

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)

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JOINT MEMORANDUM OF COUNSEL RESPONDING TO CROWN  
SUBMISSIONS ON INQUIRY PLANNING

Dated 19 Hakihea 2024

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Presented for filing by:

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Counsel Acting: S J Roughton / L Oliver / P Ye

## MAY IT PLEASE THE TRIBUNAL

1. This joint memorandum of counsel is filed on behalf of claimant counsel listed in the **attached** Appendix “A”.
2. By memorandum-directions dated 16 Mahuru 2024<sup>1</sup> (“**post-JC directions**”), her Honour Judge Reeves directed counsel to file submissions on inquiry planning matters by **5pm, Friday 25 Whiringa-ā-nuku 2024**. A joint memorandum of claimant counsel was filed on 25 Whiringa-ā-nuku 2024.<sup>2</sup> The Crown subsequently provided submissions on 25 Whiringa-ā-nuku 2024, and 1 Whiringa-ā-rangi 2024.<sup>3</sup> Her Honour then directed that any claimant submissions in reply were to be filed by 5pm, Friday 15 Whiringa-ā-rangi 2024.<sup>4</sup> Counsel were granted leave to file joint submissions in response to the Crown by 5pm, Wednesday 27 Whiringa-ā-rangi 2024.<sup>5</sup> On 26 Whiringa-a-rangi 2024, counsel sought a further extension to file the reply submissions by **5pm, Thursday 19 Hakihea 2024** in order to accommodate further discussions amongst claimant counsel, and with Crown counsel.<sup>6</sup> On 17 Hakihea 2024, that extension was granted.<sup>7</sup>
3. Coordinating counsel met with counsel for the Crown on 21 Whiringa-ā-rangi (November) 2024. A further hui with claimant counsel was convened on 17 Hakihea (December) 2024, and a follow up hui was convened yesterday afternoon with Crown counsel.
4. At the Whiringa-ā-rangi (November) hui, several proposals were discussed and agreed in principle that would seek to address the Crown’s concerns in relation to its preparation for the substantive hearings. Coordinating counsel expended great effort in attempting to obtain agreement from the claimant counsel roopu to these proposals. Unfortunately, this afternoon, Crown counsel has advised that despite these efforts, it cannot agree with the

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<sup>1</sup> Waitangi Tribunal, *He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 Here-turi-kōkā 2024 Judicial Conference* (Wai 2700 #2.5.103, 16 Mahuru 2024).

<sup>2</sup> S Roughton, L Oliver, *Joint memorandum of counsel regarding inquiry planning matters* (Wai 2700, #3.1.839, 25 Oketopa 2024).

<sup>3</sup> F Dean, *Memorandum of counsel for the Crown regarding inquiry planning* (Wai 2700, #3.1.838, 25 Oketopa 2024); V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024).

<sup>4</sup> Waitangi Tribunal, *Memorandum-directions of Judge Reeves concerning further submissions on inquiry planning* (Wai 2700 #2.5.105, 7 Whiringa-ā-rangi 2024) at [7]

<sup>5</sup> Waitangi Tribunal, *Memorandum-directions of Judge Reeves concerning further submissions on inquiry planning* (Wai 2700 #2.5.105, 7 Whiringa-ā-rangi 2024) [8]

<sup>6</sup> S Roughton (Co-ordinating counsel), *Joint memorandum of counsel seeking further extension to file submissions on inquiry planning Matters* dated 26 Nov 2024, Wai 2700, #3.1.846.

<sup>7</sup> Waitangi Tribunal, *Memorandum-directions of Judge Reeves granting a further extension for claimant submissions in reply to further Crown submissions on inquiry planning* dated 16 Dec 24, Wai 2700, #2.5.107 at [5].

proposals drafted by coordinating counsel, which had been agreed to in principle during the November hui. It is our understanding that the Crown will file submissions on these matters āpōpō.

5. Accordingly, claimant counsel reserves our position and seeks leave to regroup with claimant counsel during the week of 13 Kohitātea (January) 2025 with an intention to file submissions in response to the anticipated Crown submissions by **5pm, Friday 17 Kohitātea (January) 2025**.
6. In addition, counsel set out joint submissions of the claimants on the following matters:
  - a. Draft Statement of Issues and the Particularisation of Claims.
  - b. Hearing Locations Update for Hearing Weeks One and Two.
  - c. Hearing Plan developments; and
  - d. Next Steps.

#### **Draft Statement of Issues and the Particularisation of Claims**

7. By way of background, coordinating counsel provided a *draft* Statement of Issues (“**SOI**”) to the Crown on 30 Hereturikōkā (August) 2024. In mid-Mahuru (September), the Crown responded identifying some concerns with the SOI as drafted. Given that the Crown did not seek to amend the draft SOI, on 25 Whiringa-ā-nuku (October) 2024, coordinating counsel filed the draft SOI with the Tribunal. In response to this filing, the Crown submissions identified that the draft SOI covers too vast a range of topics, and:<sup>8</sup>
  - a. encompassed all aspects of the lives of wāhine Māori since 1840.
  - b. almost all the issues are stated without any workable degree of specificity;<sup>9</sup> and

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<sup>8</sup> V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024) at [6.5.1] to [6.5.3].

<sup>9</sup> V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024) at [6.5.2]

- c. no specific Crown action, omission, policy, process or system is identified.<sup>10</sup>
8. In response, counsel notes that her Honour observed in previous memorandum-directions that “the statement of issues will likely have a broad scope”<sup>11</sup> requiring an inquiry into both historical and contemporary issues. This we submit accords with the judicially determined scope of the Wai 2700 Mana Wāhine Kaupapa Inquiry (“**Inquiry**”) which states that:<sup>12</sup>

...It is important that the Wai 2700 Inquiry remains sufficiently broad to ensure that the recommendations or outcomes are able to achieve the desired result – meaningful change to a Treaty-compliant system. If the Inquiry becomes solely a claim by claim inquiry it risks being side tracked by specific examples without considering the big picture.

As such, it is the claimants’ position that the SOI should not be viewed as a replacement for the claims themselves, but reflect the totality of claims and issues for determination within the inquiry.<sup>13</sup>

9. What has become clear is that there are different interpretations of the purpose of the Tribunal Statement of Issues (“**TSOI**”). Crown submissions have indicated that it views that the TSOI is a document that it wishes to respond to and to build discovery around. In this regard, it was submitted that:<sup>14</sup>

...it is not possible for the Crown to respond to issues frame at such a high level (noting that usually the Crown would not respond to claims until after particularisation), nor could such a statement of issues usefully shape disclosure.

Whereas the claimant counsel submit that by creating a framework for the inquiry and identifying the broad issues to be determined in the inquiry. The claimants further submit the TSOI does not replace the, that the TSOI does not replace (Amended) Statements of Claim.

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<sup>10</sup> V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024) at [6.5.3]

<sup>11</sup> Waitangi Tribunal, *He Pānui Whakahau O Te Kaiwhakawā Reeves Memorandum-Directions of Judge Reeves Following 30 Here-turi-kōkā 2024 Judicial Conference* (Wai 2700 #2.5.103, 16 Mahuru 2024) at [21].

<sup>12</sup> Waitangi Tribunal, *Appendix A: Confirmed scope for the inquiry* (Wai 2700, #2.5.24(a), 22 Hōngongoi 2020) at 4-5.

<sup>13</sup> S Roughton, L Oliver, *Joint Memorandum of Counsel Regarding Inquiry Planning Matters* (Wai 2700, #3.1.839, 25 Oketopa 2024) at [29].

<sup>14</sup> V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024) at [6.2].

10. While we agree with the Crown that “it must be clear, one way or the other, prior to the hearing phase what the specific issues for consideration by the Tribunal are...”,<sup>15</sup> claim particularisation continues to be a focus for the claimants. It is intended that the specifics of issues for Tribunal inquiry will naturally become clear as claim particularisation progresses.
11. Therefore, claimant counsel retain the view that the purpose of the SOI is not to assist with the particularisation of claims or to provide a document for the Crown to respond to, but rather to assist the parties by identifying, and framing at a high-level, the issues within the Inquiry.
12. Accordingly, we reiterate that there is broad support<sup>16</sup> from claimant counsel that, given the lack of agreement in respect of the draft SOI, it would be appropriate for the Tribunal to review and finalise the TSOI.

### **Hearing Location Update for Hearing Weeks One and Two**

13. Claimant counsel are in the process of discussing and agreeing to suitable venues for the first two hearing weeks. We can indicate that two locations have been tabled, namely, Ponoke for Hearing Week One and Hastings for Hearing Week Two. We understand that counsel for Wai 2655 (Ngā Kairauhii Nannies Against P Claim) is making enquiries with Tribunal staff regarding funding for hau kainga in respect of the second week. These discussions are ongoing amongst claimant counsel.
14. We expect to be able to provide a further update in early 2025.

### **Hearing Plan Developments**

15. During a discussion between coordinating counsel and Crown counsel at our November hui, we discussed how the Crown intends to respond to the claims, and in particular, when Crown evidence will be presented. At this stage (subject to evaluation after the first two hearing weeks), counsel for the Crown have indicated an intention that Crown evidence be presented after all claimant, and technical evidence has been heard rather than within

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<sup>15</sup> V Hardy, F Dean, *Memorandum of counsel for the Crown providing further submissions on inquiry planning* (Wai 2700, #3.1.844, 1 Whiringa-ā-rangi 2024) [12].

<sup>16</sup> Claimant Counsel Hui dated 18 Whiringa-ā-rangi (November) 2024: Afeaki Chambers, Ara Moana Law, Bryce Lyall Barrister, Burgess Law, Dixon & Co Lawyers, Kahui Legal, Kaupare Law, Tamaki Legal, Te Mata Law, Te Nahu Legal, Tukau Law, Wackrow Panoho & Associates, Woodward Law.

or after each set of pou hearings. In the context of that discussion, one concern that was raised was the lack of certainty around the total number of hearing weeks for the Inquiry.

16. Coordinating counsel are conscious that due to a lack of a hearing plan, at least, for the claimant and technical evidence, it may be difficult for all parties, including the Tribunal, to contemplate how many hearing weeks are required. We recall that at the last Judicial Conference there appeared to be a general acceptance of *about* eight weeks being required for claimant and technical evidence.
17. Given this uncertainty and the current issues around funding, coordinating counsel are creating a hearing plan to set out how the Inquiry can be progressed. This is being done by assessing the claims, identifying and categorising the key issues for each claim under the relevant pou, and assigning claims to the pou/hearing week to which they most align. This work is close to completion and once complete, the initial analysis will be circulated to claimant counsel for feedback and/or confirmation.
18. Once we have received feedback, we will create a *draft* hearing plan that includes the likely time required for each pou (e.g. the number of hearing weeks per pou) and we will engage with the Tribunal research unit and the Joint Research Committee to determine how best to plan for the presentation of technical evidence within the hearing plan. We anticipate this work to be completed prior to the commencement of the first hearing week and on this basis, seek leave to file a *draft* hearing plan by **5pm, 11 Paengawhāwhā (April) 2025**, if not before.

#### **Next Steps**

19. Claimant counsel seek leave to respond to the anticipated Crown submissions by **Friday 17 Kohitātea (January) 2025**.

**DATED at TĀMAKI MAKĀURAU this 19th day of HAKIHEA 2024**

The image shows two handwritten signatures in blue ink. The signature on the left is 'Stephanie Roughton' and the signature on the right is 'Lauren Oliver'. Both signatures are written in a cursive, flowing style.

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Stephanie Roughton / Lauren Oliver / Patrick Ye  
**Coordinating Counsel (Tāmaki Legal)**