

In Confidence

Office of the Minister of Justice

Cabinet Māori Crown Relations: Te Arawhiti Committee

Responding to the Waitangi Tribunal's recommendations for claimant funding

Proposal

- 1 This paper seeks:
 - 1.1 agreement to targeted engagement with Māori to inform the Government's response to a recent Waitangi Tribunal recommendation to implement a system to fund claimants in Tribunal inquiries where there is no other claimant funding system; and
 - 1.2 agreement to an interim claimant funding policy for kaupapa inquiries to address claimant need for funding in the interim ahead of the longer-term work.

Relation to government priorities

- 2 These proposals will support the Government's manifesto commitment to continue to partner with Māori and uphold the Crown's obligations under the Treaty of Waitangi. The paper also responds to Cabinet's direction that "all agencies should be proactive in ensuring their policy, regulatory, and service delivery functions are consistent with the Treaty of Waitangi".¹

Executive Summary

- 3 The Waitangi Tribunal (the Tribunal) recently conducted a mini-inquiry into the funding of claimant participation in Tribunal processes - Whakatika ki Runga. It found that the Crown has breached its Treaty obligation to ensure that Māori claimants have the necessary resources to participate fully in all its processes.
- 4 There is currently no whole-of-government claimant funding system to cover claimant costs in kaupapa and contemporary inquiries that has been endorsed either at Ministerial or Cabinet level. Kaupapa inquiries look into issues of national significance affecting Māori as a whole. Contemporary inquiries relate to Crown acts or omissions on or after 21 September 1992 and usually focus on specific issues or local areas.² While legal aid provides funding for the legal representation of claimants in Tribunal inquiries, it does not cover other claimant costs such as travel and accommodation. Agencies have made their own decisions on how to fund claimants resulting in funding

¹ Cabinet Office Circular 19(3): Better Co-ordination of Contemporary Treaty of Waitangi Issues.

² Historical claims are those that relate to matters that occurred before 21 September 1992. Since 1 September 2008 no new historical claims are able to be filed.

I N C O N F I D E N C E

being provided in an inconsistent and ad hoc way. Agencies typically provide funding by reimbursing claimants.

- 5 Claimants' evidence contributes to well informed and considered Tribunal findings which support the Crown to explore, in a collaborative way, improvements in policy and practice to uphold the rights and interests of Māori as guaranteed under the Treaty of Waitangi.
- 6 I am seeking agreement to targeted engagement with Māori to inform our next steps on a long-term approach to funding claimants in kaupapa and contemporary inquiries. This engagement would consider the scope of any design work that is required to develop a long-term funding system, taking account of the policy work undertaken to date, what was heard from Māori during the inquiry, and the Tribunal's findings. The engagement would also discuss a design process that works for both Māori and the Crown.
- 7 Should you agree to this engagement occurring, I will return to Cabinet by early 2024 to seek agreement to the Government's response to the Waitangi Tribunal recommendation to implement a claimant funding system. I will provide advice on next steps for a process for developing a long-term funding system that reflects insights from the targeted engagement. The future paper will address the scope, method, timing, and any funding implications of a design process for a long-term funding system.
- 8 In the meantime, kaupapa inquiries are underway. A consistent approach to funding claimants in the near term would be more efficient and clearer for everyone and demonstrate the Crown's commitment to support Māori to access justice. That is why I am also seeking agreement to an interim common claimant funding policy (interim funding policy). Agencies leading responses to kaupapa inquiries (lead agencies) would follow the interim funding policy to fund claimants' costs to participate. Although it is hard to estimate, the costs involved are likely not sizeable.
- 9 The interim funding policy I propose at Appendix A builds on the approaches agencies have already put in place. It also implements the Tribunal's recommendation to adopt the funding policy for the Mana Wāhine Inquiry³ (with one small change) until a long-term funding system is in place.⁴ The policy enables flexibility to fund other costs not explicitly described in the policy. However, to balance flexibility with the need for consistency for claimants, Ministerial or Cabinet agreement will be required for more significant funding decisions where lead agencies wish to regularly fund costs outside of the interim funding policy.
- 10 While the interim policy goes some way in alleviating claimant funding issues, it is not a long-term solution. Further consideration is needed of matters such as funding of claimants in contemporary and other inquiries where there is no other claimant funding system, upfront funding (rather than reimbursement),

³ The Mana Wāhine Kaupapa Inquiry (Wai2700) – will hear outstanding claims which allege prejudice to wāhine Māori as a result of Treaty breaches by the Crown.

⁴ The small change is that agencies should pay the actual and reasonable costs of flights and should also approve travel by rental car or public transport (bus, train or ferry) where the cost is comparable.

delivery of funding by a single agency, independence of decision-makers, and the scope of expenses that are covered. These are the types of matters on which I will further advise Cabinet when I return with a proposed approach to a long-term funding system.

- 11 If the interim funding policy is still in place after 18 months, I will return to Cabinet to revise or update the policy as required.

Background

The Tribunal has been critical of the funding arrangements for claimants

- 12 In 2021, the Tribunal began its kaupapa inquiry into the justice system, Te Rau o te Tika (Wai 3060). The Tribunal started with Whakatika ki Runga, a mini-inquiry into the funding of claimant participation in Tribunal processes. It considered that claimant funding should be addressed first since it may be an obstacle to claimants' participation in the broader inquiry and in other inquiries. There are 13 current and planned kaupapa inquiries concerning a range of issues across government that affect Māori as a whole, from health services to environmental management.
- 13 In February 2023, the Tribunal released its report and found that the Crown breached its Treaty obligation to ensure that Māori claimants have the necessary resources to participate fully in all its processes. The Tribunal considers that "...when the Crown fails to properly resource Māori to participate in its inquiries, the purpose of the Tribunal is seriously undermined".⁵ The Tribunal made a number of findings relating to the funding of claimants, including that:
 - 13.1 the Crown has not developed or implemented a robust funding model;
 - 13.2 the different and inconsistent rules that lead agencies apply to funding claimants in kaupapa inquiries do not work for claimants. They are uncertain and confusing, claimants do not understand them resulting in inconveniences, uncertainties, fears, costs and embarrassment, and this has affected claimants' participation in Tribunal inquiries;
 - 13.3 the Crown did not seek alternatives to payment by reimbursement as the only way of funding claimants although it should have known that reimbursement does not work for many claimants, and alternatives are available; and
 - 13.4 claimant funding through lead agencies is ineffective and the Crown has failed to address it.
- 14 The Tribunal was critical about the time that it has taken the Crown to address the problem of claimant funding in kaupapa inquiries and for its failure to

⁵ Tribunal releases report on claimant funding | Waitangi Tribunal Press Release
<https://www.waitangitribunal.govt.nz/news/tribunal-releases-report-on-claimant-funding/>

engage appropriately with Māori in developing policy concerning funding of claimants.

- 15 The Tribunal recommended change for both the long and short term. In the long-term the Tribunal recommends that Māori and the Crown design a suitable system to fund claimants in Tribunal inquiries where there is no other claimant funding. The Tribunal suggested that engagement might cover several areas, including:
 - 15.1 the benefits of centralised funding, and the extent to which the Crown Forestry Rental Trust's provision of claimant funding is suitable and applicable to a system supporting claimant participation in kaupapa inquiries;⁶
 - 15.2 what categories of participant and what categories of activity should be funded, and to what extent; and
 - 15.3 the degree of independence required for a decision-maker to make the best decisions about funding claimant participation in the Tribunal.
- 16 In the short-term, and to cover the period until a claimant funding system is implemented, the Tribunal recommended the Crown:
 - 16.1 acts urgently to require lead agencies to adopt a common set of claimant funding protocols. It recommended that all lead agencies immediately adopt the claimant funding policy used for the Mana Wāhine Inquiry (with one minor change) so that there is a common set of claimant funding protocols until a long-term claimant funding system is in place;⁷ and
 - 16.2 develops arrangements that no longer depend on claimants submitting receipts for reimbursement.
- 17 The Tribunal also made operational recommendations regarding te reo Māori translation and legal aid provision. Those other recommendations are not considered in this paper as the Ministry of Justice is still considering how to progress them. Relevant Ministers will be briefed accordingly.

The Tribunal findings are consistent with what we know about issues in claimant funding

- 18 Kaupapa inquiries look into issues of national significance affecting Māori as a whole.⁸ If claimants receive the support they need to participate, the Tribunal

⁶ Where there are claims that involve or could involve Crown Forest Licensed Land, claimants can receive funding from Crown Forestry Rental Trust (CFRT) administered through Approved Client groupings. CFRT funding can include operational and organisational costs, research costs, and specialist advice costs (for Approved Clients going through direct settlement negotiations with the Crown).

⁷ The minor change is that agencies should pay the actual and reasonable costs of flights and should also approve travel by rental car or public transport (bus, train or ferry) where the cost is comparable.

⁸ The Tribunal can also conduct contemporary inquiries – these are inquiries into Crown acts or omissions after 21 September 1992.

is more likely to have information it needs to make well-informed recommendations on which the Crown can then work with Māori to make policy improvements. While contemporary inquiries may have a narrower focus, relating to Crown acts or omissions on or after 21 September 1992 and usually focusing on specific issues or local areas, findings from these inquiries could also inform wider improvements the Crown can make.

- 19 Funding claimants is a meaningful way in which to facilitate their access to justice. The issues highlighted by the Tribunal are familiar to the Crown as claimants have raised issues in the provision of funding in previous inquiries and have been raising issues directly with government agencies.⁹ Officials have been working to respond to issues in the provision of claimant funding since 2018 in recognition of the need to improve access to justice.¹⁰
- 20 The Tribunal findings are broadly consistent with the problems with claimant funding identified in previous advice to Ministers and the evidence provided by the Crown in the inquiry.
- 21 Claimants in the Tribunal's historic inquiries generally receive funding contributions through the Crown Forestry Rental Trust.¹¹ However, there is no whole-of-government claimant funding system that has been endorsed either at Ministerial or Cabinet level to cover claimant costs in kaupapa and contemporary inquiries. While legal aid provides funding for the legal representation of claimants in Tribunal inquiries, that funding does not cover other claimant costs such as travel and accommodation. Lead agencies have made their own decisions about how to fund claimants, resulting in funding being provided in an inconsistent and ad hoc way.
- 22 The Tribunal was critical about the time that it has taken the Crown to address the problems and for its failure to engage appropriately with Māori. In its closing statements to the inquiry, the Crown acknowledged that work to establish a funding policy has taken too long and that it needs to move quickly to establish a whole-of-government claimant funding policy that is clear, consistent and provides adequate levels of funding.
- 23 It is therefore time that we commit to a course of action to improve the certainty and consistency of funding for claimants to improve their access to justice. It is important that this involves engaging with Māori to ensure that we uphold our responsibility as a Treaty partner and find solutions that will work for Māori.

⁹ For example, claimants raised these issues in the Tribunal's Housing kaupapa inquiry (Wai 2750).

¹⁰ The Crown submitted a chronology in evidence in the Te Rau o te Tika Inquiry (Wai 3060). In recognition of the access to justice issues and to encourage some consistency, a cross-agency project team led by Te Arawhiti developed draft interim funding guidance in 2021. The interim guidance has not been endorsed by Ministers or Cabinet, but has been used by lead agencies to develop their own funding policies whilst officials worked to advise Ministers on options.

¹¹ Historical claims are those that relate to matters that occurred before 21 September 1992. Since 1 September 2008 no new historical claims are able to be filed.

Planning next steps on a claimant funding system in response to the Tribunal's long-term recommendation

- 24 A long-term claimant funding system designed in partnership with Māori would help ensure Māori can receive the funding needed to participate in the Tribunal in inquiries where there is no other claimant funding system.
- 25 In response to the Tribunal's long-term recommendation outlined in paragraph 15, I seek agreement to officials conducting targeted engagement with Māori to inform advice for Cabinet on next steps for a long-term claimant funding system. This engagement would include consideration of:
- 25.1 the scope of any further design work that is required. This would take account of the existing work in this policy area, and consider the suitability of the interim funding policy to operate as a funding policy over the longer term, what we heard from Māori as part of the Whakatika ki Runga Inquiry, and previous advice and work on this issue to date; and
- 25.2 processes that may be used to design aspects of the system.
- 26 The advice will describe the scope, method, timing, and any funding implications of a process to develop a long-term claimant funding system. The advice will include consideration of the Tribunal's suggested range of topics on which the Crown could engage with Māori (outlined in paragraph 15).¹² These matters concern the funding available and ease of access for claimants. I will return to Cabinet in early 2024 with this advice on the next steps the Government could take to design the long-term funding system and seek agreement to the proposed Government response.
- 27 Conducting targeted engagement with Māori would also ensure Māori are engaged appropriately in an area where the Crown has fallen short of expectations. To date, no agencies have engaged with Māori on their funding policies in any substantial way. Section 9(2)(h)
- 28 The planned approach to this engagement recognises that there is a long history to this issue. The Tribunal's short-term recommendation to adopt the Mana Wāhine policy may go some way to solving some of the funding issues and alleviating claimant concerns with the funding system, Section (9)(2)(f)(iv)
- there still may be significant aspects that require further design, such as Section (9)(2)(f)(iv)

¹² Waitangi Tribunal, Report on Whakatika ki Runga, a Mini Inquiry Commencing Te Rau o te Tika, page 136

Section 9(2)(h)

Section (9)(2)(f)(iv). I will know more once officials have had those initial discussions with Māori.

- 29 To manage expectations, officials will suggest the interim policy and the Tribunal's highlighted topics as a starting point for discussion and clearly communicate that the response to the Tribunal's recommendation for a claimant funding system is subject to Cabinet decisions and restraints of broader government policy eg funding rules.
- 30 The Tribunal suggested that participants in the design processes should comprise a group that includes individuals who can speak for the interests of claimants in Te Rau o te Tika and other kaupapa inquiries, and the interests of hapū and iwi. Officials will take this into consideration when they conduct the targeted engagement.

I propose an interim common claimant funding policy to address the Waitangi Tribunal's short-term recommendations

- 31 While it is important we develop a long-term funding system, there is an urgent need to have a consistent Crown approach to funding in the interim as there are many kaupapa inquiries that are already underway.¹⁴ The Tribunal recommended that in the interim we urgently adopt the funding policy used in the Māna Wāhine Inquiry (with one minor change).¹⁵ The Mana Wāhine claimant funding policy is slightly broader than other lead agencies' funding policies as it includes funding for preparatory hui.
- 32 I seek your agreement to the interim funding policy attached at Appendix A. The interim funding policy would provide clear direction to lead agencies, improving consistency in claimant funding across inquiries. Cabinet endorsement of the interim funding policy provides more certainty and consistency to current and future claimants participating in kaupapa inquiries about the costs that will be covered.
- 33 The interim funding policy includes funding for costs that must be met for claimants to be able to participate, including travel, meals, accommodation and support to facilitate preparatory hui. The interim funding policy includes specified amounts for meals and mileage. I recommend the mileage rate is set to the Inland Revenue business expense kilometre rate so that as prices change, the mileage rate will accurately reflect that. I seek agreement for the Ministry of Justice to update the amounts for meals in the interim funding policy to ensure it accurately reflects reasonable amounts. Retaining a funding amount for meals provides a clear guideline for claimants about what a reasonable expectation for food costs is and what will be paid. Amounts are not provided for other costs as they can vary, and agencies should pay the actual and reasonable costs.

¹⁴ There are 13 current and planned kaupapa inquiries affecting a range of issues across government from health services to environmental management.

¹⁵ The minor change is that agencies should pay the actual and reasonable costs of flights and should also approve travel by rental car or public transport (bus, train or ferry) where the cost is comparable.

- 34 Agencies are moving toward incorporating the Mana Wāhine policy in their own policies, but this could still give rise to inconsistencies in what agencies will fund as individual policies are developed. The interim funding policy I propose will help ensure funding is sufficient to suit claimants' needs across a broad range of inquiries. Agencies with existing claimant funding policies will need to update them to ensure they align with the interim funding policy.
- 35 The interim funding policy goes some way in addressing the issues in claimant funding identified by officials and the Tribunal. However, it is not a long-term solution. In my view there are still outstanding issues that are not addressed by the interim funding policy that must be considered before a long-term funding system can be implemented. This includes Section (9)(2)(f)(iv) [REDACTED] the independence of decision-makers; whether the policy adequately enables disabled people to participate; the use of reimbursement; and whether the costs specified, and the extent of those costs, are sufficient. I would also like to consider what we can learn from what worked well in the funding approach used by the Crown Forestry Rental Trust. These outstanding issues were also identified by the Tribunal as areas for further consideration and engagement with Māori.
- 36 The interim policy would apply to claimants in kaupapa inquiries. It would also advise agencies to consider applying the interim policy to any urgent contemporary inquiries.¹⁶ Work on the long-term funding system will include consideration of the funding of claimants in other inquiries in which there is no claimant funding system

The interim funding policy goes further than the Tribunal recommendation in some places

- 37 The interim funding policy I recommend includes funding for some costs that were not included in the Mana Wāhine funding policy, but have been funded by some lead agencies already to better support claimants. This was either because the funding was needed to support a particular claimant or because it was in the interim guidance developed by Te Arawhiti. Continuing to fund these additional costs ensures that claimants do not face a situation where they receive less funding than previously.
- 38 Areas where the interim funding policy is broader than the Tribunal recommendation to adopt the Mana Wāhine policy are:
- 38.1 providing funding for all claimants attending Tribunal events, where the Mana Wāhine policy provides funding only for claimants attending a hearing if they are giving evidence or acting as support people. This

¹⁶ Urgent inquiries are hearings that are prioritised because applicants are suffering or likely to suffer significant and irreversible prejudice as a result of a current or pending Crown action and there is no alternative remedy.

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- ensures all claimants can attend events relating to the inquiry and hear the evidence being given;
- 38.2 providing discretion to fund interested parties on a case-by-case basis (for example those who made a claim, but were assigned as interested parties by the Tribunal).¹⁷ This is more relevant for inquiries where only some claimants are assigned claimant status in the time available, or where interested parties may provide key information and require support to engage in the Tribunal processes;
- 38.3 making funding available to attend Tribunal events more generally (for example Tribunal-convened wānanga) rather than just hearings to allow flexibility and support access to justice where the Tribunal adopts new processes. This allows the policy to be adaptable to new approaches taken by the Tribunal;
- 38.4 clarifying that whilst “actual and reasonable costs” is a judgement call for agencies this should include funding of additional support to enable the participation of all claimants, particularly elderly and disabled people who may require additional assistance to access the Tribunal, such as accessible transport options;
- 38.5 specifying lead agencies should consider requests to fund research and work with the Tribunal on the usefulness of such research and who should fund it. This allows agencies to fund research where there is an identified need. This was included in the interim guidance developed by Te Arawhiti and research has been funded as part of the Mana Wāhine inquiry; and
- 38.6 setting specified funding amounts only for meals and mileage (using the mechanisms set out at paragraph 33 for these amounts to be updated), as other costs are more straightforward or appropriate to fund as actual and reasonable costs.¹⁸
- 39 The interim funding policy also maintains the expectation set out in the interim guidance developed by Te Arawhiti that, where Cabinet has agreed a response to the Tribunal’s recommendations and this response requires ongoing engagement with claimants, lead agencies are expected to meet the actual and reasonable costs of claimants attending any required meetings or hui. However, the policy also notes, if agencies intend to fund any other engagement with claimants outside the inquiry process, this is left to lead agency discretion and should be considered in light of Cabinet Office Circular 19(3) Better Co-ordination of Contemporary Treaty of Waitangi Issues.¹⁹
- 40 There are other costs that have not previously been funded that could have been considered for inclusion in the interim funding policy. However, I view

¹⁷ People assigned interested party status under the Commissions of Inquiry Act 1908.

¹⁸ The Mana Wāhine policy specified up to \$30 excluding GST for parking per day, but parking may cost more than this.

¹⁹ This circular sets out Cabinet reporting requirements where agencies are entering into formal discussions with Māori about the resolution of contemporary Treaty of Waitangi claims.

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consideration of other costs as part of the long-term work to design a funding system with Māori.

- 41 The interim funding policy sets out that lead agencies will not fund the time or lost wages for claimants, claimant witnesses, or their support people. This is to prevent creating significant inequalities in what claimants receive across inquiries and to avoid setting precedents for funding across the broader justice system.
- 42 The interim funding policy would be in place until a long-term claimant funding system can be implemented. I will consider the policy in 18 months and return to Cabinet to revise or update the policy as required.

The interim funding policy would enable flexibility for lead agencies to fund other costs

- 43 While consistency in practice is important, I note that lead agencies need discretion to be able to meet claimants' needs, for example elderly and disabled people may require more support or other related costs. The interim funding policy enables lead agencies to fund other costs not explicitly described in the policy, and provides discretion to go beyond specified amounts on a case-by-case basis where reasonable.
- 44 In order to reduce inconsistency in practice and increase visibility of claimants' needs across inquiries I recommend the interim funding policy:
- 44.1 encourages lead agencies to share information with each other on costs being funded outside of the interim funding policy on a one-off, case-by-case basis, and
 - 44.2 gives lead agencies discretion to consider funding beyond the interim funding policy on a regular basis (such as through communicating that a cost will be covered that is not included within the interim funding policy). To enable this process to work I seek agreement to the following mechanisms described in paragraphs 45 and 46.
- 45 The lead agency of the relevant inquiry has the authority to approve regular funding of additional costs beyond the interim funding policy where funding the cost fits within existing appropriations, does not have impacts on equality across wider systems, does not have wider policy implications or significant fiscal impacts and officials consider it is not something that requires updating in the interim funding policy.
- 46 If any of these conditions in paragraph 45 are not met, decisions about exceptions to regularly fund additional costs beyond the interim funding policy are to be put to the Minister of the lead agency considering the funding and the Minister of Justice to make a joint decision on the matter. In such cases:
- 46.1 the Minister of Justice, in collaboration with the Minister of the lead agency of the relevant inquiry, will have the authority to agree exceptions to fund additional costs not specified in the interim funding

policy in a particular inquiry where the cost can fit within existing appropriations and does not meet the threshold of a significant policy issue that should be considered by Cabinet;

- 46.2 the Minister of Justice will also consider if any amendment to the interim funding policy is required so that the additional costs will be met in other inquiries, and will have the delegated authority to make minor updates as required; and
- 46.3 the Minister of Justice will return to Cabinet if the funding changes being considered to the interim funding policy have wider policy implications, will significantly impact on equality across wider systems (such as the justice system) or will have significant fiscal impacts across portfolios.

A travel management supplier is being used for some upcoming Tribunal events and could inform future thinking about models that do not use reimbursement

- 47 Reimbursement models rely on claimants being able to afford expenses until they can be reimbursed. This creates a barrier to access as claimants are left out of pocket while they apply for funding, and it may be uncertain whether they will be reimbursed for particular costs. The Tribunal recommends claimant funding arrangements that do not depend on reimbursement as it puts claimants in an “invidious situation”.²⁰ The Tribunal considered it should be possible for agencies to use other approaches.
- 48 The interim funding policy does not specify the way in which lead agencies provide funding, Section (9)(2)(f)(iv) [REDACTED] This issue will be considered as part of the targeted engagement with Māori to develop advice on next steps for designing the long-term funding system. In the meantime, the Ministry of Justice has used a travel management supplier for travel and accommodation bookings for Te Rau o te Tika/the Justice System Inquiry events in May and June 2023.²¹ Events for further kaupapa inquiries are also taking place in 2023/24.
- 49 My officials will provide me with information about the use of travel management suppliers, which could inform future consideration around whether this approach is worth pursuing.

Cost-of-living implications

- 50 The proposals in this paper will not have broad cost-of-living-impacts. The proposals in this paper will help support Waitangi Tribunal claimants as funding claimants is a meaningful way in which to facilitate their access to justice. The Tribunal heard evidence from claimants that they struggle to meet

²⁰ Waitangi Tribunal, Report on Whakatika ki Runga, a Mini Inquiry Commencing Te Rau o te Tika, page 80.

²¹ Note reimbursement of costs will still be available where this is preferred by the claimant or for costs that cannot be met through the supplier, for example meals.

costs to participate.²² Improving certainty and consistency in funding for claimants may mean that individuals can pursue claims more easily.

Financial Implications

- 51 The expectation that agencies will fund claimants is not new. Agencies are already expected to absorb the costs of participating in kaupapa inquiries within baselines or to seek additional funding.²³ In practice, this has included funding for claimants. The Tribunal is a permanent commission of inquiry and operates through claims brought by Māori alleging that Crown actions breach the principles of the Treaty of Waitangi. Funding claimant participation facilitates the effective operation of this mechanism. The interim funding policy sets consistent expectations about how funding will be provided to claimants to prevent inconsistency and inequity across inquiries. A new consistent minimum standard may mean agencies fund costs for claimants that they otherwise would not have funded.
- 52 The financial cost of inquiries is uncertain as it depends on when the Tribunal will commence inquiries and hold events requiring claimants to participate. The Tribunal does its timetabling annually and holds a number of hearing weeks each year, although other inquiries can commence during the year. This makes predicting costs per year difficult. Costs are demand driven and any estimates are based on assumptions about the number and location of hearings, the needs of claimants and the costs incurred, which are difficult to predict accurately. For example, it is hard to predict how many claimants will need to travel, how much flights will cost at any time, and the type of support some claimants might require.
- 53 Uptake of claimant funding has been relatively low in the past. For example, reimbursements to claimants as part of the Oranga Tamariki urgent inquiry Wai 2915 were much lower than anticipated (\$19,500 compared to a budgeted \$125,000).²⁴ It is expected that a clearer policy and some changes to the way payment is provided (upfront payment options) might increase the uptake of funding. It is impossible for officials to say what the extent of this might be, however lead agencies have attempted to take this into account in their budgeting. Although it is hard to estimate, the costs involved are likely not sizeable, for example for the Tribunal's Tūāpapa events held in May and June 2023 for the Justice System Inquiry (Wai 3060) the Ministry of Justice trialled an approach that aligns with the Tribunal's short-term

²² Waitangi Tribunal, Report on Whakatika ki Runga, a Mini Inquiry Commencing Te Rau o te Tika, pages 76-77.

²³ The Cabinet Office Circular 19(3): Better Co-ordination of Contemporary Treaty of Waitangi Issues states, on the cost of kaupapa inquiries, "In general, agencies will be expected to absorb the costs of participating in kaupapa inquiries within baselines, as they represent the business-as-usual activity of ensuring policy is consistent with the Treaty of Waitangi. Where absorbing costs within baselines is considered unmanageable, a case for additional funding can be put to Ministers during the lead agency appointment process or when reporting to MCR, for consideration through the Budget process."

²⁴ Waitangi Tribunal, Report on Whakatika ki Runga, a Mini Inquiry Commencing Te Rau o te Tika, page 62.

recommendations. The claimant costs are approximately \$45,000 for the four events, significantly less than what was budgeted for.

54 The lead agencies that are most likely to need to provide funding for events in 2023/24 expect to be able to fund claimants in line with the interim funding policy either within baseline, or within existing project funding. Agencies have made assumptions in their budgeting to try to predict costs as best they can and provide some leeway for costs to vary. Agencies have generally budgeted for around \$200,000 to 300,000 for claimant costs per year. This includes:

54.1 Te Rau o te Tika/the Justice System Inquiry. The Ministry of Justice has received specific budget funding for the inquiry until the end of June 2024. Further funding options will need to be considered beyond 2024 as the inquiry is in early stages and likely to continue for a number of years. This will be needed irrespective of whether the interim funding policy is approved by Cabinet.

54.2 Health Services and Outcomes Inquiry. The Ministry of Health will continue to manage estimated costs within baselines;

54.3 Military Veterans Inquiry. Section (9)(2)(f)(iv)

54.4 Housing Policy and Services Inquiry. The Ministry of Housing and Urban Development has received specific budget funding for the inquiry (held in contingency). Section (9)(2)(f)(iv)

and

54.5 Mana Wāhine Inquiry. The Ministry for Women has received specific budget funding for the inquiry.

55 Other inquiries including those inquiries that are yet to commence,²⁵ will also need to fund claimant participation according to the interim funding policy. Affected lead agencies would need to source funding from within existing baselines or seek additional funding. The timing for when funding is required will depend on when events are scheduled for these inquiries, which are difficult to predict.

Legislative Implications

56 There are no legislative implications arising from the proposals in this paper.

²⁵ For example, it is unknown when the Natural Resources and Environmental Management Inquiry, and the Education Services and Outcomes Inquiry will commence.

Impact Analysis

- 57 The proposals in this paper do not require a Regulatory Impact Analysis or a Climate Implications of Policy Assessment.

Population Implications

- 58 An interim claimant funding policy and a design process for a long-term claimant funding system would benefit Māori who have, or are contemplating, a claim that would be considered in a kaupapa inquiry. It would have particular benefit for disabled people, who on average have fewer financial resources and face greater barriers to participation in the Tribunal. This aligns with the United Nations Convention on the Rights of Persons with Disabilities.

Treaty of Waitangi implications

- 59 The Tribunal has found the Crown has breached its Treaty of Waitangi obligations to ensure that Māori claimants have the necessary resources to participate fully in all its processes. The Tribunal was clear that the Treaty principles of active protection and partnership include providing sufficient resources for Māori to participate fully in inquiry processes.²⁶
- 60 The proposed improvements to claimant funding made through the interim funding policy and the design of a long-term funding system align with the Tribunal's recommendations to address this breach. They will better support access to justice for Māori by promoting meaningful participation in the Tribunal. This aligns with the United Nations Declaration on the Rights of Indigenous Peoples Article 37: indigenous peoples' right to have states honour treaties. The Tribunal is the only forum in which Māori can bring claims for breaches of the Treaty.

- 61 I acknowledge the interim funding policy is an initial solution. Section 9 (2)(g)(i)
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Human Rights

- 62 The proposals in this paper do not limit any rights or freedoms contained in the Human Rights Act 1993 or the New Zealand Bill of Rights Act 1990. The proposals further the principles of natural justice and align with New Zealand's

²⁶ See the Waitangi Tribunal's Report on Whakatika ki Runga, a Mini-Inquiry Commencing Te Rau o te Tika – Pre-publication Version (justice.govt.nz), page 20 on active protection and page 24 on partnership.

commitment to the United Nations Declaration on the Rights of Indigenous Peoples.

Use of External Resources

- 63 No external resources were used in the preparation of the policy advice in this paper. Section 9(2)(b)(ii)



Consultation

- 64 This paper was prepared by the Ministry of Justice in consultation with current and possible future lead agencies, including the Ministries for the Environment, Education, Health, Social Development, Women, Housing and Urban Development, and the New Zealand Defence Force. Crown Law, Treasury, and Te Arawhiti were also consulted. Other agencies informed of the paper include Oranga Tamariki – Ministry for Children, Te Puni Kōkiri, the Department of Corrections, New Zealand Police, Whaikaha/Ministry for Disabled People, the Department of Internal Affairs, and the Department of Prime Minister and Cabinet.
- 65 The interim funding policy is not based on engagement with claimants or their counsel. While this is a concern to some agencies, my view is that an interim funding policy should be in place as soon as possible as the Tribunal was very clear that the Crown should act urgently.²⁷ The interim funding policy is based on the Tribunal's Report, which was informed by all claimants' submissions, and what was heard from claimants during the Whakatika ki Runga hearings. Discretion within the policy will provide agencies with enough flexibility to respond to evolving claimant needs, while also setting clear expectations to reduce inconsistency and inequity across inquiries. Further engagement with Māori is a fundamental part of shaping a long-term claimant funding system. Time on engagement is better spent developing the long-term funding system.

Communications

- 66 If the interim funding policy is agreed, it will be effective immediately. It will be published on the Ministry of Justice website. I will also write to the chief executives of current and likely future lead agencies informing them of the

²⁷ The Ministries for the Environment, Health, Housing and Urban Development, Social Development and Women support engaging with claimants on the interim funding policy

interim funding policy. The Ministry of Justice, with Crown Law, intends to update the Tribunal on the interim funding policy. Lead agencies for current inquiries will be expected to update their claimants.

Proactive Release

- 67 I intend to proactively release this paper, subject to any necessary redactions under the Official Information Act 1982, within 30 business days of decision by Cabinet. This will likely be after or around the same time as communications with claimants and the Tribunal about decisions made in this paper.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** there is no whole-of-government claimant funding system endorsed at a Ministerial or Cabinet level for claimants in Waitangi Tribunal kaupapa and contemporary inquiries;
- 2 **note** without a claimant funding system, agencies have made their own decisions on how to fund claimants, resulting in funding being provided in an unclear, inconsistent and ad hoc way;
- 3 **note** that the Waitangi Tribunal has found that the Crown breached its Treaty of Waitangi obligation to ensure that Māori claimants have the necessary resources to participate fully in all its processes;
- 4 **note** the Waitangi Tribunal's long-term recommendation that the Crown and Māori engage in a process to design a suitable system to fund claimants in Waitangi Tribunal inquiries where there is no other claimant funding;
- 5 **agree** to officials conducting targeted engagement with Māori to develop advice on next steps the Government could take in response to recommendation 4;
- 6 **agree** that in early 2024 I will seek Cabinet's agreement to the next steps the Government could take in response to recommendation 4. This advice will take account of the policy work undertaken to date, the proposed interim policy, what was heard from Māori during the Whakatika ki Runga Inquiry, and the Tribunal's findings;
- 7 **note** that for the short-term the Waitangi Tribunal recommended that the Crown:
 - 7.1 acts urgently to require lead agencies to adopt a common set of claimant funding policies; and
 - 7.2 develops arrangements that no longer depend on claimants submitting receipts for reimbursement;

IN CONFIDENCE

- 8 **agree** (in response to recommendation 7.1) to the attached interim common claimant funding policy for kaupapa inquires (interim funding policy) that all lead agencies will apply until a long-term claimant funding system is in place;
- 9 **note** that lead agencies with existing claimant funding policies for kaupapa inquiries will adopt the interim funding policy;
- 10 **agree** the Ministry of Justice will periodically update funding amounts for meals in the interim funding policy as required;
- 11 **agree** the lead agency of a relevant inquiry may approve exceptions to regularly fund additional costs beyond the interim funding policy where:
- 11.1 funding the additional cost fits within existing appropriations;
 - 11.2 funding the additional cost does not have impacts on equality across wider systems, wider policy implications or significant fiscal impacts; and
 - 11.3 officials consider it is not something that requires updating the interim funding policy;
- 12 **agree** that if agencies cannot approve an exception to regularly fund additional costs beyond the interim funding policy under recommendation 11, then the Minister of Justice, in collaboration with the Minister of the lead agency of the relevant inquiry, may agree the exception in a particular inquiry where the cost can fit within existing appropriations and does not meet the threshold of a significant policy issue that should be considered by Cabinet;
- 13 **agree** that the Minister of Justice have the delegated authority to make minor updates to the interim funding policy as required;
- 14 **note** that the Minister of Justice will return to Cabinet if changes being considered to the interim funding policy have wider policy implications, will significantly impact on equality across wider systems (such as the justice system) or will have significant fiscal impacts across portfolios;
- 15 **note** that if the interim funding policy is still in place after approximately 18 months the Minister of Justice will return to Cabinet to revise or update the policy as required;
- 16 **note** that the financial implications of the interim funding policy are uncertain as they are dependent on when the Waitangi Tribunal commences inquiries and schedules events, how many claimants there are and the needs of those claimants;
- 17 **note** that lead agencies with or most likely to have inquiry events in 2023/24 expect to be able to fund the implementation of the interim funding policy within baselines or within existing project funding;
- 18 **note** that in respect of recommendation 17 above, Section (9)(2)(f)(iv) [REDACTED]

Section (9)(2)(f)(iv)

and

- 19 **note** that lead agencies for other inquiries, including those yet to commence, may also need to fund claimant participation according to the interim funding policy.

Authorised for lodgement

Hon Kiri Allan

Minister of Justice

Claimant funding in Waitangi Tribunal kaupapa inquiries

Interim common claimant funding policy for lead agencies

Date xx /xx/2023



MINISTRY OF
JUSTICE
Tāhū o te Tīare

Purpose

This interim claimant funding policy establishes:

- what funding (at a minimum) lead agencies for Waitangi Tribunal (Tribunal) kaupapa inquiries are required to provide claimants, and
- where lead agencies have discretion to fund other claimant costs.

The purpose of the policy is to provide more consistency in the funding available to claimants across Waitangi Tribunal kaupapa inquiries and enable lead agencies to be responsive to claimants' specific needs where necessary. This is an interim policy and is intended to be in place until a long-term claimant funding system is developed. It has been agreed by Cabinet [TBC and insert minute].

Lead agencies are responsible for communicating to claimants and claimant counsel what funding they will provide to claimants under this policy and administering that funding. The policy covers:

- who can access funding including funding to support the participation of kuia, kaumātua and disabled people
- what funding can be provided for:
 - Tribunal events
 - preparatory hui
 - post inquiry engagement
 - research
- a process for funding costs outside of this policy, and
- guidance on what is actual and reasonable.

This policy applies to claimant funding for kaupapa inquiries. Lead agencies for urgent contemporary inquiries should consider funding claimants according to this policy.

Who can access funding

Lead agencies will fund claimants, claimant witnesses and support people.²⁸ Support people will be funded to ensure all claimants have the tautoko and awhina they need during hearings. The funding will particularly ensure kuia, kaumātua and disabled people can participate. Agencies can decide to fund interested parties on a case-by-case basis.

What funding will be provided

Funding for attending Tribunal events

Lead agencies will fund the following costs for claimants and claimant witnesses to attend Tribunal events:

- domestic travel, where required (such as transport between airports, accommodation and event venues), including:
 - domestic flights where required (actual and reasonable costs)
 - buses, ferry, and rental car (actual and reasonable costs)
 - petrol (actual and reasonable costs) or mileage (\$0.95 per kilometre),²⁹ but not both
 - taxis or ride share options (actual and reasonable costs)
- parking (actual and reasonable costs),
- accommodation where required (actual and reasonable costs), and
- meals (up to \$73 per person per day excluding GST).

If higher amounts are needed: Lead agencies will fund mileage and meals according to the specified amounts included above. Where these amounts do not seem sufficient, agencies can fund higher amounts on a case-by-case basis. This discretion will not be used to regularly fund higher amounts than the policy. The discretion is for use, for example, when a location has limited meal options that are high in price, or when there are higher than average travel costs for the time of the event.

Support people: Lead agencies will also fund the above costs for up to three support people per claimant or claimant witness who is giving evidence or presenting at a Tribunal event. Lead agencies can fund more support people on a case-by-case basis where reasonable. This could include funding support people for claimants and claimant witnesses who are not presenting or giving evidence. Some Tribunal events may not require evidence to be presented.

²⁸ This may include non-government organisation staff who are support people.

²⁹ Use kilometre rates for the applicable tax year as specified by Inland Revenue. For the 2022-2023 income year this is 0.95 cents per kilometre. Inland revenue publishes the rates after each tax year ends. However, if the rates for the tax year have not yet been published continue to use the latest available rate from the previous tax year.

Funding for preparatory hui

Lead agencies will fund the actual and reasonable costs for claimants to hold preparatory hui for claimants and claimant witnesses to meet and prepare for Tribunal events. This will include funding of members within a claimant group and claimant witnesses to travel to and from preparatory hui (subject to the same parameters as attending Tribunal events above), venue hire, audio-visual equipment hire, and catering. Lead agencies will also fund any required accommodation. Agencies can fund other costs on a case-by-case basis and should discuss what costs could be covered with claimants.

Support people: Lead agencies will fund up to three support people per claimant group for preparatory hui. Lead agencies can fund more support people on a case-by-case basis where reasonable.

Funding of post inquiry engagement

Where Cabinet has agreed to engagement with claimants in response to the Waitangi Tribunal's recommendations, and this response requires ongoing engagement with claimants, lead agencies are expected to meet the actual and reasonable costs of claimants, and their support people, attending any required meetings or hui. If agencies intend to fund any other engagement with claimants outside the inquiry process, this is left to agency discretion and should be considered in light of Cabinet Office Circular 19(3) Better Co-ordination of Contemporary Treaty of Waitangi Issues.

Funding of research costs

Lead agencies will consider requests from claimants to fund research to support their claims. This will involve:

- considering whether the research has a clear purpose
- working with the Tribunal and claimants to identify the research topic, and
- working with the Tribunal on whether the research is useful and should be funded by the Tribunal or the lead agency.

Where possible agreement will be reached with claimants on the research topic, who undertakes the research, and what review and quality assurance processes will be in place. However, agencies can still fund claimant research where it is agreed that the agency has limited input into the above matters. Agencies should engage across the claimant group in a co-ordinated way. Claimants can be funded as a collective.³⁰

³⁰ For example, the Tribunal's Mana Wāhine Inquiry has a joint research committee which has the mandate and Crown funding to commission independent research on behalf of claimants.

What cannot be funded?

Agencies will not fund time or lost wages for claimants, claimants' witnesses, or their support people.

Funding costs beyond the policy

Funding of costs on a one-off case-by-case basis

Different claimants will have different needs. To respond to the diverse needs claimants may have, lead agencies can fund other costs not expressly included in this policy where reasonable on a one-off, case-by-case basis. This could include, for example, counselling sessions during the claim process, costs to participate virtually, or koha for staying overnight in a private residence or marae. Lead agencies will keep other lead agencies of all current inquiries informed of the types of costs of this nature that they are funding (eg things not communicated to claimants as being funded more consistently).

Regularly funding costs

Regularly funding costs outside of the interim funding policy could create unnecessary inconsistencies across inquiries and the wider justice system, or other government systems. To balance being responsive to specific claimant needs with the need to improve consistency in practice across inquiries, the lead agency of the relevant inquiry may consider funding beyond this policy on a regular basis (such as through communicating to claimants that a cost will be consistently funded that is not included within the interim funding policy) if it follows one of the approaches outlined below.

Funding that can be approved by agencies

The lead agency has the authority to approve exceptions to regularly fund additional costs beyond the interim funding policy in a particular inquiry where funding the cost fits within existing appropriations, does not have impacts on equality across wider systems, does not have wider policy implications or significant fiscal impacts and officials consider that it is not something that requires the interim funding policy to be updated.

Funding that must be approved by Ministers

If any of these conditions in the previous paragraph are not met, decisions on exceptions to regularly fund additional costs beyond the interim funding policy are to be put to the Minister of the lead agency considering the funding and the Minister of Justice. The Ministers will make a joint decision on the matter. They have the authority to agree exceptions in these circumstances where the cost can fit within existing appropriations and does not meet the threshold of a significant policy issue that should be considered by Cabinet.

The Minister of Justice will also consider if any amendment to the interim funding policy is required so that costs will also be met in other inquiries. The Minister has the authority to make minor updates as required, and will return to Cabinet if the changes being considered to the interim funding policy have wider policy implications, will significantly impact on equality across

wider systems (such as the justice system) or will have significant fiscal impacts across portfolios.

What is actual and reasonable?

What costs are actual and reasonable is a judgment call for lead agencies. Claimant participation is the priority, but when deciding what is actual and reasonable lead agencies will also consider:

- if there is a need for claimants and claimant witnesses to be accommodated overnight
- the distance people must travel and if a suitable form of transport has been selected
- if the number of people from a claimant group and support people attending the event is reasonable
- the comparable costs for travelling to the location at the time of the event, and
- the comparable costs for accommodation in a location at the time of the event.

Agencies will discuss with claimants or claimants' counsel what amounts might be reasonable ahead of costs being incurred or rejecting any payments. Information sharing between lead agencies on judgements about what is actual and reasonable will support consistency in practice. Reasonable costs should include funding of additional support to enable the participation of kuia, kaumātua and disabled people. This could include extra nights' accommodation to avoid long periods in cars, extra costs of accessible accommodation, accessible taxis, provisions for service animals. This is not an exhaustive list and other costs will be considered by lead agencies where needed.

Review of this policy

The Minister of Justice can make minor updates to the amounts included for meals as needed to ensure they are appropriate. If this policy is in place after 18 months, the Government will decide if it should be reviewed.