

TE RŌPŪ WHAKAMANA I TE TIRITI O WAITANGI
IN THE WAITANGI TRIBUNAL

WAI 2700

KEI RARO I TE MANA O
IN THE MATTER

te ture o te Tiriti o Waitangi 1975
of the Treaty of Waitangi Act 1975

ME
AND

I TE TAKE O
IN THE MATTER

te pakirehua Wai 2700 mō ngā kerēme
e pā ana ki te Mana o te Wahine
of the Mana Wāhine Kaupapa Inquiry
(Wai 2700)

JOINT MEMORANDUM OF COUNSEL REGARDING INQUIRY PLANNING
MATTERS AFTER JUDICIAL CONFERENCE

Dated 25 October 2024

RECEIVED Waitangi Tribunal
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Ministry of Justice WELLINGTON

Presented for filing by:

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MAY IT PLEASE THE TRIBUNAL

1. This joint memorandum of counsel is filed on behalf of the claimant counsel listed in the **attached** Appendix “**A**”.
2. By memorandum-directions dated 16 Mahuru 2024¹ (“**post-JC directions**”), released after the 30 Hereturikōkā 2024 Judicial Conference (“**JC**”), her Honour Judge Reeves directed counsel to file submissions on inquiry planning matters by **5pm, Friday 25 October 2024**. It was directed that submissions should be filed jointly, where possible. Accordingly, we provide joint submissions from claimant counsel on the following matters:²
 - a. Forward Hearing Planning;
 - b. Amended Statement of Claim (“**ASoC**”) Particularisation and Overlap Issues;
 - c. Joint Statement of Relief and Approaches to Remedies;
 - d. Draft Statement of Issues; and
 - e. Discovery.(“**inquiry planning matters**”)
3. Where the views of claimants differ from the joint position, supplementary and/or submissions in opposition may be filed by claimants and/or their counsel as necessary.

Forward Hearing Planning

Hearing Structure

4. During the course of the JC, counsel spoke to the hearing structure.³ Therein we noted there was broad support among the claimant community for a thematic and chronological hearing structure with flexibility to enable

¹ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024).

² Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024).

³ S Roughton, L Oliver, T N Hauraki, R Dyll-Hekata & M Cherrington, Joint Memorandum regarding Inquiry Planning Matters dated 23 August 2024 (Wai 2700, #3.1.832), at [10].

witnesses to present their evidence in ways and locations convenient and appropriate to them.⁴

5. The claimants reiterate the need for a flexible approach in the substantive hearing phase. In this regard, while there is still some support for a pou-by-pou hearing structure commencing with rangatiratanga,⁵ it has become clear as the inquiry has progressed that most claims traverse multiple pou, with only a very small number of claims likely to be focused on a singular pou. This is simply because most claimant groups represent hapū, iwi, or whānau, and the members of these groups by virtue of being wāhine Māori have faced (and therefore are raising) multiple overlapping issues. Ergo, most claims will overlap with most, if not all, the pou.
6. We refer to her Honour's comments during the JC that:⁶

...my view is that having a hybrid range of evidence within a hearing week or weeks dealing with a pou would by necessity have that mixture of evidence which is dealing with the issue at a high level in terms of obviously the expert research and then to have the specific and local evidence which is on the shared Māori experience of the kaupapa issue or the claims which have been dealt with under that pou.

So that's kind of the approach that I have taken to that so, you know, of necessity for the types of claims that we are dealing with in this inquiry which are of a high level, **the experiential evidence needs to be relevant and to those issues and support those issues.**

[Emphasis Added]

7. Given these comments, it is submitted that the flexibility envisaged by the claimants would mean that some of the evidence presented may not be *directly relevant* to the pou that a hearing week is focused on. However, the level of flexibility sought would enable claimants to present their evidence in a way that is appropriate and in a pragmatic sense, achievable. This is

⁴ S Roughton, L Oliver, T N Hauraki, R Dyll-Hekata & M Cherrington, Joint Memorandum regarding Inquiry Planning Matters dated 23 August 2024 (Wai 2700, #3.1.832), at [10].

⁵ S Roughton, L Oliver, T N Hauraki, R Dyll-Hekata & M Cherrington, Joint Memorandum regarding Inquiry Planning Matters dated 23 August 2024 (Wai 2700, #3.1.832), at [15].

⁶ Waitangi Tribunal, *Wai 2700 – Mana Wahine Kaupapa Inquiry Judicial Conference Held Remotely Via AVL Friday 30 August 2024*, Wai 2700, #4.1.14 at 20.

especially important given the limited Crown funding for hearing attendance that is available and the logistical concerns of the claimants.

8. In terms of timetabling, coordinating counsel don't anticipate any difficulty in accommodating the various ways of presenting evidence. One suggestion has been that specific days in hearing timetables are set aside for pou-specific evidence, with other days for all-in evidence and/or technical evidence. Another suggestion is that we have all-in specific hearing weeks alongside the pou hearing weeks. Coordinating counsel expect that as we prepare the wider hearing plan, and obtain indications from counsel as to readiness, the particular approach will become clear for each hearing week and may differ from week to week.

Dates for Hearings One and Two

9. In the post-JC directions⁷, three sets of dates were indicated as being available as potential sitting weeks for hearings one and two:⁸
 - a. 14 – 18 April 2025 (“**April dates**”).
 - b. 12 – 16 May 2025 (“**May dates**”); and
 - c. 3 – 6 June 2025 (“**June dates**”).
10. There is broad agreement in principle in support of the April and June dates.⁹ Counsel note that further work is required to establish the number of claimants and/or witnesses that will be ready to present their evidence across the first two weeks. Notwithstanding, we highlight that both weeks have statutory holidays on Friday 18 April 2025 (Good Friday) and Monday 2 June 2025 (King's Birthday). Accordingly, the first two hearing weeks will have a total of eight (8) hearing days, instead of ten (10). On this basis, if the April and June dates are confirmed, we signal that there is a possibility that additional days may need to be added to the hearing programme at a later stage.

⁷ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024).

⁸ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024), at [9].

⁹ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024), at [9].

11. There is broad support for the Wai 381 claimants opening the substantive phase¹⁰ with the presentation of their evidence. The Wai 381 claim has a strong emphasis on rangatiratanga, but it is expected that its evidence will traverse other pou. Counsel for Wai 381 have indicated that if agreed, it is likely that they will need 3-4 days to present their case, which may mean that the first hearing week is allocated solely to the Wai 381 claim.

Location of Hearings

12. The Tribunal has reiterated its intention to hold hearings in Gisborne and Taranaki/Ngāmotu during the substantive hearings.¹¹ Concern has been raised with more remote locations such as Gisborne and Ngāmotu due to the likelihood of bad weather conditions leading to accessibility issues depending on the time of year that hearings are convened in those locations. Similarly, Ms Sykes raised concerns at the JC about cost related accessibility issues to those locations. Notwithstanding, there is general consensus that these locations be used within the substantive hearing phase. In addition, further locations have been tabled for later hearing weeks which include Palmerston North, Te Tai Tokerau, Bay of Plenty and King's Country.
13. In addition to the support for the Wai 381 claimants presenting their evidence across hearing week one, there is broad support for a more central location with AVL capabilities, such as Tamaki Makaurau or Poneke, for the first two hearing weeks.
14. Claimant counsel agree that AVL technology be used across the hearing weeks to assist with participation by claimants and witnesses who are unable to travel, who wish to present on multiple occasions and/or who may face limited available Crown funding or other resource or logistical constraints on attending hearings. We note, however, that for some claimants/witnesses, AVL technology may not resolve all issues that may prevent witnesses presenting at hearing. In that case, there may be some claimants/witnesses who prefer to have their evidence taken as read and questions in writing, due to ill health.

¹⁰ S Roughton, L Oliver, T N Hauraki, R Dyal-Hekata & M Cherrington Joint Memorandum regarding Inquiry Planning Matters dated 23 August 2024 (Wai 2700, #3.1.832), at [23].

¹¹ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024), at [15].

Technical Evidence

15. The claimant community support the hearing of technical evidence within each relevant pou. Within this, suggestions were put forward of one day each hearing week allocated to technical evidence, subject to witness availability.

Hearing Plan

16. In terms of timetabling of the first two hearing weeks, a draft timetable will be prepared in due course in accordance with filing directions.
17. In regard to a broader hearing plan, insofar as it relates to the claimants' evidence, once fully particularised claims are filed, and the first two hearing weeks' timetables have been agreed, we will prepare a *preliminary* hearing plan to map out the remaining claimant hearing weeks. We can indicate an intention to begin to liaise with Crown counsel to see what their views are on the placement and presentation of Crown evidence within the hearing plan.
18. Despite an intention to have a draft hearing plan prepared by late October, this has not been possible due to the breadth of evidence/issues and the need for claimants to identify the pou to which their claims mostly align, if they align to one in particular at all. It is submitted that the claimants will be in a better position to identify their respective pou once final ASoCs are filed in 2025.

Claim Particularisation and Overlap Issues

19. In previous claimant counsel submissions, two dates for claim particularisation were supported. The first was for claims to remove any overlaps with other Kaupapa Inquiries, and the second for final fully particularised amended statements of claims. The Tribunal has since indicated support for two dates for claim particularisation.¹² The issue of kaupapa inquiry overlap was raised by the Crown in its memorandum prior to the JC,¹³ and again during the JC.

¹² Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024), at [25].

¹³ V. Hardy, A. Ou, E. Sidnam, *Memorandum of Counsel for the Crown* dated 23 August 2024, Wai 2700, #3.1.833 at [6].

20. As noted in the Waitangi Tribunal's Guide to Practice 2023, claims may "have interconnected issues across more than one kaupapa inquiry".¹⁴ We view that the interconnected nature of claims should not be the cause of unnecessarily delay in the hearing of claims. In addition to jurisdictional restrictions, it is well known that claimants cannot relitigate claims. Therefore, unless claimants have themselves previously raised a claim issue, it is for them to determine the inquiry within which they wish their claims to be heard. By way of example, although other kaupapa inquiries may address similar issues, such as within the Wai 2575 Health Services and Outcomes Kaupapa Inquiry, a claimant may wish that this Mana Wāhine Tribunal Panel inquire into issues of maternal health issues, such as birthing, menopause or similar from a mana wāhine lens. This is not an overlap per se as it falls squarely within the ambit of this inquiry, that is, claims relating to the experiences by wāhine Māori of Crown breach, in particular, claims relating to the diminution of their status and identity.
21. Overlapping claims is an issue which has occurred across the kaupapa inquiry programme generally and is not unique to the Wai 2700 Inquiry. The likelihood of overlaps has been recognised in the Wai 2575 Health Inquiry and Wai 2750 Housing Inquiry, in the course of the Wai 2575 and Wai 2750 Tribunal's consideration of a possible joint sitting for the overlapping issues which arose in those Inquiries. It is clear that the experience of colonisation for wāhine Māori is distinct, and each experience of Crown breach for wāhine Māori has compounded upon another. It is Counsel's position that the Claimants are entitled to present their issues under whichever Inquiry they see as most appropriate, and any overlaps should be dealt with on a case-by-case basis within each relevant Inquiry.
22. In this regard, the earlier overlap analysis by the Crown¹⁵ seemed to indicate that several claims in the Wai 2700 have overlap issues. In reality, the Crown did not identify substantive overlaps that would amount to a relitigation of a claim but a number of claims with bare references to subject-matter that was likely to be examined in another kaupapa inquiry. It is counsels' view that the

¹⁴ Waitangi Tribunal, *Guide to the Practice and Procedure of the Waitangi Tribunal: A Comprehensive Practice Note Issued Under Clause 5(9) and (1) of Schedule 2 to the Treaty of Waitangi Act 1975* dated August 2023, at [3.25] at 12.

¹⁵ L Theron, M Tukapua, S Gwynn, Crown Submissions on Eligibility Appendix dated 16 September 2020, Wai 2700, #3.1.290(a) at 22-41.

Crown has not provided evidence of a need for an inquiry-wide approach to overlaps.

23. Claimant counsel are working with their clients to develop and particularise claims in preparation for the final filing date. This work is ongoing and substantial due to the broad nature of the issues in this Inquiry. Counsel suggest that any overlaps identified as part of this process can be dealt with by way of memoranda when final ASoCs are filed. Accordingly, counsel no longer consider it necessary to have a separate filing date for ASoCs with overlap issues and, instead, seek a filing date for final ASoCs eight (8) weeks after the close of the casebook.
24. Counsel note that claims participating in the first two hearing weeks will file their final ASoCs prior to the commencement of the hearing they are participating in. We defer to the Tribunal's determination of an appropriate filing date for those hearing participants.

Joint Statement of Relief and Other Approaches to Remedies

25. In furtherance to her Honour's encouragement towards a formulation of a joint statement of relief and any other innovative approaches to remedies, the claimants have begun discussions on this point. In particular, a suggestion has been tabled by Wai 381 claimant ropu (and supported by all counsel in support of this joint memorandum) for a claimant wānanga to discuss possible relief, and ways to coordinate the claimant approach to remedies. Dates and locations for this wānanga have not yet been decided, but it is likely to occur in early to mid-2025. The first step towards planning is for the claimants to ascertain whether any Crown funding is available. Counsel will keep the Tribunal updated on this point.
26. Further claimant wānanga towards remedies are likely as the substantive hearings progress towards remedies hearing(s) or other event(s).

Draft Statement of Issues

27. As discussed at the JC, counsel have prepared a draft Statement of Issues ("**draft SOI**"), which is **attached** as Appendix "**B**".

28. A copy of the draft SOI was provided to Crown counsel on Friday, 30 August 2024 subsequent to the JC. On 13 September 2024, Crown Law responded with a view that the draft SOI was too broad.
29. The claimants disagree and consider that a broad SOI is necessitated by the broad range of issues encompassed within the Mana Wāhine Kaupapa Inquiry. Furthermore, as the issues are to be fully particularised by claims in due course, we do not believe it is necessary for the SOI to be of the same level of specificity as the claims themselves. This is because the SOI is not a replacement for the claims; it is a high-level summary of the key issues within the Inquiry to guide the parties. This is supported within the post-JC directions that:¹⁶
- Due to the nature of this inquiry and the breadth of the claims, the statement of issues will likely have a broad scope. I indicate, however, that the issues will require a [] particularisation to guide a focused and efficient hearing process and enable a comprehensive Crown response.
30. Accordingly, as indicated above, counsel does not envisage that the Crown would respond to the SOI, but to the claims which will be particularised in due course.
31. Given the differing views between claimant counsel and the Crown on the draft SOI, it has been agreed that the matter should be deferred to the Tribunal. In this respect, counsel understand that the Crown will file submissions outlining their views of the draft SOI and counsel seek leave to respond to the same once filed.

Discovery

32. Taamaki Legal is in the process of preparing a coordinated targeted discovery request (insofar as we are able) on behalf of the claimants. Counsels' view is that the parties will be required to engage with the claims as well as the guiding SOI to ensure effective and comprehensive discovery.
33. Counsel will keep the Tribunal updated on the progress of discovery.

¹⁶ Waitangi Tribunal, He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 August 2024 Judicial Conference (Wai 2700 #2.5.103, 16 Mahuru 2024) at [21].

Engagement with Crown

34. Counsel will continue to engage with the Crown as we progress planning/interlocutory matters and work toward a preliminary hearing plan.

DATED this **25th** day of **October 2024**

Handwritten signatures in blue ink. The first signature is 'Stephanie Roughton' and the second is 'LO'.

Stephanie Roughton / Lauren Oliver
Coordinating Counsel