

## The “kaupapa approach” being implemented by the Waitangi Tribunal to address Kaupapa Inquiries

In 2014, the Waitangi Tribunal launched a new ten-year strategic plan<sup>1</sup>, which broadened the nature of claims being scheduled and considered by the Tribunal. Since 2015, the Waitangi Tribunal has been engaging in a programme of hearing and determining kaupapa (thematic) inquiries alongside district inquiries.<sup>2</sup> The Waitangi Tribunal Chair has issued two memoranda<sup>3</sup> on the kaupapa inquiry programme, taking into account feedback from claimants who have been engaging through the process.

### Key Features of the Kaupapa Inquiry Programme

The Waitangi Tribunal have stated that the “kaupapa inquiries programme provides an inquiry pathway for claims outside of 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 or settled. Each kaupapa inquiry will focus on a single issue or cluster of related issues.”<sup>4</sup>

In 2019, in response to feedback from some claimants over different inquiries, the Waitangi Tribunal Chair issued a new memorandum concerning how it was planning to run kaupapa inquiries going forward, following a continuous review approach. The Chair clarified that:

“The **purpose of a kaupapa inquiry** is not to conduct a general exploration of all aspects of its thematic topic or one 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.”<sup>5</sup>

At the outset, it was intended that kaupapa inquiries would follow a similar process to that used in most district inquiries. This meant 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.<sup>6</sup> The Waitangi Tribunal Chair advised, however, that the Tribunal would have some flexibility in process- for example, there may be agreement on early hearing of claimant oral evidence.<sup>7</sup>

In 2019, the Tribunal Chair announced<sup>8</sup> an additional two steps may be introduced at the discretion of the Chair prior to appointing a presiding officer and panel for the inquiry, in order to speed up the process and appear to be useful innovations:

1. **Claimants intending to participate:** The Tribunal will:
  - a. Distribute a preliminary list of claims registered with the Tribunal that appear to relate to the inquiry’s kaupapa issues and request that claimants indicate whether they wish to participate in the inquiry; and

<sup>1</sup> *Strategic Direction 2014-2025* (Waitangi Tribunal, 2 July 2014). Available here:

<https://www.waitangitribunal.govt.nz/news/waitangi-tribunal-strategic-direction-launched-2/>.

<sup>2</sup> Previously, kaupapa claims were only considered if it was a matter of urgency or as part of a district inquiry programme. In his 2015 memorandum, the Chairperson of the Waitangi Tribunal noted that “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.” *Memorandum of the Chairperson concerning the Kaupapa Inquiry Programme* (Waitangi Tribunal, 1 April 2015) “The 2015 Memorandum”, paragraph 8, pg. 3.

<sup>3</sup> Available here: <https://www.waitangitribunal.govt.nz/inquiries/kaupapa-inquiries/>.

<sup>4</sup> The 2015 Memorandum, paragraphs 2-3, pg. 2.

<sup>5</sup> *Memorandum of the Chairperson concerning the Kaupapa Inquiry Programme* (Waitangi Tribunal, 27 March 2019) “The 2019 Memorandum”, paragraph 13, pg. 3.

<sup>6</sup> The 2015 Memorandum, paragraph 36, pg. 8.

<sup>7</sup> The 2015 Memorandum, paragraph 37, pg. 8.

<sup>8</sup> The 2019 Memorandum, paragraphs 28 to 31, pages 5 to 6.

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- b. Request any claimant intending to participate particularise or otherwise amend their claim and identify any issues that they think that the Tribunal should prioritise for early inquiry.
2. **Exploratory scoping report:** To assist with planning and identifying the principal issues, the Tribunal would commission an exploratory scoping report as a preliminary step. Terms of reference may vary but generally this would include:
- 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;
  - An indication of whether and to what extent any such issues concern current Crown policy and practice; and
  - 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.

**Eligibility for Kaupapa Inquiry**

In the 2015 Memorandum, the Waitangi Tribunal Chair stated that each kaupapa inquiry will usually have the following characteristics of scope and significance:

- The inquiry will be organised around a theme that brings together all aspects of a kaupapa claim issue or a cluster of related issues.
- 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.
- The claim grievance 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.
- 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 potential impact on government policy or resources.

The range of kaupapa issues will also be influenced by the extent to which an issue (or sub-issue) has been addressed in previous Tribunal inquiries<sup>9</sup> and whether an issue met the national scale threshold. The Waitangi Tribunal's *Strategic Directions* document states that it intends to provide alternative processes for claims that fell into these excluded categories. In 2019, the Tribunal Chair stated that it had established a "Standing Panel process for hearing remaining historical claims and a process for remaining contemporary claims would commence once the district inquiries have been completed."<sup>10</sup>

The Chair advised that the overall thematic scope of the kaupapa inquiry programme was intended to enable claimants to bring all eligible claims to the Tribunal for a hearing – an "inclusive approach"<sup>11</sup>.

In 2019, the Chair clarified how this **inclusive approach** worked by setting out the following three-part threshold test for participation of claims raising specific and local issues in a kaupapa inquiry<sup>12</sup>:

1. **Nationally significant claim issues:** 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 others, e.g. whānau, hapū) may seek to participate in the subsequent kaupapa inquiry. Claims are not required to meet the threshold individually.
2. **Māori widely affected:** 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 is also met where a group of claims brought by individuals and groups on their own behalf that, taken together can be regarded as representing most of the affected Māori (e.g. in the Māori Military Veterans Inquiry).

<sup>9</sup> i.e. no hearing of a claim or part claim a second time (unless a claim's kaupapa grievance was severed from the inquiry and the Tribunal noted it was excluded from the report or only partially inquired into e.g. under urgency) and for registered claims yet to be heard but which raise kaupapa issues that were heard and reported on in a previous inquiry eligibility depends on the extent to which they raise new and substantive aspects of the kaupapa issue. The 2015 Memorandum, paragraph 15, pg. 4.

<sup>10</sup> The 2019 Memorandum, paragraph 44, pg. 8.

<sup>11</sup> The 2015 Memorandum, paragraph 13, pg. 4.

<sup>12</sup> The 2019 Memorandum, paragraphs 36 to 43, pg. 7.

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3. **Similarity of experience of the Crown policy or action complained of:** The Tribunal will hear and report on such claims on the basis that the claimants assert that they have been similarly affected in respect of the alleged Treaty breaches.

**How are Kaupapa Inquiries prioritised?**

In 2015, the Chair of the Tribunal established that the following factors<sup>13</sup> would be taken into account to determine priority of kaupapa claims, with some flexibility as the programme progressed:

- **Removal of the Tribunal's ability to inquire** (i.e. 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).
- **Immediacy of the take or potential remedy** (i.e. can something meaningful still be done to remedy the grievances, is it time bound, is the take both live and current)?
- **Seriousness of the alleged breach or prejudice** (i.e. how significant is the issue having regard to the Treaty relationship – this takes into account the severity of the alleged Treaty breach and the severity and extent of the prejudice alleged to have resulted from it)?
- **Importance of the take to claimants** (i.e. what is the weight of claimant interest in the take and how important is the kaupapa take within the context of their claims as a whole)?
- **Importance of take to Māoridom** (i.e. 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, by looking at the numbers of Māori actually or potentially affected and the importance of the issue to Māori generally).
- **Importance of the issue to the nation** (i.e. This factor particularly applies to matters affecting major aspects of economic, social and environmental policy, particularly where there are large scale financial implications or political / legal uncertainty).

In the 2019 Memorandum, the Chair provided further advice on how the Waitangi Tribunal would be **enabling pressing contemporary issues to be prioritised for rapid inquiry where early reporting**. The six factors outlined in the 2015 Memorandum (see above) still apply, but there is a stronger focus on contemporary kaupapa issues giving additional weight to the immediacy of the take or potential remedy.<sup>14</sup> In addition, the Tribunal would:

- continue a targeted approach where appropriate to the nature of the issue (e.g. housing policy);
- take a proactive approach to consulting affected claimants and the Crown on contemporary matters that may merit an early and rapid kaupapa inquiry; and
- prioritising issues within inquiries.<sup>15</sup>

The Tribunal Chair also clarified the process for starting unlisted kaupapa inquiry claims where an early start may be requested (effectively, a request for prioritisation). In these circumstances, the Tribunal may take into account the following matters:

- Clarifying the issues that the claimants and the Crown propose to include in the kaupapa inquiry;
- Establishing whether the issue(s) satisfy the threshold test for starting a kaupapa inquiry;
- Identifying which claims the claimants wanted the Tribunal to hear, particularly pressing contemporary claim issues concerning current Crown policy and practice;
- Confirming claimant and Crown readiness to proceed; and
- Any consequential impacts of delaying other claims that are scheduled.

**What is the nature and status of the Kaupapa Inquiries?**

The kaupapa programme was designed to meet two of the Tribunal's strategic goals, namely:

<sup>13</sup> The 2015 Memorandum, paragraph 22, pp. 5-6.

<sup>14</sup> The 2019 Memorandum, paragraph 10, pg. 3.

<sup>15</sup> The 2019 Memorandum, pg. 4.

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- 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 the historical Treaty settlements, as well as other claims with high priority issues.
- 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.

A list of scheduled, current and completed claims is outlined in the table below. As can be seen, while there is significant mahi that has been done by the Waitangi Tribunal in hearing substantial kaupapa inquiries, we are only two years out from their 2025 deadline set in their second strategic goal. In 2019, the Waitangi Tribunal Chair advised that the Tribunal's resources were heavily committed and that this would limit the Tribunal's ability to progress the next inquiries in the Kaupapa Inquiry Programme.<sup>16</sup> At this stage there are six kaupapa inquiries yet to commence and only one kaupapa inquiry that has been completed.

| Priority | Kaupapa Inquiry  | Status  |
|----------|--|---|
| Pre-2015 | <a href="#">The National Fresh Water and Geothermal Resources Inquiry (Wai 2358)</a> . This inquiry was commenced prior to the formal kaupapa inquiry programme being established. | Stages 1 and 2 complete, hearings to commence in 2024 |
| 1        | <a href="#">The Military Veterans Kaupapa Inquiry (Wai 2500)</a>   | Commenced   |
| 2        | <a href="#">The Health Services and Outcomes Kaupapa Inquiry (Wai 2575)</a>  | Stage 1 complete, hearing stage 2.                    |
| 3        | <a href="#">The Marine and Coastal Area (Takutai Moana) Act Inquiry (Wai 2660)</a>   | Stage 1 complete, Stage 2 hearings complete           |
| 4        | <a href="#">The Mana Wāhine Kaupapa Inquiry (Wai 2700)</a>   | Commenced in inquiry research phase                   |
| 5        | <a href="#">The Housing Policy and Services Kaupapa Inquiry (Wai 2750)</a>   | Stage 1 complete                                      |
| 6        | Constitution, self-government, and the electoral system services   | Commenced   |
| 7        | Education and outcomes   | Scheduled   |
| 8        | Social services and social development   | Scheduled   |
| 9        | Economic development   | Scheduled   |
| 10       | Identity and culture   | Scheduled   |
| 11       | Natural resources and environmental management   | Scheduled   |
| 12       | <a href="#">The Justice System Kaupapa Inquiry (Wai 3060)</a>  | Commenced   |
| 13       | Citizenship rights and equality  | Scheduled   |
| 14       | Trans-Pacific Partnership Agreement – Stage 2 (Wai 2522)   | Completed in 2021                                     |

<sup>16</sup> The 2019 Memorandum, paragraphs 24-25, pg. 5.