

**IN THE WAITANGI TRIBUNAL**

**CONCERNING** the Treaty of Waitangi Act 1975

**AND** Waitangi Tribunal kaupapa inquiries

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

**1 April 2015**

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Tēnā koutou katoa

## **Introduction**

1. The purpose of this memorandum is to inform all claimants and the Crown of the Waitangi Tribunal's new kaupapa (thematic) inquiry programme concerning nationally significant claims affecting Māori and to outline a general framework for the programme. It sets out, in particular:
  - (a) the place of the kaupapa inquiry programme in the Tribunal's strategic framework;
  - (b) threshold criteria and the general scope of the programme;
  - (c) the Tribunal's approach to constituting kaupapa inquiries;
  - (d) the factors taken into account in setting the order in which kaupapa inquiries will be heard;
  - (e) the programme of kaupapa inquiries; and
  - (f) steps for initiating kaupapa inquiries.

## **Summary**

2. This memorandum sets out a framework for the Tribunal's kaupapa inquiry programme, which is a core component of the Tribunal's strategic direction over the next decade. The programme will provide an inquiry pathway for claims outside of the district inquiries which raise nationally significant issues affecting Māori as a whole or a section of Māori in similar ways, and which have not previously been fully heard, reported on or settled.
3. Each kaupapa inquiry will focus on a single major issue or cluster of related issues. Based on an assessment of current registered claims that raise kaupapa grievances, an initial programme of 11 kaupapa inquiries has been identified (see paragraph 25 and Appendix A). This programme may be expanded should new kaupapa issues arise, or narrowed where claimants do not wish to bring their claims before the Tribunal.
4. For each issue or set of issues, claims will be grouped for joint inquiry. An inquiry will proceed to hearing once sufficient evidence to proceed has been filed, the issues for inquiry determined and the parties have confirmed their readiness to proceed. The inquiry process will be flexible and responsive, for example to facilitate the early hearing of claimant oral evidence or a staging of the inquiry around sub-issues or matters demanding early attention.
5. The starting order for the 11 identified inquiries has been prioritised in terms of a set of key factors: removal of the Tribunal's ability to inquire; the immediacy of the take (issue) or potential remedy; the seriousness of the alleged breach or prejudice; and the importance of the take to claimants, Māoridom and the nation. Any new kaupapa claim issue set down for separate inquiry will follow the existing 11 inquiries unless the Tribunal determines that promotion is merited in terms of the six priority criteria.
6. The Chairperson will start each kaupapa inquiry by appointing a presiding officer and panel and notifying affected claimants, the Crown and identifiable interested parties. The Tribunal will consult the parties in an initial interlocutory process on their intention and eligibility to participate, their readiness to proceed and any factors that may affect the ability of the Tribunal to hear the claims.

## **The kaupapa inquiry programme in the Tribunal's strategic framework**

7. The Waitangi Tribunal's *Strategic Direction, 2014-2025*, launched on 2 July 2014, states the Tribunal's overarching objective of completing its inquiry into most registered

claims by the mid-2020s. To that end, it sets five strategic goals to be achieved by 2025 and outlines new inquiry pathways for claims that have not already been fully heard in district and other inquiries.

8. One of the new pathways is a kaupapa claims inquiry programme. In the past, claimants with kaupapa grievances have been able to have them heard only under urgency or within the Tribunal's district inquiry programme. From the 1990s, the Tribunal has prioritised the hearing of claims on a district basis in order to assist the Crown and claimants to achieve settlement of historical claims. These district inquiries have adopted differing approaches, with some excluding particular kaupapa from their framework of issues. In any case, many kaupapa issues are, by definition, national in scope and not suited to a district inquiry context, even though many have a significant historical dimension. Urgent inquiries, of necessity, have often focused on the specific matter bearing the risk of imminent and irreversible prejudice, with neither time nor evidential resources for a full investigation of the underlying issues and historical context. As a result, some kaupapa claims have been waiting for many years to be heard.
9. The new kaupapa programme will provide that opportunity for claimants who wish to bring their kaupapa grievances before the Tribunal. Kaupapa grievances may include both historical (grievances arising before 21 September 1992) and contemporary claim issues. The programme will fulfil two of the Tribunal's strategic goals:
  - a) The first goal aims to achieve a significant reduction in the backlog of kaupapa claims by 2020. These include claims with kaupapa grievances that are likely to be included in historical Treaty settlements, as well as other claims with high priority issues.
  - b) The second goal aims to substantially advance or complete the remaining kaupapa claims by 2025. These comprise claims with non-district-specific historical grievances that are not included in historical Treaty settlements, such as those raised by national organisations rather than tribal groups, and claims with contemporary kaupapa grievances.
10. As foreshadowed at the July 2014 launch of the *Strategic Direction*, the programme has now started with the first kaupapa inquiry, into claims concerning military veterans and their whānau. Its first judicial conference was held on 17 December 2014 and the inquiry is now in active preparation. It is therefore timely to set out a general framework for the conduct of kaupapa inquiries as a whole.

### **Threshold criteria and the general scope of the kaupapa inquiry programme**

11. 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. They have been used to group claim issues, as identified in the current claims before the Tribunal, into 11 inquiries as set out in the programme outlined below in paragraph 25.
12. More specifically, each kaupapa inquiry will usually have the following characteristics of scope and significance:
  - a) The inquiry will be organised around a theme that brings together all aspects of a kaupapa claim issue or a cluster of related issues.
  - b) The kaupapa issue should extend to Māori as a whole or to a section of Māori on a national scale, whether or not the issue by its nature is limited to particular geographical areas.

- c) The claim grievances should have broadly similar features, as should the nature and impacts of the Crown legislation, policies, acts and omissions alleged to be in breach of the Treaty.
  - d) The kaupapa issue should be of national significance to Māori in terms of the seriousness of the Treaty breaches alleged or to the nation in terms of the potential impact on government policy or resources.
13. The overall thematic scope of the kaupapa inquiry programme is intended to enable claimants to bring before the Tribunal all eligible claims for which they seek a hearing on kaupapa issues. This is an inclusive approach. The programme of kaupapa inquiries listed in paragraph 25 below is based on an assessment of the issues as currently specified in existing registered claims.
14. Sustaining an inclusive approach will require some flexibility in the overall scope of the kaupapa inquiry programme. Future claims may raise new contemporary issues that merit inclusion in the programme and, if sufficiently distinct, a separate inquiry. Conversely, for some claimants the kaupapa take may have passed or may be pursued by other means. A withdrawal of claims from further inquiry may narrow the scope of a kaupapa issue and change its focus or, if the remaining claims together no longer meet the threshold criteria, lead to its removal from the kaupapa inquiry programme.
15. The range of kaupapa issues will also be influenced by the extent to which an issue has been addressed in previous Tribunal inquiries and thus by the eligibility of claims for inclusion:
  - a) For claims or parts of claims already heard, the Tribunal cannot inquire a second time. This applies to claims whose kaupapa grievances have been fully heard in a previous or current inquiry. Exceptions may arise where a claim's kaupapa grievance was severed from the inquiry, noted by the Tribunal as excluded from its report, or only partially inquired into, for example under conditions of urgency.
  - b) For registered claims not yet heard but which raise kaupapa issues that were heard and reported on in a previous Tribunal inquiry into other claims, their eligibility for inclusion in this particular programme will depend on the extent to which they raise new substantive aspects of the kaupapa issue. This applies both to claims arising in districts on which the Tribunal has previously reported and to claims raising grievances that have been the subject of previous kaupapa inquiries.
16. The extent of previous Tribunal inquiry into claims with kaupapa grievances is likely to have three limiting effects on the scope of the programme, although it is impossible to be fully prescriptive in advance:
  - a) It will exclude those kaupapa issues already fully covered in previous and current Tribunal inquiries.
  - b) For kaupapa issues that are included in the programme, it will similarly exclude sub-issues previously fully covered, except to the extent necessary to reach a full understanding of the principal issues concerned.
  - c) For kaupapa issues previously partly covered, the issue may not reach the required threshold of national scale, especially where some of the claims raising the issue have already been heard in a number of district inquiries.
17. As indicated in the Tribunal's *Strategic Direction*, the Tribunal intends to provide alternative processes for the consideration of claims whose unheard kaupapa grievances raise issues that have been subject to previous inquiry or that, taken together, do not meet the threshold for inclusion in the kaupapa inquiry programme.

### **Approach to constituting kaupapa inquiries**

18. As with district inquiries, the Tribunal has adopted general principles to guide the configuration of inquiries under the kaupapa inquiry programme. These include, in particular, a broad issue scope for each inquiry and the grouping of claims for joint inquiry.
19. The scope of kaupapa inquiries may be broadly defined or kept within specific bounds. For instance, there might be a single inquiry into the health sector as a whole or several inquiries each focusing on a particular health issue. On balance, the Tribunal's preference is for a broad approach, especially where the claim grievances are clearly interrelated. 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. This preference does not, however, rule out 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.
20. As indicated in paragraph 13 above, each kaupapa inquiry will be inclusive of all related kaupapa grievances that claimants wish to have heard. All eligible claims that raise such grievances will be grouped for joint inquiry. The initial programme of 11 kaupapa inquiries listed in paragraph 25 has been determined on the basis of the Tribunal's preference for a broad thematic approach and an assessment of the kaupapa grievances raised in eligible statements of claim, taking into account the threshold criteria set out in paragraphs 11-12.

### **Priority criteria for setting the order of kaupapa inquiries**

21. As well as indicating the issues for inquiry, the initial programme of kaupapa inquiries is also arranged in the order in which they are expected to proceed. The purpose of indicating the order of inquiries is to give claimants, the Crown, and any interested parties an approximate indication of when claims will be heard, especially where claimants have grievances that may fall within the scope of more than one inquiry.
22. The Tribunal has taken a number of factors into account in arriving at an order of priority for the kaupapa inquiries to proceed. Amongst them are the following general considerations:
  - a) *Removal of the Tribunal's ability to inquire*: Is something about to happen that would prevent the Tribunal from hearing some or all of the claims if they are given a lower priority? This criterion is closely related to the risk of significant and irreversible prejudice that is a necessary condition for granting urgency to a claim.
  - b) *Immediacy of the take or potential remedy*: Can something meaningful still be done to remedy the grievances? Is the take both live and current? Is remedial action potentially time-bound?
  - c) *Seriousness of the alleged breach or prejudice*: How significant is the issue in terms of the Treaty relationship? This factor takes into account the severity of the alleged Treaty breach and the severity and extent of the prejudice alleged to have resulted from it.
  - d) *Importance of the take to claimants*: What is the weight of claimant interest in the take? How important is the kaupapa take within the context of their claims as a whole?

- e) *Importance of the take to Māoridom*: How significant is the issue to Māori as a whole today? This factor considers the overall significance of the take for Māori as a whole, on the basis partly of the numbers of Māori people actually or potentially affected and partly of the importance of the issue to Māori generally.
  - f) *Importance of the take to the nation*: How significant is the issue to the nation? This factor applies in particular to matters affecting major aspects of economic, social and environmental policy, in particular where large-scale financial impacts or political or legal uncertainty might be involved.<sup>1</sup>
23. Although an order of inquiries is set down, some flexibility may be needed as the programme proceeds. Changing circumstances will sometimes rebalance the relative priorities and require a reordering of the forward inquiry programme. When preparing inquiries for hearing, the appointed Tribunal panel may decide to sever particular issues for separate inquiry, which would then need to be relocated in the inquiry programme. In addition, new kaupapa issues may arise that cannot be accommodated within the planned inquiries and are best designated for separate inquiry.
24. The Tribunal will determine any change in the order of inquiries and the placement of any new inquiries in the forward kaupapa inquiry programme, taking into account the general priority criteria in paragraph 22 and all other relevant circumstances.

### **The kaupapa inquiry programme**

25. On the basis of an examination of existing registered claims that raise kaupapa issues, the Tribunal has determined that the initial kaupapa programme will comprise 11 inquiries. Fuller descriptions of these inquiries are provided in Appendix A, but here a list of inquiry titles is outlined. The inquiries will proceed in the following order:
1. Māori military veterans
  2. Constitution, self-government and electoral system
  3. Health services and outcomes
  4. Mana wahine and mana tāne
  5. Education services and outcomes
  6. Identity and culture<sup>2</sup>
  7. Natural resources and environmental management<sup>1</sup>
  8. Social services, social development and housing
  9. Economic development
  10. Justice system
  11. Citizenship rights and equality
26. As new kaupapa grievances may arise from time to time, it will be open to the affected claimants and the Crown to propose them for inclusion in the kaupapa inquiry programme. The proposal should endeavour to locate the new issue within the scope

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<sup>1</sup> This factor was considered in the Tribunal's decision to give priority to hearing Central North Island claims (Wai 1200, #2.3.1).

<sup>2</sup> Where sub-issues under this heading overlap with the Tribunal's report on the Wai 262 claim (*Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, (Waitangi Tribunal, 2011)) or with district reports, these kaupapa inquiries will be limited to addressing historical and specific contemporary aspects not fully covered in the relevant reports.

of a current or future kaupapa inquiry in the forward programme. If that is not feasible, the proposal should state clearly and fully how the new issue meets the threshold for constituting a kaupapa inquiry in terms of the factors outlined in paragraphs 11-12 above.

27. Ordinarily, a new kaupapa inquiry, if approved, will be placed at the end of the forward programme. A proposal for a new kaupapa inquiry may, however, also state a case for it to be prioritised higher in the order of inquiries. As well as any specific factors arising from the circumstances of the claims, the case should fully address the six priority criteria described in paragraph 22 above. Should the matter be deemed urgent, it remains open for the claimants to apply for urgency in the usual manner.
28. For claimants with claims or part-claims awaiting the Tribunal's attention, the kaupapa inquiry programme provides one pathway alongside several others. Alternative options for bringing claims before the Tribunal include:
  - a) the three final district inquiries now in preparation or hearing (Te Paparahi o Te Raki, Taihape and Porirua ki Manawatū), in which a number of claimants who also have kaupapa grievances are participating;
  - b) the forthcoming process for Tribunal consideration of historical claims that have not been settled but were submitted too late for inclusion in the respective district or kaupapa inquiry;
  - c) the post-2020 inquiry process for contemporary claims with a district or local focus that are new or have fallen outside the scope of the district and kaupapa inquiry programmes and of historical Treaty settlements.

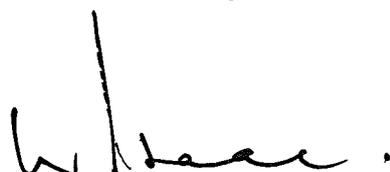
### **Initiating kaupapa inquiries**

29. The pace at which the kaupapa inquiry programme advances will depend on a number of factors, including the completion of the final inquiries currently under way in the Tribunal's district inquiry programme and the resources available to the Tribunal and the parties. Updates to the forward programme of kaupapa inquiries will be published on the Tribunal's website and significant developments reported in the Tribunal's journal, *Te Manutukutuku*, which is published twice yearly.
30. Ordinarily, when the Tribunal is in a position to launch the next kaupapa inquiry in the forward programme, the Chairperson will appoint a presiding officer and a panel to prepare the inquiry for hearing and notify all the claimants who appear to have outstanding kaupapa grievances related to the issue for inquiry, as well as the Crown and any identifiable interested parties.
31. At the outset the Tribunal will consult all parties on whether they wish to participate and their eligibility for inclusion. The inclusive approach outlined above will enable all claimants who consider that any of their grievances are within the scope of the inquiry to indicate their intention to participate. At that point the Tribunal will address any questions concerning their inclusion in the inquiry.
32. Limitations on eligibility that the Tribunal will take into account are that the claimants' grievances:
  - a) are partially or fully subject to a historical Treaty settlement; or
  - b) have been heard in a previous or current Tribunal inquiry.
33. The Tribunal may also take into account factors that suggest that a claim is better suited to a non-kaupapa form of inquiry, such as those indicated in paragraph 28, including that the claimants' grievances:
  - a) have not been heard but are the same as issues that the Tribunal has previously reported on; or

- b) have a purely local focus that disconnects them from the national frame of reference of a kaupapa inquiry.
34. As one of the preliminary steps, the Tribunal will seek confirmation of readiness to proceed from the Crown and those eligible claimants who have grievances that fall within the thematic scope of the inquiry and which they wish to be heard. This is an essential condition for the start of any kaupapa inquiry and does not mean readiness to go to hearing, with evidence prepared, but rather an ability to engage in the preparation of the inquiry. Should the Tribunal consider that the state of readiness is insufficient, it may defer the start of the inquiry to a later date or demote it in the order of inquiries.
35. If there is sufficient weight of claimant interest to meet the threshold criteria identified in paragraphs 11-12 for starting the inquiry, as well as readiness to proceed, the Tribunal will consult further on what kind of inquiry process the parties would prefer and any factors that may affect the ability of the Tribunal to hear the claims, such as pending Treaty settlements.
36. In general, it is expected that a kaupapa inquiry will adopt a process similar to that employed in most district inquiries, proceeding to hearing once the eligible claims have been combined for joint inquiry, a sufficiency of technical, claimant and Crown evidence has been filed, the issues for inquiry have been determined, and the parties have confirmed their readiness to proceed.
37. However, as circumstances are likely to vary widely across kaupapa inquiries, the Tribunal will adopt a flexible and responsive approach to setting an inquiry process. Commonly, a preliminary interlocutory process may assist in establishing an initial framework of issues, the claimants who wish to participate, their eligibility to do so, the readiness of the parties to proceed with the inquiry, and any jurisdictional questions in need of resolution. There may also be agreement on the early hearing of claimant oral evidence.
38. An inquiry may be organised into stages to hear particular groups of claims and issues, or to address priority matters demanding early attention. Given the nature of a joint inquiry into grouped claims, it is nevertheless important that the Tribunal be able to hear and report on an issue or sub-issue in a single process, whether or not organised into stages.
39. As noted, the first kaupapa inquiry, into the claims of Māori military veterans, has recently started. It is expected that the preparation of the next two kaupapa inquiries will commence during the coming business year (July 2015 to June 2016).

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 1<sup>st</sup> day of April 2015



Chief Judge W W Isaac  
Chairperson  
**WAITANGI TRIBUNAL**

**Appendix A. Indicative overview of kaupapa issue coverage**

| #  | Inquiry  | Indicative scope of issues in current registered claims   |
|----|--|---|
| 1  | Māori military veterans                            | Discrimination, treatment, rehabilitation, farm settlement  |
| 2  | Constitution, self-government and electoral system | Constitutional law, sovereignty; provision for the exercise of Māori self-government; electoral regime, political representation in national, local and specialised bodies  |
| 3  | Health services and outcomes                       | Hospitals, primary healthcare, rongoā, provision for the disabled, rehabilitation, elder care and rest homes, mental health, smoking, HIV/AIDS, public health, health promotion, occupational health, poor health status and outcomes   |
| 4  | Mana wahine and mana tāne                          | Discrimination against women, status of men, services for women, refugees   |
| 5  | Education services and outcomes                    | Primary and secondary schools, tertiary education, curricula, education finance; kura kaupapa and wānanga   |
| 6  | Identity and culture                               | Adoption, guardianship, wards, whāngai; custody and access control; coronial law and practices, burials; genetic modification; material culture: mokomokai, artefacts, heritage, museum collections, archives, monuments, films/audiovisual   |
| 7  | Natural resources and environmental management     | Minerals (surface, underground, offshore); atmospheric resources; foreshore and seabed; water; regulation of fishing, water quality, pollution; marine reserves, customary fishing, whales, dolphins, impact of pollution and run-off on coastal marine resources, commercial overfishing |
| 8  | Social services, social development and housing    | Urban and rural housing provision, state housing; processes of impoverishment, urbanisation policy and impacts; welfare provision, social development, child protection, family well-being; gambling, alcohol   |
| 9  | Economic development                               | Taxation: rates, rating, land valuation, land tax, death duties, control of taxation and revenue; carbon taxation, emissions trading scheme, impact on Māori forestry; Māori economic development institutions and law  |
| 10 | Justice system                                     | Legal aid, barriers to accessing courts, colonial justice system, Supreme Court/Privy Council; criminal justice system; Māori land law, succession, court procedure and costs   |
| 11 | Citizenship rights and equality                    | Human rights, racial discrimination   |