the lead agency approach, or some version of it, to continue, even though all the officials' policy work had explained why that approach was leading to incoherence and inconsistency. Nevertheless, the Minister now seemed to want officials to explore lead agencies continuing via an 'MOU', but documents indicate officials were not prepared to back the agency-led funding model. It had too many drawbacks. Justice official Ms Marjoribanks wrote in an email thread on this topic in June 2021 that a 'centralised framework with annual funding is more efficient in both time and money for the Crown and claimants and therefore is the only appropriate option'. It became officials' aim to find 'options for securing funding for a centralised claimant funding system that didn't involve MOJ fronting a cross-govt bid'. That is, the officials planned to manoeuvre to avoid the issue coming back to Minister Faafoi.[151]

Back to the claimants . . .

In the meantime, there was still no decision on Te Kapotai's application for an urgent Tribunal inquiry. Claimant counsel submitted in July 2021 that claimants were continuing to suffer prejudice because of 'the ongoing failure of the Crown to provide a Tiriti compliant and suitable funding solution in a timely manner', and asked the Tribunal to decide whether or not to grant an urgent hearing of their application.[152]

On 9 August 2021 the deputy chairperson directed that because Te Kapotai's claim concerning claimant funding had been included in the new kaupapa inquiry into the justice system, this Tribunal would deal with the claim.[153]

This gets us to where we are now. However you characterise the bureaucratic tangle we have described – Mr Fraser described it as 'a series of false starts' and 'a

150. Document A67(a), p 42
151. Document A67(a), pp 39–40
152. Wai 3006 ROI, submission 3.1.41, para 8
153. Wai 3006 ROI, memo 2.5.9, para 43

tale of government not working'[154] – it signally failed to produce a coherent plan for how the Crown would fund claimants in kaupapa inquiries.

Currently, Te Arawhiti's April 2021 'interim guidance' for leading agencies about the costs that funding should cover is all there is in terms of policy. The approach of the various lead agencies handling claimant funding is not – as we will see in chapter 4 – consistent. Consequently, in each kaupapa inquiry, claimants must jump through a different set of hoops. The suitability of funding from agency to agency depends, in large part, on the competence, influence, and what we might call Māori consciousness of the various Crown officials. We cover this in the next chapter.

Analysis and Findings

The core failing of the Crown

Counsel for Te Kapotai, when applying for an urgent hearing, said in her statement of claim that her client had raised the lack of claimant funding since 2015 and that 'the core failing of the Crown is that despite notice, correspondence and engagement, the Crown has neither developed nor implemented a robust funding model for claimant funding for kaupapa and urgent inquiries.'[155] This was on 8 September 2020.

Let us look at these allegations. First, did the Crown develop a robust funding model for claimant funding for kaupapa and urgent inquiries?

The documents attached to the evidence of Mr Fraser and Mr Chhana reveal that the Crown did engage in quite extensive deliberation about whether and how to provide claimant funding. Pages 33–177 of the bundle attached to Mr Fraser's evidence includes memos, emails, and papers that address Crown policy on the kaupapa inquiries and claimant funding. That is a lot. Officials seem to engage with each other again and again on the same matters. Some of what they say seems entirely on point, but it is puzzling that they seem to come back repeatedly to the same matters as if they haven't been there before.

The March 2020 draft ministerial briefing paper entitled 'Proposal for work on a Waitangi Tribunal kaupapa and contemporary inquiry claimant funding scheme' shows that the Crown asked itself the question 'Why should the Crown look at funding these costs?', and provided this answer:

> In other proceedings that are legally aided, the parties pay their own costs that are not legal services. However, the Waitangi Tribunal process operates in a different way compared with other judicial-type processes as it takes an inquisitorial approach with an emphasis on participation and mediation. Therefore, the costs raised above that aren't covered by legal aid, are important to promoting full involvement of claimants in the process.[156]

154. Transcript 4.1.4, pp 132, 172
155. Wai 3006 R01, statement 1.1.1, para 4.33
156. Document A72(a), p 92

The 'costs raised above' were in the same categories that the Crown Forestry Rental Trust uses: operation funding; hearing week costs; and research and mapping.

Thus in March 2020 officials were trying to persuade their Ministers that the lack of funding for kaupapa inquiry claimants had 'significant and immediate risks' and Ministers ought to authorise officials to find a longer term solution than the lead agency funding model and come back to them with advice on what that should look like.

To us, this paper shows that Crown officials had got their heads around the issues, and understood what needed to be done to advance the process towards a solution. What was missing was a Māori sensibility. Officials consistently conceived the work as needing to be done in-house rather than taking the issue into an engagement with the affected parties – namely, Māori claimants in the Waitangi Tribunal.

In terms of claimant counsel's criticism that the Crown had not developed a robust funding model, she was certainly right that had not happened by March 2020 – and anyway the draft briefing paper of March 2020 never reached Ministers because of lockdown commencing in the same month it was prepared.

But was a robust funding model developed subsequently?

Well the answer is 'no, not really'. Let us look again at the May 2021 ministerial briefing paper – this time to three Ministers. That paper was the first time that Ministers were actually briefed on the subject of claimant funding. It sought their agreement 'to take a paper to Cabinet in June 2021 to seek the transfer of short-term funding to enable the Ministry of Justice to undertake the work necessary to prepare budget costings for running a claimant funding scheme.'[157] The paper said that officials considered that a centralised claimant funding agency under the Ministry of Justice was the option that 'performed best against relevant criteria' and they wanted Ministers to agree that a paper should go to Cabinet to get $0.66m to do the work necessary to develop this option.

Mr Chhana responded to questions from the Tribunal in hearing about this money, explaining that the $660,000 was an underspend by Te Arawhiti: 'So, that under-spend transfer refers to the proposal to transfer approximately $600,000 from a Te Arawhiti under-spend to the Ministry of Justice to fund the work to be able to explore the proposals that were in the May 2021 Cabinet Paper.'[158] Thus, we see that in the Crown's estimation the proposals in the May 2021 paper needed further development before becoming a robust funding model that Cabinet could approve.

In any event, it is really irrelevant whether officials were proposing a 'robust funding model', because the ideas in the paper did not win the support of one of the three key Ministers, Minister Faafoi. Without that Minister's approval, no paper would go to Cabinet.

Thus, we agree with what counsel for Te Kapotai said in 2020. She was addressing the situation then, but it remains true for the present. The Crown has neither

157. Document A72(a), p 157
158. Transcript 4.1.4, p 262

developed nor implemented a robust funding model for claimant funding for kaupapa and urgent inquiries.

Lest there should be any suggestion that the lead agency funding arrangements constitute a robust funding model, it is implicit in the Crown's own policy work that they are not and that something different is required. Chapter 4 explains its inadequacies.

Timeliness

Critically, the Crown has taken too long to deal comprehensively with the problem of claimant funding in kaupapa inquiries.

We have already talked about the Te Arawhiti memorandum of June 2020 that says it was identified in 2014 'that certain types of funding to support claimants . . . was not available' and 'the Tribunal and claimants have continued to raise this issue with the Crown.'[159] Thus, the Crown itself accepts that the issue has been before it since 2014, and even accounting for the disruption of COVID-19, and for the fact that the announcement of this mini-inquiry stopped work on the topic, there have been seven years in which little has been achieved. That is too long.

Although officials' documents talk about the deleterious effect on the process of the absence of claimant funding, we see little evidence in the discourse that this is a compelling consideration for them. Usually, the concern is attributed to others, as here in a Te Arawhiti weekly status report for Minister for Treaty of Waitangi Negotiations Andrew Little: 'This funding gap has been repeatedly raised by the Tribunal and claimant counsel who claim it is a significant access to justice issue and the consequent inability to participate in hearings undermines the point of the inquiry process.'[160]

The failure of the Crown to take account of the effect of the lack of funding on claimants, and the need therefore to prioritise this work, contributed to the paper-go-round that we see in the record. Nowhere do we see a Minister taking ownership of the issue so that it could move forward decisively. On the contrary, Mr Faafoi's concern about his department budget and wanting others to share the responsibility showed no regard at all for the effect of prevarication on claimants in this jurisdiction.

Finally on timeliness, we say that the period over which the Crown should have been responding with alacrity to the claimant funding deficit in kaupapa inquiries is seven years. In this chapter we described the situation in 2013 when the Crown stepped in to fill the funding gap that the Crown Forestry Rental Trust left in the Te Paparahi o Te Raki inquiry. We considered whether it was reasonable to pinpoint that time as when the Crown should have been aware that, in the absence of Crown Forestry Rental Trust funding for any reason, the situation of claimants and of inquiries was suddenly very difficult. We observed that the Crown did not derive from this experience of funding the Te Raki Inquiry any wider learnings about its responsibility to fund claimants when the Trust did not. It consistently

159. Document A72(a), p 82
160. Document A72(a), p 147

characterised what it did as a one-off and temporary expedient. We have decided to let the Crown off on this. The Crown knew that the funding problem with Te Raki was temporary, so it did not look beyond that circumstance. As a Treaty partner and in a perfect world, it would have. But the reality of government is that officials and Ministers do not make decisions they do not have to make. There was no need at that time to think about the long term, and they did not. Accordingly, we say that it was after the introduction of the kaupapa inquiry programme that the Crown should have been able to see – and in fact did know – that there was no funding available for claimants in those inquiries. It was from the point of that realisation that the Crown had no excuse not to take on as a priority the need to deal with the hapless situation of claimants who wanted to participate in those inquiries.

The Crown Forestry Rental Trust's contribution to funding Crown costs

Although, as we said, we do not approach this matter in terms of compliance with Treaty principles, we record as a factual finding that the Crown Forestry Rental Trust paid for significant aspects of the costs of holding Waitangi Tribunal events like hearings, judicial conferences, and site visits. The extent of the Trust's contributions to the total costs are unknown, and nor do we know how much of the $104 million dollars the Trust told us it has spent relates to 'hearings hosting funding'.[161] However, we find as a matter of fact that the Māori beneficiaries of the Crown Forestry Rental Trust have contributed over the years since the 1990s to event-related funding that we say is more naturally a Crown cost. What the Trust does not spend theoretically forms part of the remedies the Tribunal can order under section 8A of the Treaty of Waitangi Act 1975, so its contributions to Crown costs can in some senses be regarded as a kind of credit that claimants have with the Crown. The Crown should bear this in mind when it broaches the topic of Crown contribution to the cost of claimants' participation in Waitangi Tribunal processes.

Engagement with Māori

The Crown's extensive deliberation about kaupapa inquiries and claimant funding nowhere prioritised sitting down with the people affected – Māori claimants – to devise a funding model that would be fit for purpose.

The ministerial briefing paper of May 2021 had a heading 'Consultation has informed this advice' under which it said that certain groups had been consulted on the issues discussed in the report. All of the parties listed as having been consulted were civil servants in different ministeries and departments, except that 'the project team spoke directly with two claimants and eight claimant counsel, and received two substantial written submissions from two claimant groups and their counsel'. It does not forecast any future engagement with Māori.[162]

This level of consultation is at the very lowest end of what might be expected of the Crown on any policy matter affecting Māori. On a topic like this, where

161. Document A77, para 45
162. Document A72(a), p168

only Māori people are affected, and it bears on their access to a body set up to give effect to the Crown's Treaty obligations, engagement with Māori should be of an entirely different order.

Earlier in this chapter we mentioned the Cabinet-endorsed guidelines that Te Arawhiti developed on Building Closer Partnerships with Māori. The guidelines were in place by 2019. The accompanying 'Engagement Spectrum' diagram describes a range of appropriate levels of engagement depending on the topic. Where Māori interests are significantly affected, the diagram indicates the type of engagement that is called 'Partner/Co-design.'[163] Much further down the scale, where Māori interests exist or are affected but wider interests take priority, the Crown has a duty to consult. Even at this lower level:

> The Crown will seek Māori feedback on drafts and proposals. The Crown will ultimately decide. The Crown will keep Māori informed, listen and acknowledge concerns and aspirations, and provide feedback on how their input influenced the decision.[164]

Thus, we see that, far short of treating Māori as partners and co-designers in the context of funding for Māori before the Waitangi Tribunal, as the diagram indicates would be appropriate, the Crown has not met its own prescription of what consultation entails.

163. Office of the Minister for Māori Crown Relations: Te Arawhiti, 'Building Closer Partnerships with Māori' Cabinet paper, 5 March 2019, https://tearawhiti.govt.nz/assets/Maori-Crown-Relations-Roopu/cf1e519f93/Proactive-release-Building-Closer-Partnerships-with-Maori.pdf, p 4

164. Office of the Minister for Māori Crown Relations: Te Arawhiti, 'Building Closer Partnerships with Māori' Cabinet paper, 5 March 2019, https://tearawhiti.govt.nz/assets/Maori-Crown-Relations-Roopu/cf1e519f93/Proactive-release-Building-Closer-Partnerships-with-Maori.pdf, p 4

CHAPTER 4

WHAT ARE THE CURRENT ARRANGEMENTS FOR CLAIMANT FUNDING AND HOW EFFECTIVE ARE THEY?

Introduction

This chapter assesses how effective the 'lead agency approach' has been as a vehicle for funding claimants to participate in the Waitangi Tribunal.

We begin by explaining how it came about – when and how the lead agencies arrived at their different claimant funding protocols, and what categories of expenditure they cover.

Secondly, under the heading 'The adequacy of the lead agencies' funding protocols', we address claimants' concerns with (1) how the agencies go about funding activities that are eligible for funding, and (2) the problems caused because the agencies do not fund certain activities.

Thirdly, we assess reimbursement as a mechanism for providing funding to claimants.

Fourthly, we look at the overall effectiveness of lead agencies funding claimants.

The last topic we address is the problems that claimants encounter when they file documents in te reo Māori, for which translations into English are required to meet the needs of participants who cannot understand the original text.

We end with the Tribunal's analysis and findings.

The Ad Hoc Development of the Lead Agency Approach

Since the failure in May 2021 to get Ministers to agree to take to Cabinet proposals for a centralised funding scheme, claimant funding has remained in the hands of lead agencies in each kaupapa inquiry. As we outlined in chapter 3, this approach sprang from Cabinet's April 2019 decision that agencies should respond to Tribunal inquiries as 'business as usual' within baseline funding. There was no formal authorisation for lead agencies to fund claimants' costs, but lead agencies began to do it anyway. A little bit further down the track, in April 2021, Te Arawhiti released its 'interim' guidance to advise lead agencies on funding claimants in an endeavour to standardise lead agencies' practice.[1]

We have explained that lead agencies are those Crown entities whose work most aligns with the kaupapa that the Tribunal is inquiring into. For instance, the Ministry of Health is the lead agency in the Health Services and Outcomes Inquiry (Wai 2575). Lead agencies have taken on responsibility for funding claimants in

1. Document A72(a), p 33

the inquiry into those claims. At the time of our inquiry, all lead agencies used protocols in which claimants were eligible for reimbursement of the 'actual and reasonable costs' of their participation in hearings. To varying degrees, agencies cover travel, accommodation, and food costs for claimants, for witnesses, and (in some regimes) for support persons who attend the hearings. Most agencies only reimburse the costs of claimants or claimant witnesses to attend the day, or days, where they are scheduled to give evidence and, in some cases, the day, or days, where their counsel are scheduled to make closing arguments for their inquiry.[2] Witnesses are not funded to attend an entire hearing.[3] All agencies fund only claimants, not interested parties. Each agency's funding protocol is unique, however.

We now go through the individual protocols and how each agency arrived at them.

Inquiries without claimant funding

The Tribunal commenced a number of inquiries between 2012 and 2017 in which claimants were ineligible for funding from the Crown Forestry Rental Trust. Some were formally called 'kaupapa inquiries' while others began as urgent or priority inquiries, but none involved claims to Crown forest land and no claimants had access to funding arrangements.

The first of these was the National Freshwater and Geothermal Resources Inquiry (Wai 2358), stage one of which began in 2012 without claimant funding. Its second stage had hearings between 2016 and 2018, and claimants were unfunded in these too.

The Military Veterans Kaupapa Inquiry (Wai 2500) was the first inquiry to be called a kaupapa inquiry.[4] It began in 2014. It was like the National Freshwater inquiry in that when it got underway the Tribunal had not yet formally launched kaupapa inquiries, there was no claimant funding, and the Crown had not begun to think about a Crown kaupapa inquiry policy.[5]

The New Zealand Defence Force decided to assist in the Military Veterans inquiry by providing 'logistics and protocol support' for a series of oral hearings in 2015 and 2016.[6] The evidence of Lieutenant Colonel Martin Dransfield, project director of the New Zealand Defence Force Waitangi Tribunal Kaupapa Inquiry Team, informed us that this comprised '[c]atering support . . . to at least the hearing held in the Gisborne area in August 2015', and the use of the Army Marae at Waiouru Military Camp for the sixth hearing week in October 2016.[7] This was nothing like the support that the Crown Forestry Rental Trust offered to approved

2. Document A72, paras 45–48
3. Document A72(a), p154
4. Wai 2500 ROI, memo 2.5., para 2.1
5. Wai 2500 ROI, paper 6.1.2
6. Document A64, para 9
7. Document A64, paras 9–10

clients, but Lieutenant Dransfield said, '[a]t that point, all that was requested was for us to support the hearings themselves, rather than the claimants.'[8]

The Health Services and Outcomes Inquiry (Wai 2575) launched in November 2016, and no funding protocols were in place for the stage one hearings between October 2018 and March 2019.

No claimant funding was available for the hearings between 2017 and 2019 of the first stage of the inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011 (Wai 2660).[9]

All these inquiries were underway before the Crown first considered its policy position on kaupapa inquiries. In April 2019, the Cabinet Office released a circular entitled 'Better Co-ordination of Contemporary Treaty of Waitangi Issues'. It set out the Crown's expectation that lead agencies would absorb the costs of their own participation in kaupapa inquiries out of their baselines, or seek additional funding from Cabinet if they could not do so. Te Arawhiti, which drafted the circular, framed this approach as the Treaty-compliant thing to do. It said that such costs 'represent the business-as-usual activity of ensuring policy is consistent with the Treaty of Waitangi'.[10] This circular set no expectations that agencies would meet claimants' costs. At this point, as we noted in chapter 3, the Crown was considering only how it would deal with its own costs of participating in kaupapa inquiries.

Oranga Tamariki introduces a claimant funding protocol (2019)

In October 2019, the Tribunal granted urgency to claims about Oranga Tamariki and the disproportionate numbers of tamariki Māori being brought into state care and protection (Oranga Tamariki Urgent Inquiry, Wai 2915).[11] Although, as we said, the Cabinet circular did not require lead agencies to meet claimant costs, Oranga Tamariki decided to do so, along with funding mental health support.[12]

Developing its own protocols was difficult when 'there was no agreed Crown approach or guidance for agencies regarding claimant funding in the Waitangi Tribunal', Jane Fletcher, director of the office of the chief executive of Oranga Tamariki, told us.[13] Oranga Tamariki engaged with other agencies (including Te Arawhiti), reviewed policies relating to witness expenses from the Royal Commission into Abuse in State Care and Faith-based Institutions and the inquiry

8. Transcript 4.1.4, p 419

9. Document A36, paras 29–37. The Freshwater and Marine and Coastal Area (Takutai Moana) Act inquiries are both effectively kaupapa inquiries, though neither formally began as such. Freshwater started as a priority inquiry to hear claimants objecting to the government's proposed sale of water rights owned by State-owned enterprises. Likewise, the Marine and Coastal Area (Takutai Moana) Act inquiry was initiated by several applications for an urgent inquiry.

10. Document A72(a), pp 39, 42. Specifically, the Cabinet Māori Crown Relations: Te Arawhiti Committee.

11. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021), p 1

12. Wai 2915 R01, memorandum 3.1.162, para 21

13. Document A71, para 7

into the New Zealand Defence Force's Operation Burnham, and sought estimates of claimant expenses from claimant counsel in the urgent inquiry.[14]

Three days of contextual hearings for the inquiry were held in July and August 2020 before this work was complete. The week before the first substantive hearing commenced on 19 October 2020, Oranga Tamariki approved and announced its funding protocol, which would be provided out of its baseline budget. On 22 October 2020, during the first hearing week, it distributed a factsheet and claimant reimbursement form.

All funding was provided as reimbursement. Claimants and witnesses in the two claimant evidence hearings in October 2020 were eligible to receive funding as follows:

- Claimants could be reimbursed for the 'actual and reasonable' costs of flights, transport, accommodation, and food. There was no maximum amount claimants could claim for travel costs (within the bounds of being 'actual and reasonable' costs), but the following funding caps did apply (excluding GST):[15]
  - $226.05 for accommodation and meal costs per day per person, where overnight accommodation is necessary;
  - $47.80 for meal costs per day per person, where overnight accommodation is not required;
  - $30 for parking per person per day; and
  - $0.73 per kilometre for petrol costs up to 100 kilometres of travel.[16]
- Oranga Tamariki's initial protocol did not provide funding for support persons, but following requests from claimants, Oranga Tamariki amended its policy to provide funding for one support person to accompany claimant witnesses in closed session hearings only.[17]
- Oranga Tamariki also engaged a counselling service called Benestar which claimants and witnesses could access at no cost to themselves. No claimants ultimately used the service.[18]

Oranga Tamariki budgeted $125,000 out of its baseline to fund these claimant costs, based on an estimated $1,780.05 of funding per person for approximately 70 witnesses.[19] Reimbursements were ultimately made to 24 claimants, with a total expenditure of $19,432.31.[20] We asked Jane Fletcher of Oranga Tamariki why the payouts were much lower than anticipated. She was candid. She said that submitting a whole lot of financial information via email was 'not a very friendly process', and the idea of engaging with Oranga Tamariki to do so could engender 'mixed feelings' for claimants.[21] She said that, on reflection, she thought Oranga Tamariki

14. Document A71, paras 7–10
15. Document A36(b), pp 15–25
16. Document A71, paras 18–20; doc A71(a), p 5
17. Document A71, para 21
18. Document A71, paras 13–15; transcript 4.1.4, p 500
19. Document A71, para 14
20. Transcript 4.1.4, p 494
21. Transcript 4.1.4, p 502

was 'too focused on fiscal responsibility' and 'could have been more generous to enable participation'.[22] She also acknowledged the problems claimants had with payment by reimbursement.[23]

The funding protocols from Manatū Wāhine and the Ministry of Housing (2021)

Other agencies eventually followed Oranga Tamariki's lead in providing claimant funding, though not immediately and not necessarily. As we noted in chapter 3, Te Arawhiti's executive team rejected an internal proposal in September 2020 to establish an interim claimant funding scheme for stage two of the Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry (Wai 2660). They said they did not want to pre-empt the broader policy work underway on establishing a centralised scheme (which did not of course eventuate).[24]

In early 2021, lead agencies in the Mana Wāhine (Wai 2700) and Housing Policy and Services (Wai 2750) Inquiries released funding protocols for claimants that were very much along the same lines as Oranga Tamariki's.

Manatū Wāhine/Ministry for Women and Te Puni Kōkiri are joint lead agencies in the Mana Wāhine Inquiry, with their response coordinated by a 'joint roopū' located in Manatū Wāhine.[25] Six hearings in the tūāpapa (contextual) phase of the Mana Wāhine Inquiry were held between February 2021 and September 2022. The joint roopū provided funding for claimant costs in the first two hearing weeks from baseline funding, and sought additional funding to fund the remaining four weeks.[26]

On 5 February 2021, the closing day of the first hearing in the tūāpapa (contextual) phase of the Mana Wāhine inquiry in Kerikeri, the joint roopū circulated an information sheet and reimbursement form for the first two hearings.[27] Subsequent hearings were in Ngāruawāhia and Whangārei in February and July 2021 respectively, and in Whakatāne, Lower Hutt, and Christchurch in the second half of 2022.

Like Oranga Tamariki, Manatū Wāhine committed to cover the reasonable and actual costs of claimant and witnesses' participation in hearings. The following maximum limits applied (excluding GST):

- $434.78 for flights per person;[28]
- $226.05 for accommodation per day per person;
- $47.80 for meal costs per day per person;

22. Transcript 4.1.4, p 498
23. Transcript 4.1.4, pp 498–499
24. Document A72, para 66
25. Document A68, paras 2–4, 11
26. Document A68, paras 12–17
27. The Mana Wāhine inquiry was formally initiated in December 2018 and is led by both the Minister for Women and the Minister for Māori Development. The Mana Wāhine joint roopū is based in Manatū Wāhine – the Ministry for Women, and contains representatives from both Manatū Wāhine and Te Puni Kōkiri: doc A68, paras 11, 15.
28. This figure was derived by subtracting GST from the GST-inclusive figure of $500 given in evidence, see: doc A68(a), p 16.

- $30 for parking per person per day;
- $0.83 per kilometre for petrol costs; and
- no limit for taxis, Uber, or other ride share options.[29]

Departing from the Oranga Tamariki model, Manatū Wāhine's arrangements allowed named claimants to be reimbursed their costs of attending hearings where they were not giving evidence. The protocol provided for each witness to have up to three support people, regardless of the nature of the evidence.[30] Manatū Wāhine also agreed to fund claimant hui, reimbursing the actual and reasonable costs (with the same maximum limits as above) for convening hui to prepare evidence, and to prepare to present evidence at the tūāpapa hearings.[31] It is the only agency to make this type of funding available.

The joint roopū originally budgeted $270,000 out of its baseline to cover claimant costs in the first two hearing weeks. Then, on 1 July 2021, Manatū Wāhine received an appropriation of $1.25 million every year for three financial years to support 'Mana Wāhine Inquiry claimant engagement' ($3.75 million overall).[32] As of mid-September 2022 when Ms Ngawati gave her evidence, five tūāpapa hearings had taken place and Manatū Wāhine had reimbursed claimants a total of $98,528.39.[33] Ms Ngawati said Manatū Wāhine had reimbursed $55,305.37 for the first two hearings was still receiving claims for the later hearings.[34] Ms Ngawati estimated only half of all claimants had sought reimbursement of costs.[35]

In the same month of February 2021, Te Tūāpapa Kura Kāinga-Ministry of Housing and Urban Development (hereto after referred to as 'Ministry of Housing') announced a protocol for funding claimants in the Housing Policy and Services Inquiry (Wai 2750).[36] Five hearings for stage one of the inquiry were held in Auckland and Wellington in 2021. Kararaina Calcott-Cribb, Deputy Chief Executive-Tumuaki, Te Kāhui Māori Housing, explained that like Manatū Wāhine, her ministry had sought additional funding to participate in the Housing Inquiry, as it was unable to cover costs from its baseline budget. On 6 April 2020, Cabinet committed $10 million over four years in Budget 2020 'as an operating allowance for the Crown's participation in the Wai 2750 Inquiry' ($2.5 million per financial year).[37] None of this new money was for claimant funding, but part of it has been used for that purpose.

Although Mrs Calcott-Cribb did not refer to the Oranga Tamariki funding protocol in her evidence, the Ministry of Housing appears to have adopted the same funding arrangements. It agreed to reimburse claimants' 'actual and reasonable costs' of participating in hearings, with no maximum for flights or taxis, Uber, or

29. Document A68(a), pp 15–16
30. Document A68, para 24
31. Document A68, para 24
32. Document A68, paras 15–16
33. Transcript 4.1.4, p 517
34. Document A68, paras 15–18; transcript 4.1.4, pp 517–518
35. Transcript 4.1.4, p 528
36. Document A73, paras 18–19
37. Document A73, paras 8, 14–15

other ride share options. The following caps applied for other types of expenses (excluding GST):

- $226.05 (excluding GST) for accommodation per day per person, where overnight accommodation is necessary;
- $47.80 for meal costs per day per person, both when overnight accommodation is and is not required;
- $30 for parking per person per day; and
- $0.82 per kilometre for petrol costs.[38]

The Ministry of Housing departed from the Oranga Tamariki funding protocol only when it updated its policy in March 2021, agreeing now to reimburse the costs of one support person per witness to attend the hearings if required, on the same basis as funding for witnesses – regardless of the sensitivity of the evidence.[39]

Mrs Calcott-Cribb told us that, by the end of 2021, the Ministry of Housing had reimbursed 19 claims, paying out $11,865 – significantly less than the agency has at its disposal.[40]

Te Arawhiti releases guidance on claimant funding (2021)

By early 2021, therefore, different funding protocols were operating in a number of kaupapa inquiries. In April 2021, in an attempt to 'encourage consistency across agencies', Te Arawhiti distributed its first guidance for lead agencies on funding claimants' costs.[41] This 'interim' guidance was intended to operate only for '12–15 months' until a centralised funding scheme (anticipated for 'July 2022') was established.[42] It is still in place.

Te Arawhiti's guidance did not add much to what the lead agencies were already doing. It recommended agencies fund

> reasonable and actual costs of claimants, claimant witnesses and necessary support people to attend the hearing days where they are scheduled to give evidence and closing days where claimants and their counsel are scheduled to make closing arguments for their inquiry.[43]

It said claimant funding should be 'aimed solely at claimants', not interested parties.[44]

The document explained that it was reasonable and appropriate for agencies to cover travel, food, and accommodation for a claimant group, which could consist of between one and 10 claimants, claimant witnesses, and necessary support people.[45] Te Arawhiti's guidance did not specify any exact amounts or ranges for

38. Document A73, paras 3–9
39. Document A73, paras 20–21
40. Document A73, para 23
41. Document A72(a), p 154
42. Document A72(a), p 154
43. Document A72, para 46
44. Document A72(a), p 154
45. Document A72(a), p 154

these expenses. It advised agencies not to cap the funding available to claimant groups, but informed them that 'a cost range of $500-$5,000 per claimant group is normal and is directly dependent on the number of people attending, the distance they must travel and their accommodation requirements'. It encouraged agencies to understand who the claimants are in their inquiry, to 'make an accurate calculation of the cost of providing claimant funding'.[46]

There was nothing about what agencies should do concerning venue costs, costs already incurred by claimants in past inquiries, or funding to support claimants' organisational costs like claimant hui, administration, and preparation of evidence (although it noted some agencies had funded claimant hui). These categories would be dealt with in 'Cabinet proposals for the long-term centralised provision of claimant funding' (which has yet to eventuate).[47] Agencies were not expected to fund claimants directly to undertake their own research, or consider 'issues of equity, for example whether costs already incurred by claimants should be reimbursed; should larger claimant groups receive more funding, or less; or should lump sum funding be provided and is it equitable'.[48]

This 'guidance' is exactly that – lead agencies retain discretion to formulate their own funding protocols, and the funding regimes developed after the guidance was issued still differ.

Ministry of Health devises a different funding protocol (2022)

The Ministry of Health announced in early 2022 that it would fund claimant participation in the second stage of hearings.[49] The focus of these hearings is the experience of tāngata whaikaha and whānau hauā (Māori living with disabilities). Hearings began in March 2022 via audio-visual link and the first in-person hearing will be in 2023.[50]

By the time Crown Law circulated the Ministry of Health's funding protocol to claimants in April 2022, one hearing for the inquiry had already taken place via audio-visual link. The Ministry of Health described its reimbursement protocol as 'interim', apparently still anticipating that a comprehensive policy was in the offing.

The Ministry of Health's arrangements for claimant funding did not completely match either Te Arawhiti's interim guidance or the approaches of Manatū Wāhine, Te Tūāpapa Kura Kāinga, or Oranga Tamariki – although, like these agencies, the Ministry of Health did proceed on the basis that all payments would be made by reimbursement.[51] The Ministry of Health adapted principles used in the Operation Burnham Inquiry:

46. Document A72(a), p 155
47. Document A72(a), p 156
48. Document A72(a), p 156
49. Its first stage had, as noted, taken place in 2018 and 2019 without any funding for claimants.
50. Document A70, para 6
51. Document A70, para 10

- to be non-adversarial and collaborative in the Ministry of Health's approach to kaupapa inquiries;
- the witness should neither be out of pocket for costs associated with travel, nor should they benefit financially; and
- the witness is expected to take responsibility for their actions and expenditure when travelling.[52]

The second and third of these principles do not align: if a claimant has to pay up front – 'take responsibility for their actions and expenditure when travelling' – they are immediately out of pocket. No agency seems to have contemplated an alternative to reimbursement as a means of paying for claimants' costs.

The Ministry of Health's approach was the same as Manatū Wāhine's as regards paying for the attendance of support people. But, unlike other agencies, and contrary to Te Arawhiti's guidance, it capped the total amount of funding available at $1000 per witness and $5000 per claim.[53] Its maximum funding figures are as follows (the evidence did not say whether this was inclusive or exclusive of GST):

- $500 for flights, taxis or ride shares, or petrol costs per person;
- *$226 for accommodation per day per person where overnight accommodation is necessary;*
- *$50 for meal costs per day per person, where overnight accommodation is not required;* and
- $30 for parking per person per day.[54]

Another unique feature of the Ministry of Health's protocol was that they specified that claimants and witnesses are not eligible for funding if they appear on behalf of, or supported by, organisations, institutions, agencies, or entities that pay them a salary or cover their costs of attending.[55] John Whaanga, deputy director-general for Māori health at the Ministry of Health, added in our hearing that the ministry will consider funding above the limits for such witnesses 'on a case-by-case, "by exception" basis'.[56]

The Ministry of Health did not provide us with any information about whether it had already disbursed funding, possibly because the stage two hearings that took place in 2022 all occurred virtually.

Ministry of Justice also devises its own funding protocol (2022)

On 17 June 2022, the Ministry of Justice announced its own funding scheme for claimants in the present inquiry.[57] Unlike the Ministry of Health, these protocols did not limit the amount that can be claimed by a claimant group. The Ministry of Justice would cover the 'actual and reasonable' costs of flights and cap other expenses as follows (excluding GST):

52. Document A70, para 12
53. Document A70, para 15
54. Document A70, para 15; doc A70(a)
55. Document A70, para 16
56. Document A70, para 17
57. Document A67, paras 37–38

- $178.26 for accommodation per day per person where overnight accommodation is necessary;
- $69.57 for meal costs per day per person;
- $30 for parking per person per day;[58] and
- $0.82 per kilometre for petrol costs, with a maximum amount to be assessed on a case-by-case basis.[59]

Other transport fares are assessed on a case-by-case basis. The Ministry of Justice also noted in a fact sheet for claimants that '[t]he maximum limits will be treated with flexibility, provided that the Ministry considers a claim for a sum exceeding the limit to be a reasonable cost'.[60]

Retrospective claimant funding protocols developed for Freshwater and MACA (2022)

In 2022, the Ministry for the Environment and Te Arawhiti announced that retrospective reimbursement was available for claimants in the earlier stages of the Tribunal's inquiries into National Freshwater and Geothermal Resources (Wai 2358) and the Marine and Coastal Area (Takutai Moana) Act 2011 (Wai 2660).[61]

In May 2022, claimants in the Marine and Coastal Area (Takutai Moana) Act 2011 inquiry were told that those who also had a takutai moana application in the High Court could apply for up to $3,000 of funding to cover 'the actual and reasonable costs claimants faced in participating and attending Stage 2 hearing weeks'.[62] No caps were placed on the cost of flights, but the following limits were set (the evidence did not say whether this was inclusive or exclusive of GST):

- $192 per person per night for accommodation in Wellington or Auckland, or up to $179 for accommodation everywhere else;
- $50 per person per night for koha for an overnight stay at a marae or private residence (this was a unique feature of the funding regime); and
- $24 for breakfast, $16 for lunch, and $45 for dinner (altogether $85), per person, per day for food.[63]

Claimants could be reimbursed if they sent to Te Kāhui Takutai Moana 'documentary proof of expenses incurred (in the form of a signed letter from claimant counsel's client confirming the total funds to be reimbursed, an itemised list of claims to be reimbursed, and relevant bank details)'. The lead agency, Te Arawhiti, did recognise that 'given the time between costs being incurred and a request for funding being made, copies of receipts may not be able to be submitted'.[64]

58. These figures were derived by subtracting GST from the GST-inclusive figures given in evidence.
59. Document A67(a), p 46
60. Document A67(a), p 46
61. For the National Freshwater and Geothermal Resources Inquiry, two hearings for the first stage were held in 2012, and three hearings for the second stage were held between 2016 and 2018. For the Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry, two hearings for the first stage were held in 2019, and seven hearings for the second stage were held in 2020 and 2021.
62. Document A72(a), p 210
63. Document A72, para 74
64. Document A72, para 71

The Ministry for the Environment announced during the course of our inquiry (in August 2022) that it would retrospectively reimburse participants in the National Freshwater and Geothermal Resources inquiry.[65] The process for claiming reimbursement has not been announced, though.[66] Meanwhile, claimants would be funded for stage 3 of the inquiry, which is yet to commence.

Lucy Bolton, Manager of the Freshwater Rights and Interests Team at the Ministry for the Environment, stated that the ministry did not make a decision about funding claimants earlier as stage three of the inquiry 'seemed to be a long time away' and the 'Ministry just hadn't turned its mind to that albeit very important issue'.[67]

How the lead agencies' protocols compare

The table on pages 70 and 71 summarises and compares the funding protocols of each lead agency.

The Adequacy of the Lead Agencies' Funding Protocols

Mr Fraser, Deputy Chief Executive, Strategy Policy and Legal at the Office for Māori Crown Relations-Te Arawhiti, said 'robust is not a word that I would use' to describe lead agencies' different arrangements for funding claimants. Words he did use for the lead agency approach were 'ad hoc', 'interim', and 'not hitting the mark'.[68] Claimant evidence echoed Mr Fraser's assessment.

Below, we discuss first claimants' concerns with how the regime funds activities that *are* eligible for funding. Then, we look at what they say about the activities that are *not* funded, like those associated with administering their claims and holding hui, and preparing evidence. Finally, we assess the overall adequacy of the current set of funding protocols from each lead agency.

Problems with what the Crown protocols do cover

Claimants had the following concerns about the various funding protocols:

- caps on reimbursement for flights in the Mana Wāhine and Health inquiries failed to acknowledge the high costs of flying from rural areas, and the high costs of flying for elderly or people with disabilities;[69]
- some of the amounts of money allocated to accommodation were insufficient in cities like Auckland and Wellington, where hearings of kaupapa inquiries are more likely to occur;[70]

65. Document A65(a), para 14
66. Document A65(a), para 14
67. Transcript 4.1.5, pp 71–72
68. Transcript 4.1.4, p 170
69. Document A18, para [15]; doc A43, paras [19]-[20]; submission 3.3.37, para [74]; doc A9, para [19]
70. Document A35, paras 7–9; doc A37, para 31

Comparison of funding protocols from each lead agency (excluding GST, unless specified)

Inquiry	Flights	Accommodation	Food	Transport
Oranga Tamariki	Actual	$226.05 per person per night, including food	$47.80 per person per day if accommodation not required	$30 for parking per person per day. Taxis, ride share, and Uber within reason.
Mana Wāhine	$434.78 per person	$226.05 per person per night	$47.80 per person per day	$30 for parking per person per day. Taxis, ride share and Uber within reason.
Housing	Actual	$226.05 per person per night, not including food	$47.80 per day if accommodation not required	$30 for parking per person per day. Taxis, ride share and Uber within reason.
Health				
(no mention of GST in evidence)	Up to $500 for flights, taxis or ride shares, or petrol costs	$226 per person per night, not including food	$50 per person per day	$30 for parking per person per day.
Justice	Actual	$178.26 per person per night	$69.57 per person per day	$30 for parking per person per day. Taxis, ride share and Uber within reason.
Takutai Moana				
(no mention of GST in evidence)	Actual	$192 in Auckland or Wellington $179 in other locations $50 in marae or private residence	$24 breakfast $16 lunch $45 dinner = $85 per person per day	
Freshwater	Will be available in stage 3	Will be available in stage 3	Will be available in stage 3	Will be available in stage 3
Te Arawhiti guidance				

Petrol	Claimant hui	Support persons	Individual maximum	Claim maximum
$0.73/km up to 100 km of travel in a personal vehicle		1 support person	No individual maximum cost	No maximum cost for claim
$0.83/km for travel in a personal vehicle	Covers flights, accommodation, and food within same limits as hearing costs	Yes, up to 3 support people	No individual maximum cost	No maximum cost for claim
$0.82/km for travel in a personal vehicle			No individual maximum cost	No maximum cost for claim
Petrol costs included in $500 limit on flights			$1000	$5000
$0.83/km for travel in a personal vehicle	No	Yes	No individual maximum cost	No maximum cost for claim
			No individual maximum cost	$3000
	Will be available in stage 3	Will be available in stage 3	Will be available in stage 3	Will be available in stage 3
			Not recommended	Not recommended

- lack of funding for support people or limits on the number of support people poses a risk to cultural safety,[71] particularly given the sensitive nature of evidence in some inquiries like the Oranga Tamariki inquiry, where only one support person was funded to attend alongside a witness, and only when that witness was presenting in a closed session;[72]
- limiting attendance to only the hearing day where witnesses were presenting evidence, and a lack of funding for claimants to attend hearing weeks where they are not giving evidence (including Crown evidence weeks), constrains claimants' ability to exercise rangatiratanga over their claim and leads to greater dependence on lawyers.[73]

Problems with what the Crown protocols do not cover

Claimants described various Crown funding protocols as too narrow, and neglectful of the broader costs associated with advancing claims in the Waitangi Tribunal, such as the costs of claimant hui, administration, and preparation of evidence.[74] Lacking such support, claimants said their evidence was likely to be more repetitive and less well-developed,[75] they felt 'removed from' the design of the hearings, and inquiries were dominated by lawyers rather than claimants.[76]

Claimants argued that the Crown Forestry Rental Trust's funding categories better reflected their actual costs.[77] Faye Deborah Harding and Dr Guy Gudex (representatives of Patuharakeke Te Iwi Trust Board) provided this list of the many tasks involved in progressing their claims, only one of which – attendance at hearings – is currently covered by the current funding arrangements:

a. Correspondence and hui with our legal representatives to discuss Inquiries and management;
b. Committee and Trustee hui to discuss management of our claims and interests;
c. Hui-a-hapū to discuss ways forward and to inform the hapū of the process, which will include notification and organisation of the hui, as well [as] preparing materials for presentation;
d. Research for evidence to be presented in support of our claim (for example, our own research into land alienation);
e. Commissioning of research and advice to advance our objectives (for example, options available to us to progress our issues);
f. Drafting briefs of evidence and/or liaising with our lawyers to prepare and finalise briefs of evidence;

71. Document A46, para 17; doc A4, paras 20, 23
72. Document A71, para 21
73. Document A3, para 34; doc A26, para 46; doc A27, paras 82–85; doc A33, para 22; doc A47, paras 13, 25; submission 3.3.38, para 31(c); submission 3.3.32, para 17; doc A9, paras 18–19, 22–24; submission 3.3.6, para 43; submission 3.3.1, para 3.7, 4.15, 4.18
74. Document A46, para 8; doc A41, para 31; doc A35, p 4
75. Document A26, pp 12–13; doc A10, para 11
76. Document A3, para 11; doc A41, para 27
77. Document A47, paras 10–14; doc A41, paras 24

g. Providing instructions for statements of claim, submissions and reviewing documents from our lawyers;
h. Attendance at hearings.[78]

Claimants also told us the lack of funding for broader categories ignored the unique needs of claimants in kaupapa inquiries – including supporting groups not previously involved in Waitangi Tribunal processes.

Cherie Kurarangi and Paula Ormsby, claimants for Wai 3011, are new to the Tribunal. Their claim is on behalf of the Wāhine Toa movement of the Mongrel Mob Kingdom that focuses on Māori women and their children associated with gangs.[79] They told us there is a growing desire amongst the Mongrel Mob to participate in Waitangi Tribunal kaupapa inquiries.[80] Ms Kurarangi said the 'Mongrel Mob engaging in a judicial process in an official capacity, where we're not just a criminal looking at jail . . . That's huge for us. It's about a real engagement'.[81] Ms Kurarangi said that 'six [gang] pads' were livestreaming the first Whakatika ki Runga hearing.[82]

This involvement does not come without a significant commitment of time and money, however. Ms Kurarangi and Ms Ormsby said gathering evidence from wāhine in their community is not 'as simple as going in and doing an interview'. After wāhine have shared their stories, 'we've then got a responsibility . . . to act and then put supports around [them]'.[83] Ms Kurarangi said she has attended family group conferences, judicial reviews at the Family Court, court cases and/or whānau hui, and jail visits and/or AVL conferences with whānau in jail.[84] She also said she often has to travel to people's homes to gather evidence, as they may be on home detention or have responsibilities for tamariki. She calculated that, over the last six months, the Wāhine Toa Movement has spent 'just under $35,000' to get interviews done and cover these additional costs.[85] Not funding claimants to prepare their evidence, she said 'set[s] us up to fail'.[86] Another claimant, Timoti Te Moke, gave us similar evidence about carrying the financial burden of participation. We discuss this further in the context of reimbursement as a funding mechanism.

The Crown stated that its policy work in the second half of 2022 would consider funding the wider costs of progressing a claim like those associated with attending hearings (office supplies, printing and photocopying, internet, and phone costs); administrative costs associated with gathering evidence (such as those described

78. Document A33, para 25
79. Statement of claim 1.1.33
80. Transcript 4.1.3, pp 324–325
81. Transcript 4.1.3, p 315
82. Transcript 4.1.3, p 316
83. Transcript 4.1.3, pp 325–326
84. Transcript 4.1.3, p 313
85. Transcript 4.1.3, p 322
86. Document A25, p 10

by Ms Kurarangi); and funding for people coordinating the involvement of whānau hauā.[87]

Funding protocols inadequate for whānau hauā

Whānau hauā claimants also told us the Crown's funding protocols did not meet their needs.

Prior to the adoption of the Accessibility Protocol in the Health Inquiry, whānau hauā characterised Waitangi Tribunal processes as largely inaccessible to them.[88] The Health Inquiry adopted the Accessibility Protocol to enable whānau hauā to participate in its second stage of hearings. The Accessibility Protocol was created by an Accessibility Working Group that included claimants, and consulted with a range of disabled people's organisations and service providers.[89] It provides a wide range of guidance about achieving an accessible inquiry – with procedures that span from the pre-hearing phase when hearing venues are selected and documents are circulated to parties, to the hearing phase, to the Tribunal's reporting on claims.[90]

We adopted some accessibility measures in Whakatika ki Runga, including New Zealand Sign Language interpretation and live audio captioning. The evidence of Richard Williams (the Lower North Regional Manager of Courts and Tribunals at the Ministry of Justice), is that, like funding for simultaneous te reo interpretation (a topic we discuss later in the chapter), funding for New Zealand Sign Language interpretation in the Waitangi Tribunal has come out of the Ministry of Justice's budget rather than the Waitangi Tribunal Unit's budget (through a non-departmental appropriation called 'Court and Coroner Related Costs').[91]

Ms Kingi said that when the Health Inquiry committed to meeting these requirements, many whānau hauā were able to participate in Tribunal processes for the first time.[92] But, considering the previous inaccessibility of the Tribunal, claimants said they have had to dedicate substantial time and effort to informing their community about te Tiriti, the Tribunal, and the purpose of their claims.[93] For tāngata turi – Māori who are also part of the deaf community[94] – this is made

87. Submission 3.3.47, para 135
88. Transcript 4.1.3, p 590
89. In May 2021, the Ministry of Health also provided funding for an 'accessibility discussion' to 'establish a joint working group to develop comprehensive accessibility protocols for conducting the remainder of Wai 2575'. Mr Whaanga said the ministry had provided $10,000 toward 'engagement costs (for example, for food and venue hire') for stage two of the inquiry: doc A70, para 30. For the accessibility protocol see doc A6(a), p 158.
90. Document A6(a), p 158; Wai 2575 ROI, memo 2.6.59(a)
91. Document A92, para 25; memo 2.6.11, paras 12–13
92. Document A6, para 29
93. Document A9, paras 14–17; doc A8, paras 8–26. Tania Kingi said that a lack of knowledge about Tribunal processes is why Wai 2143 was only granted interested party, rather than claimant, status in the Health Inquiry as they were unaware of the December 2019 deadline for becoming a claimant: doc A6, para 14.
94. Transcript 4.1.3, pp 558, 567

more difficult by the lack of New Zealand sign language resources about te Tiriti and its principles.[95]

Ms Kingi said that organisations like Te Roopu Waiora currently volunteer time and resources to providing accessible information for tāngata turi.[96] For instance, on the evening Ms Kingi presented evidence in our inquiry, Te Roopu Waiora organised a two-hour hui to recap the hearing.[97] Te Roopu Waiora also held a meeting about their claims with 20 tāngata from across the motu in March 2020. The costs of New Zealand Sign Language interpretation were covered by Legal Aid Services, but whānau hauā volunteered their time, some travelled 'from around the motu at their own cost', and Te Roopu Waiora covered the costs of providing the venue, equipment, and kai.[98] Ms Kingi anticipated she will spend 1,626 hours on mahi associated with advancing her claim in the disability inquiry in 2023, close to an additional full time job.[99]

For whānau hauā, the costs of preparing evidence are increased by their accessibility requirements.[100] Even if preparation hui were funded for all inquiries, Ms Kingi explained that the baseline costs of things like venue hire, kai, internet/printing costs, and travel to hui are typically higher for whānau hauā because of the cost of meeting requirements like a suitable venue and New Zealand Sign Language interpretation.[101]

Ms Kingi also criticised the exclusion in the Health Inquiry protocol of payment for the costs of witnesses appearing on behalf of organisations, including Māori health providers. She said this 'fails to recognise the already chronic underfunding of the Maaori health and disability sector' that is the subject of claims in the Health inquiry.[102] She described how when her organisation Te Roopu Waiora has to pay to participate in the Health Inquiry, it diverts resources from other 'pressing work streams'. Excluding witnesses from organisations like hers from reimbursement 'fails to recognise that our funding largely comes from contracts that have specific performance requirements and so it is not appropriate to just use this puutea to cover such costs'.[103]

Whānau hauā also emphasised their need for funding for accessible information. They said the large written documents the Tribunal relies on are difficult for them to access. They prefer kanohi ki te kanohi dialogue or '[s]imple, culturally relevant English/Maaori text and illustrations'.[104]

95. Transcript 4.1.3, p 569
96. Transcript 4.1.3, p 586
97. Transcript 4.1.3, p 586
98. Document A6, paras 15–16
99. Document A6(e)
100. Document A9, paras 25–28
101. Document A6, paras 23, 33–35; doc A7, para 23, 28; transcript 4.1.3, p 560
102. Document A6, para 35
103. Document A6, para 35
104. Document A6, para 21; transcript 4.1.3, pp 567–568, 578; doc A8, para 8. Karen Pointon explained that many tāngata turi 'are not able to read or write due to being deprived of early language development', meaning literacy support is crucial to make legal processes accessible to tāngata turi.

Whānau hauā also took issue with the Ministry of Health's interim reimbursement protocol capping the amount of funding that could be reimbursed to each claimant group at $1,000 per witness and $5,000 per claim.[105] As noted above, the Ministry of Health is the only agency to apply such a cap. Te Arawhiti's April 2021 guidance for lead agencies advises against caps.[106]

Dayna Tiwha and Wayne Te Rangi, witnesses who are whānau wakatūru (Māori wheelchair users) said that '[i]n our view, these guidelines have been developed with an able-bodied person in mind, and do not consider the additional costs and logistics incurred for Whaanau Wakatuuru.'[107] They said '$1,000 simply would not cover [the] travel, accommodation, and kai costs' associated with their in-person attendance at hearings. They need:

- two caregivers to attend a full day hearing in person and travel with whānau wakatūru witnesses to another city, which incurs additional travel, accommodation, and kai costs;
- a larger accessible hotel room, which can come at a higher cost;
- two nights of accommodation for a one-day hearing to prevent a witness being in their chair for too long;
- flights in an Airbus A320, which has a cargo area large enough to accommodate a wheelchair; and
- accessible taxi vans.[108]

Travelling without such arrangements can have serious health implications for whānau wakatūru, Mr Te Rangi told us.[109]

Mr Whaanga gave evidence that the Ministry of Health will consider funding above the current caps on a case-by-case, by-exception basis. However, counsel for whānau hauā claimants argued that it is burdensome for claimants to have to prove their exceptional circumstances when, clearly, claimants in the disability phase of the Health inquiry have a unique range of needs.[110]

Funding Only by Reimbursement

All the lead agencies' funding of claimants is done by reimbursement. This means claimants and witnesses have to pay for their expenses when they incur them, and get repaid later. In this section, we look at this mechanism, why it is used, and whether it works.

Claimants' experiences of the reimbursement model

Claimants said in evidence that reimbursement is not an appropriate vehicle for funding because they often have no spare money to pay for costs like

105. Document A70, para 15
106. Document A72(a), p 155
107. Document A9, paras 18–19
108. Document A9, paras 22–24
109. Transcript 4.1.3, p 580
110. Submission 3.3.28, p 11

accommodation and flights.[111] They said if their law firms did not step in to cover these costs, they would struggle to participate in Tribunal processes.[112]

This was confirmed by witnesses who work for law firms. Delani Wihongi-Hemaloto, a registered legal executive at Watkins Law in Kaikohe, said her firm acts for many claimants who, as beneficiaries, would be unable to attend Tribunal hearings without the firm's financial support.[113] Te Ringahuia Hata, a legal executive at Annette Sykes & Co, said her firm bore all the costs of claimants' and witnesses' flights, rental cars, accommodation, and meals for two hearings in the Mana Wāhine inquiry.[114] Otherwise, it 'would have been impossible' for these claimants and witnesses to attend.[115] Ms Hata is also a co-claimant on the Wai 558 claim on behalf of Ngāti Ira hapū in the Marine and Coastal Area (Takutai Moana) Act inquiry, in which Annette Sykes & Co covered the costs of travel, accommodation and kai for 13 witnesses to attend a hearing at Mataatua Marae, Whakatāne. When Ms Hata appeared before us, the firm had not yet been reimbursed because, until May 2022, there was no funding regime for claimants in the inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011. This made claimants feel '[w]hakamā that Annette had to cover all our costs and she has not been reimbursed. This dampens our wairua and we lose motivation to participate, so it puts us off from attending any more hearings in person because we feel like a burden to our lawyers.'[116]

Timoti Te Moke is a claimant who has struggled to pay upfront for accommodation, kai, and travel.[117] He was involved with gangs and spent time in prison when young, but in later life Mr Te Moke became a paramedic and is currently a medical student. He wanted to participate in the Justice inquiry so that he can contribute to 'the kind of change that means the next generation of Māori won't have to go through the kinds of things that myself and the guys I grew up with had to experience.'[118]

Mr Te Moke described lacking money to pay basic expenses like travelling across town to meet his lawyer, or to maintain a working computer – let alone paying up front for flights.[119] Studying now gives him access to internet and printing facilities but, as he put it, 'I don't think I have to take on a degree so I can make a claim.'[120] Mr Te Moke told the Tribunal that the cost of running his Waitangi Tribunal claim

111. Document A12, para 22; doc A6, para 35(f); doc A25, paras 35–42; doc A13, para 15; doc A4, paras 18, 26–30; doc A26, paras 41, 49–50, 60(c); doc A17, paras 12–13; doc A27, paras 82–86; doc A3, paras 38, 41; doc A5, paras 4, 13; doc A46, paras 19–20; doc A21, para 39; doc A23, paras 32, 37, 47, 60; doc A37; para 30; submission 3.3.43, paras 228, 236

112. Document A13, paras 15–16; doc A4, para 30; doc A46, para 19; doc A23, paras 32, 37; doc A37, paras 31, 33; submission 3.3.42, para 7

113. Document A14, para 27

114. Document A23, paras 31–34

115. Document A23, para 36

116. Document A23, para 47

117. Document A12, paras 7–11, 22–25

118. Document A12, para 27

119. Document A12, pp 2–3

120. Transcript 4.1.3, p 269

has affected major life decisions. He chose to do his final year of medical school in Wellington rather than in Auckland because the Waitangi Tribunal is based in Wellington.[121] He knew that 'sooner or later' there would be a hearing of the Justice Inquiry in Wellington and if he were living there he could attend without paying for flights or accommodation.[122]

Similarly, Muriwai Jones, a claimant on behalf of Ngāi Tai, said that her 'small iwi' limited their participation in Tribunal inquiries due to the 'uncertainty' and lack of a 'guarantee that we would be reimbursed if we did take on costs ourselves. It meant, she said, they could not 'fully engage and commit'.[123]

Some witnesses did self-fund, but described the 'personal burden', 'risk', and 'financial stress' it placed on them.[124] Pamela-Anne Ngohe-Simon felt that she was 'lucky' that she could afford to pay her own costs up front.[125] Rowena Tana explained how witnesses for her claim have had to 'borrow money for petrol, or couch surf with friends, or fork out hundreds of dollars for flights just so they can attend a hearing'.[126] Despite the financial burden, she said she felt she had no option but to participate. Otherwise, 'how else do we hold the Crown to account?'[127]

Ms Ngohe-Simon vividly outlined the choices she had to make to take part in the Housing Inquiry:

> It would have been so much easier for us to fly down the night before, stay in a hotel and be well rested and ready for the hearing in the morning. But because we had to pay up front for that and I wanted to bring my daughter, we chose to drive even though that meant that we had to leave by 2am and were exhausted by the time we got there. I looked into it, and it would have cost me thousands of dollars to fly, stay somewhere and get taxis around and there is just no way I could afford that. I would also have liked to have been able to stay longer in Auckland to attend the hearing week in full so I could hear what the other witnesses were saying before I gave my own evidence, but that was not possible because I could not afford to pay for accommodation for myself and my daughter.[128]

Ms Kurarangi told us she slept on the streets of central city Auckland after a hearing of the Housing Inquiry that focused on homelessness. She said, 'I badly miscalculated and misunderstood the accommodation' believing it would be at Te Puea Marae, where the hearing was hosted and was unable to pay for accommodation at short notice, and did not qualify for emergency housing.[129]

121. Document A12, para 14
122. Transcript 4.1.3, p 277
123. Document A11, para 6
124. Document A26, para 49
125. Document A5, para 11
126. Document A3, para 20
127. Document A3, para 12
128. Document A5, para 12
129. Transcript 4.1.3, pp 314–315; doc A25(a)

Claimant Hurimoana Dennis, Chairperson of the Te Puea Memorial Marae Board of Trustees, told us that the disincentives and barriers to participation created by reimbursement as a funding mechanism mean that the Tribunal often misses out on hearing 'the most important perspectives'.[130]

Ngāi Tamahaua claimant Tracy Hillier said she thought reimbursement was particularly inappropriate in kaupapa inquiries where the costs of participating in hearings will probably be higher than for claimants in district inquiries, because hearings are more likely to take place in main centres like Auckland and Wellington.[131]

Reimbursement especially ill-suited to whānau hauā claimants

Whānau hauā face even greater challenges if they want to participate fully. Their costs are higher, and they are likely to be poorer. Statistics show that whānau hauā are more likely than both the general Māori population and the non-Māori disabled population to experience economic deprivation. They have lower incomes and higher rates of poverty, poor housing, and unemployment.[132] The 2010 *Costs of Disability* report by the Disability Resource Centre highlights the extra costs whānau hauā face every week to access education, employment, healthcare, and community-based support services.[133] Ms Kingi described as 'absurd' the assumption that whānau hauā have spare money to pay the costs of participating up front.[134]

The Crown's preference for reimbursement as a funding mechanism

Claimants have raised concerns about funding them only by reimbursement since its first use in the Oranga Tamariki Inquiry.[135] Ms Fletcher said that due to the speed at which the funding protocol came together, 'we just went with it' but said 'I have heard evidence about how unsatisfactory [reimbursement] is for claimants and I wouldn't argue with that'.[136] However, other lead agencies went down the same track.

Fiscal responsibility and efficiency were the main reasons Crown witnesses gave for funding only by reimbursement. Officials described it as an efficient mechanism to meet costs for an agency that already has reimbursement systems in place, satisfying audit requirements. Paying only on receipts also meets the requirements of the Public Finance Act 1989. Mr Chhana argued that the Ministry of Justice is 'limited in its ability to provide funding outside of a reimbursement model', as paying on receipts allows the ministry to ensure 'that all costs claimed can be

130. Document A27, para 83
131. Document A26, para 50. It must be noted that some kaupapa inquiries have held hearings in regional centres – the Health Tribunal sat in Hamilton and Ngāruawāhia in its first stage, and Mana Wāhine Tribunal sat in Northland, Waikato, Bay of Plenty, and Christchurch in its tūāpapa phase.
132. Document A6, paras 7–13
133. Document A6(a), pp 1–114
134. Document A6, para 35(f)
135. Transcript 4.1.4, p 499
136. Transcript 4.1.4, p 499

validated', consistently with the ministry's obligation to ensure that public funds are 'within the scope and amounts of set appropriations'.[137]

Ms Ngawati of Manatū Wāhine described reimbursing costs as 'best practice',[138] but she said she was flexible and attempted to 'take as many proactive steps as we can within the parameters that we have to work in'.[139] She had considered a last minute request to provide upfront funding 'to enable a larger group to attend to support a witness'. Manatū Wāhine 'turned around an exemption request on a one-off basis' to approve funding in advance for this group. However in that case 'the lawyers decided they didn't want to progress that'.[140] Ms Ngawati indicated that Manatū Wāhine is open to further consultation with claimants on ways to provide funding in advance, including methods that do not require the use of a lawyers' trust account.[141]

Conclusion

Reimbursement as an invariable means of meeting claimants' costs is not appropriate in this context. It should not be expected that claimants have the means to front up for expenses. That expectation puts them in an invidious situation. They may well choose not to participate at all so they can avoid the embarrassment, uncertainty, and risk that the current practice imposes, or they may not seek reimbursement. We have no means of knowing how often claimants have made these unpalatable choices. It is also not a reasonable or acceptable alternative to expect law firms to carry the cost until reimbursement comes through.

One of the principles that applies to claimants' participation in Waitangi Tribunal processes must surely be that doing so causes them no hardship. Reimbursement as an instrument runs counter to that principle, because having to pay costs out of pocket causes hardship for many.

The Crown's fiscal concerns can be overcome by other means of ensuring accountability. A number were discussed at hearing, and we will address them in recommendations.

Overall Effectiveness of Lead Agencies Funding Claimants

The Crown never made a formal decision that claimants in Waitangi Tribunal kaupapa inquiries should be funded by the individual lead agencies. As we have explained, a Cabinet circular in April 2019 ordained that lead agencies had to respond to kaupapa inquiries out of their existing budgets. It said 'agencies will be expected to absorb the costs of participating in kaupapa inquiries within baselines, as they represent the business-as-usual activity of ensuring policy is consistent with the Treaty of Waitangi'.[142] This frames the idea of lead agencies working

137. Document A67, para 57
138. Document A68, para 37
139. Transcript 4.1.4, p 527
140. Transcript 4.1.4, p 523
141. Transcript 4.1.4, p 546
142. Document A72(a), p 42

within existing funding to address a whole new area of work as some kind of Treaty-forward idea, but in reality the agencies were just being told to make do with what they had. This was always going to be difficult. If agencies needed to, they could bid for more funding, but before doing that they would be expected to move around their existing allocations to divert some to the kaupapa inquiry costs.

The first thing to note here, as we said in chapter 3, is that there is no mention in the Cabinet circular of lead agencies funding claimants as part of the costs of participating in kaupapa inquiries. The circular was talking only about the lead agencies' own costs. This means that Oranga Tamariki's decision to fund claimants, and other lead agencies' decisions to do the same thing, was an exercise of discretion on the part of individual agencies. There was no Cabinet authorisation, and no budget allocation.

As we have seen, beginning with the Oranga Tamariki inquiry, lead agencies did develop their own protocols and did agree to fund claimants, although in two cases only retrospectively.[143] In the Military Veterans Kaupapa Inquiry, Lieutenant Colonel Dransfield told us that in future the New Zealand Defence Force would fund claimants on the same basis as the Te Arawhiti interim guidance.[144] It might be said that establishing the various protocols and actually reimbursing costs is a de facto recognition by the Crown of claimants' right to be funded, or that providing funding creates a legitimate expectation that the Crown will keep funding. However, this situation did not arise because of a policy determination that claimants have a right and that the Crown has a duty to meet it

What Crown officials said about the lead agency funding approach

The documents attached to the evidence of Mr Fraser and Mr Chhana make it plain that officials do not think that the de facto practices of individual lead agencies to fund claimants makes for an effective system. In Mr Fraser's words, it was officials' 'least preferred' option for managing kaupapa inquiry funding.[145] Te Arawhiti and Justice officials favoured a centralised funding scheme, and tried to direct efforts towards that outcome – thus far without success, as we have seen.

In one of many briefing papers on this and related topics, an aide-memoire of 6 May 2021 'designed to be read alongside the joint ministerial briefing' entitled 'Waitangi Tribunal kaupapa and contemporary inquiry claimant funding' gave the Minister of Justice further insights into the problems with lead agency funding of claimants. The aide memoire accompanied the ministerial briefing of 21 May 2021, which we have discussed extensively.

The briefing paper itself told Ministers that the status quo – claimant funding by lead agencies – would be the 'quickest solution', but it was:

143. In the inquiry into claims about the Marine and Coastal Area (Takutai Moana) Act 2011 and Freshwater and Geothermal Resources inquiry.

144. Document A64, paras 14–17

145. Transcript 4.1.4, pp 177–178

- the least efficient or effective as arrangements for delivery must be replicated across each agency with limited ability to streamline delivery;

. . . . .

- least consistent with the broader Māori–Crown relationship and policy settings, due to a lack of perceived independence and consistency . . .[146]

Commenting further on lead agency claimant funding, Justice officials told their Minister in the aide memoire (trying to persuade him to agree to a centralised funding scheme) about how difficult and expensive it would be for the Ministry of Justice, as lead agency, to run both claimant funding in this Justice system inquiry, and a forthcoming constitutional inquiry.[147] It confided:

> The experience of other lead agencies in recent inquiries is that claimant funding issues tend to dominate inquiries, with arrangements being extremely complex and resource-intensive to negotiate with claimants and to then administer via small, standalone funding schemes.[148]

Moreover, the aide memoire said, getting agencies to fund out of baseline had not been working:

> [A]gency-led funding options have struggled in practice, as outlined in the briefing. Where agencies have provided claimant funding, the cost has often been met through the reprioritisation of other programmes intended for Māori, rather than from new funding sources or other areas of agency baseline.[149]

Lead agencies could not fund their participation in kaupapa inquiries as 'business as usual', so they had to sacrifice other 'business as usual' to pay for it.

In her submissions, Crown counsel did not address these swingeing criticisms of the lead agency funding approach.

Local variance

Another aspect that was apparent to us when we heard evidence from Crown witnesses representing the different lead agencies is that the protocols established and the way they were implemented seemed to be strongly influenced by the approach of the official in charge of running them.

The variance continued in the amount of money officials were able to get for their agency's involvement in kaupapa inquiries.

Nicola Ngawati gave evidence that Manatū Wāhine absorbed the costs of the first two tūāpapa hearings in the Mana Wāhine inquiry 'within baseline'.[150]

146. Document A67(a), p 25
147. Document A67(a), p 27
148. Document A67(a), p 27
149. Document A67(a), p 29
150. Document A68, para 20

It budgeted $270,000 for claimant costs in these hearings, but spent much less. There was $214,694.63 left over.[151] She told us: 'In addition to the amount leftover, Manatū Wāhine received an appropriation for $1.25 million each financial year (July to June) for the three years, beginning 1 July 2021, for "supporting Mana Wāhine Inquiry claimant engagement"'.[152]

This is the only budget allocation we are aware of specifically for claimant funding.

Kararaina Calcott-Cribb told us that when the Ministry of Housing could not meet the costs of the Housing inquiry from baselines, 'a tagged operating contingency was sought by Te Tūāpapa Kura Kāinga from Budget 2020. On 6 April 2020, Cabinet committed $10 million over four years . . . as an operating allowance for the Crown's participation in the Wai 2750 Inquiry.'[153] This was an increase of $2.5 million a year but, in this case, Mrs Calcott-Cribb said, the extra funding was 'not specifically allocated for claimant funding'. However, part of it has been used for that purpose.[154]

While local variance may have brought the Crown into a different level of Treaty-compliance in certain kaupapa inquiries as a result of the influence of individuals, that is not how Treaty-compliance should be achieved and is not a solution for system-wide problems. Wide variance of this kind means that some lead agencies will be better off, and some claimants will receive better treatment than others. This creates potential for inconsistency, uncertainty, and unfairness as between claimants in different kaupapa inquiries.

One glaring inconsistency was in the case of claimant funding sought for Stage 2 of the Tribunal's inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011. In September 2020, Te Arawhiti said no. They expected a centralised funding scheme to be introduced and did not want to approve lead agency funding for this inquiry before that happened.[155] Whatever the reason, however, that decision was out of line with then-current practice in other inquiries, and created unfairness for those claimants.

Poor uptake of lead agency funding

As we mentioned earlier, the underspend on claimant funding as compared to anticipated expenditure is another phenomenon of lead agency funding. We think it likely to have arisen from a combination of the problems we have identified with the lead agency approach: (a) the 'ad hoc' development of inconsistent protocols from agency to agency; (b) the limited scope of the categories of funding provided; and (c) the financial difficulty for claimants of having to front up for expenses themselves, with reimbursement possibly a long way down the track, and uncertainty too about whether they will be reimbursed at all. Without clear expectations of what funding would be approved for claimants from inquiry to

151. Transcript 4.1.4, p 517. The figures quoted differ from those in the text of Ms Ngawati's brief of evidence (doc A68). She updated them at the hearing.
152. Document A68, para 16
153. Document A73, para 14
154. Document A73, para 15
155. Document A72, para 66

inquiry, with protocols only covering a small fraction of the actual costs involved, and uncertainty about whether they might be permanently out of pocket for their expenses, it is not surprising if claimants did not apply for funding. We think it even more likely that they simply limited the nature and extent of their participation by not incurring expenses. The fact that few claimants attended our hearings in Whakatika ki Runga supports this supposition.

Lead agency concept flawed from the outset

The lead agency concept was flawed from the outset. We have emphasised that the Cabinet circular created no expectation that the agencies would pay claimants' costs, but even without that they would struggle to fund a whole new tranche of work from baseline. Add claimant funding to the mix, and the situation gets worse.

The lack of any budget allocation to claimant funding would inevitably influence how and when each agency rolled out its claimant funding protocol, and what categories of funding they would approve. It would also make it less likely that they would put resources into engaging with the claimant community. Ms Ngawati and Mrs Calcott-Cribb seemed most engaged with the claimants in the kaupapa inquiries they are involved with, and they also have the most money at their disposal. They are of course also Māori, well-informed, and genuinely interested in the kaupapa inquiry work. They behave more like the Crown Forestry Rental Trust, which also deliberately builds relationships with claimants.

Conclusion

All in all, and borrowing the words of Mr Fraser, there are very good reasons why the lead agency model is no one's preferred option. Given what the Crown clearly knew about its inadequacies, it is a real indictment that the measures aimed at replacing it (the centralised funding scheme) have failed.

Translation of Te Reo Māori Documents into English

Another funding issue that claimants raised concerns the translation into English of documents filed in te reo Māori. This topic does not sit neatly in this chapter, which concerns the inadequacies of the lead agency funding model. Lead agencies do not pay for translations. However, it is a cost of bringing claims to the Waitangi Tribunal, and one of particular concern to some claimants who wish to conduct their claims in te reo rangatira. Accessing funding has been problematical, and so we deal with the topic in this report on claimant funding.

In Whakatika ki Runga it emerged quite clearly that the translation of claimants' te reo Māori documents into English is a cost of the Waitangi Tribunal process for which the Waitangi Tribunal Unit should pay.[156] Because that unit has not

156. As noted in chapter 1, the Waitangi Tribunal Unit is a business unit of the Ministry of Justice that employs staff who support the Waitangi Tribunal, including inquiry facilitation, research, report writing and registrarial staff: doc A89, pp 3–4.

until recently regarded translating these documents in that way, getting the documents translated has become a problem for claimant counsel. The Legal Services Commissioner does not regard this work as a natural part of what legal aid pays for either. In this section we address what is really a simple problem that should be quickly fixed.

We saw in Whakatika ki Runga that the Waitangi Tribunal conducts its hearings so as to support claimants to present oral evidence in te reo Māori. An interpreter is present at every Waitangi Tribunal hearing to translate everything said in Māori into English. Earpieces are provided to anyone who attends and, in our hearings, the interpretation was also accessible via live captioning on the live video feed.

Until 1 July 2022, the cost of providing interpretation at hearings was met through the Waitangi Tribunal Unit's budget as a departmental appropriation. After that date, the cost was transitioned to the Centralised Services, National Service Delivery team of the Ministry of Justice. The cost of interpretation was now a non-departmental appropriation and no longer came out of the Waitangi Tribunal's operating budget.[157] Steve Gunson, director of the Waitangi Tribunal Unit, said this allowed the Unit 'to reduce the administrative overhead of engaging in contracting [interpreters]'.[158] Until 1 July 2022, the average rate for te reo interpreters booked by the Tribunal Unit was $120 per hour.[159] The Tribunal Unit still meets the cost of technical and audio support for interpretation.[160]

Oral interpretation and translation of written documents are not dealt with in the same way. Now we turn to the situation that applies to translating evidence and submissions that claimants file in the Waitangi Tribunal in te reo Māori.

We heard from Mr Gunson that the new budgetary arrangements for simultaneous interpretation do not apply to translation of documents. Thus, the cost comes out of the Waitangi Tribunal's operating budget. Mr Gunson said that the Tribunal Unit was guided by the Waitangi Tribunal *Guide to Practice and Procedure*'s 'preference for claimants to provide translations of briefs of evidence at the outset to avoid misinterpretation'.[161] Consequently, claimants and their counsel have been asked if they can provide translations themselves.[162]

Mr Gunson said that '[w]here claimant counsel has not provided translations or at the request of Presiding Officers, the Unit has funded the translation of documents' out of its baselines.[163] If the Tribunal Unit cannot meet the costs within baselines, the director of the Waitangi Tribunal Unit can make a request to the

157. Document A89, paras 23–24
158. Transcript 4.1.5, p 98
159. Document A89(a), pp 9–10
160. Document A89, para 25
161. Mr Gunson was referring here to the *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (August 2018), which is a judicial document to be read in conjunction with the legislation that governs the Tribunal, including the Commissions of Inquiry Act 1908 and the Treaty of Waitangi Act 1975: see Waitangi Tribunal, *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (Wellington: Waitangi Tribunal, 2018), p 1.
162. Document A20
163. Document A89, para 27

Chief Operating Officer, Operations & Service Delivery at the Ministry of Justice, a role currently held by Carl Crafar.[164] Mr Crafar was unable to give evidence due to health reasons, and we heard instead from Mr Williams, the Lower North Regional Manager of Courts and Tribunals.[165] He said 'Mr Crafar has not denied any requests for additional funding [including for translating documents] that he is aware of in his 6 years as the Chief Operating Officer'.[166]

However, evidence was put before us of an incident where a presiding officer informed counsel that evidence/submissions filed in te reo Māori could not be translated by the Tribunal due to a lack of resourcing.[167] In August 2021, speaking as presiding officer of the Tribunal's inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011, Judge Miharo Armstrong stated that the Tribunal did 'not have the resource to fund the translation of [the] written submissions' in that inquiry. The material filed by claimant counsel Kaupare Law was largely in te reo Māori. He said 'the Tribunal will provide an interpreter to translate counsel's oral submissions at the hearing', and otherwise suggested that counsel (Alana Thomas and Aroha Herewini) 'raise the issue of funding with the Legal Services Agency'.[168]

Mr Gunson said he was 'not across that situation in August 2021', and was not aware of what information Tribunal staff gave Judge Armstrong.[169] Mr Gunson confirmed that, unlike the cost of simultaneous interpretation, translation of written documents in Māori has had no specific allocation in the Waitangi Tribunal Unit budget, including in the latest 2022–23 budget.[170] Any request that a presiding officer makes for translation is therefore an 'unplanned activity', and the Tribunal Unit's ability to meet it depends on other funding pressures at any given time.[171] Mr Gunson said that, in the first instance, the Unit would look to reshape its existing inquiry programme budget to accommodate translation requests, which could have implications for other work streams. Or, the Unit could seek additional funding.[172] The Unit has met requests to pay for translations in the 2022–23 financial year from its baseline budget, and Mr Gunson has not needed to seek additional funding 'thus far'.[173]

Mr Gunson referred to the translation of documents filed in te reo as 'a new emerging space', and said that the decision to shift the funding of interpretation to a non-departmental appropriation has left the Tribunal Unit 'a bit exposed'.[174] Because of the focus on funding for translation in this inquiry, and more requests

164. Document A92, para 20
165. Transcript 4.1.4, p 95; submission 3.2.69
166. Transcript 4.1.5, p 29
167. Document A20(d)
168. Document A20(d), p [5]
169. Transcript 4.1.5, p 115
170. Transcript 4.1.5, p 90
171. Transcript 4.1.5, p 94
172. Transcript 4.1.5, p 104
173. Transcript 4.1.5, p 105
174. Transcript 4.1.5, p 106

for translation from presiding officers, Mr Gunson said the Tribunal Unit was considering including translation costs in its 2023–24 budget bid.[175]

When doubt was raised as to whether translation of Māori documents into English could really be characterised as an emerging issue, Crown counsel defended Mr Gunson. She said he was not saying 'it was an emerging issue that Te Reo be spoken in the Tribunal', but was instead commenting on the increasing frequency of requests for translations of written documents.[176] She also said 'Mr Gunson clarified that although there hasn't previously been a specific allocation for translation in the Tribunal's budget, this does not mean there has been no funding for translation work'.[177]

Analysis and Findings

The adequacy of the lead agencies' funding protocols

In response to claimant concerns about what is funded, Crown counsel submitted that the scope of funding provided by lead agencies was reasonable and consistent with Treaty principles, emphasising that the arrangements were still 'interim' and under development, and that the Crown was actively considering whether to fund organisational costs.[178] Counsel argued that variations in protocols between agencies did not amount to a Treaty breach and that it is not 'necessarily inconsistent with Treaty principles for the provision of claimant funding to be provided on an agency-by-agency basis'.[179] She added 'it is the provision of legal aid (not claimant funding) in Waitangi Tribunal that primarily fulfils the Crown's obligation to protect Māori rights of access to justice',[180] and went on to say that 'while the Crown intends to provide claimant funding for kaupapa inquiries going forward, . . . the absence of such funding [is not] a breach of Treaty principles'.[181]

The Crown therefore rejected the suggestion that we can make a finding of Treaty breach based on the unavailability of claimant funding for the Military Veterans inquiry oral evidence hearings, the stage one Health inquiry hearings, the stage one and two Freshwater hearings, and stage one of the inquiry into the Marine and Coastal Area (Takutai Moana) Act 2011.[182] Crown counsel said 'it is reasonable for the Crown's policies and practice to evolve over time, to meet the prevailing circumstances,' noting that 'CFRT's approach to funding also appears to have evolved over time'.[183]

175. Transcript 4.1.5, p 91
176. Transcript 4.1.5, p 636
177. Transcript 4.1.5, p 638
178. Submission 3.3.47, para 135
179. Submission 3.3.47, para 127
180. Submission 3.3.47, para 137
181. Submission 3.3.47, para 156
182. Crown counsel did not mention stage two of the Marine and Coastal Area (Takutai Moana) Act inquiry in this part of her submission: see submission 3.3.47, para 154.
183. Submission 3.3.47, para 137

While this last observation is broadly true, it is not a valid comparison. When the Crown finally delivered itself in about 2018 to the issue of claimant funding in kaupapa inquiries, it was in a very different position from the Crown Forestry Rental Trust when it was starting up its claimant funding processes in the early 1990s. Plainly, the Crown had a precedent to go by, whereas the Crown Forestry Rental Trust was starting from a blank slate. The Trust's funding regime broadly worked for claimants, and the Crown knew about it because the papers note officials' interaction with Trust personnel and discuss the Trust's funding.[184] Discussion documents also record the Crown's appreciation of the claimants' position that 'without the Crown covering these costs' – that is, the costs that the Crown Forestry Rental Trust covered – claimants' ability to participate in inquiries would be compromised.[185] It was available to the Crown to pick up the Trust's readymade system and adapt it to the circumstances of kaupapa inquiries. However, nowhere in the papers do we see an appetite for the Crown to take on a funding regime as comprehensive as the Crown Forestry Rental Trust's. Officials do favour a centralised funding system – which is essentially what the Crown Forestry Rental Trust is in inquiries where Crown forest land is in issue – but thus far they have been unable to get traction to advance to a concrete proposal.

It is possible to see in the Crown's supporting papers slow and halting movement towards a better system than the lead agency arrangements currently in place, but the reality is that the lead agency arrangements are all there is and no end to them is in sight. They may be 'interim' but that does not lessen their impact.

Aspects of the arrangements that concern us most are:

- The requirements to provide comprehensive financial documentation to apply for retrospective funding in the Marine and Coastal Area (Takutai Moana) Act Inquiry is unrealistic, considering the hearings were several years ago and claimants are unlikely to have kept the necessary records when no funding was available at the time.
- Whānau hauā have been disadvantaged by the capping of funding in the protocols for the Health inquiry. The levels of funding authorised do not reflect the reality of the circumstances of whānau hauā and the extra costs involved in their participation in the Waitangi Tribunal's processes.
- Protocols need to reflect the reality that Māori are communal people, and many claims to the Tribunal are advanced by a group or on behalf of a group. Work on claims ā rōpū is therefore a necessity for full participation. Important aspects are gathering and sharing information; providing manaakitanga, which includes physical and emotional support, especially to people who are old or vulnerable; and enabling group decision-making through both hui and the use of digital resources. Most lead agencies do

184. Document A72(a), pp 82–84, 90–91, 120–121
185. Document A72(a), p 121

not have functional relationships with claimants that enable them to assess these needs,[186] and most do not provide for them in their protocols.

- Limiting costs and categories of costs is arguably less appropriate in kaupapa inquiries: claimants will not benefit financially from settlement of their claims in these policy-oriented inquiries, so it is more important to ensure that all reasonable costs of participation are funded.[187]
- Setting limits on amounts that will be expended is not inherently objectionable, but 'caps' must be realistic so as not to deter participation. Crown counsel argued that caps are reasonable, and cited the Crown Forestry Rental Trust's practice of setting 'benchmarks' for funding.[188] The Crown Forestry Rental Trust filed documents on a confidential basis that set out the average amounts it spends on a hearing week or on an approved client. These indicate that the Trust's pay-outs are considerably more generous than the lead agencies.[189] Moreover, the Crown Forestry Rental Trust sets benchmarks only in some contexts.[190]
- This segues to the poor uptake of funding, discernible in the disparity between the amounts that lead agencies budgeted for claimant funding and the amounts they have disbursed. Crown counsel says we do not know why the amounts budgeted have not been claimed, and should therefore make no findings about it.[191] We make no specific findings about the underspend, but note it as an area of concern. We have hypothesised that the most likely reason why claimants have not sought reimbursement, or have decided to limit their participation and have therefore not incurred costs, is the inadequacies of the arrangements and the way they are administered. We are confident that if the lead agencies' approach changed in material ways there would be no shortage of applications for funding. As far as we are aware, the Crown Forestry Rental Trust has never experienced low uptake of its funding of claimants. On the contrary, Anita Miles explained how the Trust must carefully manage how it responds to the demand for funding[192] now that it has less money to support its operations[193] because otherwise it might run out of funds.

186. Claimant counsel Alana Thomas cross-examined Ms Ngawati about her view that claimant counsel could do more to encourage claimants to apply for funding. Ms Thomas put to Ms Ngawati that the Crown has a responsibility to engage with claimants, and could help claimants to submit funding applications. Claimant counsel are not funded to help claimants with reimbursements, whereas Manatū Wāhine has received significant new funding for engagement with claimants: see transcript 4.1.4, p 554.

187. Document A47, para 25

188. Submission 3.3.47, para 138

189. Submission 3.2.215

190. Anita Miles said in 'a Waitangi Tribunal district inquiry . . . operations funding for an Approved Client is not capped (ie Approved Clients can receive operations funding for as long as an inquiry lasts) and research and hearing hosting funding is also not capped': see doc A77, p 28.

191. Submission 3.3.47, para 140

192. Document A77, paras 47–57

193. Document A77, paras 40–41

The different and inconsistent rules that lead agencies apply to funding claimants in kaupapa inquiries leads to an uncertain and confusing situation that is poorly understood by claimants. The shortcomings are more serious because lead agency protocols should have been no more than a brief stopgap measure, but because the Crown has not been able to deliver a better, comprehensive system they have become de facto Crown policy. Those arrangements are flawed in all the ways we have described, and continued adherence to ad hoc arrangements that are not fit for purpose puts the Crown in breach of its responsibilities under the principles of active protection and good government. The inadequacy of the arrangements has spawned countless inconveniences, uncertainties, fears, costs, and embarrassments for claimants, and we do not doubt that their participation in Tribunal inquiries has been and continues to be affected.

Reimbursement

The Crown says that a reimbursement model for claimant funding is not, in principle, inconsistent with Treaty principles.[194] The authority for this statement is a passage in a recent Waitangi Tribunal report, the stage one report into claims about the Marine and Coastal Area (Takutai Moana) Act, where the panel observed that 'retrospective payment is a common feature of other funding regimes Māori litigants might access'. It said '[r]etrospective payment, as a principle, does not breach the Treaty principles of active protection and partnership.'[195]

It seems to us that whether payment should be prospective or retrospective is not a matter that can be analysed in terms of principle. Everything is contextual. No doubt there are contexts when reimbursement will not cause difficulty. This is not one of them.

Paying claimants' costs only by reimbursement has caused difficulty: claimants told us so. Carrying the costs is a burden on them and disincentivises them to participate fully. For example, witnesses may opt to have their testimony 'taken as read' rather than incur travel and accommodation costs involved in attending a hearing to present evidence. Crown witnesses Jane Fletcher, Kararaina Calcott-Cribb, John Whaanga, and Nicola Ngawati acknowledged that claimants had found reimbursement problematical.[196]

We saw low attendance of claimants at our hearings, and the report of the inquiry into the Marine and Coastal (Takutai Moana) Act 2011 recorded that panel's disappointment that so few had attended, apparently for cost reasons.[197]

We observe that the funding regime that the Crown Forestry Rental Trust runs does not work on reimbursement. Approved clients are provided with bank accounts set up for the purposes of receiving funding, and the Trust funds an

194. Submission 3.3.47, para 148

195. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report* (Lower Hutt: Legislation Direct, 2020), p 11

196. Transcript 4.1.4, pp 377, 482, 498–499, 546

197. Waitangi Tribunal, *The Marine and Coastal Area* (*Takutai Moana*) *Act 2011 Inquiry Stage 1 Report*, p 11

accountant to assist with financial reporting every month.[198] Nor is the provision of legal aid analogous to the Crown's funding of claimants by reimbursement. Claimants do not pay their lawyers and then seek reimbursement. After lawyers have provided their pre-approved services, they submit the final bill to the client for approval, then invoice Legal Aid Services directly for payment. At no point are claimants expected to carry costs. Thus, it is only in the context of the present policy for funding claimant participation in the Waitangi Tribunal that claimants themselves must first meet the costs and then seek reimbursement.

Funding claimants only by reimbursement is especially inappropriate in the context of Treaty of Waitangi claims. This is a process in which claimants seek recognition and rectification of Treaty-breaching Crown action, much of which has adversely affected their ability to succeed economically in our society. If in the process of pursuing their claims, claimants experience more financial stress, the negative effects on them are compounded – and the goals of the Treaty of Waitangi Act 1975 are simultaneously thwarted.

Nor do we accept that fiscal responsibility requires the Crown to insist on the reimbursement model. As Mrs Calcott-Cribb confirmed in an answer to claimant counsel, if the Crown were to set up a capacity for payments up front, it would do so in a way that would still satisfy audit requirements[199] – just as the Crown Forestry Rental Trust has devised a financially accountable way of paying claimants in advance of their incurring expenditure. Far from encouraging claimants to be irresponsible about money, Anita Miles said claimants have an incentive to ensure that this type of system works well and 'become very good at' meeting their auditing and financial report requirements.[200] Claimants have decades of experience of meeting the Crown Forestry Rental Trust's accounting standards, which should encourage the Crown to use this capacity and explore alternatives to reimbursement.

In the context of funding claimants to participate fully in Waitangi Tribunal inquiries, the Crown's duty of partnership requires it to find other means of covering costs than relying entirely on reimbursement.

Overall effectiveness of lead agencies funding claimants

The Crown never made a formal decision that the way to fund claimants in Waitangi Tribunal kaupapa inquiries was through lead agencies. The Cabinet circular of 2019 told the lead agencies to manage their participation in kaupapa inquiries out of baseline funding, and they – one by one – took it upon themselves to set up funding protocols to fund claimants as part of that participation. Because the agencies set up funding for claimants off their own bat there were no standards or guidelines they had to follow, and although there were more and more precedents as they went along, the set of protocols they arrived at differed. So did the timing of adoption of protocols in relation to the hearing timetable.

198. Transcript 4.1.4, p 61
199. Transcript 4.1.4, p 435
200. Transcript 4.1.4, p 61

Some kaupapa inquiries had claimant funding in place from the outset, others not at all, and some covered only the later hearings. We quote Crown officials' low estimations of what resulted.

The highly discretionary way that the various arrangements came into effect is mirrored by their administration being quite different in character. We saw individual officials' preferences and orientation really influencing how the protocols came together; what activities were covered; the extent of engagement with claimants; how much money they managed to extract from the budget process for involvement in kaupapa inquiries; and how much of that money they were prepared to devote to claimant funding. We call this phenomenon local variance.

We agree with officials' assessment that claimant funding through lead agencies is ineffective, and the Crown breached the principle of active protection in not devising and implementing an effective means of supporting claimants to participate fully in Waitangi Tribunal hearings.

Translation of te reo Māori documents

The Waitangi Tribunal's decision in the Te Reo Māori Inquiry[201] set in motion changes that produced legislation in 1987 that declared Māori to be an official language of New Zealand. Language exists in both written and oral form, of course. Encouraging the use of te reo Māori in the Waitangi Tribunal, whether spoken or written, involves facilitating translation and interpretation into English so that those not fluent in Māori can participate fully. That is a requirement of the rules of natural justice, and fulfilling it benefits the Waitangi Tribunal's process and not participants who want to function in Māori. At no stage should there be a burden of cost or inconvenience on participants in our process who exercise their right to communicate in te reo Māori.

If it has not been said before, we will say now that the right for participants to express themselves freely and easily in both written and spoken Māori is a tika tūāpapa[202] of the Waitangi Tribunal. We are uninterested in discourse about what the *Guide to Practice* says about translation of documents from Māori to English, or whether translation of documents is under the mana of the judiciary or the Waitangi Tribunal Unit, or whether translation of documents requires a request from a presiding officer,[203] or whether this is or is not a new and emerging issue.[204] Any administrative or bureaucratic Waitangi Tribunal settings that get in the way of Māori documents being translated into English as of right are a mistake and must change.

We inferred from the evidence of Steve Gunson as director of the Waitangi Tribunal Unit that translation of te reo documents has not been appropriately

201. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Māori Claim* (Wellington: Brooker's Ltd, 1986), p 20; Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wellington: GP Publications, 1999), p 48; Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 47; Waitangi Tribunal, *He Pāharakeke*, p 96

202. Fundamental or basic right.

203. Submission 3.3.47, para 203

204. Transcript 4.1.5, p 111

prioritised. He told us that the lack of specific budgeting for translation has 'potentially been an oversight when we've put the Inquiry programme together'.[205]

It was the Waitangi Tribunal that formally recognised te reo Māori as a taonga under the Treaty over 30 years ago, and it is incumbent upon us all to ensure that the Waitangi Tribunal's practices and policies reflect that reality. It is quite unacceptable that, as we heard from Kipa Munro and his counsel, parties preparing evidence or submissions in te reo Māori face a prejudicial administrative burden.[206] It was clear from Mr Munro's evidence that Mr Gunson understated the position when he said the current settings for translating Māori to English 'could be perceived as restraints on the use of te reo Māori'.[207] It is not enough that '[the Tribunal Unit] make every effort to get translations done'.[208] Enabling the use of te reo Māori in all forms in this jurisdiction should never be characterised as an 'unplanned activity'.[209]

Translation from Māori to English is a standard part of the Tribunal Unit's business, and the Unit should have measures in place for the Tribunal to receive, process, and translate documents filed in Māori without fuss or bother. The participant should be able to choose the translator, but where this is not possible for any reason, the Tribunal Unit should have a list of suitable translators so that the creator of the Māori document can choose a translator who has the right mita (dialect).

In sum, te reo Māori is a taonga under te Tiriti/the Treaty, and an official language of New Zealand. The operation of the Waitangi Tribunal is effected through the Waitangi Tribunal Unit, which is part of the Ministry of Justice. The Crown's Treaty duty to Māori to protect taonga extends to an obligation as regards te reo Māori to ensure that the Waitangi Tribunal Unit has in place all the right operational settings to facilitate the written and spoken use of te reo Māori in every inquiry of the Waitangi Tribunal. The current operational shortcomings that hamper the ability of Māori participants in inquiries to have their evidence and submissions in Māori translated as of right and without cost or inconvenience to them put the Crown in breach of its Treaty duty, and must change.

Conclusion

We endorse Crown officials' assessment that the arrangements for funding claimants via lead agencies are the 'least efficient or effective' and 'least consistent with the broader Māori–Crown relationship and policy settings'.[210] We add our concerns about local variance and underspend. The various agency-run protocols are an ad hoc stopgap measure. They have gone on for too long.

205. Transcript 4.1.5, p 115
206. Submission 3.3.35; doc A20
207. Transcript 4.1.5, p 110
208. Transcript 4.1.5, p 115
209. Transcript 4.1.5, pp 94, 105
210. Document A67(a), p 25

We also draw attention to current settings for translating Māori documents into English because this also is a fundamental aspect of Māori participating in Waitangi Tribunal inquiries on their own terms. Arrangements that have the current bias towards English are quite unacceptable in this jurisdiction.

CHAPTER 5

LEGAL AID

Introduction

We have already said that claimants in the Waitangi Tribunal are entitled to funding to enable their full participation in the Waitangi Tribunal's inquiries, including the availability of a facility for payment in advance for travel and incidental costs where that is required.

We now turn to another key aspect of claimant funding: the aid for legal representation provided through the Legal Services Act 2011. This aspect of funding for claimant participation in the Waitangi Tribunal differs from the direct funding addressed in chapter 4. We saw there that there is no real system in place for the Crown to pay the costs of claimant participation across the Waitangi Tribunal's inquiries. The inadequacy of the ad hoc arrangements is principally what Whakatika ki Runga is about. By contrast, there is a system that provides for the Crown to pay for litigants to be legally represented. It is of long standing, commencing in 1969 when Parliament passed the first Legal Aid Act. Waitangi Tribunal claimants were included in the legal aid regime in 1988 as part of the settlement of the Lands case, with an amendment to the Legal Aid Act 1969 being effected by the Treaty of Waitangi (State Enterprises) Act 1988 (see chapter 1).[1] The Crown has provided legal aid for claimants' lawyers since that time.

Our inquiry into and recommendations concerning Tribunal legal aid

The claimants and the Crown take a different view of the extent to which we should inquire into and make recommendations concerning legal aid at this stage in Te Rau o te Tika: the Justice System Inquiry.

The Crown submitted in opening that we should address only legal aid matters that are '*operational* (as distinct from *legislative*) policy and practice' (emphasis in original),[2] and 'an examination of the Treaty-consistency of current legislative settings cannot be accomplished in this mini-inquiry, which has been concerned with only a part of the overall legislative scheme'.[3]

In response, claimant counsel pointed out that in the document that effectively defined the scope of Whakatika ki Runga by setting out the questions we proposed to address,[4] we did not limit our inquiry in the way the Crown seeks. The

1. Document A69, para 19
2. Submission 3.3.23, para 6
3. Submission 3.3.47, para 175
4. Appendix 2.5.9(a)

questions ask whether there are problems with legal aid that compromise claimants' legal representation. We did not restrict the problems to administrative ones.

In this chapter, we look into all the issues that the claimants raised, and which the evidence raises. Claimant counsel submitted in closing that our investigation would inevitably involve 'an assessment of the underlying legislative framework'.[5] We agree with her proposition. Moreover, as we go on to explain, we do consider that legislative change is required.

However, we do not propose to recommend changes to the Legal Services Act 2011 now. We will consider how the legal aid regime applies across all the courts later in Te Rau o te Tika: the Justice System Inquiry. Whakatika ki Runga is only the first stage of this inquiry, and there is a long way to go, including inquiry into the adequacy in Treaty terms of legal aid generally. It is not appropriate for us to recommend now that the Government should amend the legal aid provisions relating to lawyers in the Waitangi Tribunal. However desirable that might be, it is impractical. Recommendations for legislative change to this part of the regime will be part of any recommendations concerning how the Act applies to legal aid in other jurisdictions. That is because, realistically, when the Government comes to consider our findings and recommendations on legal aid, it will act on any recommendations to change the Act in one amendment Bill. It is foolish to imagine that a Bill would be introduced to amend only the provisions relating to legal aid in the Waitangi Tribunal when further recommendations to amend the provisions that relate to other jurisdictions may well follow. A comprehensive set of recommendations on the topic of legal aid, including recommendations for legislative change, makes much more sense. Thus, we will recommend change of the legal aid provisions concerning the Waitangi Tribunal in our main report.

There is a caveat though. In Whakatika ki Runga, we will recommend that Māori and the Crown engage to design a system for claimant funding. That engagement should also consider whether the money that goes into legal aid for Waitangi Tribunal claimants is being spent in the best way. Changes to legal aid may result. If the engagement happens before Te Rau o te Tika: the Justice System Inquiry ends, we will know the results of it and that may affect our current intention to recommend amendment of the Legal Services Act 2011.

These are good reasons not to embark upon recommending legislative change now. There is a further one, which is also important. It did not seem to us that the undoubted shortcomings in the operation of legal aid affecting claimants are having dire consequences. We will point out the ways in which the legal aid system for claimants falls short in terms of both fairness and the Crown's Treaty obligations. There is certainly room for improvement. However, we saw no instances where claimants needed legal counsel and were unable to obtain aid.

When she gave evidence to us Tracey Baguley, the Legal Services Commissioner, presented as a reasonable person who takes a pragmatic approach. She said she is open to working with claimant counsel on the problems that the claimants

5. Submission 3.3.377, para 7

identified. That may be the best means of improving the areas of difficulty at an administrative level sooner rather than later.

What this chapter covers

In this chapter, we examine the law relating to the provision of legal aid for Waitangi Tribunal claimants. We then turn to the evidence of Ms Baguley – who has been the Legal Services Commissioner since May 2021 – to understand how she says the regime works in practice. We discuss the issues arising from the commissioner's approach to the provision of legal aid in this jurisdiction. We then outline the four areas of concern that claimants brought to our attention:

- the requirement for reports under section 49 of the Legal Aid Act before the commissioner can approve legal aid for Waitangi Tribunal claimants;
- the failure to reimburse law firms doing this work for the significant administrative work involved;
- the inappropriateness of decisions about legal aid being made by a civil servant when the Crown is always the defendant in Waitangi Tribunal proceedings; and
- how the requirements for funding expert witnesses in Waitangi Tribunal claims have caused difficulties for claimants.

The Legal Services Act as it Applies to Tribunal Claimants

The Legal Services Act 2011 ('the Act') provides for legal aid in civil and criminal jurisdictions in New Zealand,[6] and sets out unique statutory criteria for legal aid in Waitangi Tribunal proceedings. The Act is supported by two publicly available key policy documents: *Granting Aid for Waitangi Tribunal Matters – Operational Policy* and the *Legal Aid Services Grants Handbook*.[7]

Subpart 6 of the Legal Services Act 2011 is headed 'Legal aid grants for Treaty of Waitangi claims'. It deals with aid for Māori claimants in the Waitangi Tribunal. Under the Act, the Legal Services Commissioner is the person whose job it is to grant legal aid in accordance with the Act.[8] Section 47 requires the Legal Services Commissioner, deciding on whether to grant an application for aid in this jurisdiction, to be satisfied that the applicant requires legal representation, would suffer 'substantial hardship' if aid were not granted, and that the interest of the applicant is 'not sufficiently protected by any other claim'.[9]

Before determining the application, the commissioner must receive a report from the Waitangi Tribunal about the claim in respect of which aid is sought. She must take into account the information in that report. Regulation 20 of the Legal Services Regulations 2011 says the report must contain the following information:

6. Legal Services Act 2011, s 3
7. Document A69(a), pp 1, 35p 5
8. Legal Services Act 2011, s 71(1)(a)
9. Legal Services Act 2011, s 47(2)(a)–(c)

(a) whether the applicant has submitted a claim to the Waitangi Tribunal, and if so, the group (if any) for whose benefit the claim is submitted:
(b) a brief description of the claim including—
    (i) the allegations made against the Crown; and
    (ii) in relation to a specified period, the extent to which the Waitangi Tribunal has been engaged or is likely to be engaged (if this can be ascertained) in the claim:
(c) whether a provider representing the applicant has filed any documents or submissions in relation to the claim and, if so, whether the documents or submissions were filed solely in relation to the claim, or in relation to more than 1 claim:
(d) the extent to which the claim relates to other claims before the Waitangi Tribunal:
(e) whether the Waitangi Tribunal considers that the terms on which the applicant may be represented by a provider should be limited in any way and, if so, in what way.

In addition to this information, section 48(1) directs the Legal Services Commissioner to assess the financial resources of the group of Māori for whose benefit the claim is made, and which would suffer substantial hardship if aid were not granted. She must take into account:

> not only the financial resources of those members of the group who are immediately involved in making the claim, but also the extent to which other members of the group, or any incorporated body that represents the members of the group, or both, might reasonably be expected to contribute towards the costs of the proceedings.

The term 'incorporated body' includes Māori land trusts and incorporations.[10] If the group provides insufficient information about the financial resources of the 'members of the group, or any incorporated body that represents the members of the group, or both,'[11] the commissioner may refuse to grant the application.[12]

The commissioner may make the grant of legal aid to a Waitangi Tribunal claimant conditional on 'repayment towards the cost of legal services'.[13] The total to be repaid must be fair and reasonable having regard to the resources of the applicant and associated persons and bodies, and the likely cost of the proceedings.

Of course the Legal Services Commissioner does not personally make all the decisions. She delegates powers to employees of the Legal Aid Services Unit of the Ministry of Justice, who administer the legal aid scheme. They assess applications for legal aid, determine repayments of legal aid, assign providers to legally aided people, and oversee salaried lawyers performing legal aid work.[14]

10. Legal Services Act 2011, s 48(4)
11. Legal Services Act 2011, s 48(1)
12. Legal Services Act 2011, s 10(4)(a)
13. Legal Services Act 2011, s 50(1)–(2)
14. Document A69, paras 9–11

How do the statutory rules for legal aid in Tribunal proceedings differ?

For someone to be eligible for legal aid in civil jurisdictions other than the Waitangi Tribunal – that is, in civil proceedings in the District and Family Courts, High Court, Court of Appeal, and Supreme Court:

- the applicant must be an individual, not a group (defined as a 'body of persons, whether corporate or unincorporate');
- the applicant's income and disposable capital must not exceed specified maximums;
- their case must have a reasonable prospect of success; and
- their interest in the proceedings must be in proportion to the likely cost of taking the case.[15]

A successful applicant will receive a grant for the costs of 'legal services' associated with their litigation, which are defined in the Act as 'legal advice and representation'. The legal services can include assistance:

- with resolving disputes other than by legal proceedings; and
- with taking steps that are preliminary to any proceedings; and
- with taking steps that are incidental to any proceedings; and
- in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings.[16]

Funding to meet the cost of the legal services is called a grant, because people who receive a legal aid grant in civil proceedings must pay it back.[17] In most types of civil proceedings, a grant will specify a 'maximum grant', which may be expressed in either dollar terms or number of hours, as a time period within which the aid must be provided, or any combination of these.[18]

We now go through the ways in which the rules differ for applicants for legal aid in the Waitangi Tribunal.

Regulations concerning income and disposable capital do not apply

In other civil jurisdictions, '[t]he Commissioner must refuse to grant legal aid to an applicant whose income or disposable capital exceeds the relevant maximum level prescribed in regulations'.[19]

Although the Legal Services Commissioner must assess the financial resources of applicants in proceedings before the Waitangi Tribunal, there is no equivalent to the provision quoted above.

We do draw attention though to the fact that section 11(3) of the Act provides that this section does not apply to '*certain proceedings* in the Waitangi Tribunal' (emphasis added). Nothing was said at the hearing about these words. They came

15. Legal Services Act 2011, s 11; doc A69, p 6
16. Legal Services Act 2011, s 4
17. Document A69, para 26, p 6
18. Legal Services Act 2011, s 23
19. Legal Services Act 2011, s 10(2)

to our attention in preparing the report. We simply observe that we are puzzled by the implication that there are proceedings in the Waitangi Tribunal to which the rules about maximum income or capital will or may apply. Which proceedings? We do not know. Thus, we do not understand the use of the words 'certain proceedings' in section 11(3). We cannot discern any way in which Waitangi Tribunal applicants are or may be subject to the regulations that specify the maximum level of income or disposable capital that a legal aid applicant may not exceed.[20]

Groups may apply for legal aid for Tribunal proceedings

Another distinction is that in this jurisdiction – as would obviously be necessary for legal aid to operate in the Waitangi Tribunal – groups as well as individuals may be legally aided.[21]

No maximum for the amount of legal aid authorised

Nor does the legislation require the commissioner to set a maximum for the amount of legal aid authorised for Waitangi Tribunal claimants. No maxima are set for their legally aided lawyers, whether as to a dollar amount, a total of hours, or a period within which the aid must be provided. This is an important difference because the extent of legal assistance available to the applicant could be seriously limited by such maxima. Although the commissioner specifies the extent of the grant to a legal aid provider in the Waitangi Tribunal, because there is no cap the provider can apply to increase the grant where it is insufficient.[22]

Different repayment provisions

The commissioner may make the grant to a Waitangi Tribunal claimant conditional on contribution to repayment, but in this jurisdiction there is no requirement for her to seek repayment. In practice, the commissioner does not seek repayment from Waitangi Tribunal applicants.[23]

Lawyers' rates

Legal aid lawyers engaged in the Waitangi Tribunal are paid the same hourly rate as legal aid lawyers in the High Court, the Māori Appellate Court, and the Employment Court.[24] This remuneration rate is higher than the rates of remuneration in other courts of first instance.

20. We note that, when considering applications for legal aid in other jurisdictions, the commissionerCommissioner may exercise discretion in certain situations to grant aid even where the maximum is exceeded: Legal Services Act 2011, s 10(2)(a)–(b).

21. Legal Services Act 2011, s 47

22. Document A69, paras 52

23. Document A69, para 44

24. Document A36, paras 130–132. A lawyer with at least nine complete years of litigation experience receives $167, a lawyer with at least four and up to nine complete years of litigation experience receives $150, and a lawyer with up to four complete years of litigation experience receives $120: doc A69, para 53.

Each claimant may have their own lawyer, and there are no limits on the number of separately represented claimants in an inquiry.[25]

We now focus on a couple of differences that are likely to be less beneficial to Waitangi Tribunal claimants in receipt of legal aid.

Some kinds of legal services are not funded

The Act defines 'legal services' as legal advice and representation, which includes assistance

(i) with resolving disputes other than by legal proceedings; and
(ii) with taking steps that are preliminary to any proceedings; and
(iii) with taking steps that are incidental to any proceedings; and
(iv) in arriving at or giving effect to any out-of-court settlement that avoids or brings to an end any proceedings.[26]

Curiously, the aspects of legal services in subparagraphs (i)–(iv) above are not included in the definition of legal services for proceedings before the Waitangi Tribunal.[27] The funded legal services in this jurisdiction are legal advice and representation only.

Claimants in the Waitangi Tribunal these days – and perhaps especially those in urgent inquiries – would seek the assistance of their lawyer in all the respects listed in subparagraphs (i)–(iv). Possibly, the nature of proceedings in this jurisdiction was not understood at the time when the legislation was drafted, and it was mistakenly thought that those other services were not relevant in the Waitangi Tribunal.

It is very difficult to see that anybody benefits from the narrower definition of legal services in this jurisdiction. It would benefit the Crown, for example, if claims or aspects of claims were the subject of an out-of-court settlement. It does not make sense that claimants' lawyers would be unable to access aid for such work.

The requirement for section 49 reports

Another unique aspect of legal aid applications for Waitangi Tribunal proceedings that claimants regard as burdensome[28] is the requirement for the Waitangi Tribunal to report to the commissioner about the claim under section 49 of the Act before aid is granted. These are called section 49 reports. The commissioner must consider the information in the section 49 report before granting an application for aid. There is no other instance in the Act where, before aid is granted, a forum is required to furnish information to the commissioner about the case for which legal aid is sought. This is a difference about which we have more to say later in this chapter.

25. Transcript 4.1.4, p 657
26. Legal Services Act 2011, s 4
27. Legal Services Act 2011, s 4(2)
28. Submission 3.3.40, para 33; doc A36(c), paras 17–32

No aid to Tribunal claimants on an interim basis

There is one final distinction that the Legal Services Act 2011 makes between civil legal aid applicants in other jurisdictions and applicants before the Waitangi Tribunal upon which we now focus. Claimants did not bring this to our attention, but the Legal Services Commissioner mentioned it in her evidence, and we see that it affects her ability to grant legal aid to lawyers appearing in, for example, applications for an urgent inquiry.

Under section 16(4) of the Act, the commissioner may grant legal aid to a person on an interim basis. However, this does not apply to Waitangi Tribunal applicants 'in respect of certain proceedings before the Waitangi Tribunal'. Again, the Act is distinguishing between different kinds of proceedings in the Tribunal, which baffles us.

However, in practice it appears that the commissioner attaches no significance to the words 'certain proceedings'. She said in evidence that the Act prohibits her from granting aid to Waitangi Tribunal claimants on an interim basis. She connects her inability to grant interim legal aid with her need to receive section 49 reports.[29] The implication is that she cannot grant legal aid to Waitangi Tribunal applicants on an interim basis and then take the time to understand fully the circumstances that apply to the application. She has only one opportunity to decide whether or not to grant aid, so she has to make sure she gets it right immediately. That means that she needs all the information she can get about the claim, including the information contained in the section 49 report.

The prohibition on a grant of legal aid on an interim basis is another difference in the Act between Waitangi Tribunal and other applicants for legal aid that seems to us to lack a sound policy basis, and we return to it later.

The evidence of the Legal Services Commissioner

Ms Baguley gave evidence about how she and her delegates approach the grant of aid to claimants in the Waitangi Tribunal.

She said she is readily satisfied that a claimant will need a legal representative because of 'the distinct nature and complexity of inquiry proceedings'.[30]

As to the requirement for her to be satisfied that the group of Māori would suffer substantial hardship if aid were not granted, she told us:

> The Commissioner principally determines substantial hardship by considering the participation status of the group of Māori on whose behalf legal aid is sought. If the Tribunal has approved the group's participation in the proceeding, as either a claimant or interested party, the Commissioner will accept the substantial hardship criterion has been met.[31]

29. Document A69, paras 76–77
30. Document A69, para 36
31. Document A69, para 37

She may take into account the financial resources of members of the claimant group, but 'in practice, the financial information provided within applications for legal aid in Waitangi Tribunal proceedings does not usually preclude a finding of substantial hardship.'[32]

The commissioner also told us about how she exercises her discretion in other aspects of legal aid for Waitangi Tribunal applicants. We have already noted Ms Baguley's evidence that although the Act states that Waitangi Tribunal claimants may be required to repay legal aid,[33] in practice she does not seek repayment.[34] Similarly, although she has discretion to deny legal aid to an applicant whose claim has low prospects of success, Ms Baguley said 'in practice findings of insufficient prospects of success occur only occasionally in cases where aid is sought for an application for an urgent hearing'. That may be because of an assessment that the applicant cannot meet the Tribunal's criteria for urgency.[35]

We turn now to what we have identified as claimants' particular concerns about legal aid.

Claimants' Particular Concerns

The requirement for section 49 reports

What the claimants said

The claimants' main complaint about section 49 reports is that they take too long, and lead to unacceptable delay in the decision of the commissioner to grant aid.

Merepeka Raukawa-Tait told us that the 'road to being granted legal aid is slow, results in several delays, and hinders Claimants' access to funding for participation in the WT inquiries'.[36] Claimant counsel told us that section 49 reports often pose a 'significant hurdle for obtaining a timely grant of legal aid'.[37]

Claimant witnesses told us that because it takes so long for legal aid to be approved – with the section 49 report a significant element in the time it takes – lawyers end up embarking on work for claimants before the commissioner grants aid.

Claimant witness Te Ringahuia Hata is responsible for handling legal aid applications at a legal firm that has many claimant clients. She said that in her experience 'the process has generally taken 3 months or longer'. This was made more difficult because '[a]lmost all the legal aid applicants we deal with are either pensioners or suffer hardship and therefore are already at a disadvantage, hence the need for their access to justice becoming even more urgent.'[38] She said:

32. Document A69, para 38
33. Legal Services Act 2011, s 50
34. Document A69, para 44
35. Document A69, para 39
36. Document A22, para 5
37. Submission 3.3.29, para 81
38. Document A23, paras 6–11

> If an application is processed and a section 49 report issued within 20 days, this would have a significant benefit for those seeking legal representation. Furthermore, it would ensure a significant barrier to access for justice lessened. I do not think you can underestimate how the uncertainty of a grant of legal aid being made affects the motivation of individuals with significant claims issues from pursuing them.[39]

The firm that Ms Hata works for often does significant legal work during the time spent waiting for legal aid to be granted. Legal Aid Services therefore advises counsel to undertake 'as little work on the file as possible' during that time.[40] Ms Hata, however, said that was impractical. She said that often

> several hui have already taken place with the client, planning for the interim stages of the Inquiry have been explored, a judicial conference would have been set down and convened, and preparation of drafting statements of claim commenced, all which remain unfunded, until the legal application is approved.[41]

In her evidence Delani Wihongi-Hemaloto, a registered legal executive, agreed that the recommendation to minimise work on the file before the formal grant of aid did not address the reality that 'the inquiry would have already started or be in the active planning stages'. Lawyers would have to read emails and other parties' statements of claim, attend judicial conferences and counsel hui, and complete other preliminary legal work.[42]

What the Crown said

The Crown first observed that section 49 reports are required by the statute, and as we discussed in the introduction to this chapter, the Crown considers we should not be addressing the Treaty consistency of 'legislative settings' in Whakatika ki Runga.[43]

In her evidence, Ms Baguley says the commissioner may not determine an application for aid without the report, because that is what the law requires.[44] For the same reason, the Waitangi Tribunal must supply the report in the form specified.[45] However the commissioner's evidence implies that even if she had discretion about whether to obtain the report from the Waitangi Tribunal, she would do so. The reports are useful to her because of the 'specialist nature and knowledge of the Waitangi Tribunal'. They clarify the applicant's claimant status and 'assist in the determination of the hours provided in the initial grant'.[46]

39. Document A23, para 11
40. Document A14, para 8; doc A23, para 10
41. Document A23, pp 4–5
42. Document A14, para 9
43. Submission 3.3.47, paras 168, 185
44. Document A69, para 73
45. Document A69, para 74
46. Document A69, para 75

Steve Gunson, director of the Waitangi Tribunal Unit, gave evidence on the average timeframes for section 49 reports in recent years. He said that in 2019, the average time taken to produce a section 49 report was 20 business days. This turnaround marginally improved (by one business day) in 2020, before increasing to an average 24 business days in 2021. Since then, Mr Gunson reported, the average time for the Tribunal Unit to produce a section 49 report has dropped to 18 business days. Although this was an improvement, Mr Gunson said the Tribunal Unit will carry out an internal review of its process 'to see what potential efficiencies might be gained'.[47] For her part, when acting independently as the commissioner, Ms Baguley noted that Legal Aid Services will generally request an update from the Tribunal Unit if a report has not been furnished within three months. Crown counsel also highlighted the willingness of the commissioner to engage with the Waitangi Tribunal Unit to 'find ways of streamlining the provision of section 49 reports'.[48]

The Crown characterised the delays experienced by claimants while waiting for the production of section 49 reports as outside its purview. Section 49 reports 'are not the result of actions or omissions of the Crown', and are instead 'the responsibility of the Waitangi Tribunal, which operates independently and within its own timeframes'.[49]

Ms Baguley addressed the timeliness of deciding applications for legal aid in her evidence. She said that the time taken to decide Waitangi Tribunal applications cannot be compared with other civil applications, which are decided within five working days.[50] She said:

> applications for Waitangi Tribunal proceedings take significantly longer due to the statutory requirement that the Commissioner first obtain a report from the Tribunal. If there were no such statutory requirement, and the Commissioner could determine the application immediately upon receipt from the provider and without a Tribunal report, the determination times for Waitangi Tribunal applications would be directly comparable to other civil applications.[51]

Once the commissioner receives the section 49 report, she sends it on to the provider (the claimant lawyer) for a response within 10 days, and there is a further 10-day timeframe to decide the grant once all information is received.[52] For Waitangi Tribunal legal aid applications: 'Approval time has halved since 2019, when an average of 113 working days were required for approval of a Waitangi Tribunal legal aid grant. An average of 57 working days were required in 2021, and 55 working days in 2022.'[53]

47. Document A89, paras 18–19
48. Submission 3.3.47, p 76; transcript 4.1.4, p 591
49. Submission 3.3.47, paras 169–170
50. Document A69, para 79
51. Document A69, para 79
52. Document A69, para 83
53. Document A69, para 82

The Crown submitted that, overall, 'while there are areas of potential improvement for the operational policy and practice in respect of the provision of legal aid in Waitangi Tribunal proceedings, the evidence falls well short of establishing a breach of Treaty principles'.[54]

No reimbursement for application-related administrative work

Many claimants argued that a key shortcoming of legal aid in the Tribunal is that law firms are not funded for the administrative work required to apply for legal aid, to seek amendments to the initial grant, nor to prepare the required form of invoice.[55] An aspect of their complaint is that working for multiple claimants in inquiries – which is a more efficient use of lawyers' time and is generally promoted in the legal aid system – creates a very great deal of administrative work because it involves securing legal aid for multiple clients, who are typically not individuals but groups.

For lawyers to run their legal aid files well – which entails making good applications, seeking amendments when necessary, invoicing regularly and monitoring payment – they have to have in-house expertise. Expert witness Mr Hockly told us: 'There have been and still are law firms which employ additional administrative staff to assist with the preparation and filing of all that legal aid documentation.'[56]

The documentation includes 'unique and particular' forms required for amending legal aid grants and sending invoices, the latter involving re-drafting timesheet entries into the legal aid form. The digital invoice forms are 'incredibly particular' and 'not the kind expected by most accountants and administrative staff'. Mr Hockly recounted experience of invoices being sent back 'for a rounding error (according to the LAS formula) of less than a dollar'. This can cause a lot of work.[57]

Amber Alderton is a legal secretary at Watkins Law, one of the firms that acts for Waitangi Tribunal claimants. She told us about 'the considerable cost of time spent seeking funding', which includes jobs like corresponding with Legal Aid Services staff. None of this time is recoverable.[58] Another Watkins Law staff member, Ms Wihongi-Hemaloto, said that the invoice form (Form 16) for seeking payment includes an option for claiming costs incurred by 'Other' service providers. Ms Wihongi-Hemaloto suggested that this category should be used to claim for work undertaken by 'staff engaged to do research, summaries, reports to clients or other substantive work on a file'. Her firm has not been able to recover the cost of such work:

> The result of this approach is that the lawyers are forced to do work that support staff would otherwise be able to do, or are more suited to doing, or the work is simply

54. Submission 3.3.47, para 193
55. Submission 3.3.36, paras 6.11–6.17
56. Document A36, para 139
57. Document A36, paras 138–140
58. Document A78(c), para 14

not charged for. That is an inefficient use of resources and, again, is unfair to the lawyers taking on the work.[59]

Tiana Epati, former president of the New Zealand Law Society, gave evidence as a witness knowledgeable about legal aid. She referred us to findings of an Otago University study entitled *New Zealand Lawyers, Pro Bono, and Access to Justice*, which interviewed legal aid lawyers.[60] Like the claimant witnesses we quote above, participants in that study highlighted the time burden (and by extension, cost) of responding to Legal Aid Services' requirements for legally aided work. Participants said it was sometimes easier to provide services pro bono than to contend with the bureaucratic and administrative demands of Legal Aid Services. Ms Epati quoted one participant who told the study:

> The legal aid system drives them [lawyers] mad. . . . And a lot of people would find they'd rather do it pro bono than, otherwise. It can take you know up to twenty, thirty percent of the time you spend on dealing with the legal aid authority. So you know if you didn't do that, you save twenty to thirty percent of your time already.[61]

Ms Epati gave us her assessment that

> the long standing issue with the administrative burden of legal aid needs to be addressed. This is in terms of applying to be a provider, the administration involved in grants, and getting amendments for further remuneration and disbursements granted.[62]

Insufficient guidance

Claimant evidence was that Legal Aid Services does not provide enough information about applying for legal aid, and lack of clear guidance expands the amount of time that it all takes. This makes it worse that there is no compensation available for the time and effort involved.[63]

Legal Aid Services' *Granting Aid for Waitangi Tribunal Matters – Operational Policy* provides some further guidance on how applications for legal aid can be made. It states that '[l]egal aid should be sought as soon as possible' and that providers should 'minimise the work undertaken on a claim prior to a decision . . . being made'. In terms of the criteria for eligibility, the policy provides further information on what constitutes 'substantial hardship', noting that it 'includes but is not limited to financial hardship (ie the claimant(s) do not have the financial resources to pursue their claim). It may also include consideration of the consequences of the claimants not being able to progress a Treaty claim.'[64]

59. Document A14, paras 16–18
60. Document A88, para 20
61. Document A88, para 22
62. Document A88, para 54
63. Submission 3.3.36, p 32, para 6.11–6.17; doc A36
64. Document A69(a), paras 28, 33

In hearings, Ms Baguley also told us however that the policy may have been intended primarily for a legal audience, and that it could be reworked to improve the clarity for claimants.[65]

Ms Wihongi-Hemaloto gave an example of the insufficient guidance from Legal Aid Services. She said that, when her firm puts in time estimates in support of an amendment to a grant, on occasion the firm's estimates have been 'pushed back' by Legal Aid Services because they involved more hours than officials estimated were necessary. Ms Wihongi-Hemaloto told us:

> The point is that clearly LAS [Legal Aid Services] has a schedule setting out the hours it will accept for certain tasks. We have requested a copy of such a schedule or some guidance on what acceptable hours would be but have not received a response.
>
> In my experience, legal aid is a mystery, but it should not be. If there are guideline estimates that legal aid works towards, those should be made known.[66]

Instead, Legal Aid Services have been

> absolutely silent on our requests for assistance. Instead of providing an explanation or guidance on a particular issue, the response has been for legal aid to simply pay out the amount applied for (and initially declined) with no explanation as to . . . the change in decision. Consequently, we are none the wiser as to the deficiency in our application (though very grateful for the payment).[67]

Mr Hockly said the guidance lawyers do receive from Legal Aid Services can be inconsistent and unclear. In relation to sorting out a rejected invoice, Mr Hockly said '[d]epending on which LAS staff member you get, there may be a helpful comment provided about where in the invoice the figure is incorrect, but you may not, and simply have to work through the billing process again and hope for the correct figure.'[68]

What the Crown said

The Crown pointed to the Act's definition: 'in relation to legal aid, [legal services] means legal advice and representation'.[69] Time spent in correspondence with Legal Aid Services staff regarding funding applications is by definition not eligible for funding, because it does not fall within the definition of 'legal services'. It therefore cannot be covered 'under the current legislative settings'.[70]

The issue of administrative work being unfunded in relation to legal aid is not unique to the Tribunal's jurisdiction, Crown counsel pointed out. It affects many other areas of legal aid on which the Tribunal has yet to hear evidence. She urged

65. Transcript 4.1.4, p 679; submission 3.3.47, p 84
66. Document A14, para 31–33
67. Document A14, para 21
68. Document A36, para 140
69. Legal Services Act 2011, s 4; submission 3.3.47, para 183
70. Submission 3.3.47, para 184

us to be cautious about looking at the issue in this jurisdiction alone. She submitted again that we should not tackle issues requiring legislative reform during this mini-inquiry. Because it is the Act's definition of 'legal services' that would have to be changed in order for administrative costs to be fundable, the Tribunal should be circumspect about entering into a matter of legislative policy. Counsel pointed out that 'the Tribunal has not called for or heard evidence on the policy rationale for the definition of "legal services"' under the Act.[71]

Lastly, the Crown confirmed that 'specific disbursements may be approved for non-legal staff employed by the providers necessary to progress the particular claim before the Tribunal'.[72]

The Crown should not make decisions on legal aid when it is a party in the litigation

What the claimants said

Some claimants' counsel also argued that the Crown lacks the necessary independence to make decisions about funding for claimants. They alleged that the Crown had a conflict of interest when it is both a litigant in proceedings and the 'entity responsible for the administration and provision of legal aid services', as well as claimant funding.[73]

Expert witness Professor Jane Kelsey considered the Crown's conflict of interest to be the root cause of what she called the Crown's 'abject failure to address access to justice in the Waitangi Tribunal'.[74]

Dr Richard Meade, an economist, also addressed conflict of interest. He criticised the assumption that the Crown would be disinterested in the question of whether and how much to fund a litigant in proceedings in which it is itself a party. He said:

> [A]ssessment of whether or not the state/Crown should support or discourage private litigation rests on an implicit assumption – that the state/Crown will act disinterestedly, and in the wider interests of all its constituents. This supposes the state/Crown will not favour its own interests over that of its constituent population, or unduly favour the interests of some members of that population over those of other members (eg disenfranchised minorities).
>
> Furthermore, the assessment assumes the state/Crown will remain disinterested and impartial in its decision to encourage or discourage litigation even if it is litigant in the relevant proceedings (whether as plaintiff or defendant). Experience provides numerous examples from around the world where such an assumption is clearly untenable (eg states using the courts to persecute political opponents, barring legal action to protect themselves against claims, etc).

71. Submission 3.3.47, para 185
72. Submission 3.3.47, para 187; doc A69, paras 62–63
73. Submission 3.3.29, para 71; submission 3.3.43, paras 7, 243, 276
74. Document A79, para 29

> Hence, realistically, even the most enlightened state/Crown cannot be assumed to be devoid of self-interest, or to act impartially in all circumstances.[75]

What the Crown said

Crown counsel rejected claimants' assertions that the Crown has a conflict of interest because of its dual role as both a litigant in kaupapa inquiry proceedings and as the body responsible for the administration of claimant funding in those proceedings. Instead, the Crown argued:

> A decision as to whether to provide funding to a claimant is not a matter that involves practical discretion from lead agencies: rather, funding is provided in line with the guidelines that each agency has developed. In other words, the provision of funding is not dependent on the relevant Crown agency being satisfied of certain eligibility criteria that involve a discretionary assessment (compared with, for example, the criteria that must be satisfied in order to obtain a grant of legal aid). A potential conflict of interest therefore does not arise.[76]

The Crown also rejected claimants' suggestion that the administration of legal aid in the Waitangi Tribunal lacks independence. The commissioner, counsel highlighted, is required to act independently when exercising her functions under the Act.[77] Should an applicant disagree with a grant decision, they may seek an independent reconsideration. Ms Baguley explained that such a reconsideration would be undertaken by a grants official who was not involved in the original decision, and that 'reconsideration is given from there'.[78] Beyond this, further avenues of independent review exist under the Act, as an 'application can be made for review of a decision to the Legal Aid Tribunal, and a subsequent right of appeal exists to the High Court'.[79]

Legal aid rules for funding expert witnesses

Claimants can apply to have the costs of expert witnesses met by legal aid. Here, we first set out how Legal Aid Services approaches such applications, before turning to the claimants' critique.

The *Granting Aid for Waitangi Tribunal Matters – Operational Policy* states that an expert witness's costs can be funded if their expertise is deemed 'relevant and necessary to progress the particular claim in the Tribunal'.[80] The *Legal Aid Services Grants Handbook* (January 2022) defines an expert witness as 'a skilled witness on issues that relate to their profession – for example, an accountant specialising in forensic accounting, a psychiatrist specialising in child abuse or a ballistics

75. Document A34, paras 49–51
76. Submission 3.3.47, para 153
77. Legal Services Act 2011, s 71(2); submission 3.3.47, para 179
78. Transcript 4.1.4, p 638
79. Document A69, para 97
80. Document A69(a), p 28; submission 3.3.47, para 189

expert'.[81] Ms Baguley added that Legal Aid Services considers 'whether the proposed witness is able to be accepted as an expert witness' by the Tribunal, and assesses whether they 'can demonstrate a history of paid professional engagement in the provision of expert opinion in their particular field'.[82]

Expert witnesses who belong to the claimant group are not eligible to be funded.[83] In the hearing, Ms Baguley clarified that this applies only to claimants whose names are on the statement of claim ('named claimants'), not to members of the wider hapū or iwi.[84]

Applications for funding for an expert witness must:

- include a full quote from the expert witness of the costs involved;
- tell the commissioner 'whether or not other funding agencies have provided funding (or been approached to provide funding) for work by the expert (and if so what funding and what work)';[85] and
- explain the 'relevance and necessity of the proposed evidence', which should also address 'any issues concerning witness expertise'.[86]

If Legal Aid Services assesses that a person meets its criteria for expert witnesses, it reimburses costs arising from the preparation of the evidence, and for travel associated with presenting it (provided travel costs were included in the quote given to Legal Aid Services).[87] Expert witnesses are not funded to undertake new research; legal aid covers only 'the preparation and presentation of a statement of evidence'.[88]

Criteria for expert witnesses are inconsistent with tikanga

Claimants criticised two of the criteria for granting legal aid for expert witnesses as being inconsistent with tikanga. They argued that the application of these rules could result in a tohunga being denied the status of expert witnesses.[89]

The two rules concerning expert witnesses that claimants object to are first, the requirement for expert witnesses to demonstrate a history of paid professional engagement in providing expert opinion, and secondly, the rule that experts cannot be funded if they are members of the claimant group.[90]

On the issue of previous paid professional engagement, claimant counsel Ms Panoho-Navaja argued that it is unlikely that many tohunga or experts could demonstrate a history of paid professional service, as 'their time would often be given

81. Document A69(a), p 153. A further edition of the *Legal Aid Services Grants Handbook* was published in September 2022, however the definition of an expert witness remains unchanged. See https://www.justice.govt.nz/assets/Documents/Publications/Grants-handbook-v4.62.pdf.
82. Document A69, para 87. It is not a requirement for an expert witness to have past experience giving evidence before a Court or Tribunal: see transcript 4.1.4, p 575.
83. Document A69, para 89
84. Transcript 4.1.4, p 604
85. Document A69(a), p 28
86. Document A69, paras 88, 91
87. Document A36, para 172
88. Document A36, para 167
89. Submission 3.3.37, para 101
90. Submission 3.3.37, paras 101–103

on a koha basis where they may be a member of the taumata or paepae on their respective marae or a kaumatua/kuia who holds particular knowledge'.[91]

Ms Hata gave evidence that she had worked with pou tikanga who could not supply a curriculum vitae showing that they had paid professional experience, even though they were 'some of the greatest exponents of Te Reo Māori and repositories of Mātauranga Māori that I have ever seen before the Tribunal'.[92] For instance, she said that Dr Moana Jackson 'didn't have a CV, he didn't work like that'. She said '[CVs] are not the kind of things you have as a pou tikanga or a pūkenga'.[93] Requiring such people to submit a curriculum vitae is a 'Pākehā hoop' that shows that Legal Aid Services do not recognise mātauranga Māori as 'a taonga in its own right'.[94]

In fact, the Legal Aid Service approved all four of Dr Jackson's applications for engagement as an expert witness between 2015 and 2020, as Ms Baguley stated in a supplementary brief of evidence.[95] However, Ms Sykes used her experience of how the Legal Aid Service dealt with Dr Jackson as an expert witness to show how the criteria do not take account of cultural factors.[96] She also explained how the Legal Aid Service's questions about the content and relevance of his evidence placed an unnecessary and inappropriate burden on a leading expert like Dr Jackson:

> This not only illustrates the frustrations with the funding provisions, but also the onerous burdens in preparing evidence that the most astute of individuals struggle with in the present forum. In addition, it has had fundamental impacts on the type and nature of evidence produced by claimants and their chosen technical advisers, tohunga, pou tikanga and the like. This, in effect, has meant that valuable insights and knowledge have not been put before the Tribunal.[97]

She said these 'significant bureaucratic requirements . . . stymied early participation by Dr Jackson in hearings processes' or 'led him to withdraw in frustration from the process itself'.[98]

Claimants cannot be funded as expert witnesses in their own claim

On the issue of prohibition of members of the claimant group being funded as experts, claimants argued that they are experts in their own tikanga and experiences. Not allowing them to receive legal aid funding as expert witnesses means that valuable evidence may not come before the Tribunal.[99]

91. Submission 3.3.37, para 102
92. Document A23, para 24
93. Transcript 4.1.3, p 60
94. Transcript 4.1.3, p 60; doc A23, para 24
95. Document A69(b)
96. Submission 3.3.36, paras 7.11–7.12
97. Submission 3.3.36, paras 7.12–7.13
98. Submission 3.3.36, para 7.11
99. Document A26, paras 28–29; doc A27, paras 90–92

For instance, Hurimoana Dennis assured us that the kaimahi at Te Puea Memorial Marae 'are the closest you can get to "experts" on the homelessness kaupapa'. And yet, 'unless they have the credentials according to the Pākehā regulations' they are ineligible for funding.[100] Similarly, Tracy Hillier, claimant for Ngāi Tamahaua, said: 'As claimant researchers, we may not have letters after our name or a certain degree or title, but we are experts in our hapū tikanga, history, knowledge and lore, so we are in our own way, experts.'[101]

According to Tania Kingi, chief executive of Te Roopu Waiora, whānau hauā 'are accessibility experts from their own lived experience'.[102] Ms Kingi took issue with their exclusion from being funded as expert witnesses through legal aid, when the Crown – including parts of the health sector, the Ministry of Social Development, Kāinga Ora, the Accident Compensation Commission, Te Pūni Kōkiri, and 'several Ministers' – regularly seek them out for advice.[103]

Ms Panoho-Navaja submitted that to exclude such witnesses from legal aid funding is to exclude expert evidence on the tikanga of the claimant group:

> The fact that an expert cannot be a member of the claimant group fails to recognise that tikanga varies depending on what iwi or hapū you come from. Therefore, if a claimant group appearing before the Tribunal wanted to give expert evidence about how their particular tikanga operates, the current policy settings mean this would need to be done for free.[104]

Ms Sykes also stated that members of the claimant group tend to be the ones bringing the claim because they have been mandated by their community and are 'leaders with specialist knowledge of that particular area'. There may not be a knowledge keeper outside the claimant group.[105]

Information about expert witness rules unclear

Claimants found the expert witness criteria unclear. The Legal Aid Services' policy, *Granting Aid for Waitangi Tribunal Matters – Operational Policy*, contains neither the requirement for experts to demonstrate a history of paid professional experience giving expert evidence, nor the exclusion of experts who are a member of the claimant group.[106] There is no form for applying for funding for expert witnesses that lists the criteria Legal Aid Services apply. This lack of clarity means, Ms Panoho-Navaja told us, 'there is a high likelihood that claimants making an application will fail on the first attempt'.[107]

100. Document A27, para 90
101. Document A26, para 29
102. Document A6, p 7
103. Transcript 4.1.3, p 586
104. Submission 3.3.37, para 103
105. Transcript 4.1.4, p 624
106. Submission 3.3.37, para 104
107. Submission 3.3.37, para 105

What the Crown said

The Crown 'acknowledge[d] that the *Granting Aid for Waitangi Tribunal Matters – Operational Policy* could be clearer around the criteria for expert witnesses' and about what claimants need to do when applying for legal aid for an expert witness.[108]

Ms Baguley said she assumed that the guidelines *Granting Aid for Waitangi Tribunal Matters – Operational Policy* and *Legal Aid Services Grants Handbook* were mainly used by legal aid providers (law firms). She acknowledged that it may not be easy for claimants to understand them. She said '[w]e can certainly look to change that.'[109]

Ms Baguley also acknowledged when she gave evidence that experts in tikanga or traditional healing practices may not have academic qualifications but still have expertise in their own cultural context. She also indicated there was scope for the Tribunal to assist Legal Aid Services to identify as experts witnesses whose expertise is in mātauranga Māori. One measure Legal Aid Services uses to make a decision about granting legal aid to expert witnesses is whether the Tribunal would accept them as such.[110]

In a subsequent brief of evidence, Ms Baguley clarified that she is 'open to working with the Tribunal to improve Legal Aid Services' processes for assessing expert witness requests'.[111] She said that, 'should the Tribunal expressly recognise a person as an expert in their field this would be a significant factor in Legal Aid Services' decision but could not determine it outright' as the 'Commissioner and Legal Aid Services must still consider other factors such as the reasonableness of the cost'.[112]

Although acknowledging that there were 'areas of potential improvement for the operational policy and practice' concerning expert witnesses, including the criteria to be applied, the Crown said that the evidence did not establish a breach of Treaty principles.[113]

The Tribunal's Assessment

Introduction

Generally speaking, legal aid in the Waitangi Tribunal is at least commensurate with other jurisdictions and is in some respects better. We did have evidence of claimants' lawyers' dissatisfaction with the level of remuneration,[114] but in the context of the current legal aid system, lawyers in this jurisdiction fare better than others.

108. Submission 3.3.47, para 191
109. Transcript 4.1.4, p 679
110. Transcript 4.1.4, p 594; submission 3.3.47, para 191
111. Document A69(e), para 3
112. Document A69(e), para 6
113. Submission 3.3.47, para 193
114. Submission 3.3.27, paras 5–15; submission 3.3.37, paras 121–122; submission 3.3.43, para 45; submission 3.3.29, paras 76–79; submission 3.3.40; para 41

Our reasons for this view arise from what we said at the beginning of this chapter. The hourly rate for Waitangi Tribunal lawyers is the same as applies in the High Court, and legal aid for Waitangi Tribunal claimants is not capped as to the number of hours that may be spent, or the dollar figure. The commissioner confirms the amount of a grant of aid, but it may be revised upon further application, and on an ongoing basis. These are differences that benefit Waitangi Tribunal claimants and their lawyers.

Aid also appears to be freely available to claimants. We saw no evidence of where it ought to have been approved but was denied – although sometimes there were issues at the administrative level that led to delays.[115] Claimants also pointed to occasions where applications were initially denied and subsequently approved, which meant considerable administrative work and a long wait to be paid.[116] These experiences can certainly make this work needlessly hard for lawyers to manage, which also affects their clients, as we described above. However, the Crown's evidence did indicate that turnaround times for section 49 reports have decreased in recent years.[117]

It is apparent that the Crown's principal contribution to assisting claimants to participate in the Waitangi Tribunal is via its legal aid regime. This allocation is separate to, and far larger than, the modest sums lead agencies have earmarked to pay claimants directly for the costs of travel and other expenses.

For comparison, the Crown spent $20.291 million on legal aid for claimants in the Waitangi Tribunal in the 2020–21 financial year, and $18.255 million in the 2021–22 financial year.[118] Direct funding of claimants has differed in the different inquiries, both as to nature and extent. The Crown did not lead evidence of an overall annual figure, presumably because the 'lead agency' policy means that the statistics are held in the different departments and may have been treated in ways that make arriving at an overall figure tricky. For an indication of scale, there were figures included in a ministerial briefing paper prepared by Te Arawhiti in 2020 estimating the cost of a claimant funding scheme at $1 million to $1.5 million per year based on an assumption of $400,000-$600,000 per inquiry and 20 inquiries over 10 years.[119] Legal aid costs are at quite a different level. Over the six-year period from July 2016 to August 2022, the legal aid expenditure for kaupapa inquiries has ranged from $0.196 million in the National Fresh Water and Geothermal Resources Inquiry, to $11.567 million in The Marine and Coastal Area (Takutai Moana) Act 2011 Inquiry. Across all kaupapa inquiries running throughout this period (including the Oranga Tamariki Urgency Inquiry), we broadly estimate that the overall legal aid spend has been just shy of $50 million.[120]

The large numbers of lawyers per inquiry must significantly increase the cost of legal aid. Whether the current approach – under which, the commissioner told us,

115. Document A22, paras 13–15; doc A23, paras 9–11; doc A36, p 14
116. Document A36, pp 16–17
117. Document A89, paras 18–19
118. Document A69(d), p [5]
119. Document A72(a), p 93
120. Document A69(d), p 7

anyone with a registered claim may have their own lawyer – benefits claimants or the process overall, and whether there are arrangements for claimants' legal representation that might work better for claimants and for the conduct of inquiries, are questions we believe should be addressed. We do not address them here.

As we have said, we leave recommendations for changes to the Legal Services Act 2011 for a later report. We indicate our current intentions here, but go no further than that for the reason principally that amendments to the Act in response to our recommendations are likely to be the subject of only one Bill. They should be comprehensive, and we cannot now assess whether and to what extent we will consider broader legislative change to be necessary.

There is another reason for our not recommending legislative change now. As we have observed, the Crown's current contribution to claimants' costs in the Waitangi Tribunal is principally through funding their lawyers. Later in this report, we will recommend that the ultimate design of a system to fund claimants' own costs should be the subject of engagement between Māori and the Crown. Because so much of the Crown's funding is currently directed towards claimants' legal costs, we consider it is important that this expenditure too should be part of what Māori and Crown talk about when they engage on the topic of how and to what extent the Crown should fund Waitangi Tribunal claimants. We would expect the parties in that engagement to consider whether legal representation of Waitangi Tribunal claimants is working well both for claimants and for the Waitangi Tribunal's own processes.

Both Māori and the Crown will need to consider whether the current spend on lawyers is the best use of public money in the context of the wider question of how best to provide for all claimants' needs so that they can participate fully in the Tribunal's processes. Although lawyers play an essential part in the Waitangi Tribunal processes, there may be better ways to manage their contribution to advancing claimants' interests and to the process overall. We calculated that 54 claimant lawyers participated in Whakatika ki Runga, which on any view of it seems a lot. We are conscious that lawyers might struggle to be objective when assessing how best to provide effective representation for claimants at the best price. Many of the knowledgeable people in this field are lawyers and they will doubtless play a role in any engagement between Māori and the Crown on claimant funding. Those people will be required perhaps to think beyond their own interests to consider whether there may be practical changes to the funding regime that would optimise claimants' experience of Waitangi Tribunal processes.

The engagement described could of course result in the view that the provisions of the Legal Services Act 2011 that apply to Waitangi Tribunal proceedings should be amended in small or large ways, depending on the content of any agreement between Māori and the Crown on a new system for funding claimants. Such changes could be of a different kind from those we are minded to recommend now, which seek only to improve the current system in various ways that we describe in the following paragraphs. Hopefully, by the time we come to write our final report on Te Rau o te Tika: the Justice System Inquiry, the engagement between Māori and the Crown on claimant funding will have taken place, and we will know the

size and shape of what they have agreed. We can assess at that point whether we still wish to recommend any amendments to those parts of the Legal Services Act 2011 that provide for aid for legal services in Waitangi Tribunal proceedings.

We do not address the adequacy of legal aid here. Those questions are common to legal aid across all courts and tribunals and we will address them later in this inquiry. For now, we can simply say that claimants in this jurisdiction who need the assistance of a lawyer can obtain that assistance through the Legal Aid Service, and lawyers' remuneration seems to be enough to keep them supplying legal services to claimant clients.

Law and practice as regards legal aid for Tribunal proceedings

We now address financial eligibility under the legal aid regime as enacted in the Legal Services Act 2022 compared with current practice.

We find ourselves in a curious situation here. Ms Baguley presented to us as a statutory officer who endeavours to exercise her powers under the Act in favour of Waitangi Tribunal claimants. We of course approve this approach and regard it as being consistent with the Crown's obligations as Treaty partner.

However, when we read the legislation then listened to Ms Baguley's evidence and her responses to questions at the hearing, it did strike us that she does try to ameliorate the exacting nature of the Act's requirements. Quite simply the regime for Waitangi Tribunal claimants as enacted looks like one in which the commissioner would make fewer grants of aid, and would more often require repayment than is actually the case.

We hesitate to say that Ms Baguley's approach to Waitangi Tribunal legal aid sits outside the scope of the discretions that the Act offers her. However, it does seem that by routinely exercising discretions in favour of claimants, she has in effect created a system that is wholly more amenable to their needs than the legislation would lead one to predict. Unfortunately, although her exercise of discretion in various ways does benefit claimants, it creates other issues. We discuss those now.

Financial requirements

We have described the provisions in the Act under which the commissioner may determine that applicants for aid in Waitangi Tribunal proceedings do not qualify for legal aid because they earn too much or have too much capital. There are also provisions under which she may require grantees to contribute to repayment as a condition of the grant of legal aid. Ms Baguley's evidence makes it plain that in practice she does not exercise these powers. We saw no examples where the commissioner declined aid on the basis that a group would not suffer substantial hardship if aid were not granted. We saw no examples where groups were required to contribute to repayment of aid.

We have talked about the helpful evidence lawyer Cameron Hockly gave us as an expert witness. In his opinion, regular departure from what the law appears to require is not the whole answer. In response to questions at hearing, he said 'claimants are very concerned about what is possible and the reassurance that something

is [rarely] or never done doesn't always sit well enough with them, when the law [still] permits it'.[121]

In their submissions, claimant counsel referred to the uncertainty that results from the difference between what the law says and the commissioner's practice.[122] Counsel referred to how the requirement remains to provide financial information when applying for legal aid when that information is actually 'not required in practice'.[123] Mr Hockly wondered whether the provisions that appear to disqualify pecunious claimants, or require them to repay aid, might be a reason why post-settlement governance entities have rarely played a part in the Tribunal's kaupapa inquiries.[124]

It is impossible to say whether, how, and to what extent Waitangi Tribunal claimants' behaviour may be influenced by the difference between how the legal aid regime looks in the Act and how the commissioner actually administers it. We heard only from those who are in receipt of aid, who on the whole are those whose lawyers know the commissioner's approach.

We are by no means advocating that Ms Baguley should change her approach to applying the financial aspects of section 47 and section 48 of the Legal Services Act 2011. Far from it. For the reasons we outlined in chapter 1 about the source of the Crown's Treaty duty to fund claimants to participate fully in Waitangi Tribunal proceedings, we consider it has a Treaty duty to provide resources for claimants to be represented in those proceedings. Claimants should not have to be poor to qualify, and nor should they be required to repay the aid granted to them. Such requirements would inhibit their participation, and undermine the value of the Treaty of Waitangi Act 1975 as an expression of the Crown's good intentions as a Treaty partner. Under Ms Baguley's leadership, legal representation is reliably available to claimants without close scrutiny of either their financial circumstances or those of others more loosely connected with the claim, and they do not have to repay the grants. That is as it should be.

However, we consider that public policy would be better served if the Act itself clearly delineated the tasks that the commissioner performs in the manner that Ms Baguley performs them. That would allow a potential claimant to look at the law and know where they stand. That is what statutes are for. It should not be necessary to delve into the practice of an official to predict confidently what the outcome of an application will be. And yet, currently, that is the case for applicants for legal aid in Waitangi Tribunal proceedings.

We discussed earlier the Crown's preference that we not broach the topic of legislative change in Whakatika ki Runga. However, as Ms Panoho-Navaja predicted, our analysis of this topic necessarily delivers us to consideration of the Act. For reasons already articulated, we will not recommend now that the Legal Services Act 2011 is amended to bring its Treaty of Waitangi provisions as regards

121. Transcript 4.1.4, p 26
122. Submission 3.3.42, para 27
123. Submission 3.3.42, para 27
124. Transcript 4.1.4, pp 31–32

financial eligibility in line with current practice. We signal though that we intend to include such a recommendation in our final report, after we have inquired into legal aid more comprehensively.

Some kinds of services not funded

This too is a matter that concerns the provisions in the Legal Services Act 2011, but in this case one where the Act provides no scope for the commissioner's discretion.

It is a simple matter. For lawyers in Waitangi Tribunal proceedings, the Legal Aid Service can fund a narrower range of 'legal services' than for lawyers in other jursidictions. This results from the definition in section 4 of the Legal Services Act 2011, which in this regard differentiates between the Waitangi Tribunal and other jurisdictions.

We explained earlier how Waitangi Tribunal lawyers are not funded for a range of activities,[125] including assisting clients with 'taking steps that are incidental to any proceedings' and 'arriving at or giving effect to any out-of-court settlement'.[126] Assistance with 'resolving disputes other than by legal proceedings' – which would most obviously include the use of mediation – is also not funded.

Claimants in the Waitangi Tribunal these days – and perhaps especially those in urgent inquiries – would seek the assistance of their lawyer in all the respects listed in section 4(a)(i)–(iv) as comprised in the term 'legal services'. Why would those have been excluded from funding? The Waitangi Tribunal often refers parties to mediation, and the Crown is either a party or specifically consents to the mediation between other parties. Could it be that the nature of proceedings in this jurisdiction was not fully understood at the time when the legislation was drafted? Was it mistakenly thought that the wider suite of legal services would not be relevant for claimants in the Waitangi Tribunal?

We do not know, but we speculate about this possibility because it is very difficult to see how the narrower definition of legal services benefits anybody – including the Crown. Mediations and out-of-court settlements, both of which have the potential of curtailing lengthy proceedings, benefit all parties. It does not make sense that the legislation precludes claimants' lawyers from being funded for such work.

We can signal now that this is another area where we intend to recommend legislative change. We are conscious of Crown counsel's urge for caution here, suggesting that we need to know more about the reasons for the definition of 'legal services' in the Act. We agree that we were not addressed on this topic in Whakatika ki Runga, but look forward to learning more when we address legal aid more comprehensively.

The requirement for section 49 reports

We have described how the Legal Services Act 2011 requires the commissioner to receive from the Waitangi Tribunal a report containing a plethora of information

125. Legal Services Act 2011, s 4(2)
126. Legal Services Act 2011, s 4

about the claim for which legal aid is sought. She may not make a grant without first considering this information. The legislation requires the Waitangi Tribunal to prepare the reports and send them to her. When doing this, the registry of the Waitangi Tribunal is performing a function in relation to the Tribunal as a commission of inquiry and therefore part of the judiciary in constitutional terms. It is not acting as part of a government department, which is part of the executive branch of government. The Waitangi Tribunal does not make findings and recommendations about the judicial branch of government.

There is no other instance in the Act where the commissioner must consider a report like those provided under section 49 before granting aid. Our first instinct was to regard section 49 as needlessly creating a bureaucratic hurdle for Waitangi Tribunal claimants that does not exist for applicants in other jurisdictions. It seemed to us that the commissioner and her staff ought to have enough cultural competence and knowledge about Waitangi Tribunal proceedings to understand applications for legal aid in our proceedings without such a report. They should be just as capable of assessing the need for aid for this setting as they apparently are of assessing what cases in the other jurisdictions demand.

However, we listened carefully to Ms Baguley's evidence. She said she relies on the information provided in section 49 reports in a number of ways. She told us that the requirements for the information to be contained in the reports

> reflect the specialist nature and knowledge of the Waitangi Tribunal, and ensure that a decision on whether to grant legal aid is informed by these. They also clarify the applicant's claimant status and assist in the determination of the hours provided in the initial grant, to allow those hours to reflect the Tribunal's view of when the proceedings are likely to be heard.[127]

Despite Ms Baguley's comments, we doubt that most of the information in the section 49 report is required. Much of it is aimed at allowing the commissioner to deny aid if the interest of the applicant in the claim is not strong enough, or is duplicated in another claim. There are a number of things to say about this. At the time when the Tribunal gives the information to the commissioner about the claim, it has not yet conducted its inquiry. Many of the statements of claim filed in the registry are pro forma, and provide little real information about the claim apart from the name of the claimant or the group on whose behalf the claim is brought. The allegations are usually not well developed until the claim is in an active inquiry and statements of claim are particularised at that point.

The Waitangi Tribunal would never tell the commissioner before it has conducted its inquiry that the claim is weak or duplicated in another claim. It does not know enough to do so. Even if different claimants were raising similar issues – which is often the case, perhaps especially in kaupapa inquiries – we had no evidence that the commissioner would use that information as a basis for not granting aid. She does not require that claimants with similar interests cluster together;

127. Document A69, para 75

nor does she deny aid because their interest in the claim is too tangential or weak. The information in a section 49 report would be very unlikely to give her the grasp of the situation that would allow her to do that.

In fact, her evidence indicates that she does not try to manage how lawyers represent clients through the grant of aid. She relies on the lawyer to attribute their time to different claims appropriately. Waitangi Tribunal providers understand that it is implicit in a grant of aid that they

> cooperate with other providers whose clients have common interests, [and] split time claimed where that provider acts for a number of clients within an inquiry, and . . . seek prior approval for time to be spent and disbursements to be incurred in relation to the grant.[128]

While these are aspects of good practice that the commissioner says Waitangi Tribunal practitioners observe, none is dependent on the provision of a section 49 report. In our assessment, the only information contained in the report that the commissioner really needs in a jurisdiction where there are many claims in the registry that are not the subject of active inquiry is whether and when the Tribunal will be including the claim in an active inquiry.

Section 49 reports unfair when aid is sought for urgent hearings

The requirement for a section 49 report is especially unfair where a claimant wishes to apply to the Waitangi Tribunal for an urgent hearing. Lawyers must be in a position when they seek an urgent hearing to be able to assure the Tribunal that a hearing can commence directly.[129] However, if urgency is not granted, there is no prospect of legal aid being granted retrospectively, because of the requirement in section 49 that the claim must have a 'reasonable prospect of success'. Obviously, if urgency was not granted the claimant has in a sense lost, but that does not mean that making the application was without merit.

These circumstances mean that claimants who want to ask the Tribunal to clear their claim as a matter of urgency may find it difficult to get a lawyer to agree to represent them.

Timeliness of section 49 reports

Although section 49 reports are now delivered more quickly than previously[130] there is no doubt that the commissioner would be able to grant legal aid to Waitangi Tribunal applicants much more quickly if she did not have to get a section 49 report first.[131] The commissioner says it takes only five days to decide most civil applications, but the timeframe for applications in Waitangi Tribunal

128. Document A69, para 43
129. Waitangi Tribunal, *Waitangi Tribunal Practice Note: Guide to the Practice and Procedure of the Waitangi Tribunal* (Wellington: Waitangi Tribunal, 2018), p 5
130. Document A69, para 82; doc A89, para 18
131. Document A69, paras 79–84

proceedings is much longer. How long relates directly to how quickly she receives the section 49 report. Once she receives it, her processes occur within 20 days.[132] In 2022 it took 55 working days on average to approve a Waitangi Tribunal legal aid grant – down from 113 working days in 2019.

The information about how much time the requirement for section 49 reports adds to the time it takes for the commissioner to approve a grant of legal aid comes from both the commissioner and from Steve Gunson, director of the Waitangi Tribunal Unit. Their statistics do not really align. What we can say with confidence is that it takes the Waitangi Tribunal considerable time to provide a section 49 report. Steve Gunson undertook to see if further efficiencies can be made. Although we do not really know why section 49 reports take so much time, we speculate that providing the information that the law requires of the Waitangi Tribunal is difficult because the level of detail about claims will not often be easily sourced from the claim as filed. At the hearing, Ms Baguley talked about how the process of producing these reports might be expedited further, and possibly automated, while still remaining compliant with the Act. Ms Baguley's office (the Legal Aid Services Unit) and the Waitangi Tribunal Unit will convene to agree to a solution that allows the Tribunal to provide the information required by the Act in a more efficient manner moving forward.[133]

Claimants and their lawyers will be heartened to hear this, but long term we think it more advisable that the need for these reports is closely scrutinised. This will involve a cost/benefit analysis of the value of the material contained in the reports compared with the time they add to grants of legal aid. We consider that the information that the commissioner really needs for the kinds of decisions about aid for claimants that she is actually making is very limited. It probably goes little further than the Tribunal letting her know whether the claim is part of an active inquiry, and if not when it is likely to be part of an active inquiry.

Certainly, if the commissioner endeavoured to manage the grant of aid to claimant lawyers by, for example, getting claimants to cluster together as the Crown Forestry Rental Trust does for related claims, she would need to know a great deal more. It appears from the nature of the information sought in section 49 reports that the Act might have required them with a view to the commissioner taking more of this kind of management role when granting aid. But the reality is that in order to do that, she and her staff would need to be much more fully informed about the claims and the claimant groups than they are ever likely to be through receipt simply of a section 49 report.

In conclusion we consider that the requirement for section 49 reports causes delays, which claimants and their lawyers find particularly hard to manage at times. Ultimately that requirement should change, but legislation is required. In the meantime, the commissioner and the Waitangi Tribunal Unit may be able to contrive improvements in the system.

132. Document A69, para 83
133. Transcript 4.1.4, p 591

No aid to Waitangi Tribunal claimants on an interim basis

Focus on this aspect of the legal aid regime for Waitangi Tribunal applicants emerged from Ms Baguley's evidence that she depends on section 49 reports for information at least in part because the Act does not allow her to grant aid to claimants on an interim basis.[134] In this section we discuss the unavailability of interim legal aid, together with related considerations concerning section 49 reports.

The preclusion of interim legal aid for Waitangi Tribunal applicants is another distinction in the Act between Waitangi Tribunal and other civil applicants for legal aid that we do not understand. Perhaps it arose from the perception that the commissioner should not make any decisions about Waitangi Tribunal applicants without a section 49 report.

From the evidence before us, it is apparent that section 49 reports are a bureaucratic problem that causes unacceptable delays. While she waits for a section 49 report, the commissioner is not allowed to grant interim aid. For the legal aid system to work fairly for Waitangi Tribunal claimants, the commissioner needs to be able to grant interim aid and make a final grant of aid without first receiving a section 49 report – at least in their present form.

Before granting aid of any kind, whether on an interim or final basis, the commissioner would need to know from the Tribunal the status of the claim – that is, whether it is currently part of an active inquiry, and what processes the claimant lawyer needs to be engaging in on the claimant's behalf. Sometimes, this information will be available from memoranda and directions of the Tribunal, which the applicant could furnish to the commissioner. In fact, presiding officers of tribunals could deliberately include the necessary information about claims early on to alleviate the necessity for a report. In addition, a suitably trained person or persons in the Tribunal's registry could be charged as part of their job with responding promptly to any queries from Legal Aid Services. It would be interesting to know how much information about a case the commissioner has to hand when she grants legal aid on an interim basis to applicants in other civil jurisdictions. When that happens, 'The provider can claim for payment under the interim grant, and be paid under that interim grant, whether or not a full grant is subsequently approved.'[135]

This would alleviate a lot of the problems legal aid claimants told us about, especially those arising from delay. In relation to applications for urgency, it could be a game-changer. The commissioner could award interim legal aid more or less immediately, without awaiting a section 49 report.

However, in order for any of these possible approaches to be adopted, the Act would need to be changed. Section 49 would need to be repealed or significantly amended, as would subsection (4) of section 16, which is where applicants in Waitangi Tribunal proceedings are made ineligible for an award of aid on an interim basis. For the reasons expressed, recommendations for legislative change

134. Document A69, paras 76–77
135. Document A69, para 76

will not ensue now. We do encourage the commissioner and the Waitangi Tribunal Unit to work together in the meantime to find a quicker and more streamlined means of fulfilling the requirements of section 49.

No reimbursement for application-related administrative work

Legal Aid Service's *Granting Aid for Waitangi Tribunal Matters – Operational Policy* states that a grant of legal aid only applies to 'approved legal services and disbursements required to progress a particular claim or claims before the Tribunal'.[136] It specifically excludes both 'file and office administration', and 'attendance and correspondence with Legal Aid Services staff or other agencies (for example, seeking funding)' as an approved legal service.[137]

Ms Baguley told us that '[s]pecific disbursements may . . . be approved for non-legal staff employed by the providers'[138] but this does not extend to administrative work relating to the progression of a claim. In principle, Legal Aid Services pays only for 'legal services', and these are to do with the services of a lawyer in providing legal representation for a client.

From the evidence presented to us, it is plain that the administrative costs associated with legal aid for Waitangi Tribunal claimants can be considerable. It is appropriate for the commissioner to run a system that requires accountability, because she is spending public money. However, the system should not be unduly finicky. We heard evidence that suggests that sometimes it is. However, the overriding point is that claimant lawyers should not have to bear the cost of meeting the bureaucratic requirements of the Legal Aid Service and the Act. We note also that although we are not in a position to make a direct comparison, we suspect that the effort involved for law firms who act for multiple claimants applying for legal aid in a Waitangi Tribunal inquiry will routinely exceed what a legal aid lawyer has to cope with in other jurisdictions. When we say effort, we include the requirement for managing each claim and set of claimants, and the interrelationship between the claims and the claimants; the need to communicate with them all about their legal aid; the need to communicate with Legal Aid Services about any issues affecting any of their applications; and constant monitoring of the status of invoices. It is manifestly unfair that all this effort is unremunerated.

The Crown argued that the definition of legal services – which excludes administrative work – is a matter of legislative policy, and as we have not yet heard the policy rationale behind the definition, we should leave the issue for our wider Justice Inquiry.[139] The Crown also submitted that the lack of funding for the administrative work involved in supporting legal aid grants is an issue that affects lawyers and applicants in other jurisdictions as well. This is another reason for not addressing it here, instead leaving it for our broader inquiry into legal aid.[140]

136. Document A69(a), p 8
137. Document A69(a), pp 9–10
138. Document A69, para 63
139. Submission 3.3.47, paras 185–186p
140. Submission 3.3.47, paras 185–186

We agree with the Crown that the inability for the commissioner to reimburse the cost of administrative work connected with legal aid applications and grant management arises from the terms of the Act. She must follow the Act, and can do nothing to ameliorate the situation until the Act changes – except to ensure that the hoops Legal Aid Services staff require applicants or grantees to jump through are necessary and fair. Moreover, we accept that this problem is not unique to lawyers and claimants in this jurisdiction. Ms Epati's evidence made it clear that the frustration with the unfairness of having to bear all the administrative costs that witnesses expressed in this inquiry is felt as strongly by lawyers in other jurisdictions.

Thus, for now:

- we find that it is unfair that there is no reimbursement of the considerable costs that can be incurred by law firms in supporting their claimant clients through the process of applying for and maintaining legal aid funding;
- it is likely in our view that there is more administration involved in supporting multiple legally aided Waitangi Tribunal claimants, but the problem of non-payment for this time is not unique to this jurisdiction;
- it is appropriate that we receive more evidence about the policy behind administrative costs not being funded;
- we accept that the unfairness can be remedied only by legislative change, and we are not recommending changes to the Act at this stage; so
- we will address this issue again in the context of our wider inquiry into legal aid, and once we learn whether the outcome of the engagement between Māori and the Crown affects our current views on recommending legislative change.

The Crown should not make decisions on legal aid when it is a party to litigation

The Legal Services Commissioner is certainly part of the Crown. Under section 70(1) and (2), she must be a public servant and an employee of the Ministry of Justice. However, under section 71(2) she must act independently when carrying out her functions.

We saw no evidence that Ms Baguley carries out her functions in a way that was pro-Crown in the sense of wanting to undermine claimants' legal representation in the claims in which the Crown is always the defendant. Thus, in legal terms, no actual bias was at all discernible. The question is whether by virtue of her being a public servant and therefore part of the Crown, and notwithstanding the Act's injunction on her to act independently, there will always be apparent bias. Apparent bias exists where a person's position (in the commissioner's case, being a public servant and employee of the Crown) in relation to the interests at stake (litigation that opposes the Crown's interests and those of Māori) gives the appearance of bias. There is certainly a risk, for the reasons articulated in the evidence of Dr Richard Meade, that a person performing the role of Legal Services Commissioner will either not act independently in fact – perhaps even unconsciously – or will be perceived as not being truly independent. This might be a particular risk when

a commissioner is making decisions in respect of Māori people, whose interests have so often been at odds with those of the Crown.

This conflict of interest question in relation to deciding on grants of legal aid will no doubt be addressed in the future, when Māori and the Crown engage to find an agreed way forward for funding claimants in this jurisdiction. We recommend such an engagement in chapter 6. The Crown's being the decision-maker about everything will of course be one of the topics that Māori will raise. Professor Jane Kelsey talked in her evidence about how all funding for Māori Treaty claimants is 'subject to Crown-determined criteria and approval'.[141] This occurs whether in the context of legal aid decisions, where the Legal Services Act imposes 'restrictive criteria' on the grant of aid to claimants,[142] or in settlement negotiations.[143] These kinds of arrangements make 'no pretence of addressing the Crown's Tiriti obligations under Articles 2, 3 or 4'.[144]

There is certainly no partnership to be seen in decisions about the allocation of funding to claimants in kaupapa inquiries thus far.

Legal aid requirements for funding expert witnesses

It is clear to us that Legal Aid Services' criteria for granting legal aid to expert witnesses do not take into account the different circumstances that apply to a Māori cultural context. In particular, the insignia of expertise should not be confined to academic qualifications or CVs that detail external recognition of the person's skill and knowledge.

We acknowledge Ms Baguley's openness to 'working with the Tribunal to improve Legal Aid Services' processes for assessing expert witness requests'.[145] She also indicated that 'should the Tribunal expressly recognise a person as an expert in their field' Legal Aid Services will consider this a significant factor in making that determination.[146]

Cultural competence

We must observe however that Legal Aid Services should not rely on the Waitangi Tribunal to supply all its information about te ao Māori. Especially given her responsibilities in relation to claimants in the Waitangi Tribunal, the commissioner should ensure that she has expertise in-house. Her team should include people who would, for example, know and understand the status of a luminary of the Māori world like Dr Moana Jackson. That would enable them to deal with an application concerning him more appropriately.

We mention also the requirements in section 14 of the Public Service Act 2020. The commissioner is a public servant.[147] According to the Public Service Act, 'The

141. Document A79, paras 16–17
142. Document A79, para 15
143. Document A79, paras 16–17
144. Document A79, para 16
145. Document A69(e), para 3
146. Document A69(e), para 6
147. Legal Services Act 2011, s 70(1)–(2)

role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi (te Tiriti o Waitangi).'

To do this in the context of considering legal aid applications from Waitangi Tribunal claimants, both the commissioner herself and her staff must be culturally competent people. This is relevant also to the question of section 49 reports. Legal Aid Services would be in a better position to handle applications from claimants deftly if they themselves knew more about, for example, iwi and hapū Māori and their interrelationships. Building this competence should be a priority for the commissioner. We note that under the Ministry of Justice Statements of Intent and Māori Strategy, staff are also expected to demonstrate cultural competency.[148]

It appears to us that the commissioner appreciated that experts in te ao Māori will not necessarily be able or willing to demonstrate their expertise in the same way as Pākehā experts. She must develop means of assessing the expertise of those Māori witnesses in relation to the claim in which the evidence is to be called. There are no blanket rules. The Waitangi Tribunal may be able to assist, but she could also consult other Māori advisers to help her with these questions. Well-connected Māori know a great deal about who's who and what's what in te ao Māori. Ideally, Legal Aid Services would have such people on staff, but if not – or if not immediately – forming relationships with advisers would be another approach.

Expert witnesses who are claimants or a member of a claimant group

We turn now to the question of whether a member of a claimant group should be eligible to receive legal aid funding as an expert witness.

This is a difficult question in the context of the work of the Waitangi Tribunal, where the Māori cultural context is equally as important as the legal context.

Addressing the legal context first, we know that the reason that a party calls an expert witness in litigation is to show the court or tribunal that a qualified person who is independent of them and objective about their case supports their position. The strength of the evidence and its persuasive power stems from the witness's acknowledged expertise, and the fact that the witness personally has no interest in the outcome of the litigation. We use the word 'interest' here to mean that they have nothing personally to gain from giving evidence that supports that party's case. This is the legal context for expert evidence.

Claimants, operating within a Māori cultural context, expressed to us their frustration that a person who is a claimant cannot give evidence as an expert witness in their own claim. To clarify, such a person can give evidence, but is not eligible for funding as an expert witness through Legal Aid Services. And yet, to claimants, no person could be more expert about them and their claim issues than one of their own – and there would be matters about which no one independent of them would have the knowledge to give such evidence. This may be especially true in relation to a witness whose evidence concerns the tikanga of the group.

We must first remind ourselves that Ms Baguley told us that Legal Aid Services funding is available for expert witnesses called by a claimant when they

148. Documents A20(a)–A20(c)

are members of the same hapū or iwi as the claimant. Legal aid does not fund as expert witnesses the claimants whose names are on the statement of claim ('named claimants').[149] As a rule of thumb, we think this will usually be appropriate. Most claimants give evidence, and they all know a lot about their claim, but that does not make them an 'expert witness' in the way that term is usually understood. However, there may sometimes be a situation where the claim particularly concerns tikanga, and the only person who has the necessary knowledge to give evidence about the particular matter is a named claimant. Such a situation will not be usual, but it might arise and in that case would call for flexibility on the commissioner's part.

Thus, the commissioner needs to use two lenses when she funds expert witnesses. She needs to consider whether they have the necessary status in relation to the subject of the evidence to give the evidence weight, and at the same time whether the witness can be regarded as having a voice and a perspective that goes beyond simply supporting their own claim. True objectivity will not be available, but an expert's perspective has its own integrity, and that will be plain to the members of the Waitangi Tribunal when the evidence is presented.

Lack of funding for claimants is the real issue

We consider that the issue about funding claimants' own witnesses as experts, and also the issue about funding for expert witnesses not covering new research,[150] both arise from the inadequacy of funding for claimants. If funding for claimants commensurate with the funding that the Crown Forestry Rental Trust provides were available in inquiries generally, claimants' work to prepare their own evidence would be funded, as would the preparation of research. We regard the pressure to extract funding for these activities from Legal Aid Services is simply a symptom of the unavailability of funding from any other source. Accordingly, once there is a system in place to fund claimants' participation in Waitangi Tribunal inquiries properly, claimants will not need to try to force themselves into categories under the legal aid regime where they do not naturally fit.

While the criteria for funding expert witnesses may well, in practice, inhibit applications for such funding in the Waitangi Tribunal, we acknowledge that in the last six financial years, less than two per cent of of funding requests for expert witnesses in the Tribunal were rejected.[151]

Conclusion

In this chapter we examined the issues claimants face in attempting to secure adequate and timely funding through the legal aid regime, in order to participate in Waitangi Tribunal proceedings. We have identified that there are shortcomings in

149. Transcript 4.1.4, p 604
150. Document A36, para 163
151. Document A69(d), p 8

the regime that adversely affect claimants, and sometimes these could affect access to justice. We find that:

- the Act's financial requirements (requiring hardship and repayment of grants) are inappropriate for claimants in this jurisdiction, and may deter claimants who would be ineligible if those exacting requirements were applied;
- defining 'legal services' differently in this jurisdiction is pointless and discriminatory, and could mean that claimants cannot get legal assistance in areas where they need it;
- section 49 reports, although required by law, are in fact not necessary for the commissioner to approve grants of legal aid in this jurisdiction, and the time they take causes unacceptable delays in decisions about grants;
- interim legal aid should be available for claimants in Waitangi Tribunal proceedings;
- it is unfair that the considerable administrative effort required to apply for and manage legal aid in this jurisdiction is not reimbursed;
- although formally independent, the commissioner is an employee of the Ministry of Justice which aligns her structurally with the Crown. Moreoever, in the Waitangi Tribunal the Māori claimants are always arguing against the Crown. These circumstances inevitably raise issues of conflict of interest and apparent bias;
- references in sections 11(3) and 16(4) of the Act to 'certain proceedings before the Waitangi Tribunal' are confusing, because it is unclear what proceedings are included or excluded by this language;
- the criteria for expert witnesses do not take account of the different circumstances of experts in te ao Māori, and nor do they provide for the limited circumstances when persons may need to be regarded as expert witnesses even though they are associated with the claimants; and
- the guidelines for applying for and managing legal aid are inadequate because they are not comprehensive and do not disclose how the process works in practice.

In the following chapter, we set out the recommendations we are minded to make on these matters at this stage of the inquiry. We also signal where we intend to make recommendations for legislative change in our later report, where we will consider the legal aid regime more generally.

CHAPTER 6

FINDINGS AND RECOMMENDATIONS

Introduction

When we were considering whether to establish a mini-inquiry to hear claims about claimant funding for kaupapa inquiries, the Crown told us – as it told the Deputy-chairperson when he was deliberating on granting an urgent hearing of these claims – that it was not necessary. The Crown had the work in hand, and a proper regime would emerge shortly.

Now that we have had the opportunity to see at close quarters what the Crown was working on through 2020–21, we have asked ourselves whether it really was necessary to address the issues in a Waitangi Tribunal inquiry. The material we have reviewed does show that officials were seriously deliberating about claimant funding – and they will do more of it after we report, because acting on what we say will fall for consideration by the same people. Should we have intervened?

Well yes, we should have. The claimants were right to distrust a process that was taking so long and producing so little. Because what we see when we look through all the material that the Crown has produced is that ensuring that claimants can bring their claims to this Tribunal without any hardship to them is not enough of an imperative for the Crown. The memos and briefing papers and meetings go round and round, debating who should lead the project and who should fund the project, but all the documents lack conviction that making this provision for claimants is essential. It is, and now we say exactly why.

The Waitangi Tribunal's kaupapa inquiries are addressing areas of policy and practice where Māori occupy the sorry end of all the statistics. This Justice System Inquiry is an example, as are the Health and Housing Inquiries. The Waitangi Tribunal was established for this purpose: to allow this group of skilled and experienced people to sit together to look into the claims of Māori under the Treaty, and as the title of our Act says, 'to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi'. This is a constitutional matter. It is a justice matter. It is a fairness matter. It is a Treaty matter. Claimants are not able to pay their own way through these processes precisely because those policy areas do not work in their favour. It is imperative that it is easy for them to come to this Tribunal. It should cause them no difficulty or hardship at all. They should be supported to pursue their claims in a way that is culturally appropriate, which usually means as a collective. In the absence of other assistance, it is up to the Crown to support them to do this.

The Crown says no Treaty breach

In her closing submissions, Crown counsel acknowledged that the establishment of a funding regime for claimants in kaupapa inquiries was 'taking longer than expected'. She noted that claimants were 'dissatisfied' with the prevailing arrangements under which lead Crown agencies reimburse them for some of their expenses. She accepted that the claimants expected greater clarity from the Crown about the activities it would fund and the caps on spending. She agreed that there was scope for some efficiencies to be created with regard to the payment of legal aid.[1] Overall, however, she submitted that while the Crown took the matters raised by the claimants 'seriously', careful consideration of the Crown's actions showed 'there is no foundation upon which to conclude that the Crown has breached Treaty principles'.[2]

Counsel went on in her submissions to reject allegations of Treaty breach with regard to: the use of the reimbursement model to provide funding; the provision of funding on an agency-by-agency basis; lead agencies' inconsistent approach; the changes (or 'evolution') in Crown policies over time; the fact that agencies administering funding are respondents in the same inquiries; the level of resourcing the Crown provides to the Tribunal; the 'false starts' acknowledged by Mr Fraser; the low number of claimant reimbursement requests; the amount of time it took for agencies to process reimbursement requests; the absence of any funding for several of the kaupapa inquiries to date; and operational policy and practice concerning the provision of legal aid.[3]

The bigger picture

Analysing whether specific actions or omissions constituted Treaty breaches misses the point. We focus instead on the bigger picture. In the present context, the relevant facts are that although the Crown has known for many years now that the absence of Crown Forestry Rental Trust funding has serious implications for claimants in the Waitangi Tribunal and indeed for the Waitangi Tribunal itself, the Crown has yet to act decisively or comprehensively to put in place a claimant funding system that is fit for purpose.

As we explained in chapter 3, we believe this knowledge pre-dated the commencement of the kaupapa inquiries. In 2013 the Crown stepped in and funded multiple hearings in the Te Paparahi o Te Raki district Inquiry because the Crown Forestry Rental Trust was temporarily unable to approve claimant funding. The Crown's intervention was on a solely pragmatic basis. The presiding officer had made dire predictions about delay that would have derailed the Crown's timeframe for settling claims.

Although the Crown at no stage referred to a duty to fund claimants when the Crown Forestry Rental Trust could not, its taking on the funding role shows that

1. She submitted though that several of these matters sat 'primarily within the remit of the Tribunal itself': submission 3.3.47, para 3.
2. Submission 3.3.47, para 4
3. Submission 3.3.47, paras 14, 16, 113, 127, 137, 140, 148, 152, 153, 155, 193, 202

it understood the predicament for claimants and the Waitangi Tribunal when the Trust's funding was suddenly unavailable. Yet when the kaupapa inquiries began barely two years later, and the Trust was again unable to provide funding (for different reasons), the Crown did not act consistently with its approach in the Te Paparahi o Te Raki inquiry. Later, some lead agencies chose to fund claimants according to their own protocols, but the situation overall remains ad hoc, inconsistent, and unclear.

We might add that, looking back through the history of the Waitangi Tribunal, the Crown has never volunteered to fund claimants' costs. The Crown's submissions now claim that legal aid is the cornerstone of the Crown's provision of access to justice in this jurisdiction, but it did not provide legal aid to Waitangi Tribunal claimants on its own initiative or from an appreciation of Treaty obligations. Legal aid and direct funding of claimants were both ushered in as a product of negotiations to settle litigation. In the political context of the late 1980s, the government really needed to settle the *Lands* and *Forests* cases. That provided the incentive for it to accede to the Māori negotiators' insistence that Treaty claimants must be included in the legal aid scheme, and a mechanism had to be created to fund claimants directly to prepare and present their Treaty claims (which generated the Crown Forestry Rental Trust).

Failure to acknowledge a Treaty obligation

Since the early 1990s, claimants in almost all Waitangi Tribunal inquiries have relied on the funding system the Crown Forestry Rental Trust developed to support claimants. If it had a genuine interest in supporting claimants and the role of the Waitangi Tribunal, the Crown would have acted differently. Once it became apparent that there was now a whole tranche of Tribunal work where the Trust could provide no funding, the Crown would have moved promptly to fill that gap. It would have called on the Crown Forestry Rental Trust's more than 20 years of experience to fashion and install a funding system in the same vein. A conscientious Treaty partner could have done that. The Crown did not.

We received no evidence that the Crown has ever taken on this responsibility in a committed and principled way. Minister Faafoi's May 2021 decision is the most significant example of the Crown's failure to do so, but the chronology is dotted with other instances, as one kaupapa inquiry after another commenced and the Crown's representatives took insufficient heed of the claimants' concerns. In 2017, as the Health Services and Outcomes Inquiry began, Crown counsel even ventured that it was not clear there was even a problem to resolve. As we said in chapter 2, the Crown, in its closing submissions, did not accept in terms that its Treaty duty to claimants goes beyond meeting their legal costs.

This was foreseen. When they briefed Ministers on the proposed claimant funding scheme in May 2021, officials advised that if Ministers agreed that the work could proceed, the Waitangi Tribunal would probably not grant claimants an urgent inquiry on claimant funding, 'thus potentially avoiding an inquiry and the

finding of a Treaty breach'.[4] Officials expected that the Tribunal would not find the Crown's position to be Treaty-compliant, and so has it transpired.

Findings

Chapter 3 findings

Chapter 3 addresses the evolution of Crown policy on claimant funding in Waitangi Tribunal processes. We now set out the findings we made in that context:

- We find that the Crown has neither developed nor implemented a robust funding model for claimant funding for kaupapa and urgent inquiries.
- We also find that the Crown has taken too long to deal comprehensively with the problem of claimant funding in kaupapa inquiries.
- We find that the Crown has failed to engage appropriately with Māori in developing policy concerning funding for claimants in the Waitangi Tribunal. Its engagement to date has fallen far short of its own standard of 'Partner/Co-design' for a policy area like this, and even fails to meet the standard of consultation outlined for areas where the Crown says that much lower levels of engagement are appropriate.

These findings mean that the Crown has breached the principles of partnership, active protection, good government, and equity.

We also find as a matter of fact that the Māori beneficiaries of the Crown Forestry Rental Trust have contributed over the years since the 1990s to event-related funding that we say is more naturally a Crown cost.

Chapter 4 findings

Chapter 4 addresses the lead agencies' arrangements for funding claimants, and its compliance with Treaty standards. The findings we made there were these:

- We find that the different and inconsistent rules that leading agencies apply to funding claimants in kaupapa inquiries do not work for claimants. They are uncertain and confusing, and claimants do not understand them. There was no overarching Crown perspective that would have enabled protocols to be rational and fair, because each leading agency was just devising what would work for its own situation. These arrangements have become de facto Crown policy even though officials know about, and told Ministers about, their inadequacies. The result for claimants has been countless inconveniences, uncertainties, fears, costs, and embarrassment, and we do not doubt that their participation in Tribunal inquiries has been, and continues to be, affected.
- We find that, in the context of funding claimants in Waitangi Tribunal inquiries, the Crown did not seek alternatives to payment by reimbursement as the only way of funding claimants although it ought to have known that reimbursement does not work for many claimants, and alternatives are available.

4. Document A72(a), p165

- We agree with officials' assessment that claimant funding through lead agencies is ineffective and find that the Crown failed to fix that situation.
- Te reo Māori is a taonga under te Tiriti/the Treaty, and an official language of New Zealand. The operation of the Waitangi Tribunal is effected through the Waitangi Tribunal Unit, which is part of the Ministry of Justice. The Crown's Treaty duty to Māori to protect taonga extends to an obligation as regards te reo Māori to ensure that the Waitangi Tribunal Unit has in place all the right operational settings to facilitate the written and spoken use of te reo Māori in every inquiry of the Waitangi Tribunal. We find that current operational shortcomings do not sufficiently or effectively support the ability of participants in inquiries to have their evidence and submissions in Māori translated as of right and without cost or inconvenience to them.

These findings mean that the Crown has breached the Treaty guarantee of rangatiratanga over taonga in respect of translations from te reo Māori, and is also generally in breach of the principles of partnership, good government, and active protection.

Chapter 5 findings

Chapter 5 looks at how the legal aid system works for claimants in the Waitangi Tribunal, and assesses its adequacy, practicality and cultural responsiveness for participants in this jurisdiction. We found that:

- The Act's financial requirements (requiring hardship and repayment of grants) are inappropriate for claimants in this jurisdiction, and may deter claimants who would be ineligible if those exacting requirements were applied.
- Defining 'legal services' differently in this jurisdiction is pointless and discriminatory, and could mean that claimants cannot get legal assistance in areas where they need it.
- Section 49 reports, although required by law, are in fact not necessary for the commissioner to approve grants of legal aid in this this jurisdiction, and the time they take causes unacceptable delays in decisions about grants.
- Interim legal aid should be available for claimants in Waitangi Tribunal proceedings.
- It is unfair that the considerable administrative effort involved for counsel in applying for and managing legal aid in this jurisdiction is not reimbursed.
- Although formally independent, the commissioner is an employee of the Ministry of Justice which aligns her structurally with the Crown. Moreoever, in the Waitangi Tribunal the Māori claimants are always arguing against the Crown. These circumstances inevitably raise issues of conflict of interest and apparent bias.
- References in sections 11(3) and 16(4) of the Act to 'certain proceedings before the Waitangi Tribunal' are confusing, because it is unclear what proceedings are included or excluded by this language.
- The criteria for expert witnesses do not take account of the different circumstances of experts in te ao Māori, and nor do they provide for the limited

circumstances when persons may need to be regarded as expert witnesses even though they are associated with the claimants.

- The guidelines for applying for and managing legal aid are inadequate because they are not comprehensive and do not disclose how the process works in practice.

Collectively, these shortcomings mean that Waitangi Tribunal claimants' access to justice is adversely affected, which puts the Crown in breach of the principle of active protection.

Recommendations

This brings us to our recommendations.

The long term

For the long term, we recommend that the Crown and Māori engage in a process to design a suitable system to fund Waitangi Tribunal claimants in inquiries where there is no other claimant funding.

Without wishing to prescribe the topics on which the parties should engage, we suggest that they might usefully include:

- the benefits of centralised funding, and in that context the extent to which the Crown Forestry Rental Trust's provision of claimant funding is suitable and applicable to a system for supporting claimant participation in kaupapa inquiries;
- provision for whānau hauā participation;
- what categories of participant (claimant, witness, group, co-ordinator, supporter) and what categories of activity should be funded, and to what extent. Activities might include: operations, research, events (facilities and location), attendance at events (travel and accommodation arrangements, and for how many and for how long), preparation for events (including hui and support), administration, and communication;
- the degree of independence required for a decision-maker to make best decisions about funding claimant participation in the Waitangi Tribunal;
- how the legal aid regime is working for claimants and their counsel, and in that context
    - whether and how the legal aid rules for Waitangi Tribunal claimants should be changed (in light of our findings); and
    - whether and how the current funding of legal representation should be changed (in light of our comments).

We do not want to prescribe who should represent Māori in the engagement, but we recommend that it should be Māori who decide who the representatives are. That may require hui. In our view, the participants in the co-design should comprise a group that is not too large, but includes individuals who can speak for the interests of the claimants in this and other kaupapa inquiries, and the interests of hapū and iwi.

The short term

We recommend that the Crown acts urgently to require lead agencies to adopt a common set of protocols. We think it should be possible to implement these protocols immediately, because they follow Manatū Wāhine's General Claimant Funding Policy that is already in place for the Mana Wāhine Inquiry.

We recommend that the Crown requires all its lead agencies adopt the Mana Wāhine General Claimant Funding Policy, with one minor variation. Currently Mana Wāhine caps the cost of flights at $434.78 excluding GST. The variation we recommend is that agencies should pay the actual and reasonable costs of flights, and should also approve travel by rental car or public transport (bus, train or ferry) where the cost is comparable.

The General Claimant Funding Policy covers:

- flights (where required) up to $434.78 excluding GST;
- transport to and from airports and hearing venues where required;
- petrol costs or mileage reimbursements to and from the hearing (up to $0.82 per kilometre);
- meals (up to $47.80 per person per day excluding GST), taxis, Uber, or ride share options (within reason), and/or parking (up to $30 per day excluding GST); and
- accommodation (where required) up to $226.05 excluding GST.

Manatū Wāhine also covers the costs of preparatory hui on the basis that reimbursement for preparatory hui (preparation of evidence and for the presentation of this evidence at the hearings) is subject to the same parameters regarding reasonable costs as reimbursement in hearings.

Under this protocol, there is also the following provision: 'If named claimants wish to attend a hearing, but are not giving evidence, they will only be eligible for General Claimant Funding if they are attending to support a witness.'[5] Adoption of this recommendation by the Ministry of Health will have important consequences for whānau hauā in that representatives of advocacy organisations and Māori health providers will be eligible to have their costs met. This is important for entities whose funding is already limited and committed to other work streams.[6]

As to how the funding is delivered, we recommend that the Crown develop arrangements that no longer depend on claimants submitting receipts for reimbursement. Instead, we think it should be possible for lead agencies to use other devices. For example, they could procure travel and accommodation through a travel management supplier. If this option were selected, the lead agency would have to authorise the external provider to obtain fares and tariffs for those who meet their eligibility criteria, and the external provider would purchase travel and accommodation for approved persons at the best available rates. It would be a matter for lead agencies whether they also want to continue to reimburse claimants who prefer to make their own arrangements.

5. Document A68(a), p16
6. Document A6, pp7–8

Te reo Māori

We recommend that the Crown takes all necessary steps to ensure that the Waitangi Tribunal Unit provides for all evidence and submissions filed in Māori to be translated as of right; without cost or inconvenience to the claimant or the creator of the document; and, whenever possible, in accordance with the preferences as to mita of the creator of the document.

Legal aid

As we explained in chapter 5, there are two reasons why we make no recommendations for changes to the Legal Services Act 2011: we will inquire into legal aid comprehensively in the balance of our inquiry and do not want to recommend piecemeal changes; and our current thinking on Waitangi Tribunal claimants and the Act may be affected by agreements on changes that occur as part of the engagement between Māori and the Crown on a claimant funding system that we recommended above.

For now we recommend that the commissioner:

- examine and amend her office's documents *Granting Aid for Waitangi Tribunal Matters – Operational Policy* and *Legal Aid Services Grants Handbook* to make them comprehensive, and descriptive of her office's actual process for assessing eligibility and managing legal aid grants to Waitangi Tribunal claimants; and
- work with the director of the Waitangi Tribunal Unit to:
  - streamline the production of section 49 reports as far as possible within the present legislative settings; and
  - develop her office's protocols on expert witnesses called by claimants to ensure that they are clear, culturally appropriate, and workable.

Whānau hauā

In the Health Kaupapa Inquiry, a decision has been made to adopt an accessibility protocol that makes provision for whānau hauā to participate in stage 2 of that inquiry.

In this inquiry, we adopted accessibility measures in Whakatika ki Runga. We expect to make accessibility arrangements for future stages of Te Rau of te Tika, although we have not yet made formal arrangements for that purpose.

We recall that the evidence of Richard Williams informed us that sign language interpretation (like te reo Māori interpretation) is funded from a non-departmental appropriation.

In Te Rau o te Tika, we will be inquiring into claims about provision for the needs of whānau hauā across the justice system, including in contexts like police, prisons, and all the other courts. Thus, as we said in relation to legal aid, it is not appropriate that we try to address the topic piecemeal now. Any recommendations will be contained in our final report.

As to meeting needs of whānau hauā in the Waitangi Tribunal, we need to know more before standardising accessibility protocols. We intend, at a later stage of Te Rau o te Tika, to:

- Commission evidence on the cost and other implications of following accessibility protocols as standard provision in all Waitangi Tribunal events;
- Commission evidence about the use of the non-departmental appropriation for provision of accessibility services in other courts and tribunals;
- Try to assess the demand among whānau hauā to participate in or engage with Waitangi Tribunal processes;
- Address accessibility protocols as a Treaty issue in the wider context of the whole justice system in our final report.

We expect that the forthcoming engagement between Crown and Māori on claimant funding will include as a topic the nature and extent of provision for whānau hauā.

Dated at Wellington this 16th day of February 2023

Judge Carrie Wainwright, presiding officer

Dr Paul Hamer, member

Dr Ruakere Hond, member

Dr Hana O'Regan, member

THE SEAL OF THE WAITANGI TRIBUNAL