

Preparing Claimant Evidence For the Waitangi Tribunal

by

Dr Grant Phillipson



A Waitangi Tribunal Publication

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The cover illustration shows Dr Phillipson
with the casebook for the Urewera inquiry

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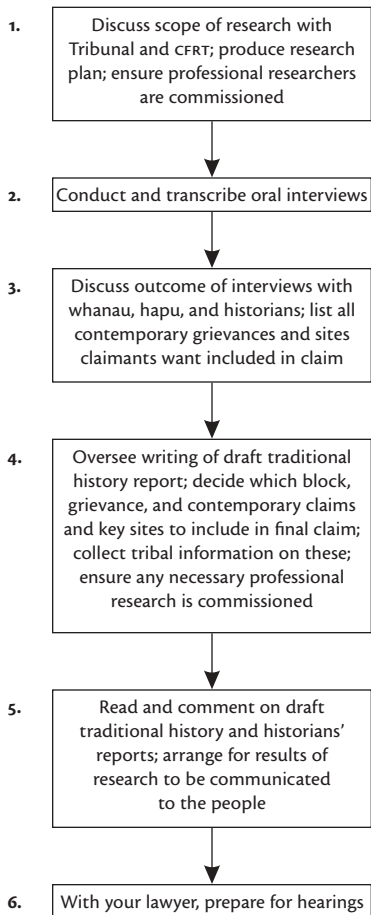
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PREFACE

This booklet has been written in response to claimant requests. It is designed to assist claimants with information about what they need to do to prepare their claims for an inquiry by the Waitangi Tribunal. Part I provides a step-by-step guide for preparing claimant evidence. It describes the types of information that the Tribunal needs and it outlines a process for claimants to follow in identifying the issues that have to be covered and in providing evidence about those issues. Part II provides both a more detailed outline of what the Tribunal needs to know from traditional history reports and a guide for claimants on how to provide that information.

This booklet does not cover in any detail what needs to be done for the land alienation and other historical reports (these reports should be prepared by professional historians). Instead, it suggests ways for ensuring successful input from claimants into the process of researching and writing historical reports. The claimants' contribution is a vital one and needs to be organised effectively. A second booklet will be written on the process for preparing professional historical reports, describing what claimants need to ensure is covered in those reports.

The Tribunal's research unit can provide further information on any of the matters raised in this booklet. The Tribunal can be contacted at PO Box 5022, Wellington.



Summary of steps in preparing evidence for Waitangi Tribunal claims

I: PREPARING EVIDENCE FOR CLAIMS TO THE WAITANGI TRIBUNAL

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INTRODUCTION

Claims to the Waitangi Tribunal are complaints that:

- (a) the Crown has breached the Treaty of Waitangi by particular actions, laws, policies, or inactions; and
- (b) Maori have suffered prejudice (harmful effects) as a result.

Claims need to be comprehensive – that is, cover all matters at issue between claimants and the Crown – and they need to be proven – that is, supported by evidence of a standard which the Tribunal will find convincing. The Crown has an opportunity to challenge evidence by cross-examining witnesses, and to submit evidence of its own. When receiving historical evidence, the Tribunal requires reports from professional historians. A professional historian will be a member of each Tribunal, to advise other members in their interpretation of historical evidence. When receiving traditional evidence, the Tribunal requires reports based at least partly on oral interviews with claimants, and it requires oral evidence from claimants at hearings. There is a kaumatua on each Tribunal, to advise other members in their interpretation of traditional evidence. These and other types of evidence are all important in a Tribunal inquiry.

WHAT DO CLAIMANTS NEED TO DO?

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In order for claims to be both comprehensive and proven by sufficient evidence, the Tribunal normally expects the following evidence from claimants:

- ▶ A traditional history report, covering matters set out in part II of this booklet.
- ▶ Any surviving oral traditions about Crown actions. This would include:
 - oral traditions passed down to claimants about nineteenth-century actions of the Crown; and
 - oral evidence about actions of the Crown committed within living memory (eg, public works takings in the 1960s, etc).

This oral evidence should be collected and collated through taped and transcribed interviews. It should be made available to the historians writing the land alienation and other reports, and should also be made available directly to the Tribunal through oral presentations at hearings.

- ▶ Any surviving oral traditions about the impact of Crown actions, and the prejudicial effects on claimants. As with the item above, this would cover both oral traditions and matters in the more recent past, and would be supplied to the historian writing the social impact report and to the Tribunal during oral evidence at hearings.
- ▶ A list of the particular grievances of whanau or hapu. These often relate to particular blocks of land, recent

public works takings, and so forth. Claimants need to identify all their specific claims as early as possible. A list of these claims should be compiled, and oral evidence recorded about the nature of each grievance, including any details that the claimants have. After defining which blocks or matters are at issue, a professional historian should search archival sources and write a report. These 'specific claim' reports can be commissioned by the Tribunal or the Crown Forestry Rental Trust (CFRT). Claimants should make each specific claim an item in the iwi or hapu statement of claim. Alternatively, the whanau or hapu can lodge their own separate claim if they wish.

- ▶ A list of contemporary grievances of iwi, hapu, or whanau. The Tribunal would expect to:
 - hear oral evidence about these grievances;
 - receive any relevant papers about these grievances; and
 - receive a written submission from the claimants' lawyer, outlining the claimants' issues and how these relate to the Treaty.

Contemporary grievances usually relate to current relationships between iwi and the Crown, its agencies, and local government. They sometimes refer to matters at issue with the Department of Conservation (DOC), the Resource Management Act 1991, and the education and health systems. Evidence and submissions on these matters do not have to be included in the casebook, but they

should be ready in time for the hearings. Again, each specific issue needs to be covered by an item in the statement of claim.

- ▶ Written historical reports about actions of the Crown, and the impact of those actions. These reports need to be researched and written by professional historians and included in the casebook. This type of research can be commissioned by the Tribunal or CFRT.

WHAT IS THE TIME-FRAME FOR THESE MATTERS?

Step 1

Discuss the scope of research with the Tribunal and CFRT, and produce a research plan to cover claimant reports. Engage professionals where appropriate, obtain training in conducting and recording oral history, and plan a questionnaire for the interviews. (Scoping and research by the professional historians should begin at the same time.)

Step 2

Conduct oral interviews covering:

- ▶ oral traditions about Crown actions;
- ▶ Crown actions that took place within living memory;
- ▶ oral traditions about the impact of Crown actions;
- ▶ memories of the impact of Crown actions that took place within living memory;
- ▶ any specific block or issue grievances;

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- ▶ any sites of major significance; and
 - ▶ any contemporary grievances.

Afterwards, transcribe the interviews.

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Step 3

Discuss the outcome of interviews with whanau and hapu, and compile a list of all the specific block or issue grievances.

Discuss the outcome of interviews with the professional historians. Supply material for inclusion in their reports. Arrange follow-up meetings and interviews between informants and the historians where necessary.

Compile a list of all the contemporary grievances.

Compile a list of the key sites that claimants want to include in the claim.

Step 4

Oversee the writing of the traditional history report. Discuss what the researcher is finding in Maori Land Court minute books and other written sources. Provide feedback wherever possible. Make strategic decisions about how to approach this part of the research; in particular, discuss issues with hapu and neighbours, and minimise the opportunities for mutual misunderstanding and conflict.

Decide which specific block or grievance claims to pursue – there may be too many, and strategic decisions may have to be made. The whanau or hapu that ‘owns’ the grievance has to be happy with the decision. Having finalised the list of these

claims, you need to ensure that they are covered by professional research. This can be done in one of two ways: a specific report can be written on a block or group of blocks; or the block or blocks can be used as case studies in large reports. This should be discussed with the Tribunal and CFRT, and arrangements made to cover the research. The results of the interviews should then be supplied to the historian, and follow-up interviews or meetings arranged where necessary.

Decide which contemporary grievances will be included in the claim. Here, you need to consider whether there is a better avenue of redress (eg, through the courts), and weigh the importance of the matter to the overall claim or claims. Having decided which matters to include, you need to find out what written material is available about them (eg, correspondence with DOC and other agencies in the hands of individuals or groups), and collect it. Conduct follow-up interviews where necessary. Then discuss what else needs to be done with your lawyer.

Decide which key sites you wish to include in the claim. Having done so, discuss with the historians whether there needs to be research of written sources in addition to the oral material that you have collected. This may be necessary in some cases. Having decided which sites need to be researched, you should ensure that these get included in the Tribunal's or CFRT's research programme, or researched as part of the traditional history report.

Collect information about your contemporary status for the traditional history report (see part II of this booklet). Decide how you wish to present yourselves to the Tribunal.

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Step 5

Read and comment on the draft traditional history report, and ensure that this report is completed in time for the casebook.

Read and comment on the historians' reports, and ensure that these reports are completed in time for the casebook.

Arrange for the results of the completed research to be communicated to the people by circulating the reports and setting up oral briefings.

Step 6

While the casebook is in process, and in consultation with your lawyer, begin preparations for the hearings. These should include:

- ▶ deciding where you want to be heard;
- ▶ deciding when you want to be heard (in particular, discuss the order of hearings with other claimants);
- ▶ deciding who should give evidence (which kaumatua and kuia, which representatives of whanau or hapu, which rangatahi);
- ▶ preparing briefs of evidence (together with your lawyer, discussing what will be said in the oral evidence, and writing summaries of it for submission to the Tribunal);

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- ▶ finalising your evidence and submissions on contemporary grievances;
 - ▶ discussing with your lawyer how the claim will be presented overall; and
 - ▶ finalising your statement of claim (this involves itemising all the Crown actions and points of grievance in a written document, which the lawyer will prepare with your input).

II: TRADITIONAL HISTORY REPORTS: WHAT DOES THE TRIBUNAL NEED TO KNOW?

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WHO ARE YOU, AND HOW DO YOU RELATE TO YOUR LAND?

The Tribunal researches and hears claims on a district-by-district basis. Each Tribunal inquiry will include all the claims from those individuals, whanau, hapu, and iwi whose main claims are located within a defined region. There are normally overlapping claims from neighbouring groups that will also be considered, in so far as they relate to Crown actions in the region under inquiry. The focus of claims is on the actions of the Crown, and two questions arising from those actions:

- (a) Did the actions breach the Treaty?; and
- (b) To what extent were Maori prejudiced (harmfully affected) by those actions?

A related question is: Who was affected by those actions of the Crown? A mana whenua or traditional history report should assist the Tribunal to answer all three of those questions.

The last question above is the main focus of a traditional history report: Who was affected by the actions of the Crown? The answer to this question will require evidence that identifies claimant groups and their relationship to the land. If a group of people was affected by the actions of the Crown, then the Tribunal needs to know the answers to the following questions:

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- ▶ What is the name of that group, and what was its name in the nineteenth century (or earlier)?
 - ▶ Is the group an original people of the region?
 - ▶ Did the group migrate to the district? If so, when? What is the relationship with the original inhabitants?
 - ▶ Having arrived in the region, what sort of customary rights were acquired? Where were pa and kainga located? What sort of fishing and other hunting and gathering rights were exercised, and where were they exercised? Did the group migrate regularly around the region, exercising rights in different areas from time to time? If so, where and what kinds of rights? Did groups share land and resources? If so, on what basis?
 - ▶ If the group is an iwi, what are the names of its hapu, and where did they live in the nineteenth century? Where do they live now?
 - ▶ What are the relationships between the hapu? How are they linked in terms of whakapapa, geography, history, and so forth?
 - ▶ Who are their neighbours and how are they related to them?
 - ▶ What were the wider regional relationships? Who was allied with whom? Who fought with whom and why?

Claimants should note that, in answering these types of questions, they should not restrict themselves to matters before 1840. The Tribunal needs to know how the customary world of Maori continued to function after 1840, because it is critical in

evaluating the actions of the Crown on all sorts of issues, especially questions of whether the Crown used *iwi* against each other to obtain land sales, military conquest, and so on. Claimants must always keep in mind the questions: Did the Crown deal with the correct right-holders when negotiating land transactions? Did it deal with *all* the correct right-holders? Did it recognise some sorts of rights but not others? A traditional history report should not try to address these matters directly. Instead, the land alienation reports should cover them for each transaction, drawing on the information in the traditional history reports; that is, in arguing the claim, discussions of the direct actions of the Crown should be left to the historical reports.

ROHE BOUNDARIES, EXCLUSIVE RIGHTS, AND CLAIMS AGAINST OTHER MAORI

Claims are against actions of the Crown, not actions of other Maori groups. Unfortunately, it is not possible to make a neat division between these two things. Sometimes, the actions of the Crown were at fault because the Government bought land from the wrong people, or returned land to the wrong people after *raupatu*. Similarly, the Native Land Court sometimes awarded land to the wrong people, the right people then petitioned Parliament, and the Crown then either did not act on the petition or acted inadequately. In all these cases, claimants could have a legitimate grievance against the actions of the

Crown. The Tribunal would require proof of these matters. Some of the proof should be contained in the traditional history report. The specific arguments about wrongdoing should be left to be discussed in the land alienation reports, but the traditional history report should clearly set out the nature of overlapping rights in any particular area. If a claimant group feels that it was the 'right' group for the Government to deal with, then the reasons for that should be evident in the traditional history report. It might be wise to include a section on particular blocks or court cases, setting out the argument about customary interests (but leaving aside Crown actions), if these are to be a major part of the claim.

Claimants need to weigh up a number of factors in deciding how to present this evidence. It is often difficult to prove that groups were the 'right' or 'wrong' group to be dealt with. It is often the case that the Crown should have dealt with more than one group. It is much easier to show this than to set up a claim for exclusive rights. Claimants also need to consider what impact running this type of case may have on their relationships with their neighbours. Strategic decisions need to be made about how best to argue matters; in particular, claimants need to avoid showing disrespect to each other's tupuna and each other's claims against the Crown. There are ways to manage these things, so that the focus remains on the Crown instead of the past actions of other claimants.

The Tribunal does not require people to state the extent of their rohe, or to draw hard and fast boundaries on a map. In

setting out the information required to answer the questions posed above on pages 9 to 11, it is sufficient to state where people were living and where they exercised their rights, and the types of rights.

WHAT ARE YOUR SITES OF SPECIAL SIGNIFICANCE?

A traditional history report should include information about sites of special significance. This does not mean that claimants need to list all wahi tapu or all sites of significance to them. Instead, claimants should identify those sites of special significance that are of relevance to the claim against the Crown. These would include:

- ▶ wahi tapu that claimants feel unhappy about, whatever the issue (whether because of who owns them now, how they are being treated, past damage caused to them, and so forth);
- ▶ key mahinga kai, where for some reason (involving the Crown) these can no longer be used in the same way;
- ▶ rivers or other waterways, if they are going to be at issue in the historical reports;
- ▶ the tribal mountain, if there are issues with the Crown about it;
- ▶ any flora and fauna with which claimants have a special relationship that the Crown has damaged in some way, or for which the claimants are seeking greater legal protection;

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- ▶ any key pieces of Crown land that the claimants want to have returned for whatever reasons (in the traditional history report, their history and significance should be noted, not that the claimants wish for their return).

Claimants need to provide evidence about these sites that explains:

- ▶ their history;
- ▶ why they are significant – every cultural, economic, and other reason; and
- ▶ what the complaint against the Crown is (this explanation should be brief – the detailed analysis of actions of the Crown should be contained in the land alienation reports by the historians, drawing on information from the traditional history report and elsewhere).

The sections on specific sites will also need to provide a context of general information about how the claimants relate to the natural world of, and how they used resources in, their rohe. There will be some crossover with the questions on pages 9 to 11.

WHO ARE YOU TODAY?

At the end of the traditional history report, there should be a section that provides the Tribunal with a contemporary profile of the claimant group. This should include:

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- ▶ a description of your marae;
 - ▶ a description of any trusts or incorporated societies that are used to give the group a legal character and basis of operations;
 - ▶ a description of any cultural, social, or other programmes that are run through your marae or any other vehicle;
 - ▶ a population estimate, based on beneficiary lists and any other information that you have, and also an account of how many of those people still live in the rohe; and
 - ▶ anything else that claimants feel is relevant to describing themselves as a group today.

CONFIDENTIAL INFORMATION

Claimants can provide sensitive information to the Tribunal on a confidential basis. While normally a report to the Tribunal is a public document, claimants can ask the Tribunal to restrict access to certain information (such as whakapapa) or place limitations on how it can be used by others. Before imposing such restrictions, however, the Tribunal must be satisfied that there are good grounds for doing so. Fairness may still require that the information be available to:

- ▶ the Tribunal members;
- ▶ all the lawyers representing parties to the inquiry, including the Crown's lawyer; and
- ▶ those Tribunal staff who are involved in the inquiry.

RESEARCH

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Research for traditional history reports should cover two types of source:

- ▶ Oral evidence: interviews should be conducted with kaumatua and kuia. These interviews should cover not just matters for the traditional history report but also issues of concern to other reports (see part 1 of this booklet).
- ▶ Written evidence: key written sources need to be consulted: Maori Land Court minute books; archival sources (eg, missionary correspondence, papers of nineteenth-century officials); any whakapapa books and other written material in the keeping of the tribe; and any published tribal histories.

Tribunal reports should be consulted for examples of the types of evidence that the Tribunal needs, and to see how it has used the oral stories related in traditional history reports and at hearings.

Research needs to be carried out by trained professionals where possible. The report needs to be written by a person with excellent writing skills. Not all the information needs to be written up though; claimants can present it orally at hearings. This is often a more effective way of presenting this type of evidence. Your lawyer should advise you on which would be the better way to do it, depending on the type of information and a host of other factors.

In general, the best method of researching material for a traditional history report is to have the claimants search their own papers, get training on how to record information at interviews, and then carry out the interviews themselves. At the same time, a professional researcher should search Native Land Court and other written records. Information should then be pooled, the claimants should discuss the shape and content of the report with a professional writer, and the writer should then produce a first draft for consideration by the claimants. The writer and the claimants should agree on any changes to be made to the content or emphasis.

There also needs to be close liaison and sharing of information with the historians writing the land alienation and other historical reports, so that the oral histories can contribute to these. For more on this point, see part 1 of this booklet.

MAPS AND ILLUSTRATIONS

Traditional history reports should be illustrated by maps and photographs. These illustrations should enable readers of the report to locate sites covered in the claim, and should show any visual points that the claimants wish to make. They are an important part of the overall effect of the report in communicating its ideas to the Tribunal. Colour maps and photographs are more expensive and may be reproduced in black and white by the Tribunal when it copies reports for release to the Crown

and other claimants. Professional mapping assistance can be accessed through CFRT funding or from private providers. Existing maps can be reproduced (with permission if there is copyright) for less cost, and claimants can of course take their own photographs. Copies of historical maps and photographs can be obtained from various libraries and museums.

FUNDING

There are two main sources of funding for traditional history reports. The principal funding organisation is CFRT. It organises the funding of this type of research through a team called Te Roopu Raranga Tangata. Claimants can write to this team at PO Box 2219, Wellington. The Tribunal is the second main source of funding, although it operates with a much smaller research budget than CFRT. The Tribunal commissions traditional history reports via the research unit, which is headed by the chief historian. Claimants can write to the Tribunal at PO Box 5022, Wellington. Claimants may also be able to access other sources of funding.

HOW MANY TRADITIONAL HISTORY REPORTS ARE NEEDED?

Usually, the Tribunal would expect to receive a traditional history report from each claimant group (or from combinations of claimant groups) in the inquiry. Sometimes, the report is

combined with the land alienation and other historical reports, especially when the claim is a small one. Sometimes, there are no traditional history reports, and the evidence is provided orally at the hearings. The Tribunal's preference is to have a traditional history report from each group, which reports would be included in the casebook, or to have a report on behalf of as many groups as possible that can combine to produce a common report with one author. Afterwards, the Tribunal may decide to commission an independent report, which would cover the whole region and provide the Tribunal with a comparative analysis of key issues and overlapping histories.

Additional copies of this booklet can be obtained from the Waitangi Tribunal and a PDF version is available at the Tribunal's website, www.waitangi-tribunal.govt.nz



Dr Grant Phillipson is the chief historian of the Waitangi Tribunal.