

MAY IT PLEASE THE TRIBUNAL:

1. On 1 March 2024, the Presiding Officer, Chief Judge Fox, issued memorandum-directions inviting counsel to file written submissions on the proposed inquiry design for Tomokia ngā tatau o Matangireia — the Constitutional Kaupapa Inquiry.¹ In summary, the proposal is that:
 - 1.1 The Tribunal convene a series of marae-based wānanga takiwā that would take a future-focussed and thematic approach to the Inquiry’s claim issues with the goal of reaching a consensus amongst the parties as to what a Tiriti/Treaty-compliant constitution might look like today.
 - 1.2 More specifically, the wānanga takiwā would provide an opportunity:
 - 1.2.1 for parties to discuss values and principles of constitutionality;
 - 1.2.2 for parties to define the themes of the Inquiry² and how they were understood or framed;
 - 1.2.3 for claimants to identify which themes were relevant to their claims; and
 - 1.2.4 for parties to identify possible solutions in relation to each theme and whether they supported those solutions.
 - 1.3 If consensus on these matters were not reached, a focus on past Crown conduct might be necessary in a following phase, after the wānanga takiwā. The wānanga takiwā would provide an opportunity to discuss how such further inquiry might take place.

¹ Memorandum-Directions of Chief Judge Dr C L Fox Prior to Second Inquiry Planning Wānanga, 1 March 2024 (Wai 3300, #2.5.11).

² From an analysis of claims before the Tribunal that relate to constitutional issues, the Tribunal and pou have identified 11 themes under which the claim issues could potentially be grouped.

- 1.4 The discussions the wānanga takiwā would be led in the first instance by claimants and Crown officials, rather than their legal representatives.
- 1.5 The wānanga takiwā would be guided by the principles, values, tikanga and kawa of the hau kāinga hosting each wānanga takiwā.³
2. Having attended the planning wānanga at Waitangi and Waipatu, and having taken instructions, counsel for the Crown file this memorandum to record the Crown's position in respect of the proposed inquiry design.

General points regarding the Inquiry

3. It is important to the Crown that the Inquiry is a constructive process.
4. There are limitations as to what officials are able to agree to in the course of the wānanga takiwā, and officials may need to provide advice to, and seek decisions from, Ministers. It would be helpful to have, in advance of each wānanga, sufficient notice of what the issues for discussion would be, so the Crown could prepare adequately and bring the right officials and experts to the discussion.
5. Even then, there would be limitations as to what outcomes Ministers could agree to in the course of the Inquiry, given the Inquiry's subject matter. Our constitutional arrangements and systems of government need, as a stable foundation, broad public support. The Crown therefore expects the proceedings, the findings and any recommendations the Tribunal makes in Tomokia ngā tatau o Matangireia — the Constitutional Kaupapa Inquiry, to contribute to broader constitutional discussions.

Procedural points

6. Building on the general points above, and to support the Tribunal in exploring a more tikanga-centred process while at the same time meeting the requirements of the Treaty of Waitangi Act 1975 and the Commissions

³ It is acknowledged that the Tribunal has the power to regulate its procedure in such manner as it thinks fit, and to conduct its hearings "in accordance with the kawa of the marae"; Treaty of Waitangi Act 1975, Schedule 2, cl 5(9).

of Inquiry Act 1908, the Crown makes the following more specific procedural points for the Tribunal to consider.

Statements of claim

7. Fairness to all participants is essential in any Tribunal inquiry. The Tribunal has acknowledged the need to ensure natural justice is observed, including by giving adequate notice to the Crown of the claims made against it. To that end, it would assist the Crown and serve the interests of justice if the Tribunal provided the list of claims that the Tribunal has indicated its staff have identified and which has informed the Tribunal's indicative list of themes for the wānanga takiwā to discuss.
8. In addition, the Crown is mindful that it is the Tribunal's general practice to set a timetable for the submission of fully-particularised statements of claim to the Tribunal for inquiry. This practice leads to a more efficient process, by avoiding or least limiting the number of fresh issues arising part-way through an inquiry and potentially disrupting the inquiry timetable.⁴ The Crown would support the Tribunal setting a date that would require the filing of fully-particularised statements of claim before the wānanga takiwā start.
9. The Crown also supports the Tribunal establishing a process to determine which claims, or part of claims, will be heard in this Inquiry. There may be claimants currently participating in other inquiries who have claims with constitutional elements that may be better inquired into in this Inquiry (for example, claims in the Wai 3060 Te Rau o te Tika: Justice System Kaupapa Inquiry). Conversely, there may be claims, or parts of claims, that have been submitted with the intention that they be heard in this Inquiry when they would be better dealt with in another inquiry.
10. This approach would also ensure the Tribunal only inquires into a claim once.

⁴ The Tribunal would still have a discretion to grant leave for a new claim, or an amendment to a claim, to be made after the deadline. The important point is that the Tribunal's leave would be necessary.

11. From the discussion at the wānanga at Waitangi, the Crown understands that the Inquiry themes will be drawn from statements of claim.⁵ Therefore, identifying the claims to be heard in the Inquiry before the wānanga takiwā start would enable parties to discuss the potential themes for the Inquiry meaningfully at the wānanga takiwā and, if possible, reach agreement on what those themes would be and which claims would be inquired into under each theme.

Jurisdiction and evidence

12. The Crown is interested to understand better the intended relationship between the proposed wānanga takiwā and the Tribunal's statutory jurisdiction to inquire into and determine the claims before it.⁶
13. The Crown therefore seeks clarification as to the status the parties' discussions at the wānanga takiwā would have, how the interests of natural justice would be met, and how any documents produced in the wānanga takiwā would be dealt with. For example, would they be entered on the record of Inquiry? Further, the Crown seeks clarification as to whether the wānanga takiwā would involve the hearing of evidence (from claimants, the Crown and independent experts) in order to identify "possible solutions" in relation to the themes. If evidence is to be heard at the wānanga takiwā, the Crown seeks to understand how this evidence would be tested, whether by cross-examination or by other means.
14. The Crown also seeks to understand how information or evidence provided in the course of the wānanga takiwā would be included in any Tribunal report on the outcome of the wānanga or in the Tribunal's further inquiry into extant issues following the wānanga.
15. At the first planning wānanga at Waitangi on 30 January, the Presiding Officer asked the Crown for its position regarding Tribunal reports from previous inquiries being entered on the Wai 3300 record of Inquiry.⁷ As a matter of principle, it is not necessary for Tribunal reports to be added to

⁵ Draft public transcript of Wānanga Tuatahi at Waitangi, 30 January 2024 (Wai 3300 #4.1.1), from p 98, l 21.

⁶ Treaty of Waitangi Act 1975, ss 5(1)(a) and 6.

⁷ Draft public transcript of Wānanga Tuatahi at Waitangi, 30 January 2024 (Wai 3300 #4.1.1), from p 86, l 8.

a record of inquiry for them to be a source of findings that are referred to in that inquiry. Nevertheless, the Crown does not object to such a course, provided the reports are relevant to this Inquiry. Relevance will be tethered directly to the claims the Tribunal will inquire into. Accordingly, the Crown reserves its position in respect of any particular reports until the claims to be inquired into are known.

16. To the extent it is proposed that evidence from other inquiries be placed on this Inquiry's record of Inquiry, relevance will again be the benchmark. Where such evidence is entered on the Wai 3300 record of Inquiry, it would be appropriate also to put on the record the transcript of the cross-examination and Tribunal questions relating to that evidence.

Thematic and/or regional approach to wānanga

17. The Crown seeks clarity on whether the wānanga takiwā would be arranged thematically, or whether all themes might be discussed at each wānanga takiwā. The Crown is also interested to understand how differences across wānanga takiwā will be mediated by the Tribunal, in light of the goal to achieve consensus. For example, how might the Tribunal proceed regarding the themes of the Inquiry if different wānanga takiwā express different views on what those themes should be?
18. One suggestion is that the Tribunal might co-ordinate the process of arriving at the Inquiry themes by holding wānanga that would bring together claimant representatives from various takiwā solely for the purpose of determining the themes of the Inquiry.
19. While it is ultimately up to claimants to organise themselves in a manner they see fit, the Crown supports the Tribunal's suggestion around clustering and convening a claimant hui within each takiwā in advance of each wānanga. This would facilitate efficiency and enhance the prospects of achieving consensus at the wānanga.

Role of lawyers

20. The Crown acknowledges the Tribunal's intention for an efficient inquiry process and one that enables claimants to have a strong and genuine voice

in the process, consistent with tikanga. The Crown notes the views expressed by several claimants at the planning wānanga, particularly at Waipatu, that lawyers have an important role to play in the Tribunal's inquiry process. The Crown seeks clarification from the Tribunal as to the role that lawyers will be expected to play in the wānanga.

14 March 2024



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Counsel for the Crown

TO: The Registrar, Waitangi Tribunal

AND TO: Claimant Counsel