

# Policy on Legal Aid for Proceedings before the Waitangi Tribunal

## 1. Objective of Policy

The policy reflects the function of the Legal Services Agency to administer the legal aid scheme in "as consistent, accountable, inexpensive and efficient a manner as is consistent with the purpose of this [the Legal Services] Act" (section 92(a), Legal Services Act 2000).

The aim of this policy therefore is to establish fair and transparent guidelines for the granting of aid for Waitangi Tribunal proceedings, and to ensure that the delivery of legal services under legal aid is cost effective.

The purpose of the Act is to promote access to justice. The Agency must therefore ensure that its policy takes account of access to justice issues for Waitangi Tribunal claimants by ensuring that legal aid supports the processes and the context of the Waitangi Tribunal.

To ensure that these issues have been given appropriate consideration, this policy has been developed in close consultation with the Waitangi Tribunal, including a representative of the Presiding Officers, the Legal Services Committee of the New Zealand Law Society, the Maori Law Society (Te Hunga Roia Maori O Aotearoa), the Agency's Specialist Advisers for Waitangi Tribunal legal aid cases, and Agency staff. In addition to these groups, consultation over the development of the policy has been carried out with the Office of Treaty Settlements, Crown Law Office, Crown Forestry Rental Trust, and the Ministry of Maori Development (Te Puni Kokiri).

One key outcome of the policy development process is a commitment by the parties mentioned above to continue to maintain ongoing close working relationships over Waitangi Tribunal legal aid matters. In particular, the Waitangi Tribunal and the Agency will continue to communicate regularly and co-operate closely over Waitangi Tribunal processes and the way that legal aid is administered in support of this.

## 2. Background

Sections 42 to 45 of the Legal Services Act 2000 (the Act) specifically govern the granting of legal aid in respect of proceedings before the Waitangi Tribunal. In addition to these sections of the Act, other sections also affect the granting of aid and the administration of the grant.

For example, section 7(1)(f) of the Act provides for legal aid in respect of Waitangi Tribunal proceedings, but sections 9(5), 14(3) and 15(4) relate to issues surrounding a claimants' eligibility for legal aid. Section 32(5) provides that property returned or granted as a result of Waitangi Tribunal proceedings is not subject to a charge in favour of the Agency.

Sections 42 to 45 together set out the key criteria the Agency must take into account in considering a grant of aid (sections 42 and 43), a process that must be followed by the

Agency (referring the application to the Tribunal under s 44), and the contribution that may be imposed as a condition of a grant (s 45).

In considering an application for legal aid from a claimant group, or an amendment to a grant already made, the Agency will, as required under section 42 (2) of the Act, make a determination of whether in the specific case, a grant should be made. Key aspects to the decision are the legitimacy of the claim as a separate claim, and the need for legal aid to pursue it. If aid is granted, the Agency will reassess these issues whenever the grant is amended and may at any time seek full information to assist it in this consideration.

## **2.1 The availability of legal aid for proceedings before the Tribunal**

Whilst in terms of the administration of legal aid, a grant of aid for Waitangi Tribunal proceedings is not different to any grant of civil legal aid, the history behind the granting of legal aid for Tribunal proceedings establishes a particular context.

The extension of civil legal aid for Waitangi Tribunal proceedings arose out of litigation by the New Zealand Maori Council (on behalf of all Maori) against the Crown in relation to the sale of land owned by state owned enterprises (SOEs). [1] The provision of legal aid for Waitangi Tribunal proceedings was a term of the settlement of this litigation and was enshrined in the Treaty of Waitangi (State Enterprise) (TOWSE) Act 1988 which among other things, amended the then Legal Aid Act 1969.

It is clear under the terms of the settlement between the Crown and Maori that the availability and provision of legal aid to Maori was essential if the other terms negotiated in the settlement were to be effective. In particular, because the terms of the settlement allowed the Crown and SOEs to transfer and/or sell land and other assets, it was of fundamental importance to Maori to be provided with the means (through legal aid) of pursuing their claims in the Waitangi Tribunal.

The amendments effected to legal aid legislation in 1988 (described above), and carried through to the Legal Services Acts 1991 and 2000, were designed therefore to ensure that the settlement and the protections in the TOWSE Act were not made meaningless through the inability of Maori groups to bring their cases before the Tribunal, and to recognise that the nature of claimants and proceedings before the Tribunal differ from other areas where legal aid is available.

This policy must therefore encompass the spirit and intention of the 1988 settlement. This has implications for a number of issues to do with eligibility for legal aid and the way aid is administered generally.

## **2.2 The role of legal aid for Waitangi Tribunal proceedings**

The availability of aid should support the Tribunal processes and approaches. The Tribunal is a specialist Commission of Inquiry with its own statute (the Treaty of Waitangi Act 1975). When hearing cases, it is not bound by the Court rules of evidence and it may to some degree set its own procedure, which can vary between inquiries. It is, however, required to follow the rules of natural justice.

The Tribunal follows a process of continual review of its practice and will issue guides to its practice from time to time. The Agency will use these as a guide to the broad standard practices and procedures of the Tribunal.

The Agency's practices will support the Tribunal's emphasis on the effective management of historical claims on a district-wide basis and the overall streamlining of claims before the hearing.

The Agency will meet on a regular basis with officials and presiding officers of the Tribunal in order to maintain a close understanding of the approaches it is following in inquiries generally, especially with regard to the rohe or district, the statements of claim, key milestone dates, the finalisation and review of the casebook, amended statements of claim, pleadings and the hearing process, issues of cohesiveness of groups, mandate and representation, expected manner of cross examination etc.

The Agency may seek information from the Tribunal at any stage on issues such as the nature and extent of matters raised in the claim, the relativity of the claim and the claimant group to others in the inquiry, and the extent of any overlapping or conflicting claims.

### **2.3 Integrity of legal aid**

Legal aid decisions must be seen to be cost effective and legitimate. Each decision must generally build confidence in the legal aid system. To this end, this policy is consistent with that for other eligible proceedings, in that each grant of aid for Waitangi Tribunal proceedings, or an amendment of a grant already made, will be subject to the same general considerations as any other grant of aid.

#### ***Authorisation required for other ("top-up") payments***

Section 66 of the Legal Services Act 2000 provides that before a listed provider receives a payment additional to a payment from the Agency from or in respect of a person to whom services are provided under legal aid, the provider must seek authorisation from the Agency. The Agency's policy on additional ("top up payments") refers.

An additional payment could include payments to the listed provider from any member of the claimant group or from third parties such as the Crown Forestry Rental Trust, the Office of Treaty Settlements, the Waitangi Tribunal, and any other sources. Such payments include contingency payment arrangements.

In line with this requirement, prior to the receipt by a listed provider of any payments for work or other activities associated with a Waitangi Tribunal claim for which aid is granted, the lead provider must seek the authorisation of the Agency. Before it will consider the approval of such a payment, the Agency may seek a detailed breakdown of the proposed payment/s and its purpose. The Agency may wish to see certified invoices and accounts for money received.

#### ***Advice that claimant is in receipt of legal aid***

As required under section 21 of the Act, the lead provider is responsible for ensuring that the Tribunal and the Crown are informed that the claimant group is in receipt of legal aid. In the interests of transparency and the most cost effective use of government

funds, the Agency may choose to inform another government agency involved in the Treaty process that the lead provider or the claimant group is in receipt of legal aid.

### ***Other Legal Aid Policies***

A grant of legal aid for a claim before the Waitangi Tribunal is subject to all relevant legal aid policies applied by the Agency. Especially relevant are the Agency's policies on authorised payments under section 66, payment for providers' travel costs, assignment, and disbursements. The Agency expects that Waitangi Tribunal legal aid providers are familiar with the Agency's policies, contained in the Provider Manual.

### **3. Overview of the application process**

Claimants may submit a claim to the Tribunal at any stage before the completion of the inquiry[2] and may amend or add to their claim at any stage in the course of the inquiry until the date fixed for the finalisation of statements of claim. Although an application for legal aid or an application for an amendment of a grant may also be made at any stage before the completion of the proceedings, the Agency strongly prefers to receive applications as early on in the process as possible.

If the Agency approves the grant application, or the application to amend the original grant, it will approve a maximum grant[3], after consideration of the detailed estimate provided by the lead provider[4]. This represents the full financial commitment of the Agency at that time, subject to justification that the actual amount invoiced was valid and in accordance with the maximum grant made.

The maximum grant will cover future anticipated work over a period specified by the Agency. The Agency will generally specify whether the period is to be three or six months, depending on the stage of the case and the ability of the lead provider to detail foreseeable work to be carried out. If a grant is to be for a longer period, there must be specific and demonstrable reasons for this exception.

The Agency expects and prefers that all work is specified and approved in advance so that lead providers know the extent of the Agency's commitment before work is undertaken. However, the maximum grant may cover work prior to the application as well as over a future period of three to six months (as decided by the Agency) from the date of application.

No sum greater than the maximum grant will be considered for payment by the Agency unless the request for payment is accompanied by an application for amendment to the grant. The Agency will want to know the reasons for variation from the original estimate as well as the grounds for any future maximum grant.

If at any time after the application for legal aid is made, Agency staff consider it beneficial to discuss the application in person with the lead provider and/or other listed providers, the Agency may propose such a course of action. The Agency would generally fund direct travel costs associated with this but would not fund the time for such a meeting.

The Agency may amend the maximum grant before the expiry of the existing maximum grant. The Agency will assess the grounds for amendment on the basis of the

information provided to support the amendment. The information supplied must be clear and in sufficient detail to allow the Agency to make a fully informed decision.

#### **4. Stages of application process**

To make an application for legal aid for Waitangi Tribunal proceedings, the Agency requires the lead provider and/or the applicant to complete and submit the prescribed application form together with supporting information as described in this policy.

The process the Agency will follow on receipt of an application for legal aid is as follows:

1. Assess the application and supporting information provided to ensure that full information about the nominal claimant and the claim is included (see information required set out below in section 7).
2. Acknowledge receipt of the application and either seek additional information or advise that the application is to be referred to the Tribunal as required under section 44 of the Legal Services Act 2000. The application will not be referred until the Agency is satisfied that it has all the information it requires.

#### ***Referral to Tribunal for a section 44 Report***

3. Refer the application to the Waitangi Tribunal as provided for under the Act and seek information from the Tribunal on the matters on section 44 (a), (b) and (c). The Agency will also seek from the Tribunal the date when the section 44 Report will be available and convey this information to the proposed lead provider and the claimant/s as soon as it is received.

As part of the section 44 request for information, the Agency will normally seek from the Waitangi Tribunal information on:

- the nature of the inquiry of which this claim forms part, and
- the other claims that may be part of this inquiry or are likely to become part, and
- how this claim might relate to other claims, and
- whether, in the opinion of the Tribunal, this claim, or part of it, could or would better be dealt with in conjunction with another claim, and
- any historical information or issues that the Tribunal considers the Agency should be aware of, and
- the expected course of the inquiry in terms of anticipated activities as part of the proceedings, and their timing.

#### ***Interim Grant***

4. Pending further consideration of the application, once the Agency receives the section 44 Report from the Tribunal, the Agency may agree to make an interim grant of aid under section 14(1) (b) of the Act. This will be a maximum grant under section 20 of the Act, and will not cover more than three months. The Agency may amend an interim grant in three-month stages.

The Agency would only agree to an interim grant or an amendment to an interim grant

- if the Agency is satisfied that a full grant of aid is likely to be approved

- if the lead provider submits a detailed account of the activities proposed to be undertaken in the coming three months and then submits a detailed invoice every month (as for a full grant, see paragraph 7 below)
- in a situation where the Tribunal has not yet delivered its full inquiry report. In other words, an interim grant is not usually available for settlement negotiations or a remedies hearing once the Tribunal has delivered its full inquiry report.
- An interim grant of aid, and/or an amendment to an interim grant of aid does not in any way imply that a full grant will be made once the section 44 Report is received.

***Once s 44 Report is received***

5. On receipt of the section 44 Report from the Tribunal, the Agency will, on the basis of the information before it, determine whether aid will be granted.

If the Agency plans to grant aid, it will send the section 44 report to the lead provider and seek from the proposed lead provider specific information as to the activities to be carried out under the maximum grant to be made, including a detailed estimate of costs under the maximum grant. The Agency may at this stage advise the provider of any matters it believes may affect the maximum grant limit.

The Agency may decline to grant aid at this stage or may decide to defer a decision. It may also decide to make a limited maximum grant at this stage and defer an amendment until a later time. The Agency will provide reasons for any course of action it takes in such circumstances.

***Maximum Grant***

6. If the Agency proposes to make a grant, it will, once it is satisfied it has the information it requires, make a maximum grant under the Act (s 20). The Agency will advise the applicant and the lead provider of the maximum grant, what it covers (in terms of the estimate provided), whether the grant covers payments to other specified listed providers (s14(2)(b)), any conditions that attach to the grant (s14(2)(c)), and confirm that the lead provider has been assigned to the case. If the Agency has made a maximum grant that is less than that sought in terms of any aspect of the estimate, the Agency will give an explanation as to why it has limited the maximum grant.

***Reconsideration or Review***

7. The lead provider or the applicant may seek a reconsideration of this decision and/or may seek a review of this decision by the Legal Aid Review Panel. (Reconsideration or review may be also be sought of a decision to amend a grant.)

**5. Financial resources and financial eligibility**

On receiving an application for aid for Waitangi Tribunal proceedings, the Agency will, as required, give due consideration to the level of hardship that might be suffered if aid were not granted (s 42(2)(b)). Hardship here is not merely a financial consideration, although this must also be considered, but relates to the effect on the claimant group of the claim going unheard, and there being no possibility of Crown acknowledgement of grievance and material compensation.

The Agency considers that these factors in themselves would give rise to substantial hardship in most cases.

Sections 9(5), 14(3) and 15(4) together allow that where a claim to the Waitangi Tribunal is made by a Maori on behalf of any group of Maori of which he or she is a member, the financial criteria relating to disposable income and capital cannot be the basis for denying legal aid and the ordinary contribution requirements may not apply. In light of the above paragraphs, the Agency does not generally require financial information in respect of the nominal applicant or the claimant group at the time of application.

However, Section 43 (1) allows the Agency, in assessing whether the group of Maori would suffer hardship, to take into account "not only the financial resources of those members of the group who are immediately involved in making the claim, but also the extent to which other members of the group, or any incorporated body that represents the members of the group, or both, might reasonably be expected to contribute towards the cost of the proceedings."

The Agency may therefore require detailed financial information if there is reason to believe that the claimant group is reasonably able to fully fund its own legal representation.

If the Agency does seek financial information, it will specify what information it requires. This is likely to include details of

- assets owned by the group, or any incorporated body associated with the group.
- any significant assets privately or jointly owned by any members of the group.

This may include property or financial reserves including trusts. The Agency may require a copy of the trust deed and most recent financial statements.

## **6. Conditions on a grant of aid for Waitangi Tribunal proceedings**

Section 45 of the Act provides for the Agency to require a contribution as a condition of grant, calculated in accordance with the Act and the Legal Services Regulations 2000. Under section 45, a contribution can apply not only to the applicant, but also to any group whose financial resources could be taken into account under section 43 (see above).

However, the Agency considers that to require claimants to fund their participation in a process to address claims of grievance against the Crown could be inconsistent with the grounds for granting aid. The Agency will not therefore generally seek a contribution from the claimant or the claimant group.

## **7. Submitting an application**

An application form for Waitangi Tribunal legal aid must be completed by or on behalf of the nominal applicant, signed by the nominal applicant and submitted to the Agency's Specialist Unit.

The nominal applicant must have the mandate of the group they represent for the purposes of the legal aid application. If this is disputed at any stage in the course of the

legal aid grant, the Agency may require detailed information as to the issues at dispute in order to determine the best course of action for the Agency to take. If the nominal applicant changes, the Agency would generally seek to withdraw aid and a new application by a new nominal applicant would be required.

The application must contain sufficient detail and information to enable the Legal Services Agency to make a fully informed decision as to whether the application is to be approved. As noted above, if insufficient information is submitted, the Agency will seek further information before the application is referred to the Tribunal for a section 44 Report.

The full information required by the Agency to approve a grant should be included in an annex to the application form, submitted at the same time as the application form. This additional information should be submitted under the headings below.

- Contact details of the applicant and the group  
The name and address of those on behalf of whom the claim to the Tribunal is made. If it is impractical to name all those on whose behalf the claim is made, an appropriate description of this group is required. The relationship of the group to the claimant must also be provided.
- Contact details and provider numbers for the lead provider<sup>[5]</sup> and all other listed providers proposed to be involved  
The full name and address of the lawyer who wishes to be assigned as the lead provider and the names and provider numbers of any other listed providers anticipated to be involved in the claim covered by the application. Note that all legal advice and representation in the claim must be provided by a provider listed with the Agency as a Waitangi Tribunal provider. If in doubt in any particular instance, providers should consult the Agency over this before a non-listed provider undertakes legal advice and/or representation that the lead provider wishes to be covered by a grant of legal aid.
- Full background to the claim, including the WAI number if this is available  
A full background as to the nature of the claim for which aid is sought, setting out all relevant matters, including the likely historical, and other factual and legal issues to be presented to and/or addressed by the Tribunal.
- Involvement of experts, witnesses or others  
Whether the views and perspectives of experts, witnesses or other people are likely to be needed in the course of the claim and if so, who these might be and what might be the nature of their involvement.
- Full information on matters set out in section 42(2) of the Legal Services Act 2000, which the Agency must consider before making a grant:
  - why the claim requires separate legal representation from any other claim before the Tribunal
  - details of the nature and the extent of the hardship that would be suffered by the group of Maori on whose behalf the application is made if aid were not granted
  - why the interests of the group of Maori is not sufficiently protected by any other claim (either before the Tribunal, or that might be before the Tribunal in due course, or that is subject to settlement negotiations). This may mean that a full explanation of the relationship to and difference from other claims may be required.

## **8. Information required on receipt of section 44 Report**

Once the Agency receives the Tribunal's section 44 Report, and assuming that the Agency is considering approval of a grant of aid, it will immediately seek further detailed information from the proposed lead provider as follows:

- A detailed overview of the activities under the maximum grant  
Full information on activities to be covered by the initial maximum grant. This may cover actions completed prior to the application for aid and up to the receipt of the section 44 Report, as well as those to be undertaken over a future period of not more than three months from the date of the Agency's request for this information.
- Involvement of experts, witnesses or others  
Whether the involvement of experts, researchers, witnesses or other people is likely to be needed during the next three months and if so, who these might be and what might be the nature of their involvement.
- An itemised estimate  
This must cover all chargeable time and disbursements included in the maximum grant sought. The estimate must clearly demonstrate the relationship to all actions undertaken and proposed to be carried out (as outlined above).

The estimate must give a detailed breakdown of all matters it covers including

- Document drafting time
- Correspondence
- All preparation including reviewing and supervision of research and other material, and collation of this material
- Client and witness attendances including telephone attendances and liaison with claimants
- Hui attendances
- Conference attendances
- Preparation for hearing time
- Tribunal attendances and hearings
- Disbursements, including all work carried out by people who are not listed to provide legal services for the Agency under Waitangi Tribunal proceedings (see below for more information on disbursements).

## **9. Amendment to a grant**

An amendment to a grant must be sought for any work not already covered by a maximum grant. This may be work that was not anticipated in the course of an existing maximum grant or work to be undertaken over the coming period of up to six months. Each time an application for an amendment is made, it should cover all matters described in the section above

## **10. Payment for preparation and attendances, conferences and hearings**

In general, the Agency will pay for one or at most two listed providers for pre-approved and certified actual time spent at client attendances, conferences, other Hui, hearings, mediations and negotiations, at the guideline hourly rate. The role and activities of all providers to be covered by a maximum grant must be demonstrated to the Agency, and their distinct and justifiable contribution must be outlined at the time an invoice is submitted.

In addition, the Agency will fund preparation time. This will be assessed on the basis of demonstrated need for preparation at the time an application is made and/or an amendment is sought. There is to be no duplication in preparation activities and all preparation must be justified.

Preparation includes document drafting, correspondence, reviewing and supervision of research and other material, and collation of this material, all client, claimant and witness attendances, Hui attendances, conference attendances, preparation for hearing time, Tribunal attendances and hearings, mediations and negotiations.

Whilst the Agency recognises that the investment of preparation earlier in the case may be valuable, providers are expected to keep all work to the minimum necessary and not to engage at any stage in any activities that can not be justified.

The Agency will pay for pre-approved disbursements (see section 16 below). In making an application for a grant or an amendment to a grant, the provider will need to estimate attendance and hearing times, and base the request in the application on this estimate. When the monthly invoice is submitted, justified actual hearing time will be paid, and the preparation time will be based on the attendance at hui and hearings. The lead provider is to attend pre-approved attendances, conferences, other Hui, hearings, mediations and negotiations, unless an alternative arrangement has been approved by the Agency.

### **11. Three to six month maximum grant**

The Agency will consider a maximum grant of aid (or an amendment to a maximum grant) to cover all activities that the lead provider anticipates will take place during the coming three to six months, depending on the ability of the provider to specify the activities to be carried out. If there are no activities proposed during the coming months, the Agency will defer a decision until a clear plan of actions is demonstrated. It is to be noted that the Agency accepts no financial liability unless activities are specifically covered by a maximum grant.

### **12. Submitting an invoice**

Invoices are to be submitted at least every month. The invoice should cover all work during the past month, and itemise all activities and disbursements. The regular submission of invoices is required so that the Agency can properly manage its liabilities. The invoice submitted must align with the earlier estimate and include all completed actions including preparation, all hearings, and any other activities including hui. If the invoice is for more than the maximum grant in respect of any individual costs in the estimate, an amendment must be sought to the maximum grant before that aspect of the invoice will be paid. The reasons for the activities not covered by the maximum grant must be given.

A copy of each invoice that is sent to the Agency must be sent to the claimant group. This ensures that the claimants are aware of the cost of the legal aid and the specific activities carried out under the grant.

### **13. Payment of Invoices**

The Agency's payment terms for invoices submitted under this policy are the same as those applying to other providers of legal aid.

#### **14. Specialist Advice**

In considering the granting of aid, the Agency will seek the expert advice of its contracted or in-house specialist advisers for Waitangi Tribunal matters as and when it considers this necessary. Whilst the Agency recognises it will always need a level of access to external specialist advice, especially in such a specialised area, it is the aim of the Agency to develop its own expertise so as to limit the need for external input.

#### **15. Funding for activities as part of the Tribunal process**

The Agency may consider funding for any activities that the lead provider and/or other listed providers are required to carry out as part of the Tribunal processes. Prior approval for funding for all such activities must be sought and any approval will be specific and included in a maximum grant.

An amendment to the existing maximum grant must be sought to cover any activities not already approved.

In considering such requests for approval for funding, the provider will need to demonstrate to the Agency's satisfaction that the proposed activity is legitimate, needed and/or the most cost-effective way to progress the claim before the Tribunal.

The Agency will seek advice and guidance from whatever third parties it considers appropriate in assessing such requests, including from the Tribunal and other agencies involved in the process including funding agencies.

The list below is indicative of the activities, in addition to attendances, hui and conferences that may be covered by a grant:

##### **a. Urgent hearings**

If a claimant group wishes to apply to the Tribunal for urgency and the lead provider wishes to seek legal aid for matters that require to be addressed as part of such a request, the provider will need to supply to the Agency a copy of the application for urgency submitted to the Tribunal and a copy of the decision of the Tribunal to grant urgency.

The Agency may seek further information from the Tribunal on the urgent proceedings. The Agency will give priority to processing requests related to urgent hearings.

##### **b. Mediation**

If the Tribunal refers a claim to mediation (under clauses 9A to 9D of the second schedule of the Treaty of Waitangi Act 1975 where the whole claim must be referred to mediation and the parties are the claimants and the Crown), the Agency will give consideration to an amendment to a grant to cover legal representation at mediation and any preparation.

Where a private mediation is proposed around selected issues and between two or more groups of claimants, the Agency will consider funding for legal representation at

such mediation and appropriate preparation. Before funding approval is given, the provider will need to demonstrate to the Agency that the Tribunal has adjourned its inquiry for the purpose of the mediation, or that the mediation is supported by the Tribunal.

### **c. Settlement negotiations with the Crown**

Mandated claimants and the Crown may enter settlement negotiations in respect of a claim before the Waitangi Tribunal before or after the Tribunal has issued its final report. This may depend on the readiness of the group to proceed to settlement negotiations, and the Crown's agreement to prioritise their entry into negotiations.

Whether or not legal aid has already been granted for the Tribunal proceedings, the Agency may consider a grant of aid in respect of legal representation required in the course of the negotiations (see section 44(2)(a) of the Act).

The Crown (through the Office of Treaty Settlements) makes a "reasonable contribution" to claimants' costs related to the negotiations. With this in mind, the Agency assumes that a grant of aid for settlement negotiations will only cover legal representation where it is demonstrated that this is required and cannot be covered by OTS funding.

There are specific aspects of the settlement negotiations that may require legal representation, such as review of the deed of settlement, the establishment of a governance entity for the claimant group, and review of the settlement legislation. The Agency may also fund legal representation during negotiation meetings and for reviewing correspondence relating to redress options. Generally, the Agency would only consider funding for these aspects of the negotiations.

If the Agency agrees to grant aid for this stage, it will generally only grant aid in respect of the mandated claimants with whom the Crown proposes to negotiate.

#### ***Amendment or New Grant***

If no grant of aid has been made for proceedings before the Tribunal, a new grant of aid may be considered for legal representation during settlement negotiations, as described above. If an application for a grant of aid is made at the stage of settlement negotiations, a section 44 Report must be sought by the Agency from the Tribunal before the application can be considered, as required under the Act.

The Agency may make an amendment to the existing grant to cover settlement negotiations where aid has been granted for proceedings before the Tribunal and

- the nominal applicant is still part of the claimant group, and
- the claimant group is the same as before
- the interests of the claimant group have not been subsumed within the wider interests of other groups.

The amendment application should include confirmation of the three points above. If the applicant or the claimant group are different from the group covered by the original legal aid application, the Agency will require a new legal aid application to be lodged by the lead provider. In such a case, the Agency would require the written agreement of any previous lead provider/s and information as to the relationship between the new group and the original claimants.

The new lead provider will be required to submit a new legal aid application specifically to cover the settlement negotiations.

At this stage the Agency is required to seek a new section 44 Report from the Tribunal. The Agency will generally not make an interim grant for settlement negotiations.

***If other funding is received***

As noted earlier, under section 66 of the Act, a listed provider may not receive a payment without the authority of the Agency. As a result, if claimants intend to fund legal representation in settlement negotiations from OTS funding, and propose also to seek funding for the same negotiations from the Agency, the Agency's agreement to such an arrangement must be sought *before* funds from OTS are received by any listed provider.

In light of this, in considering an application to grant aid or amend a grant to cover settlement negotiations, the Agency will require detailed information on (and demonstration of) the following matters:

- Whether, and which aspects of settlement negotiations are to be funded via OTS funding,
- Why legal representation is required, and for what specific activities.
- The proposed contribution by OTS and the proposed payment schedule to the claimant group by OTS.
- Whether representation costs are to be funded from the OTS grant, and if so, why additional legal aid funding is required,
- Exactly which activities OTS funding is to cover. The Agency recognises that OTS does not require forecasted budgeting of spending of OTS funding. Nonetheless, the Agency for its own purposes will require a detailed breakdown of the budget estimate for agreed OTS funds that demonstrates how such funds are to be spent. This budget will need to be specific and show the cost estimates for legal representation and associated or direct or indirect expenses. At the time monthly invoices are received for payment, the Agency will also require to see certified invoices submitted to OTS to date.

If the Agency grants aid to cover settlement negotiations, it will make a maximum grant to cover any activities it agrees to fund that have already taken place and all activities in the next three to six months.

The Agency and the Office of Treaty Settlements have agreed to meet regularly to discuss funding matters in general and in relation to specific negotiations to ensure that Crown claimant funding is consistent with section 66 of the Act.

***d. Remedies hearing***

Aid may be available for a remedies hearing after the Tribunal has released its report. An amendment to the existing grant should be sought, accompanied by a detailed estimate of costs.

The Agency may seek information from the Tribunal in respect of the hearing. Because remedies hearings impose additional costs on the Crown, the Agency will require justification of the hearing and information as to whether negotiations with the Crown have been considered or entered into prior to the request for aid for a remedies

hearing. The Agency may encourage consideration of such a course of action before it considers a grant of aid for a remedies hearing.

## **16. Disbursements**

Disbursements can represent a significant part of the cost of legal aid for Waitangi Tribunal cases.

The Agency expects to pay only for disbursements where prior approval has been given. The Agency will require detailed explanation of why any particular disbursement is required and how it contributes to the claimants' case.

The Agency expects that all activities covered by a prior request for payment will be carried out in the most cost effective manner. Before approving the payment of a disbursement, the Agency will require evidence of quotes and estimates for such activities wherever possible, and may suggest alternative ways of carrying out such activities if it believes that the outcomes of these activities can be more cost effectively achieved.

The Agency will require certified invoices and receipts relating to all disbursements to be submitted when the lead provider submits the invoice for payment. The comments above in relation to the authorisation of other payments apply in respect of all disbursements. This means that the lead provider can accept no payment for activities in respect of matters covered by a legal aid claim without the prior authorisation of the Agency.

### **16.1 Research, expert evidence and reports**

The Agency will generally not fund research, and will only fund other expert evidence and reports if these are necessary to prove the claim before the Tribunal.

Whether or not research, expert evidence or reports have been prepared before the application for aid is made, the Agency expects that quotes will be submitted to the Agency together with an explanation of

- for research, why this research has not been approved for funding by CFRT or the Tribunal, and
- for research, and other expert evidence and reports, the relevance of the research to the claim and the inquiry.

### **16.2 Travel**

The Agency's travel policy applies to Waitangi Tribunal legal aid applications.

The location of many conferences and hearings may require the lead provider (and any other listed provider whose participation in the claim is funded under the grant of aid) to travel significant distances on a reasonably regular basis. The Agency may therefore consider the payment of direct travel costs (in terms of the provisions of the travel policy) to be appropriate.

Each request for reimbursement of direct travel costs will be considered on its merits.

### **16.3 Other disbursements**

Payment of other disbursements may be approved, if the Agency assesses the activities to be necessary the overall context of the legal representation provided under the claim. In general the levels of disbursements in the Agency's Disbursement Policy apply. Prior approval should be sought for all disbursements, and wherever appropriate, quotes should be sought to establish the most cost effective way to source the activity in question.

The Agency will generally not fund the transcription of recordings of hearings. Listed providers present at the hearing are expected to take notes of any aspects of the hearing they require a record of. In any event, if the Agency does agree to fund transcription, it will only fund the transcription of specific parts of the recording. The lead provider will be required to demonstrate to the Agency why any transcription is required. The Agency expects that photocopying of documents will be kept to the minimum needed. The Agency will pay no more than 20c/page for photocopying and expects savings to be generated by carrying out photocopying in the most cost effective way.

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<sup>1</sup> New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641

<sup>2</sup> It is, however, likely that claims will not be heard in that inquiry if they are lodged after a casebook is approved and after the filing of an amended statement of claim in the inquiry.

<sup>3</sup> See section 20, Legal Services Act 2000. A maximum grant is the amount authorised under the grant of aid. In a staged grant, it is the amount authorised for a specific stage. This can be expressed in any way (eg dollar amount, hours, period of time, all of these etc).

<sup>4</sup> See section 19, Legal Services Act 2000. If more than one listed provider provides services under a grant of legal aid, the Agency has an obligation to pay or communicate with only the lead provider. In general, the Agency prefers the lead provider to be the listed provider who is most closely involved with the work to be carried out. This may not necessarily be the most senior provider involved.

<sup>5</sup> The Agency expects the lead provider to remain as lead provider throughout the claim and would only agree to terminate the assignment of the lead provider and assign another lead provider in exceptional circumstances, such as a breakdown of the relationship or a conflict of interest. See the Agency's Assignment, Termination of Assignment and Reassignment Policy. If the nominal applicant or the lead provider seeks a termination of the assignment, the Agency will require information as to why the reassignment is sought. The nominal applicant would require the mandate of the claimant group to seek reassignment.