27 June 2025

Access to Justice Policy
Ministry of Justice

By email: legalassistanceconsult@moj.govt.nz

Tēnā koe,

Legal Assistance in the Waitangi Tribunal: improving funding arrangements for claimants' legal assistance

1. The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the consultation note provided by the Ministry of Justice (**the Ministry**), *Legal Assistance in the Waitangi Tribunal: improving funding arrangements for claimants' legal assistance* (the **Discussion Note**).

2. This feedback has been prepared with the assistance of members of the Law Society's law reform committees with experience in Waitangi Tribunal (**Tribunal**) proceedings, claimant funding processes, and the Waitangi Tribunal legal aid system.

Summary of the Law Society's position

3. In summary, the Law Society does not support the suggested option of transferring responsibility for allocating funding for legal assistance to the Tribunal.

4. The process followed so far appears to lack several critical elements that would be expected for a proposal of this scale and constitutional significance:

    a. Consultation with claimants (present and past) and Māori as to what, if any, challenges arise from the present legal aid arrangements.

    b. Analysis and consultation on other options, including improvements to the present arrangements (as have been recommended by the Tribunal in the past).

    c. Analysis of the potential impact on the Tribunal, and any consequential effects on the work of the Tribunal, including whether it might undermine the Tribunal's ability to carry out its constitutional functions.

    d. An analysis of the necessary level of funding required to establish such a function within the Tribunal, while still meeting the legal assistance funding needs of all claimants.

5. Any consideration of changes to the funding arrangements for Tribunal claimants must respect and take into account:

    a. The specialist jurisdiction and constitutional role of the Tribunal.

b. The Tribunal's role in providing access to justice for all Māori, and the importance of maintaining its independence and public credibility.

c. The Tribunal's present lack of capacity and capability to take on the substantial administrative role of assessing claims for funding, as well as oversight of that funding and mechanisms to address disputes that arise.

Consultation process

6. The genesis of this proposal is unclear, but does not appear to have arisen from consultation with current and former claimants about challenges arising from the present system. To the extent that any substantive reform of funding for Tribunal claimants is necessary, this should follow a considered process of consulting on and identifying any problems to be addressed, before looking to consider possible options.

7. Although the thinking on this potential option may still be early, and further consultation may occur at a later stage, the failure to more widely consult current claimants, Māori, and other relevant stakeholders when identifying potential issues and potential solutions, cannot be cured by consultation on a later, more developed proposal.

Question One: What are your views on what might work well with this approach and what might not for claimants, providers, the Tribunal, and the Crown?

8. The Law Society does not support the suggested option of transferring responsibility for allocating funding for legal assistance to the Tribunal. It does not appear the Tribunal has sought this role, and the Law Society considers it is not appropriate to impose it.

9. A key consideration must be how the Tribunal would be expected to manage such a process. The volume and complexity of funding decisions, the need for vetting and quality assurance of providers, and the risk of conflicts all point to a significant undertaking. Without a fully developed institutional framework and guaranteed resourcing, the proposal would transfer substantial obligations to an already stretched body and create serious risks for both claimants and the viability of the Tribunal itself.

10. More fundamentally, if the Tribunal is tasked with making determinations about who should be funded in proceedings before it, particularly in inquiries involving competing or overlapping claims, there is a risk of undermining its independence and public credibility.

The current approach

11. We question whether there is a problem with the current system, such that it warrants intervention or substantive change. If there are such problems, they are not evident from the Discussion Note and as noted above, it does not appear they have been identified through a process of consultation with claimants and other stakeholders. The Discussion Note refers only to the proposed change as "a better fit for the Tribunal" and suggests it "could enable some reduction in government costs." The only issue identified with any specificity is that the Legal Services Commissioner must consider each legal aid claim in its own right.

12. It is not clear what a "better fit" means in this context:

a. If it refers to a tikanga-aligned practice, the existing legal aid system has already shown flexibility and might be adapted to better incorporate tikanga (if that is indeed the issue).

b. If it instead refers to administrative convenience or cost savings, we have a concern that any changes to funding that deter or prevent individual claimants from participating – whether through greater administrative complexity, narrower eligibility, or a chilling effect from institutional gatekeeping – would risk undermining the Tribunal's constitutional role. If cost savings are pursued at the expense of claimants' rights, the system would fail the very purpose it exists to serve.

13. The current legal aid system complemented by provision of funding for claimant participation from relevant agencies during hearings, broadly, serves claimants well, ensuring they can participate meaningfully in what are often complex and lengthy hearings, where historical and tikanga-based claims must be advanced through detailed evidence and legal submissions.

14. The Tribunal's specialist jurisdiction is unique within our legal and constitutional framework, and its deep constitutional roots are reflected in the preamble to the Treaty of Waitangi Act 1975, which cites the Tribunal's role in navigating the differing texts of the Treaty and Te Tiriti and holding the Crown to account. The current approach to legal aid reflects the public interest nature of Treaty litigation. It was shaped in part by concerns arising from the era of Crown forest litigation, where Māori were forced to seek relief through the courts without appropriate support. Tribunal legal aid was a deliberate policy response, designed to uphold access to justice and ensure Māori could challenge Crown breaches of Te Tiriti without prohibitive financial barriers.

15. Without legal representation, claimants would be at a significant disadvantage in presenting their cases and protecting their claims. The Crown is represented at every stage of these proceedings by senior legal counsel from Crown Law, private law firms and the independent bar, often with access to expert and departmental resources. As the Tribunal itself notes, its preference is that claimants have legal representation, especially when dealing with claims dependent on documentary records or claims that give rise to complex issues.[1] Legal aid is therefore available to claimants on a non-threshold basis – it does not require means testing and is not repayable. Any attempt to remove or restructure that framework without full engagement and resourcing would raise serious constitutional concerns.

16. While there are ongoing concerns with funding levels, in particular rates for counsel and for provision of expert evidence, the current system ensures access to legal representation while upholding high professional standards and fiscal accountability.

17. The current legal aid scheme is a comprehensive regime that determines who receives aid, what rates and items of aid will and will not be paid for, over what timeframes, and includes a system to handle challenges about all of those matters, including decades of legal

1 Waitangi Tribunal *Guide to the Practice and Procedure of the Waitangi Tribunal* (Waitangi Tribunal, 2023) at 22.

precedents from appeals. This institutional capacity, like the protections described above, will not be easily replicated if funding responsibility is transferred to the Tribunal.

Access to justice of all Māori

18. One of the most valuable features of the Tribunal is that any Māori person can bring a claim. This is protected by s 6 of the Treaty of Waitangi Act 1975 and affirms s 27(3) of the New Zealand Bill of Rights Act 1990. This openness ensures that individuals, whānau, hapū, and iwi, can hold the Crown to account regardless of resources or institutional backing.

19. Two significant recent inquiries show the benefit in individuals being able to pursue claims. The Tu Mai Te Rangi! report (Wai 2540) arose from a claim filed by an individual concerning the Crown's failure to address disproportionate Māori reoffending rates. The Report on Claims about the Reform of Te Ture Whenua Māori Act 1993 (Wai 2478) was likewise initiated by an individual. Both claims raised nationally important issues and contributed to the Crown reconsidering major areas of policy and legislation. These examples demonstrate why the Tribunal's broad and accessible jurisdiction should be preserved.

20. The ability for individuals, whānau, hapū and iwi to make claims to and/or participate in the Tribunal is expressly preserved by the Treaty of Waitangi Act, and reflects the guarantees made by the Crown to 'nga Rangatira me nga Hapu' of Aotearoa. Similar participation rights, for whānau and hapū, are not formally recognised by the common law, which can create barriers to accessing the general courts where issues of mandate and representativeness may be raised in relation to standing to progress claims against the Crown. The absence of a 'single corporate legal personality for tribal groups' is accordingly not a barrier to accessing the Tribunal's jurisdiction to make claims that Crown conduct is, or is likely to be, inconsistent with the principles of the Treaty of Waitangi.'[2]

Provider quality

21. Provider quality is currently ensured through a robust eligibility framework. Before being approved as a 'lead provider', lawyers must have at least 18 months of supervised practice experience in the Tribunal and demonstrate substantial and active involvement in a minimum of three significant Tribunal proceedings. They must also show a sound knowledge of Te Tiriti and Tribunal jurisprudence, an understanding of tikanga Māori, and a basic level of te reo Māori. Applications are assessed by a panel made up of Ministry of Justice staff and experienced Tribunal counsel. This system ensures that only competent and culturally aware lawyers receive legal aid approval in this specialist jurisdiction.

22. The Legal Services Commissioner provides necessary oversight and consistency in funding decisions. Estimates of costs in advance, independent scrutiny of invoices, established audit practices, and an established review process for decisions taken all contribute to the integrity of the system.

23. It is unclear whether these factors have been considered.

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2 Hille, Jones and Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at [12.3.1].

Claimant—counsel relationships

24. Claimants must be able to work with the lawyer of their choice. Many claimants have long-standing and trusted relationships with their legal counsel, relationships that in some cases extend back decades. These relationships are not incidental; they are essential for the effective presentation of claims, and for avoidance of conflicts as between claimant groups which may not be obvious to an outside observer.

25. The sharing of kōrero tuku iho and the building of trust required for wānanga, evidence gathering, and strategic direction cannot be undertaken without these relationships. We are concerned the proposed change may endanger those relationships.

Resourcing

26. The Tribunal is not resourced to administer a high-volume funding system. There are currently more than 20 Tribunal inquiries underway, many involving over 100 participating claimants.

27. These inquiries include historical inquiries, priority inquiries, kaupapa inquiries, urgent inquiries, and remedies inquiries. As at 19 June 2025, there were 1,625 active Waitangi Tribunal legal aid files. This reflects the significant volume of funding applications the Tribunal would be required to manage. Importantly, this number does not indicate an excessive or unwarranted number of files. Before any grant of legal aid is made, claimants and providers must demonstrate how each claim is distinct from others before the Tribunal and how it is not sufficiently protected by another claim, as required by section 47(2)(c) of the Legal Services Act 2011. Each of these 1,625 files has gone through that screening process, confirming that each raises particular claim issues or requiring the claim issues to be combined with or represented by another claim would create a real risk of conflict or prejudice.

28. Shifting responsibility for managing, assessing, and monitoring these files would require a significant reallocation of resources and a fundamental change to the Tribunal's operational structure. Even if a simplified or partial model were adopted, the administrative burden would remain substantial. Further staffing would be required, and institutional capacity, which the Ministry of Justice has developed over years of provision of this funding, would be lost and need to be redeveloped.

29. The difficulties in establishing a novel funding regime are well known and must be acknowledged. Consider, for example, the administration of the Takutai Moana Funding Scheme, managed by Te Tari Whakatau. The Wai 2660 and Wai 3400 inquiries scrutinised the Crown's failure to properly fund legal assistance for those matters, finding that Te Arawhiti (now Te Tari Whakatau) was under-resourced and subsequently unable to adequately implement its funding for legal assistance. They also speak to the start-up cost of a new regime. For example, at page 30 of The Takutai Moana Act 2011 Urgent Inquiry Stage 2 Report (Wai 3400), Tribunal evidence showed that officials projected an entire year's agency budget would be needed to stand up a funding system comparable to some other departments. As a result, low tech options such as Excel spreadsheets are relied on, which increase time for processing of invoices and introduce a high risk of human error.

30. Without full Crown commitment and resourcing, the same risks apply here with the likely result being institutional confusion, delay, and prejudice to claimants' rights. That could not only undermine the purpose of the Tribunal but also breach the Crown's commitment to ensure Māori can meaningfully pursue remedies for breaches of Te Tiriti.

31. The unique character of customary rights-related proceedings was recently recognised by the Supreme Court in a case under the Marine and Coastal Area (Takutai Moana) Act 2011: *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka*.[3] In that decision, the Court took the rare step of making a prospective costs order, confirming that no costs would be awarded even if the applicants' appeal was unsuccessful. While the case was not a Tribunal hearing, this decision reinforces the principle that Treaty litigation should not be constrained by the chilling effect of financial risk.

Question Two: Are there alternative approaches that you would recommend?

32. The current legal aid model should be retained, with targeted improvements to ensure better responsiveness and suitability for the Tribunal context.

33. The Legal Services Commissioner has already demonstrated that the current system can adapt to the Tribunal's evolving kaupapa inquiry model. Following the Whakatika ki Runga inquiry, the Commissioner made operational changes to improve engagement, simplify expert witness funding processes, and support claimants with clearer information. Further improvements could include:

    a. Reducing reliance on reimbursement models, particularly for whānau and hapū without financial reserves;

    b. Standardising protocols across all Tribunal inquiries, using the Mana Wāhine funding model as a baseline (as recommended by the Tribunal);

    c. Improving timeliness of decision-making, particularly where legal aid is sought for urgent hearings;

    d. Clarifying the application and reporting processes, particularly around section 49 reports and support for expert evidence.

34. These changes should be made through strengthening the existing legal aid framework—not by transferring responsibility to a judicial body that lacks the infrastructure, mandate, or resources to administer funding at this scale. There must also be genuine engagement with Māori should changes be made.

35. The Waitangi Tribunal's Wai 3060 Report on Whakatika ki Runga, a Mini-Inquiry Commencing Te Rau o te Tika: The Justice System Inquiry addressed the issue of claimant specific funding (rather than funding for legal services). It recommended a system-wide response to ensure adequate and timely support rather than reliance on individual agencies. We would not want that emerging model — nascent as it is — to be disrupted by a sudden shift in responsibility by placing the burden on the Tribunal. The current approach involves

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3 *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waiōweka* (Prospective Costs Order) [2024] NZSC 119; [2024] 1 NZLR 418.

central government taking responsibility for funding design and delivery, which is the appropriate and Tiriti-consistent approach for now.

36. If structural reform is to be considered, one possible option could be the establishment of an independent funding body. However, if such a body were pursued, it should be co-designed with Māori, and then transitioned from within the Ministry of Justice to avoid institutional disruption and minimise the risk of delays, inconsistency, or confusion around funding responsibilities. This cannot be rushed.

37. Finally, we recommend the legal aid regime be extended to provide non-repayable and non-means tested assistance for civil proceedings that are directly connected to Tribunal claims or outcomes. This includes, for example, situations where claimants are compelled to bring or participate in judicial review or declaratory proceedings due to Crown inaction, to resolve jurisdictional matters affecting their claims, or to challenge Tribunal findings (as has been seen following release of *The Mangatū Remedies Report 2021*.[4]

38. These are not ordinary civil disputes—they are a necessary continuation of the Treaty claims process. As confirmed by the High Court in *Griggs v Legal Services Commissioner*,[5] legal aid for Waitangi Tribunal proceedings is a distinct and justified regime, designed to ensure access to justice in the context of historical grievance and collective Māori rights. Extending legal aid in this way would be a principled and constitutionally appropriate step.

Question Three: Some inquiries run over a few years, so there will be a number of inquiries that are already underway if a new system were introduced. What would be the fairest and most effective way of accommodating claimants with legal aid in existing inquiries in any new system?

39. Given the concerns outlined above, we do not support the transfer of funding responsibility to the Tribunal. However, if changes were made to the administration of funding within the existing legal aid system, the fairest approach would be to maintain continuity for existing claimants and providers.

40. That would mean:

    a. Engagement with whānau, hapū and iwi to codesign a replacement system;

    b. Retaining all existing legal aid approvals;

    c. Allowing current claimants and counsel to continue under their current terms of grant, without disruption;

    d. Ensuring any new system is phased in only for new applications, with clear transitional guidance and communication;

    e. Avoiding retrospective compliance burdens on current recipients.

41. Disrupting legal assistance arrangements in ongoing inquiries risks delay, confusion, and potential prejudice to claimants who are already navigating a complex and lengthy process.

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4 See *Attorney-General v Waitangi Tribunal* [2023] NZHC 132.
5 [2022] NZHC 3001.

Continuity and clarity must be the priority. The current legal aid framework is functioning—the only material challenge that the Law Society is aware of remains the level of Crown funding available to meet current and future demand.

42. Any move that risks undermining timely access to legal assistance — such as shifting responsibility to an already under-resourced body — risks breaching not only the Crown's Treaty obligations but also its express undertakings under the 1989 Crown Forests Agreement. In the Mangatū and Waipāoa Forest Remedies context the Crown has affirmed its "best endeavours" obligation under the 1989 Forests Agreement, committing to support the Tribunal to process and report on Crown Forest claims in the shortest reasonable time. That obligation is ongoing and has real constitutional weight. The enforceability of that obligation was recently affirmed by the Supreme Court in *Wairarapa Moana ki Pouākani Inc v Mercury NZ Ltd*,[6] which confirmed that a failure to comply could give rise to legal remedies, including financial consequences. In this context, delays caused by funding changes are not merely procedural – they carry real constitutional and legal risk for the Crown.

Conclusion

43. The Law Society urges caution and a thorough, open process before proceeding further, if at all. Changes to the funding of Tribunal claimants will impact both claimants and the Tribunal. Without adequate funding and the necessary support to establish and maintain a funding scheme, the Tribunal's constitutional role risks being undermined.

Nāku noa, nā

Frazer Barton
President

6 [2022] 1 NZLR 767.