

HEI WHAKATAU | BRIEFING

Waitangi Tribunal Review – Establishment Process

Date:	6 September 2024	Priority	Medium
Classification	In Confidence	Tracking Number	49505

Action sought	Date action required by
<ol style="list-style-type: none"> Agree to iwi engagement on the Terms of Reference: <ol style="list-style-type: none"> Before the review - Seeking direct input from iwi/hapū into the Terms of Reference, <i>OR</i> During the review - Directing the Panel to identify priority issues for iwi/hapū/Māori, <i>OR</i> Alongside the review - Seeking a direct submission from iwi/hapū for Minister's to consider alongside the independent review panel's report <i>OR</i> Discuss further with Officials Agree to amend Terms of Reference to include at the end of the consideration for the panel on 'The extent of the Tribunal's powers': <i>to address contemporary claims.</i> Agree to Te Puni Kōkiri undertaking the appointments process and providing you with advice on members of the panel in line with your preferred timeframe, and seeking nominees from: <ol style="list-style-type: none"> Te Hunga Rōia Māori The National Iwi Chairs Forum Note that Te Puni Kōkiri is working with Crown Law Office to agree an approach to their involvement in the Review Note that Te Puni Kōkiri is working with the Waitangi Tribunal Unit in the Ministry of Justice to enable alignment with the Waitangi Tribunal's Strategic Review and that advice will be provided on this alongside the draft Cabinet paper Indicate your preferred timing to the Review commencement: <ol style="list-style-type: none"> 26 November 2024, <i>OR</i> 9 December 2024, <i>OR</i> Discuss further with Officials. 	13 September 2024

Contact for telephone discussion (if required)				
Name	Position	Telephone	Mobile	1 st contact
Paula Rawiri	Deputy Secretary, Policy		S 9(2)(a)	
Laine Fisher	Policy Manager, Te Pae Tawhiti			√



Other Agencies Consulted					
<input type="checkbox"/> MBIE	<input type="checkbox"/> MoJ	<input type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input type="checkbox"/> DIA	<input type="checkbox"/> Treasury	<input type="checkbox"/> MoH
<input type="checkbox"/> MHUD	<input type="checkbox"/> Other				

Attachments	1. Draft Terms of Reference for a Review of the Waitangi Tribunal
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- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

6 September 2024

Te Minita Whanaketanga Māori

Waitangi Tribunal Review – Establishment Process

Purpose

1. This briefing seeks your agreement to the process and timeframes to establish the Waitangi Tribunal Legislation Review (the Review).
2. Our advice recognises the limited time available to establish and complete the Review to give effect to the Coalition commitment. At the same time, we attempt to provide tangible solutions that recognise the constitutional and sensitive nature of this kaupapa.
3. Nonetheless, we acknowledge this work will receive a high degree of scrutiny and may be subject to litigation.

Background

4. The National Party and New Zealand First Coalition Agreement (Coalition Agreement) commits to “amend the Waitangi Tribunal legislation to refocus the scope, purpose, and nature of its inquiries back to the original intent of that legislation”.
5. Based on our advice in July 2024, you have agreed to undertake an independent focused review of the Waitangi Tribunal legislation to give effect to the Coalition Agreement.
6. The independent focused review will assess whether certain legislative provisions are effective in achieving key objectives of the Waitangi Tribunal. The components of this are outlined in the attached draft Terms of Reference (version 2.0 is attached as annex one).

Process to Establish the Review

7. We recommend a three-step process to establish the Review. This is based on similar review processes, while recognising the constitutional nature of the Waitangi Tribunal and its importance to the effective implementation of Te Tiriti o Waitangi/the Treaty of Waitangi.
8. The proposed process steps would operate concurrently and are as follows:
 - a. Finalisation of the Terms of Reference,
 - b. Appointment of the Panel Members, and
 - c. Commencement of the Review.

9. In providing our advice, we assume that the Review is to commence this calendar year and to conclude prior to 30 June 2025. This timeframe will enable the Government to make any decisions on legislative amendments this Parliamentary term.

Finalisation of the Terms of Reference

10. We recommend that the Review enables consideration of priority issues for iwi given the Waitangi Tribunal serves as a dispute resolution mechanism for Iwi/Māori and the Crown to address alleged breaches of Te Tiriti o Waitangi/the Treaty of Waitangi.
11. This approach will assist in addressing concerns with the legitimacy and nature of the Review and, potentially, improve engagement with the process. It will also provide Ministers with more comprehensive information to make policy decisions upon.
12. Typically, Government's commission reviews of regulatory areas without consultation on its scope. The terms of reference are approved by Cabinet following Ministerial and government agency advice and feedback. This is due to the scope of such reviews reflecting what the Government is willing to consider addressing. This then provides a scope for the public, including Māori, to participate within.
13. However, our proposed approach differs due to the need to recognise the partnership the Crown has with iwi and hapū through early engagement on a matter core to the effective functioning of the partnership.
14. To achieve this, you could consider one of the following approaches:

Approach	Main pro	Main con
Before review - Seeking direct input from iwi/hapū into the Terms of Reference	Enables the Panel to provide whakaaro on priority issues for iwi/hapū	Timing constraints in seeking input prior to the review beginning
During review - Directing the Panel to identify priority issues for iwi/hapū/Māori	Highlights areas of shared issues and provides time for engagement	Limits the depth to which the panel can look at issues and creates risks of scope expansion
Alongside review - Seeking direct submission from iwi/hapū for Minister's to consider alongside the independent review panel's report.	Provides space for iwi/hapū to consider the issues and provide direct kōrero to Ministers for consideration	Limits ability of the panel to reflect iwi/hapū perspectives and, consequently, effectiveness of the panel approach.

15. We would see working through National Iwi Chairs Forum (NICF) as an effective means to achieve these approaches. The NICF has the breadth of representation, while the Panel could also identify other iwi and Māori not represented in the NICF to engage with as part of their processes. The likely connection would be through Pou Tikanga.
16. Dependent on your direction, we would work with your office to initiate a discussion with the NICF on the preferred approach and building a shared understanding prior to Cabinet's agreement to the Terms of Reference.

17. Alternatively, or in addition to this approach, you could look to utilise the October NICF to discuss the Review. We can provide you with key messages and generally support your attendance should you wish.
18. We note here the litigation risk related to the Review. This is highlighted by recent urgent hearings granted by the Waitangi Tribunal into the Coalition commitments, which identified breaches relating to the process prior to policy decisions and the basis for policy decisions. Undertaking the Review prior to policy decisions will assist in addressing these concerns. However, we recognise that limiting engagement with iwi and Māori to the Review process will likely be seen as insufficient in meeting the Crown's obligations.

Amendments to the Terms of Reference – Te Puni Kōkiri advice

19. We note the Terms of Reference now includes consideration of 'the extent of the Tribunal's powers' and 'appointment of Tribunal members and relevant matters (e.g. term) including officer roles'. We consider that the inclusion of appointments as a useful focus that aligns with the focus of the review.
20. We consider that the review of the Tribunal's powers will likely focus on the Tribunal's ability to make both binding and non-binding recommendations. We understand, anecdotally, that this has been an issue for iwi and hapū also. However, for different or, in some cases, contrary reasons to the Crown's.
21. We note that considering the extent of the Tribunal's powers will likely lead to examination of the *Mangatu* case that is currently before the Court of Appeal. This case considers both Crown and claimant applications for judicial review on the Tribunal's resumption jurisdiction and its relationship with ongoing settlement negotiations.¹
22. As you will be aware, there will be notable sensitivity on this matter, particularly on any impacts of the *Mangatu* case. The main risk would be a subsequent policy change impacting the rights of iwi and hapū to their whenua and leading to further litigation. We recommend that the law is provided further time to develop on these matters. Accordingly, we recommend providing a refined scope to focus on the binding powers for contemporary claims.
23. We recommend that the wording in the Terms of Reference is added to, to include (added words in italic):
 - i. The extent of the Tribunal's powers *to address contemporary claims*.

Appointment of Panel Members

24. We recommend that the independent panel is appointed at the same time that the Terms of Reference is agreed by Cabinet. This will streamline the process and enable decisions on the Review to be taken as one package.
25. We recommend that Te Puni Kōkiri provides you with a list of potential panel members and chair panel member based on the criteria in the Terms of Reference. We would consider our internal networks alongside any potential candidates from your Office and,

¹ Ref to *Haronga* decision.

subject to your approval, seek potential candidates from Te Hunga Rōia Māori and the NICF.

26. The inclusion of potential panel members from Te Hunga Rōia Māori recognises the need to consider a broad pool of panellists and dual identity of Māori citizens. The inclusion of the NICF recognises the partnership with iwi and hapū by further broadening the pool of panellists to draw upon. As result, it will address concerns with legitimacy and nature of the Review.
27. Alternatively, the appointment process could be facilitated by your office with support from Te Puni Kōkiri. However, we consider that this would utilise a disproportionate amount of capacity within your office and create perception issues.

Commencement of the Review

28. The commencement phase of the Review will entail standing up the independent panel, activating the secretariat and beginning public communications.
29. As part of the secretariat approach led by Te Puni Kōkiri, we will work closely with the Crown Law Office (alongside other key government agencies). This will ensure that the advice and supporting documentation provided to the panel is reflective of a cross-Government approach. We are in discussions with the Crown Law Office as to the best mechanism to ensure they can provide the necessary capacity to support the Review. It is likely that we will provide you with a short letter to send to the Attorney General to confirm this support. We will confirm this with your Office in the coming week.
30. We are also in discussions with the Waitangi Tribunal Unit at the Ministry of Justice on ensuring alignment between the Review and the Waitangi Tribunal's Strategic Review. We will provide you with advice on any proposed wording on the Strategic Review in the Terms of Reference and/or how we will operationalise this alignment as part of our next set of advice. Depending on your desired timeframe, this will either be in mid-September or early October 2024.
31. We have also begun work on the communications strategy and approach as well as the induction packs for the panel. We will work with your office on these products. This will ensure that the Review can proceed in a timely manner.

Next Steps

32. We have identified two timing options to enable the Review to commence this calendar year. These are outlined in the table below. We recommend we 'aim' for timeframe A and use timeframe B as a fallback option dependent on any delays in progress.
33. We propose that the Review aims to commence four weeks after Cabinet agreement. The review would be for a minimum of 6 months.

34. We acknowledge that the Review will likely be complex and technical. We expect there will be requests for extension of time, which we will work with you on at the time they arise.

Step	Timeframe A	Timeframe B
Consultation with Māori on ToR (dependent on your direction)	By 16 September	By 30 September
Draft Cabinet paper, advice on panel members/chair, and ToR to Minister's office	18 September	2 October
Ministerial/coalition/agency consultation	30 Sept – 11 October	14 - 25 October
Lodge	17 October	31 October
Social Outcomes (SOU) Cabinet Committee	23 October	6 November
Cabinet	29 October (Labour Day on 28 th)	11 November
Review commences	26 November	9 December
Review concludes	26 May 2025	9 June 2025

Recommended Action

It is recommended that you:

1. **Agree** to iwi engagement on the Terms of Reference:
 - a. Before the review - Seeking direct input from iwi/hapū into the Terms of Reference, **OR** **Yes / No**
 - b. During the review - Directing the Panel to identify priority issues for iwi/hapū/Māori, **OR** **Yes / No**
 - c. Alongside the review - Seeking a direct submission from iwi/hapū for Minister's to consider alongside the independent review panel's report **OR** **Yes / No**
 - d. Discuss further with Officials **Yes / No**
2. **Agree** to amend Terms of Reference to include at the end of the consideration for the panel on 'The extent of the Tribunal's powers': *to address contemporary claims.* **Yes / No**
3. **Agree** to Te Puni Kōkiri undertaking the appointments process and providing you with advice on members of the panel in line with your preferred timeframe, and seeking nominees from: **Yes / No**
 - a. Te Hunga Rōia Māori **Yes / No**

- | | |
|----------------------------------|-----------------|
| b. The National Iwi Chairs Forum | Yes / No |
|----------------------------------|-----------------|
-
4. **Note** that Te Puni Kōkiri is working with Crown Law Office to agree an approach to their involvement in the Review

 5. **Note** that Te Puni Kōkiri is working with the Waitangi Tribunal Unit in the Ministry of Justice to enable alignment with the Waitangi Tribunal's Strategic Review and that advice will be provided on this alongside the draft Cabinet paper

 6. **Indicate** your preferred timing to the Review commencement:

a. 26 November 2024, OR	Yes / No
b. 9 December 2024, OR	Yes / No
c. Discuss further with Officials	Yes / No



Paula Rawiri
 Hautū, Te Puni Kaupapa | Deputy Secretary, Policy

Hon Tama Potaka Te Minita Whanaketanga Māori
Date: ____ / ____ / 2024

Independent Focused Review into the Treaty of Waitangi Act 1975 Terms of Reference

Background and Purpose

In 1975, the Treaty of Waitangi Act established the Waitangi Tribunal. The Waitangi Tribunal was established to make recommendations on claims relating to the practical application of the Treaty of Waitangi/Te Tiriti o Waitangi and to determine whether certain matters are inconsistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi. Amendments to the Treaty of Waitangi Act in 1985 enabled the Waitangi Tribunal to consider historical claims back to 1840.

Since the establishment of the Waitangi Tribunal, it has addressed over 2000 contemporary and historical claims through its inquiries. In that time, notable progress has been made in settling historical claims between Māori and the Crown. Over 100 deeds of settlement have been signed, with approximately 38 deeds of settlement remaining with 28 of those already being progressed.

The 2023 Coalition Agreement committed the Government to reviewing the Waitangi Tribunal legislation. To give effect to this commitment, the Government will undertake an independent focused review (the review). The review will assess whether certain legislative provisions are effective in achieving key objectives of the Waitangi Tribunal.

The legislation sits within the portfolio of the Minister for Māori Development. Given the legislation has implications for a range of portfolios, the review is being commissioned by a Ministerial Group led by the Minister for Māori Development, alongside the Attorney General, the Minister of Justice, Minister for Resources, and Associate Minister for Justice (Hon Seymour). Ministers have decided to utilise external independent reviewers with the support of a secretariat housed by Te Puni Kōkiri to undertake this review.

Objectives

The review will assess whether key provisions within the legislation are:

- Effective in meeting the intent of the legislation and its provisions;
- Enabling of claims to be addressed in a thorough and timely manner;
- Effective in supporting historical claims to be addressed and contribute to timely settlements;
- Supporting a positive Māori Crown relationship and outcomes, including the distinctive rights and interest of iwi and hapū; and
- Leading to improved policy processes and outcomes for Māori development.

Scope

The review will consider the following provisions:

Jurisdiction

- The Tribunal's threshold for claims to be considered, namely the acts or omissions that are considered within claims.
- The Tribunal's ability to refuse claims and whether there is sufficient provision for the Tribunal within legislation. This includes the ability to assess whether there are more efficient and effective means than an inquiry to address all or part of a claim.
- The Tribunal's ability to appropriately scope, refine and address kaupapa inquiries.
- The Tribunal's threshold to consider applications for urgency, including exploring whether there are more effective pathways to seek relief.
- The extent of the Tribunal's powers.

Nature of claims

- The distinction between historical and contemporary claims and whether there is sufficient differentiation between these two forms of claims.
- The interpretation of legislated settlements and what they exclude from consideration in Tribunal claims and whether greater clarity is needed.
- The types and categorisation of contemporary claims being considered and whether the legislation is sufficient in providing a legislative framework to triage and address these.

Interaction with other legislation

- The application of the Commissions of Inquiry Act 1908 and whether this is an appropriate legislative framework for the Waitangi Tribunal, including whether the Tribunal should be subject to the Inquiries Act 2013.
- The application of the Parliamentary Privilege Act 2014 and the principles of comity and separation of powers, including whether further clarity is required in the Treaty of Waitangi Act on the interaction of these.

Implementation of recommendations

- The improvements that could be made to section 8(1) of the Treaty of Waitangi Act 1975 in terms of supporting progress through providing transparency and accountability relating to the response to Waitangi Tribunal recommendations.

Composition of Tribunal

- The appointment of Tribunal members and relevant matters (e.g. term) including officer roles.

Independent review panel

The independent review panel will comprise of three or four external independent reviewers. One of the independent reviewers will be appointed as the Chair of the independent review panel.

The external independent reviewers will come from a range of backgrounds, while having a strong understanding and experience in matters relating to:

- The roles, responsibilities of the different branches of government and the context to which they operate within.
- The Treaty of Waitangi/Te Tiriti o Waitangi and its application in government policy and regulatory design.
- The Treaty of Waitangi/ Te Tiriti o Waitangi settlement processes and the implementation of settlements.
- The intricacies of the Māori Crown relationship, including approaches that create benefits for Māori and all of New Zealand.

Process

The independent review panel will consider:

- Waitangi Tribunal reports and publications, academic research, and relevant data, and
- Perspectives from representatives of the Parliamentary/legislative branch of government, Executive branch, Judiciary, the Waitangi Tribunal, claimants, and legal practitioners.

The independent review panel will not consider:

- The funding of the Tribunal and its members and participants such as counsel, claimants and witnesses.
- The Tribunal's interpretation of the Treaty of Waitangi/ Te Tiriti o Waitangi and its principles.
- Any ongoing or lodged claims to be considered by the Tribunal.

The independent review panel, supported by the secretariat, will effectively implement all legislative requirements, including the Privacy Act 2020, Official Information Act 1982 and the Public Records Act 2005.

Timeline

The independent review will report back to the Ministerial Group of the Minister for Māori Development (Hon Potaka), the Attorney General (Hon Collins), the Minister of Justice (Hon Goldsmith), the Minister for Resources (Hon Jones), and the Associate Minister for Justice (Hon Seymour) in May 2025.