

I TE RŌPU WHAKAMANA
I TE TIRITI O WAITANGIWAI 3300
WAI 682
WAI 1464

KEI RARO I TE MANA o te ture o te Tiriti o Waitangi 1975

I TE TAKE O te pakirehua, Tomokia ngā tatau o Matangireia -
the Constitutional Kaupapa Inquiry (Wai 3300)

Ā

I TE TAKE O he kereme na Rewiti Paraone, Erima Henare,
Pita Tipene and Waihoroi Shortland mo Te
Rūnanga o Ngāti Hine mo ngā uri o Torongare
me Hauhaua (Wai 682)

Ā

I TE TAKE O he kerēme nā Te Riwhi Whao Reti rātou ko Hau
Hereora, ko Romana Tarau, ko Karen Herbert, ko
Edward Cook, ko Pearl Reti mō Te Kapotai (Wai
1464/1546)

HE MANATŪ RŌIA

I tēnei rā, i te rā 12 o Tihema 2024



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Waitangi Tribunal

13 Dec 24

Ministry of Justice
WELLINGTON

TĒNĀ, I TE TARAIPUUNARA:

Introduction

1. This Memorandum of Counsel is filed on behalf of Te Rūnanga o Ngāti Hine (Wai 682) and Te Kapotai (Wai 1464/1546) (“the claimants”).
2. In Memorandum-Directions dated 28 Whiringa-ā-rangi 2024, her Honour Chief Judge Fox invited claimants to respond to the Crown Memorandum of 13 November 2024 by no later than **5pm, Thursday 12 December 2024**.¹
3. The Crown’s position in its Memorandum is summarised as follows:
 - (a) The Crown says the Minister of Justice has not made any further decisions on the Treaty Clause Review programme (“Review”) since the Crown’s Cabinet materials were filed on 16 September. The Crown anticipates further decisions being made in the new year;²
 - (b) The Crown seeks clarity as to the nature and scope of the inquiry in relation to the Tribunal’s Direction that the Crown file relevant documents as they are produced. In respect, the Crown says it would face “very real difficulties” in complying with the Tribunal’s Direction on the basis that:³
 - (i) the Review will consider some 28 pieces of legislation;
 - (ii) Cabinet has agreed that detailed policy work and consultation will be undertaken at an individual agency level across 13 separate agencies; and
 - (iii) the Review is liable to proceed over a long-term and generate extensive documentation; and

¹ Wai 3300, #2.6.37, *Memorandum-Directions of Chief Judge Dr C L Fox regarding the Treaty Clause Review* (28 Whiringa-ā-rangi 2024), at [12].

² Wai 3300, #3.2.143, *Memorandum of Counsel for the Crown* (13 November 2024), at [4].

³ Wai 3300, #3.2.143, *Memorandum of Counsel for the Crown* (13 November 2024), at [5].

- (iv) certain documentation, or parts of it would likely attract privilege or confidentiality that the Crown may wish to assert.
- (c) The Crown says the timeframe for the review and the proposed consultation process does not generate the same urgent concerns as work concerning the Treaty Principles Bill given:⁴
 - (i) completion of the work required by the review programme is not imminent;
 - (ii) the proposal is that there be public consultation before policy decisions on specific provisions are made; and
 - (iii) there is an ongoing wider Constitutional Kaupapa inquiry.

Response to the Crown's Memorandum dated 13 November 2024

Approach to inquiry moving forward

4. The claimants' position is that the inquiry should continue to proceed with urgency due to the wide-ranging impacts and te Tiriti breaches that the Review will cause, and the Crown's ability to make quick legislative and policy decisions in respect of the Review.
5. The unfortunate reality is that the Crown's legislative and policy decisions over the last 12 months, including the decision to progress the Treaty Principles Bill against the findings and recommendations in *Ngā Mātāpono*, have left the claimants with little to no trust that the Crown will attempt to honour its Tiriti obligations to Māori where the Review is concerned.
6. The Crown's assurances in paragraph 3(c) above do not alleviate the claimants' concerns or the need for urgency, particularly as there has been no attempt from the Crown to engage with them on the

⁴ Wai 3300, #3.2.143, *Memorandum of Counsel for the Crown* (13 November 2024), at [7].

recommendations made in *Ngā Mātāpono* or reroute the Review in a Tiriti compliant way.

7. The claimants say that the public consultation process intended by the Crown is not Tiriti compliant and does not alleviate the prejudice Māori will suffer as a result of the Review. There is also no way of knowing the extent to which the Crown's wider policy objectives will influence its decision to carry out public consultation, or whether Māori will be able to have any real impact on the outcome of such a process.
8. The claimants also do not accept the Crown's submission that the completion of the work required by the Review is "not imminent".
9. Throughout this inquiry, the Crown has maintained that it cannot provide assurances in relation to the timeframes for its policy and legislative decisions.⁵ It's inability to do so has meant that the claimants have often been notified of the Crown's policy decisions at the last minute, and the inquiry has had to progress under significant time pressures which in turn have inhibited the claimants' ability to fully participate and engage in the inquiry.
10. Accordingly, the Crown cannot at this stage make assurances as to policy timeframes. To accept such assurances and lift the urgency in which the Tribunal progresses this inquiry, is to compromise the claimants participation in this inquiry and risk the Tribunal's ability to report on the issues in a timely way. This is especially so if some aspects of the Review, such as the legislation relating to the Fast Track

⁵ Wai 3300, #3.2.130, *Memorandum of counsel for the Crown regarding cabinet consideration of the draft Treaty Principles Bill* (5 November 2024) at [4]; Wai 3300, #3.2.37, *Memorandum of counsel for the Crown providing an update on the timing of the Cabinet paper* (15 August 2024) at [3]; Wai 3300, #3.2.35, *Memorandum of counsel for the Crown providing an update on the Cabinet Paper and Regulatory Impact Statement* (26 July 2024) at [2]; Wai 3300, #3.1.52, *Memorandum of counsel for the Crown confirming Crown witnesses, updates on Treaty Principles bill and claimant funding* (24 April 2024) at [11]; Wai 3300, #3.1.13, *Memorandum of counsel for the Crown in response to memorandum-directions dated 26 February 2024* (18 March 2024) at [32].

Approvals Bill,⁶ are prioritised as suggested in the Crown's Cabinet Paper.⁷

11. Given the potential impacts of the Review, and the Crown's unilateral approach to progressing it, the claimants submit that an overly cautious approach should be taken to support and protect the claimants in this inquiry, and Māori more broadly, who are already vulnerable to exacerbated breaches of te Tiriti based on the findings already made on the Review in *Nga Mātāpono*. Such an approach will also ensure that the Tribunal is able to carry out its inquiry the most effective way.

Direction for ongoing disclosure

12. Counsel submit that the circumstances above support the need for transparency from the Crown and the Tribunal's Direction that the Crown file documents relevant to the Review as they are produced.⁸
13. Any issues as to privilege or confidentiality should be dealt with on a case-by-case basis as it has been throughout the course of this inquiry. In this respect, where confidentiality is sought by the Crown and opposed by the claimants, the document(s) should be provided to the Tribunal to determine the nature and extent of the confidentiality sought.
14. Counsel note that the Crown's Cabinet Paper identifies several workstreams for the Review that should be included as part of the Crown's disclosure. These include:⁹

⁶ Wai 3300, #A30, *Cabinet paper and Minutes of Decision on the review of legislation containing reference to the principles of the Treaty of Waitangi* [16 September 2024], page 6 at [33.1].

⁷ Wai 3300, #A30, *Cabinet paper and Minutes of Decision on the review of legislation containing reference to the principles of the Treaty of Waitangi* [16 September 2024], page 6 at [33.1].

⁸ Wai 3300, #2.6.18, *Memorandum-Directions of Chief Judge Dr C L Fox regarding the Treaty Clause Review* (8 Whiringa-ā-rangi 2024).

⁹ Wai 3300, #A30, *Cabinet paper and Minutes of Decision on the review of legislation containing reference to the principles of the Treaty of Waitangi* [16 September 2024], page 6 at [30]-[33].

- (a) Any instructions and/or arrangements relating to the governance or oversight of the Review;
- (b) Any options for timeframes and priorities for the review;
- (c) Any details or information regarding the implementation of the Review, including any Regulatory Impact Statements developed to date;¹⁰ and
- (d) Any engagement to date with Māori and/or other stakeholders.

Next steps

15. Given the time that has passed since the Crown's Cabinet Paper was filed, counsel suggest that the next step in the inquiry is for the Crown to file any documents relating to the Review in accordance with the Tribunal's Direction dated 8 November 2024. It may also be helpful for the Crown to provide updating evidence alongside the documents explaining the Crown's process for the Review and the rationale for its approach.

Counsel seek an opportunity to file further submissions in respect of a process for the inquiry once we have had the opportunity to review the Crown's documents. Counsel expect that any matters arising from the documents, including any further evidence or disclosure required, can also be addressed in these submissions.

I TĒNEI RĀ, i Whāngarei, te rā 12 o Tīhema 2024



Dr Season-Mary Downs / Chelsea Terei-Tipene / Majka Cherrington
Counsel for the claimants

¹⁰ Wai 3300, #A30, *Cabinet paper and Minutes of Decision on the review of legislation containing reference to the principles of the Treaty of Waitangi* [16 September 2024], page 8 at [45]-[47].