

WAITANGI TRIBUNAL

CONCERNING

the Treaty of Waitangi Act 1975

AND

the kaupapa inquiry programme

**MEMORANDUM OF THE CHAIRPERSON CONCERNING THE KAUPAPA
INQUIRY PROGRAMME**

27 March 2019

Tēnā koutou katoa

Introduction

1. In my memorandum of 1 April 2015 I set out the Waitangi Tribunal's kaupapa inquiry programme, detailing the proposed order in which inquiries into claims raising issues of national significance would be heard. The order of inquiries as listed under that programme is attached as **Appendix A**.
2. The purpose of this memorandum is to inform all claimants and the Crown of amendments and updates to the Waitangi Tribunal's kaupapa inquiry programme, as set out below. The revised inquiry programme is attached as **Appendix B**.
3. The memorandum also outlines some refinements to the process that the Tribunal will follow in scheduling and commencing kaupapa inquiries. It is not intended to replace the process set out in the April 2015 memorandum, but rather to refine and update it so as:
 - (a) To enable pressing contemporary issues to be prioritised for rapid inquiry where early reporting would make a significant difference;
 - (b) To outline preliminary steps that the Tribunal will usually take before commencing a listed or new kaupapa inquiry; and
 - (c) To clarify the Tribunal's approach to including specific and local claims that relate to the issues of national significance with which kaupapa inquiries are concerned.

Background – an emerging contemporary focus

4. In its *Strategic Direction 2014-2025*, the Tribunal recognised that as well as claims currently being heard in district inquiries, a number of unheard claims lodged with the Tribunal raised historical and contemporary grievances concerning issues of national significance ('kaupapa issues'). Two of the Tribunal's strategic goals were to commence inquiry into claims relating to high-priority kaupapa issues by 2020 and to substantially advance or complete the hearing of claims relating to other kaupapa issues by 2025.
5. Since issuing the *Strategic Direction*, the Tribunal has commenced or taken steps to commence five kaupapa inquiries, under which claims raising issues of national significance have been grouped for hearing. The inquiries are:
 - a) The Māori Military Veterans inquiry (Wai 2500);
 - b) The Health Services and Outcomes inquiry (Wai 2575);
 - c) The Marine and Coastal Area (Takutai Moana) Act inquiry (Wai 2660);
 - d) The Mana Wāhine inquiry (Wai 2700); and
 - e) The Housing Policy and Services inquiry (Wai 2750).
6. In addition to these inquiries the Tribunal has continued its hearings in the National Freshwater and Geothermal Resources inquiry (Wai 2358), which commenced prior to the formal kaupapa inquiry programme being established.
7. The Tribunal's experience to date in four of the five kaupapa inquiries (Māori Military Veterans being a partial exception) is that most claimants who have sought to participate have put greater emphasis on the contemporary elements of their claims, with some requesting that they be heard ahead of historical grievances. More specifically, in some cases claimants have proposed that the Tribunal give priority to the early hearing and reporting of claims alleging significant actual or potential prejudice from current Crown policy and practice.

8. As a part of its commitment to progressing high-priority kaupapa claims, the Tribunal is giving due weight to this emerging preference when reviewing the sequencing of kaupapa inquiries and the targeting of issues within inquiries. It may not always be appropriate to start an inquiry where the Crown is already engaging with Māori and developing policy that may address the issue complained of. In general, however, while taking due account of historical antecedents and context that are a part of some kaupapa claims, the Tribunal will prioritise pressing contemporary claim issues where Tribunal inquiries may make a substantive contribution to strengthening the Crown-Māori Treaty partnership.

Prioritising contemporary kaupapa issues

Sequencing kaupapa inquiries

9. The Tribunal's approach to setting the order of inquiries for hearing is set out in paragraph 22 of the April 2015 memorandum. It identifies six criteria to be taken into consideration. These are, in summary:
 - a) Removal of the Tribunal's ability to inquire;
 - b) The immediacy of the take or potential remedy;
 - c) The seriousness of the alleged breach or prejudice;
 - d) The importance of the take to claimants;
 - e) The importance of the take to Māoridom; and
 - f) The importance of the take to the nation.
10. These criteria continue to apply, with the stronger focus on contemporary kaupapa issues giving additional weight to the immediacy of the take or potential remedy. This will require the Tribunal to be flexible and responsive in reordering the inquiry programme as and when claimant and Crown priorities change. Greater flexibility may also be required in determining and scheduling the issues to be heard and reported on within the inquiries.
11. The Tribunal will therefore keep the order of kaupapa inquiries under review and adjust it as appears appropriate, informing parties when it does so. The Tribunal will also consider applications by claimants or the Crown to amend the inquiry programme so as to make an earlier start on a listed kaupapa inquiry that focuses mainly on contemporary issues.

Inquiry topics and kaupapa issues

12. The April 2015 memorandum signalled the Tribunal's preference for the thematic topic set down for a kaupapa inquiry to have a broad scope so that related claim issues could be grouped for concurrent hearing, noting:

This will help to promote efficiency in the conduct of kaupapa inquiries and to enable faster completion of the programme as a whole. It will reduce the fragmentation and duplication of effort by the Tribunal and the inquiry parties across multiple inquiries. It will also assist the Tribunal to consider all aspects of the issue, enabling an inquiry to consider related matters together and to deliver more comprehensive findings and recommendations.
13. The purpose of a kaupapa inquiry, however, is not to conduct a general exploration of all aspects of its thematic topic or of the totality of Māori experience of Crown actions and omissions. Rather, it is to investigate and make findings on the Treaty breaches and prejudice alleged by the claimants in respect of the kaupapa issue or issues of national significance that fall within the scope of that topic. Kaupapa issues may themselves be broadly or narrowly defined and may be given differing levels of priority by claimants.

Targeted inquiries into contemporary issues

14. The original programme of 11 inquiries was organised under broad thematic topics that grouped related issues set out in existing claims on the Tribunal's register. I also indicated, however, that the Tribunal would be prepared to take 'a more targeted approach where appropriate to the nature of the issue, to the grievances raised and remedies sought, or to circumstances requiring a fast inquiry process for particular claims'.
15. This targeted approach has since taken practical effect:
 - a) The Housing Policy and Services inquiry was severed from the broader kaupapa inquiry into Social Services, Social Development and Housing claims, and proposed for early inquiry. The basis for doing so was that housing had become a major current issue in Crown policy and practice that affected Māori generally and significantly, and had been the subject of an application for urgency. The Tribunal has recently consulted affected claimants and the Crown on whether a separate inquiry should proceed.
 - b) Claims about the Marine and Coastal Area (Takutai Moana) Act were given priority for a targeted kaupapa inquiry in view of the claimants' allegations that imminent prejudice would arise from the Crown's process for recognising Māori rights under this Act.
16. The Tribunal will continue to take a proactive approach to consulting affected claimants and the Crown on contemporary matters that may merit an early and rapid kaupapa inquiry. As indicated in the April 2015 memorandum, claimants or the Crown may also apply at any time for a targeted inquiry.

Prioritising issues within inquiries

17. Recent experience in kaupapa inquiries suggests an active interest on the part of many claimants and the Crown in dealing first with issues they consider to be pressing, in particular matters of current Crown policy and practice. This has led to Tribunal panels organising their inquiries into stages so as to give early attention to issues seen as important for early reporting by claimants and/or the Crown.
18. Exemplifying that approach, in the Health Services and Outcomes inquiry the Tribunal is hearing two national claims concerning primary healthcare in stage 1 and has signalled that it will hear claims concerning three health sectors (mental health; smoking, alcohol and substance abuse; and Māori with disabilities) in stage 2, before proceeding with other claim issues.
19. There may be kaupapa inquiries where a staged approach or early, selective reporting is not appropriate. In general, however, my expectation is that issues concerning current Crown policy and practice will be given priority where there is substantial claimant support and readiness for early hearing and reporting, provided that doing so would remain relevant alongside any Crown-initiated policy development or inquiry process under way.

The updated kaupapa inquiry programme

20. As indicated above, five kaupapa inquiries are under way. Next to commence will be the Constitution, Self-government and Electoral System inquiry. This inquiry was delayed so as to minimise overlaps with the hearing of claims about constitutional issues, autonomy and tino rangatiratanga in the four active district inquiries, in particular the Te Paparahi o Te Raki inquiry, where hearings and closing arguments have now concluded.
21. The order of future inquiries is also adjusted so as to bring forward two that focus in part on major fields of current Crown policy and action and may require targeted inquiry processes should the parties propose particular issues to prioritise. They are:

- a) The Education Services and Outcomes inquiry; and
 - b) The Social Services and Social Development inquiry.
22. These and other changes are listed in the updated inquiry programme (see **Appendix B**).

Progressing the kaupapa inquiry programme

23. The pace at which the kaupapa inquiry programme advances is necessarily conditioned by the resources available to progress Tribunal inquiries. As the Tribunal has many calls on its resources, the *Strategic Direction 2014-2025* laid down a general framework of priority settings for balancing the allocation of such resources across its inquiry programme. It specified that resources are to be prioritised, in ranking order, to the hearing of:
- a) Urgent inquiries, including remedies proceedings granted urgency;
 - b) Historical claims, principally completion of the final district inquiries;
 - c) Kaupapa inquiries; and
 - d) Contemporary claims not heard in other inquiries.
24. At present and for the next few years, the Tribunal's resources are likely to be heavily committed to urgent and district inquiries. Beyond the three kaupapa inquiries already under way and the two about to commence, the Tribunal's ability to progress the next inquiries in the kaupapa inquiry programme is accordingly limited.
25. Scheduling the start of a kaupapa inquiry will therefore depend in part on sufficient resources being available. Given current constraints, for any proposed new kaupapa inquiry the Tribunal will give priority to targeted, rapid inquiries into pressing contemporary issues concerning current Crown policy and action where the claimants can demonstrate their readiness to go to hearing.

Preparing for upcoming kaupapa inquiries

26. The April 2015 memorandum indicated that the first formal step in starting a kaupapa inquiry would be the appointment of a presiding officer and panel. This has been the Tribunal's standard practice for non-urgent inquiries.
27. Depending on the circumstances in each case, the standard practice may change. The Tribunal's experience in several kaupapa inquiries to date has been that extensive preparatory and consultative work has required a lengthy start-up phase. The two preliminary steps outlined below are intended to shorten the time required and prepare the way for the start of each inquiry listed in the inquiry programme. These steps will be initiated at the discretion and under the auspices of the Chairperson prior to the appointment of a presiding officer and panel to conduct the inquiry.

Claimants intending to participate

28. The first preliminary step concerns claimant participation. For a forthcoming kaupapa inquiry, the Tribunal will:
- a) Distribute a provisional list of claims registered with the Tribunal that appear to relate to the inquiry's kaupapa issues and request the claimants to indicate whether they wish to participate in the inquiry; and
 - b) Request any claimants intending to participate:
 - i) to particularise or otherwise amend their claims; and
 - ii) to identify any issues that they consider the Tribunal should prioritise for early inquiry.

29. Once appointed, the Tribunal panel conducting the inquiry will undertake the formal aggregation and consolidation of claims as participants in the inquiry.

Exploratory scoping report

30. The second preliminary step is designed to assist the planning of the inquiry. For each inquiry listed in the inquiry programme, the Tribunal would commission an exploratory scoping report as a preliminary step. The precise terms of reference for the report would depend on the topic and context of the inquiry, but would normally be expected to provide:
- a) A preliminary outline and analysis of statements of claim likely to fall within the scope of the inquiry and of the kaupapa issues to which they appear to relate;
 - b) An indication of whether and to what extent any such issues concern current Crown policy and practice; and
 - c) A brief description and select, annotated bibliography of the main evidential resources in the public domain that are likely to be relevant to the identified kaupapa issues.
31. The purpose of the scoping report would be to provide claimants, the Crown and, when appointed, the Tribunal panel with information that would help to expedite the planning of the inquiry and to identify principal issues.

Starting new unlisted kaupapa inquiries

32. Preliminary steps will also be taken for proposed new, unlisted kaupapa inquiries. The April 2015 memorandum provided for additions to be made to the kaupapa inquiry programme in circumstances:
- a) Where a kaupapa issue included in a future listed inquiry is severed and set down for an earlier targeted inquiry;
 - b) When claim issues emerge that cannot be accommodated within the inquiries listed in the programme, in particular:
 - i) issues that a Tribunal kaupapa inquiry panel decides to exclude from the scope of its inquiry; and
 - ii) new kaupapa issues for which the claimants request a separate inquiry.
33. Where an early start to a proposed new kaupapa inquiry is requested, the Tribunal will conduct a preliminary round of interlocutory proceedings under the auspices of the Chairperson to consult the affected claimants and the Crown. The purpose of the proceedings is to assist the Tribunal in determining whether the proposed inquiry should commence and if so, when, on which main issues and in what manner.
34. Matters that the Tribunal will take into consideration may include:
- a) Clarifying the range of issues that the claimants and the Crown propose to include in the kaupapa inquiry;
 - b) Establishing whether the issue or issues satisfy the threshold test for starting a kaupapa inquiry (see below);
 - c) Identifying which claims the claimants want the Tribunal to hear, in particular any pressing contemporary claim issues concerning current Crown policy and practice;
 - d) Confirming claimant and Crown readiness to proceed, including claimant access to adequate resources to prepare their claims for hearing.

35. A decision to add and prioritise a new kaupapa inquiry may lead to delay for claims due to be heard later in the inquiry programme. The Tribunal will therefore take due account of any consequential impacts.

An inclusive approach to claimant participation

36. The April 2015 memorandum set out a three-part threshold test that must be met for each of the issues proposed for inclusion in a kaupapa inquiry:

The kaupapa inquiry programme is designed to provide a pathway for the hearing of nationally significant claim issues that affect Māori as a whole or a section of Māori in similar ways. These thresholds – national significance, Māori widely affected, similarity of experience of the Crown policy or action complained of – must normally be met for a kaupapa inquiry to be constituted.

37. At the same time, it signalled an inclusive approach that was intended to ‘enable claimants to bring before the Tribunal all eligible claims for which they seek a hearing on kaupapa issues’. The participation of claims raising specific and local issues in a kaupapa inquiry is further clarified below.

‘Nationally significant claim issues’

38. The April 2015 memorandum states that the first part of the threshold test for starting a kaupapa inquiry is that a claim or claims raise one or more issues of national significance. This threshold may be met either by one or more national claims or by a group of claims about the same issue taken together.
39. Once the Tribunal is satisfied that the national significance threshold has been met, any claimant whose claim relates to the issue, including specific and local claims brought on behalf of individuals, whānau, hapū and other groups, may seek to participate in the subsequent kaupapa inquiry. Claims are not required to meet the threshold individually. If admitted to the inquiry, it should be clearly understood that the claims will be heard as part of the nationally significant kaupapa issue on which the inquiry will focus.

‘Māori widely affected’

40. The second part of the threshold test for constituting a kaupapa inquiry concerns the extent to which claims that relate to the kaupapa issue in question are brought on behalf of Māori generally or the section of Māori affected by the issue.
41. At its simplest, this threshold may be met by a single claim brought on behalf of all Māori said to have suffered prejudice as a result, provided that the claimant is a member of the affected group. The threshold may also be met by a group of claims brought on their own behalf by individuals and groups that, taken together, can be regarded as representing most of the affected Māori, as was the case in the Māori Military Veterans inquiry.

‘Similarity of experience of the Crown policy or action complained of’

42. The third part of the threshold test extends to the hearing of specific and local claims that relate to a kaupapa issue being heard in the inquiry. Such claims play an important role in kaupapa inquiries in providing local context, case examples and representative Māori experience of the national issue under examination.
43. The focus of a kaupapa inquiry in which specific and local claims participate will be on the shared Māori experience of the kaupapa issue or issues concerned. The Tribunal will hear and report on such claims on the basis that the claimants assert that they have been affected in similar ways in respect of the Treaty breaches alleged.

Alternative inquiry options

44. Not all claimants whose grievances relate to a kaupapa issue may wish to have them heard in a kaupapa inquiry, in particular where they arise from distinct local circumstances. As indicated in the April 2015 memorandum, the Tribunal will provide alternative inquiry pathways for historical and contemporary claims that remain to be heard outside of the district and kaupapa inquiry hearing programme. A standing panel process for remaining historical claims has recently been started and a process for remaining contemporary claims will commence once the district inquiries have been completed. The Tribunal is committed to fulfilling its statutory obligation to inquire into all the claims before it.

The Registrar is to send this memorandum to the Crown and all claimants with registered claims and to place an electronic copy on the Tribunal's website for public information.

DATED at Wellington this 27th day of March 2019



Chief Judge W W Isaac

Chairperson

WAITANGI TRIBUNAL