Te Arawhiti
THE OFFICE FOR MĀORI CROWN RELATIONS

PROVIDING FOR THE TREATY OF WAITANGI IN LEGISLATION AND SUPPORTING POLICY DESIGN

Questions for policy-makers

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Providing for the Treaty of Waitangi in legislation and supporting policy design – questions for policy-makers

1. This document seeks to guide policy-makers[1] in their analysis of when and how to provide for the Treaty of Waitangi in legislation. It encourages policy-makers to consider the Treaty early in the policy process and to think about the broad range of options available to reflect the Treaty relationship – both legislative and non-legislative. If a legislative reference to the Treaty is appropriate, this guide assists in the design of suitable provisions.

2. Use of this guidance should lead to:

    - a better understanding of the policy and legal implications of different measures to provide for the Treaty in policy and legislation;
    - a more deliberate and planned approach to providing for the Treaty partnership; and
    - a more consistent approach when legislative references to the Treaty are used.

3. This guidance is not intended to define what the Treaty means or prescribe policies and rules. It is intended to prompt good policy thinking and process by posing important questions. It is designed to work alongside other resources, including Cabinet Office guidance.

Seeking a more considered and coherent approach to providing for the Treaty in legislation

The first legislative references to the Treaty principles date from 1975 – different forms have developed since then

4. Legislative references to the Treaty principles emerged in the Treaty of Waitangi Act 1975, in the State Owned Enterprises Act 1986 and in early environmental law reform to give legal recognition to the Treaty and as a safeguard for Māori rights. These legislative provisions are commonly referred to as 'Treaty clauses'.

5. Existing Treaty clauses have two common forms:

    the operative/general form – which requires those exercising functions or making decisions under an Act to consider or act in accordance with the Treaty principles, for example: "In achieving the purpose of this Act, all persons exercising functions and powers under it shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)"

    the descriptive/specific form which references the Crown's Treaty responsibilities and describes or enumerates how these are given effect to in the Act, for example: "In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
    (a) section …"

6. Treaty clauses have been an important catalyst for advances in the Treaty relationship, for example, the *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 ('the Lands case') centred on section 9 of the State Owned Enterprises Act 1986 which states "nothing in

[1] The term 'policy-maker' refers here to public service policy advisors and analysts developing advice for Ministers/Cabinet (who make decisions on policy) and Parliament (which scrutinises and passes legislation).

this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".[2]

7. As Crown agencies have become more aware of the Crown's Treaty responsibilities it has become more common to consider a Treaty clause in policy and legislative reform. Moreover, our Treaty partners often seek a Treaty clause in legislation during engagement on policy reform. This is unsurprising given the history of the Māori Crown relationship, a corresponding lack of Māori trust in government and the need for the Crown to be a better Treaty partner.

8. Legislating the Crown's commitment to the Treaty in any particular context can help hold the Crown to account for its future actions. For both Crown agencies and Māori alike, in particular circumstances, Treaty clauses can provide a "catch-all" mechanism by which recognition of the Crown's Treaty obligations may be concisely recognised albeit in a very generalised way. As explored further in this paper, there are times when a catch all provision is appropriate while in other contexts specific direction as to what is required will be more effective.

9. A recent proliferation of Treaty clauses, however, has raised questions about the extent to which they are the product of well-considered policy and careful analysis of their legal and practical effect. If Parliament's intended effects of a Treaty clause are not clear there is a risk they will not be implemented, potentially leading to unintended or adverse consequences both in the portfolio area and for the Māori Crown relationship.

Treaty clauses need to have a clear intent and be developed for a specific context: no one-size-fits-all

10. Treaty clauses need to be developed within their specific context – there is no one-size-fits-all set of provisions that will work in every case. Nevertheless, a higher degree of consistency between provisions of similar intent is important and achievable.

11. Recognising the Treaty is not reliant on having specific reference to it in legislation. The best expression of Treaty partnership, for example, may be non-legislative policies and practices that engage Māori in day-to-day operations. It may be legislative provisions that directly provide the mechanisms by which Treaty interests are engaged. It may be a Treaty clause, as discussed above, or possibly a combination of these.

12. The most important thing is to identify the outcomes you are seeking to achieve and how the Treaty is engaged with those outcomes, so you can achieve them in the most meaningful way.

13. Our aim should be legislation which is inherently Treaty compliant because it is the product of proper engagement, sound Treaty analysis, and clear provisions which carefully implement the policy outcomes intended to give expression to the Treaty in that context. Whether the underlying policy and the Māori Crown relationship are best served by a Treaty clause should be determined in light of that work.

[2] The Court of Appeal held that, following section 9 of the Act, Crown land should not simply transfer to SOEs as that would impede the Crown's capacity to give fair and reasonable redress for historic breaches of the Treaty of Waitangi. In response to the Court's decision, the Treaty of Waitangi (State Enterprises) Act 1988 ensured that land transferred from the Crown to the new State-Owned Enterprises would still be available for settling Māori claims through new 'resumption' powers granted to the Waitangi Tribunal.

This guidance aims to prompt critical thinking and good process and is meant to be used in conjunction with other resources

14. There is no rigid formula for developing Treaty provisions and this guide does not prescribe one. The way the Treaty is recognised in each policy should be the product of genuine engagement with relevant iwi/Māori groups, analysis and debate. This guide sets out questions that are designed to prompt critical thinking and good process. It is not a comprehensive guide to developing Treaty policy. It calls for an integrated analysis which draws on the various sources of guidance, information and precedent available. It is specifically designed to work in conjunction with the following resources:

    - Engagement Framework for Crown engagement with Māori and associated guidelines 2019 – which assists agencies to determine who they need to engage with and how.
    - Cabinet Office guidance, including CO (19) 5: Treaty of Waitangi Guidance 2019 and any subsequent updates.
    - He Tirohanga o kawa ki te Tiriti o Waitangi 2001 – which outlines the principles of the Treaty as expressed by the Courts and Waitangi Tribunal, and provides other information that might facilitate the application of these principles in policy development including key concepts in the Treaty exchange.
    - Legislation and Design Advisory Committee Guidelines 2018 – which assists policy-makers to follow good processes and provide clear advice in making legislation.

Seek advice from relevant agencies

15. The development of Treaty provisions draws from and contributes to the broader Māori Crown relationship and inherently touches on legal and constitutional matters. The following agencies have responsibilities in relation to how the Treaty is provided for in policy and legislation and should be engaged early in thinking about these issues:

    - Te Arawhiti: the Office for Māori Crown Relations is an agency dedicated to making the Crown a better Treaty partner through fostering strong, ongoing and effective relationships with Māori across Government and bringing the Treaty and te ao Māori to the heart of government policy.
    - Te Puni Kōkiri can provide strategic advice on relationships and engagement to improve outcomes for iwi, hapu, whānau and Māori, and to understand and respond to their needs, aspirations, rights and interests.
    - Ministry of Justice Te Tāhū o te Ture: the Treaty establishes a constitutional relationship between Māori and the Crown. The Ministry of Justice's constitutional stewardship role includes being mindful of how public power is exercised in light of the Crown's Treaty obligations and thinking about the rights of Māori as the indigenous people of Aotearoa.
    - Crown Law Te Tari Ture o te Karauna can help policy-makers by advising on case law, Tribunal decisions or legislation which may be relevant and on the legal implications of proposals under consideration, to assist policy-makers design and select proposals that can achieve the policy goal and avoid unforeseen consequences so far as possible. Crown Law also has a broad overview of how the Treaty is provided for in policy and legislation across government.

- Parliamentary Counsel Office Te Tari Tohutohu Paremata drafts the law and exercises stewardship of New Zealand's legislation as a whole. PCO will have a good understanding of how the Treaty has been recognised in different contexts across legislation, and can help policy-makers find useful approaches to get good long-term outcomes. Policy-makers should speak to PCO early in the process and well before settling on any particular wording for a legislative clause.

Stage 1 – Understanding the issue

What is the policy problem we are trying to address? What are the opportunities we are trying to realise?

16. A clearly defined and understood problem definition is the starting point for any effective policy proposal. This is as true for Treaty interests as any policy matter. It is essential to examine the policy problem and opportunities in light of the Treaty. Treaty analysis should look for the opportunities in each context to realise better outcomes for Māori and to support the Māori Crown relationship.
17. Fundamental to developing an understanding of the policy issue from the perspective of Māori is determining who the Māori Treaty partner is in the particular circumstances. A clear policy definition comes from understanding all rights and interests involved as well as the different perspectives through engagement and collaboration between the Crown and Māori.
18. Only after the problem and opportunities are fully understood and the outcomes defined should the question of what mechanisms would best achieve those outcomes be addressed.

What does the Treaty mean for the proposed policy?

19. Understanding the significance of the Treaty for the policy issues in question is a fundamental requirement for policy development. Good policy will not just look at the compliance aspect of the Treaty in terms of safeguarding rights and interests. The Treaty provides a positive framework that supports the Treaty partners working together to achieve mutually beneficial outcomes and to fully realise the Treaty relationship.
20. While recognition of rights and interests must be a central focus, this should be part of a broader engagement that recognises the value Māori perspectives, matauranga Māori and rangatiratanga bring to the development of effective, equitable solutions. Māori-led decision-making and delivery of services can be the best way to achieve improved and equitable outcomes for Māori.

Treaty analysis should be informed by all relevant sources

21. There are multiple resources to assist policy-makers think about how to apply the Treaty. Some of these focus on the text of the Treaty, others on the principles. There is extensive commentary from the Waitangi Tribunal and the courts. There is also existing precedent which will contain important lessons for what might work or not work in the future.
22. The most effective approach to Treaty analysis is one that actively considers and integrates all these sources. Starting with the articles and the Treaty principles, a thorough consideration of relevant Māori Crown relationships (there is more than one and they will change in specific contexts), the rights and interests of Māori and those of wider Aotearoa New Zealand (Treaty-derived and more generally).
23. Effective engagement should be at the centre of this analysis – if you deal with the issues in an appropriate manner with Māori, you are likely to have addressed those Treaty considerations. A thorough, integrated approach to Treaty analysis involving the above is the standard to aspire to.

What have our Treaty partners said? How does the proposed policy process recognise the Treaty relationship?

24. The Treaty partnership requires genuine engagement and, depending on the issue, collaboration on issues of significance to Māori. Early engagement with affected iwi Māori is crucial for informing development of policy that provides for the Treaty.

25. Key questions that should be asked in the development of all policy and legislation are:

    - Who are the Crown's Treaty partners on this issue? Have we engaged with the people who have interests, experience or who hold roles on behalf of iwi Māori? Have we talked to Māori leadership/expertise that should have a voice on these particular issues?
    - Have we asked what is needed to ensure iwi Māori are effectively supported to engage on this issue? What is needed in terms of resources, control of, or input into, decision-making?
    - Does our proposal accurately reflect what iwi Māori have said is important?

26. Te Arawhiti's Engagement Guidelines set out the government's expectations of what Treaty engagement should involve. Te Arawhiti is available to assist you with the application of the Engagement Framework and the development of an engagement strategy.

Analysis of the Treaty articles* – Treaty of Waitangi Guidance *CO (19) 5

27. Cabinet Office guidance requires informed analysis of the application of the Treaty to the proposed policy. Like this document, the Treaty of Waitangi Guidance is intended to be used in conjunction with Te Arawhiti's Engagement with Māori framework.

28. The Treaty of Waitangi Guidance focuses on the articles of the Treaty and poses practical questions to assist this analysis. The following are some examples of key questions posed in the guidance which could be considered before any decisions about Treaty provisions are made.

    - Does the proposal support the Māori Crown relationship and offer an opportunity to enhance Māori as well as all New Zealand's wellbeing? Are there ways for Māori to participate?
    - Does the proposal affect Māori interests and rights? Are these interests or rights in relation to a taonga? Are there ways for Māori to lead responses to the issues that affect them and/or exercise rangatiratanga over their taonga?
    - Does the proposal look to achieve equitable outcomes including addressing inequalities and cultural bias?

Analysis of the Treaty principles – He Tirohanga ō Kawa ki te Tiriti o Waitangi

29. A focus on the Articles of the Treaty does not detract from the Treaty principles or any other guidance and case law on the Treaty. Treaty principles are an essential component of any thorough Treaty analysis. The principles aid in the practical examination of what the Treaty means in a particular context.

30. The jurisprudence developed by the Waitangi Tribunal and the courts is focused on the Treaty principles. Policy-makers and designers of any Treaty provisions need to understand how their

proposals are likely to be viewed by the courts and the Tribunal to understand the implications of the proposals and the risks to the Crown. They should also consider case law and Tribunal reports for the wider value of these institutions' guidance.

31. The Puni Kōkiri publication *He Tirohanga ō Kawa ki te Tiriti o Waitangi* contains a useful summary of early but formative Tribunal reports and case law on the Treaty principles.

The Waitangi Tribunal and the courts' guidance on the Treaty principles

32. The Waitangi Tribunal and the courts' reports and decisions provide extensive guidance on the application of the Treaty principles to policy and legal contexts.

33. The courts have discussed the Treaty principles in the following terms:

> *"…the "principles" are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty…With the passage of time, the "principles" which underlie the Treaty have become much more important than its precise terms." (New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 at 517 (PC))

34. The Waitangi Tribunal has commented extensively on the value and nature of the Treaty principles to policy design. In its WAI 414 Te Whānau o Waipareira Report, the Tribunal discusses the Treaty principles as giving expression to the Treaty as a "living document" where the underlying spirit overcomes narrow and limiting readings of its precise terms.

> *"We consider counsel's arguments in this claim followed an overly narrow interpretation of the Treaty's words. It must be asked, having regard to the Treaty's terms and the circumstances of its execution, what are the essential principles involved?"*

And in its *Report on the Motunui–Waitara Claim* of 1983, the Tribunal said:

> *"A Māori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place."*

35. The Waitangi Tribunal is now progressing its kaupapa inquiry programme which includes consideration of contemporary Treaty issues. The inquiries in this programme contain highly relevant advice to the Crown on how to provide for the Treaty in policy and legislative design. More information on the kaupapa inquiry programme can be found on the Tribunal's website. waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports/

36. A number of more recent court decisions have considered legislative references to the Treaty principles as well as the relevance of the Treaty principles without express legislative reference. See for example:

- *Barton-Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179, 184-186 (HC)
- *New Zealand Maori Council v Attorney-General* [2013] 3 NZLR 31 at [35], [88]-[90]
- *Ngaronoa v Attorney-General* [2017] NZCA 351 at [44] – [46]
- *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [53]-[55], [92]-[95]

- *Trans-Tasman Resources Ltd v Taranaki-Whanganui* [2021] NZSC 127 at [8], [151]

37. Policy-makers should carefully consider the respective functions and relevant findings of these institutions to understand implications for any policy proposals. Case law determined by the courts sets legal precedent. The Tribunal's findings and recommendations are not formally binding on the Crown in most instances, but because they are a key component of New Zealand's constitutional framework, relevant Tribunal reports should always be carefully considered. Tribunal reports are available on the Waitangi Tribunal website. waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports/

38. While Treaty settlements have a historical focus, they often contain provisions and commitments that need to be identified and upheld in contemporary policy development. Iwi should not be required to defend settlement outcomes in each new policy process. As such, policy-makers should identify any possible impacts on Treaty settlements and build in the necessary protections and engagement processes from the outset. This is to safeguard the durability of Treaty settlements, and the renewed relationship that settlements have established. Te Arawhiti's Te Haeata is a resource for identifying Treaty settlement commitments. tehaeata.govt.nz/nau-mai-haere-mai-ki-te-haeata?destination=/kia-ora

Action points for stage 1

- Engage with the Crown's Treaty partners – develop an engagement strategy as per the Cabinet endorsed Engagement Framework for Crown engagement with Māori and associated guidelines 2019
- Undertake preliminary Treaty analysis – use existing guidance and the Treaty principles to assess what the Treaty means in the context of the proposal
- Review examples from existing legislation
- Identify relevant case law, and Tribunal reports and settlement commitments
- Seek advice from Te Arawhiti, Te Puni Kōkiri, Ministry of Justice and Crown Law Office including a review of your Treaty analysis

Stage 2 – Defining the policy objectives

How does integrated Treaty analysis flow into the identification of policy objectives?

39. The application of the Treaty is highly dependent on context. This means each policy process needs to start by considering how the Treaty might be relevant for this policy. Key questions include: how can the Treaty partnership be reflected in the process? If specific Māori rights or interests are affected, what is the best way to advance or protect them within the policy or legislation? If the policy touches on broader Māori interests or has Article 3 equity implications – how can these be addressed most effectively?

40. A central message in this guidance is that before launching into discussion about what, if any, legislative or non-legislative measures should be used, it is necessary to invest time and effort into clearly identifying and articulating what the intended policy objectives and outcomes are. This level of analysis is needed to allow Ministers to make informed decisions.

41. Working with affected Iwi/Māori to design policy which protects and provides for Treaty interests and rights is a crucial part of good policy. But the focus of this discussion should follow the stages in this guidance rather than start with specific questions about legislative drafting, for example, asking if a bill should include a Treaty clause before the actual objectives and intended outcomes of the policy have been identified.

42. Developing policy objectives that are as well defined and practical as possible will be more effective and more straightforward to implement. This doesn't detract from the importance of identifying higher level objectives such as the need to give meaningful recognition to the Māori Crown relationship, but to the extent possible, high level objectives should be given meaning through more practical and implementable objectives.

Stage 3 – What are the options for realising those policy objectives?

43. There is a wide range of legislative and non-legislative options to protect and promote Māori rights and interests and further the Māori Crown relationship. Which measures to use should be the result of careful consideration of how to best achieve the policy outcomes identified above, including serving the Māori Crown relationship.

Are there non-legislative measures which can achieve or support the realisation of the intended policy outcome?

44. The Legislative Design Advisory Committee Guidelines state a legislative measure should only be used when it is necessary – in many cases, the policy outcomes sought may be adequately or even better achieved through non-legislative measures (or a combination of legislative and non-legislative provisions).

45. Non-legislative provisions may be appropriate if the outcome sought is a relationship or improved service delivery. For example, a relationship-based arrangement may better reflect the spirit of partnership than one that responds to a legislative requirement (although this is not always true – there are many genuine relationships that were initiated in response to a legislative requirement). There is also more flexibility if an arrangement is not set out in legislation (or at least not set out completely) because amendments when circumstances change may require new legislation.

46. Some examples of non-legislative measures include:

- *Creating Māori-Crown governance arrangements*[3]

  For example, Te Waihora Co-Governance Group is formed by an agreement. The agreement records the commitments of Te Rūnanga o Ngāi Tahu, the Canterbury Regional Council (Environment Canterbury), Selwyn District Council, Christchurch City Council and Te Papa Atawhai (Department of Conservation) to share responsibility for Te Kete Ika a Rākaihautū (Te Waihora) and the wider Te Waihora catchment.

- *Investing in programmes that are developed in partnership with Māori and for Māori*

  For example, Te Puni Kōkiri is investing in opportunities for whānau-centred approaches to address family violence designed and tested through co-design processes. Underpinning this investment is the recognition of kaupapa Māori conceptual frameworks to change the way family violence is understood and addressed.

- *Sharing delivery functions and responsibilities with Māori partners*

  For example, Ara Poutama Aotearoa committed to co-designing kaupapa Māori services specifically for wāhine Māori and rangatahi Māori. A key focus would be on strengthening sense of identity and belonging through better cultural awareness and connection to whānau, hapū and iwi through rehabilitation and reintegration pathways and interventions.

[3] The Public Service Commission Te Kawa Mataaho is the government's advisor on machinery of government and system design issues and should be consulted when creating Māori-Crown governance arrangements or sharing delivery functions and responsibilities with Māori partners.

- *Building Treaty-related capability and capacity, particularly in leadership*

  For example, Ara Poutama Aotearoa established a Deputy Chief Executive – Māori position to maximise positive outcomes for Māori across Ara Poutama Aotearoa and to support the Chief Executive to implement shared responsibility across the Executive Leadership Team for delivering the actions and outcomes identified in the Ara Poutama Aotearoa strategy Hōkai Rangi.

- *Building the partnering capability of Māori partners*

  For example, Justice Sector Chief Executives and Ināia Tonu Nei are establishing a mana ōrite relationship. The purpose of the mana ōrite relationship is to create a future that benefits both Māori and all New Zealanders by transforming the justice system whereby Māori are no longer affected by the impacts of institutional racism, whānau and communities are empowered, and the system focuses on healing and restoration. To enable this, Ināia Tonu Nei is receiving government funding to support it to develop its policy capability.

- *Taking Te Ao Māori approaches*

  For example, Te Puni Kōkiri provides funding for papakāinga, which in this context means a group of three or more houses on whenua Māori and functioning as an intentional 'community' in accordance with tikanga Māori.

- *Taking action to eliminate racism and discrimination*

  For example, the Māori Education Strategy commits to providing leadership and professional development to support education services to work to eliminate racism.

Are legislative measures needed?

47. If the proposed measure is to take the form of new legislation and there are significant Māori/Treaty interests, the legislation may need to include provisions for these interests. This does not necessarily mean a Treaty clause is appropriate or the best way to go about this. It is crucial to think about and engage on the intended effects of legislative provisions – how will they address the interests in question in a practical way that is able to be implemented effectively?

Action points for stages 2, 3 and 4

The following questions should be asked when considering if a legislative provision or Treaty clause is appropriate:

- What is the problem we are trying to solve?
- What are the policy outcomes sought?
- What options – legislative and non-legislative could deliver those outcomes?
- Is a legislative provision / Treaty clause part of the solution? If so, why? What is it intended to achieve? How will it be implemented?
- If a Treaty provision/clause is part of the solution what form of provision is best? (see stage 4 below)
- If it is not the solution, what measures will ensure the policy recognises the Treaty and gives Māori confidence in what is proposed?

Stage 4 – If legislative provisions are needed to recognise the Treaty or specific Māori rights and interests, how should they be constructed?

48. There are a number of approaches to providing for the Treaty in legislation. The following section outlines the main examples as well as considerations, principles and questions for determining which is most appropriate in the particular context.

Examples of legislative provisions that reflect different policy functions

49. While there is a wide range of examples of provisions that implement the Treaty, they can be broadly grouped into three high level categories:

Operative/General Treaty clauses

50. These clauses require decision-makers under the relevant Act to consider, place a particular statutory weighting on, or act in accordance with the Treaty principles. They can apply generally to all decisions under an Act. Alternatively, a requirement to consider the Treaty principles can be directed to certain decisions or decision-makers within an Act. Thought should be given to which decisions require application of the Treaty principles and who such obligations most appropriately sit with.

51. Although examples vary, these clauses may be more appropriate in situations where there is significant devolution to a non-Crown decision-maker (eg the Resource Management Act 1991) which touch on broad questions of rights and interests, or where core Crown agencies exercise wide operational discretion under the statutory framework (eg the Conservation Act 1987).

52. By their nature, operative Treaty clauses pass responsibility for determining what the Treaty means to statutory decision makers and ultimately the courts. This may be appropriate, especially if the legislative regime delegates significant discretion to decision makers and lists other relevant considerations. But such clauses should reflect a very deliberate and clear policy outcome – for example, to ensure delegated decision-making incorporates the Treaty principles – and they must fit within the design of the legislative framework. There should be a clear understanding of what their practical effect will be and how those charged with implementing the Act will implement it.

53. Examples of these operative/general clauses are in:

> *Section 8 of the Resource Management Act 1991*
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)
>
> *Section 4 of the Conservation Act 1987*
>
> This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

Urban Development Act 2020

In achieving the purpose of this Act, all persons performing functions or exercising powers under it must take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Descriptive/Specific Treaty clauses

(Sometimes referred to as the "modern standard form", but this approach does not represent a uniform modern approach – which provision is appropriate will depend on the policy outcome sought.)

54. 'Descriptive' or 'specific' Treaty clauses expressly reference the Crown's Treaty responsibilities, in a generalised way, and describe or enumerate how these are given effect to in the Act. They show what Parliament determined upfront is required to comply with the Treaty in the particular context. They acknowledge the link between the Treaty and those provisions so that the reader can see how the Treaty has been given effect in the legislation.

55. The descriptive approach (and the substantive analysis that goes into designing specific mechanisms to address Treaty obligations) provides greater certainty for decision-makers than the operative clause, but it can be less flexible in application. It may struggle to anticipate all situations where more specific provision is needed to ensure a meaningful expression of the Treaty. The effectiveness of a descriptive clause really depends on the ability of the practical provisions it accompanies to address each situation a Treaty interest arises (discussed below).[4]

56. Examples of these clauses are in:

Section 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—

(a) section 18 … provides for … ; and
(b) section 32 requires … ; and
(c) sections 33 and 59, respectively, require … ; and
(d) section 46 requires … .

Section 6 of the New Zealand Geographic Board (Ngā Pou Taunaha o Aotearoa) Act 2008

In order to recognise and respect the Crown's responsibility to take appropriate account of the Treaty of Waitangi (Te Tiriti o Waitangi),—

(a) section 11(1)(d) confers on … ; and

[4] The Supreme Court recently commented on this form of Treaty clause in *Trans-Tasman Resources Ltd v Taranaki-Whanganui SC 28/2020 [2021] NZSC 127* stating: "In considering the effect of the Treaty of Waitangi clause in s 12 of the EEZ Act, all members of the Court agreed that a broad and generous construction of such Treaty clauses, which provide a greater degree of definition as to the way Treaty principles are to be given effect, was required. An intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear. Here, s12(c) provided a strong direction that the DMC was to take into account the effects of the proposed activity on existing interests in a manner that recognises and respects the Crown's obligation to give effect to the principles of the Treaty."

(b) section 11(1)(e) confers on … ; and
(c) clause 1(2)(a) of Schedule 1 requires … .

Section 4 of the Local Government Act 2004

In order to recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to local government decision-making processes, Parts 2 and 6 provide principles and requirements for local authorities that are intended to facilitate participation by Māori in local authority decision-making processes

The wording of Treaty clauses

57. The wording in Treaty clauses is an important acknowledgement of the Treaty and the Crown's obligations. There have been many variations in wording to date which have sometimes been appropriate for the context but at other times added to a lack of coherence across the statute book.

58. The aim of this guide is not to prescribe one formula or model for recognising the Treaty – such decisions should be a matter for discussion and analysis in the context of the policy. But because a difference in drafting from one Act to another can imply a difference in meaning, it is important that, where the intended meaning and context are alike, the wording in clauses of new Bills is, to the greatest extent possible, consistent with precedents and with other new clauses of this type.

59. Any departures from standard wording or established precedent and the rationale for the departure should be considered carefully in consultation with the agencies listed in this guide so that the advantages of taking a coherent approach across the statute book are not lost by a handful of ad hoc variations.

60. The drafting of a bill is the responsibility of PCO. PCO will have a good understanding of existing provisions and why certain constructions may be more appropriate in certain situations. It is important to consult PCO and CLO on this early as the construction of such clauses may raise important legal and drafting matters. Variations from standardised wording and the reasons for them should be clearly spelt out in advice to Ministers along with legal analysis of the intended effect and how any risks have been considered and addressed.

Provisions that require a practical action or function

61. These provisions require a practical action, function or establish a specific entity or duty which contributes to the practical recognition of the Treaty. Such provisions are sometimes, but not necessarily, linked to a specific or descriptive Treaty clause chapeau (introductory words).

62. These provisions are important as they translate what the Treaty means into practice. It takes considerable work and debate to properly work out how the Treaty should be given effect in a new legislative setting. But giving as clear as possible direction to those implementing the Act is a requirement of good policy and will result in more effective recognition of the Treaty and Māori rights and interests.

63. Examples include requirements for:

- Establishment of governance, management, advisory or service delivery bodies tasked with supporting the Treaty partnership and/or delivering more equitable outcomes – see for example, ss 18 and 19 of the Environmental Protection Authority Act 2011.
- Capability building – requiring an understanding of te ao Māori and the Treaty – see for example, s 14(2)(a) of the Public Service Act 2020, and section 11(1)(b)(i) of the Kāinga Ora–Homes and Communities Act 2019.
- The recognition of te ao Māori concepts in governance and decision-making – see for example, cl 21(7) Sch 6 of the COVID-19 Recovery (Fast-track Consenting) Act 2020.
- Engagement/informed decision-making – see for example, s 6D(1)(d) of the Children's Act 2014.
- Delegation of decision-making – see for example, s 6(3) of the Hauraki Gulf Marine Park Act 2000.
- Qualifications of members of a board/panel/council – see for example, s 12(2) of the Taumata Arowai – the Water Services Regulator Act 2020.
- Participatory processes with Māori involvement – see for example, s33 of the Urban Development Act 2020.
- Supporting equitable outcomes – see for example, s 11(2) of the Mental Health and Wellbeing Commission Act.

64. Assess these existing examples against your carefully defined policy outcomes and the regulatory purpose of the proposed legislation and wider goals. However, don't borrow uncritically, as the proposed legislation has its own context and past solutions may not be the most appropriate or effective option.

Principles to guide the development of legislative provisions

65. The following are a list of principles that reflect or summarise the main messages in this guidance and should be used when considering whether a Treaty provision is appropriate, and, if so, what its functions should be.

66. The Legislation Guidelines give guidance on how to develop legislation. Principles from that guidance that are particularly relevant for Treaty provisions include:

- *Legislation should be fit for purpose — it should be used only when necessary, but when used it should be effective for that purpose (including by minimising unintended costs). In order to achieve this, that purpose needs to be clearly defined early and robustly tested.*
- *Legislation should be designed to provide certainty as to rights and obligations but also build in sufficient flexibility to enable them to last.*
- *Legislation should be comprehensive enough to deal with likely scenarios.*
- *Legislation is part of wider regulatory systems and must work effectively within them as well as integrating with the existing body of legislation and common law.*

67. The following principles should also guide the development of Treaty specific provisions or Treaty clauses:

- *A Treaty clause should not be the starting point for the inclusion of the Treaty in policy thinking*

  Treaty clauses are not in and of themselves a sufficient measure to make a proposal Treaty compliant – the Treaty should inform the overall design and policy process from the outset.

- *A Treaty clause should be designed to achieve a policy objective*

  If a Bill includes a Treaty clause, it should be supported by comprehensive analysis of its intended functions. As a rule, the practical effects of a Treaty clause must be clear – either through the construction of the clause itself or by accompanying provisions clarifying what any Treaty obligations will mean in practical terms for those acting under the Act.

- *Clear direction on what the Treaty means in a specific context is desirable*

  Provision for the Treaty is not reliant on having specific reference to it in legislation. To the extent possible, any statutory mechanisms to protect and provide for Māori interests, shared decision-making and the Māori Crown relationship should be provided expressly in legislation rather than relying solely on a 'catch-all' reference to the Treaty. This does not exclude the possibility of combining a general operative Treaty clause with more specific measures where an operative clause is called for.

- *Consider how the provision plays out in future scenarios*

  Treaty clauses are part of an ongoing constitutional dialogue. Our understanding of the Treaty and its principles is evolving with legal and policy developments. Taken together, and over time, Treaty clauses also impact on our understanding of the Treaty and its place in the legal system. Policy-makers should consider how a proposed Treaty clause may sit alongside, or contribute to, future developments. The Ministry of Justice should be consulted during the policy process to assess the constitutional impacts of proposed Treaty provisions.

- *Uniformity is not the goal, but coherency and consistency between like provisions is important*

  Differences in the design of Treaty clauses are not inherently problematic. Variations will be required to reflect specific outcomes or context. It is, however, desirable to use existing terms where those will achieve the intended policy objective and to vary them when there is a policy rationale for doing so.

- *When proposing a Treaty clause, policy-makers should understand the steps necessary to implement them*

  Treaty clauses often delegate aspects of the Crown's Treaty responsibilities on to those implementing the Act who may not be the Crown. It is essential in doing this that the practical effects of what is proposed are well thought through and set out in advice to Ministers. For example, delegated responsibilities may require accompanying funding to ensure the delegate has capacity to meet the responsibility.

Questions to guide the development of legislative provisions

68. The following questions are designed to help determine which type of legislative provision will suit the specific policy outcome and context.

- *Is it possible to give clear direction about the extent and effect of rights and interests in the legislation or is it better to leave the interpretation and application of those rights and interests for those implementing the Act?*

  To the extent possible, policy-makers should consider how they can expressly provide for the Treaty in the development of the legislation through subject-specific provisions that give those implementing the Act clear direction as to how the Treaty is to be provided for.

  However, the application of the Treaty is highly contextual. There will be times where specific provisions will be too limited to capture the implications of the Treaty in all the possible scenarios. In those cases, broader references that import the Treaty principles into decision-making frameworks may be necessary.

- *If the intention is to require decision makers to actively consider what the Treaty means in a particular scenario, who is that responsibility intended to apply to?*

  Some statutes extend to non-Crown decision-makers, for example local government, boards. Noting that the Crown is the Treaty partner and carries the underlying responsibilities who should be delegated those responsibilities and in what form? What are the measures to ensure they are implemented effectively?

- *How does the proposed provision play out in possible future scenarios?*

  This question comes back to the principle of 'when proposing a Treaty clause, policy-makers should understand the steps necessary to implement them'.

- *What legal and practical risks arise from the provisions – how have these been thought through and mitigated?*

  Policy-makers should consider and discuss with Crown Law the legal risk associated with a Treaty clause and address it in advice to Ministers.

- *What else is needed for a Treaty clause to be effective*

  For a Treaty clause to be effective, what other things may need to change (eg accompanying provisions, operational initiatives, ongoing investment in relationships, capability building, funding)? A consideration of how change will be achieved and maintained is crucial to creating an effective Treaty clause. Poor or inconsistent implementation of a Treaty clause is likely to lead to inadequate decision-making and consequential legal challenges.

- *If a Treaty clause is not needed – what is required to provide confidence the Treaty has been provided for?*

  As noted in this guidance, recognition of the Treaty is not reliant on a Treaty clause and there may be more appropriate and effective ways to give effect to the Treaty in a Bill (eg through other clear and specific provisions). However, Treaty clauses can help instil a sense of confidence the Treaty has been thought about in a Bill. Where they are not used the need

for careful and transparent communication of the policy process that has led to decisions about the appropriate Treaty provisions may be crucial in achieving that confidence.

Concluding question and challenge

- *What option will support the Treaty partnership in the long term by contributing to a coherent and effective Treaty policy and legislative framework?*

69. There is an opportunity for policy-makers to ensure that a well-considered and coherent approach to expressing the role of Treaty in policy is taken – one based on genuine engagement and clear analysis of outcomes and the practical meaning of the Treaty relationship. This is a more ambitious and mature approach to Treaty-compliant legislation.
70. Our aim should be legislation which is inherently Treaty compliant because it is the product of proper engagement, Treaty analysis, and clear provisions which carefully set out and define the agreed meaning of the Treaty in that context. Whether the underlying policy and the Māori Crown relationship are best served by a Treaty clause should be determined in light of that work.
71. The message of this guide is not to downplay the importance of direct references to the Treaty in legislation. Treaty clauses should be considered on a case-by-case basis, especially when legislation confers kāwanatanga functions or addresses significant rights and interests.
72. It is hoped that genuine engagement on the interests involved will result in new, creative, well-conceived approaches to recognising the Treaty. The level of analysis and coherence provided here should support not discourage trying new things.