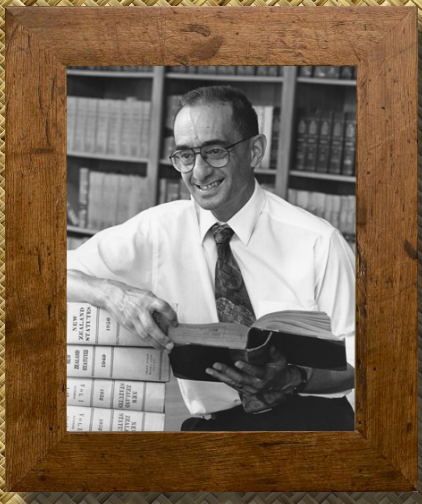
NGĀ MĀTĀPONO

The Principles



WAITANGI TRIBUNAL REPORT 2024

NGĀ MĀTĀPONO

The Principles

NGĀ MĀTĀPONO

THE PRINCIPLES

The Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies

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PRE-PUBLICATION VERSION

WAI 3300

WAITANGI TRIBUNAL REPORT 2024

The cover depicts (clockwise from top left) the Honourable Matiu Waitai Rata (Ngāti Kuri, Te Aupōuri, Ngāti Whātua), former Minister of Māori Affairs (1972–75) and politician; Dame Whina Cooper ONZ, DBE (Te Rarawa), teacher and community leader, and her mokopuna, Irene Cooper, setting off from Te Hāpua for Wellington on the 1975 Land March; Sir Robin Brunskill Cooke, Baron Cooke of Thorndon and Cambridge ONZ, KBE, PC, former president of the Court of Appeal (1986–96); and Tā Edward Taihākurei Durie KNZM (Rangitāne, Ngāti Kauwhata, Ngāti Raukawa), former chairperson of the Waitangi Tribunal (1980–2004) and High Court judge.
The photograph of the Honourable Matiu Waitai Rata is courtesy of the photographic negatives and prints of the *Evening Post* newspaper (1865–2002), Alexander Turnbull Library, Wellington, New Zealand. /records/22830228, reference ¼-021374-F. The photograph of Dame Whina Cooper was taken by Michael Tubberty and is courtesy of the *New Zealand Herald* Archive. The photographs of Sir Robin Cooke and Tā Edward Durie are courtesy of the *New Zealand Herald* Archive.
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ISBN 978-1-7385974-7-5 (PDF)

www.waitangitribunal.govt.nz
Typeset by the Waitangi Tribunal
Published 2024 by the Waitangi Tribunal, Wellington, New Zealand
28 27 26 25 24 5 4 3 2 1
Set in Adobe Minion Pro and Cronos Pro Opticals

PREFACE

This is a pre-publication version of the Waitangi Tribunal's interim report *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on the Crown's Treaty Principles Bill and Treaty Clause Review Policies*. As such, all parties should expect that, in the published version, headings and formatting may be adjusted, typographical errors rectified, and footnotes checked and corrected where necessary. Additional illustrative material may be inserted. However, the Tribunal's findings and recommendations will not change with the publication of this interim report.

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Minister for Māori Development
Minister for Māori Crown Relations: Te Arawhiti

The Honourable Paul Goldsmith
Minister of Justice
Minister for Treaty of Waitangi Negotiations

The Honourable David Seymour
Associate Minister of Justice

Parliament Buildings
WELLINGTON

15 August 2024

Tēnā koe e te Pirimia, koutou ko te Minita o
ngā take Māori, ko ngā Minita o te Ture

Tēnei ngā utanga mō runga i te waka o te kāwanatanga. Ehara i te tino kete, he rourou iti nei, me kuhuna atu e koutou ki raro i te taupopoki o te ihu, kei makere ki te moana. Ka ū ki uta, makaia atu ki te taha tika o te wāhi. Ko te tūmanako e manakohia e koutou hei mere pounamu e kuhu ai ki ō koutou manawa titi ai.

Ko tā mātou kupu ki a koutou kei roto i te kete, he kupu mō te Tiriti o Waitangi me te raweke a ētahi i ngā mātāpono. Ahakoa kua mate ki te pō ngā tāngata i whakaaetia ai te kawenata tapu rā, e tiakina ana ngā kupu e ngā uri. I timata ia te whakakotahitanga o ngā iwi i tēnei whenua, ā, e kore e taea te pēhi.

Heoi, ka mahara ake mātou te hunga i kawe nei te rākau (mo te Tiriti) i ngā tau kua pahure. Me kī pēnei te kōrero ki a rātou: haere koutou ki

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Web/Ipurangi: www.waitangitribunal.govt.nz

MINISTRY OF JUSTICE
Tāhū o te Ture

te pōuriuri, ki te pōtangotango, ki tua o paerau. Hoatu, haere i runga i ā koutou mahi pai i ora ai te tangata me ēnei motu.

Kāti ēnā, me huri pū tā mātou kupu.

Greetings Prime Minister, Minister for
Māori Development, and Ministers

This cargo is meant for the government's canoe. It's not a large package, just a small basket that you can store in the bow of the canoe to prevent it from falling overboard. Once you reach land, place the basket on the shore in the right spot. Hopefully you will treasure it like a precious weapon made of greenstone and keep it close to your heart.

The basket contains our report to you, a report about the Treaty of Waitangi and the changes sought to some of its principles. Even though the people who agreed to that sacred covenant are no longer alive, their descendants still honour its words. The coming together of different races in this country began with the Treaty and it cannot be suppressed.

So, let us remember those who carried the responsibility (for the Treaty) in past years. Let us address them in this way: go to the dark and gloomy realms, where the streams of darkness flow, beyond the place where the deceased gather. Depart, go you who did good and beneficial things for the people and the country!

Let us now turn to the purpose of our report.

This report concerns claims submitted to the Waitangi Tribunal under urgency regarding Crown actions and two Crown policies: to progress a Treaty Principles Bill and, separately, to review legislative enactments referring to 'the principles of the Treaty of Waitangi' (the Treaty clause review).

As you are aware, both policy initiatives arise from political commitments made by the New Zealand National Party and the ACT New Zealand Party, and the New Zealand National Party and the New Zealand First Party in their respective coalition agreements dated 24 November 2023. These political commitments are now settled Crown policy currently being worked on by the relevant Ministers and officials, and they are the subject of the Cabinet Office Circular dated 25 March 2024 which requires that all Ministers, parliamentary under-secretaries, and officials work to implement the coalition agreements.

As we canvassed in chapters 2 and 3, the Treaty/te Tiriti created a foundational relationship for this country founded on a partnership

between Māori and the Crown. It recognised two spheres of authority – the tino rangatiratanga and kāwanatanga spheres. We also noted that the Cabinet Manual recognises the constitutional significance of the Treaty of Waitangi.

With respect to the Treaty Principles Bill policy, we have found that the Crown's agreement to pursue it unilaterally belies the existence of this partnership. Despite the constitutional significance of defining the Treaty principles in legislation and the importance of this to Māori, the Crown agreed to pursue the policy without any engagement or discussion with Māori. Māori did not want this policy and in fact many have been strongly opposed to it from the beginning. We find in this report that the policy of a Treaty Principles Bill 'based on existing ACT policy', as the coalition agreement requires, is a solution to a problem that does not exist; there is no policy imperative that justifies it; it is 'novel' in its Treaty interpretations; it is fashioned upon a disingenuous historical narrative; its policy rationales are unsustainable; and its current text distorts the language of the Treaty/Te Tiriti. Logically that means it has been pursued without any consideration of the Crown's constitutional and Treaty/te Tiriti obligations to Māori. Senior officials gave clear advice to Ministers on this, also warning that it would damage the Māori–Crown relationship, and risk undermining social cohesion.

We have noted that the rights of all New Zealanders and equality before the law are protected by a combination of domestic statutes, the common law, and international instruments. Yet by engaging with this policy the Crown is sanctioning a process that will take away indigenous rights. We have found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of partnership and reciprocity, active protection, good government, equity, and redress, and contrary to the article 2 guarantee of rangatiratanga. It is also in breach of the Crown's duty to act honourably and with the utmost good faith. For the Crown to entertain 'principles' that contain inaccurate representations of the text and spirit of the Treaty/te Tiriti and warped interpretations of te reo Māori from te Tiriti o Waitangi is a breach of the duty to act in good faith and to act reasonably.

With respect to the Treaty Clause Review policy, the Tribunal found the Crown breached the Treaty principles of partnership, active protection, equity, redress, good government, and the article 2 guarantee of rangatiratanga. It found the policy was predetermined and would result in amendments to or repeals of Treaty clauses. This would reduce Treaty/te Tiriti protections for Māori, affecting the rights of Māori to access justice

to have their Treaty/te Tiriti rights realised. The Crown further failed to engage with Māori on this policy.

Reducing the impact of, or repealing, Treaty clauses affects the rights of Māori to access justice to have their rights under the Treaty/te Tiriti realised, which is in breach of the principles of equity and redress. The Crown also has an obligation to actively protect the rights and interests of Māori. To remove or limit the effect of the Treaty/te Tiriti protections contained in Treaty clauses is a self-evident breach of the principle of active protection.

In this report, we conclude that both the Crown's Treaty Principles Bill policy and Treaty clause review policies are inconsistent with the principles of the Treaty of Waitangi/Te Tiriti o Waitangi.

We have also found that, considered jointly, these policies are consistent with an alarming pattern of the Crown using the policy process and parliamentary sovereignty against Māori instead of meeting the Crown's Treaty/te Tiriti obligations. The combined impacts of the policies are or will be highly prejudicial to Māori.

Having made findings of breach and prejudice, we have made the following recommendations:

1. We recommend that the Treaty Principles Bill policy should be abandoned.
2. We recommend that the Crown should constitute a Cabinet Māori–Crown relations committee that has oversight of the Crown's Treaty/te Tiriti policies. We do not consider it appropriate that these matters are considered by the Social Outcomes Cabinet Committee.
3. We recommend that the Treaty clause review policy be put on hold while it is re-conceptualised through collaboration and co-design engagement with Māori.
4. We recommend that the Crown consider a process in partnership with Māori to undo the damage to the Māori–Crown relationship and restore confidence in the honour of the Crown. While the issue is wider than the two specific policies before us in this urgent inquiry, we make this recommendation based on the findings we have made and the redress that is necessary to remove the prejudice and prevent similar prejudice in the future.

As this report is an interim report, we reserve our jurisdiction to consider the issues again following the filing of the Cabinet paper and regulatory impact statement, and any further evidence or submissions that might be required in response to those documents.

We also reserve our jurisdiction to reconsider these issues should the Treaty Principles Bill be enacted and/or should the Treaty clause review proceed as planned and result in statutory amendments or repeals.

Nāku noa nā

Dr Caren Fox
Chair of the Waitangi Tribunal
Chief Judge of the Māori Land Court
Presiding Officer

ABBREVIATIONS

ACT	Association of Consumers and Taxpayers
app	appendix
CA	Court of Appeal
ch	chapter
CJ	Chief Justice (when used after a surname)
doc	document
DPMC	Department of the Prime Minister and Cabinet
DWG	Declaration Working Group
ed	edition, editor, edited by
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights
J, JJ	Justice, Justices (when used after a surname or surnames)
KC	King's Counsel
LDAC	Legislation Design and Advisory Committee
ltd	limited
memo	memorandum
MMP	mixed-member proportional representation
MOJ	Ministry of Justice
NZCA	*New Zealand Court of Appeal*
NZHC	*New Zealand High Court*
NZLR	*New Zealand Law Reports*
NZSC	*New Zealand Supreme Court*
p, pp	page, pages
para	paragraph
PCO	Parliamentary Counsel Office
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act of Parliament)
SOE	State-owned enterprise
TPB	Treaty Principles Bill
TPOG	Treaty Principles Oversight Group
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
v	and (in a legal case name)
vol	volume
Wai	Waitangi Tribunal claim

Unless otherwise stated, footnote references to briefs, claims, documents, memoranda, papers, submissions, and transcripts are to the Wai 3300 record of inquiry. A copy of the index to the record is available on request from the Waitangi Tribunal.

UPOKO 1
Chapter 1

TE UIUINGA KŌHUKIHUKI MŌ TE PIRE MĀTĀPONO TIRITI ME TE PŪRONGO TAUPUA

The Treaty Principles Urgent Inquiry and Interim Report

1.1 He Kupu Whakataki

Introduction

On 14 October 2023, New Zealand held a General Election in which the New Zealand National Party (National) received 38.08 per cent of the popular vote, the ACT New Zealand Party (ACT) received 8.64 per cent, and the New Zealand First Party (New Zealand First) received 6.08 per cent.[1]

National and ACT, as well as National and New Zealand First entered into separate coalition agreements both dated 24 November 2023. They included several policies that were to be implemented during this parliamentary term. The coalition agreements enabled the parties to achieve the required majority of members in Parliament so that a new government could be sworn in.

Our inquiry and this interim report address claims submitted to the Waitangi Tribunal under urgency regarding Crown actions and policies pursued following the swearing in of the new Government. In summary the claims allege (consistent with the coalition agreements) that the Crown is now progressing a Treaty Principles Bill and a review of legislative enactments referring to 'the principles of the Treaty of Waitangi' (the Treaty clause review) contrary to the principles of the Treaty of Waitangi/Te Tiriti o Waitangi.

In this chapter, we consider the jurisdiction of the Tribunal to inquire into and report on these claims, before outlining the procedural history of this urgent inquiry, including reserving our jurisdiction to inquire and report further on them following release of this interim report. We then list the parties, the full extent of the coalition agreement commitments, the issues for determination, and we explain the structure of this report.[2]

1. Electoral Commission Te Kaitiaki Take Kōwhiri, '2023 General Election – Official Result', https://electionresults.govt.nz/electionresults_2023, accessed 29 May 2024

2. In this report, we use 'the Treaty/te Tiriti' when referring to both the English and Māori texts together, or to the agreement as a whole. Where evidence or submissions refer specifically to one of the texts of the Treaty/te Tiriti we have preserved that usage where possible. Quoted text referring specifically to 'the Treaty' or 'te Tiriti' has been left unchanged.

1.2 Te Mana Whakatau o te Rōpū Whakamana i te Tiriti o Waitangi

The Tribunal's Jurisdiction

The Waitangi Tribunal was established under the Treaty of Waitangi Act 1975 to provide for the 'observance, and confirmation, of the principles of the Treaty of Waitangi'.[3] Its functions are set out in section 5. The aspects of these functions relevant to this inquiry is the Tribunal's mandate 'to inquire into and make recommendations upon . . . any claim submitted to the Tribunal under section 6'.[4]

In so inquiring, the Tribunal must 'have regard to the two texts of the Treaty as set out in Schedule 1 of the 1975 Act' and, for the purposes of the 1975 Act, it has 'exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them'.[5] Under section 3, the 1975 Act binds the Crown.[6]

Section 6 of that Act sets out the Tribunal's jurisdiction as follows:

> (1) Where any Maori claims that he or she, or any group of Maoris of which he or she is a member, is or is likely to be prejudicially affected—
>
> (a) by any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after 6 February 1840; or
>
> (b) by any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after 6 February 1840 under any ordinance or Act referred to in paragraph (a); or
>
> (c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (d) by any act done or omitted at any time on or after 6 February 1840, or proposed to be done or omitted, by or on behalf of the Crown,—
>
> and that the ordinance or Act, or the regulations, order, proclamation, notice, or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the principles of the Treaty, he or she may submit that claim to the Tribunal under this section.
>
> (2) The Tribunal must inquire into every claim submitted to it under subsection (1), unless—
>
> (a) the claim is submitted contrary to section 6AA(1); or
>
> (b) section 7 applies.
>
> (3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case,

3. Treaty of Waitangi Act 1975, Long Title
4. Treaty of Waitangi Act 1975, s 5(1)
5. Treaty of Waitangi Act 1975, s 5(2)
6. See also *Collen Skerret-White & Ors v Minister for Children* [2024] NZCA 160, para 40

recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

(4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.[7]

Sections 5(1) and 6 of the 1975 Act require the Tribunal to inquire into claims filed by any Māori claiming that he or she is likely to be prejudicially affected by any matter listed in section 6. Section 6(2) makes it clear that the Tribunal must inquire into the matter as alleged unless one of the exceptions listed in that provision applies. The Court of Appeal has confirmed with respect to the powers of the Tribunal to issue summons that:

> [The Tribunal] has been given, and issued the summons while fulfilling, a statutory duty to inquire into whether a policy of the Crown will prejudicially affect Māori claimants. This is the work which Parliament (the Sovereign in right of New Zealand and the House of Representatives) has not only authorised but required the Tribunal to undertake. We say 'required' because of the statutory obligation in s 6(2) of Treaty of Waitangi Act that the Tribunal 'must inquire into every claim submitted to it under subsection (1)'.[8]

An inquiry focuses on legislation, regulations, ordinances, Crown policies and practices, and/or Crown acts and omissions. In its decision on urgency discussed below, the Tribunal determined that the actions and policies of the Crown with respect to the Treaty Principles Bill and the Treaty clause review are subject to our jurisdiction.

Therefore, if we find these claims to be well founded, we may, having regard to all the circumstances of the case, make recommendations to the Crown to compensate for or remove the prejudice or prevent others from being similarly affected in the future.

1.3 Te Tukanga o te Uiuinga Kōhukihuki

The Urgent Inquiry Process

Between December 2023 and January 2024, the Waitangi Tribunal received several applications for urgency concerning current or pending Crown actions or policies arising from new and developing policy initiatives by the coalition Government.[9]

The Tribunal's Deputy Chairperson, Judge Sarah Reeves, assessed the applications for urgency and decided to group the applications into discrete themes for their efficient handling by the Tribunal.[10]

7. Treaty of Waitangi Act 1975, s 6
8. *Collen Skerret-White & Ors v Minister for Children* [2024] NZCA 160, para 84
9. Memorandum 2.5.10(a)
10. See memos 2.5.10, 2.5.10(a)

On 25 January 2024, those applications (or parts of applications) relating to the proposed Treaty Principles Bill were referred to Chief Judge Dr Caren Fox, as presiding officer, and the Wai 3300 Tomokia Ngā Tatau o Matangireia – Constitutional Kaupapa Inquiry panel for determination.[11]

The Constitutional Kaupapa Inquiry commenced in 2022.[12] The panel members are Derek Fox, Dr Grant Phillipson, Prue Kapua, Kevin Prime, Professor Emeritus David V Williams, and Dr Monty Soutar ONZM.[13]

On 5 February 2024, the presiding officer directed the Crown and interested parties to respond to the applications for urgency by midday, 9 February 2024. Applicants were directed to file reply submissions by midday, 16 February 2024.[14]

On 15 February 2024, the presiding officer advised parties that the applications for urgency would be determined by Professor Williams, Ms Kapua, and Dr Soutar. She noted that Mr Fox, Dr Phillipson, and Mr Prime were unable to sit on the urgent inquiry panel due to their limited availability.[15]

The presiding officer scheduled a hearing for 8 April 2024, after determining several preliminary matters. Its purpose was to establish whether there were sufficient grounds to grant the urgency applications.[16] The hearing also concerned the issue of whether certain Crown documents – a legislative bid and two Ministerial briefing papers – which had been filed confidentially with the Registrar and circulated to parties in the inquiry, should be placed on the public record of inquiry. The Crown, at hearing and in submissions filed after the hearing, argued confidentiality subsisted in the documents on the grounds that it was 'advice tendered by Ministers of the Crown and officials' and therefore the documents ought not be made public.[17] It advanced arguments related to protecting the integrity of decision-making processes in Government, enabling the free and frank advice from officials to Ministers, and Cabinet confidentiality as these matters had not been considered by Cabinet.[18]

The claimants opposed the Crown's application, submitting (among other things) that the Crown's request for confidentiality had to be balanced against public interest considerations on a case-by-case basis.[19] In this case, they argued, public access to the documents was needed to facilitate the participation of claimants, counsel, and the wider public in the inquiry, and 'the public interest in having a fair and transparent hearing on this most important issue for Māori' outweighed the Crown's claimed confidentiality in the documents.[20] The Tribunal ultimately declined the Crown's application, finding no established basis to keep

11. Memorandum 2.5.6, p 3
12. Memorandum, 2.5.1
13. Memoranda 2.5.1, 2.5.2, 2.5.3
14. Memorandum 2.5.7, p 2
15. Memorandum 2.5.8, p [2]
16. Memorandum 2.5.10, p [8]
17. Memorandum 3.1.40
18. Memorandum 3.1.40, pp 8–10
19. Memorandum 3.1.47, p 2
20. Memorandum 3.1.47, p 11

the documents confidential. It found the Crown's desired restrictions would be inconsistent with the principle that due administration of justice be done and, except in very rare cases, be seen to be done. The Tribunal directed the Registrar to enter redacted versions of the documents on the record of inquiry.[21]

Following the hearing, on 10 April 2024, the Tribunal granted the applications for urgent inquiry.[22] The presiding officer released the Tribunal's substantive reasons for granting urgency on 29 April 2024, and confirmed Mr Prime, Mr Fox, and Dr Phillipson would rejoin the panel for the hearing to inquire into the substance of this urgent inquiry.[23]

On 9 and 10 May 2024, a hearing was held at the Tribunal Offices in Wellington.

On the first day of hearing on 9 May 2024, Crown witnesses addressed the Treaty Principles Bill and the Treaty clause review policies. These senior Crown officials advised that work was progressing on a draft Cabinet paper and a regulatory impact statement to progress the Bill. The regulatory impact statement was to include an analysis of the implications of the Bill and the timing and process of its development. It was also to consider the impact of the Bill on existing Treaty rights of Māori and on Crown responsibilities under the Treaty of Waitangi.[24] The Ministry of Foreign Affairs and Trade, Te Arawhiti, the Electoral Commission, and Te Puni Kōkiri were consulted on the draft analysis for the regulatory impact statement as well as the draft Cabinet paper. Crown witnesses advised that these agencies' views have been incorporated, 'as appropriate'.[25] They stressed that the indicative policy for the Bill and the legislative timeframes previously advised were subject to change. The Tribunal was told that late May was a possibility for when Cabinet would consider a Cabinet paper regarding the proposed Bill.[26]

As these documents were a significant part of the policy process concerning the Crown's Treaty Principles Bill policy and were very germane to the inquiry, the presiding officer directed the Crown to file a copy of the Cabinet paper and the regulatory impact statement within 24 hours of the Cabinet meeting where the papers were to be considered.[27] The presiding officer also directed the Crown to file simultaneously an update on the Treaty clause review.[28]

The Tribunal received claimant and interested parties' closing submissions on 22 May 2024.[29]

The Tribunal sought updates from the Crown regarding the Cabinet paper and the regulatory impact statement on 16 May, 20 May, 28 May, and 12 June 2024.[30]

21. Memorandum 2.5.28, p [6]
22. Memorandum 2.5.18, p [4]
23. Memorandum 2.5.27, p [12]
24. Document A23, p 13
25. Document A23, p 12
26. Document A23, pp 8–9
27. Memorandum 2.6.1, p [3]
28. Memorandum 2.6.1, pp [3]–[4]
29. Memorandum 2.6.5, p [4]
30. Memorandum 2.5.10, pp [3]–[4]; memo 2.5.10(a)

On 3 July 2024, the presiding officer directed the Crown to file its closing submissions, together with answers to questions concerning the progress of ministerial consultation on the draft Treaty Principles Bill Cabinet paper and regulatory impact statement. These were to be filed on 9 July 2024.[31] The claimants and interested parties were directed to file reply submissions on 15 July 2024.[32]

On 9 July 2024, the Crown filed its closing submissions and an affidavit of Rajesh Chhana responding to the Tribunal's question.[33] Mr Chhana stated that it was not possible to say when Cabinet would consider the Cabinet paper as ministerial consultation on the draft paper was ongoing.[34] He stated further that the Crown could update the Tribunal once the Cabinet paper had been lodged.[35]

In reply-submissions, several interested parties requested the Tribunal release an interim report, citing (among other factors) the importance of the kaupapa, submitting there was 'ample' evidence before the Tribunal to make findings that the Crown has breached Treaty principles, noting the concerns of Māori, and underscoring 'the current government's pursuit to implement the coalition agreements'.[36]

On 24 July 2024, the presiding officer noted the Tribunal may release an interim report depending on a further update from Crown. The Crown was directed to file an update advising when the Tribunal could expect to receive a copy of the Cabinet paper and regulatory impact statement.[37]

On 26 July 2024, the Crown advised that 'the dates for Cabinet consideration remain unknown.'[38]

The Tribunal has decided to release this interim report to assist all parties to understand the Treaty/Te Tiriti implications of the Crown's actions and its policies relating to the Treaty Principles Bill and the Treaty clause review. The Tribunal reserves its jurisdiction to consider the issues again following the filing of the Cabinet paper and regulatory impact statement, and any further evidence or submissions that might be required in response to those documents.

We also reserve our jurisdiction to reconsider these issues should the Treaty Principles Bill be enacted and/or should the Treaty clause review policy proceed as planned and result in statutory amendments or repeals.

31. Memorandum 2.6.9, p [2]
32. Memorandum 2.6.9, p [2]
33. Submission 3.3.23; doc A23(f)
34. Document A23(f), p 2
35. Document A23(f), p 3
36. See submission 3.3.25, p 11; submission 3.3.24, p 6.
37. Memorandum 2.6.12, p [4]
38. Memorandum 3.2.35, p 1

1.4 Ngā Pāti kei tēnei Uiuinga

The Parties in this Inquiry

1.4.1 Ngā kaikerēme me ngā kaitono e whai pānga ki te kaupapa

The claimants and interested parties

The claimants and interested parties in this urgent inquiry are numerous. In our view, the long list of claimants and interested parties indicates how important the matters being addressed in this urgent inquiry are to Māori. The list also shows that the issues have significance to Māori across Aotearoa New Zealand and are not limited to one geographical area. These parties represent peoples from Te Waipounamu/the South Island to Te Hiku o Te Ika – the northern tip of the North Island, and also include bodies with a national focus like Te Rōpū Wāhine Māori Toko i te Ora/the Māori Women's Welfare League.

The named claimants in this inquiry are:

- Nora Rameka on behalf of Te Rūnanga Nui o Ngāti Rēhia for and on behalf of Ngāti Rēhia hapū (Wai 3077);
- Jane Mihingarangi Ruka on behalf of the Waitaha Executive Grandmother Council (Wai 3316);
- Sailor Morgan and Frances Goulton on behalf of themselves, Ngāti Ruamahue hapū, and Ngāti Kahu ki Whangaroa (Wai 3317);
- Moerangi Potiki on behalf of Te Rūnanga o Ngāti Whakaue ki Maketu Incorporated, for and on behalf of Ngāti Whakaue ki Maketu hapū (Wai 3318);
- Nicola Dally-Paki on behalf of herself, her whānau, hapū, iwi, whānau whānui, and whāngai (Wai 3319);
- Ruiha (Louisa) Te Matekino Collier, Rihari (Richard) Takuira Dargaville, and Joseph Kingi on behalf of themselves and Ngāpuhi-nui-tonu (Wai 3320);
- Apihaka Irene Tamati-Mullen Mack on behalf of herself, her whānau, and Ngātiawa ki Kapiti (Wai 3321);
- Daniel Watson and Tūwharerangi Ruka on behalf of themselves and the Waitaha Executive Grandfather Council (Wai 3343);
- Colleen Skerrett White, Te Ariki Morehu and Timitepo Hohepa on behalf of the descendants of the tupuna Te Rangiunuora I and II under the mantle of Ngāti Te Rangiunuora (Wai 1194 and Wai 1212);
- Pita Tipene, Moana Maniapoto, Donna Kerridge, George Laking, India Logan-Riley, and Veronica Tawhai for and on behalf of Ngā Toki Whakarururanga (Wai 3342);
- Te Riwhi Whao Reti, Hau Hereora, Romana Tarau, Karen Herbert, Edward Cook, and Pearl Reti on behalf of Te Kapotai (Wai 1464/Wai 1546); and
- Reweti Paraone, Erima Henare, Pita Tipene, and Waihoroi Shortland on behalf of Te Rūnanga o Ngāti Hine and the descendants of Torongare and Hauhau (Wai 682).[39]

Parties granted interested party status are:

39. Memorandum 2.6.1(b), pp [1]–[2]

- Patricia Tauroa and Robyn Tauroa on behalf of ngā hapū o Whangaroa (Wai 58);
- Karanga Pourewa, Hinemoa Pourewa, William Hori, and the late Tarzan Hori on behalf of themselves and the descendants of Whakaki and Te Hapū o Ngāti Kawau (Wai 1312);
- Doreen Puru, Anna Kahukura Hotere, Emma Torckler, William Puru, and the late Louie Katene on behalf of themselves, Te Hoia, Ngāti Rangimatamoemoe, and Ngāti Rangimatakaka (Wai 1684);
- Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau whānui, and whāngai (Wai 3314);
- Donna Awatere-Huata on behalf of herself, her whānau, hapū, iwi, and all Māori (Wai 2494);
- Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira, and Te Ringahuia Hata (Wai 2872);
- Druis Barrett on behalf of Te Rōpū Wāhine Māori Toko i te Ora – the Māori Women's Welfare League Incorporated, its members and all wāhine Māori of Aotearoa (Wai 2959);
- Margaret Mutu on behalf of Te Rūnanga a Iwi o Ngāti Kahu and Ngāti Kahu Iwi (Wai 2214);
- Te Rūnanga Nui o Te Aupōuri Trust (Wai 2831);
- Dr Rapata Wiri on behalf of his whānau, hapū, iwi, whānau whānui and whāngai (Wai 3330);
- Ngāti Muriwai Authority Trust on behalf of the Ngāti Muriwai Hapū (Wai 3329);
- Lady Tureiti Moxon on behalf of herself and the whānau, staff and governors of Te Kōhao Health Limited (Wai 3351);
- Rueben Taipari Porter on behalf of himself and Ahipara hapū (Wai 1968);
- Violet Eva Walker on behalf of herself, her whānau and Ngāti Rangi o Waiapu ki Tawhiti and Ngāti Kahu ki Whangaroa (Wai 2382);
- Michael Williams and Jessica Williams on behalf of their whānau, and the wāhine of Ngaitūpango and of wāhine Māori survivors of family violence (Wai 2838);
- David Hawea, for and on behalf of the Hawea whānau and Te Whānau a Kai iwi (Wai 892);
- Jasmine Cotter-Williams, on behalf of herself and her whānau (Wai 2063);
- Stephanie August on behalf of the late Robert Charles William James Farrar and her whānau (Wai 3096);
- Robert Gabel on behalf of Ngāti Tara (Wai 1886);
- April Grace on behalf of herself, her whānau, Ngā Wahapu o Te Rarawa o Kohai Settlement, and Te Hokingamai e te iwi o Ngāti Whātua Ngāpuhi Nui Tonu (Wai 2206);
- Annette Hale on behalf of the late James Toopi Kokere Wikotu and the Wikotu whānau of Te Upokorehe (Wai 2743);
- Te Enga Harris and Lee Harris, on behalf of themselves, and the Harris whānau (Wai 1531);

- Tasilofa Huirama on behalf of the late Ziporah Grace Huirama, her whānau as members of Ngāti Ueoneone and Ngāti Tautahi of Ngapuhi (Wai 2890);
- Te Urunga Evelyn Aroha Kereopa on behalf of herself and her whānau (Wai 762);
- Richard Nathan for and on behalf of the Mangakahia Hapū Claims Collective (Wai 861);
- Diane Marie Paekau for and on behalf of herself, her whanau as members of Ngāti Hounuku, Ngāti Houa, Ngāti Poua, Ngāti Mahuta, Ngāti Te Ata and Ngāti Whātua (Wai 3131);
- John Pikari on behalf of himself and the descendants of Hone Karahina, and members of the hapū of Te Uri o Hua and Ngāti Torehina (Wai 2394);
- Audrey Okeroa Rogers on behalf of herself, her whānau and members of Ngāti Koheriki (Wai 2869);
- Jane Stevens for and on behalf of her whānau and Ngāi Tahu iwi (Wai 2671);
- Kahura James Watene on behalf of Ngāi Tukōkō and Ngāti Moe (Wai 2778);[40] and
- Umuhuri Matehaere, Kataraina Putiputi Rihara Nuku Keepa, and Nepia Hona Ranapia, for themselves and as of trustees of Te Haupapa Kohatu Trust for the benefit of ngā karanga hapū o Ngāi Te Hapū.

1.4.2 Te Karauna

The Crown

The Crown agencies engaged in the urgent inquiry are the Ministry of Justice (MOJ) and Te Arawhiti – the Office for Māori Crown Relations (Te Arawhiti). MOJ is currently responsible for both the Treaty Principles Bill and the Treaty clause review policies.

MOJ is the lead agency in the justice sector and reports to the Minister of Justice (currently the Honourable Paul Goldsmith). Among other roles, MOJ is responsible for providing policy advice on matters related to justice and the administration of law (including advice on constitutional matters). The Secretary for Justice and Chief Executive, Mr Andrew Kibblewhite, and the Deputy Secretary, Policy, Mr Rajesh Chhana, gave evidence on behalf of MOJ to this inquiry. Their evidence concerned both the Treaty Principles Bill policy and the Treaty clause review.[41] For the former policy, MOJ now reports to the Honourable David Seymour who was appointed Associate Minister for Justice with responsibility for the Treaty Principles Bill on 25 January 2024.[42]

Te Arawhiti is the lead agency for Māori Crown Relations within the public service and reports to the Minister for Māori Crown Relations, the Honourable Tama Potaka and the Minister for Treaty of Waitangi Negotiations, the Honourable Paul Goldsmith. Among other roles, Te Arawhiti chairs the Treaty Principles Oversight Group (TPOG). The Chief Executive – Tumu Whakarae Lilian Anderson and

40. Memorandum 2.6.1(b), pp [3]–[5]
41. Document A23
42. Document A23, p 5

Deputy Chief Executive Strategy and Policy Warren Fraser provided evidence to this inquiry. Their evidence primarily concerned the Treaty clause review, on which they had begun preliminary work.[43] On 10 April 2024, responsibility for the Treaty clause review policy was formally transferred to MOJ with Te Arawhiti remaining in an advisory capacity.[44]

1.5 Te Pūtake o te Pire Mātāpono Tiriti me te Arotakenga i te Whakaritenga e Pā Ana ki te Tiriti

The Origins of the Treaty Principles Bill and Treaty Clause Review Policies

The coalition agreement between National and ACT recorded a commitment under the heading 'Strengthening Democracy' to 'introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable' (the 'Treaty Principles Bill').[45]

The existing ACT policy on their website states:

> The Treaty itself guarantees that 'all the ordinary people of New Zealand . . . have the same rights and duties of citizenship.' The Treaty does not confer greater privileges on Māori than the Government owes to other New Zealanders. All New Zealanders have a basic human right to be treated equally under the law and with equal political worth. One person, one vote.
>
> **1) A Treaty Principles Act and giving New Zealanders a say**
>
> Far from a divisive document that affords unique privileges to one group, the Treaty is a taonga for all New Zealanders, establishing that all New Zealanders have above all else the same rights and privileges as each other and that the government has a duty to protect those rights. Treaty principles are not vague 'free floating' ideas for activist judges and officials to divine. Parliament created the 'principles of the Treaty', so Parliament has the right and the duty to define what they are.
>
> Allowing the courts, the Waitangi Tribunal and the bureaucracy to effectively write the constitution is contrary to the notion that major constitutional change can only be with the explicit consent of the people. This is especially important given that the courts and the bureaucracy are increasingly making reference to vague Treaty principles as justification for actions which are contrary to other matters (such as equal voting rights). To avoid the courts and the public service from venturing into areas of political or constitutional importance based on amorphous principles, Parliament has a duty to set out what those principles are.
>
> The Māori version of the Treaty provides a guide for its principles:

43. Document A20, p 2. Ms Anderson and Mr Fraser's joint brief of evidence also briefly outlines their interactions with the Minister for Māori Crown Relations concerning the Treaty Principles Bill 'for completeness'.

44. Document A20, pp 3–4

45. New Zealand National Party and ACT New Zealand Party, 'Coalition Agreement', 24 November 2023, p 9

Article 1: 'kawanatanga katoa o o ratou whenua' – the New Zealand Government has the right to govern all New Zealanders

In the first article of the Treaty, rangatira gave absolutely forever the complete government (kāwanatanga) of New Zealand. However, Māori chiefs were right in 1840 to place two crucial limits on the power of government (and the potential tyranny of the majority): that their property couldn't be arbitrarily taken by the government, and that they would not be denied the same rights and privileges as British subjects.

Article 2: 'ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' – the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.

The second article of the Treaty guarantees the chiefs, hapū and all the people of New Zealand the authority over their land, houses and treasures for as long as they wish to own those. There is no mention of rights belonging to a particular ethnicity or race in Article 2 of the Treaty. In the Treaty, Queen Victoria promises 'te tino rangatiratanga' of their lands not just to the rangatira and hapū, but to 'all the inhabitants of New Zealand.' However, New Zealand's history has shown poor regard for upholding Māori property rights. The protections of property rights against the desires of the government are weak. Repeatedly, governments seize or impose controls on peoples' property well beyond any legitimate public interest and ignore the rights of ownership. ACT believes the principle of rangatiratanga over one's own property is a basic human right. The right to use and enjoy one's own property is a basic human right for natural persons embodied in a number of overseas constitutions and the UN Declaration of Human Rights. ACT believes in the words of the Treaty: that rangatiratanga over one's property and possessions are protected.

Article 3: 'a ratou nga tikanga katoa rite tahi' – all New Zealanders are equal under the law with the same rights and duties

The third article of the Treaty is unequivocal. It guarantees equal rights for all (ngā tikanga katoa rite tahi). This is consistent with New Zealand's egalitarian culture and political history, where many peoples came to New Zealand to escape the inequalities of class, caste or tribal societies. The guarantee for equal rights is embodied in the Bill of Rights Act and the first article of the UN Declaration of Human Rights which states that 'All human beings are born free and equal in dignity and rights.' ACT says that nobody is entitled to superior rights or privileges because of their ancestry or identity. To argue otherwise is inconsistent with the Treaty's guarantee of equal rights and duties for all.

Putting the Treaty Principles Act to referendum

The End of Life Choice Act was passed by Parliament in 2019 and confirmed by the people in referendum at the 2020 election. This sequence allowed Parliament to debate and fine tune a proposed law, and the people to have the final say about whether it should become law. Critically, this was a 'binding' referendum. The majority voted 'yes' and it automatically became law. We propose the same process for the Treaty Principles Act. This law should be passed by Parliament with the usual process

> of debate, public submissions, more debate, then subject to a yes or no vote by the public. Public ratification would have two effects. It would put the Act above other statutes because it would be one of few, along with the laws that brought in the MMP voting system and the End of Life Choice Act, that have been ratified by the people. Second, it would legitimise an open debate about the Treaty and its place in our constitutional future. The result would be a much more robust and widely understood conception of New Zealand's constitutional arrangements, and each person's rights within it.
>
> The New Zealand Parliament is highest representative of the people. Questions of constitutional importance must be debated there. All New Zealanders, including Maori, will be able to have their say in the open select committee process, where alternate interpretations of what the Treaty actually says can be heard and debated openly. ACT believes that in a democracy based on equal rights of all the ultimate decider of important issues has to be the people. [Emphasis in original.][46]

The National and New Zealand First coalition agreement, in turn, recorded a commitment under the heading 'Strengthening Democracy and Freedoms' to 'reverse measures taken in recent years which have eroded the principle of equal citizenship', including by conducting:

> a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi' and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references.[47]

On 27 November 2023, her Excellency the Governor-General Dame Cindy Kiro issued warrants of appointment for the Prime Minister, Deputy Prime Minister, and each of the Ministers. They were then sworn in. Those Ministers (and the public service associated with each ministerial portfolio) comprise the Executive branch of the Government of New Zealand, commonly referred to as the Crown.

1.6 Ngā Take mō te Uiuinga Kōhukihuki

The Issues for the Urgent Inquiry

On 23 April 2024, the Tribunal confirmed the following statement of issues for this inquiry:

46. Memorandum 2.5.27, pp [3]–[4] (citing ACT New Zealand Party, 'A Path from Co-government to Democracy' (policy document, Auckland: ACT New Zealand, [2023]), https://assets.nationbuilder.com/actnz/pages/10543/attachments/original/1698888391/230916_ACT_Policy_Document_%28CoGovernance%29.pdf?1698888391, pp 3–4); see also ACT New Zealand Party, 'The Treaty Principles Bill', www.treaty.nz

47. New Zealand National Party and New Zealand First Party, 'Coalition Agreement' (2023), p 10

Treaty Principles Bill

1. Is the Crown's policy, and the process it has undertaken, in relation to the Treaty Principles Bill consistent with te Tiriti o Waitangi and its principles?
   (a) What Treaty principles apply to the Crown's laws, policies, practices, actions and omissions in relation to the proposed Treaty Principles Bill?
   (b) In the context of the proposed Treaty Principles Bill, what are the Crown's duties and obligations to Māori arising from those Treaty principles?
   (c) What is required by the Crown to give effect to these Treaty principles in this context, including, in relation to engagement with Māori, and the process of developing the proposed Treaty Principles Bill?
   (d) To what extent, if at all, are the Crown's laws, policies, actions and omissions in relation to the Treaty Principles Bill inconsistent with te Tiriti o Waitangi and its principles, and the Crown's legislative obligations relating to te Tiriti and its principles?
2. To what extent are Māori suffering or likely to suffer prejudice as a result of the Crown's policy and process in relation to the Treaty Principles Bill?
3. What findings and/or recommendations should the Tribunal make about any prejudice suffered, or likely to be suffered, by Māori as a result of Crown conduct in relation to the Treaty Principles Bill?

Treaty Clause Review

4. Is the Crown's policy, and the process it has undertaken, to 'conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi' and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references', consistent with the Tiriti o Waitangi and its principles?
   (a) What Treaty principles apply to the Crown's policy to conduct a review of the Treaty clauses?
   (b) In the context of the Crown's policy to conduct a review of Treaty clauses, what are the Crown's duties and obligations to Māori arising from those Treaty principles, including in relation to the Treaty principles of tino rangatiratanga and partnership?
   (c) What is required by the Crown to give effect to these Treaty principles in this context, including in relation to engagement with Māori, and the process of conducting a review of Treaty clauses?
   (d) To what extent, if at all, are the Crown's actions and omissions in relation to its policy to review Treaty clauses, and the process it has undertaken, inconsistent with te Tiriti o Waitangi and its principles?
5. To what extent are Māori suffering, or likely to suffer prejudice, as a result of the Crown's policy and process to review Treaty clauses?

6. What, if any, findings and/or recommendations should the Tribunal make in relation to any prejudice suffered, or likely to be suffered, by Māori as a result of the Crown's review of Treaty clauses?[48]

1.7 Te Whakatakotoranga o tēnei Pūrongo

The Structure of this Report

As noted in the introduction, in this chapter we considered the jurisdiction of the Tribunal to inquire into and report on these claims, before outlining the procedural history of this urgent inquiry, including reserving our jurisdiction to produce a final report. We also listed the parties, the relevant coalition agreement commitments, and the statement of issues for in this inquiry.

In chapter 2, we provide an overview of the Treaty/te Tiriti in Aotearoa New Zealand's constitutional arrangements. The chapter explains the nature of Māori society prior to 1840 and their legal system. It then considers the impact of the Treaty of Waitangi/te Tiriti o Waitangi on rangatiratanga, kāwanatanga and our nation's evolution from the assumption by the Crown of unbridled power and Parliamentary sovereignty to a recognition of the Treaty/te Tiriti as the constitutional foundation for legitimacy. It then explains the Crown's Treaty/te Tiriti policy-making process. We conclude by summarising current expressions of rangatiratanga in Aotearoa New Zealand and consistency with the United Nations Declaration on the Rights of Indigenous Peoples.

In chapter 3, we consider the origins of the term the 'principles of the Treaty of Waitangi' as first recognised in legislation and how they were applied by the courts in the early period from 1987 to 1994 (along with one 2021 case). We then identify the principles we consider relevant to this urgent report.

In chapter 4, we examine the Crown's Treaty Principles Bill policy and consider the Treaty/te Tiriti implications of Crown actions in pursing this policy, before setting out our findings on whether these actions and the policy are consistent with Treaty principles.

In chapter 5, we examine the Crown's Treaty clause review policy and consider the Treaty/te Tiriti implications of Crown actions in pursuing this policy, before setting out our findings on whether these actions and the policy are consistent with Treaty principles. We then consider and make findings about the combined impact of these two policies, after which we make our recommendations to the Crown.

48. Memorandum 2.5.25; Tribunal statement of issues 1.4.2

UPOKO 2
Chapter 2

TE TIRITI ME NGĀ WHAKARITENGA KAUPAPA TURE O AOTEAROA
The Treaty and New Zealand's Constitutional Arrangements

2.1 He Kupu Whakataki
Introduction

This chapter considers the status of the Treaty of Waitangi/te Tiriti o Waitangi and its principles within Aotearoa New Zealand's constitutional arrangements. We begin with the rangatiratanga sphere of authority, which long predated the Treaty/te Tiriti. We reference Māori and Crown understandings of the Treaty/te Tiriti and how it should be observed as the constitutional foundation of the nation state of Aotearoa New Zealand. We explain the impact of the two texts of the Treaty/te Tiriti on Māori rangatiratanga. We note that since 1840 there has been a continuous unbroken recognition in the common law and statute law of Māori 'tino rangatiratanga', sometimes subject-dependent, sometimes reduced in scope, but always capable of being reinvigorated either by statute or in the common law.

We then turn to the Crown's kāwanatanga that has existed since 1840. We summarise the nature of kāwanatanga, including the introduction of parliamentary sovereignty. We then look at the status of the Treaty/te Tiriti in Aotearoa New Zealand's current constitutional arrangements. This section includes the findings of the Constitutional Advisory Panel in 2013. The chapter also examines the policy process and guidance provided by both the *Cabinet Manual* and Crown officials as to how the Treaty/te Tiriti should be given effect within the Crown policy making process.

The chapter concludes by examining contemporary Māori expressions of constitutionalism and how Māori expect their rangatiratanga to be respected.

2.2 Te Taha ki te Rangatiratanga: Te Mātauranga o te Māori e Pā Ana ki te Kaupapa Ture
The Rangatiratanga Sphere: Māori Notions of Constitutionalism

Many Tribunal reports contain tribal landscape chapters that explain how the political, social, and economic systems of the hapū and iwi of this country operated prior to 1840. In *Te Mana Whatu Ahuru*, for example, the Rohe Pōtae Tribunal explained the basis of this system as follows:

Mana taketake

This system of thought created a network of interwoven relationships – and a network of rights and obligations – among all people, all elements of the environment, and all ancestors. Māori society was guided by its own system of law and authority and a series of organising principles. Here we discuss tapu, mana, whanaungatanga, manaakitanga, utu, tuku, and tikanga. . . .

Tapu

For Māori, to be tapu was to be set apart by atua for a particular purpose, and therefore to be placed off-limits to other purposes. Tapu defined the roles and functions of every person, place, being, word, or thing in existence. A tree was set aside to be a tree, and could only be put to other purposes with the gods' permission. Hence, karakia (incantations) were used to seek permission for any change of use. Similarly, when a person stepped into a tapu space the change of states was immediate and so were the attributed obligations. To then leave a tapu space required a ritual act, such as sprinkling oneself with water.

Likewise, people and families might be set aside for particular functions or specialities – spiritual, political, or economic leadership; diplomacy and warfare; cultivation; hunting and fishing; rongoā; artistic endeavours; and so on – and would therefore inherit or acquire tapu commensurate with those roles, and would need ancestral blessing for any change.

Every person was born with tapu commensurate with his or her lines of descent and expected role in life. To be in a state of tapu was to be under a ritual obligation to behave in a manner that would not offend the atua and as such tapu could be gained or lost through events in the physical world. Tohunga, spiritual leaders, were in constant communion with the gods, seeking to maintain the purity of tapu associated with their lines of descent. Though it was a spiritual force, tapu had practical purposes. Those accorded tapu status maintained specialist knowledge and performed important functions. By setting aside parts of the environment, the use of tapu also ensured that resources were used wisely.

Mana

Like tapu, mana was handed down from atua through lines of descent, often, though not always, to the eldest son. An example is the story of Maniapoto inheriting his father's mana over his older brother, as discussed in section 2.4.1. 'Mana' is usually translated as authority, but it is not limited to political power. It is a spiritual authority or power to act in the world as agents of atua. Just as tapu sets a person aside for particular purposes, mana is the authority and ability to fulfil those purposes.

Throughout Māoridom, mana is generally said to be acquired in any of three ways. First, mana tūpuna is authority inherited from ancestors at birth. As the claimant Piripi Crown told us: 'Ko te kōrero mai rānō ka whānau mai te tangata me tōna ake mana, nā Io i hōmai' (When a man is born he has his own individual mana given to him by Io). As with tapu, some inherit more than others. Traditionally, mana tūpuna was highest among those who were descended from chiefly lines.

Secondly, mana tangata is the influence or authority acquired through actions and events in the world. A person whose actions, expertise, or service enhance the well-being of their kin group will enhance his or her mana, as will a person who rights a wrong. Thirdly, mana atua is the authority derived from direct contact with atua, as shown by tohunga and sometimes by matakite (prophets or seers).

Each of these sources can reflect different functions or roles – mana tangata being of considerable importance to someone whose roles include leadership in warfare or economic matters, and mana atua being important to a tohunga, whose roles are concerned with ritual and spiritual matters. Mana tūpuna is typically important for all leadership roles . . .

However mana was acquired, it was derived from atua and tūpuna, and could be used only to serve them and the kin groups descended from them. It was not the same as personal power. Any leader, no matter how great, could not act against communal interests or without communal consent (either implicit or explicit) and still retain his or her mana.

. . . . .

Whanaungatanga, manaakitanga, and utu

Closely associated with mana are three fundamental values which define how authority should be used. Whanaungatanga (kinship) emphasised the value of whakapapa, not only as a way of tracing connections between people, but as a way of understanding and ordering rights and interests. Fostering kinship connections was one of the fundamental duties of leaders in pre-colonial times. . . .

Manaakitanga (hospitality) emphasised the value of supporting and providing for others, and thereby building relationships based on mutual obligation and interest. . . .

Kaitiakitanga (guardianship) emphasised the value of sustaining and providing for each element of the natural world. As we will see, by fostering these values, leaders and their kin groups could keep peace, build alliances, enhance security, ensure a supply of food and other resources, and create economic interdependence which could be vital during times of scarcity.

Underlying these values was the principle of utu, which can be seen as reciprocity or balance, the essence of which was that anything taken – including mana or tapu – must be returned. Utu could work in constructive ways, creating cycles of reciprocal obligation which brought people together, supporting collective effort and enhancing their joint mana. It could also work in destructive ways, such as when the killing of a senior leader created cause for retribution.

. . . . .

Tikanga

Together, these values and principles were essential elements of a system of tikanga – which can be understood as law, and more broadly as referring to what is right, correct, and just in accordance with mātauranga Māori (Māori knowledge and systems of thought).

Tikanga cannot be understood merely as customs. Rather, tikanga was a system of law, and also as a system of social controls and norms, of personal morals and

ethics, of rules and guidelines for managing relationships, and of rituals for mediating relationships between people and atua. In the words of former Tribunal chair Justice Joseph Williams, it was 'essentially the Māori way of doing things – from the very mundane to the most sacred or important fields of human endeavour'. Tikanga in pre-European times applied to all areas of life and all relationships. There were tikanga for family and kin relationships, social and economic exchanges, marriage, warfare, peacemaking, migration, social and political organisation, group decision-making, leadership, relationships with land and the environment, and so on.

Because tikanga was a principles-based system it could be applied flexibly to different circumstances. The underlying principles were well understood, and guidance was provided in the form of stories, sayings, songs, and other information handed down from generation to generation.

How tikanga was applied depended on circumstances. For public events, tikanga typically involved rituals which invoked atua. . . .

Following periods of war, tikanga was similarly a means of dictating who could claim mana whenua over areas of land, which was often then realised through the use of pou whenua (boundary markers). . . .

Though unwritten, tikanga contained the essential elements of law, including predictable rules for behaviour and predictable responses to transgression.

As the New Zealand Law Commission has noted, early settlers in New Zealand understood that tapu had legal effect, as did Māori systems of land tenure. Nor did they have any difficulty recognising utu and muru as aspects of law enforcement. In the commission's view, it was only through changes in British legal doctrine after 1840 that law came to be associated with western institutions.

In Treaty terms, tikanga and tino rangatiratanga cannot be separated, because tikanga guides all relationships with people, the environment, and atua, and because the actions of rangatira are legitimate only if they are tika.

In a world without written language, tikanga were handed down from generation to generation through histories, stories, songs, sayings, place names, carvings, and other knowledge. By describing the actions of atua and tūpuna, these kōrero also provided guidance on how to act in this world.

In the time of gods, for example, Tūmatauenga's defeat of his siblings gave humankind some measure of dominion over forests and oceans. Likewise, the histories of this district's ancestors – their journeys, discoveries, battles, and marriages, and the names and taonga they left behind – helped determine who had rights and how they could be used.[1]

This was the constitutional, political, and legal landscape British settlers encountered during the early nineteenth century. Notions of constitutionalism can be gleaned from the manner in which political authority was exercised. Leadership among whānau, hapū, and iwi was exercised by the elders and rangatira (usually in rūnanga) who were in turn accountable to their people. Professor Margaret Mutu

1. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 1, pp 38–45

explained that rangatira are 'our hapū and iwi elders and leaders, whose role is to ensure the well-being of the hapū and iwi'. She added:

> Kaumātua have analysed the word rangatira as follows:
>
> > Tirohia tō mata ki te moana, he ika e ranga ana. Tirohia tō mata ki uta, he tira tangata e haerere ana. Mā wai e raranga kia kotahi ai?
> >
> > Look to the sea where the fish shoal (as one body); look to the land where a group of people wander about. Who will bind them in unity?
>
> The essential words here are ranga: 'shoal'; raranga: 'weave, plait'; and tira: 'group'. A rangatira, then, holds a group of people together so that they move as one, like a shoal.
>
> Rangatiratanga is often translated literally as chieftainship. This is not a good translation. In truth it is the exercise of leadership in a manner that ensures that the iwi preserves and upholds its mana. The distinguishing feature of rangatiratanga is encapsulated in the notion of 'taking care of one's people'. In practical terms it means exercising paramount power, and authority in respect of the people and their resources, so that the people can prosper and enjoy social, economic and spiritual well-being. Rangatiratanga is a control exercised not only by particular individuals, but by local groups collectively as well. It is, in short, the manifestation of the iwi political system. Tino rangatiratanga is the exercise of ultimate and paramount power and authority.[2]

It was a system governed in accordance with Māori principles and values including whanaungatanga, manaakitanga, kaitiakitanga, tapu, and utu. It was within this world view that the mostly northern chiefs declared their sovereignty in the 1835 He Whakaputanga – the Declaration of Independence, fully explained by the Waitangi Tribunal in its *He Whakaputanga me te Tiriti* stage 1 report for the Te Paparahi o Te Raki inquiry (2014).[3]

2.3 Te Tiriti o Waitangi

The Treaty of Waitangi

The texts of the Treaty of Waitangi/te Tiriti o Waitangi are scheduled to the Treaty of Waitangi Act 1975. They read as follows:

(The Text in English)

2. Document A14, pp 1–2
3. Waitangi Tribunal, *He Whakaputanga me te Tiriti/The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Lower Hutt: Legislation Direct, 2014), ch 4. We note that the signatories of He Whakaputanga also included rangatira from outside Te Tai Tokerau, including Te Hāpuku of Ngāti Te Whatuiāpiti of Mahia and Te Wherowhero of Ngāti Mahuta of Waikato.

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First
The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second
Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third
In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

W Hobson
Lieutenant Governor.

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty.

[*Here follow signatures, dates, etc.*]

(The Text in Maori)

Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te Tuatahi
Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua.

Ko te Tuarua
Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te Tuatoru
Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani.

(Signed) William Hobson,

Consul and Lieutenant-Governor. Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o matou ingoa o matou tohu.

Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.

Ko nga Rangatira o te wakaminenga.

The text of both versions of the Treaty of Waitangi/te Tiriti o Waitangi have been discussed in numerous reports of the Waitangi Tribunal. For our purposes, we refer again to *Te Mana Whatu Ahuru*, where the Tribunal explained the differences in the text as follows:

> As is now well understood, the English and Māori texts differed in three key respects. The first two concerned the relative powers retained by Māori and acquired by the Crown, and the third concerned the sale of land.
>
> First, in article 1 of the English text, Māori purportedly ceded to the Crown 'absolutely and without reservation all the rights and powers of Sovereignty' in their territories. Sovereignty, in the English legal tradition, refers to the supreme power within any territory to govern and make law. The Crown defined it as 'paramount civil authority', encompassing a right to govern and an 'unfettered' right to make laws applying to all people and territories within New Zealand. Claimants, similarly, defined sovereignty as 'the supreme, absolute power by which any State is governed', and said it encompassed political organisation, territorial control, and independence.
>
> In the Māori text, Māori granted the Crown 'te kawanatanga katoa o o ratou wenua'. 'Kāwanatanga' is usually translated as government or governorship. As the Tribunal explained in its Te Paparahi o Te Raki stage 1 report, kāwanatanga was a newly coined word, made by combining the transliteration 'kāwana' (for 'governor') with the suffix 'tanga', to form an abstract noun. Witnesses in that Tribunal explained how Northland Māori were familiar with the term 'kāwana' through their leaders having travelled to New South Wales and met governors there. Some would also have been familiar with the term 'kāwanatanga' from Māori translations of the Bible, where it was used to describe the powers accorded a provincial governor, as distinct from those of a sovereign. Te Rohe Pōtae leaders, in contrast, had not experienced any direct contact with New South Wales governors, and were considerably less likely to have been familiar with the term from the Bible, since mission stations had opened much more recently and had not yet been established south of Kāwhia and the Pūniu. What the term did not convey, in the view of that Tribunal (and many others), was the idea of supreme authority inherent in the English term 'sovereignty', which was what the Crown in fact sought. That Tribunal noted that in He Whakaputanga, the 1835 declaration of independence, 'sovereign power and authority was translated as 'ko te Kingitanga ko te mana i te wenua', whereas kāwanatanga was used for 'any functions of government', implying an administrative authority, not a supreme, unconditional power. Scholars

have debated whether another term, such as mana, should have been used to explain the power that the Crown sought, without reaching consensus. Some have argued that kāwanatanga was an appropriate choice, even if it did not convey all of the connotations of sovereignty, because it explained the practical power that the Crown sought, which was to establish a government.

The second significant difference between the two texts occurred in article 2. In the English text, Māori were guaranteed full, exclusive, and undisturbed possession of their 'Lands and Estates Forests and Fisheries and other properties which they may collectively or individually possess'. By contrast, in article 2 of the Māori text, Māori were guaranteed 'te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa' (which the Orakei Tribunal explained as conveying 'full authority over their lands, homes, and things important to them', and the Motunui–Waitara Tribunal explained as the 'highest chieftainship' or 'the sovereignty of their lands'). The preamble in Māori also indicated the Crown's intention to protect Māori in their exercise of rangatiratanga as well as their whenua ('o ratou rangatiratanga, me to ratou wenua'); this was translated in the English text as the protection of 'just Rights and Property'. The use of 'tino rangatiratanga' reflected that Māori would retain the highest form of political authority relevant to them. He Whakaputanga had used 'Rangatiratanga' as a translation for 'Independence', and 'Wenua Rangatira' as a translation for 'independent State'. The same term used in the Treaty could therefore be read as a guarantee of independent statehood. He Whakaputanga also vested sovereignty ('ko te Kingitanga ko te mana i te wenua') in 'nga tino rangatira'. Whereas kāwanatanga was used in the Bible to represent the powers of a provincial governor, rangatiratanga had been used for 'kingdom' (as in 'the kingdom of God').

The third point on which the texts differed concerned land transactions, which were covered in the rest of article 2. The English text granted the Crown an 'exclusive right of Preemption' over such lands as Māori were willing to part with. In the Māori text, pre-emption was translated as 'hokonga', generally understood to refer to buying, selling, or trading, without necessarily conveying any exclusive right.

The Tribunal in the Te Paparahi o Te Raki inquiry agreed with Claudia Orange and other historians who had concluded that the differences in the texts meant that much depended on how the Treaty was explained verbally to rangatira who were deciding whether to sign.[4]

We note that the *Te Mana Whatu Ahuru* Tribunal concerned iwi and hapū in the Te Rohe Pōtae district, and that other iwi and hapū may have had different understandings of the term 'kāwanatanga'.

Since historian Ruth Ross's essay on the Treaty/te Tiriti texts was published in 1972, most scholars who have considered the two texts have noted the differences between them.[5] In 2022, however, lawyer and historian Ned Fletcher concluded on the basis of archival research into the English text that 'the Māori and English texts

4. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, pp 146–149

5. Ruth Ross, 'Te Tiriti o Waitangi: Texts and Translations', *New Zealand Journal of History*, vol 6 no 2 (1972), pp 129–157

of the Treaty reconcile'.[6] He argued further that '"sovereignty" in the English text is to be understood according to the principal purpose of establishing government over British subjects for the protection of Māori' and that 'sovereign power did not supplant tribal government'.[7] Rather, Crown officials saw 'British sovereignty' as consistent with plurality in government and law and accepted Māori custom.[8] Although Dr Fletcher does not explicitly address the Tribunal's findings in *He Whakaputanga me Tiriti* that Māori did not cede sovereignty and instead established separate spheres of authority with the British, on the face of it, his argument does not undermine this finding.

Even Āpirana Ngata, in his 1922 booklet designed to explain the Treaty/te Tiriti to the Māori people conceded there were differences between the two texts. He noted the differences as follows: 'English expressions in the Treaty were not adequately rendered into Maori. There were minor parts left out. However, the Maori version clearly explained the main provisions of the Treaty, therefore, let the Maori version of the Treaty explain itself'.[9]

As a politician of his time, Āpirana Ngata was committed to the English text of the Treaty. However, in considering article 2 of the Māori version he asked 'ko tehea tenei mana, tenei rangatiratanga e korerotia nei hoki e te Upoko Tuarua?' ('What is this authority, this sovereignty that is referred to in the second article?')[10] Simply by his need to ask this question, he demonstrates that on any literal interpretation of article 2 of the Māori text, the chiefs would have understood that they retained their authority. Āpirana Ngata uses mana and rangatiratanga synonymously.

Returning to the Treaty/te Tiriti, over 500 chiefs signed the Māori text – te Tiriti o Waitangi. The only version of the English text signed by Māori was the copy referred to today as the 'Waikato–Manukau sheet'.[11] Thirty-nine chiefs signed this version.[12] However, for all other Māori signatories it was the Māori text – te Tiriti – that they signed.

In its stage 1 report, the Te Raki Tribunal noted it was 'the first Tribunal panel to have heard comprehensive historical claims from descendants of the rangatira who signed te Tiriti in February 1840 at Waitangi, Waimate, and Mangungu' and was therefore the first to have 'the opportunity to hear and test the full range of evidence about the treaty's meaning and effect in February 1840'.[13] The Tribunal stated that the agreement reached in 1840 could be

6. Ned Fletcher, *The English Text of the Treaty of Waitangi* (Wellington: Bridget Williams Books, 2022), p 529. Some exceptions to this pattern, aside from Ned Fletcher, are Paul Moon and Samuel Carpenter (cited in Fletcher, p 9).
7. Fletcher, *The English Text of the Treaty of Waitangi*, p 529
8. Fletcher, *The English Text of the Treaty of Waitangi*, p 525
9. Paper 6.2.13, pp 2–3
10. Paper 6.2.13, pp 8, 22
11. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 149, see also pp 149–153, 164–165, 170–171
12. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 157
13. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxi–xxii

found in what signatory rangatira (or at least the great majority of them) were prepared to assent to, based on the proposals that William Hobson and his agents made to them by reading te Tiriti and explaining the proposed agreement verbally, and on the assurances the rangatira sought and received.[14]

It concluded that:

- The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.
- The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.
- The rangatira consented to the treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence. The detail of how this relationship would work in practice, especially where the Māori and European populations intermingled, remained to be negotiated over time on a case-by-case basis.
- The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-treaty land transactions and to return any land that had not been properly acquired from Māori.
- The rangatira appear to have agreed that the Crown would protect them from foreign threats and represent them in international affairs, where that was necessary.[15]

The chiefs, therefore, did not surrender their rangatiratanga to the Queen by signing the Treaty or te Tiriti. The Māori text suggests that they would have understood that they retained their rangatiratanga as guaranteed by the Crown. That logically means they retained the right to make their laws, operate their own political and legal system and determine their own tribal membership. Put another way, by the consent of Māori signatories to the kāwanatanga conferred in article 1 and the guarantee of rangatiratanga in article 2, a new system was created. One where there was an overlap of jurisdictions whereby the Crown's right to govern was tempered by the guarantee of Māori authority. The Te Rohe Pōtae Tribunal put the matter this way:

> We consider that the Treaty represented a coming together of two peoples, each with their respective cultural, legal, and political traditions. The Treaty therefore cannot be understood only on the basis of what British officials or the Crown believed it to mean in 1840; nor can it be understood solely in terms of its meaning and effect under English law at that time. The rangatira who signed the Treaty had pre-existing systems of law (tikanga) and authority (mana and tino rangatiratanga), which could be modified only with the free, informed consent of Māori communities. What Māori

14. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p xxii
15. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 529

> consented to depended on what they understood the Treaty to mean, and this inevitably reflected the explanations that were made to them in their own language, and which they interpreted through the lenses of their own assumptions about law and authority. The Treaty's meaning and effect can therefore be found in the common ground between Māori and British understandings – a common ground that provided for the Crown to exercise a new governing power, but one that did not interfere with the rights of Māori to continue to govern themselves in a manner consistent with their own mana and tikanga; for the Crown's new power to be used in a manner that protected Māori interests; and for the relationship to provide for mutual benefit to Māori and settlers alike. Inevitably, much remained to be negotiated, in particular about the potential overlaps and tensions between Crown and Māori spheres of influence. It is from these key elements of the Treaty transaction that we can derive principles that should be applied to the claims before us.[16]

Thus, the kāwanatanga and rangatiratanga spheres provided for in the Treaty/te Tiriti have led to singular and overlapping authorities. For Māori, the rangatiratanga sphere led to movements such as the Kiingitanga and Kotahitanga. For the Crown it led to the introduction of the Westminster form of government. At times both have depended on the other to progress the mutual benefit of all New Zealanders such as during the First and Second World Wars.[17]

2.4 Te Taha ki te Kāwanatanga: Motuhaketanga o te Pāremata, ngā Whakaritenga Kaupapa Ture me ngā Tukanga Kaupapa Here

The Kāwanatanga Sphere: Parliamentary Sovereignty, Constitutional Arrangements, and Policy Processes

In this section, we explore the impacts of kāwanatanga, including the introduction of parliamentary sovereignty. We look at Aotearoa New Zealand's current constitutional arrangements, including the Constitution Act 1986 and the *Cabinet Manual* and what these say about the constitutional status of the Treaty/te Tiriti. Next, we set out the findings of the Constitutional Advisory Panel in 2013. The section concludes by examining the policy process and guidance provided by both the *Cabinet Manual* and Crown officials as to how the Treaty/te Tiriti should be given effect within that process.

2.4.1 Motuhaketanga o te pāremata

Parliamentary sovereignty

The doctrine of parliamentary sovereignty represents the notion that Parliament can enact or repeal any law. Its legal authority is not bound by any other body,

16. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 214

17. This collaboration was prominent at the onset of both wars when Māori aimed to fulfil their duties and obligations of citizenship, prompting the Government to form units for overseas service based on ethnicity: the Māori Contingent in 1914 and the 28 (Māori) Battalion in 1939.

including the judiciary or previous parliaments. The most well-known statement of the doctrine is a pronouncement by the Victorian jurist Albert Venn Dicey. He defined parliamentary sovereignty as 'the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[18]

Since the New Zealand Constitution Act 1852 (passed by the imperial parliament in Westminster), the English heritage of parliamentary sovereignty has generally been assumed to be fully applicable in Aotearoa New Zealand. The doctrine of parliamentary sovereignty was increasingly applied in Aotearoa New Zealand from 1852.

Under this system, the overlapping spheres of kāwanatanga and rangatiratanga experienced flash points, resulting in clashes such as the Northern War of 1845–46, the New Zealand wars of the 1860s and early 1870s, and the Crown's confiscation of land under the New Zealand Settlements Act 1863. But more often, the rangatiratanga or self-government sphere sought recognition in statute. Accommodation has been made to varying degrees in statute since 1846, including section 71 of the Constitution Act 1852 which allowed for the setting aside of districts under Māori law and self-government. As the Tribunal noted in the *Whaia te Mana Motuhake* (2014) report, the question of why Māori sought statutory recognition and that Tribunal's response is worth repeating:

> It might be asked as a preliminary question: why did Māori need State recognition for their own institutions of self-government, and why was the Government so reluctant to give it? The short and inescapable answer was that Māori community decision-making required political acknowledgement (from the Government) and legal acknowledgement (from the courts) before its decisions could be made to stick. Hence, Māori constantly sought statutory powers for their local, district, and national bodies. Otherwise dissentients could defy the community, by selling land, for instance, and neither private settlers nor the Crown had to recognise or respect the decisions of Māori communities in such instances. Similarly, Māori communities could not enforce their rules on outsiders (whether settlers, Government bodies, or other Māori groups) without legal powers to do so. Māori self-government institutions could not operate effectively within the State and the economy without a corporate legal identity. Thus, even where Māori autonomy movements established their own institutions without State sanction or permission, as with the Kīngitanga in the 1850s and the Māori parliaments in the 1890s, it was still common to seek some form of recognition and even empowerment from the New Zealand Government. The alternative, as with the aukati (boundary) of the King Country in the 1870s, was enforcement by Māori through persuasion, agreement, or the threat of force.[19]

18. Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1886; repr Charleston: Bibliolife, no date), p 36

19. Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Lower Hutt: Legislation Direct, 2015), p 53

Statutes that provided for some degree of rangatiratanga and law or rule-making authority included the Native Circuit Courts Act and the Native Districts Regulation Act, both of 1858, and the Māori Representation Act 1867. The latter Act constituted the first Māori seats in Parliament. Then there was the Māori Councils Act 1900, the Māori Social and Economic Advancement Act 1945, the Māori Trust Boards Act 1955, the Māori Community Development Act 1962, Treaty settlement legislation, and the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021. The history of most of these statutes and their impact on the rangatiratanga sphere is discussed in the *Whaia te Mana Motuhake* report and the *Māori Wards And Constituencies Urgent Inquiry* report.[20]

During the late twentieth century, statute law also enabled the kāwanatanga and rangatiratanga spheres to interact through Treaty clauses referencing 'the principles of the Treaty of Waitangi' included in legislation such as section 9 of the State-Owned Enterprises Act 1986. At the time the coalition Government took office, over 40 statutes referenced the Treaty 'principles'. Alternatively, interaction has occurred through legislative references to the text of the Treaty/te Tiriti as in the preamble of Te Ture Whenua Maori Act 1993. While many Māori consider that these Acts do not go far enough, the statutes nonetheless demonstrate the power of the kāwanatanga or the Westminster parliamentary process to advance Māori rights and the Crown's obligations under the Treaty/te Tiriti. Most were also subject to standard select committee processes where the general public were able to air their views on the proposed legislation, and therefore the enactment of these statutes was not something done in secret.

2.4.2 Motuhaketanga o te pāremata kei te rautau 21

Parliamentary sovereignty in the twenty-first century

The question now is whether the doctrine of parliamentary sovereignty remains unbridled. In the twenty-first century, doubts have been expressed about the literal application of the Diceyan formula of parliamentary sovereignty. When she was the Chief Justice, the Right Honourable Dame Sian Elias observed:

> Parliamentary sovereignty is an inadequate theory of our constitutions. An untrammelled freedom of Parliament does not exist. We need to develop a better consciousness of the dependence of our societies upon the law of the constitution – and a feel for constitutional movement, in renunciation of an immobility which is unreal.[21]

Evidence on behalf of the claimants asserted that it cannot be possible for the Treaty/te Tiriti – which some view as a kawenata tapu, a sacred compact, agreed to between their tūpuna and the Crown – to be rewritten by an Act of Parliament

20. Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 70–208; Waitangi Tribunal, *Māori Wards And Constituencies Urgent Inquiry Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), pp 21–22

21. Sian Elias, 'Another Spin on the Merry-go-round', address to the Institute for Comparative and International Law, University of Melbourne, 19 March 2003, p 25, https://www.courtsofnz.govt.nz/assets/speechpapers/speech19–03–2003.pdf

or for the Crown to unilaterally undertake a Treaty clause review of statutory enactments.

Kawenata is the Māori term for covenant. The idea of a covenant, which is a sacred agreement, was introduced to the Māori people before the Treaty of Waitangi/te Tiriti o Waitangi was signed, primarily through biblical texts. The missionaries presented the Treaty/te Tiriti as more than just a human agreement; they portrayed it as a sacred relationship between the monarch and Māori under the divine authority of God. Historical records and speeches after 1840 consistently refer to the Treaty/te Tiriti as a covenant or sacred compact. For example, in 1860 Hemi Matini of Ngāti Maahanga referred to the Treaty/te Tiriti as 'te Kawenata o Waitangi' in his speech at the Kohimarama Conference of 1860. He also referred further to the Kawenata as

> te whakakotahitanga tena o nga iwi ki Waitangi. I reira hoki ahau e whakarongo ana ki te aroha o te Kuini. Ka rongo ahau ki nga paenga o tena korero.
>
> the union of races at Waitangi. I was there at the time, and I listened to the love of the Queen. I then heard about the advantages of the Treaty.[22]

Lord Bledisloe's prayer at Waitangi in 1934 referred to the Treaty as a sacred compact,[23] and the Governor-General, the Right Honourable Dame Cindy Kiro, used similar language in her recent Waitangi Day Address in 2022.[24] Despite the passage of time, many Māori continue to hold a sense of loyalty and trust towards the monarch, despite the actions of settler governments, due to the Māori perception of the Treaty/te Tiriti as a kawenata tapu or sacred compact.

The view of the Treaty/te Tiriti as a kawenata tapu underlined its constitutional significance. Professor Andrew Geddis explained British constitutional theory as follows:

> There is, of course, an extensive historical account of how the institution of Parliament came to exercise 'sovereignty' over the law. That account involves the literal battles fought between the forces of the Crown and those of Parliament in the 17th Century, the subsequent enactment of the Bill of Rights 1688 as a part of the political settlement reached after the 'Glorious Revolution', and judicial acceptance thereafter that parliamentary enactments represent the apex source of law.
>
> That history and the attendant presumptions regarding what a legitimate form of governance looks like was transposed into Aotearoa New Zealand with the arrival of the Crown. Over time, the sovereignty of the 'mother Parliament' at Westminster was

22. *Te Karere Maori: The Maori Messenger*, 14 July 1860, no 13, p 4

23. Whare Runanga (including Bledisloe Prayer), 6 February 1934, https://gg.govt.nz/publications/whare-runanga-incl-bledisloe-prayer#:~:text=O%20God%2C%20who%20in%20Thy,made%20in%20these%20waters%20may, accessed 11 June 2024

24. Rt Hon Dame Cindy Kiro, 'Waitangi Day Address 2022', 6 February 2022, The Office of the Governor-General, https://gg.govt.nz/publications/waitangi-day-address-2022, accessed on 11 June 2024

devolved on to the legislative institutions in Aotearoa New Zealand. By 1986, section 16 of the Constitution Act was confidently able to restate as an assumed matter of legal fact that 'The Parliament of New Zealand continues to have full power to make laws.'

However, the rationale for this 'bedrock' assumption in our constitutional order has changed over time to reflect the emergent claims of mass representative democracy. That is to say, Parliament's sovereignty over the law can no longer rest on the claimed cultural superiority of the United Kingdom's institutional arrangements, but rather in its democratic genesis in 'the will of the people'. Simply put, the claim is that Parliament has (and should have) the final say over the nation's laws because the individuals who serve within it have been chosen by voters through a system of free and fair elections. It is then argued that the decisions of a majority of such elected representatives then can be said to reflect the preferred view of the populace in some meaningful fashion.

Nevertheless, the law making authority of Parliament still sits within a broader constitutional arrangement for which some normative account must be given. It must be explained why the decisions of a majority of elected representatives ought to be treated as finally deciding 'this is what the law will be' with respect to a particular matter. Recourse to claims of political fact – 'parliament has the final word because everyone accepts that parliament has the final word' – rather beg the question as to *why* everyone (purportedly) does so.

The answer to that question requires some explanation of what constitutes legitimate parliamentary authority in the particular constitutional context of Aotearoa New Zealand. In recent years, the model of Parliament as an institution unbounded by anything other than political limits imposed by the popular will has become hard to sustain. By way of example, in 2017 a unanimous five member bench of the Court of Appeal noted that Parliament is subject to some constraints that are 'legal in nature'.

Situating the institution of Parliament and its law-making role in the particular constitutional context of Aotearoa New Zealand then suggests wider constraints must apply. If those constitutional arrangements rely, in a normative sense, on Te Tiriti/The Treaty as a founding accommodation, then Parliament must be limited in how it can act in relation to that accommodation. Admittedly, the content of Te Tiriti/The Treaty has never been accepted as a substantive constraint on Parliament's law-making authority. Direct judicial enforcement of the terms of Te Tiriti/The Treaty depends on its specific incorporation into the law and is subject to parliamentary mediation in this respect.

However, the relationship of Te Tiriti/The Treaty to Parliament's law-making powers on specific issues is different to Parliament's law-making power vis-à-vis Te Tiriti/The Treaty itself. Simply put, even if Parliament can legislate *in breach* of Te Tiriti/The Treaty, it may not be able to make law that *alters or amends* Te Tiriti/The Treaty. The former action will create a disjunct between the formal law (as set out in an enactment) and the underlying normative presumptions of our constitution. That is undesirable and should be a matter of concern, but it also is part-and-parcel of sourcing sovereign law-making authority in our Parliament. The latter action, however, would purport to alter the very basis of our constitutional arrangements,

> insofar as it would rewrite the narrative about what we are and how we came to be as a country. [Emphasis in original.][25]

Professor Geddis distinguished between the Crown implementing a policy by asking Parliament to legislate in breach of the Treaty/te Tiriti and the Crown implementing a policy that alters or amends the Treaty/te Tiriti itself which is part of the very basis of our constitutional arrangements. An instance of the former would be the decision to repeal section 7AA of the Oranga Tamariki Act 1989.[26] The proposal to introduce a Treaty Principles Bill is an example of the latter. We examine these issues in more detail in chapters 4 and 5. What is clear is that the doctrine of parliamentary sovereignty can be abused.

One of the reasons that Aotearoa New Zealand's kāwanatanga system of government has worked is that parliamentarians have been prepared to exercise a degree of self-restraint. Nevertheless, public law orthodoxy has it that Parliament has the power to enact legislation of any sort – including an Act that might have all kinds of draconian consequences, such as the New Zealand Settlements Act 1863 referred to above. A modern example might be amending entrenched provisions of the Electoral Act 1993,[27] without the requisite majority of 75 per cent of all the members of the House of Representatives, by first repealing the entrenchment provision in section 268 of that Act which requires only a simple majority. Yet thus far constitutional practice and convention have ensured sufficient self-restraint by the Crown in Parliament to avoid a direct confrontation with other branches of government on possible limits to the doctrine of parliamentary sovereignty.

2.4.3 Ētahi atu whaiwhakaaro kāwanatanga

Other kāwanatanga considerations

Aotearoa New Zealand is one of the few countries in the world that does not have a formal written constitution. Rather, our constitutional arrangements are reflected in the common law and in legislation, including the Constitution Act 1986, the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993. Constitutional conventions (or unwritten and written rules) govern the conduct of all State actors. Other rules under which the kāwanatanga system operates can be found in the Standing Orders of the House of Representatives and the *Cabinet*

25. Document A19, pp 5–6. The 2017 Court of Appeal decision that Professor Geddis cited in his brief is *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [43].

26. Waitangi Tribunal, *The Oranga Tamariki* (*Section 7AA*) *Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 34

27. The 'entrenched provisions' are sections in the Act that can only be amended by a 75 per cent super-majority of the House of Representatives. The entrenched provisions relate to the term of Parliament, membership of the Representation Commission that divides New Zealand into electoral districts (starting with 16 general electoral districts in the South Island), 18 years as the minimum age for persons qualified to vote, and the method of voting.

Manual. Ancient English statutes and charters such as the Magna Carta 1297[28] and the Bill of Rights 1688 may also be referenced.[29]

However, the *Cabinet Manual* recognises that it is the Treaty of Waitangi that is a founding document of government in Aotearoa New Zealand. As Natalie Coates noted in her evidence, the *Cabinet Manual* 'is the current authoritative guide to central government decision making for Ministers, their offices and those working within the public service'.[30] It was last updated in 2023 and all of our references are to that edition of the manual. This constitutional status of the Treaty is explicitly acknowledged in the *Cabinet Manual*. As Sir Kenneth Keith, who authored the introduction to the *Cabinet Manual* in 1990, stated in his opening discussion of Aotearoa New Zealand's constitutional arrangements:

> The New Zealand constitution is to be found in formal legal documents, in decisions of the courts, and in practices (some of which are described as conventions). It reflects and establishes that New Zealand is a constitutional monarchy, that it has a parliamentary system of government, and that it is a democracy. It increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand (see appendix A). The constitution must also be seen in its international context, because New Zealand governmental institutions must increasingly have regard to international obligations and standards.[31]

Of particular note is the recognition that the Treaty may counterbalance majority decision-making and be a source of additional rights for Māori:

> The Treaty of Waitangi, which may indicate limits in our polity on majority decision-making. The law sometimes accords a special recognition to Māori rights and interests, particularly those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi, of two parties negotiating and agreeing with one another, is appropriate. Policy and procedure in this area continues to evolve.[32]

28. There were several versions of Magna Carta issued by successive kings in the thirteenth century. One of them was enacted as a statute in 1297. The 1297 Act included key articles from the original 1215 charter. New Zealand Parliament's Imperial Laws Application Act 1988 confirmed that one constitutionally important article of Magna Carta in the 1297 Act remains in force in New Zealand. This article declares that no one can be imprisoned or punished except 'by lawful judgment of his peers, or by the law of the land'.

29. Paper 6.2.10, p 22

30. Document A6, p 11

31. Cabinet Office, *Cabinet Manual 2023* (Wellington: Department of Prime Minister and Cabinet, 2023), p 1

32. *Cabinet Manual 2023*, p 2

Given times have moved on since 1990 when Sir Kenneth Keith first commented on the status of the Treaty/te Tiriti in the *Cabinet Manual*, it is more correct to say that the Treaty/te Tiriti is *the* founding document of Aotearoa New Zealand's governing arrangements, and not just a founding source. This view is shared by Ms Coates who, in response to a question from the Tribunal, stated: 'In terms of our modern nation state in the way that power operates between Māori, Pākehā and all the institutions in Aotearoa, te Tiriti o Waitangi . . . is "the" foundational document.'[33] This is also how the Treaty/te Tiriti is described in the Crown's briefing to Minister Goldsmith dated 28 November 2023.[34] The briefing, entitled 'the New Zealand Constitution, Democracy and Open Government', described the Treaty of Waitangi 'as the founding document of New Zealand' and the basis for the exercise of kāwanatanga.[35] This is also how the Treaty/te Tiriti was described in the Wai 262 report,[36] and in the Te Raki stage 1 report where the Tribunal described the Treaty/te Tiriti as 'the nation's founding document'.[37] Indeed, the Tribunal only referred to this status of the Treaty/te Tiriti in passing, underscoring just how commonly-held this view has become.

2.4.4 He Kōtuinga Kōrero a te Ranga Kaupapa Ture 2013

Report of the Constitutional Advisory Panel 2013

Aotearoa New Zealand's constitutional arrangements were the subject of a review conducted under the auspices of the last National-led Government. In August 2011, the Government established the Constitutional Advisory Panel as part of a 'Consideration of Constitutional Issues', as agreed in the 2008 Relationship Accord and Confidence and Supply Agreement between the National Party and the Māori Party. The panel's work was jointly overseen by the then Deputy Prime Minister and the Minister of Māori Affairs.

The panel, co-chaired by Professor John Burrows and Sir Tipene O'Regan, was appointed to:

- stimulate public debate and awareness of the current constitutional arrangements[;]
- provide Ministers with an understanding of New Zealanders' perspectives on those arrangements, including the views of Māori[; and]

33. Transcript 4.1.6, pp 195–196
34. Document A25
35. Document A25, p 6
36. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 82
37. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, p 441

- report to Ministers with advice on the constitutional topics, including any points of broad consensus where further work is recommended.[38]

The terms of reference gave the Māori co-chair specific responsibility to ensure the panel's engagement process was inclusive of Māori, consistent with the Treaty/te Tiriti relationship, and responsive to Māori consultation preferences.[39]

To identify the different perspectives present in Aotearoa New Zealand, the panel held a series of preliminary conversations relating to Aotearoa New Zealand's constitutional arrangements. In February 2013, the panel formally launched the Constitution Conversation. Over the course of this national conversation, the panel attended over 120 hui, community-hosted meetings, and independent events including academic conferences, and resources in several languages were developed to support people's engagement.[40] In total, the panel received 5,259 submissions from individuals and groups.[41]

The panel reported to Ministers in November 2013. Their report, *New Zealand's Constitution – A Report on a Conversation*, provides a snapshot of a developing conversation on New Zealand's constitution. An important theme of the conversation was the place of the Treaty/te Tiriti in Aotearoa New Zealand's constitutional arrangements.

The report acknowledged that for many participants, 'the Treaty was the focus of the Conversation'.[42] It described the history of Māori–Crown relations as 'important context for any future conversations about how this country is governed'.[43] The report further recognised the Treaty/te Tiriti as 'the foundation of the Māori-Crown partnership', and stated that the Treaty/te Tiriti text 'reflects an understanding of the fundamental elements of the relationship and about how iwi and hapū would work with the Crown in developing the country's future'.[44]

During its consultation process, the panel received varied and at times conflicting perspectives on the constitutional significance of the Treaty/te Tiriti. One view saw the Treaty/te Tiriti as fundamental to how this country is governed, another as both the foundation for the bicultural partnership and the basis for a Treaty-based multicultural future, and another as having no role in how the country is governed.[45]

For the Constitutional Advisory Panel, a key consideration stemming from the conversations was that 'Māori are tangata whenua: Māori culture, history and

38. Memorandum 3.2.8(c), p 9. The other members of the Constitutional Advisory Panel were Peter Chin, Deborah Coddington, the Honourable Sir Michael Cullen, the Honourable John Luxton, Bernice Mene, Dr Leonie Pihama, Hinurewa Poutu, Professor Linda Tuhiwai Smith, Peter Tennent, and Dr Ranginui Walker.
39. Memorandum 3.2.8(c), p 9
40. Memorandum 3.2.8(c), p 10
41. Memorandum 3.2.8(c), p 10
42. Memorandum 3.2.8(c), p 31
43. Memorandum 3.2.8(c), p 29
44. Memorandum 3.2.8(c), p 29
45. Memorandum 3.2.8(c), pp 31–32

language have no other home'.[46] In the panel's view, this meant 'Māori culture, history, and language needs to be used and to be able to develop, regardless of the standing of the Treaty within our constitutional arrangements'.[47]

The panel observed that 'a broad consensus' supported the 'Government taking active steps to continue the conversation about the Treaty in our constitutional arrangements . . . including commitments made in Treaty settlements between iwi and the Crown and what they mean for the nation'.[48] In their view, it was timely 'as historic Treaty settlements draw to a close to look to our history to inform our future. We have an opportunity to go back, examine our history, explore missed opportunities and forge a unique future.'[49]

The panel commented that the Crown could 'support this work, although iwi must also have time and space to develop options that reflect tikanga Māori'.[50] They stated that the outcome of such a conversation could not be predicted, but noted that one option emerging from its own consultation related to a 'Treaty-based constitution'. This suggested discussing 'placing the Treaty and Treaty relationships at the centre of our constitutional arrangements, rather than attempting to graft them onto existing Westminster arrangements'.[51]

Finally, based on the conversations, the Constitutional Advisory Panel commented that:

> Many New Zealanders remain sceptical that the Treaty can be a constructive element of our constitution and so may be reluctant to participate in a conversation about its future. Based on the Conversation, however, the Panel believes it is not viable to wind back the clock. The Treaty is already a fundamental element of our constitutional arrangements. It would be unfair, unjust and unrealistic to go back on the commitments made to iwi and hapū by successive governments. Nor do the arguments of equality put forward by some proponents of this view sufficiently acknowledge the diversity of this country's people.
>
> The Treaty is not inherently divisive – its purpose was to establish a relationship between two peoples in one nation. Any divisions arise from a failure to meet those obligations, not from meeting them. The question is not just whether the Treaty is part of the constitution, but how it is best reflected and what we want to achieve by reflecting it.
>
> The Crown cannot turn back on the commitments made in the Treaty and subsequently without the risk of social and political tensions. Any decisions made in such a crisis situation are unlikely to be enduring.[52]

46. Memorandum 3.2.8(c), p 33
47. Memorandum 3.2.8(c), p 33
48. Memorandum 3.2.8(c), p 33
49. Memorandum 3.2.8(c), p 33
50. Memorandum 3.2.8(c), p 33
51. Memorandum 3.2.8(c), p 34
52. Memorandum 3.2.8(c), p 35

In reviewing the perspectives captured in the conversations on the place of the Treaty/te Tiriti in Aotearoa New Zealand's constitution, the panel made a series of recommendations. Regarding the constitutional role of the Treaty/te Tiriti, the panel recommended the Government:

- continues to affirm the importance of the Treaty as a foundational document
- ensures a Treaty education strategy is developed that includes the current role and status of the Treaty and the Treaty settlement process so people can inform themselves about the rights and obligations under the Treaty
- supports the continued development of the role and status of the Treaty under the current arrangements as has occurred over the past decades
- sets up a process to develop a range of options for the future role of Treaty, including options within existing constitutional arrangements and arrangements in which the Treaty is the foundation
- invites and supports the people of Aotearoa New Zealand to continue the conversation about the place of the Treaty in our constitution.[53]

2.5 Te Tukanga o te Kaupapa Here

The Policy Process

We turn now from examining the status of the Treaty/te Tiriti and our kāwanatanga constitutional arrangements to how the Treaty/te Tiriti is observed in practice within the kāwanatanga sphere, particularly in the development of policy and legislation. In this section we set out the evidence we heard from the Crown witnesses at the urgent hearing about how the policy process works. We then consider official guidance on how policy can be made Treaty/te Tiriti consistent and we set out Te Arawhiti guidance on policy development and engagement with Māori.

In their evidence, Secretary for Justice Andrew Kibblewhite and Deputy Secretary Rajesh Chhana – both senior officials within the Ministry of Justice (MOJ) – described key roles and responsibilities in the development of policy. We find it useful to quote their description of this process in full:

> Ministers decide the direction of, and the priorities for, the agencies for which they hold 'portfolio responsibilities'. Agencies can also give advice on the direction and priorities of the portfolio.
>
> Officials provide advice on policy issues. This process, especially on complex subjects, is typically iterative with officials' advice to Ministers for decisions informing further advice and decisions.
>
> For policy decisions requiring Cabinet approval (see paragraph 16), a Cabinet paper is drafted, on behalf of the Minister. This can be an iterative process, with the Minister reviewing versions of the paper. Proposals can still be subject to change.

53. Memorandum 3.2.8(c), p 28

> If the policy proposal includes a regulatory option, officials must prepare a Regulatory Impact Analysis, which provides Cabinet with officials' assessment of the policy options.
>
> Relevant agencies are consulted on the draft Cabinet paper and the draft Regulatory Impact Analysis, and their comments are incorporated as appropriate.
>
> Ministers consult their Ministerial colleagues on the draft Cabinet paper and their comments are incorporated as appropriate. Consultation between political parties will also occur where required.[54]

Mr Chhana further identified the dual parts of officials' role in the policy process. During the policy development stage, the role of officials is to give 'politically neutral and free and frank advice' – a role that is reflected in the *Cabinet Manual*. However, 'once a decision is made, officials are expected to implement that decision as effectively as possible'.[55]

Mr Chhana clarified the wider role of officials concerning policy stewardship. He said that MOJ had a stewardship responsibility to consider how Aotearoa New Zealand's constitutional arrangements 'could adapt in the future'. This stewardship role included how our constitutional arrangements 'relate to te Tiriti o Waitangi, the Treaty of Waitangi and the Treaty principles'. He further noted that the *Cabinet Manual* required MOJ to be 'consulted on anything affecting constitutional arrangements'.[56]

In an affidavit filed after hearing, Mr Chhana also described the Cabinet paper process in further detail.[57] He noted that ministerial consultation on a draft paper occurs before a paper is lodged with the Cabinet office.[58] This process may involve rigorous debate between Ministers and will 'take as long as is required'.[59] Public officials are generally not involved and 'may have limited insight into the ongoing consultation and when it is likely to conclude.'[60]

After this process, and once a Minister is satisfied the paper is ready to go to Cabinet, the paper is lodged with the Cabinet Office.[61] The usual deadline for lodgement is 10am on the Thursday before the relevant Cabinet committee meeting.[62] In cases requiring urgent consideration, and with the approval of the Prime Minister's office, papers may be lodged after this deadline.[63] In the case of the Treaty Principles Bill, the relevant committee is the Social Outcomes Committee.[64] It meets weekly when the House of Representatives is sitting.[65]

54. Document A23, pp 2–3; see also *Cabinet Manual*, paras 2.22(e), 3.9
55. Document A23(d), p 2
56. Document A23(d), p 1
57. Document A23(e)
58. Document A23(e), p 1
59. Document A23(e), p 2
60. Document A23(e), p 2
61. Document A23(e), p 2
62. Document A23(e), p 2
63. Document A23(e), p 3
64. Document A23(e), p 3
65. Document A23(e), p 3

Mr Chhana explained further that all matters are first considered by Cabinet committee(s) before being considered and final decisions made by Cabinet.[66] Cabinet committees will have detailed discussions and either send their decisions to Cabinet for confirmation, or refer the relevant paper to Cabinet for further discussion.[67] The committee could also decide the paper should not proceed to Cabinet or decide further work is required before a paper is considered by Cabinet, in which case the submitted paper may be withdrawn.[68] Depending on the outcome of the Cabinet committee's deliberations and the priorities for the Cabinet agenda, Cabinet will typically consider a paper the week after the Cabinet committee meeting.[69] Ultimately, 'Cabinet is the final decision-maker' and no committee decision may be acted upon until it is confirmed by Cabinet.[70] Cabinet may also decide to amend a committee decision or direct it to consider a matter further.[71]

As referred to by Mr Chhana in his brief of evidence, the standards set by the Public Service Act 2020, the regulations and advice contained in the *Cabinet Manual*, and the Legislation Design and Advisory Committee (LDAC) 'Legislation Guidelines' serve to guide officials and Ministers through this process. We note that the two latter documents address consistency with the Treaty/te Tiriti as a key consideration for those developing policy, and each acknowledges the central place of the Treaty/te Tiriti in Aotearoa New Zealand's constitutional arrangements.

In the following sections, we summarise the requirements relating to the Treaty/Te Tiriti specified in the LDAC Legislation Guidelines. We also summarise advice contained in other guidance produced by Crown officials – particularly that of Te Arawhiti – on recognising the Treaty/te Tiriti in the design of legislation and supporting policy.

2.5.1 Te Hoahoa Whakaturetanga me te Rōpu Aroturuki

The Legislation Design and Advisory Committee

A key opportunity for officials to seek expert advice prior to the drafting of legislation is through consulting the Legislation Design and Advisory Committee (LDAC). The committee was established in 2015 to build on the work of the former Legislation Advisory Committee (1986–2015). Appointed by the Attorney-General, its members include senior public service officials and external advisers from the private sector, law, and academia with policy and legislative skills.[72]

As noted in the introduction to LDAC's guidelines for good legislation, 'it is important those involved in making legislation are committed to a shared goal of having high quality legislation for New Zealand and that there is a common set of

66. Document A23(e), p 3
67. Document A23(e), p 3
68. Document A23(e), p 3
69. Document A23(e), p 4
70. Document A23(e), pp 4–5
71. Document A23(e), p 5
72. Paper 6.2.10, p 4

principles by which that quality is measured'.[73] LDAC sets out three core objectives for high quality law. Of greatest relevance for our inquiry is the principle that:

> Legislation should be *constitutionally sound*—Legislation should be consistent with the Treaty of Waitangi . . . and should reflect the fundamental values and principles of a democratic society . . . including in the processes by which it is made . . . [Emphasis in original.][74]

In chapter 5 of its guidelines, LDAC sets out a number of specific questions that policy-makers should apply to legislation that engages 'The Treaty of Waitangi, Treaty settlements, and Māori interests' and identifies the Treaty as part of Aotearoa New Zealand's constitutional arrangements.

We quote LDAC's questions and accompanying commands for policy-makers. We note that the additional commentary on each question has been removed for conciseness.

> *Does the proposed legislation affect, or have the potential to affect, the rights or interests of Māori under the Treaty?*
> Māori interests that will be affected by the proposed legislation should be identified.
>
> . . . . .
>
> *Does the proposed legislation impact Crown commitments made under any Treaty settlement?*
> New legislation must not be inconsistent with an existing Treaty settlement.
>
> . . . . .
>
> *Does the legislation potentially affect rights and interests recognised at common law or practices governed by tikanga?*
> Any land, bodies of water, or other resources potentially subject to customary title (or rights), and that might be affected by proposed legislation, should be identified, as should any other potentially affected practices that are governed by tikanga.
>
> . . . . .
>
> *Should Māori be consulted?*
> The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.
>
> . . . . .
>
> *Who should be consulted?*
> Consultation must target Māori whose interests are particularly affected.
>
> . . . . .
>
> *In the event of a conflict between the proposed legislation and the principles of the Treaty of Waitangi, does the legislation include additional measures to safeguard Māori interests?*

73. Paper 6.2.10, p 8
74. Paper 6.2.10, p 9

> If legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned.
>
> . . . . .
>
> *Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?*
> Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.[75]

It is also worth noting the general emphasis in LDAC's guidelines on the importance of understanding the 'policy problem', and the objective it gives rise to, as key to responsible regulatory change. As the guidelines noted, 'a current understanding of the problem should always underpin analysis of the possible solutions', and policy-makers should assess:

> What is needed or not needed in the legislation to implement the policy objective and solve the policy problem . . . remember to step back and assess whether legislation is really needed and make sure to look at whether the existing regime, common law, or non-legislative solutions, are already apt to meet the purpose.[76]

2.5.2 *Pukapuka Aratohu o te Kāhui Minita* e pa ana ki ngā whiringa whakaaro a te Kāwanatanga

Cabinet Manual guidance on Government decision-making

The Treaty/te Tiriti is noted in the context of the due diligence Ministers must do to ensure Bills comply with legal obligations:

> Ministers must confirm that bills comply with certain legal principles or obligations when submitting bids for bills to be included in the legislation programme. In particular, Ministers must draw attention to any aspects of a bill that have implications for, or may be affected by: (a) the principles of the Treaty of Waitangi; (b) the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993; (c) the principles in the Privacy Act 2020; (d) international obligations; and (e) the guidance in the LDAC Guidelines.[77]

The *Cabinet Manual* also notes that:

> Treaty principles are primarily concerned with the way in which the Crown and Māori behave in their interactions with one another. The Courts and the Waitangi Tribunal have emphasised the need for recognition and respect in the Treaty

75. Paper 6.2.10, pp 28–32
76. Paper 6.2.10, p 12
77. *Cabinet Manual*, p 116

partnership and stress the parties' shared obligation to act reasonably, honourably, and in good faith towards each other.[78]

Finally, it bears mentioning that both texts of the Treaty/te Tiriti have been appended to the 2023 edition of the manual for the first time, a significant fact noted in the preface to the Manual. As the introduction to the appendix notes:

> As an integral part of New Zealand's constitutional framework, the Treaty's status will continue to evolve along with other constitutional principles and norms. Constitutional, legal, ethical, and procedural issues associated with the Treaty are likely to remain a focus of discussion and be debated in various settings.[79]

As the *Cabinet Manual* states, Ministers are responsible for deciding 'both the direction of and the priorities for the agencies for which they hold portfolio responsibilities', however they have a 'duty to give fair consideration and due weight to free and frank advice provided by the public service'. This duty includes advice regarding Treaty/te Tiriti implications.[80] In recent years, several agencies have emerged to provide bespoke advice for legislators and policy-makers on Treaty/te Tiriti compliance, principally Te Arawhiti. We discuss the advice available to policy-makers from Te Arawhiti next.

2.5.3 Kupu arahi e pā ana ki te Tiriti nā Te Arawhiti i hoahoa mā ngā kaiwaihanga kaupapa here

Office for Māori Crown Relations Treaty guidance for policy-makers

Established in 2018, Te Arawhiti is a Crown agency dedicated to completing the settlement of historical Treaty/te Tiriti claims and shifting the relationship between the Crown and Māori to one focused on the future, post-settlement (among other responsibilities). Since its inception, one of the workstreams of Te Arawhiti has been the provision of advice and guidance for officials throughout the public service as to how policy and law may comply with the Crown's Treaty/te Tiriti obligations.

(1) *Oketopa 2019 Pānui Kāhui Minita*

October 2019 Cabinet circular

Following the establishment of Te Arawhiti, one of its first tasks was to initiate a process to provide Treaty/te Tiriti guidance for Crown officials. This process, which involved senior officials, legal experts, and the Crown Law Office, resulted in a Cabinet circular on 22 October 2019. The Cabinet Office circular set out 'guidelines agreed by Cabinet for policy-makers to consider the Treaty of Waitangi

78. *Cabinet Manual*, p 155
79. *Cabinet Manual*, p 155
80. *Cabinet Manual*, p 42

in policy development and implementation.'[81] Specifically, the circular supplied a series of questions for policy-makers to consider in developing policy 'so that the resulting policy appropriately recognises the influence the Treaty should have in the circumstances.'[82]

The circular clarified that, compared to other guidance and jurisprudence from the courts and the Tribunal, its guidance focused on the terms of the Treaty/te Tiriti.[83] It nevertheless made several observations about applying the Treaty/te Tiriti and the role of the courts and the Tribunal.

Regarding the application of the Treaty/te Tiriti, the circular noted the importance of context, and stated that 'the Treaty must be considered "on the whole"'.[84] Specifically, it commented that 'any specific meaning of the Treaty, and its implications for particular issues, is not easy to specify in advance as it depends on circumstances and views that surround any issue at the time it arises.'[85] In turn, 'no article of the Treaty stands apart from the others. Consideration of how the Treaty/te Tiriti applies in any situation will require consideration of the applicability of all articles and the relationship each has to the others.'[86]

Regarding the Tribunal and the courts, the guidance noted they had 'developed a considerable body of Treaty jurisprudence'.[87] It observed further that the Tribunal 'plays an important role in providing advice to government on the application of Treaty principles in relation to acts or omissions of the Crown which Māori allege breach the principles of the Treaty'.[88] It commented that its guidance did not displace the continued role of courts 'in interpreting laws where the Treaty is relevant to the matter.'[89]

Turning to the guidance itself, the circular specified questions related to each article of the Treaty/te Tiriti. For article 1, which the circular stated meant 'the government gained the right to govern', it asked:

1. How does the proposal/policy affect all New Zealanders? What is the effect on Māori (if different, how and why?)
    1.1. Will the proposal affect different Māori groups differently?
    1.2. What could the unintended impacts on Māori be and how does the proposal mitigate them?
2. How does the proposal demonstrate good government within the context of the Treaty?
    2.1. Have policy-makers followed existing general policy guidance?

81. Paper 6.2.4, p 1. The circular stated it was intended for all Ministers, chief executives, senior private secretaries, private secretaries, and officials involved in policy work.
82. Paper 6.2.4, p 3
83. Paper 6.2.4, p 3
84. Paper 6.2.4, p 2
85. Paper 6.2.4, p 2
86. Paper 6.2.4, p 2
87. Paper 6.2.4, p 1
88. Paper 6.2.4, p 3
89. Paper 6.2.4, p 3

2.2. Are there any legal and/or Treaty settlement obligations for the Crown?
3. What are the Treaty/Māori interests in this issue?
   3.1. How have policy-makers ascertained them?
4. How does the proposal demonstrate that policy-makers are meeting the good faith obligations of the Crown?
5. To what extent have policy-makers anticipated Treaty arguments that might be made?
   5.1 And how does the proposal respond to these arguments?[90]

Under article 2, which the circular summarised as meaning 'the Crown promises that Māori will have the right to make decisions over resources and taonga which they wish to retain', it asked:

1. Does the proposal allow for the Māori exercise of rangatiratanga while recognising the right of the Crown to govern?
   1.1. Can/should the proposal, or parts of it, be led by Māori?
   1.2. What options/mechanisms are available to enable rangatiratanga?
2. Have Māori had a role in design/implementation?
   2.1. If so, who?
   2.2. If not, should they?
3. Does the proposal:
   3.1. enhance Māori wellbeing?
   3.2. build Māori capability or capacity?
4. Is there any aspect of this issue that Māori consider to be a taonga?
   4.1. How have policy-makers come to their view of whether the issue is a taonga, and is there consensus?
   4.2 What effect does that have on the proposal?[91]

Lastly, under article 3, which the circular summarised as 'the Crown promises that its obligations to New Zealand citizens are owed equally to Māori', it asked:

1. Does the proposal aim to achieve equitable outcomes?
2. How does the proposal differ from previous efforts to address the issue?
3. How does the proposal demonstrate that policy-makers have looked at the proposal from the perspective of legal values such as natural justice, due process, fairness and equity?
4. How does the proposal demonstrate that policy-makers have looked at the issue from the perspective of tikanga values?[92]

90. Paper 6.2.4, p 4
91. Paper 6.2.4, p 8
92. Paper 6.2.4, p 11

(2) *Te Arawhiti 2022 kupu whākamarama i te Tiriti kei ngā kaupapa here*
Office for Māori Crown Relations 2022 guidance on the Treaty in policy

Most recently, in 2022, Te Arawhiti produced the document titled 'Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design: Questions for Policymakers'. Te Arawhiti summarised the purpose of its guidance as encouraging

> 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.[93]

The document noted that use of its 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.[94]

(3) *Te Arawhiti kupu whākamarama ki te whakahuihui rōpu*
Office for Māori Crown Relations engagement guidance

Te Arawhiti also provides resources, advice, and training on engagement to Crown agencies in engaging with Māori. The core resource for officials is the *Guidelines for Engagement with Māori*, which we summarise here.

In 2018, Te Arawhiti released guidance for the public sector to assist public servants 'to determine who you need to engage with, how to engage, and how to develop an effective engagement strategy'.[95] This guidance was approved by Cabinet.[96] The guidance encouraged Crown officials to 'Engage early, Be inclusive, Think broadly.'[97] It prompted officials to consider (among other things) the nature of their kaupapa, who ought to be engaged, how engagement should occur, and the proper engagement strategy with a series of questions.

The guidance advised that effective engagement with Māori carried numerous benefits for the robustness of policy and for 'realising Māori Crown partnerships'.[98] It stated, 'the process of genuine engagement with Māori by the government' (among other things) acknowledges the rangatiratanga of Māori and their status as treaty partners.[99] Effective engagement could also strengthen 'the legitimacy of

93. Paper 6.2.3, p 2
94. Paper 6.2.3, p 2
95. Paper 6.2.8, p 2; Te Awawhiti, 'Vote Justice: 2020 Briefing for the Incoming Minister for Māori Crown Relations: Te Awawhiti' (2020), p 10
96. Te Awawhiti, 'Vote Justice: 2020 Briefing for the Incoming Minister for Māori Crown Relations: Te Awawhiti' (2020), p 10
97. Paper 6.2.8, p 2
98. Paper 6.2.8, p 2
99. Paper 6.2.8, p 2

decisions' and 'contributes to the development of effective policy options, assists agencies in providing robust advice to Ministers and helps deliver improved outcomes'.[100] Conversely, failing to engage early, inclusively, or broadly could result in 'reduced opportunities to develop meaningful future relationships and the development of effective policy options may be compromised'.[101]

Regarding 'who to engage with', the guidance encouraged Crown officials to 'think broadly' to ensure the full range of interested parties relevant to the specific kaupapa are engaged, and the full range of views and feedback are canvassed.[102] It suggested Crown officials consider the 'geographical relevance' of their kaupapa, for example, whether it had local implications or was a national issue affecting all Māori in Aotearoa (or a mixture of both).[103] In terms of 'how to engage', the guidance provided a 'sliding scale assessment' to help Crown officials consider which engagement method was most appropriate.[104] The scale progressed from 'inform', where the Crown would keep Māori informed about what is happening, to an obligation to 'empower', where the Crown would assist Māori to implement a decision made by Māori.[105] Where the kaupapa sat on this scale was to be determined by its significance to Māori – although this is generally determined by Crown officials.

Regarding 'the engagement process' itself, the guidance (among other things) noted that strategy should show that due consideration had been given to allowing 'sufficient time for people to engage sufficiently'. It also encouraged public officials 'seek input early and not too late in the policy development process (it is important to go to Māori with initial thinking/proposals rather than a fully formed or fixed view)', and consider the capacity of the relevant audience to participate in the engagement process.[106]

Senior Te Arawhiti official, Warren Fraser confirmed at the hearing that the Cabinet circular of October 2019 is still extant and has not been superseded by the March 2024 circular, which we discuss in the next section.[107] This must be true as well for the Te Arawhiti guidance cited in this section.

2.5.4 Pānui kāhui minita o te 25 o Maehe 2024

Cabinet circular 25 March 2024

On 25 March 2024, the Cabinet Office issued a circular concerning the operation of the current coalition Government. Unlike guidance previously cited in this chapter, this circular did not reference the Treaty/te Tiriti directly or the Crown's obligations therein.

100. Paper 6.2.8, p 2
101. Paper 6.2.8, p 2
102. Paper 6.2.8, p 4
103. Paper 6.2.8, p 4
104. Paper 6.2.8, p 6
105. Paper 6.2.8, p 6
106. Paper 6.2.8, p 8
107. Transcript 4.1.6, p 48

Specifically, the Cabinet circular provided guidance for Ministers and agencies on the coalition Government's agreed consultation and operating arrangements.[108] In particular, the circular explained that the parties' relationships are to be guided by the principle of 'no surprises', and Ministers are required to uphold general principles of confidentiality, collective responsibility, and timely consultation.[109] It also detailed the different levels at which consultation is required, noting that Ministers from all parties are required to consult relevant ministerial colleagues before proposing government appointments or submitting papers on 'significant or potentially controversial matters, or that affect other Ministers' portfolio interests'.[110] The circular also stated that consultation between coalition partners is also required at the party level on all legislative proposals 'to ensure that there is sufficient parliamentary support for them to proceed'.[111] Where the concerns of a particular Minister or party cannot be resolved between party leaders, they may decide on a case-by-case basis to 'agree to disagree' on an issue or policy.[112]

Crucially for this urgent report, the circular required all Ministers, parliamentary under-secretaries, chief executives, and their respective offices to be familiar with the Government's two coalition agreements 'and ensure that they have processes in place to implement them'.[113] The circular makes clear in this regard that all Ministers, parliamentary under-secretaries, and officials must work to 'implement' the coalition agreements entered into between National, ACT, and New Zealand First. Whilst it does not mention it in the circular, this stipulation appears to apply whether the coalition agreement commitments are Treaty/te Tiriti consistent or not.

2.6 Rangatiratanga me te Kaupapa Ture i te Tau 2024

Rangatiratanga and Constitutionalism 2024

In this section we return to what the rangatiratanga sphere looks like in the twenty-first century. What is clear is that the principles and values underpinning the rangatiratanga sphere have remained the same as those described in section 2.2. The *Report of Matike Mai Aotearoa: The Independent Working Group on Constitutional Transformation* identified the principles and values underpinning Māori constitutionalism as: mana, (mana motuhake, mana taketake, mana whenua), arikitanga, rangatiratanga, whakapapa, whanaungatanga, and tikanga.[114]

That report canvassed Māori perspectives on constitutionalism based upon He Whakaputanga (the Declaration of Independence 1835) and the Māori text, te Tiriti. The report was the outcome of 252 hui facilitated by the working

108. Paper 6.2.6, p 1
109. Paper 6.2.6, pp 2–3
110. Paper 6.2.6, p 3
111. Paper 6.2.6, p 4
112. Paper 6.2.6, p 2
113. Paper 6.2.6, p 2
114. Paper 6.2.11, pp 33–38

group between 2012 and 2015, as well as focus groups, interviews, and invited submissions.[115]

One of the questions the working group asked participants was whether tikanga, He Whakaputanga, te Tiriti, 'and other indigenous instruments' have constitutional relevance, historically and contemporarily.[116] It found Māori believed these kaupapa were 'fundamentally relevant' to a constitution because 'they all express the right [of] Māori to make decisions for Māori that is the very essence of tino rangatiratanga.'[117] Participants endorsed He Whakaputanga because it affirmed that 'rangatiratanga is independence' and envisioned that iwi and hapū would exercise an overlapping authority.[118] They also considered te Tiriti was 'the only possible starting point for any discussion about a new constitution', and that any constitution not deriving from te Tiriti would be in breach of te Tiriti. Participants emphasised that Māori had not ceded their mana, or sovereignty, in signing te Tiriti. For this reason, they considered that actively basing a constitution on te Tiriti would be 'different from incorporating it into the existing constitutional system.'[119]

Another key finding was that Māori believed a constitution should be based on certain values. Examples of the values highlighted were equality as promised in te Tiriti, the importance of the land, and the need for a constitution to 'enhance the sense of belonging that Te Tiriti reaffirmed for Māori and offered to others.'[120] Rangatahi in particular felt a new constitution must recognise and protect the well-being of the natural environment; Māori knowledge, systems, and institutions; and the rights of all people to peace and mutual respect, and to education, health, and well-being.[121] Other highlighted values were the convention of transparency in government, and the need for mechanisms to ensure Māori authority was not subordinated to that of the majority.[122] Overall, Māori felt a constitutional model (or models) could only be developed when there was clarity about the values that should underpin it. The report concluded that this emphasis on values indicated 'a very real desire for a more open constitutionalism and what we describe as a conciliatory and consensual democracy rather than an adversarial and majoritarian one'.[123]

The working group based its indicative models for a new constitution on the understanding that te Tiriti provided for 'the continuing exercise of rangatiratanga while granting a place for kāwanatanga'. Drawing on the different spheres of influence articulated by the Te Raki Tribunal, *Matike Mai* recognised a 'tino rangatiratanga' where 'Māori make decisions for Māori', a 'kāwanatanga sphere' where

115. Paper 6.2.11, p 7
116. Paper 6.2.11, p 8
117. Paper 6.2.11, p 8
118. Paper 6.2.11, pp 44, 45
119. Paper 6.2.11, p 57
120. Paper 6.2.11, p 8
121. Paper 6.2.11, pp 117–121
122. Paper 6.2.11, p 8
123. Paper 6.2.11, p 9

'the Crown will make decisions for its people', and a 'relational sphere' where the two 'will work together as equals' to make joint decisions.[124] The report suggested a different framework for accommodating and enabling these spheres of authority, through mechanisms including Parliament, assemblies, deliberative bodies, and mandated relationships. Another kaupapa underlying the working group's constitutional models was the recognition, based in tikanga, that iwi and hapū are independent but 'ultimately bound' together by whakapapa, and that 'any concept of constitutional and political authority was reflective of that'.[125]

2.7 UNDRIP and *He Puapua*

UNDRIP me He Puapua

2.7.1 Te whakahau a te Rūnanga o ngā Whenua o te Ao, mē te mana o ngā iwi taketake

The United Nations Declaration on the Rights of Indigenous Peoples

Over decades, indigenous peoples from around the world worked to develop the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), including several Māori representatives. UNDRIP was passed in 2007 by the United Nations General Assembly, although Aotearoa New Zealand was one of four countries who voted against its adoption at that time.[126] A subsequent Government then reversed that decision in 2010 by expressing its support for UNDRIP.

Article 3 of UNDRIP states: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. The right to self-determination is set out in the core United Nations conventions to which Aotearoa New Zealand is a signatory.[127] UNDRIP provides an articulation of what that right means for the specific situation of indigenous peoples. In this way, it is analogous to the Treaty/te Tiriti guarantee of tino rangatiratanga.

Article 37 of UNDRIP further states:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

124. Paper 6.2.11, p 9
125. Paper 6.2.11, p 9
126. The other opposing countries were the United States, Australia, and Canada.
127. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In providing for the recognition of treaties and agreements, UNDRIP upholds the foundational status of the Treaty/te Tiriti. The Treaty/te Tiriti and UNDRIP can therefore be seen as mutually reinforcing standards. The Waitangi Tribunal dealt with the status of UNDRIP in its report *Whaia te Mana Motuhake* as follows:

> International declarations while not binding as a matter of international law are solemn instruments developed by States for matters of 'major and lasting importance where maximum compliance is expected'. As such, UNDRIP carries significant normative weight affirming basic human rights standards that all States are expected to comply with at the international, regional and national level. Those standards are not new as UNDRIP merely restates for the most part, human rights contained in other international instruments. Such standards include those in the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966.
>
> UNDRIP is now routinely referred to by international institutions. Significant referencing of UNDRIP is now emerging in judgments from regional human rights bodies such as the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples' Rights.[128]

In affirming UNDRIP for Aotearoa New Zealand on 19 April 2010, the Honourable Dr Pita Sharples shared that a

> unique feature of our constitutional arrangements is the Treaty of Waitangi, signed between representatives of the Crown and Māori in 1840. It is a founding document of New Zealand and marks the beginning of our rich cultural heritage. The Treaty establishes a foundation of partnership, mutual respect, co-operation and good faith between Māori and the Crown. It holds great importance in our laws, our constitutional arrangements and the work of successive governments. The Declaration contains principles that are consistent with the duties and principles inherent in the Treaty, such as operating in the spirit of partnership and mutual respect. We affirm this objective, and affirm the Government's commitment to build and maintain constructive relationships with Māori to achieve better results for Māori, which will benefit New Zealand as a whole.
>
> . . . . .
>
> We further recognise that Māori have an interest in all policy and legislative matters and acknowledge the determination of Māori that custom, worldviews and cultural heritage should be reflected in the laws and policies of New Zealand. Māori have been, and continue to be, active in developing innovative responses to issues with a strong indigenous perspective and in engaging with successive governments on possible paths forward.
>
> We will continue that conversation within the relationship that the Treaty and New Zealand's constitution as a whole affords. Further, we will continue to work in international fora to promote the human rights of indigenous peoples. New Zealand

128. Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 34–35

> acknowledges the ongoing process of dialogue and debate over the meanings that may be given to the aspirations put forward by the Declaration.
>
> New Zealand's support for the Declaration represents an opportunity to acknowledge and restate the special cultural and historical position of Māori as the original inhabitants – the tangata whenua – of New Zealand. It reflects our continuing endeavours to work together to find solutions and underlines the importance of the relationship between Māori and the Crown under the Treaty of Waitangi. Its affirmation of longstanding rights supports and safeguards that ongoing relationship and its proclamation of new aspirations give us all encouragement and inspiration for the future.
>
> Nō reira, tēnā koutou, tēnā koutou, tēnā koutou katoa.[129]

The Tribunal in its *Ko Aotearoa Tēnei* report described UNDRIP as 'perhaps the most important international instrument ever for Māori people".[130] The courts in Aotearoa New Zealand have also referenced UNDRIP in their decisions.[131] In 2013, the Supreme Court in *New Zealand Māori Council v Attorney-General* stated that:

> We doubt if the Declaration adds significantly to the principles of the Treaty statutorily recognised under the State-Owned Enterprises Act and Part 5A of the Public Finance Act. We accept, however, that the Declaration provides some support for the view that those principles should be construed broadly. In particular, it supports the claim for commercial redress as part of the right to development there recognised.[132]

The court was dealing with a 'Treaty clause' in the statute concerned, namely the State-Owned Enterprises Act 1986. The power of that clause could be enforced through ordinary litigation without specific reference to UNDRIP.

In *Ngāti Whātua Ōrākei Trust v Attorney-General*, Ngāti Whātua sought to challenge the proposed transfer of Crown-owned commercial properties in Auckland to other Auckland iwi as part of their settlement, on the basis that such transfers intruded on the mana whenua rights of Ngāti Whātua.

Ngāti Whātua submitted that the Minister's decision was required to be exercised in a manner that upholds and is consistent with UNDRIP.[133] The majority found it was unable to assess that particular argument because it challenged the principle of parliamentary non-interference.[134] In her dissent, Chief Justice Elias considered this particular point, finding that she would not have struck out the argument based on UNDRIP. She reasoned that the Crown's legal compliance with tikanga Māori, the Treaty of Waitangi, and UNDRIP is likely to arise again under

129. Pita Sharples, New Zealand statement at the opening ceremony of the ninth session of the United Nations Permanent Forum on Indigenous Issues, 19 April 2010 (quoted in Waitangi Tribunal, *Whaia te Mana Motuhake*, pp 35, 36–37)

130. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi*, p 233

131. *Takamore v Clarke* [2012] 1 NZLR 573 (CA), paras 250–253, per Glazebrook and Wild JJ; *Takamore v Clarke* [2013] 2 NZLR 733 (SC), para 12, per Elias CJ

132. *New Zealand Māori Council v Attorney-General* [2013] 3 NZLR 31, para 92

133. *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, para 23

134. *Ngāti Whātua Ōrākei Trust v Attorney-General*, para 46

applicable legislation and/or under the continuing relationship between Ngāti Whātua and the Crown.

Ellis v R was a highly publicised case, quashing the historical sexual offending convictions of Peter Ellis (deceased)[135] In its decision granting Mr Ellis' posthumous appeal, the Supreme Court unanimously confirmed that tikanga has, and will continue to be, recognised in the development of the common law of Aotearoa New Zealand in cases where it is relevant.[136] In her judgment's concluding remarks, Justice Glazebrook emphasised the interwoven threads of UNDRIP that manifest in Aotearoa New Zealand's legal system today, noting:

> This case has provided an opportunity for this Court to synthesise and describe the current state of the place of tikanga in the common law and to offer some comments on future developments. Any discussion needs to be viewed in the context of the widespread incorporation of tikanga principles, concepts and values into statutes and policies of government. This means that we are now at a point where tikanga and/or tikanga-derived principles are part of the fabric of Aotearoa/New Zealand's law and public institutions through legislation, the common law and policy. *This is a manifestation of Te Tiriti, particularly in relation to Article Two, and also highlights Aotearoa/New Zealand's commitment to the United Nations Declaration on the Rights of Indigenous Peoples.* [Emphasis added.][137]

Justice Glazebrook specifically cited article 34 of UNDRIP – the right of indigenous peoples to promote and maintain their institutional structures and customs, and article 19 – the obligation on States to consult and cooperate in good faith with indigenous peoples through their own representative institutions. *Ellis v R* demonstrates the harmony between the Treaty/te Tiriti and Aotearoa New Zealand's commitments under UNDRIP.

To summarise, the courts have drawn on UNDRIP on various occasions following *New Zealand Māori Council v Attorney-General* in 2013. Most recently, a direct link was drawn between UNDRIP and the Treaty/te Tiriti in *Ellis v R*. As UNDRIP is increasingly used in judgments it will make it an important reference within Aotearoa New Zealand's legal system.

2.7.2 Further developments – *He Puapua*

Ērā atu nekehanga whakamua – He Puapua

In March 2019, Cabinet established the Declaration Working Group (DWG) to provide the Minister for Māori Development with advice and recommendations on developing an UNDRIP implementation plan and an engagement process with iwi, hapū, and whānau. DWG consisted of five non-State representatives from

135. See *Ellis v R* [2022] NZSC 115
136. See *Ellis v R* [2022] NZSC 114
137. *Ellis v R* [2022] NZSC 114, para 126

Māoridom and four Government officials, all of whom were appointed by the Minister.[138]

In November 2019, DWG released their report, *He Puapua*. The report set out a plan to implement UNDRIP in law and policy by 2040 (named 'Vision 2040'). Its main recommendation was to refocus on rangatiratanga: 'Our Vision 2040 is one where rangatiratanga is realised, where Māori and the Crown enjoy a harmonious and constructive relationship, and work in partnership to restore and uphold the wellbeing of Papatūānuku, tāngata and the natural environment.'[139]

DWG divided its consideration of UNDRIP into five thematic areas: self-determination/rangatiratanga; participation in kāwanatanga Karauna; lands territories and resources; culture; and equity and fairness. Each area provided a 'roadmap' with incremental step-changes towards 'giving greater space for the operation of rangatiratanga over time.'[140] Under the first theme of self-determination/rangatiratanga, Vision 2040, to realise articles 3, 4, and 34 of UNDRIP, stated:

- Māori will be exercising authority over Māori matters as agreed by Māori, and including exclusive and/or shared jurisdiction over their lands, territories and resources and over matters to do with taonga tuku iho and culture;
- iwi and hapū will have agreed and established their governance structures with their authority recognised; and
- tikanga Māori will be functioning and applicable across Aotearoa under Māori (national, iwi, hapū, whānau) authority and also, where appropriate, under Crown/kāwanatanga authority.[141]

He Puapua then set out concrete actions that can be taken towards reaching these objectives and a timeline for achieving them by 2040. These actions included:

- building Māori capacity to exercise rangatiratanga;
- building Crown capability and laying the groundwork for constitutional change;
- building on Treaty settlements to enhance Māori self-determination and facilitate greater involvement in governance and decision-making in those areas that have particular impact on Māori;
- actively making 'space for rangatiratanga by resiling from regulation of issues internal, integral and essential to Māori';
- generating 'public support for the respect and recognition of rangatiratanga Māori' through an inclusive national conversation and public education campaign; and
- establishing a process for constitutional change.[142]

138. Paper 6.2.14, pp 1–2
139. Paper 6.2.14, pp 4–5
140. Paper 6.2.14, pp iv–vi
141. Paper 6.2.14, pp 26–27
142. Paper 6.2.14, pp 32–35

He Puapua also articulated the need for constitutional change to reflect the Māori text – te Tiriti and rangatiratanga. Building on the *Matike Mai* report, *He Puapua* utilised the 'spheres of authority' model to demonstrate its 2040 vision of rebalancing the rangatiratanga and kāwanatanga spheres at the constitutional level. *He Puapua* stated it envisioned 'a larger "joint sphere", in which Māori and the Crown share governance over issues of mutual concern' in the future.[143] The report continued: 'This sphere is effectively the intersection of Articles 1 (kāwanatanga) and 2 (rangatiratanga), with an overlay of Article 3 (equity).' The DWG concluded that the joint sphere may require co-governance mechanisms and a regulatory body to determine jurisdictional boundaries.[144]

2.8 Kupu Whakamutunga

Conclusion

Prior to the Treaty of Waitangi/Te Tiriti o Waitangi, Māori exercised mana and rangatiratanga over Aotearoa New Zealand. They had their own constitutional order and political systems. Under the Treaty/te Tiriti Māori were guaranteed their full authority or tino rangatiratanga in exchange for 'kāwanatanga katoa'. As a result of that exchange, the founding document of government in Aotearoa New Zealand is the Treaty/te Tiriti. The Crown and Parliament have from time to time accommodated Māori authority in statute (such as the Māori Councils Act 1900) and, since the late twentieth century, in its policy processes. The significance of the Treaty/te Tiriti in Aotearoa New Zealand's constitutional arrangements is also evident from the Crown's engagement in the Treaty settlement process. If there were no special rights, and no breaches of those rights, then there could be no grounds for the Crown to enter the comprehensive Treaty settlement process that successive governments have undertaken since 1995. The fact the Crown engages in this process acknowledges that the Treaty/te Tiriti has significance as a founding document. Thereby the constitutional significance of the Treaty/te Tiriti has been embedded in government until late 2023–2024 when the coalition government indicated it would redefine, amend, or review the principles of the Treaty of Waitangi. Finally in this chapter, we acknowledge that the Māori claimants who we heard from remain consistent in their demand for recognition of their 'tino rangatiratanga' by the Crown as seen in *Matike Mai* and as replicated in their evidence to this Tribunal. There is nothing new in this response to the issues before us. Such aspirations are also consistent with UNDRIP and the domestic call for its implementation in *He Puapua*. We discuss the extent to which these themes are relevant to the issues before us in the chapters that follow.

143. Paper 6.2.14, p 11
144. Paper 6.2.14, p 11

UPOKO 3
Chapter 3

NGĀ MĀTĀPONO O TE TIRITI O WAITANGI
The Principles of the Treaty of Waitangi

3.1 He Kupu Whakataki
Introduction

In this chapter, we address the question: What are the principles of the Treaty/te Tiriti?

The Treaty Principles Bill policy proposes to define the 'principles of the Treaty of Waitangi' in statute. The Treaty clause review, in turn, proposes a review of statutory provisions referring to the 'principles of the Treaty of Waitangi'. As context for our later analysis of both policies, this chapter sets out the origins of the term 'principles of the Treaty of Waitangi' and describes how the principles were subsequently interpreted by the courts. We then identify the principles that will be applied in this inquiry.

3.2 Te Pūtake o te Kupu 'ngā Mātāpono o te Tiriti o Waitangi'
Origins of the Term 'Principles of the Treaty of Waitangi'

In this section, we address the origins of the term 'principles of the Treaty of Waitangi' in legislation and its early elucidation by the courts.

3.2.1 Te kunenga i roto i te whakaturetanga
Origins in legislation

The first legislative reference to the principles of the Treaty of Waitangi was in the Treaty of Waitangi Act 1975 (the 1975 Act), which established the Waitangi Tribunal to inquire into contemporary claims (that is, from 1975 onwards). The principles are referenced in several places: the long title, the preamble, and in sections 6 and 8. Both texts, te Tiriti (the te reo Māori text) and the Treaty (the English text), are included in its schedule.

Section 6 of the 1975 Act, as it was originally enacted, provided for any Māori to make a claim that they had been or were likely to be prejudicially affected by any Crown legislation, policy or practice (among other things), and that it was 'inconsistent with the principles of the Treaty'. The preamble of the 1975 Act, in turn, recognised that differences existed between the English and Māori texts. It stated that it was 'desirable' to establish a tribunal to 'make recommendations on claims relating to the practical application' of Treaty principles, and, 'for that purpose', to determine the 'meaning and effect' of Treaty/te Tiriti 'and whether certain

matters are inconsistent with those principles'. In the last 49 years, the Tribunal has heard numerous claims brought by Māori under section 6 and has issued over 155 reports.[1] These reports have developed jurisprudence on the content and practical application of the Treaty principles.

Emeritus Professor Dr Jane Kelsey, who provided evidence in this inquiry, stated that the 1975 Act 'was informed by the Labour Party's 1972 manifesto that committed to '"examine the practical means of legally acknowledging the principles *set out* in the Treaty of Waitangi"' (emphasis in original).[2] She told us that her research suggests that this reference was probably drawn from the Rātana Party manifesto.[3] The Labour Party and the Rātana Party had had a long-standing political alliance beginning in 1936.[4] From the early 1920s, Rātana was calling on the Government to 'ratify' the Treaty, with a petition presented to Parliament in 1932 seeking statutory recognition of the Treaty gathering over 30,000 signatures.[5] The new Rātana members of Parliament brought this demand into the Labour caucus.[6] Historian Dame Dr Claudia Orange noted that over the next few decades 'the need for legislation to give effect to the treaty's promises remained a Maori concern'.[7] The Honourable Matiu Rata, a Labour member and strong Rātana supporter, eventually became the architect of the 1975 Act to give effect to this desire as Minister of Māori Affairs in the third Labour Government.[8]

Witness Natalie Coates noted another important reason for the creation of the Waitangi Tribunal and the legislative reference to Treaty principles. The 1960s and early 1970s, Ms Coates explained, marked a period of change led by Māori activism on issues of whenua and the Treaty/te Tiriti. In her words:

> A staunch generation of Māori (many young, urban, and educated) came out fighting and vocally demanded the recognition of te Tiriti and Māori rights. They took action ā-waha, ā-waewae, and ā-ringaringa to pull Māoridom back from the brink of

1. See Waitangi Tribunal, 'Waitangi Tribunal Reports', https://waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports

2. Document A15, pp [11]–[12]

3. Document A15, p [12]

4. Ministry for Culture and Heritage, 'Rātana and Labour Seal Alliance', Ministry for Culture and Heritage, https://nzhistory.govt.nz/page/ratana-and-labour-seal-alliance, last modified 8 October 2021; Labour nominated Rātana leaders as its candidates in the Māori electorates. The Rātana Party was established in the 1920s to help give effect to the overall vision of the Rātana church, both spiritual and political.

5. Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Ltd, 1987), pp 232–233

6. 'Treaty of Waitangi Bill', 16 September 1975, *New Zealand Parliamentary Debates*, vol 401, p 4500

7. Orange, *The Treaty of Waitangi*, p 246

8. Tiopira McDowell, '"Ka Hoki a Kupe?" The Political Career of Matiu Rata, 1963–1979', *New Zealand Journal of History*, vol 49, no 1 (2015), pp 105–125; Minister Rata was a member of the Rātana church and active in its youth movement prior to becoming a Labour member of Parliament. McDowell commented that 'Rata and his colleagues inherited a political tradition encapsulating the Rātana-Labour alliance and a commitment to the issues of the Treaty of Waitangi, Māori land rights and social and cultural reform' (see p 108).

cultural and language extinction. This was the start of the Māori renaissance, and it would go on to change the course of Aotearoa, including the recognition of te Tiriti.[9]

Matiu Rata advocated for the new activist groups and provided a voice of support for them within government.[10] In introducing the Treaty of Waitangi Bill, he noted that the Government had set up a committee to 'examine the practical means of legally acknowledging the principles set out in the treaty', and that the Bill would 'honour in perpetuity the terms of that formal pact'. After two years' work, the committee concluded that formal recognition of the Treaty/te Tiriti was possible.[11] As constitutional scholar and Court of Appeal judge Matthew Palmer has noted, the means by which the Treaty/te Tiriti was incorporated into New Zealand law by way of the 1975 Act gives it 'legal status; but not full legal force'.[12]

Government members in 1975 explained the reason for this distinction during the parliamentary debate, noting that Māori had sought legal recognition of the Treaty/te Tiriti but had not wanted to put the texts themselves into law (fearing that it might be repealed like any other statute). Citing the submission of the Māori Graduates Association, for example, the Honourable Whetu Tirikatene-Sullivan said, 'in the circumstances, legislative support for the principles of the Treaty is an acceptable alternative to proper ratification of the Treaty'.[13] In Professor Kelsey's view, the parliamentary debate on the Bill showed that 'Māori MPs viewed the "principles" as a means to get around what they saw as the frustrating refusal of colonial law to enforce the Crown's obligations under the Treaty. By contrast, Pākehā MPs reasserted the English text and the cession of sovereignty.'[14]

Opposition members in 1975 had been critical of the lack of definition of the principles. Robert Muldoon, the Leader of the Opposition, said the Bill did not give the Tribunal much direction on what the principles were, commenting 'I imagine, it will have to determine [them] for itself'.[15] Member of Parliament Venn Young commented on the Tribunal's function 'if necessary [to] reinterpret the treaty'. He noted that the consequence of this 'cannot be foreseen'.[16]

9. Document A6, p 8; 'ā-waha, ā-waewae, and ā-ringaringa' may be translated to mean action taken with their mouths, with their feet, and with their hands. It encompasses oral and written action to raise awareness (ā-waha), hīkoi or marches to Parliament (ā-waewae), and letter writing, placard making, signing and drafting petitions, and generally applying political pressure on those in the corridors of power (ā-ringaringa).

10. McDowell, 'Ka Hoki a Kupe?', pp 112–113

11. 'Treaty of Waitangi Bill', 8 November 1974, *New Zealand Parliamentary Debates*, vol 395, pp 5725–5726

12. Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008), p 180

13. 'Treaty of Waitangi Bill', 16 September 1975, *New Zealand Parliamentary Debates*, vol 401, p 4496

14. Document A15, p [12]

15. 'Treaty of Waitangi Bill', 8 November 1974, *New Zealand Parliamentary Debates*, vol 395, p 5727

16. 'Treaty of Waitangi Bill', 10 September 1975, *New Zealand Parliamentary Debates*, vol 401, p 4344

Professor Kelsey's evidence noted that the use of Treaty 'principles' as a means of legally recognising the obligations and rights contained in te Tiriti was controversial.[17] Certainly, initial submissions on the Treaty of Waitangi Bill by groups such as Ngā Tamatoa were critical of its lack of remedies and its 'only giv[ing] the appearance of fulfilling the stated intention of the 1972 manifesto without beginning to get anywhere near it.'[18] Dr Orange too noted that suspicions about its intent remained after the Bill was passed.[19] Once the Tribunal began holding hearings on marae, however, under the chairpersonship of Chief Judge Durie, and the Tribunal was given the power in 1985 to hear historical claims, suspicions were allayed. Claims began flooding in to the Tribunal's registry.

After the 1975 Act, Parliament included further references to the 'principles of the Treaty' in legislation during the 1980s and 1990s.[20] Most prominently, in 1986, Parliament enacted section 9 of the State-Owned Enterprises Act (SOE Act) which declared 'nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.' This section was later interpreted by the Court of Appeal in its landmark *New Zealand Maori Council v Attorney-General* decision in 1987, known as the *Lands* case, which is discussed below in section 3.2.2.[21] Ms Coates noted this formulation of the principles was applied with significant effect when the Court of Appeal went on to find that Crown action in that case was inconsistent with the principles of the Treaty.[22]

Professor Kelsey in her evidence noted that the SOE Act was 'an anomaly in that officials did not have any hands-on role in its drafting', and the 'Treaty was not raised at the drafting stage or in submissions to select committee'.[23] Instead, the clause which became section 9 was included during the third reading debate after the Bill was reported back to Parliament.[24] The Bill, which gave effect to the Government's policy of corporatising State-owned assets, had come to the Tribunal's attention in the Muriwhenua inquiry. The claimants raised alarm that the Bill if enacted as drafted would alienate from the Crown the power to return land in accordance with Tribunal recommendations. The Tribunal agreed and issued an interim report.[25] The Government and Parliament responded by including section 9.[26]

The trend of including statutory references to Treaty principles, sometimes called 'Treaty clauses', continued into the twenty-first century. As Ms Coates observed, references to the Treaty principles now 'abound' in Acts on the statute

17. See doc A15 generally; see also doc A6, pp 16–17.
18. 'Treaty of Waitangi Bill', 10 September 1975, *New Zealand Parliamentary Debates*, vol 401, p 4344
19. Orange, *The Treaty of Waitangi*, p 246
20. See doc A15, pp [31]–[32]
21. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641
22. Document A6, p 9
23. Document A15, p [32]
24. Document A15, p [32]; doc A6, p 17
25. Waitangi Tribunal, *Interim Report to the Minister of Maori Affairs on State-Owned Enterprises Bill* (Wellington: Waitangi Tribunal, 1986)
26. Parliament also enacted section 27.

books and are 'present across a vast array of subject matter and areas of law', with particular prominence in 'legislation involving natural resources and the environment, social services (defined broadly) and local government.'[27]

Ms Coates further observed that the way Treaty clauses are expressed varies across statutes, including the following phraseology: 'give effect to'; 'not act in a manner inconsistent with'; 'ensure full and balanced account is taken'; 'give particular recognition'; 'take into account'; 'have regard to'; and 'acknowledge' the principles of the Treaty of Waitangi.[28] Since 2000, Parliament has tended to enact more specific, 'elaborated', or 'descriptive' Treaty clauses which specify how the Crown would recognise, respect, or give effect to the principles in the context of the specific statutory regime.[29]

As noted above, Ms Coates undertook a search for the phrase 'Treaty of Waitangi' on the New Zealand legislation website. It returned a hit of 231 Acts of Parliament. She noted that the majority of these are related to Treaty settlements, but at least 40 Acts include reference to Treaty principles.[30] The assessment of Te Arawhiti in December 2023 also identified about 40 Acts,[31] although the Ministry of Justice (MOJ) noted in a 23 May 2024 briefing that eight of those Acts had since been repealed or were about to be repealed.[32] Where the Treaty/te Tiriti is of particular relevance to the subject matter of the legislation, Ms Coates noted, 'there has been a movement towards specifically including legislative reference to the treaty.'[33] Alternatively, the clauses are elaborated to specify how they are to be applied.[34] She gave the example of section 4 of the New Zealand Public Health and Disability Act 2000, which states:

> In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Māori, Part 3 provides for mechanisms to enable Māori to contribute to decision-making on, and to participate in the delivery of, health and disability services.[35]

Another example is the Heritage New Zealand Pouhere Taonga Act 2014. The Treaty clause of this Act states that 'in order to recognise and respect the Crown's responsibility to give effect to the Treaty of Waitangi (Te Tiriti o Waitangi), this Act provides'.[36] This section of the Act then enumerates the various provisions that are said to give effect to the Treaty/te Tiriti, such as the appointment of a Māori Heritage Council to 'ensure the appropriate protection of wāhi tūpuna, wāhi tapu,

27. Document A6, p 9
28. Document A6, pp 9–10
29. Document A6, p 10
30. Document A6, p 9
31. Document A7, p [8]
32. Document A26, p 2
33. Document A6, p 9
34. Document A6, p 10
35. Document A6, p 10
36. Heritage New Zealand Pouhere Taonga Act 2014, s 7

wāhi tapu areas, historic places, and historic areas of interest to Māori.'[37] Another such provision is that, persons carrying out functions or exercising powers must 'recognise' the 'relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tūpuna, wāhi tapu, and other taonga.'[38]

3.2.2 Ngā whiringa kōrero a ngā kooti i nga mātāpono

Interpretation of the principles by the courts

In a series of cases beginning in 1987, the New Zealand Māori Council and some iwi sought to protect Māori interests in several superior court cases using section 9 of the SOE Act. These landmark cases on Treaty jurisprudence are commonly known by their subject matter; the *Lands*, *Forests*, *Coal*, *Fisheries*, and *Broadcasting Assets* cases.[39]

The Court of Appeal in *New Zealand Maori Council v Attorney-General* (the *Lands* case) was the first superior court to define the content of the Treaty principles. The significance of the case was marked by President Cooke (later Lord Cooke) who observed: 'This case is perhaps as important for the future of our country as any that has come before a New Zealand Court.'[40] The *Lands* case concerned the transfer of Crown-owned land to State-owned enterprises under the SOE Act. Māori were concerned the transfers could defeat current and prospective claims to the Tribunal for return of Crown land. In a lengthy decision, comprised of five separate judgments, the court unanimously declared that transferring assets to State-owned enterprises without establishing a system to consider whether the transfer would be inconsistent with the principles of the Treaty would be unlawful.[41]

President Cooke noted that under section 9 'the principles of the Treaty are to be applied, not the literal words.'[42] He observed that the Māori and English texts of the Treaty were not translations of each other, but that 'differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit.'[43] In his view, such an approach accorded with the 'oral character of Maori tradition and culture.'[44] It was also necessary to enable a Treaty signed in 1840 to apply to new circumstances unforeseen by its signatories; 'the relatively sophisticated society for whose needs the State-Owned Enterprises Act

37. Heritage New Zealand Pouhere Taonga Act 2014, ss 7(c), 7(d)
38. Heritage New Zealand Pouhere Taonga Act 2014, s 4
39. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (the *Lands* case); *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (the *Coal* case); *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (the *Forests* case); *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641 (the *Fisheries* case); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (the *Broadcasting Assets* case)
40. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 651
41. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 643
42. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 662
43. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 663
44. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 663

has been devised could not possibly have been foreseen by those who participated in the making of the 1840 Treaty.'[45] In his view:

> The Treaty has to be seen as an embryo rather than a fully developed and integrated set of ideas. The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. . . .
>
> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty.[46]

President Cooke observed that this duty was no light one, and 'infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the court will be to insist that it be honoured'.[47]

President Cooke went on to accept that the Treaty relationship created 'responsibilities analogous to fiduciary duties'.[48] The duty of the Crown was not merely passive but extended 'to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[49] Here, President Cooke noted that 'practicable means reasonably practicable'.[50] President Cooke also accepted that the Crown should grant redress for breaching the principles of the Treaty, unless there were 'very special circumstances, if ever' justifying it be withheld.[51] Finally, President Cooke, like the other justices, stopped short of finding a duty to consult, noting that such a duty 'in any detail or unqualified sense . . . is elusive and unworkable'.[52] However, he observed that the transfer of Crown lands to State-owned enterprises was 'such a major change' that 'although the Government is clearly entitled to decide on such a policy, as a reasonable Treaty partner it should take the Maori race into its confidence regarding the manner of implementation of the policy'.[53]

The most often cited judgment is that of President Cooke, but Justice Richardson observed that

> any reading of our history brings home how different the attitudes of the Treaty partners to the Treaty have been for much of our post 1840 history: on the one hand, relative neglect and ignoring of the Treaty because it was not viewed as of any constitutional significance or political or social relevance; and on the other, continuing reliance on Treaty promises and continuing expressions of great loyalty to and

45. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 663
46. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, pp 663–664
47. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 667
48. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 664
49. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 664
50. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 664
51. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 665
52. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 665
53. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 665

> trust in the Crown. It is only in relatively recent years and as reflected in the Treaty of Waitangi legislation itself that the lagging partner has started seriously addressing these questions.[54]

Justice Richardson observed, that 'against that background it is readily understandable that much of the contemporary focus is on the spirit rather than the letter of the Treaty, and on adherence to the principles rather than the terms of the Treaty'.[55] In his view, the Treaty represented a 'solemn compact' between Māori and the Crown, and suggested the 'way ahead calls for careful research, for rational positive dialogue and, above all, for a generosity of spirit'.[56] He also referred to the importance of the oral explanations given to Māori at the signing of the Treaty,[57] and the preamble of the Treaty, which referred to the Crown's being 'anxious to protect' the 'just Rights and Property' of Māori.[58] As with President Cooke, Justice Richardson did not find an absolute duty to consult, and suggested the better view was that

> the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.[59]

Finally, Justice Richardson also referred to the concept of the honour of the Crown:

> Where the focus is on the role of the Crown and the conduct of the Government that emphasis on the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country.[60]

54. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 672
55. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, pp 672–673
56. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 673
57. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 671
58. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 674
59. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 683
60. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 682

Justice Somers, in turn, stated 'the principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply.'[61] He further observed:

> The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle, and was in my view intended by Parliament to be embraced by the terms it used in s 9. As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other — a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.[62]

Justice Casey, in turn, stated:

> I think the deliberate choice of the expression 'inconsistent with the principles of the Treaty' in preference to one such as 'inconsistent with its terms or provisions' points to an adoption in the legislation of the Treaty's actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today's changed conditions and expectation in the light of that relationship.[63]

Finally, Justice Bisson stated:

> This Court is not concerned with a strict or literal interpretation of the Treaty of Waitangi, nor to the application of such an interpretation to a given set of facts. This Court is called upon to consider what are the principles of the Treaty. The principles of the Treaty of Waitangi were the foundation for the future relationship between the Crown and the Maori race.[64]

He observed:

> The passages I have quoted from the speeches of two Maori chiefs and from the letter of Governor Hobson enable the principles of the Treaty to be distilled from an analysis of the text of the Treaty. The Maori chiefs looked to the Crown for protection from other foreign powers, for peace and for law and order. They reposed their trust for these things in the Crown believing that they retained their own rangatiratanga and taonga. The Crown assured them of the utmost good faith in the manner

61. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 692
62. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 693
63. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 702
64. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 714

> in which their existing rights would be guaranteed and in particular guaranteed down to each individual Maori the full exclusive and undisturbed possession of their lands which is the basic and most important principle of the Treaty in the context of the case before this Court.[65]

Two years later, in 1989, the New Zealand Māori Council applied for a declaration that the Crown's proposal to dispose of forestry assets was inconsistent with the *Lands* decision. In the *Forests* case, the Court of Appeal realised that it should go further than it had in the *Lands* case. There had been reluctance by the justices in 1987 to impose a duty on the Crown to consult with Māori 'as an absolute open-ended and formless duty to consult'. In 1989, the justices clarified the scope of the duty to act in good faith. The Court of Appeal observed that the good faith owed each other by the partners 'must extend to consultation on truly major issues.'[66] It further recognised that presenting Māori with a predetermined decision, described as a 'fait accompli', was inconsistent with the 'spirit of the partnership which is at the heart of the principles of the Treaty of Waitangi.'[67] It found that partnership did not mean that 'every asset or resource in which Maori have some justifiable claim to share must be divided equally. There may be national assets or resources as regards which, even if Maori have some fair claim, other initiatives have still made the greater contribution.'[68]

In the same year of 1989, the Court of Appeal was asked to apply the principles of the Treaty/te Tiriti in the context of coal mining rights (the *Coal* case). President Cooke confirmed the approach to statutes concerned with the Treaty demanded 'a broad, unquibbling and practical interpretation.'[69] President Cooke further confirmed that reparation had to be made for past and continuing breaches of the Treaty:

> It is obvious that, from the point of view of the future of our country, non-Maori have to adjust to an understanding that does not come easily to all: reparation has to be made to the Maori people for past and continuing breaches of the Treaty by which they agreed to yield government. Lip service disclaimers of racial prejudice and token acknowledgments that the Treaty has not been honoured cannot be enough. An obligation has to be seen to be honoured. On the Maori side it has to be understood that the Treaty gave the Queen government, Kawanatanga, and foresaw continuing immigration. The development of New Zealand as a nation has been largely due to that immigration. Maori must recognise that it flowed from the Treaty and that both the history and the economy of the nation rule out extravagant claims in the democracy now shared. Both partners should know that a narrow focus on the past is useless. The principles of the Treaty have to be applied to give fair results in today's world.[70]

65. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 715
66. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, p 152
67. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, p 152
68. *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142, p 152
69. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, p 518
70. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, p 530

In 1990, the Court of Appeal considered a dispute related to the fishing rights of Muriwhenua iwi and other coastal tribes (the *Fisheries* case). The fishing rights of Muriwhenua iwi had recently been the subject of the Tribunal's 1988 report on the Muriwhenua Fishing claim.[71] Delivering the judgment for the court, President Cooke commented that 'the Treaty obligations are ongoing. They will evolve from generation to generation as conditions change.'[72]

In 1994, the Privy Council, New Zealand's highest appellate court at that time, considered the application of Treaty principles in the context of the Government's proposed sale of broadcasting assets (the *Broadcasting Assets* case). Their Lordships recognised that the Treaty agreement was of the 'greatest constitutional importance to New Zealand',[73] that the obligations of the Queen of England under the Treaty were now those of the Crown in right of New Zealand,[74] and that

> 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. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty.) With the passage of time, the 'principles' which underlie the Treaty have become much more important than its precise terms.[75]

Their lordships further observed that the Treaty relationship 'should be founded on reasonableness, mutual cooperation and trust'.[76] They stated that the Crown's obligation to protect a taonga was therefore not absolute, or unqualified and required the Crown to only take such 'action as is reasonable in the prevailing circumstances'. However, if a taonga was in a vulnerable state, this was a matter to be

> taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.[77]

Finally, due to its relevance in respect of Treaty clauses (especially descriptive or elaborated clauses) and the constitutional status of the Treaty/te Tiriti, we

71. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wellington: Waitangi Tribunal, 1988)
72. *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, p 656
73. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, p 516
74. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, p 517
75. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, p 517
76. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, p 517
77. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, p 517

note a more recent 2021 decision of the Supreme Court: *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board*. This case was emphasised by Ms Coates in her evidence, and raised by senior MOJ officials in their 23 May 2024 briefing to the Minister of Justice because of its relevance to the Treaty clause review.[78]

In a joint opinion, Justice Young and Justice France referred to section 12 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012. This was similar to section 7 of the Heritage New Zealand Pouhere Taonga Act, discussed above. Section 12 stated that, 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', various sections of the statute required certain things. Section 12(a), for example, referred to section 18 under which the Māori Advisory Committee would advise marine consenting authorities to ensure their decisions were 'informed by a Māori perspective'.

Justice Young and Justice France stated:

> Ultimately, it was not contended that s 12 has the effect of ousting Treaty principles. That is not surprising, given the Treaty's constitutional significance. The broader, constitutional context in which Treaty clauses like s 12 are to be interpreted has been the subject of attention in the authorities. Chilwell J in *Huakina Development Trust v Waikato Valley Authority* made the point that the cases 'show that the Treaty was essential to the foundation of New Zealand and since then there has been considerable direct and indirect recognition by statute' of the Crown's Treaty obligations. Of that statutory recognition, s 12 illustrates the trend in more recent statutes to give a greater degree of definition as to the way in which the Treaty principles are to be given effect and a departure from the more general, free standing Treaty clauses like that in s 4 of the Conservation Act. The author of *Burrows and Carter Statute Law in New Zealand*, for example, notes that in recent years there has been a move towards precise consideration of how Parliament 'wants particular legislative schemes to provide for and protect Māori interests in the light of the Crown's responsibility under the Treaty'.
>
> But the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question. It ought to follow therefore that Treaty clauses should not be narrowly construed. Rather, they must be given a broad and generous construction. 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.[79]

78. Document A6, pp 15–16; doc A26, p 7

79. *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, paras 150–151

The opinions of Justice Glazebrook, Justice Williams, and Chief Justice Winkelmann were in agreement on this point.[80]

What these cases demonstrate is that the term 'the principles of the Treaty of Waitangi', as used in operative or descriptive Treaty clauses, has enabled the courts to consider the historical context of the signing, the objectives of the Crown and Māori signatories, the actual texts of the Māori and English versions, as well as the constitutional significance and the spirit of the Treaty/te Tiriti. As Dr Max Harris observed, the justices in 1987 grounded their interpretation of the principles of the Treaty in both the texts and in the parties' motivations for entering the accord. He continued, 'what is striking . . . is the way the principles . . . are regarded as having a historical and textual grounding: [and] the principles reflect the hopes and expectations of the parties signing Te Tiriti/the Treaty in 1840.'[81]

From 1987, therefore, the use of the term 'principles of the Treaty' has led to significant judicial and legal recognition of Māori rights and Crown obligations under the Treaty/te Tiriti. For the purposes of this urgent report, it is sufficient to note this point although there will no doubt be further debate about the use of this term later in the Wai 3300 Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry.

Ms Coates noted that, despite the many references to the principles of the Treaty of Waitangi, thus far there has been 'no definition or attempt to define what the principles of the treaty mean in legislation in a general way'.[82] That has meant that the courts and the Waitangi Tribunal have been required to interpret what the principles of the Treaty of Waitangi are. The courts will continue to have a role interpreting the law, whether the Treaty Principles Bill is enacted, or whether the Treaty clause review results in statutory amendments to, or repeals of, Treaty clauses.

In concluding this section, we note that the term 'the principles of the Treaty' was introduced into legislation for a number of reasons, including as a way of reconciling the differences between the English and Māori texts of the Treaty/te Tiriti. We do not attempt to resolve the debate about the utility of the principles here, but we simply note the debate exists. Our urgent inquiry instead is related to the potential impacts of the Treaty Principles Bill policy and Treaty clause review on the Treaty principles as they currently exist – in statute, as applied by the courts, and as interpreted by the Tribunal.

80. *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, paras 8, 237, 296, 332

81. Document A9, p 25

82. Document A6, p 10

3.3 He Aha ngā Mātāpono Tiriti nā ngā Pāti i Whakatauria e Whaitake Ana ki tēnei Uiuinga Kōhukihuki?

What Treaty Principles Do the Parties Consider Relevant to this Urgent Inquiry?

3.3.1 Ngā tāpaetanga kōrero a ngā kaikerēme me ngā kaitono e whai pānga ki te kaupapa

Claimants' and interested parties' submissions

Counsel for Wai 1341/3077 submitted that the 'critical starting point' is the Te Raki Tribunal's stage 1 report and its findings regarding the nature of the agreement reached between the Crown and Māori in 1840, including that rangatira who signed te Tiriti o Waitangi on 6 February 1840 did not cede sovereignty.[83]

In its stage 2 report, the Te Raki Tribunal then considered the expression of Treaty principles for consistency with its stage 1 findings. Multiple counsel referred to the Te Raki stage 2 Tribunal's articulation of the principles of tino rangatiratanga, kāwanatanga, partnership, mutual recognition and respect, active protection, and redress.[84] Counsel also referred to the connected Crown duties to foster tino rangatiratanga, not undermine it, and to ensure that Treaty/te Tiriti rights and guarantees were recognised in laws and policies.[85] Counsel further noted the Crown's obligation to engage and negotiate with Māori (rather than merely consult) where questions of relative authority arose between the exercise of tino rangatiratanga and kāwanatanga.[86]

Counsel cited the recent urgent Tribunal report of the Oranga Tamariki (section 7AA) inquiry, which stated that,

> once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi. It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms.[87]

Counsel also referred to the principles of tino rangatiratanga, kāwanatanga, active protection, good governance, and partnership, including the obligation

83. Submission 3.3.22, pp 7–9. This finding was also cited in submission 3.3.12, p 1, submission 3.3.14, pp 3–4; submission 3.3.13(a), pp 1–2; and submission 3.3.21, p 14.

84. See submission 3.3.12, p 2 (tino rangatiratanga and kāwanatanga); submission 3.3.6(a), pp 1–4, and submission 3.3.13, pp 6–8 (tino rangatiratanga, kāwanatanga, and partnership); submission 3.3.14, pp 4–7 (tino rangatiratanga, kāwanatanga, partnership, mutual recognition and respect, active protection, and redress); and submission 3.3.22, pp 9–11 (tino rangatiratanga, kāwanatanga, partnership, mutual recognition and respect, active protection, and redress). See also submission 3.3.21, pp 12–16 (tino rangatiratanga, kāwanatanga, and mutual recognition and respect); submission 3.3.17, pp 8–10, 33 (tino rangatiratanga, kāwanatanga, partnership, and mutual recognition and respect for the Bill, and tino rangatiratanga for the review); and submission 3.3.16, pp 33–34, 39–40 (tino rangatiratanga and active protection).

85. See submission 3.3.14, p 5; submission 3.3.13, pp 6–7; submission 3.3.16, p 40; submission 3.3.17, p 10

86. See submission 3.3.14, pp 5–6; submission 3.3.13, p 8; submission 3.3.16, p 42

87. Waitangi Tribunal, *Oranga Tamariki* (*section 7AA*) *Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 28; submission 3.3.14, p 10; submission 3.3.15, p 8; submission 3.3.18, p 22; submission 3.3.22, pp 11–12; see also submission 3.3.16, p 43.

to consult and the duties to act reasonably, in good faith and to make informed decisions, as articulated in other Tribunal reports or as a general statement of the principles.[88] Counsel for Wai 2214 submitted that the Crown has an obligation to obtain Māori consent before taking action affecting Māori or Māori interests.[89]

3.3.2 Ngā tāpaetanga kōrero a te Karauna

The Crown's submissions

The Crown submitted that there is a 'strong Māori interest in the issues raised by this urgent inquiry' and that the Treaty principles are 'squarely engaged' as a result. In the Crown's view, the relevant principle for this inquiry is the principle of partnership, including a mutual obligation to act 'reasonably and in good faith'. For the Crown partner, this obligation requires it to be 'sufficiently informed when making decisions that affect Māori'. Crown counsel submitted that the Treaty principles do not 'give rise to an absolute, open-ended duty to consult', the Crown will 'generally be required to consult on "truly major" issues affecting Māori in order to meet its obligation to act in good faith.'[90]

3.4 He Aha ngā Mātāpono Tiriti nā mātou i Whakatauria e Whaitake Ana ki tēnei Uiuinga?

What Treaty Principles Do we Consider Relevant to this Inquiry?

This section identifies the Treaty principles, rights and duties discussed by the Waitangi Tribunal in previous reports relevant to the Treaty Principles Bill and the Treaty clause review. We consider these principles below and note they are relevant to the exchange of kāwanatanga for the guarantee of rangatiratanga.

We note that, since the landmark court judgments in the 1980s, the Tribunal has continued to evolve and apply Treaty principles to a range of circumstances. In each case, the Tribunal has derived the applicable principles from the preamble and text of the Treaty/te Tiriti as well as the surrounding circumstances in which it was signed in 1840. In so doing, the Tribunal also has regard to both texts of the Treaty/te Tiriti and, for the purposes of the Treaty of Waitangi Act 1975, has 'exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts' and to decide any issues raised by differences between them.[91]

88. Submission 3.3.16, pp 21–39 (tino rangatiratanga, kāwanatanga, active protection, partnership, including the obligation to consult, and the duties to act honourably, reasonably, in good faith and to make informed decisions). See also submission 3.3.17, pp 8–13, 31–33 (tino rangatiratanga, the obligation to obtain the consent of Māori, engagement, good government, and active protection for the Bill, and partnership, active protection, and engagement for the review); submission 3.3.18, pp 12–20 (active protection, partnership, including the duty to act honourably, reasonably and in good faith, tino rangatiratanga, the duty to consult, and good government); submission 3.3.20, pp 2–3 (partnership, tino rangatiratanga, active protection, and good faith); and submission 3.3.21, pp 17–18 (partnership, active protection, and redress).

89. Submission 3.3.17, p 11 (for the Bill)

90. Submission 3.3.23, p 13

91. Treaty of Waitangi Act 1975, s 5(2)

3.4.1 Te mātāpono o te tino rangatiratanga

the principle of tino rangatiratanga

Tino rangatiratanga is the mana or full chiefly authority over properties and people within a particular kinship group, all that is treasured, and access to resources. It involves pre-existing sovereign authority, expressed as self-government and autonomy and 'extends to matters both tangible and intangible that [Māori] value'.[92] Rangatiratanga limits the Crown's right to govern and is itself limited by obligations to manage rights between hapū and with neighbouring iwi, obligations of kaitiakitanga, and obligations as partners to the Treaty/te Tiriti.[93] The Te Raki stage 2 Tribunal (2023) observed:

> The Tribunal has long emphasised that the treaty guaranteed the rights of Māori to exercise their tino rangatiratanga (full authority) over their lands, their villages, and all their taonga, and in each inquiry has assessed Crown actions and omissions in light of this principle of tino rangatiratanga.[94]

The Te Rohe Pōtae Tribunal (2023) explained further:

> Our conclusion is that the Treaty guaranteed to Māori their tino rangatiratanga. This was a guarantee that Māori would be able to continue to exercise full authority over lands, homes, and all matters of importance to them. This, at a minimum, was the right to self-determination and autonomy or self-government in respect of their lands, forests, fisheries, and other taonga for so long as they wished to retain them. That authority or self-government included the right to work through their own institutions of governance, and apply their own tikanga or system of custom and laws.[95]

The relationship between the rangatiratanga and kāwanatanga spheres of authority has been discussed in many Tribunal reports. The Central North Island Tribunal (2008) stated that the Treaty/te Tiriti

> envisaged one system where two spheres of authority (the Crown and Maori) would inevitably overlap. The interface between these two authorities required negotiation and compromise on both sides and was governed by the Treaty principles of partnership and reciprocity.[96]

The Te Rohe Pōtae Tribunal stated:

92. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One*, revised ed, 4 vols (Wellington: Legislation Direct, 2008), vol 4, p 1245

93. Waitangi Tribunal, *He Maunga Rongo*, vol 1, pp 172–174

94. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, 3 vols (Lower Hutt: Legislation Direct, 2023), vol 1, p 39

95. Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims*, 6 vols (Lower Hutt: Legislation Direct, 2023), vol 1, p 183

96. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

> the Treaty established a partnership where the kāwanatanga or governing power of the Crown was limited by the guarantee of tino rangatiratanga to Māori. Likewise, the former absolute authority of Māori encapsulated in the term tino rangatiratanga was limited by the grant of kāwanatanga. Each would operate in their own sphere of influence and negotiate how their chosen institutions would operate where their authorities overlapped. The Crown also accepted a duty to actively protect Māori interests, and Māori acquired all the rights and privileges of British subjects. The practical details of these arrangements were to be worked out over time.[97]

In the north, the Te Raki stage 2 Tribunal found that Māori agreed in the Treaty/te Tiriti to

> share power and authority with the Governor though they would have different rules and different spheres of influence. They understood that they had received assurances from the Crown that they would retain their independence and chiefly authority, and they also understood that through the treaty, the Crown and its agents asked for authority (kāwanatanga) to control the Europeans. This was the arrangement to which they consented.[98]

Turning to the Treaty Principles Bill and the Treaty clause review, the Crown's guarantee of tino rangatiratanga in exchange for the granting of an authority to exercise kāwanatanga created two spheres of authority. Where there is an overlap or intrusion into the rangatiratanga sphere contemplated by Crown action or policies, open dialogue and engagement with Māori is required. This constitutional positioning of the Treaty/te Tiriti Māori–Crown relationship means that the Crown is required to engage with Māori on such important policies and to recognise and give effect to the guarantee of tino rangatiratanga in statute law. That is what the principle of rangatiratanga requires and what the Treaty clauses have sought to do in legislation, albeit with varying success. In the words of the Central North Island Tribunal, that is because Māori authority 'carried with it the right to manage their own policy, resources, and affairs within the minimum parameters necessary for the proper operation of the State'.[99]

3.4.2 Te mātāpono o kāwanatanga

The principle of kāwanatanga

(1) *Te taha ki te kāwanatanga*

The kāwanatanga sphere

Kāwanatanga is the right to govern and to make laws for the 'good order and security' of the country. Kāwanatanga must be exercised in accordance with the principle of good government and in a way that actively protects and does not diminish rangatiratanga.

97. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, pp xlv–xlvi
98. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, pp 22–23
99. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

The Te Rohe Pōtae Tribunal noted that kāwanatanga was

> to be used for the protection of Māori interests, and in a manner that was consistent with Māori views about what was beneficial to them. It was therefore not the supreme and unfettered power that the Crown believed it to be; rather, it was a power that was conditioned or qualified by the rights reserved to Māori.[100]

Building on its key stage 1 finding that Te Raki Māori did not cede sovereignty in 1840, the Te Raki stage 2 Tribunal did not consider

> the authority granted to the Crown – kāwanatanga – as a superior authority, an overarching power to govern, make, and enforce law, albeit 'qualified' by the requirement to give effect to treaty guarantees, including the right of Māori to exercise tino rangatiratanga.[101]

In saying this, the Tribunal noted that it was departing from the usual framing of the partnership principle (discussed below) because 'the Crown's authority was expressly limited in Te Raki to its own sphere. Alongside it, and equal to it, was that of tino rangatiratanga.'[102]

In this context, the duty of the Crown is

> to foster tino rangatiratanga (Māori autonomy), not to undermine it, and to ensure its laws and policies were just, fair, and equitable, and would adequately give effect to treaty rights and guarantees, notably those affecting hapū autonomy and tikanga and hapū retention and management of their lands and resources.[103]

Furthermore, the Te Raki stage 2 Tribunal stated:

> Where Government decisions or policies, or their impacts, were discriminatory, or placed unreasonable limitations on tribal or hapū exercise of tino rangatiratanga, they were not in accordance with the agreement reached with Te Raki Māori in February 1840 as to the respective spheres and responsibilities of kāwanatanga and rangatiratanga.[104]

From the perspective of an urgent contemporary inquiry into current Crown policy, we do not see a significant difference between the Te Raki stage 2 Tribunal's description of the kāwanatanga sphere of Crown authority and that of other Tribunal reports. The Te Raki stage 1 report (2014) specified that it said 'nothing about how and when the Crown acquired the sovereignty that it exercises today'.[105]

100. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 196
101. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 61
102. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 61
103. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 64
104. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 60
105. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp xxiii, 527

Judge Coxhead's letter of transmittal in the stage 2 report also said that the Tribunal had not 'identified precisely when the sovereignty the Crown holds and exercises today was acquired, nor have we considered its legitimacy in a contemporary context', noting that those issues may be considered in this current Wai 3300 Tomokia ngā tatau o Matangireia – the Constitutional Kaupapa Inquiry.[106] There is no space to do so in this urgent inquiry – this will be an issue for later consideration. What is important here is that we rely on the description of the kāwanatanga sphere in the Te Raki stage 2 report and other reports in the context of the Crown's exercise of authority today.

(2) *Te mātāpono o te kāwanatanga tōtika*
The principle of good government

The Treaty/te Tiriti principle of good government or 'good governance' applies to the Crown's exercise of kāwanatanga when proposing legislation that affects Māori interests. Deriving from article 3 of the Treaty/te Tiriti, this principle 'requires the Crown to keep its own laws' and 'holds the Crown wholly responsible for complying with its own laws, rules and standards'.[107] The Whanganui Land Tribunal (2015) has observed that the Crown's actions cannot be truly consistent with good government unless they are also just and fair. The Tribunal stated that the 'language and spirit of the Treaty were imbued with the ideas of justice and fairness', as seen in the words of the Treaty's preamble:

> Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, . . . Her Majesty Victoria . . . regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order . . .[108]

The Tribunal in its *Ko Aotearoa Tēnei* or Wai 262 report (2011) commented on the Crown's obligations in respect of its te reo Māori policies in this way:

> The Crown was granted kāwanatanga in article 1 of the Treaty. This is generally translated in the case law as the right to govern. It is unarguable that the right to govern should be exercised wisely so as to produce well-designed policy which is implemented efficiently to minimise the cost to the taxpayer. That is an obligation owed by every government in the world, whatever the source of its right to govern. But here there is a greater dimension: a taonga of the utmost importance is at issue. In this Treaty context, the State owes Māori two kāwanatanga duties: transparent policies forged in the partnership to which we have referred; and implementation

106. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, pp xxiv–xxv
107. Waitangi Tribunal, *He Whiritaunoka: The Whanganui Land Report*, 3 vols (Wellington: Legislation Direct, 2015), vol 1, p 158
108. Waitangi Tribunal, *He Whiritaunoka*, vol 1, p 158 (endorsing the views of Waitangi Tribunal, *Turanga Tangata Turanga Whenua: The Report on the Turanganui o Kiwa Claims*, 2 vols (Wellington: Legislation Direct, 2004), vol 1, pp 736–737)

programmes that are focused and highly functional. Te reo Māori deserves the best policies and programmes the Crown can devise.[109]

In the context of the Treaty Principles Bill and the Treaty clause review, we consider the principle of good government applies relying in particular on the statements quoted above from the Wai 262 Tribunal. That is because if the Crown's policies impact on the constitutional status of the Treaty/te Tiriti, as these two policies do, it must produce robust well-designed transparent policy forged in partnership. The constitutional status of the Treaty/te Tiriti should not be undermined by poorly designed, unjustifiable policies as that would be inconsistent with the principle of good government.

3.4.3 Te mātāpono o te houruatanga

The principle of partnership and reciprocity

Partnership is a central Treaty principle. The Court of Appeal in the *Lands* case, canvassed previously in section 3.2.2, found the Treaty created a relationship akin to a partnership with mutual obligations to act reasonably and with the utmost good faith.[110] The Tribunal has described the principle of partnership as arising 'from one of the Treaty's basic objectives – to create the framework for two peoples to live together in one country'.[111]

The Te Rohe Pōtae Tribunal in this respect observed:

> In any negotiations over laws and institutions to give effect to kāwanatanga and tino rangatiratanga, neither party could impose its will. These matters could only be worked out through ongoing dialogue and partnership, in which the parties acted with the utmost good faith. From this are derived the principles of partnership and good governance.[112]

Further, the Central North Island Tribunal stated:

> In the words of the president of the Court of Appeal, 'the Treaty signified a partnership between races', and each partner had to act towards the other 'with the utmost good faith which is the characteristic obligation of partnership'. . . .
>
> The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.[113]

109. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), p 163

110. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, pp 663–664

111. Waitangi Tribunal, *The Napier Hospital and Health Services Report* (Wellington: Legislation Direct, 2001), p 48

112. Waitangi Tribunal, *Te Mana Whatu Ahuru*, vol 1, p 210

113. Waitangi Tribunal, *He Maunga Rongo*, vol 1, p 173

As a founding relationship for a nation, the partnership does not have an expiry date and creates enduring obligations.[114] As the *Ngai Tahu Report* (1991) stated: 'It was not intended merely to regulate relations at the time of its signing by the Crown and the Maori, but rather to operate in the indefinite future when, as the parties contemplated, the new nation would grow and develop.'[115]

In its discussion of the principle of partnership, the Te Raki stage 2 Tribunal began from the position of equal spheres of authority that were agreed in the Treaty/te Tiriti. It found that partnership is the framework for governance of New Zealand and the Crown's duty is to engage actively with Māori on 'how it should recognise Te Raki tino rangatiratanga and, where agreed, give it effect in New Zealand law'. In doing so, partnership requires both parties to act reasonably and with the utmost good faith.[116]

The principle of partnership is also linked to the obligation to consult. The minimum principles for consultation have been articulated by the courts. As the High Court in *Wellington International Airport v Waka Kotahi* described:

> *Wellington International Airport Ltd v Air New Zealand* . . . established that consultation did not require agreement, nor did it necessarily involve negotiation toward an agreement, although that might occur. However, consultation was more than mere prior notification. If the person having the power to make the decision was required to consult, for consultation to be meaningful, the other party must have available to it 'sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses'.
>
> The obligation of the decision-maker is to consult properly and with an open mind before making any final decision. A proper opportunity must be given to the person consulted to put any matters forward that they wished to, and the decision-maker must take due notice of what is said. The proposal must not have been finally decided upon prior to consulting. Rather, the decision-maker must listen to what others have to say, considering their responses, and only then saying what will be done.[117]

As the Napier Hospital Tribunal (2000) stated, 'it would not suffice, in other words, simply to call a hui and explain the proposals.'[118] That Tribunal also observed that the 'mode of consultation should take appropriate account of Maori expectations and preferences' and articulated a set of criteria for consulting with Māori.[119]

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114. Waitangi Tribunal, *Tauranga Moana 1886–2006: Report on the Post-Raupatu Claims*, 2 vols (Wellington: Legislation Direct, 2010), vol 1, pp 19–20 (citing *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, pp 664, 693, 704)

115. Waitangi Tribunal, *The Ngai Tahu Report 1991*, 3 vols (Wellington: GP Publications, 1991), vol 2, pp 222–223

116. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 70

117. *Wellington International Airport v Waka Kotahi* [2022] NZHC 954, paras 44–45; see also *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA), pp 675–683

118. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 71

119. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, pp 72, 73

The obligation to consult, in turn, is connected to the Crown's partnership obligations to act reasonably and with the utmost good faith.[120] As the Offender Assessment Policies Tribunal (2005) noted, 'one element of the Crown's obligations is that it must make informed decisions. Where Crown policies affect Māori, a vital element of the partnership relationship is the Crown's duty to consult with Māori'.[121] In *The Preliminary Report on the Haane Manahi Victoria Cross Claim* (2005), the Tribunal stated: 'In other words, the Crown could not act unilaterally on matters of importance to its Māori Treaty partner'.[122] In *Napier Hospital*, the Tribunal found that the significance of the decision to Māori may mean consultation is required even if the Crown believes it already holds sufficient information.[123]

In some cases, particularly where the issue is significant to Māori or goes to the heart of the Treaty/te Tiriti relationship, the Tribunal has found the Crown may be obliged to go further than consultation and obtain the consent of Māori. The Indigenous Flora and Fauna Tribunal in its *Ko Aotearoa Tēnei* report (2011), for example, noted that there is no '"one size fits all"' approach to consultation, and indicated there could be 'occasions in which the Māori Treaty interest is so central and compelling that engagement should go beyond consultation to negotiation aimed at achieving consensus, acquiescence or consent'.[124] The Te Raki stage 2 Tribunal similarly found that the Treaty/te Tiriti obliges the Crown to go beyond consultation and negotiate through 'discussion and agreement'.[125]

The Wai 262 Tribunal noted that 'partnership mechanisms', 'partnership structures', 'partnership forums', or 'partnership entities' are required to bring about 'responsible power-sharing' across multiple policy sectors and statutory regimes, and Tribunal reports have pointed to a number of such mechanisms designed to achieve these ends. Those include co-governance bodies and collaboration between the Crown and Māori in the co-design of policy.[126]

The principles of partnership and reciprocity require the Crown to develop its Treaty/te Tiriti policies in partnership with Māori.

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120. Waitangi Tribunal, *Report of the Waitangi Tribunal on Claims concerning the Allocation of Radio Frequencies* (Wellington: Brooker and Friend Ltd, 1990), p 42

121. Waitangi Tribunal, *The Offender Assessment Policies Report* (Wellington: Legislation Direct, 2005), p 10

122. Waitangi Tribunal, *The Preliminary Report on the Haane Manahi Victoria Cross Claim* (Wellington: Legislation Direct, 2005), p 15

123. Waitangi Tribunal, *The Napier Hospital and Health Services Report*, p 68

124. Waitangi Tribunal, *Ko Aotearoa Tēnei: Te Taumata Tuatahi*, p 237; see also Waitangi Tribunal, *Whaia te Mana Motuhake/In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wellington: Legislation Direct, 2015), pp 30–31

125. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 69

126. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011), vol 2, pp 584, 706–713; Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), pp 296–298, 558–561

3.4.4 Te mātāpono o te matapopore moroki

The principle of active protection

The principle of active protection, which is sometimes referred to as a duty, has been described in many court decisions and Tribunal reports. The Te Tau Ihu Tribunal (2008) stated that the Crown's 'duty to protect Maori rights and interests arises from the plain meaning of the Treaty, the promises that were made at the time (and since) to secure the Treaty's acceptance, and the principles of partnership and reciprocity'.[127] The Te Raki stage 2 Tribunal also noted the references to royal protection in the Treaty and in Lord Normanby's 1839 instructions to Captain Hobson, stating that protection of Māori interests was a 'duty the British imposed on themselves, as they embarked on the annexation and colonisation of New Zealand'.[128] In the *Lands* case, the Court of Appeal found the Crown's obligations were 'analogous to fiduciary duties', and were 'not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[129]

Active (rather than passive) protection 'requires honourable conduct by, and fair processes from, the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected.'[130] Otherwise, active protection can have 'paternalistic implications', reflecting the power imbalance between the Treaty/te Tiriti partners.[131] Further, active protection applies to 'all interests guaranteed to Māori under the treaty and extends to intangible properties'.[132] It applies across all statutory regimes and fields of Crown policy today, whether it be monitoring local government policies and practices,[133] or active protection of tino rangatiratanga over kāinga in child protection services.[134]

In the context of the Crown's Treaty Principles Bill policy and its Treaty clause review policy, the Crown must develop its policies that ensure the active protection of Māori rights and interests.

3.4.5 Te mātāpono o te mana taurite

The principle of equity

The principle of equity is especially important in this inquiry because the coalition agreements stressed the equality of all New Zealanders, stating that references to the principles of the Treaty/te Tiriti in legislation and Crown policies on co-governance, for example, have created inequalities for non-Māori based on race.

127. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 4
128. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, pp 64–66
129. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 664
130. Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 1, p 4
131. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, pp 66, 70–71
132. Waitangi Tribunal, *The Māori Wards and Constituencies Urgent Inquiry Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 18
133. Waitangi Tribunal, *Māori Wards and Constituencies Urgent Inquiry Report*, p 15
134. Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamarki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021), pp 19–20, 97, 101

This is a key rationale for both policies, the Treaty Principles Bill and the Treaty clauses review (see chapters 4 and 5).[135]

The principle of equity is closely related to the principles of active protection and redress. It derives from article 3 of the Treaty/te Tiriti, which promises all Māori the rights and privileges of British subjects.[136] The principle of equity requires the Crown to act fairly between Māori and non-Māori citizens, and to remove the many longstanding barriers (especially barriers of the Crown's own creation) that prevent Māori from having a genuinely level playing field with non-Māori.[137] The Tribunal found in the *Hauora* report (2023) that article 3

> not only guarantees Māori freedom from discrimination but also obliges the Crown to positively promote equity. It is through article 3 that Māori, along with all other citizens, are placed under the protection of the Crown and are therefore assured equitable treatment from the Crown to ensure fairness and justice with other citizens.[138]

In the context of the two policies of the Treaty Principles Bill and the Treaty clause review, we consider the equality envisaged in the Treaty/te Tiriti, and whether the Crown's policies seek to ensure fairness through achieving equitable results for Māori so that they fairly enjoy their citizenship in common with all New Zealanders.

3.4.6 Te mātāpono o te whakatika

The principle of redress

The principle of redress requires the Crown to remedy Treaty/te Tiriti breaches and prejudice arising from them. The Treaty settlements process has provided redress for historical breaches since the late 1980s,[139] and some legislation (including with Treaty clauses) has sought to remedy situations that were inconsistent with the principles. In its *Offender Assessment Policies Report* (2005), the Tribunal cited the *Lands* case, stating:

> The principle of redress derives from the Crown's obligation to act reasonably and in good faith. It is relevant when a breach of Treaty principle and resulting prejudice

135. New Zealand National Party and ACT New Zealand Party, 'Coalition Agreement', 24 November 2023, p 9; New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10

136. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), p 133

137. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1000; Waitangi Tribunal, *Te Tau Ihu o te Waka a Maui*, vol 3, p 5; Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Claims*, pp 518–519, 550–551

138. Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2023), p 33

139. The first Treaty settlement took place in 1989. It involved the return of land at Waitomo Caves as well as a loan: New Zealand Parliament, 'Historical Treaty Settlements', https://www.parliament.nz/en/pb/research-papers/document/00PlibC5191/historical-treaty-settlements, accessed 5 July 2024.

to Māori is established. In that situation, the Crown is obliged to restore its honour by providing a remedy for the wrong that has been suffered.[140]

As also noted in the Tribunal's *Tarawera Forest Report* (2003), the Crown must provide redress not only to restore its own honour, but also to restore the mana and status of Māori.[141] The Te Raki Tribunal in its stage 2 report found:

> Substantive redress is an important step in re-establishing the mutual recognition and respect embodied in the treaty relationship, for restoring the honour of the Crown, and for providing a renewed opportunity for giving effect to the treaty's guarantee of tino rangatiratanga and, ultimately, te mātāpono o te houruatanga [partnership].[142]

If the Crown's Treaty Principles Bill and the Treaty clause review policies were to result in legislation that inhibits or takes away access to justice, that legislation would be inconsistent with the principle of redress. This would be the case, for example, if the Treaty Principles Bill narrowed the jurisdiction of the Tribunal to consider claims for consistency only against its defined principles based on the ACT policy. Additionally, the principle would also be engaged if the two policies can be shown to inhibit the claimants and interested parties in the exercise of their tino rangatiratanga and negatively impact the partnership between Māori and the Crown. Such impacts would have the effect of denigrating the honour of the Crown in the Treaty/te Tiriti relationship. Providing meaningful redress is a way for the Crown to restore this honour and begin to repair any damage in the Treaty/te Tiriti relationship. The provision of any redress should draw on the principles outlined in the previous sections: it should be agreed between the Treaty/te Tiriti partners and be developed in good faith.

We turn next in chapter 4 to consider the claims in respect of the Crown's Treaty Principles Bill policy.

140. Waitangi Tribunal, *The Offender Assessment Policies Report*, p 13 (citing *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, p 693, and Waitangi Tribunal, *The Ngai Tahu Report 1991*, vol 1, pp 243–244, vol 3, p 1052)

141. Waitangi Tribunal, *The Tarawera Forest Report* (Wellington: Legislation Direct, 2003), p 29

142. Waitangi Tribunal, *Tino Rangatiratanga me te Kāwanatanga*, vol 1, p 69

ŪPOKO 4
Chapter 4

KAUPAPA HERE MO TE PIRE MĀTĀPONO TIRITI
The Treaty Principles Bill Policy

4.1 He Kupu Whakataki
Introduction

In this chapter, we discuss the claims in respect of the Crown's Treaty Principles Bill policy, which is mandated by National's coalition agreement with ACT.

As discussed in chapter 3, Parliament enacted the Treaty of Waitangi Act in 1975 without defining the principles of the Treaty. This task was left to the courts and to the Tribunal appointed to hear claims and make recommendations on the 'practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles'.[1] While governments have issued Executive definitions of the principles from time to time,[2] there has been no legislative definition of the principles since the Act was passed in 1975.

Under the heading 'Strengthening Democracy', the National–ACT coalition agreement recorded a commitment to introduce a 'Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable'.[3] The relevant 'existing ACT policy' is set out in section 1.4.1 of this report. In brief, it defines three Treaty 'principles' for inclusion in a Bill. Principle 1 provides that the Government has the right to govern all New Zealanders. Principle 2 states that the Government will 'honour all New Zealanders in the chieftainship of their land and all their property'. Principle 3 states that all New Zealanders are 'equal under the law with the same rights and duties'. This definition of the Treaty principles was supported by a selection of te reo Māori words taken from the text of te Tiriti o Waitangi.[4] According to the ACT policy, this definition captures the true meaning of the Treaty. The policy rationale for introducing a Bill based on ACT policy was stated in the coalition agreement as the need to 'uphold the principles of liberal

1. Treaty of Waitangi Act 1975, preamble
2. Geoffrey Palmer KC, 'Māori, the Treaty, and the Constitution', *Māori Law Review*, June 2013, https://maorilawreview.co.nz/2013/06/maori-the-treaty-and-the-constitution-rt-hon-sir-geoffrey-palmer-qc/
3. New Zealand National Party and ACT New Zealand Party, 'Coalition Agreement', 24 November 2023, p 9
4. Document A7, p [18]

democracy, including equal citizenship and parliamentary sovereignty'.[5] Much has been said about 'equality before the law' and 'Māori privilege' in support of the ACT policy.

On 28 November 2023, Cabinet endorsed the National–ACT coalition agreement (and the coalition agreement between National and New Zealand First) as the basis on which the coalition Government would operate.[6] This was followed on 25 March 2024 by a Cabinet circular which required all Ministers, chief executives, and agencies to be familiar with the contents of the coalition agreements and to implement the agreements.[7] A Treaty Principles Bill based on existing ACT policy is therefore now settled Crown policy. For this policy, the lead role has been delegated to the Associate Minister of Justice, the Honourable David Seymour, and the Ministry of Justice (MOJ). MOJ's role is to support the Government of the day with its responsibilities in relation to New Zealand's constitutional system. MOJ considers that alongside other agencies, particularly Te Arawhiti and the Crown Law Office, it has a role 'supporting the public service to understand its Treaty/te Tiriti obligations within the current constitutional settings'.[8] In carrying out these roles, senior MOJ officials have provided free and frank and advice to Ministers which raised a number of significant concerns about this policy (see sections 4.2–4.5 for the details).

Many of the officials' concerns were shared by the claimants, whose evidence and submissions were extremely critical of the Treaty Principles Bill policy and the Crown's failure to engage with them or seek the agreement of Māori prior to adopting the policy. In the claimants' view, the proposed Bill based on existing ACT policy would rewrite the Treaty/te Tiriti in a way that completely changes the meaning. They argued that the impacts of this on their tino rangatiratanga, their rights and interests, and the constitutional significance of the Treaty/te Tiriti itself, would be extremely negative. The Crown in this urgent inquiry accepted that consultation would be required on a 'truly major' issue such as the Treaty Principles Bill but argued that it was too early in the policy development phase for consultation. Further, the Crown's submission was that no Cabinet decisions have been made about the policy underlying the Bill or its content, and thus its true implications are not known. Accordingly, the Crown suggested that the Tribunal should focus its report on what is currently known and on how the Treaty Principles Bill policy could be developed in a manner consistent with the principles of the Treaty.

In this chapter, therefore, we address what *is* known about the policy, its rationale in the coalition agreement, the 'existing ACT policy' on which the Bill must be based (the three 'principles' mentioned above), and the effects that pursuing such a Bill would have on

- the authority, rights, and interests of the Māori Treaty partner;

5. New Zealand National Party and ACT New Zealand Party, 'Coalition Agreement', 24 November 2023, p 9
6. Paper 6.2.6, p 1
7. Paper 6.2.6, p 2
8. Document A23, p 4

- the Māori–Crown relationship and social cohesion; and
- the constitutional status of the Treaty/te Tiriti.

In carrying out this analysis, we examine the rationale for the Bill and whether there is a policy problem that would justify a Bill of this kind. We also discuss the ACT 'principles' that are to form the basis of the Bill and the te reo Māori words in te Tiriti that are said to underpin them. We assess the advice that senior Crown officials have provided to Ministers on the Treaty/te Tiriti compliance of the policy and its impacts on the Māori–Crown relationship. It is necessary in doing so to consider whether an exposure draft would be a sufficient form of engagement with the Māori partner. We also assess the evidence of the Crown and claimant witnesses about the policy, the effects that it is already having on Māori and on New Zealand society more generally, and the effects it will have if such a Bill proceeds to select committee or beyond that stage to enactment.

We begin by setting out the details of MOJ's advice to the Minister of Justice and the Associate Minister in the briefings of 14 December 2023, 25 January 2024, and 19 February 2024. Together with the text of the coalition agreement and the existing ACT policy, these briefings constitute what is currently known about the Treaty Principles Bill policy and the free and frank advice of senior officials to Ministers about it. We then provide a brief summary of the parties' arguments and identify the issues for determination in this chapter. This is followed by our discussion of the issues and our Treaty/te Tiriti findings.

4.2 Hui Whakamohio-a-pukapuka o te 14 o Tihema 2023

14 December 2023 Briefing

On 14 December 2023, MOJ as the lead agency responsible for the Treaty Principles Bill provided its first briefing to Minister Goldsmith. The Secretary for Justice, Mr Andrew Kibblewhite, and the Deputy Secretary Policy, Mr Rajesh Chhana, told the Tribunal that the background to the briefing was as follows:

> The Coalition Agreement, dated 24 November 2023, between the National and ACT Parties included a commitment to 'Introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable.'
>
> As this is a constitutional issue, the Ministry is lead policy advisor on the development of the proposed Bill. As noted in paragraph 13, this means the Ministry supports the current government to implement their policies, including by giving politically neutral and free and frank advice to Ministers.
>
> Ministry advice on the proposed Bill was initially provided to the Minister of Justice, Hon Paul Goldsmith.[9]

The stated purpose of the briefing provided on 14 December 2023 was to outline the steps required to develop the Treaty Principles Bill, including some of the policy issues to be addressed and associated risks, and to provide the Minister with

9. Document A23, p 5

different options for how the Bill could be developed.[10] The briefing was particularly important for this inquiry because it contained the free and frank advice of officials in respect of the risks and uncertainty that the proposed Bill would create.

The briefing began with reference to the coalition agreement. It quoted the three principles from ACT's policy and noted ACT's proposal to put the Bill's commencement to a binding referendum. In respect of the policy rationale for why such a Bill was needed, officials stated:

> We understand the intention of the proposed Bill is to create certainty about what the principles of the Treaty are and how they apply in New Zealand law. It would set out a finite number of Treaty principles that would replace the principles that have been articulated by the Courts and the Waitangi Tribunal.[11]

The briefing highlighted that the existing Treaty principles had been developed over 35 years of jurisprudence and by the actions of previous governments, so there was already a 'degree of certainty about what the existing principles are and how they operate'.[12] Officials described the principles as 'a significant part of our constitutional system' and explained the following ways in which they can be applied:

> They help to reconcile the difference between the Māori and English texts and to give effect to the spirit and intent of the Treaty when applied to contemporary issues.
>
> They operate as a check on Executive power because they can be a mandatory relevant consideration in decision-making by Ministers and others exercising a public function. What that consideration looks like depends on the context and there is extensive guidance available to assist decision-makers.
>
> They can be used in statutory interpretation (even when not expressly incorporated into statute) and the application of the common law. There is a general presumption that Parliament intends to legislate in a way that is consistent with the principles.
>
> The Waitangi Tribunal has jurisdiction to consider any legislative instrument for consistency with the principles of the Treaty.[13]

Officials also noted that the Treaty principles can influence approaches to policy problems. The 'extension of the partnership principle to structural responses like co-governance', for example, 'has come from policy and legislation', not from the courts. In addition, there were approximately 40 Acts which included reference to the Treaty principles.[14]

Officials cautioned that developing a Treaty Principles Bill would be complex, and that 'replacing the existing principles and established judicial processes with a

10. Document A7, p [6]
11. Document A7, p [7]
12. Document A7, p [6]
13. Document A7, pp [7]–[8]
14. Document A7, p [8]

statutory framework will need to be done carefully because there is a high risk that it could create more uncertainty about the application of the principles in law'.[15]

The briefing stated that this risk of uncertainty arose from four broad considerations. First, the proposed principles for the Bill significantly departed from the current principles, particularly the 'novel interpretation of Article 2'. Officials commented that they were 'not aware of any support for' this interpretation 'in legislation, judicial interpretation, or expert opinion'. Furthermore, they did 'not think it has ever been the policy of the Crown that Article 2 applied to anyone other than Māori'.[16] Officials continued:

> The [ACT] policy document also appears to narrow the scope of Article 2 of the Treaty, which protects the tino rangatiratanga of iwi and hapū over their lands and taonga (treasures). The proposal captures the protection of property rights, but not a wider range of tangible and intangible taonga. It reframes tino rangatiratanga as a right only to personal autonomy that does not recognise the collective right to self-determination held by iwi and hapū or the distinct status of Māori as the indigenous people of Aotearoa New Zealand. An interpretation that does not recognise this status (and merely restates rights established elsewhere in law) calls into question the very purpose of the Treaty and will increase confusion about its status in our constitutional arrangements.[17]

The briefing suggested it might be possible to develop principles for the Bill that more closely aligned 'with established law and the spirit and intent of the Treaty'. This would depend, however, on whether there was scope to adjust the content of the principles prior to the Bill's introduction, and the level of engagement officials could undertake with 'Treaty partners and other experts'.[18]

Secondly, officials advised it was not clear how the new principles would be applied by the courts and the Tribunal. Noting the responsibility of the courts to interpret the law, officials said the legislation 'could mean that established case law about the Treaty principles would need to be revisited and there could be uncertainty about the status of existing precedent'. In addition, officials stated that the Treaty was a 'document of constitutional significance that can be applied to legislative interpretation and the development of common law', independently of how the principles might be defined in legislation. This raised the question of how the Bill would apply to this 'general recognition of the Treaty as a document of constitutional significance'.[19]

Thirdly, officials identified that uncertainty would be introduced into the Tribunal's work, noting the 'potential for confusion about the extent to which the jurisdiction of the Tribunal may, or may not, be constrained'.[20] They further

15. Document A7, p [8]
16. Document A7, p [8]
17. Document A7, pp [8]–[9]
18. Document A7, p [9]
19. Document A7, p [9]
20. Document A7, p [9]

identified that the Bill could alter the Tribunal's jurisdiction in relation to historical claims, potentially creating inequity among claimant groups.[21]

Fourthly, officials advised that they would 'need to consider how the Bill interacts with references to Treaty principles in other legislation' and how the Bill's principles would apply where legislation does not include a specific Treaty reference. Officials noted that this work would need to 'take account of the review of all legislation that refers to the principles of the Treaty' as outlined in the coalition agreement between National and New Zealand First (discussed in chapter 5).[22]

Creating uncertainty was not the only risk that officials identified. The briefing also highlighted the 'substantial risk' that the Bill would 'generate further division, which poses a threat to social cohesion and could undermine legitimacy and trust in institutions'. This was seen by officials as a very serious matter. Further, there was a risk of 'damaging Māori–Crown relations because the Bill could be seen as an attempt to limit the rights and obligations created by the Treaty'.[23] Mr Kibblewhite noted at the urgent hearing that this was 'quite direct and strong advice'.[24] Officials also advised that the Bill 'was unlikely to facilitate the type of national conversation that will help address uncertainty and apprehension' and that there were other 'opportunities to engage in a constructive, forward-looking conversation about the future of our constitutional arrangements'. A successful national conversation required 'all communities being in a position to engage constructively'. The Tribunal's Constitutional Kaupapa Inquiry would be one 'opportunity for further discussion'.[25]

Regarding the binding referendum proposed by ACT on whether the Bill became law, officials advised against it. A referendum would be costly, may '*make the law difficult to amend as circumstances evolve*', and risked creating '*further division* about the position of the Treaty in our constitutional arrangements rather than achieve consensus and legitimacy' (emphasis in original).[26]

The briefing stated that Minister Goldsmith had choices about the process for developing the Bill and outlined three options for him to consider, each with varying degrees of public engagement. We summarise each option in turn.

Option one provided a timeline in which the select committee's consideration of the Bill would be completed in 2024. Under this approach, the Bill had to be introduced to Parliament by late May or early June 2024. Prior to this, the Minister of Justice would need to seek policy decisions from Cabinet, MOJ would need to issue drafting instructions to the Parliamentary Counsel Office (PCO), other Ministers would need to be consulted on the Bill once drafted, and then Cabinet would need to approve the Bill for introduction to the House of Representatives.

21. Document A7, p [9]
22. Document A7, pp [9]–[10]
23. Document A7, p [10]
24. Transcript 4.1.6, p 128; submission 3.3.23, p 7
25. Document A7, p [10]
26. Document A7, pp [10]–[11]

This timeframe, officials advised, would make it 'impossible to have any meaningful external engagement prior to introduction, including with iwi and hapū.'[27] Officials advised that consideration at the select committee stage was insufficient to fully mitigate this risk 'because it does not necessarily reach people who do not normally engage with the Parliamentary system.'[28] Further:

> Developing a Bill that purports to settle the Treaty principles without working with the Treaty partner could be seen as one partner (the Crown) attempting to define what the Treaty means and the obligations it creates. Failing to engage would be seen as failing to meet the obligation under the Treaty to act reasonably, honourably, and in good faith. It would be inconsistent with our Statement of Engagement with National Iwi Chairs Forum.[29]

Officials also warned that failing to engage with Māori on such a significant issue could be detrimental to the work that the Ministry had been undertaking with Māori.[30]

Option two would delay the introduction of the Bill until the end of September 2024, with the select committee process being completed in early 2025. Compared to option one, this timeline provided for a 'small amount of targeted engagement with iwi and hapū, as well as other experts, during the policy development phase.'[31] Specifically, option two specified engagement would occur with Iwi Chairs prior to the Bill's drafting. However, officials stated that this 'relatively modest engagement . . . would not fully mitigate the problems identified in option one.'[32] Officials also advised that there was a risk that a high degree of consensus on the Bill could not be achieved within the timeline, but that this also depended on whether there was scope to adjust the definition of the principles prior to the Bill's introduction.

Lastly, option three would delay the Bill's introduction until the end of April 2025. The select committee process would be completed in late 2025. This timeline would allow 'targeted engagement with the Iwi chairs' and 'broad engagement with the rest of New Zealand through a discussion document.'[33] Officials advised this approach 'could help to generate discussion about the Treaty and our constitutional arrangements, but also carries a risk that it could generate division.'[34]

Of the three options, officials recommended the Minister adopt 'an approach based on option 2 because of the importance of working with Treaty partners to develop a Bill and the objective of facilitating a national conversation.'[35] 'Alternatively,' the briefing stated, Minister Goldsmith could refer the matter to

27. Document A7, p [12]
28. Document A7, p [12]
29. Document A7, p [12]
30. Document A7, p [12]
31. Document A7, p [13]
32. Document A7, p [13]
33. Document A7, p [13]
34. Document A7, pp [13]–[14]
35. Document A7, p [11]

an independent panel to engage with a wide range of New Zealanders to report back on how to reflect the Treaty principles in legislation. Officials stated they had not yet developed this alternative option in detail but could do so if requested.[36] In terms of next steps, officials indicated they were available to discuss Minister Goldsmith's preferred approach and recommended he indicate his preferred option (one, two, or three) for developing the Bill.[37]

On 21 December 2023, 'the Minister's Office confirmed the Minister had not indicated a preference for the timing options in the briefing or signed it, and that he wanted to discuss it with officials in the new year. No decisions on the timing and process options were made.'[38]

4.3 Hui Whakamohio-a-pukapuka ki te Minita Tuarua o te 25 o Hānuere 2024

25 January 2024 Briefing to Incoming Associate Minister

On 25 January 2024, the Honourable David Seymour assumed the role of the Associate Minister of Justice and was assigned responsibility for the Treaty Principles Bill.[39] On the same day, MOJ provided a briefing to the incoming Associate Minister, attaching the December 2023 briefing provided to Minister Goldsmith.[40]

Along with general information on the Associate Minister's responsibilities, the January 2024 briefing included information on responsibilities pertaining to the Treaty Principles Bill.[41] The briefing stated the Associate Minister's key ministerial relationships for the Bill were the Minister for Māori Development and Māori–Crown Relations, and the Attorney–General. The briefing noted that the Ministry had continued to develop options for developing a Treaty Principles Bill and had commenced a draft regulatory impact analysis.[42] The Associate Minister had 'choices about the timing, content and application of the Bill'.[43]

Importantly, however, the Minister of Justice, the Honourable Paul Goldsmith, kept responsibility for all legislation bids in the MOJ portfolio regardless of delegations to Associate Ministers.[44] A legislation bid is a Cabinet paper requesting that a Bill be included in the Government's legislative programme.[45]

36. Document A7, p [11]
37. Document A7, p [14]
38. Document A23, p 6
39. Document A23, p 5
40. Document A23, pp 6–7; doc A23(a)
41. Document A23(a), p 3
42. Document A23(a), p 3
43. Document A23(a), p 3
44. Document A23, p 7
45. Document A23, p 7

4.4 Tono ā-Ture o te 19 o Pēpuere 2024

19 February 2024 Legislation Bid

On 19 February 2024, Minister Goldsmith lodged a legislative bid for the 'Principles of the Treaty of Waitangi Bill' for Cabinet consideration. The Tribunal was provided with an unsigned copy of this document.[46] Under the heading of 'Policy', the bid stated that the Bill 'directly progresses policy contained in' the coalition agreement, which included an agreement to 'introduce the Bill based on existing ACT policy and support it to Select Committee'. The Minister explained that legislative action was considered necessary because Treaty principles are 'not referred to consistently or explicitly defined in legislation'.[47] The Bill, he stated, would 'set out a finite number of Treaty principles that would replace the existing principles' articulated by the courts and the Tribunal.[48]

The bid stated that the Treaty and its principles 'are a significant part of our constitutional system, being fundamental to our legal system and society'.[49] Minister Goldsmith advised that he 'expect[s] the Bill will be contentious', but that this could be 'partly mitigated' by publicly releasing an exposure draft of the Bill prior to introduction to the House.[50] He indicated public submissions at select committee would also allow the public an opportunity to provide feedback on the Bill, including input on the wording of the principles.[51]

The bid also contained an early-stage assessment of compliance issues; that is, an initial discussion of whether the Bill complied with legislative, government, and international standards.

First, the Bill was considered 'likely' to comply with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

Secondly, the Bill was 'likely to engage' the Treaty and its principles, since it proposed to 'redefine the principles'. This would 'invite comparisons with the existing principles', including the principle requiring the Crown to act reasonably, honourably, and in good faith.[52]

Thirdly, the Bill was 'likely to engage' the 2021 'Legislation Guidelines' (discussed in chapter 2). The Minister noted that the guidelines provided 'useful process and substantive guidance on addressing Māori interests that arise in the context of law-making'. The guidelines would therefore be considered throughout the 'policy development process'.[53]

Fourthly, the Minister noted that New Zealand had 'expressed its support' for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

46. Document A23, p 7; doc A7, pp 1–4
47. Document A7, p 1
48. Document A7, p 1
49. Document A7, p 1
50. Document A7, p 1
51. Document A7, pp 1–2
52. Document A7, p 2
53. Document A7, p 2

Among other things, the Bill 'may affect . . . the ability to exercise self-determination, which may engage the UNDRIP'.[54]

The bid then outlined a timeline of steps and proposed dates leading to the enactment of the Bill on 1 September 2025. Within this proposed timeframe, an exposure draft of the Bill would be released on 22 July 2024 and a Bill introduced to Parliament on 12 November 2024.[55]

Finally, in the bid, Minister Goldsmith recommended the Cabinet Committee:

> **note** that the Principles of the Treaty of Waitangi Bill will define the principles of the Treaty of Waitangi in statute to create certainty about what the principles of the Treaty are and how they apply in New Zealand law;
> **note** that the Principles of the Treaty of Waitangi Bill ranks 5 within the bids from my Justice portfolio;
> **approve** the inclusion of the Principles of the Treaty of Waitangi Bill in the 2024 Legislation Programme, with a priority of Category 5 (to proceed to select committee by the end of 2024);
> **note** that drafting instructions will be provided to the Parliamentary Counsel Office by 7 May 2024; and
> **note** that the Bill should be introduced no later than November 2024.[56]

On 21 February 2024, MOJ officials met with Associate Minister Seymour to discuss his preferred approach to the Bill. Following that meeting, officials developed a further briefing for the Associate Minister.[57]

4.5 Hui Whakamohio-a-pukapuka o te 12 o Maehe 2024

12 March 2024 Briefing

On 12 March 2024, MOJ gave Associate Minister Seymour an updated briefing that sought his preferred policy approach to the Bill. We discuss the contents of the briefing in this section.

4.5.1 Te raru kaupapa here kua whāki atu i te take mo te Pire

The policy problem identified as requiring the Bill

This briefing articulated the policy problem as follows:

> The Coalition Agreement between the New Zealand National Party and ACT New Zealand included a commitment to introduce a Treaty Principles Bill based on existing ACT New Zealand (ACT) policy, and support it to a Select Committee as soon as practicable.

54. Document A7, p 2
55. Document A7, p 3
56. Document A7, pp 3–4
57. Document A23, p 7

The problem identified in the ACT policy document is that the Courts, the Waitangi Tribunal (the Tribunal), and the public service are increasingly referring to vague Treaty principles to justify actions that are contrary to other matters (such as equal rights for all citizens). The proposed solution is for Parliament to define the principles in statute.[58]

4.5.2 Kia toru ngā pepa Kāhui Minita

Three Cabinet papers would be necessary

The briefing stated that Associate Minister Seymour had directed officials that an exposure draft of the Bill should be released prior to the Bill's introduction, the Bill was to be introduced and referred to select committee by the end of 2024, and the commencement of the Bill was to be subject to a binding referendum.[59]

To achieve the Bill's introduction following a period of consultation, officials advised that Cabinet decisions via three Cabinet papers would be required:

- The first Cabinet paper would seek approval for the underlying policy and key features of the Bill; agreement to release an exposure draft of the Bill for public consultation; approval to issue drafting instructions to PCO to develop the exposure draft; and agreement that the Bill's commencement would be subject to a binding referendum and related budget approvals.[60]
- The second Cabinet paper, in turn, would seek approval to release the exposure draft of the Bill for public consultation. As the exposure draft would be prepared by PCO, the briefing noted that the Associate Minister would need to seek a waiver of legal professional privilege from the Attorney-General.[61]
- The final and third Cabinet paper would then seek approval to any changes to the exposure draft Bill, and approval to introduce the Bill to the House of Representatives.[62]

4.5.3 Te tautuhi i ngā mātāpono kei roto i te Pire

Defining the principles in the Bill

To inform the first Cabinet paper, the briefing set out a range of considerations and decisions for Associate Minister Seymour. Officials noted that 'decisions about the content of the principles and the Bill's purpose and application' would need to be made.[63] Specifically, officials recommended the first Cabinet paper seek Cabinet's approval 'for the policy underlying each principle, and that PCO be asked to develop precise drafting based on the policy direction approved by Cabinet'.[64] Officials noted that the ACT policy document included the following draft principles that 'could be included in the Bill':

58. Document A7, p [17]
59. Document A7, p [17]
60. Document A7, p [17]
61. Document A7, p [17]
62. Document A7, p [18]
63. Document A7, p [18]
64. Document A7, p [18]

Article 1: 'Kawanatanga katoa o o ratou whenua' – the New Zealand Government has the right to govern all New Zealanders.
Article 2: 'ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' – the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.
Article 3: 'a ratou nga tikanga katoa rite tahi' – all New Zealanders are equal under the law with the same rights and duties.[65]

Officials understood, from their meeting with the Associate Minister, that the principles in the ACT policy document (quoted above) were '*a starting point*' and there was '*scope to adjust them*' during the Bill's development and following public consultation (emphasis added).[66] Before providing their advice as to what a definition of the principles should cover, officials reiterated that ACT's principles differed significantly from current understandings of the Treaty/te Tiriti articles. They also repeated the concerns expressed in the December 2023 briefing paper. Those included the application of article 2 to all New Zealanders and the narrowing of article 2 to exclude protection of taonga and reframe rangatiratanga as 'personal autonomy'. 'That does not', they said, 'recognise the collective right to self-determination held by iwi and hapū or the unique constitutional status of Māori as tangata whenua with specific rights under the Treaty/te Tiriti'. This would call the 'very purpose of the Treaty' into question and would 'increase confusion' about New Zealand's constitutional arrangements.[67]

MOJ officials suggested other sources to draw on that would assist in developing a set of principles. According to their 'initial thinking', those sources indicated that definition of the principles would need to cover

- the obligation of the Government to govern for the benefit of everyone, as well as its positive duty to protect Māori interests, property, and taonga.
- recognition of Māori as the indigenous people of Aotearoa New Zealand, their right to maintain their own institutions, and their right to participate in decision-making about legislative or administrative measures that might affect them.
- the constitutional relationship between iwi and hapū and the New Zealand Government, which is grounded in good faith and mutual respect.
- the equality of everyone before the law and their entitlement to the equal enjoyment of fundamental human rights without disadvantage or discrimination.[68]

65. Document A7, p [18]
66. Document A7, p [18]
67. Document A7, p [19]
68. Document A7, p [19]

4.5.4 Te aronga o te whakatutukitanga i te Pire

The scope of the Bill's application

To operate effectively, officials advised, the Bill would need to state its purpose and application. They suggested three broad options for the Associate Minister to choose between:

> The principles assist the interpretation of Acts that refer directly to the principles;
> The principles assist with the interpretation of any Act; and
> Interpretations of Acts that are consistent with the principles must be preferred.[69]

In the first option, the Bill would clarify that the principles as defined in the Bill must be used in the interpretation of any enactment requiring consideration of Treaty principles (that is, Acts containing Treaty clauses).[70]

Alternatively, in option two, the Bill would assist in interpreting any enactment, where relevant. This would not necessarily require the principles to be explicitly referenced in the legislation in question.[71] Their application in decision-making would be determined by the nature of the decision rather than the explicit reference in legislation.[72]

Under option three, the approach would be modelled on section 6 of the New Zealand Bill of Rights Act 1990. When an enactment could be given a 'meaning that is consistent with the principles [as defined] in the Bill, that meaning must be preferred over any other meaning'. If Parliament intended to pass legislation that was contrary to the principles, it would have to do so in 'clear and unambiguous language'.[73]

Whichever of these options was preferred by the Associate Minister, officials recommended the Bill state clearly that its purpose was to assist in legislative interpretation, and it was 'not intended to alter the text or meaning of the Treaty/te Tiriti itself or change the nature of any Treaty settlements'.[74] Officials suggested that this 'could reassure those who are concerned the Crown is attempting to amend or "repeal" the Treaty or unilaterally define its meaning'. It could also preserve 'space for differing views about the broader place of the Treaty/te Tiriti in our constitutional arrangements'.[75] On the issue of Treaty settlements, officials noted that settlements often referred to, or were premised on, the principles. As such, further work would be needed to understand what impact the definition of the principles in the Bill could have on existing Treaty settlements, as well as to 'avoid disrupting ongoing and upcoming negotiations'.[76]

69. Document A7, p [19]
70. Document A7, p [19]
71. Document A7, pp [19]–[20]
72. Document A7, p [20]
73. Document A7, p [20]
74. Document A7, p [20]
75. Document A7, p [20]
76. Document A7, p [20]

4.5.5 Tāpaetanga Pōti

Referendum

The first Cabinet paper would need to address the issue of a binding referendum. Officials recommended that the referendum be held in-person.[77] It advised that holding a referendum simultaneously with the general election usually secures a higher turnout, but cautioned any public education campaign would have to compete for public attention, which could impact the quality of public debate and engagement.[78] Alternatively, a stand-alone referendum could be held either before or after the general election.[79]

4.5.6 Uiuinga

Consultation

The briefing paper noted that the Associate Minister had requested advice on the risks of not consulting on the policy underlying the Bill prior to its introduction. Officials advised that consultation during policy design was an expectation of Cabinet and the 2021 'Legislation Guidelines'. It was also an important part of 'developing workable and effective policy'.[80] Officials further noted that issues of significance to Māori–Crown relations usually included specific engagement with iwi, hapū, whānau, and Māori organisations. Failing to consult could result in a failure to meet the 'quality criteria' of the forthcoming regulatory impact statement, which would accompany the Cabinet paper.[81]

Officials noted that the Associate Minister had directed an exposure draft of the Bill be prepared for public consultation, but advised that an exposure draft 'serves a different purpose to consulting on the underlying policy'. While the public could make their views known through the exposure draft process, 'the public discourse will be more focused on how the Bill will operate in law and the clarity of the drafting rather than achieving the objective of a broader constitutional conversation'.[82] Officials advised:

> Consultation with iwi and hapū is one of the principal mechanisms through which Government discharges its responsibility to make informed decisions to act in good faith towards Māori. By not separately consulting on the policy underlying the bill, in the context of the claims before the Waitangi Tribunal, may be interpreted as the Crown failing to act in good faith towards Māori and therefore a breach of the Treaty/te Tiriti.[83]

77. Document A7, p [21]
78. Document A7, p [21]
79. Document A7, p [21]
80. Document A7, p [22]
81. Document A7, p [22]
82. Document A7, p [22]
83. Document A7, p [22]

4.5.7 He kōrerorero a-motu mō te wāhi ki te Tiriti kei roto i te kaupapa ture nui
A national conversation on the place of the Treaty in the constitution

After advising on the necessity to consult fully, officials reiterated their earlier advice that the Treaty Principles Bill was not the appropriate mechanism for a national conversation on the place of the Treaty/te Tiriti in the nation's constitutional arrangements. They stated:

> How we move towards constitutional law and practice that reflects the Treaty/te Tiriti is perhaps the most significant constitutional issue in New Zealand. Defining the Treaty principles in statute could clarify the Government's intentions, but it is unlikely to facilitate the type of national conversation that will achieve consensus about the place of the Treaty/Tiriti in our constitutional arrangements.[84]

Officials added that 'a successful national conversation depends on all communities being in a position to engage constructively', and this would not be achieved through the current advancement of the Treaty Principles Bill. Options for a broader constitutional conversation would therefore be addressed in the regulatory impact assessment.[85]

4.5.8 Ngā whakaaetanga i ngā hīkoi anga whakamua
Decisions on next steps

The briefing paper concluded by outlining next steps for the advancement of the Bill: if the Associate Minister agreed, officials would provide a draft Cabinet paper reflecting his preferred approach for Ministerial consideration on 28 March 2024, the Social Outcomes Committee would consider the paper on 1 May 2024, and the paper would be lodged with the full Cabinet for approval on 6 May 2024. Associate Minister Seymour was then provided with 10 actions to approve relating to the suggested approaches addressed in the briefing paper. His consent or dissent are noted here for convenience and are recorded in the evidence of Mr Kibblewhite.[86] The 10 points were:

1. **Confirm** your intention to seek Cabinet approval to publish an exposure draft of the Bill – **Yes**.
2. **Confirm** that the Bill should be introduced and referred to select committee by the end of the year – **Yes**.
3. **Confirm** that commencement of the Bill will be subject to a binding referendum – **Yes**.
4. **Agree** to seek Cabinet approval of the policy underlying each principle based on the ACT policy document and other sources – **Yes**.
5. **Agree** to the principles being applied so that either:

84. Document A7, p [22]
85. Document A7, pp [22]–[23]
86. Document A7, pp [23]–[24]; doc A23, p 14; transcript 4.1.6, pp 110–112

5.1 they assist with the interpretation of Acts that refer directly to the principles – **Yes**
5.2 they assist with the interpretation of any Act – **No**
5.3 when an Act can be given a meaning that is consistent with the principles in the Bill, that meaning must be preferred – **No**

6. **Agree** to the Bill stating that it does not alter the text or the meaning of the Treaty/te Tiriti itself or change the nature of any Treaty settlements – **Yes**.
7. **Authorise** officials to engage with constitutional experts during the development of the exposure draft – **Yes**.
8. **Discuss** the approach to a binding referendum (mode and timing) and how to present those decisions to Cabinet – **Yes**.
9. **Agree** to officials drafting a Cabinet paper for Cabinet consideration in early May 2024 that seeks policy approvals based on your decisions above – **Yes**.
10. **Forward** a copy of this briefing to the Minister of Māori Crown Relations: Te Arawhiti – **Yes**.[87]

The Associate Minister approved this briefing and confirmed his policy approach on 17 March 2024.[88] Of particular importance, he agreed to the principles being applied so that they assist with the interpretation of Acts that refer directly to the principles of the Treaty of Waitangi. The Associate Minister also agreed to seek Cabinet approval for the policy underlying each principle 'based on the ACT policy document and other sources'. These decisions give an indication of Associate Minister Seymour's intentions for the Bill. However, the ultimate decisions on the Bill will be for Cabinet to make and, for the reasons set out in chapter 1, we have decided to issue an interim report on this urgent matter without waiting for the Cabinet paper and regulatory impact assessment.

4.5.9 Rārangi ingoa o ngā mātanga kaupapa ture

Initial list of constitutional experts

As noted above, the Associate Minister agreed that MOJ officials should 'engage with constitutional experts during the development of the exposure draft'.[89] In response to the Tribunal's request, the Crown supplied an 'initial, non-exhaustive list of individuals identified as having expertise in New Zealand's constitutional arrangements'. This list included: Andrew Geddis, Ani Mikaere, Carwyn Jones, Christopher Finlayson, Claire Charters, Dean Knight, Geoffrey Palmer, Janet McLean, Linda Te Aho, Māmari Stephens, Natalie Coates, Paul McHugh, Paul Rishworth, and Philip Joseph.[90]

Crown counsel noted that the list had been sent to the Associate Minister but not yet endorsed or approved.[91] We note that the list includes three witnesses who

87. Document A7, pp [23]–[24]
88. Document A7, p [23]; doc A23, p 7
89. Document A7, pp [23]–[24]
90. Memorandum 3.2.33, p 1
91. Memorandum 3.2.33, pp 1–2

appeared in our inquiry but, since this is an incomplete and unapproved list, we can take this matter no further.

4.6 Ngā Take

Issues

4.6.1 Te tūranga mataaho o ngā kaikēreme me ngā kaitono e whai pānga ki te kaupapa

The claimants' and interested parties' position

Counsel for the claimants and interested parties in this inquiry raised many concerns about the Crown's process in developing a Treaty Principles Bill, and the substance of a proposed Bill based on existing ACT policy.

Regarding process, counsel submitted that the Crown acted unilaterally in its original decision to pursue the Bill and its subsequent development, in breach of the principles of tino rangatiratanga, kāwanatanga, mutual recognition and respect, and partnership, including the obligations to act reasonably and in good faith and to consult.[92] Counsel submitted the Crown decided to pursue the Bill without engaging Māori or obtaining their agreement, and despite overwhelming Māori opposition.[93]

Some counsel submitted that the first breach of Treaty principles may be traced to the signing of the coalition agreement between National and ACT,[94] others to its subsequent endorsement by Cabinet as the basis on which the coalition Government would operate.[95] Multiple counsel submitted that the constitutional and Treaty/te Tiriti issues raised by the Bill are of such significance that the Crown must obtain the free, prior, and informed consent of Māori before policy proposals are developed, not after.[96]

Counsel submitted further that the Crown has continued policy development without involving Māori, and the proposed exposure draft and select committee process were inadequate substitutes for Treaty/te Tiriti-compliant engagement.[97] Counsel for Wai 682 submitted that 'Māori are being limited and ringfenced from a constitutional conversation about te Tiriti, despite being the treaty partner' and that this is 'inconsistent with te Tiriti'.[98] This Crown dominated process, they argued, has inhibited the capacity of Māori to exercise tino rangatiratanga in the process.[99] In the words of counsel for Wai 3342, Wai 1194/Wai 1212, Wai 2494, and Wai 2872: 'The Crown is exercising unbridled power. . . . [The Coalition]

92. See submission 3.3.20, p 10; submission 3.3.22, p 16; submission 3.3.21, pp 13, 14, 16; submission 3.3.13, p 8; submission 3.3.16, p 27; submission 3.3.14, p 9; submission 3.3.17, pp 20–22; submission 3.3.18, pp 52, 59
93. Submission 3.3.13, p 20; see also submission 3.3.15, p 1; see also submission 3.3.16, p 30
94. Submission 3.3.13, p 17; submission 3.3.14, p 9
95. Submission 3.3.22, p 14; submission 3.3.18, pp 7, 55–56
96. Submission 3.3.22, p 20; submission 3.1.17, p 16; see also submission 3.3.18, pp 21–22
97. See submission 3.3.21, p 22; submission 3.3.22, p 22; submission 3.3.16, pp 29–30
98. Submission 3.3.13, p 21
99. Submission 3.3.21, p 13; submission 3.3.13, pp 8–9

Government is consciously proposing to use its temporary majority in Parliament to permanently rewrite the constitution of this nation in a way that causes serious violence to the kawenata tapu of Te Tiriti.'[100]

In terms of the substance of the Bill, counsel acknowledged that there is some uncertainty regarding the final form of the Bill.[101] However, counsel also noted that the coalition agreement provides for a Bill to be introduced based on existing ACT policy (at the time the agreement was signed).[102] Counsel for Wai 58, Wai 1312, and Wai 1684 submitted that this means any scope for change to the proposed Bill could only be 'minimal, if any such scope exists at all'.[103] Counsel alleged there is a 'clear analogy' between this case and circumstances leading to the Tribunal's Oranga Tamariki (section 7AA) urgent inquiry. According to counsel, the Tribunal's report on that matter 'expressed concern that the Crown's singular focus in implementing the Coalition Agreement has blinded the Crown from the consideration of facts and its Tiriti obligations and duties'.[104] Counsel for Wai 682 also referred to the proposed reinstatement of referenda on Māori wards and the disestablishment of Te Aka Whai Ora, and submitted they showed 'the Crown considers that the coalition agreements take precedence, and the policy process is just a way to arrive at a pre-determined outcome.'[105] Counsel for Wai 58, Wai 1312, and Wai 1684 similarly submitted that the Crown is 'progressing this Bill without adequate consideration of all relevant facts or identifiable issues', in breach of Treaty principles.[106] They stated: 'It appears to Counsel that no amount of risk, cost or consequence will be high enough, to deter the Crown from continuing down this reckless and dangerous path to progress the Bill for their own political purposes.'[107]

Related to the Bill's origin in the coalition agreement, counsel submitted that the Bill lacks policy rigour. Its 'policy problem' is not a problem as there is existing certainty regarding the meaning of Treaty principles.[108] Counsel for Wai 682 submitted that this is 'not the first time that the Coalition Government has proceeded with policy based on their beliefs rather than the existence of a problem', again citing the Tribunal's inquiry into the Government's repeal of section 7AA of the Oranga Tamariki Act 1989.[109] Moreover, counsel submitted that the Bill is unlikely

100. Submission 3.3.21, p 14
101. Submission 3.3.22, p 22; submission 3.3.14, p 11
102. Submission 3.3.22, pp 22–23
103. Submission 3.3.16, p 4; see also submission 3.3.22, pp 22–23, submission 3.3.17, p 5
104. Submission 3.3.16, pp 32–33
105. Submission 3.3.13, pp 22–23
106. Submission 3.3.16, p 33; see also submission 3.3.21, p 21 which stated the Crown is 'recklessly committed to pursuing this policy without any evaluation of its Tiriti implications, contrary to all of its own Treaty and "good regulatory practice" requirements'; see also submission 3.3.13, pp 9, 13 which submitted the Crown is not giving proper consideration to officials' advice and Ministers have not asked officials to explore alternative options; see also submission 3.3.15, p 6 which similarly noted that there has been no consultation or discussion regarding the likely impact of the Bill 'on Post Treaty Settlement Entities, Post Treaty settlement legislation, or Treaty settlement yet to be concluded'.
107. Submission 3.3.16, p 12
108. Submission 3.3.21, p 20; submission 3.3.22, pp 18–19; submission 3.3.13, p 13; see also submission 3.3.18, p 88
109. Submission 3.3.13, p 14

to contribute to an informed constitutional conversation because it would be 'based on politically-motivated misinterpretations of Te Tiriti' that 'cherry pick' from the text and ignore the wider context.[110]

Counsel submitted the Bill must not only be measured against the Treaty/te Tiriti principles, but also 'against its own standards of measuring conduct.'[111] Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted that the Crown's failure to evaluate the Tiriti implications of the Bill was inconsistent with its own 'good regulatory practice' requirements.[112] Counsel for 18 interested parties similarly alleged the Crown's development of the Bill conflicted with its obligations under the Public Service Act 2020, Executive and Cabinet guidelines, and UNDRIP.[113]

Counsel further submitted that the Bill is not principled, but political and ideological, and the result of 'political horse-trading.'[114] Counsel for Wai 1341/3077 argued the Crown is prioritising 'its own political agendas and ideologies contained in coalition agreement commitments over its obligations to Māori under te Tiriti.'[115] Similarly, counsel for Wai 58, Wai 1312, and Wai 1684 stated that the 'Crown cannot be said to be acting in good faith when it chooses to leverage the rights and interests of Māori in progressing the Bill, simply to cater to the ACT Party'.[116] Further, counsel stated that 'the Crown seeking to unilaterally change the terms of te Tiriti, or at least how it is understood, because it is unhappy with the jurisprudence that has developed surrounding those principles both within the Tribunal and the civil courts, is not an act of reasonableness' and breaches its duties under the Treaty/te Tiriti.[117] Counsel for Wai 58, Wai 1312, and Wai 1684 submitted that 'the Crown is openly and recklessly jeopardising the Māori–Crown relationship, potentially just for the Bill to die at the Select Committee table.'[118]

In respect of the definition of 'principles' based on existing ACT policy, counsel submitted that their inclusion in a Bill would be inconsistent with the principles of tino rangatiratanga, mutual recognition and respect, active protection, and partnership, including the Crown's obligation to make informed decisions.[119] Counsel identified three broad reasons for this in their submissions. First, they stated that the ACT 'principles' do not reflect current understandings of the Treaty/te Tiriti or the text itself.[120] Counsel for Wai 58, Wai 1312, and Wai 1684 submitted that the

110. Submission 3.3.17, p 5
111. Submission 3.3.14, p 14
112. Submission 3.3.21, p 21
113. Submission 3.3.18, p 80
114. Submission 3.3.21, pp 7–8, 14, 20; submission 3.3.22, p 16
115. Submission 3.3.22, pp 3, 15
116. Submission 3.3.16, p 31
117. Submission 3.3.16, p 31
118. Submission 3.3.16, p 2
119. See submission 3.3.21, pp 13, 17; submission 3.3.20, p 12; submission 3.3.22, p 28; submission 3.3.16, pp 31, 37–38, 42; submission 3.3.17, p 22; submission 3.3.20, p 13
120. See submission 3.3.22, p 23; submission 3.3.18, p 75

Crown's failure to apprise itself of available jurisprudence represented a failure to be properly informed.[121]

Secondly, the defined principles 'twist and disfigure' the meaning of tino rangatiratanga guaranteed in article 2, problematically equating it with 'chieftainship' and extending its guarantee to non-Māori.[122] Counsel for Wai 3343, Wai 1194/Wai 1212, Wai 2494, and Wai 2872 submitted that the Bill 'aims to rewrite the Tiriti relationship agreed to in 1840', and to literally rewrite Te Tiriti itself, by 'eliminating rangatiratanga altogether for the purposes of the Crown's exercise of its assumed rights of "government"'.[123] Counsel for Wai 3319, Wai 1504, Wai 3314, and Wai 3330 called the Crown's actions in relation to the Bill 'an avaricious power grab'.[124] Other counsel noted 'ACT's proposed Bill does not even acknowledge the existence of Māori'.[125] Counsel submitted that 'the rights and interests guaranteed to Māori in 1840 are not adequately protected by the proposed Principles or the Bill'.[126]

Thirdly, counsel argued the definition of the 'principles' disrespects te reo Māori as a taonga and the status of the Treaty/te Tiriti.[127] Counsel observed that the Crown had failed to engage te reo Māori experts to assess whether the ACT Bill's interpretations of the Treaty/te Tiriti are even plausible.[128] Counsel for Wai 58, Wai 1312, and Wai 1684 submitted the Crown's treatment of te reo Māori is 'also inconsistent with the intent and spirit of the Māori Language Act 1987'.[129]

Counsel submitted that the Tribunal could not assume the Bill would not proceed beyond the select committee stage.[130] In their view, assurances that National would not support the Bill beyond this point were made by Christopher Luxon in his capacity as party leader, and not in his capacity as the Right Honourable Prime Minister of Aotearoa New Zealand.[131] Counsel for Wai 58, Wai 1312, and Wai 1684 submitted that 'the Prime Minister, as head of government, has permitted the process thus far, making it unequivocally a Crown process. Otherwise, it would have simply been a private member's bill, not a Government Bill.'[132] Crown officials are proceeding on the basis that they are preparing a Bill to be enacted.[133] Further, once the Bill is introduced it will be in the power of the House of Representatives, not the National party.[134] Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai

121. Submission 3.3.16, p 31
122. Submission 3.3.21, pp 13, 18; submission 3.3.16, pp 36, 41; submission 3.3.18, p 76; see also submission 3.3.14, p 12
123. Submission 3.3.21, p 4
124. Submission 3.3.15, p 4
125. Submission 3.3.21, p 19; see also submission 3.3.18, pp 76–77
126. Submission 3.3.16, p 35
127. See submission 3.3.20, pp 12–13; submission 3.3.16, pp 1–2, 35, 38; submission 3.3.17, p 22; see also submission 3.3.18, p 79
128. Submission 3.3.20, pp 10, 12; see also submission 3.3.22, p 23
129. Submission 3.3.16, p 39
130. Submission 3.3.21, p 23
131. Submission 3.3.21, p 23; submission 3.3.16, p 17
132. Submission 3.3.16, p 17
133. Submission 3.3.16, p 17
134. Submission 3.3.16, pp 17, 18

2872 said it was also significant that the delegation to Associate Minister Seymour related to 'the *development and passage* of the Treaty Principles Bill and associated policy' (emphasis added in submission).[135] Counsel therefore urged the Tribunal to 'examine the development and progression of this Bill from all facets', including the risk that it becomes law.[136] Similarly, counsel cautioned that the Tribunal should not assume the proposed Bill will follow the three-paper Cabinet process outlined by the Crown.[137] The coalition Government's proclivity to pass legislation under urgency suggested these timeframes may change, and fast.[138]

Counsel dismissed the argument that the coalition Government has a democratic mandate to progress or introduce the Treaty Principles Bill, noting ACT who originated this policy only received 8.6 per cent of the vote in the 2023 general election.[139] They submitted that the current conversation led by politicians about the constitutional place of te Tiriti is 'toxic and misguided', and will not foster informed, democratic engagement on the issue.[140] Counsel also submitted that a referendum on the Bill will not give it democratic legitimacy when there was none to progress the Bill in the first place.[141] A referendum would also amount to majoritarian law making and subjugate the rights and interests of a Māori minority.[142] Counsel for Wai 3316, Wai 3317, Wai 3318, Wai 3320, Wai 3321, and Wai 3343 also submitted that it is 'not democracy which gives the Crown the authority to exercise the power it wields'. Rather, they argued, 'it is te Tiriti/the Treaty.'[143]

If enacted, counsel argued the Act would breach the Crown's international law obligations, such as the Vienna Convention regarding the need to get both parties' consent to amend an international treaty.[144] Other counsel similarly observed that the Treaty/te Tiriti signed in 1840 was between rangatira Māori and the Crown and cannot be unilaterally amended by one party.[145] Counsel for Wai 3329 stated that te Tiriti is the basis from which Parliament derives its authority and therefore there are 'real doubts' regarding whether Parliament has the constitutional basis to alter it.[146] Counsel for 18 of the interested parties submitted that the law of fiduciary duties, referring to New Zealand and Canadian precedent, also operates to prevent the Crown from unilaterally rewriting the Treaty/te Tiriti and may assist the Tribunal in defining how the principle of active protection applies.[147]

Counsel stated the Bill if passed could also remove existing pathways for Māori to access redress for past and future breaches of the Treaty/te Tiriti by the Crown,

135. Submission 3.3.21, p 23
136. Submission 3.3.16, p 18
137. Submission 3.3.21, p 21
138. Submission 3.3.21, pp 21–21
139. Submission 3.3.16, p 15
140. Submission 3.3.16, p 15
141. Submission 3.3.16, p 16
142. Submission 3.3.16, p 16
143. Submission 3.3.20, p 10
144. Submission 3.3.18, pp 7, 25–30
145. Submission 3.3.20, p 12; see also submission 3.3.22, p 3
146. Submission 3.3.19, p 9
147. Submission 3.3.18, pp 8, 31

inconsistent with the principle of redress. They submitted it would 'pull the Tiriti rug out from under the Tribunal . . . rendering it a mechanism to uphold Crown sovereignty', it would 'fetter the jurisdiction of the courts and cast existing precedents into turmoil', and impact other redress avenues under local government, international treaties, and statutory bodies exercising delegable functions.[148] Counsel for Wai 2214 submitted that restricting or removing the right of Māori to have their claims heard through the Tribunal also conflicts with the Crown's duties under the Treaty/te Tiriti.[149]

Counsel for Wai 3316, Wai 3317, Wai 3318, Wai 3320, Wai 3321, and Wai 3343 submitted that the drafting and introduction of the Bill would breach the principles of the Treaty/te Tiriti by (among other things) 'attempting to supplant the interpretative judicial role of the Tribunal and the Courts in relation to te Tiriti/the Treaty, the document which sets out the constitutional basis, and is the source of authority, for the Parliament of New Zealand.'[150] Counsel for Wai 3319, Wai 3330, Wai 1504, and Wai 3314 similarly argued the Bill and the 'unbridled power the coalition government is exercising' is 'unprecedented and an attack on the separation of powers.'[151]

Several counsel also raised issues related to the Bill's interaction with tikanga Māori. Counsel for Wai 3343, Wai 1194/1212, Wai 2494, and Wai 2872 noted that the principle of mutual recognition and respect required the Crown to recognise and respect the values, laws and institutions of the other partner, but the coalition Government had failed to engage any tikanga experts.[152] They also submitted that the substance and process of the measures proposed by the Crown denied the place of tikanga as the first law of Aotearoa.[153] Additionally, counsel for Wai 3320 stated, the Bill could breach tikanga, particularly as it is recognised in the common law. Counsel submitted that 'Te Tiriti and its principles have become an integral part of modern day Māori tikanga', citing evidence provided by Waihoroi Shortland and Te Urunga Evelyn Aroha Kereopa.[154] At present, this 'modern day tikanga' is consistent with legislation that recognises the Treaty/te Tiriti and its principles. Moreover, in line with the principle of legality, 'parliament is not to be taken to legislate contrary to fundamental rights unless such intention is clearly expressed'.[155]

Drawing on the evidence of Ms Coates, counsel said that any legislation would therefore continue to be interpreted in a Treaty/te Tiriti consistent way 'unless clear parliamentary intent is indicated to the contrary'.[156] This means that the common law recognition of the Treaty/te Tiriti and its principles as part of modern

148. Submission 3.3.21, pp 17, 21, 27
149. Submission 3.3.17, pp 12, 19, 22
150. Submission 3.3.20, p 3
151. Submission 3.3.15, p 6
152. Submission 3.3.21, p 16
153. Submission 3.3.21, p 13
154. Submission 3.3.19, p 7
155. Submission 3.3.19, p 7
156. Submission 3.3.19, p 7

tikanga would continue to be recognised unless explicitly extinguished. Counsel therefore argued that the Bill as it currently stood 'would potentially be ineffective in impacting on relevant tikanga recognised at common law'.[157] This would have the effect of creating greater uncertainty as 'it not clear that this is the intended effect of any resulting legislation'. Counsel further submitted that it is also 'arguable that the proposed legislation is in breach of . . . Te Tiriti itself in not specifically addressing any impact on such tikanga'.[158]

4.6.2 Te tūranga mataaho o te Karauna

The Crown's position

The Crown acknowledged the submissions and evidence presented on behalf of claimants and interested parties in this inquiry, and the 'particular significance' of the Bill to them (and those they represent).[159] It further acknowledged that there is 'significant concern' about the proposed Bill.[160]

The Crown stated that the Bill and the review 'are political commitments . . . that now form the foundation of the current Government'.[161] It accepted the position, stated in the Tribunal's *Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024* report, that 'once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi'.[162] It further noted that the 'provenance of the reforms' (ie the coalition agreements) are relevant to the Tribunal's task of identifying any relevant Crown action or omission, or proposed action or omission.[163]

The Crown submitted that the matters before this inquiry raised several relevant matters. First, it stated that the expert evidence in this inquiry had 'raised a number of important and multifaceted themes', such as matters relating to the current electoral arrangements and parliamentary sovereignty.[164] It anticipated that these issues 'may be more fully explored in the Constitutional Kaupapa Inquiry in circumstances where there is time available to assess these matters and to hear a broader range of views'.[165]

Secondly, the Crown stated that it was apparent from expert evidence that questions of 'how Treaty principles should be reflected in legislation, and indeed the legitimacy of the concept of Treaty principles, are complex matters on which there are a range of views, and issues, which the Tribunal may consider are worthy of serious attention'.[166]

157. Submission 3.3.19, pp 6, 8
158. Submission 3.3.19, p 8
159. Submission 3.3.23, p 1
160. Submission 3.3.23, pp 14–15
161. Submission 3.3.23, p 3
162. Submission 3.3.23, p 4 (citing Waitangi Tribunal, *The Oranga Tamariki* (*Section 7AA*) *Urgent Inquiry 10 May 2024 Report*, *Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), p 28)
163. Submission 3.3.23, p 4
164. Submission 3.3.23, p 13
165. Submission 3.3.23, p 13
166. Submission 3.3.23, pp 13–14

Thirdly, the Crown noted that, although preliminary policy work and advice have been undertaken, 'no Cabinet decisions have been made on the underlying policy or key features of the proposed Bill'.[167] 'In short', the Crown submitted, 'at this point in time' the 'exact content and implications of any proposed Bill' are not known and are still subject to Cabinet decisions.[168] The Crown stated that 'this suggests that the Tribunal's analysis is likely to have most utility when it focuses on what *is* known and on how the policies that are the subject of this inquiry might be progressed in a Treaty-compliant manner' (emphasis in original).[169]

The Crown further submitted that, due to the early stage of the policy proposals, no decisions have been made on consultation. The Crown accepted that the principle of partnership is relevant to this case, and that the partners' 'mutual obligations to act reasonably and in good faith' requires consultation on 'truly major' issues so that the Crown will be 'sufficiently informed when making decisions that affect Māori'.[170]

Fourthly, the Crown referred to the Bill and review policies' origin in the coalition agreements 'which, following a General Election, form the basis of Government'.[171] The Crown stated that

> the Government is under an obligation to pursue the commitments recorded in the Coalition Agreements which constitute the basis on which Government is formed. The public service must support the Government in doing so, including by providing free and frank advice on these proposals and the risks they may generate.[172]

However, the Crown acknowledged that, once the Government is sworn in and formed, the Executive is responsible for meeting the Crown's Treaty obligations.[173] Therefore, 'at the heart of this inquiry', the Crown submitted, are the 'potential tensions between pursuit of policies which are at [the] core of Government formation, and the application of the Treaty to those policies or proposed policies'.[174] The Crown concluded that the Tribunal's analysis 'may be directed to addressing how Government might pursue the policies to which it has committed in a Treaty-consistent manner.'[175]

The Crown, referring to evidence of Mr Chhana filed at the same time as its closing submissions, noted that the date the Treaty Principles Bill Cabinet paper will be lodged with the Cabinet Office is not yet known.[176] Although precise dates could not be provided, the Crown submitted that it 'has been as helpful as possible'

167. Submission 3.3.23, p 14
168. Submission 3.3.23, p 14
169. Submission 3.3.23, p 14
170. Submission 3.3.23, p 13
171. Submission 3.3.23, p 14
172. Submission 3.3.23, p 14
173. Submission 3.3.23, p 14
174. Submission 3.3.23, p 14
175. Submission 3.3.23, p 14
176. Submission 3.3.23, p 1 (referring to document A23(f))

and that a lot of the information the Tribunal was seeking regarding the status of the Cabinet paper was 'not yet known by officials or the Minister'.[177]

4.6.3 Ngā whakautu tāpaetanga kōrero o ngā kaikēreme me ngā me ngā kaitono e whai pānga ki te kaupapa

The claimants' and interested parties' reply submissions

Counsel submitted that the Crown's sole reliance on the principle of partnership and associated obligations failed to address the other principles engaged by the inquiry and the development of jurisprudence since the *Lands* and *Forests* cases.[178] Counsel for Wai 682 stated that it was 'concerning' that the Crown's position was 'based solely on Court findings which are over 35 years old, without any mention of more recent, and more relevant, Tribunal jurisprudence'.[179] In their view, this 'demonstrates how detached the Crown is from te Tiriti in both its understanding of its te Tiriti obligations and its decision-making'.[180] Counsel for Wai 1341/3077 similarly submitted this was 'demonstrative of the Crown's inaccurate and outdated understanding of its te Tiriti obligations'.[181]

Counsel responded to the Crown's argument that no decisions on consultation had been made as the Bill was still in the early stages of development. Counsel for 18 interested parties submitted that the Crown breached its Treaty obligations by not engaging earlier, from 'the time when the policy was formed' on 28 November 2023.[182] Counsel for Wai 682 stated that consultation must take place *prior* to decision making, not after.[183] Counsel for Wai 3319, Wai 3330, Wai 1504, and Wai 3314 submitted that consultation should have occurred when the coalition Government was sworn into office.[184] Counsel for Wai 58, Wai 1312, and Wai 1684 noted the Associate Minister had authorised officials to engage with constitutional experts during the development of the exposure draft, but 'Māori, who are the Tiriti partner, will just have to wait until a decision is made by Cabinet on whether or not they will have the opportunity to be involved in the process at all.'[185] Counsel for Wai 1194/Wai 1212, Wai 2494, and Wai 2872 commented that the Crown's assertion that it did not need to engage tikanga and te reo Māori experts until after Cabinet decisions 'means the Ministers are not adequately or competently informed of the Tiriti and tikanga implications.'[186]

Responding to the Crown's cited articulation of the duty to consult on 'truly major' issues for Māori, counsel submitted that the Bill was a truly major issue

177. Submission 3.3.23, p 1
178. See submission 3.3.25, pp 7–8; submission 3.3.26, pp 2–3; submission 3.3.27, pp 3, 6; submission 3.3.29, pp 7–9
179. Submission 3.3.26, p 3
180. Submission 3.3.26, p 3
181. Submission 3.3.29, p 8
182. Submission 3.3.24, p 5
183. Submission 3.3.25, pp 8–9 (citing *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 (CA))
184. Submission 3.3.28, p 1
185. Submission 3.3.25, p 9
186. Submission 3.3.27, p 15

for Māori. Counsel for 18 interested parties submitted this was evident, including from widespread Māori opposition to the policy and evidence before this inquiry on the Bill's likely effects.[187] In the words of counsel for Wai 58, Wai 1312, and Wai 1684, 'what . . . could be more "truly major" an issue between the Crown and Māori than the evisceration of te Tiriti?'[188] Counsel for Wai 3316, Wai 3343, Wai 3321, Wai 3320, Wai 3318, and Wai 3317 submitted that the case law cited by the Crown was not binding on the Tribunal, and that the effect of the Bill on Māori is so great that the Crown '*must* collaborate with Māori right from the outset of its process, *and must* receive the informed consent of Māori prior to any enactments being passed, or policies implemented (emphasis in original).'[189] Counsel further identified an apparent contradiction in the Crown's position regarding consultation: while the Crown submitted that it did not have an 'absolute, open-ended duty to consult', the December briefing paper provided to the Minister by officials stated that a failure to engage with Māori would result in the Crown 'failing to meet the obligation under the Treaty to act reasonably, honourably, and in good faith.'[190]

Counsel also responded to the Crown's argument that the exact content and implications of the Bill were not yet known. Counsel for Wai 1341/3077 submitted that the claimants' concerns about the Bill's implications were reinforced by an open letter sent to the Government from 27 professional translators of te reo Māori.[191] Counsel for Wai 58, Wai 1312, and Wai 1684 argued there was 'a high level of certainty as to what the Bill will contain, or at least what its effect will be on Māori particularly and on wider society more generally'.[192] Counsel had 'no doubt' the Bill would in some way contain ACT's Treaty 'principles' as that is the 'political commitment' the Government made, and counsel considered it 'extremely unlikely' that the ACT policy would change.[193] Additionally, counsel for Wai 58, Wai 1312, and Wai 1684 submitted that, even without a Cabinet paper, there is sufficient evidence before the Tribunal for it to make findings on whether the Crown has breached its obligations under te Tiriti in progressing the Bill.[194] Counsel for Wai 682 submitted further that the Tribunal must consider process issues as well as the content of a Bill and could make findings on whether the Crown had followed a te Tiriti compliant process. If it had done so, they argued, 'would the Crown's policies exist in their current forms?'[195] Counsel for Wai 1194/Wai 1212, Wai 2494, and Wai 2872 also noted that the Tribunal had jurisdiction to consider measures the Crown proposes to adopt, not just measures already adopted.[196]

187. Submission 3.3.24, pp 4, 5
188. Submission 3.3.25, p 8
189. Submission 3.3.30, p 5
190. Submission 3.3.30, p 5 (citing submission 3.3.23, p 13)
191. Submission 3.3.29, pp 3–5
192. Submission 3.3.25, p 10
193. Submission 3.3.25, p 10
194. Submission 3.3.25, p 3
195. Submission 3.3.26, p 5
196. Submission 3.3.27, p 6

Counsel opposed the Crown's suggestion that the Tribunal focus its inquiry on how the policies might be progressed in a Treaty-compliant manner. Counsel for Wai 1341/3077 stated that there was '*no* te Tiriti-consistent way in which to pursue and implement' the policies – they 'are fundamentally at odds with te Tiriti, te Tiriti jurisprudence, and historical accounts of te Tiriti' (emphasis in original).[197] Counsel for Wai 58, Wai 1312, and Wai 1684 similarly described the Bill as 'an attack' on te Tiriti and its principles: 'To achieve what the Bill sets out to do is to desecrate the kawenata tapū that is te Tiriti o Waitangi. In no way . . . can that be Treaty-consistent'.[198] Counsel for Wai 682 agreed the policies could not be progressed in a Treaty-compliant way. They submitted:

> To attempt to reroute the policies in a more Treaty-compliant way does not change the purpose, policy directives or te Tiriti breaches which continue to sit behind the Crown's policies. The Crown makes this clear where it reiterates its commitment to the coalition agreements and its intention to implement them.[199]

Counsel for Wai 1194/Wai 1212, Wai 2494, and Wai 2872 further observed that the Crown had not attempted in its submissions, evidence, or at hearing to explain how the Bill complied with the te Tiriti, the Treaty, or its principles. In their view, this implicitly conceded the point.[200] Accordingly, counsel submitted it was improper for the Crown to ask the Tribunal to suggest how to advance policies inconsistent with te Tiriti and its principles.[201]

Counsel for Wai 58, Wai 1312, and Wai 1684 noted the Crown's reference to the Associate Minister's response to the March 2024 briefing, where he agreed that the Bill does not alter the text or meaning of te Tiriti. Counsel submitted that the Associate Minister's response did 'not make sense' as the meaning of te Tiriti is 'bound up with' Treaty principles and the Bill seeks to alter them.[202] Further, they submitted that Associate Minister Seymour was not qualified to judge whether the Bill's 'proposed translations of kupu Māori alter the meaning of te Tiriti.'[203]

Counsel also disagreed with the Crown's submission that it had been as helpful as possible. Counsel for Wai 1341/3077 described the Crown's approach as 'unhelpful and obstructive'[204] and counsel for Wai 58, Wai 1312, and Wai 1684 argued the Crown had been 'hostile' to the inquiry from the beginning.[205] Both submissions referred to (among other actions) the Crown's opposition to the applications for urgency, its refusal to provide documents requested by the Presiding Officer, threatening judicial review of the Presiding Officer's decision on confidentiality,

197. Submission 3.3.29, pp 2, 6
198. Submission 3.3.25, p 6
199. Submission 3.3.26, p 4
200. Submission 3.3.27, pp 3–4; see also submission 3.3.25, pp 9–10
201. Submission 3.3.27, p 4
202. Submission 3.3.25, pp 6–7
203. Submission 3.3.25, pp 6–7
204. Submission 3.3.29, p 2
205. Submission 3.3.25, p 4

and its failure to provide indicative timeframes for when a Cabinet paper will be available.[206]

Counsel for Wai 3316, Wai 3343, Wai 3321, Wai 3320, Wai 3318, and Wai 3317 further rejected the Crown's submissions that the Government is under an obligation to pursue the commitments recorded in the coalition agreements, noting the Crown is also subject to 'te Tiriti/the Treaty obligations' and that 'legally these must be complied with'.[207] Counsel also emphasised that 'the Claimants do not accept that there can ever be a democratic mandate that can legally override Māori rights and interests which are protected under te Tiriti/the Treaty'.[208]

Finally, counsel submitted that the Crown's submissions had failed to engage with central issues raised in this inquiry. This included, for example, the relationship between the proposed Bill and the Treaty, te Tiriti, and Treaty principles.[209]

4.6.4 Ngā take e whiriwhiri ana i tēnei ūpoko

Issues for discussion in this chapter

Having considered the evidence and submissions for this urgent inquiry, we consider that the issues for consideration in this chapter are:

- What are the policy rationales for a Treaty Principles Bill based on existing ACT policy and are they reasonable?
- Are the Treaty principles uncertain or unclear at present, thereby justifying a Bill based on existing ACT policy?
- Are the rights of New Zealanders already protected under international instruments and domestic law?
- What are the constitutional implications of a Treaty Principles Bill based on existing ACT policy?
- Are the concerns raised by claimants and Crown officials about the content and effects of a Bill based on existing ACT policy justified? Would such a Bill change the meaning and effect of the Treaty/te Tiriti?
- Are the concerns raised by claimants and Crown officials about impacts on the Māori–Crown relationship and social cohesion justified?
- From what is currently known, would an exposure draft be adequate for Crown engagement with the Māori Treaty partner?
- How does the Crown's proposed approach to developing the Bill measure up against the Crown's own standards on Treaty of Waitangi/Tiriti o Waitangi matters?

In this chapter, we address these issues in the discussion section before making our Treaty/te Tiriti findings at the end of the chapter.

206. Submission 3.3.25, pp 4–6; submission 3.3.29, p 2
207. Submission 3.3.30, p 7
208. Submission 3.3.30, p 9
209. Submission 3.3.27, pp 2–3

4.7 Matapaki

Discussion

4.7.1 Ngā pānga o te Pire Mātāpono Tiriti

The effects of the Treaty Principles Bill

(1) *Whakapuakitanga*

Introduction

We begin this section by referring back to the constitutional significance of the Treaty of Waitangi/te Tiriti o Waitangi as the foundation of Government and our discussion in chapter 2. As a constitutional instrument, matters that impinge on its status and significance are constitutional issues. According to Professor Geddis, its normative function provides legitimacy to Crown authority in Aotearoa New Zealand. He stated:

> The manner in which Te Tiriti/the Treaty has been incorporated into the formal laws of Aotearoa New Zealand is . . . secondary to its normative function as the basis for the entry of Crown authority into Aotearoa New Zealand. However, inclusion of 'the principles of the Treaty' in various legislative instruments does provide (an admittedly incomplete) recognition of that function:
>
> - The very fact that such inclusion has occurred reflects an acceptance that the collective commitment represented by Te Tiriti/the Treaty remains central to the governance of Aotearoa New Zealand;
> - Those principles must be informed by that collective commitment – their meaning and must grow out of the vision that Te Tiriti/the Treaty represents.
>
> This second point is extremely important and requires reiterating. Legislative recognition of the 'principles of the Treaty' cannot be separated from Te Tiriti/The Treaty itself as a document created and signed in a particular context and understood in a particular way.[210]

The Treaty/te Tiriti represents a coming together of two different peoples in Aotearoa New Zealand where Māori rangatiratanga and Crown kāwanatanga would be respected. It was the mechanism whereby Māori leaders in most of the country agreed to share power in exchange for the guarantee of their rangatiratanga. The Te Raki Tribunal in its stage 1 report *He Whakaputanga me te Tiriti*, whilst noting that the rangatira of that district did not cede their sovereignty in 1840,[211] saw kāwanatanga in a particular way: 'The rangatira who signed te Tiriti . . . did not regard kāwanatanga as undermining their own status or authority. Rather, the treaty was a means of protecting, or even enhancing, their rangatiratanga as contact with Europeans increased.'[212]

The Tribunal therefore found that the rangatira agreed to share power and authority with the Crown and that they and the Crown would be 'equal while

210. Document A19, p 4
211. Waitangi Tribunal, *He Whakaputanga me te Tiriti*, pp 526–527
212. Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, p 528

having different roles and different spheres of influence'.[213] This is the normative value of the Treaty/te Tiriti as the foundation of Crown government in Aotearoa New Zealand. Both spheres of influence were to be respected within the new constitutional order.

The Treaty Principles Bill does not seek to reflect this spirit or constitutional intent. It reflects a policy focused on redefining the terms and meaning of the Treaty/te Tiriti through its new principles. While it will not change the actual text of the Treaty/te Tiriti sheets currently housed in the National Library, it will according to Professor Geddis 'change the meaning of Te Tiriti/The Treaty as incorporated into the current constitutional practices of Aotearoa New Zealand'.[214] We agree that that is the major constitutional effect of this policy. The meaning and effect of the Treaty/te Tiriti will be completely changed by a Bill based on existing ACT policy, and this would have enormous constitutional implications in the future as well as rewriting the past.

In addition, the policy's selective use of words from the Māori text of the Treaty/te Tiriti undermines its meaning and intent. Professor Margaret Mutu (a linguistic expert) and Hōne Sadler (a te reo and mātauranga Māori expert) gave evidence on the linguistic and mātauranga Māori issues raised by the new policy, noting it represents a 'cut and paste' or 'cherry-picking exercise'.[215] To recap, the proposed principles text reads:

> Article 1: 'kawanatanga katoa o o ratou whenua' – the New Zealand Government has the right to govern all New Zealanders ['Principle 1'];
> Article 2: 'ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa' – the New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property ['Principle 2']; and
> Article 3: 'a ratou nga tikanga katoa rite tahi' – all New Zealanders are equal under the law with the same rights and duties ['Principle 3'].[216]

As we explained in chapter 2, this is not what the Treaty/te Tiriti means. Mr Sadler noted that te Tiriti is best understood as an undivided whole, rather than analysed phrase by phrase, unlike the approach taken by the ACT New Zealand Party (and endorsed in the coalition agreement).[217] Mr Sadler referenced the Te Raki Tribunal's report that, in turn, adopted another formidable expert linguist's work, the late Dr Patu Hohepa.[218] While we agree the Treaty/te Tiriti should be approached holistically in terms of the relationship between the Crown and Māori

213. Waitangi Tribunal, *He Whakaputanga me Te Tiriti*, p xxii. The reference to different spheres of influence in the Tribunal report informed the development of the proposed constitutional models in the *Matike Mai Aotearoa* (2016) report, discussed in chapter 2 of this report.
214. Document A19, p 8
215. Document A14, p 4; transcript 4.1.6, pp 80, 207
216. See doc A7, p [18]
217. Document A4, p 2
218. Document A4(a), p 63

and the historical circumstances in which it was signed, we nonetheless analyse here each proposed 'principle' individually. We do this to draw out how the proposed principles are deeply flawed interpretations of the corresponding articles of the Treaty/te Tiriti.

(2) *'Mātāpono 1'*
'Principle 1'

Engaging with 'Principle 1' first, it asserts the unilateral right of the New Zealand Government (the Crown) to govern. It does not refer to Māori, with whom the Treaty/te Tiriti was signed, or the Crown's guarantee of tino rangatiratanga which exists equal to, and limits the Crown's exercise of, kāwanatanga. This bald assertion of unilateral power belies the relationship intended by the Treaty/te Tiriti and the findings of many Tribunal reports and court decisions.

In Ms Coates' view, the combination of the proposed 'principles' 'elevates Crown power' so that the Crown becomes 'the singular authority in Aotearoa, with the right to govern all people'.[219] According to proposed 'Principle 2' (which we discuss next), the Crown's exercise of power is only subject to the protection of private property rights.[220] In Ms Coates' view:

> This approach effectively takes an agreement between the Crown and Māori about power sharing and turns it into an affirmation of the Crown as a largely unfettered sovereign. In doing so, it strips Māori of their authority and many of the Article 2 protections and flies in the face of the Waitangi Tribunal finding in the Te Paparahi o Raki inquiry that 'The rangatira who signed te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain'. They retained their authority to make and enforce law over their people or their territories and agreed to share power and authority.[221]

(3) *'Mātāpono 2'*
'Principle 2'

'Principle 2', in turn, seeks to honour the 'chieftainship' of 'all New Zealanders'. While the reference to 'chieftainship' borrows from English translations of the Māori text, its use in the context of private property rights and its extension to 'all New Zealanders' flattens and warps the Māori concept of 'tino rangatiratanga' used in article 2. In her evidence, Professor Mutu explained the concept of rangatiratanga as follows:

> Rangatiratanga is a noun derived from the word 'rangatira'. Rangatira are our hapū and iwi elders and leaders, whose role is to ensure the well-being of the hapū and iwi.
>
> Kaumātua have analysed the word rangatira as follows:
>
> Tirohia tō mata ki te moana, he ika e ranga ana. Tirohia tō mata ki uta, he tira tangata e haerere ana. Mā wai e raranga kia kotahi ai?

219. Document A6, p 25
220. Document A6, p 26
221. Document A6, p 25

> Look to the sea where the fish shoal (as one body); look to the land where a group of people wander about. Who will bind them in unity?
>
> The essential words here are ranga: 'shoal'; raranga: 'weave, plait'; and tira: 'group'. A rangatira, then, holds a group of people together so that they move as one, like a shoal.
>
> Rangatiratanga is often translated literally as chieftainship. This is not a good translation. In truth it is the exercise of leadership in a manner that ensures that the iwi preserves and upholds its mana. The distinguishing feature of rangatiratanga is encapsulated in the notion of 'taking care of one's people'. In practical terms it means exercising paramount power, and authority in respect of the people and their resources, so that the people can prosper and enjoy social, economic and spiritual well-being. Rangatiratanga is a control exercised not only by particular individuals, but by local groups collectively as well. It is, in short, the manifestation of the iwi political system. Tino rangatiratanga is the exercise of ultimate and paramount power and authority.[222]

Professor Mutu explained further that rangatiratanga is 'inextricably tied' to whakapapa Māori and therefore not something guaranteed to all New Zealanders or something the Crown has the power to bestow. Rangatiratanga is also not exercisable for an individual's private benefit, but something exercised 'by or on behalf of the hapū'.[223] 'Principle 2' as proposed by ACT fails to acknowledge the depths of these concepts in te ao Māori, distorts their meaning as contained in te Tiriti o Waitangi, and overstates the kāwanatanga powers of the Crown.

In addition, as Professor Mutu stated, article 2 of te Tiriti o Waitangi, which contains the Crown's guarantee of rangatiratanga, was something promised to Māori and not to 'all New Zealanders'[224] (as the term 'New Zealanders' is understood today). The historical context leading up to the signing, the circumstances surrounding the signing, the preamble of the Treaty/te Tiriti, and the actual text of the Māori version in its totality make that clear. It is well known that Captain William Hobson signed on behalf of Queen Victoria. The other party was, in the words of te Tiriti, 'nga Rangatira', 'nga hapu', and 'nga tangata katoa o Nu Tirani'. There were very few Europeans present in the country in 1840 and the term 'New Zealanders' was one of the names used by Europeans at that time to refer to Māori.[225]

Article 2 also concerned matters broader than property rights alone. First, it contained the guarantee of tino rangatiratanga over kāinga, which were the Māori communities of that time, and which was an inextricable part of rangatiratanga (as Professor Mutu has explained). Secondly, article 2 contained a guarantee of

222. Document A14, pp 1–2

223. Document A14, p 4; see also doc A3, p 7; doc A3(a), p 7

224. Document A14, p 4; see also doc A3, p 7; doc A3(a), p 7

225. See, for example, Edward Shortland, *Traditions and Superstitions of the New Zealanders: With Illustrations of their Manners and Customs*, 2nd ed (London: Longman, Brown, Green, Longmans & Roberts, 1856), and William Williams, *Christianity among the New Zealanders* (London: Seeley, Jackson, and Halliday, 1867).

'taonga katoa', which Professor Mutu noted, 'is far broader than just property'.[226] Ms Coates in her evidence explained that taonga 'includes a vast scope of tangible and intangible matters of special cultural significance'.[227] She gave examples including (among other taonga) te reo Māori, mātauranga Māori, wāhi tapu, and fresh water.[228] Professor Mutu observed that ACT's proposed text for the Bill 'doesn't even accord with the text of the Treaty of Waitangi, let alone Te Tiriti o Waitangi'.[229] We agree. The fisheries guarantee contained in the English version, for example, has been left out of 'Principle 2'.

We note that MOJ officials were alert to this impact on the tino rangatiratanga of Māori and the constitutional status of the Treaty/te Tiriti in their December 2023 briefing to the Minister of Justice and March 2024 briefing to the Associate Minister. As discussed above, they observed that the policy

> states that the rights affirmed in Article 2 extend not only to Māori, but to all New Zealanders. This appears to be a novel interpretation of Article 2 as we are not aware of any support for it in legislation, judicial interpretation, or expert opinion. In addition, we do not think it has ever been the policy of the Crown that Article 2 applied to anyone other than Māori (equal citizenship rights being recognised in Article 3).
>
> The policy document also appears to narrow the scope of Article 2 of the Treaty, which protects te tino rangatiratanga of iwi and hapū over their lands and taonga (treasures). The proposal captures the protection of property rights, but not a wider range of tangible and intangible taonga, such as language, knowledge, customs and other important features of Māori identity. It reframes tino rangatiratanga as a right only to personal autonomy that does not recognise the collective right to self-determination held by iwi and hapū or the unique constitutional status of Māori as tangata whenua with specific rights under the Treaty/te Tiriti. An interpretation that does not recognise this status calls into question the very purpose of the Treaty and will increase confusion about its status in our constitutional arrangements.[230]

(4) *'Mātāpono 3'*
'Principle 3'

Turning to 'Principle 3', we note it states that 'all New Zealanders are equal under the law with the same rights and duties'. As noted by officials, the Bill's intended purpose is to redefine the Treaty principles in legislation. If this is to be the exhaustive list of all Treaty principles, then what the Bill fails to mention also becomes very important. What this and the other 'principles' are notably silent on are the duties and obligations assumed by the Crown in 1840 and that it agreed to honour in all its future dealings with Māori. It also fails to mention the rights and guarantees promised by the Crown to Māori specifically in the Treaty/te Tiriti.

226. Document A14, p 4
227. Document A6, p 26
228. Document A6, p 26
229. Document A14, p 4
230. Document A7, pp [18]–[19]; see also doc A7, pp [8]–[9]

Claimants before us noted how their ancestors have held strong to the commitments in the Treaty/te Tiriti for generations and, for some, viewed the agreement as a kawenata tapu (a sacred compact).[231] However, these 'principles' deliberately erase those commitments and, if used as the basis for a Bill which is later enacted, would have the effect of relieving the Crown from honouring its obligations to Māori as contained in current Treaty principles. In the case of article 3 and 'Principle 3', as shown in all the Treaty settlements to date, the Crown has breached the promises it made in the Treaty/te Tiriti over the past 180 years. The long-acknowledged principles of 'redress' and 'equity' require the Crown to redress those past breaches and treat Māori equitably vis-à-vis non-Māori. We note that redress of past breaches is not contained in 'Principle 1', 'Principle 2', or 'Principle 3', and that the equal citizenship promised in article 3 has not yet been fulfilled.

Formal equality, therefore, does not and has not ensured equitable outcomes. The intended equality of tino rangatiratanga and kāwanatanga in 1840 did not result in equality in power–sharing in the decades that followed. The focus of 'Principle 3' on formal equality in 2024 obscures the reality of an unequal balance of power between Māori and the Crown, and the many inequities and barriers of the Crown's making that have made the article 3 guarantee an illusory one for many Māori . It also obscures the values of fairness, reasonableness, and a 'level playing field' that underlie the principle of equity and the Crown's article 3 obligation to act fairly as between Māori and non-Māori.

The te reo Māori wording for 'Principle 3' is also problematic. During the hearing, Professor Mutu addressed the language used for each principle of the Bill and compared them to the actual text of te Tiriti o Waitangi, noting how they bear no resemblence to the terms of te Tiriti.[232] With respect to the proposed 'Principle 3', for example, she stated that:

> 'A rātou ngā tikanga katoa rite tahi' . . . has [been] dropped into the middle of a phrase and then picked . . . out in a way that the thing just makes no sense whatsoever when picked out like that. Which tells me either that the person has absolutely no understanding of the reo at all or is so disparaging of the reo that they think nothing of doing it such damage . . . We spend our whole lives creating ways to communicate with each other in a way that enhances communication and to do something like this to a language, anyone's language, is an unspeakable violation.[233]

In his evidence, William Skipper (Kipa) Munro also discussed the Bill's treatment of te reo Māori. He stated:

> Ka pukuriri ahau ki tēnei mahi te tīpako kupu reo Māori me te whāwhā i ngā whakaaro o roto ki te tautoko i tētahi kaupapa takahi Māori, takahi mana.[234]

231. See, for example, doc A10, p 1. See also the discussion of 'kawenata tapu' in chapter 2.
232. Transcript 4.1.6, pp 204–205
233. Transcript 4.1.6, p 208
234. Document A3, p 6

> I am furious at the manner in which Māori words have been co-opted and twisted to support an agenda that seeks to violate Māori and their mana.[235]

We believe that both Professor Mutu's and Mr Munro's concerns regarding the Bill's use of te reo Māori are borne out by the fact that MOJ had not yet engaged te reo Māori experts on the Bill's development at the time of our hearing.

(5) *Te urupare whānui o te reo me te kiko o 'Ngā Mātāpono' i tūtohua ai*
Overall effects of the language and content of the proposed 'Principles'

Overall, witnesses for the claimants and interested parties in this urgent inquiry spoke with one voice when they told us that the ACT text proposed for the Bill does not accord with the text or spirit of the Treaty/te Tiriti, or the historical context in which the Treaty/te Tiriti was signed. Mr Sadler stated that the text of the Bill was so 'far removed from what te Tiriti actually says that it is barely recognisable'.[236] Mr Munro stated that 'kua hē te Pire aro atu ki ngā tuhinga e rua, the Treaty/te Tiriti'[237] – 'the Bill is inconsistent with both texts, the Treaty/te Tiriti.'[238] Umuhuri Matehaere stated that 'principles' failed to 'appreciate the actual words in the text of te Tiriti and the context of the time it was signed', or 'the "spirit of te Tiriti/the Treaty" as understood by decades of Treaty jurisprudence developed by the Waitangi Tribunal and other courts'.[239] Ms Coates commented that the text and its interpretation 'ultimately bears little resemblance to the original promises and guarantees made'.[240]

Ms Coates further contended that in attempting to define the principles in this way the Crown policy used the 'structure of te Tiriti and fragments of te Tiriti based language [as] a guise and a cunning way to attempt to legitimate the redefinition endeavour'.[241] She continued 'this is disingenuous and the proposed principles are but a warped shadow of te Tiriti and an attempt to turn fiction into legal fact'.[242]

Professor Geddis noted that the policy attempted to link its interpretation with the historical reality of the Treaty/te Tiriti.[243] This rewriting of the principles through the Treaty Principles Bill will change the nature of the partnership between Māori and the Crown and the existing well-defined principles, by substituting a set of '(contested) statements derived from a classical liberal political philosophy that have little–to–nothing to do with their purported source'.[244] In

235. Document A3(a), p 6
236. Document A4, p 2
237. Document A3, p 7
238. Document A3(a), p 7
239. Document A5, p 7
240. Document A6, p 25
241. Document A6, p 25
242. Document A6, p 25
243. Document A19, p 8
244. Document A19, p 8

his view, the Bill represented an 'effort to legislate a legal fiction into fact'.[245] He continued:

> [The Bill] purports to define 'the principles of the Treaty' in a manner that does not accord with the actual text or meaning of Te Tiriti/The Treaty. It would direct those required to consider and apply 'the principles of the Treaty', including the courts, to pretend that they are giving effect to Te Tiriti/the Treaty while actually applying a quite different (and antithetical) set of governing principles.[246]

If the Treaty Principles Bill were enacted based on the principles proposed by ACT, it would fundamentally change the nature of the partnership between the Crown and Māori as affirmed in existing Treaty principles. It would do so by substituting existing Treaty principles for a set of propositions which bear no resemblance to the text or spirit of the Treaty of Waitangi/te Tiriti o Waitangi. These propositions refer to the rights of the New Zealand Government and all New Zealanders but are conspicuously silent regarding the existence and rights of Māori under the Treaty/te Tiriti or the Crown's obligations under the same. In sum, it is clear to us that the passage of the Treaty Principles Bill featuring the currently proposed definition of the principles would significantly alter the constitutional foundation of government in ways likely to undermine or extinguish Māori rights and interests and conversely to elevate the rights of the Crown.

To illustrate this point, we consider one example of how the Bill if enacted in its current form might apply in the interpretation of other Acts which reference the 'the principles of the Treaty of Waitangi'. In the resource management context, for example, section 8 of the Resource Management Act 1991 (RMA) requires decision-makers to 'take into account' the Treaty principles. Rather than requiring decision-makers to take into account Māori rights and interests and the express views of tangata whenua, the focus as directed by 'Principle 2' would be on the 'proprietary landholding' of the applicant seeking the consent.[247] Ms Coates therefore contended that the Bill would effectively remove or at least severely diminish Māori concerns, interests, and rights from consideration.[248] It is clear that section 8 will require that the new principles be taken into account, should the Bill be enacted.

It is not just the RMA, of course. Mr Matehaere discussed the ways he has tried to use statutory references to the Treaty and its principles in the Treaty of Waitangi Act 1975, the Conservation Act 1987, the Marine and Coast Area (Takutai Moana) Act 2011, and the RMA itself to protect Motiti Island and its surrounds.[249] He considered the policies of the Crown were a 'violation' of the Treaty and that the Crown failed to 'appreciate the "spirit of Te Tiriti/Treaty" as understood by

245. Document A19, p 9
246. Document A19, p 9
247. Document A6, p 24
248. Document A6, p 24
249. Document A5, pp 10–17

decades of Treaty jurisprudence developed by the Waitangi Tribunal and other courts.'[250] He wanted te Tiriti left alone.[251]

Another potential impact of the Bill concerns Treaty settlements. There are two aspects to this issue.

First, the coalition agreement did not address the impact of a Bill on Treaty settlement legislation. Each Act contains a Crown apology and acknowledgements of Treaty/te Tiriti breaches. On this point, the Associate Minister approved the development of a Cabinet paper on the basis that the Bill would state it does not 'change the nature of any Treaty settlements'.[252] Exactly how this exception would be worded is a matter for future Cabinet decisions but we rely on it to conclude that the Bill (if enacted) would not affect the breach acknowledgements that have been made in past Treaty Settlement Acts. On the other hand, the effectiveness of statutory acknowledgements or relationship agreements could be reduced if the Department of Conservation and local authorities, for example, have to apply the Conservation Act and RMA in accordance with the 'Treaty Principles Act'. The Crown's Treaty Principles Bill policy may also have impacts on the Treaty/te Tiriti relationship that has been restored by past settlements but we did not receive evidence on that point.

Secondly, there is the issue of future Treaty settlements. In response to questions from the Tribunal, Mr Fraser of Te Arawhiti considered the potential impact of a Treaty Principles Act, based on the current proposed wording, on the Crown's ability to make concessions of Treaty breaches in future settlement negotiations.[253] Mr Fraser told us that if Parliament enacted the Bill to define 'the principles of the Treaty of Waitangi', 'Te Arawhiti would be obliged to consider the Treaty Principles as defined . . . when weighing whether the Crown's historical acts or omissions breached the Treaty principles'.[254] In his view:

> The new principles would likely affect Crown breach concessions involving taonga because the second principle refers to chieftainship of all New Zealanders' 'land and all their property' (only). Taonga is a broader concept including, for example, te reo Māori. Concessions of breach in relation to the Treaty itself would still be available.
>
> For settlements being negotiated or still to come it is likely the parties would want to consider the impact of the Act on their mutual understanding of the 'principles of the Treaty of Waitangi'. This may include whether they would want to reference the principles at all, refer only to te Tiriti o Waitangi/the Treaty of Waitangi itself, or find new ways to describe their understandings and the post-settlement relationship they envisage.[255]

250. Document A5, p 7
251. Transcript 4.1.6, p 228
252. Document A7, pp [23]–[24]
253. Document A22(e)
254. Document A22(e), p 1
255. Document A22(e), p 1

Dr Harris also gave evidence concerning the Bill's application to Treaty settlements in response to the Tribunal's question. He stated that, if the Bill were enacted, the meaning of the 'principles of the Treaty of Waitangi' 'would change across the gamut of the law', depending on the wording of the Bill regarding the scope of its application.[256] He considered that the impact on the Crown's ability to settle claims would be significant:

> Crown settlement negotiators would have to shift, mid-negotiation, their approach to whether there have been breaches of the principles of the Treaty of Waitangi – because the Act changes the meaning of those principles. To answer the question directly, the Crown would be less likely to concede Treaty breaches because a higher hurdle would have to be cleared to establish a breach of a principle of the Treaty of Waitangi. What was previously a breach of tino rangatiratanga for Māori, for example, would not now be a breach of the 'principle' of chieftainship for all New Zealanders. This would have highly unsettling and rupturing effects on Treaty settlement negotiations that have involved years of discussion, concession, compromise, and careful relationship-building. The Crown will be put in an invidious position. Crown negotiators could consider that they ought to apply the same Treaty principles that have previously guided their negotiations, and that have guided other settlements, out of respect for consistency and fairness; but they would be required by law to 'shift the goalposts'.[257]

To practically illustrate how the Bill if enacted in its present form may affect future Treaty settlements, we draw on some examples from Treaty settlement legislation passed in the last decade that contain significant non–property based Treaty/te Tiriti breaches acknowledged by the Crown.

First, the Tūhoe Claims Settlement Act 2014 contained Crown acknowledgements related to the 1916 arrest of Rua Kēnana at Maungapōhatu. In the Act, the Crown acknowledged it had caused serious prejudice to Rua Kēnana and the Maungapōhatu community through its actions and breached the Treaty of Waitangi and its principles.[258]

Secondly, the Crown acknowledged in the Moriori Claims Settlement Act 2021 that it had breached the Treaty/te Tiriti and its principles through:

- failure to take steps to adequately protect the traditional tribal structures of Moriori;
- failure to actively protect ta rē Moriori (the Moriori language),
- the collection and trade of kōimi t'chakat (the skeletal remains of Moriori ancestors) by the Colonial Museum; and

256. Document A9(c), p 1
257. Document A9(c), p 1
258. Tūhoe Claims Settlement Act 2014, ss 9(29)(a)-9(29)(d); see also Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana 2019 – Rua Kēnana Pardon Act 2019

- the dissemination of school journals which depicted Moriori as racially inferior.[259]

Thirdly, the Maniapoto Claims Settlement Act 2022 contained Crown acknowledgements concerning the Taranaki wars, including breaching the Treaty/te Tiriti and its principles by failing to provide for refugees displaced by the war. This had placed significant social and economic strain on Ngāti Maniapoto who had sheltered displaced peoples instead.[260] The Crown also acknowledged breaching the Treaty/te Tiriti and its principles in its failure to actively protect te reo Māori.[261]

Fourthly, the deed of settlement signed between Te Whānau a Apanui and the Crown in April 2024 acknowledged that it 'discriminated against Te Whānau a Apanui' when it paid old age pensions to Māori at a lower rate than non-Māori, and failed to budget for a bridge that the iwi desperately needed because of the limited amount of European settlement in the area. These were acknowledged as breaches of the Treaty/te Tiriti and its principles. The Crown also acknowedged that its 'failure to actively protect te reo Māori and encourage its use by iwi and Māori was a breach of Te Tiriti o Waitangi/the Treaty of Waitangi and its principles'.[262] In its apology to Te Whānau a Apanui, the Crown stated:

> Before you signed Te Tiriti o Waitangi, Te Whānau a Apanui exercised tino rangatiratanga over your affairs. The Crown guaranteed in Te Tiriti o Waitangi/the Treaty of Waitangi that Te Whānau a Apanui would retain tino rangatiratanga. Instead, the Crown has promoted laws and policies that have undermined Te Whānau a Apanui tino rangatiratanga, and this has wrought immense harm on your iwi. For this the Crown sincerely apologises.
>
> The Crown deeply regrets that its policies to colonise and assimilate Māori into European culture have caused prejudice to generations of Te Whānau a Apanui. Crown policies have contributed to the socio-economic marginalisation of too many Te Whānau a Apanui, and the disconnection of Te Whānau a Apanui from mātauranga Māori and your taonga, te reo Māori. For this the Crown profoundly apologises.
>
> The Crown apologises for its breaches of Te Tiriti o Waitangi/the Treaty of Waitangi, which have tarnished its honour and brought great harm to Te Whānau a Apanui. The Crown is deeply sorry for its failures to protect the tamariki of Te Whānau a Apanui, the times it has discriminated against Te Whānau a Apanui, and the disconnection Te Whānau a Apanui have suffered from some important parts of your whenua.[263]

As Mr Fraser noted, the Bill's focus on property rights may affect Crown breach concessions involving taonga, such as the harm caused to ta rē Moriori (the Moriori language). It also may affect other Crown concessions for non–property based breaches of the Treaty/te Tiriti and its principles, such as the socio-economic

259. Moriori Claims Settlement Act 2021, ss 9(4)(d), 9(7), 9(9), 9(11)
260. Maniapoto Claims Settlement Act 2022, ss 9(4), 9(7)
261. Maniapoto Claims Settlement Act 2022, s 9(39)
262. Te Whānau a Apanui deed of settlement, April 2024, pp 61–62
263. Te Whānau a Apanui deed of settlement, April 2024, p 63

acknowledgements made in the Tūhoe and Maniapoto settlement Acts. Overall, these examples are illustrative of the types of non–property based Crown acknowledgements that may no longer be made if the Bill is enacted in its present form. It is also difficult to see how an apology of the kind made in the Te Whānau a Apanui deed of settlement could be made in future settlements under the redefined principles in a Bill reflecting the ACT policy.

To summarise, this section observed that the 'principles' proposed by ACT to form the basis of the Bill do not reflect the text of the Treaty/Te Tiriti, the historical circumstances before or during the signing, the spirit of the compact forged in 1840, or the jurisprudence on Treaty principles articulated over the last four decades. The examples we have discussed, in the context of the RMA and Treaty settlements, also illustrate how the Bill if enacted in its current form – to be used in the interpretation of other statutes which reference the Treaty principles – may apply. In each case, it would likely replace or at least severely narrow the consideration of Māori rights and interests in substitution for alternative considerations such as the private property interests in 'Principle 2'.

4.7.2 Ngā whakaaweawe o te kaupapa here ki te whānaungatanga i waenganui i te Karauna me te iwi Māori

Effects of the policy on the Māori–Crown relationship and social cohesion

Crown officials and claimant witnesses agreed that the Crown's Treaty Principles Bill policy will have significant impacts on society and on the relationship between the Crown and Māori. This would be the case even if the Bill did not proceed past the select committee stage, although the impacts would be more serious if the Bill were to be enacted. Their concerns, which we share, are discussed in this section.

As summarised in section 4.2, the MOJ officials did not predict any beneficial consequences from the proposed Bill in their December 2023 briefing to Minister Goldsmith. They advised that there was a 'substantial risk the Bill could generate further division, which poses a threat to social cohesion and could undermine legitimacy and trust in institutions'.[264] This advice from the Ministry responsible for administering the justice system points to extremely serious consequences for the whole society. Further, officials warned that there was a significant risk of damaging the Māori–Crown relationship because the Bill 'could be seen as an attempt to limit the rights and obligations created by the Treaty'. The damage caused by the Bill could have 'flow-on' effects on all aspects of the relationship.[265] The MOJ officials considered, for example, that there could be a detrimental effect on the work that the Ministry was undertaking with the Iwi Chairs Forum and

264. Document A7, p [10]
265. Document A7, p [10]

Ināia Tonu Nei[266] to 'seek improved justice outcomes for Māori to the benefit of all New Zealanders'.[267]

Ms Coates addressed the effects on the Māori–Crown relationship, and more broadly on society, in her evidence. Ms Coates observed that these impacts are already being created and are serious, even if the Bill does not proceed further than the select committee stage:

> If passed, it [the Bill] will represent one of, if not the worst and most flagrant breaches of Te Tiriti o Waitangi in modern history. Even if it doesn't pass, this is one point I don't pick up quite as much in my brief of evidence, the introduction of such a Bill undermines the Crown–Māori relationship. Off the back of Treaty settlements where the Crown apologises – has apologised for past behaviour and in most instances, seeks to chart a new, more Treaty consistent course. What this does, when you have such a bad faith Bill being introduced into Parliament, that proposes to [turn] Te Tiriti o Waitangi on its absolute head, it affirms what the Crown is capable of in how far they are willing to go.
>
> They could, and they are in this instance, proposing to wipe away foundational Māori rights with the stroke of a legislative pen which is a show of hand, despite the progress of 40 years, that undermines and erodes the trust and faith that we have built up in the honour of the Crown. It also undermines Te Tiriti publicly and has fostered division already within the community and as part of a series of sweeping amendments that are being proposed which is creating that sentiment and hostility more broadly within society.[268]

Dr Harris told us that the Treaty Principles Bill policy and, to a lesser extent, the review of Treaty clauses, threatened to

> rupture the relationship between the Crown and Māori with deeply damaging consequences. Once the relationship has been marked by moments of deep dishonour, 'it may not be easily repaired for some time. The Treaty Principles Bill and Treaty review clause [discussed in chapter 5] could set back the foundational relationships of Aotearoa New Zealand for decades.[269]

These are just some of the examples put before us by claimant witnesses.

When Crown officials and claimants agree that the Crown's Treaty Principles Bill poses a significant risk of damage to the Māori–Crown relationship and threatens to exacerbate divisions in society rather than opening a conversation

266. In 2019, Ināia Tonu Nei – Hui Māori was held to discuss a Māori response to reforming the justice system in Aotearoa New Zealand. At Hui Māori, attendees called for (among other reforms) constitutional change 'to entrench Te Tiriti o Waitangi', and that the Crown 'power share' with Māori to ensure te Tiriti o Waitangi 'is given its full effect': see Ināia Tonu Nei, 'Hui Māori Report', July 2019, https://www.inaiatonunei.nz/resource-documents, pp 14, 25.

267. Document A7, p [12]

268. Transcript 4.1.6, p 190

269. Document A9, p 41

towards consensus, there is no avoiding the conclusion that the policy is having, and will continue to have, serious negative effects. We return to this point in our findings and in the discussion of prejudice in chapter 6.

4.7.3 Te ahunga o te Karauna e pā ana ki te whakaahu i te Pire

The Crown's approach to developing the Bill

In this section, we discuss the process issues posed by the Crown's Treaty Principles Bill policy, in particular the issue of consultation and engagement between the Crown and Māori Treaty partners on this crucial matter.

As set out in section 4.2, MOJ advised the Minister in December 2023 that the Bill risked generating division, undermining social cohesion and damaging the Māori–Crown relationship. There was also a risk that the Bill would replace a degree of certainty about the principles with uncertainty. Mitigation of these risks while still introducing the Bill 'as soon as practicable' (a requirement of the coalition agreement), depended on:

- 'targeted engagement with iwi and hapū' while policy advice was being developed on the Bill; and
- scope to adjust the description of the principles to align more closely with 'established law and the spirit and intent of the Treaty'.[270]

On the first of these two points, officials advised that developing a Bill that 'purports to settle the Treaty principles without working with the Treaty partner could be seen as one partner (the Crown) attempting to define what the Treaty means and the obligations it creates'. Meaningful engagement with iwi and hapū was essential, and failure to engage would 'be seen as failing to meet the obligation under the Treaty to act reasonably, honourably, and in good faith'. Officials also advised that a select committee hearing into the Bill would not be a sufficient alternative to meaningful engagement while the Bill was developed.[271]

This advice to the Minister about the need for early and meaningful engagement with the Crown's Treaty/te Tiriti partner was not produced in a vacuum. We set out in chapter 2 the official guidance provided for making policy and laws in the Legislation Design and Advisory Committee (LDAC) guidelines, Te Arawhiti guidelines, and the Cabinet manual. The LDAC guidelines of 2021, for example, which are referred to in the Minister's legislative bid, stated that the process of developing policy and legislation, 'as well as the final product, should show appropriate respect for the spirit and principles of the Treaty'. Two important ways to achieve this, and to act honourably and in good faith, were through (a) informed decision-making (which includes 'effective consultation'), and (b) 'active protection' of Māori 'rights and interests under the Treaty'.[272] We note here that these most basic standards outlined by the LDAC – informed decision-making, effective consultation, and active protection of Māori rights and interests – have been

270. Document A7, p [6]
271. Document A7, p [12]
272. Paper 6.2.10, p 28

absent from the policy so far. That is evident from the discussion in preceding sections. We discuss this further below and in our findings at the end of this chapter.

The LDAC guidelines also stated more generally that 'transparency and accountability are accepted norms and consultation is a standard part of most significant policy decisions'; that is, in all Government policy development and not just for the Treaty relationship.[273] The guidelines further stated that, in some contexts, the 'expectation may extend beyond consultation to include stakeholder involvement or collaboration in the decision-making process (for example, in the Treaty of Waitangi context)'.[274]

Te Arawhiti has advised departments and agencies to build the relationship with the Māori Treaty partner 'before focusing on the work', plan together from the beginning, value the partner's contributions and knowledge (which will hopefully be reciprocated), be open and flexible, and share decision-making.[275]

These various guidelines set out the expected norms for policy-making in the twenty-first century. They are based on:

- open government;
- best practice in policy making;
- many Treaty settlements across the country that provide for ongoing Treaty-based relationships with the Crown;
- decades' worth of court decisions and Tribunal reports which have explained the principle of partnership and what it entails;
- common law principles of consultation (for example, that those consulting must keep an open mind and be prepared to make changes); and
- many consultation rounds with Māori (and with the public) over policy and legislation in past decades as well as targeted engagement and co-design initiatives with the Iwi Chairs Forum and other Māori groups.

Following the December 2023 briefing, the Minister's legislative bid in February 2024 stated that the LDAC guidelines provided 'useful process and substantive guidance on addressing Māori interests that arise in the context of law-making'. These guidelines would therefore be 'considered through the policy development process'.[276] The Minister also stated that he expected that the Bill would be 'contentious' but that this could be partly mitigated by releasing an exposure draft of the Bill prior to its introduction to Parliament. The public would have input through the exposure draft and the select committee process.[277]

In the March 2024 briefing paper, MOJ officials advised Associate Minister Seymour that

- consultation during policy design was expected under Cabinet guidance and the LDAC guidelines, and policy issues of significance to Māori have

273. Paper 6.2.10, p 98
274. Paper 6.2.10, p 98
275. Paper 6.2.9, p 1
276. Document A7, p [2]
277. Document A7, pp [1]–[2]

required engagement with iwi and hapū and Māori organisations under these guidelines;
- an exposure draft 'serves a different purpose to consulting on the underlying policy';
- an exposure draft 'generally tests how the policy has been expressed in legislation', which focuses public responses on the drafting and how the Bill will operate rather than a 'broader constitutional conversation'; and
- failure to consult separately with Māori on 'the policy underlying the Bill' may be interpreted as a failure to act in good faith towards Māori and a breach of the Treaty/te Tiriti.[278]

In response to this advice, the Associate Minister confirmed that he intended to seek Cabinet approval to publish an exposure draft of the Bill, and that the Bill should be introduced to the House and proceed to select committee by the end of 2024. The Associate Minister also authorised MOJ to 'engage with constitutional experts during the development of the exposure draft'.[279] There is apparently some scope for the wording of the ACT principles to change during policy development after public consultation on the exposure draft,[280] but it is difficult to see whether much change could occur within the ambit of the coalition agreement, which requires a Bill 'based on existing ACT policy' to be introduced and progressed to select committee.

Prior to the Cabinet paper, therefore, the situation was that there would be no engagement at all with Māori in the development of the policy, the exposure draft, or the final Bill itself except as members of the public who can make submissions on an exposure draft or to the select committee. This approach is clearly inconsistent with the Crown's own standards for how it should exercise its kāwanatanga powers, as described above (and in chapter 2).

The claimants were extremely critical of the Crown's failure to carry out even the most basic engagement with them, let alone the degree of engagement commensurate with the importance of the issue and their status as Treaty partners (see section 4.6.1). Counsel for Ngāti Hine, for example, submitted:

> Māori have had no meaningful role, power or influence over the Crown's policies or actions and, given the direction towards implementing the coalition agreements, are unlikely to have any meaningful influence in the process ahead. That Māori are being limited and ringfenced from a constitutional conversation about te Tiriti, despite being the treaty partner, is inconsistent with te Tiriti.[281]

Doreen Puru stated in her evidence:

278. Document A7, p [22]
279. Document A7, p [16]; transcript 4.1.6, p 111
280. Document A7, p [18]
281. Submission 3.3.13, p 21

> What really, really makes us mad, is that this new government is trampling on the mana of all our tupuna who have gone before us. Who fought for all governments since the Treaty was formed, to Honor The Treaty. What of our mokopuna? What of the future for them? This world is unstable enough without sending them out to the world with no identity of their own. I truly fear this could be a reality if our Treaty is not upheld.
>
> This new draft treaty has no mana. There was no consultation with Māori. There were no nationwide hui to debate the topic of change. There was no chance for Māori to have a say. But what really makes me angry is, once again:
>
> *We have been ignored*. [Emphasis in original.][282]

Pita Tipene told us that Māori are extremely concerned about what appears to be a 'tsunami of change' which has, he said, a 'focus on undermining Māori and the inclusive approach that has been built over many generations and successive governments of different stripes'.[283] The unilateral development of the Treaty Principles Bill is one of the matters of grave concern. He stated:

> The Government's approach has the same thread woven throughout all of their legislative changes since they came into power, which is undermining Māori authority, and undermining the positive and proactive changes that have been progressive over many years now.
>
> The Government does not have a right to single handedly legislate on matters concerning us. The Government should not be able to do the things it is doing to Māori and use parliamentary process to do it.[284]

Although there has been no formal engagement with Māori over the Treaty Principles Bill policy, the depth of Māori opposition to the policy must be evident to the Crown. The MOJ and Te Arawhiti officials who appeared in this inquiry were certainly aware of it. The claimant evidence and submissions at the urgent hearing have made the position very clear, and officials have advised the Minister and Associate Minister that failure to engage with iwi and hapū and Māori organisations on the development of the policy would be contrary to the Crown's obligations to act honourably and in good faith, and would be a breach of the Treaty/te Tiriti.

Further, the claimants' position is that both Treaty partners must consent to defining the principles in legislation, and that both partners must consent to the content if agreement is reached that definition in legislation is necessary. Jessica Williams, whose claim is for her three Whangaroa hapū, stated in her evidence:

> I do not believe the coalition government has the right to make any changes to Te Tiriti principles. The government, as the Crown, and Māori are partners in this Te

282. Document A2, p 5
283. Document A11, p 5
284. Document A11, pp 5–6

> Tiriti relationship. Therefore, both parties have equal rights under Te Tiriti. If one party wants to change Te Tiriti principles, this would require the consent of both parties.
>
> My view is that the Crown should only engage with Māori over the TPB when Māori agree changes are required to Te Tiriti. Only then can effective kōrero between the parties occur. Since Māori have not agreed to any changes, the TPB should not be happening.
>
> As the Crown seem steadfast in progressing the TPB, I think requiring Māori to express their concerns, over an important *take* like Te Tiriti principles, through a submission to the Select Committee is wrong. Meaningful and genuine engagement with Māori is essential. As mentioned, an engagement process with Māori that is ultimately dictated by the Crown will not work . . .
>
> If the TPB makes it to Select Committee, I believe everything will be stacked against Māori interests. Māori will not be in a good position going into any Select Committee process. Māori wouldn't have a chance. Under this coalition government all the rules are off the table. What we know as the status quo no longer exists. [Italics in original.][285]

Many claimant witnesses agreed with these points.[286] Dr Harris cited the Tribunal's 2021 report on the Oranga Tamariki urgent inquiry, stating: 'The Tribunal recorded the importance of the principle of partnership, which requires that "neither partner could act in a manner that fundamentally affects the other's spheres of influence without their consent, unless there were exceptional circumstances."'[287]

Ms Coates told us that the Crown's Treaty Principles Bill policy amounted to 'one party to the treaty unilaterally amending the treaty in a manner that narrows and reads down Māori interests without the free, prior, and informed consent of Māori'. This was, she said, 'analogous to one party to a contract seeking to change the primary terms of the contract without consent'.[288]

4.7.4 Te pūtake me te tikanga o te Pire Mātāpono Tiriti

The rationale for and purpose of the Treaty Principles Bill

(1) *He Kupu Whakataki*

Introduction

One would expect, commensurate with the potential effects of the Bill on Māori identified above, to see robust policy justification and design for the Bill. We were surprised and disappointed therefore to find little other than the ACT policy to consider, as we discuss below.

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285. Document A20, pp 6–7

286. See doc A6, p 28; doc A14, p 3; doc A17, pp 2–3; doc A16, pp [7]–[9]; doc A11, p 4

287. Document A9, p 21; Waitangi Tribunal, *He Pāharakeke, He Rito: Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021), p 19

288. Document A6, p 28

(2) *Te tikanga o te Pire*

The purpose of the Bill

Mr Kibblewhite and Mr Chhana formally advised that the purpose of the proposed Bill is to define Treaty principles in statute.'[289] Associate Minister Seymour's responses to the March 2024 briefing confirmed his desire that the Bill's defined principles (if enacted) be used to assist with the statutory interpretation of Acts that refer directly to the principles of the Treaty of Waitangi (that is, Treaty clauses).

The ACT policy, quoted in section 1.4.1 of this report, noted that Parliament had 'created the "principles of the Treaty", so Parliament has the right and the duty to define what they are'.[290] We consider here whether the Crown's exercise of kāwanatanga for this purpose would be appropriate in the circumstances of this Bill. We are not of the view that the Treaty principles could never be defined by Parliament exercising kāwanatanga powers, provided Māori as the Treaty partner also wanted the Treaty principles to be defined in statute and a Treaty/te Tiriti compliant process was followed. However, in the case of the Treaty Principles Bill, Māori did not ask for the Treaty principles to be defined in legislation and the claimants before us were overwhelmingly opposed to the policy.

Furthermore, the Crown's approach to developing the Bill to date has been unilateral. Māori have not been invited to participate in decision–making concerning the Bill or even been consulted on the proposal. As outlined above, the Crown's proposed approach to developing the Bill and consultation is to release an exposure draft and invite submissions on the draft with a further opportunity for submissions at the select committee stage. The way the 'principles of the Treaty of Waitangi' are given effect in law is so significant that, in our view, it requires engagement and consent from Māori.

Moreover, as discussed in section 4.10.2, the 'principles' proposed to be used to define Treaty principles in statute do not accord with existing jurisprudence on the Treaty principles, or the historical circumstances or text and spirit of the Treaty/te Tiriti. The development of these 'principles' is not an exercise designed to better recognise or give fuller effect to the Treaty/te Tiriti or the rights of Māori and obligations of the Crown therein. In sum, the substance of the Bill and the process proposed by the Crown for its development mean that the Crown's attempt to define the Treaty principles in statute would be an abuse of its kāwanatanga powers.

Lastly, we note that, although we do not find that Parliament could never define Treaty principles in legislation – as long as it is done with Māori agreement and a Treaty/te Tiriti-compliant process is followed – successive governments over a period of nearly 50 years have not chosen to define the Treaty principles in statute. Instead, as noted in chapter 3, Parliament chose to leave the role of interpreting Treaty clauses and defining Treaty principles to the courts and the Tribunal. This

289. Document A23, p 11

290. Memorandum 2.5.27, p [3] (citing ACT Party, 'A Path from Co-government to Democracy' (2023))

approach enabled the Treaty principles to be defined in a way which allowed the Treaty/te Tiriti signed in 1840 to apply to modern circumstances in Aotearoa New Zealand. As Dr Harris stated, there has been 'flexibility that allows general principles to apply to circumstances as they arise'.[291] This was acknowledged in the LDAC guidelines of 2021, which stated:

> The Treaty is a living document. This refers to the common understanding that the meaning and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed.[292]

Although statutory definition may reflect the norms and values of society at the time of their enactment, principles defined in this way would prevent the courts and Tribunals from evolving their meaning as new circumstances develop, which has been the practice to date, and risks their ossification. In many ways, Parliament's approach to the Treaty principles has reflected the flexible character of Aotearoa New Zealand's unwritten constitution and underscores the constitutional significance of Treaty principles.

(3) *Ngā take o te kaupapa here*
The policy rationales

In this section, we analyse the policy rationales advanced for the Treaty Principles Bill; namely, certainty, equality, and a national conversation on Aotearoa New Zealand's constitution. We address each in turn.

(a) Kupu whakatutuki mārika
Certainty

In terms of identifying what the policy problem is that the policy was attempting to address, the MOJ witnesses referenced the coalition agreement between National and ACT noting that the agreement:

> included a commitment to 'Introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable.' The problem as described in the ACT policy document is that the Courts, the Waitangi Tribunal and the public service are increasingly referring to vague Treaty principles to justify actions that are contrary to other matters (such as equal rights for all citizens). The proposed solution is for Parliament to define the principles in statute to stop this from happening.[293]

In our view, this statement is misleading. A significant degree of certainty already exists regarding the content and application of the principles of the Treaty/

291. Document A9, p 32
292. Paper 6.2.10, p 29
293. Document A23, p 11

te Tiriti as found in the reports of the Tribunal, decisions of the courts, and in public sector policy guidance. This was clearly identified by Ms Coates, Emeritus Professor Kelsey, and Dr Harris in their evidence to this Tribunal.[294] MOJ officials in their advice to Minister Goldsmith dated 14 December 2023 similarly advised that 'there is already a degree of certainty about what the existing principles are and how they operate'.[295] Furthermore, the Treaty principles have been applied to many historical and contemporary contexts so it is not logical to argue they are vague and ill-defined.[296] These principles have also formed the basis of many Treaty settlements and Crown responses to Tribunal recommendations since the 1980s.

Indeed, officials warned Minister Goldsmith and Associate Minister Seymour about the potential uncertainty that could result from pursuing a Bill based on the ACT policy principles.[297] Similarly, Ms Coates stated that the Bill would create uncertainty by 'obliterat[ing] and replac[ing] 40 years of established jurisprudence', and require the courts and the Tribunal 'to start from scratch and grapple with a whole new set of "principles"' and 'initiate and necessitate extensive litigation across all areas where the treaty is relevant and/or mentioned in legislation'.[298]

Lastly, as noted by Dr Harris in his evidence, no argument has been given as to why certainty and clarity are supreme values that trump fidelity to the text or meaning of the Treaty/te Tiriti. He explained:

> To take an extreme example to make the point, a Bill saying, 'there will be no Treaty principles henceforth' would provide certainty and clarity – but may not be justified. It is not clear why certainty and clarity should take precedence over fidelity to the text and meaning of Te Tiriti o Waitangi. At present, a balance is also struck between certainty and clarity, on the one hand, and flexibility that allows general principles to apply to circumstances as they arise. Third, courts are unlikely to view the Treaty Principles Bill as exhausting the meaning of Treaty principles if the Bill does become an Act. Courts are likely to fit these principles into the broader framework of the law, meaning the Bill cannot achieve perfect predictability in the force to be given to the Treaty Principles.[299]

Indeed, we note that the imperative of 'certainty' has been wielded by the Crown in the past to expropriate Māori rights, including in the development of the deeply

294. Document A6, pp 23–24
295. Document A7, p [6]
296. Document A6, p 26
297. Document A7, p [8]
298. Document A6, p 24
299. Document A9, p 32

divisive Foreshore and Seabed Act 2004.[300] This Act removed the power of the courts to declare Māori property rights in the foreshore and seabed, effectively expropriating the rights themselves.[301] Notably, during the Bill's first reading, the Honourable Dr Michael Cullen, then Deputy Prime Minister, explained: 'This bill delivers four-square on our promise to protect public access and clarify ownership. It gives effect to the four principles we set out at the beginning of this exercise: access, regulation, protection, and certainty.'[302]

There are obvious parallels between the Tribunal's inquiry into the proposed Foreshore and Seabed legislation and this urgent inquiry into the Treaty Principles Bill and Treaty clause review. As noted above, the Treaty Principles Bill if enacted would likely replace or at least severely narrow the consideration of Māori rights and interests. We note that in reporting on the proposed Foreshore and Seabed policy, the Tribunal commented that the Government's legislative intervention was 'only justified if the uncertainty it responds to is of a very serious kind, with manifest negative effects'.[303] Further, the Tribunal stated the context demanded that, 'given the emphasis on the need for certainty, the policy justifies itself by delivering certainty'.[304] The Tribunal ultimately found that the policy was not strictly required to meet the exigencies of uncertainty and was no less uncertain for Māori than if the law was left to run its course.[305]

We similarly conclude that the problem of 'uncertainty' does not exist but would, as officials advised, be the consequence of enacting a Bill based on the proposed ACT policy. In fact, Mr Kibblewhite made this clear when he was asked: 'What is the policy problem that you would hope to identify which would need a Bill of this type?' He stated in response: 'I don't have a policy problem that would need a Bill of this type.'[306]

(b) Mana orite

Equality

Equality is another potential rationale advanced for the Bill. The ACT policy contends that the 'Treaty is a taonga for all New Zealanders' and that 'all New Zealanders have above all else the same rights and privileges as each other and

300. In 2002, the High Court in *Attorney-General v Ngati Apa* [2002] 2 NZLR 661 found that the Māori Land Court had jurisdiction to inquire into whether the foreshore – the area between high- and low-water marks – was Māori customary land (provided it had not been extinguished) but that the Crown owned the seabed below the low-water mark. On appeal, the Court of Appeal in *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 unanimously found that the Māori Land Court had jurisdiction to determine the status of both the foreshore and the seabed. Before this could happen, however, Parliament passed the Foreshore and Seabed Act 2004; see Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 42–43.

301. See Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 121

302. Michael Cullen, 6 May 2004, 'Foreshore and Seabed Bill — First Reading', *New Zealand Parliamentary Debates*, vol 617, p 12,720

303. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 96

304. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 96

305. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 124

306. Transcript 4.1.6, pp 112–113

that the government has a duty to protect those rights.'[307] If this position were stated separately from the proposed Bill, we would agree. However, Dr Harris in his evidence described this rationale as asserting 'that people are being treated differently because of who they are, and that clarifying the Treaty Principles [in a] Bill would address this.'[308] In his view, this claim seemed 'to be that the guarantee of tino rangatiratanga undermines equality'.[309]

The assertion that the equal rights of New Zealanders are not already protected without the Bill or are threatened by guarantees to Māori under the Treaty/te Tiriti is a fiction. For example, the Universal Declaration of Human Rights 1948 records in its preamble that the 'inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world'. Article 1 states that all persons are born free and equal in dignity and rights, while article 2 declares all people are entitled to all the rights and freedoms set out in the declaration. Other protections are provided for in the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), the International Covenant on Civil and Political Rights 1966 (ICCPR), the United Nations Convention on the Rights of the Child 1989, the United Nations Convention on the Elimination of Discrimination Against Women 1979 and many others – and provide mechanisms in some cases for hearing complaints where States act inconsistently with their terms.[310] The New Zealand Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 further protect the rights of citizens, giving domestic effect to these civil and political rights. Section 19 of the New Zealand Bill of Rights Act 1990, for example, recognises that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993. We note that the right to equality is reflected in the protections of the common law, including through the principles and doctrines of equity, property, and trust law. We note that the property rights of other New Zealanders are already protected by statutes such as the Land Act 1948, the Land Transfer Act 2017, the Property Law Act 2007, and the Trusts Act 2019.

Conversely, the Treaty Principles Bill policy is contrary to the fundamental rights and freedoms of Māori as indigenous peoples as it seeks to limit their right to self-determination, the development of their own institutions, policy, and laws within the parameters of the nation state. Yet at the international level, these rights and freedoms are protected or affirmed as declared in ICCPR, ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD), and UNDRIP. These instruments are attempts to address inequalities based upon race and/or indigenous status respectively. Measures designed to give effect to the ICERD are reflected in section 19(2) of the

307. Memorandum 2.5.27, p [3] (citing ACT Party, 'A Path from Co-government to Democracy' (2023))

308. Document A9, p 31

309. Document A9, p 31

310. Transcript 4.1.6, p 242. An example is the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women 1979.

New Zealand Bill of Rights Act 1990,[311] and parts 1A and 2 of the New Zealand Human Rights Act 1993. The Treaty principles of partnership, equity, good government, and redress reflect these ideals.

In sum, there are existing protections for the rights of New Zealanders in domestic and international law. This means that the Bill is not required to fill a vacuum of protection. Furthermore, as noted by Dr Harris, no argument has been given as to why a 'flattened-out conception of equality' should take priority over constitutional commitments contained in the Treaty/te Tiriti. As he noted, all 'constitutional democracies have foundational commitments; Te Tiriti o Waitangi, and tino rangatiratanga, is one such commitment in this country, which has also taken legal form.'[312]

(c) He kōrerorero a-motu mō te kaupapa ture nui o Aotearoa

A national conversation on Aotearoa New Zealand's constitution

MOJ officials advised Minister Goldsmith on an additional ACT rationale for the Bill in their 14 December 2023 briefing. The Treaty Principles Bill, it was claimed, would generate a national conversation about the place of the Treaty in our constitutional arrangements.[313] Having a conversation about the Treaty/te Tiriti is important. How it is facilitated is the issue. The problem with the Treaty Principles Bill is that it has been unilaterally instigated by a minor political party and then adopted as Crown policy. In adopting that policy, the Crown has agreed to circumscribe the parameters of that constitutional conversation without engaging its Treaty partner. This point was accepted by officials, who noted that

> the scope of the Bill is relatively small compared to the wider constitutional issues related to the Treaty and we think it is unlikely to facilitate the type of national conversation that will help address uncertainty and apprehension. We are concerned that there is a substantial risk the Bill could generate further division, which poses a threat to social cohesion and could undermine legitimacy and trust in institutions.[314]

Dr Harris similarly considered that the Bill was unlikely to facilitate a constitutional conversation. At hearing, he stated: 'This is a monologue not a conversation or at best, a conversation that is proceeding on the terms of one party, and in my view, this is to use a sledgehammer to crack a nut, this is to crash start a constitutional conversation in a way that could cause massive social disruption.'[315]

Officials offered to provide further advice to Minister Goldsmith on ways to broaden engagement.[316] They noted many Māori (and, we add, the Crown) were already engaged in debating constitutional issues through the Constitutional

311. Document A9, p 31
312. Document A9, p 32
313. Document A7, p [10]
314. Document A7, p [10]
315. Transcript 4.1.6, p 231
316. Document A7, p [10]

Kaupapa Inquiry process of the Waitangi Tribunal.[317] However, their advice indicates they saw broader engagement could be considered as an alternative to the Treaty Principles Bill.[318]

We would suggest that if that were to happen in advance of the completion of this Tribunal's constitutional inquiry, those conversations should be independently facilitated by reference to the recommendations in the *Matike Mai* report and the report of the Constitutional Advisory Panel discussed in chapter 2. Such an approach is more likely to generate conversations that appreciate the constitutional status of the Treaty/te Tiriti and the differences between the kāwanatanga and rangatiratanga spheres and how they should be mediated.

4.8 Ngā Whakakitenga mō te Pire Mātāpono Tiriti o te Karauna

Findings On The Crown's Treaty Principles Bill policy

4.8.1 Ngā whakakitenga mō ngā wāwāhinga ture Tiriti o Waitangi

Findings of breach

As noted above, the coalition agreements between National and ACT (and National and New Zealand First) were endorsed by Cabinet on 28 November 2023 as the basis on which the coalition Government would operate. Mr Kibblewhite and Mr Chhana advised that Ministers and chief executives are expected to be familiar with the agreements and ensure there are processes in place to implement them.[319] That is because on 25 March 2024, a Cabinet circular was issued with guidance on the consultation and operating arrangements agreed to by the coalition government. It stipulated that all 'Ministers, Parliamentary Under-Secretaries, chief executives, and their respective offices need to be familiar with the two [coalition] agreements and ensure that they have processes in place to implement them.'[320]

The Treaty Principles Bill is now Crown policy. Mr Chhana made it clear that officials must act on the notion that the Treaty Principles Bill will be progressed through all its Parliamentary stages to enactment, despite what the leader of the National Party has stated about it not being supported past select committee.[321] The requirements of the Cabinet circular and the fact that officials must work to assist the Crown to implement the Treaty Principles Bill seems to conflict with officials' responsibilities under section 14 of the Public Service Act 2020. Headed 'Crown's relationships with Māori' section 14(1) states that the 'role of the public service includes supporting the Crown in its relationships with Māori under the Treaty of Waitangi (te Tiriti o Waitangi).'

Māori–Crown relationships under the Treaty of Waitangi/te Tiriti o Waitangi are not being supported. That is because the Crown has agreed to progress the Treaty Principles Bill policy knowing that it seeks to reduce the constitutional

317. Document A7, p [10]
318. Document A7, p [10]
319. Document A23, p 12
320. Paper 6.2.6, p 2
321. Transcript 4.1.6, p 169

status of the Treaty/te Tiriti, remove its effect in law as currently recognised in Treaty clauses, limit Māori rights and Crown obligations, and hinder Māori access to justice.

Yet the evidence before us indicates the Treaty Principles Bill is not necessary to solve any problem; there is no policy imperative that justifies it; it is 'novel' in its Treaty interpretations; it is fashioned upon a disingenuous historical narrative; and its policy rationales are unsustainable. Logically that means it is little more than a politically motivated attack on perceived 'Māori privilege' without any consideration of the Crown's constitutional and Treaty/te Tiriti obligations to Māori. Multiple witnesses, including the Crown witnesses, told us that the ACT 'principles' proposed for the Bill do not reflect what was agreed to in 1840 by the Crown and Māori. For example, when asked whether the text of a 'Treaty Principles Bill as it is reflected in the ACT policy document' was, in his opinion as the lead policy manager for Te Arawhiti, consistent with the Crown's obligations under the Treaty of Waitangi, Mr Fraser paused and said 'No.'[322]

Thus, the Crown has agreed to a proposal that will unilaterally redefine the manner in which the constitutional status of the Treaty/te Tiriti is applied in law, and it does so in favour of a distortion of the Treaty/te Tiriti and its two texts. We agree with the claimants and interested parties that the pursuit of the policy is an unbridled exercise of kāwanatanga power. In the words of Ms Coates, this 'legally sanctioned falsehood will undermine this Kawenata tapu and the constitutional bones of our country, based on a political agenda of a minor party.'[323] The policy elevates the kāwanatanga sphere so that it becomes the singular authority in Aotearoa New Zealand, asserting the Crown as an unfettered sovereign authority unencumbered by current Treaty/te Tiriti obligations and duties.[324] Ms Coates pointed out that in doing so the policy seeks to unilaterally strip Māori of their authority and many article 2 protections, limiting their Treaty/te Tiriti rights to nothing more than individual property rights.[325] It would also limit their self-government models, recognised by statute, and discussed in chapter 2. That is because their ability to pursue their self-determination, exercise their rangatiratanga and determine their own political, social, and cultural development options will be hindered. As Dr Harris highlighted, the Bill in its current form:

> extinguishes the tino rangatiratanga for Māori that is the basis for Māori interests to be expressed. It takes a literal translation, omitting context, to claim disingenuously that Te Tiriti o Waitangi protected the chieftainship of all New Zealanders. The absurdity of that claim is almost evident as soon as it is expressed in words. Multiple qualified historians have publicly acknowledged that tino rangatiratanga under article

322. Transcript 4.1.6, pp 47–48
323. Document A6, p 29
324. Document A6, p 25
325. Document A6, p 25

2 of Te Tiriti o Waitangi was a guarantee of Māori rights, with contextual indicators confirming this interpretation.[326]

To reiterate, the rights of all New Zealanders and equality before the law are protected by a combination of domestic statutes, the common law, and international instruments. Yet by engaging with this policy the Crown is sanctioning a process that will take away indigenous rights and reduce the Crown's Treaty/te Tiriti obligations across the statutory landscape. It has adopted a policy that is contrary to fundamental human and indigenous rights and international law, including ICERD and UNDRIP.[327] It is subjugating the Māori–Crown relationship with little regard to the normative value of the Treaty/te Tiriti in our constitutional framework. It is an attempt to utilise Parliament's law-making authority to alter Aotearoa New Zealand's constitutional foundation predicated upon a legal fiction and an attempt to oust the judiciary.[328] There may be limits on Parliamentary sovereignty which could be reviewable by the courts.[329]

For ourselves, our jurisdiction limits us to making findings relating to the principles of the Treaty/te Tiriti.

As canvassed in chapters 2 and 3 the Treaty/te Tiriti created a foundational relationship for this country founded on a partnership between Māori and the Crown and equality between the tino rangatiratanga and kāwanatanga spheres. The proposed Bill and the Crown's agreement to pursue it belies the existence of this partnership. Despite the constitutional significance of the Bill's proposal to amend the Treaty principles and its importance to Māori, the Crown agreed to pursue the policy without any engagement or discussion with Māori. Māori did not want this policy and in fact many have been strongly opposed to it from the beginning. This is a clear failure of the principle of partnership, including the obligations of good faith and reciprocity. It is also a failure of the Crown to respect the tino rangatiratanga of Māori.

In proceeding with this Bill, we agree with the submissions and evidence presented to us that the Crown also risks undermining its own legitimacy, as it is on the granting of kāwanatanga by rangatira who signed the Treaty/te Tiriti, that its legitimacy rests. This is a clear breach of the Treaty principle of partnership and reciprocity. Any changes that impact either the Treaty/te Tiriti itself or the Treaty/te Tiriti relationship *must* be decided by both parties to that agreement.

The evidence provided to us by the Crown was clear that no consultation with Māori had taken place in the development of the Treaty Principles Bill policy. This is inconsistent with the Crown's own advice on engagement with Māori, developed by Te Arawhiti and endorsed by Cabinet. According to that guidance, on matters of significance to Māori the Crown is required to co-design with Māori or empower them to implement their own solutions. Either of these options is

326. Document A9, p 37
327. Document A15(d), pp 2–3
328. Document A19, pp 9–11
329. See doc A19, pp 9–10

consistent with the exercise of tino rangatiratanga as long as they are options that Māori want. Failure to consult at all – not even at the 'inform' end of the engagement framework developed by Te Arawhiti – is a failure of the Crown's duty to consult, which arises from the principle of partnership. We agree with claimant counsel that on matters of such constitutional significance, the Crown *must* consult with Māori to obtain their free, prior, and informed consent before policy proposals are developed, not after. It follows that an opportunity to make submissions on an exposure draft or at select committee would fall well short of the Crown's obligations under the principle of partnership.

When questioned, Crown witnesses could provide no evidence of a policy problem to which this Bill was a solution – indeed, the Secretary for Justice said exactly that: 'I don't have a policy problem that would need a Bill of this type.'[330] As we have shown in the previous sections, the source of this policy was ACT policy, endorsed by just 8.64 per cent of the electorate. It was then enshrined in a coalition agreement with National that was later endorsed by Cabinet. The problem constructed by ACT was (as set out in section 4.7.4(3)) to address issues of certainty and equality. The Bill is therefore a solution to a problem that does not exist. It is being pursued in the face of clear advice from officials that it will breach the Crown's Treaty/te Tiriti obligations, damage the Māori–Crown relationship, and risk undermining social cohesion. We find that this is a breach of the duty to act reasonably and in good faith, and the duty to make informed decisions.

Further, for the Crown to entertain 'principles' that contain inaccurate representations of the text and spirit of the Treaty/te Tiriti and warped interpretations of te reo Māori from te Tiriti o Waitangi is also in breach of the duty to act in good faith and to act reasonably. Ministers' failures to inform themselves of the existing jurisprudence on the Treaty principles and to claim uncertainty where there is none represents a failure to be adequately informed.

The Bill, if enacted in its current form based on ACT policy, would unsettle the constitutional dynamic between the Crown and Māori – between kāwanatanga and tino rangatiratanga – by unilaterally asserting the Crown's dominance and undermining the guarantee of tino rangatiratanga. This would represent an unbridled exercise of parliamentary sovereignty, in breach of the principle of partnership.

The Crown has a positive obligation to take steps to actively protect Māori interests. In its current form, the Bill proposes to replace existing Treaty principles with 'principles' which replace the Crown's guarantee of tino rangatiratanga to Māori with a diluted acknowledgement of the private property rights of all New Zealanders. In effect, the Bill if enacted based on ACT policy would be inconsistent with the principle of active protection.

This is because the Crown is obliged to protect both tino rangatiratanga and taonga as guaranteed in article 2 of the Treaty/te Tiriti. It therefore has a duty to protect Māori in the exercise of their tino rangatiratanga. As we have indicated above, Māori have clearly and repeatedly rejected this Bill and its attempts to

330. Transcript 4.1.6, pp 112–113

re-define tino rangatiratanga as relating to 'all New Zealanders'. As Crown officials noted in their advice, the interpretation in the ACT 'principles' 'differs significantly from current understandings within the Crown, Courts, and Waitangi Tribunal.'[331] Moreover, tino rangatiratanga is an exercise of a collective right, analogous to the human rights concept of self-determination – it is not reducible to individual property rights. For the Crown to unilaterally attempt to redefine tino rangatiratanga in this way – against current understandings that the term is sourced in te ao Māori and accepted in legal and constitutional norms – is a violation of the principle of active protection.

The principle of active protection extends to the Treaty/te Tiriti itself. While the Associate Minister indicated that the Bill will not alter the Treaty/te Tiriti, it would in effect rewrite the Treaty/te Tiriti and drastically alter its meaning, even if the words on the Tiriti sheets in the National Library do not change. A Bill based on existing ACT policy would also render the effect of the Treaty/te Tiriti in law nugatory. The Treaty/te Tiriti was frequently described to us as a taonga and a kawenata tapu (a sacred compact) indicating its enduring significance to Māori. The expert evidence of Mr Sadler, Professor Mutu, and Mr Munro was that the te reo Māori proposed in the Treaty Principles Bill is 'co-opted and twisted',[332] 'cherry-picked and mistranslated',[333] and is an 'ultimate violation of the mana and reo of Māori'.[334] From the evidence we received, it seems clear that no-one with te reo Māori proficiency was involved in rendering the English terms into te reo Māori in the proposed 'principles'. Had the Crown consulted Māori before adopting the policy, this potential violation of the Treaty/te Tiriti would have been avoided.

We return to the words of the Wai 262 Tribunal regarding the imperatives of good governance. That Tribunal noted it 'is unarguable that the right to govern should be exercised wisely so as to produce well-designed policy which is implemented efficiently to minimise the cost to the taxpayer'.[335] In our view, it cannot be said that the Crown has met these imperatives in its actions in adopting the Treaty Principles Bill. In our analysis, we have found that the Bill is being pursued despite lacking a legitimate policy problem justifying its development. If the Bill were merely supported only to select committee to fulfil the National and ACT coalition agreement, very real questions would need to be asked regarding whether this policy was well-designed and an efficient use of precious public resources. Further, the Māori–Crown relationship will be damaged, possibly undoing years of progress in restoring the relationship through Treaty settlements and other measures, even if the Bill is only supported to the select committee stage. If it is enacted, a revolutionary constitutional change will be the result. As the Treaty/te Tiriti is the founding document of government in Aotearoa New Zealand, the Crown's own legitimacy to govern will be undermined.

331. Document A7, p [8]
332. Document A3(a), p 6
333. Document A14, p 4
334. Document A3(a), p 6
335. Waitangi Tribunal, *Ko Aotearoa Tēnei*, *Te Taumata Tuatahi*, p 163

We conclude the Treaty Principles Bill policy is poorly designed, not informed by consultation with Māori, not justified by robust policy analysis, and risks destroying the very foundation of the constitutional arrangements of this country. Such effects are inconsistent with the principle of good government. Finally, for the reasons outlined in section 4.7.1(5), the Bill, if enacted based on ACT policy, would limit the ability of Māori to access justice before the Tribunal and before the courts. That is because it will require the Tribunal and the courts to interpret Treaty principles in accordance with the policy of the Bill, a historical and legal fiction. Such a result is inconsistent with the principles of redress and equity.

A further potential consequence relates to the Treaty settlement process – a process set up to provide redress for historical breaches of the Treaty/te Tiriti. Given that the Crown's acknowledgements relate to breaches of the principles of the Treaty/te Tiriti, the proposed Bill may limit the Crown's ability to make future acknowledgements and provide redress for its past actions. It may also impact current settlements, as it will reduce the impact of statutory acknowledgements and relationship agreements with both central and local government. As the proposed Bill could weaken the Crown's ability to address significant past injustices, it would likely impact this process of settlement aimed at restoring the honour of the Crown and repairing the Māori–Crown relationship. This would represent a breach of the principle of equity, as well as the principle of redress, and compound the injustice of past breaches by the Crown of the Treaty/te Tiriti.

Therefore, for all the reasons given above we find that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of partnership and reciprocity, active protection, good government, equity, and redress, and contrary to the article 2 guarantee of rangatiratanga. It is also in breach of the Crown's duty to act honourably and with the utmost good faith, and its duty of active protection of the Treaty/te Tiriti guarantee of rangatiratanga. It is a policy being pursued without proper consultation or engagement with Māori.

4.8.2 Ngā whakakitenga o te whakahāweatanga

Findings of prejudice

In respect of the prejudicial impacts of the above Treaty breaches, we find that the prejudice is extremely serious.

On this issue, the Crown submitted:

> The Crown has considered the evidence and submissions of claimants and interested parties in this inquiry and acknowledges that there is significant concern about the proposed Bill and the Review. The Crown has not challenged the evidence of tangata whenua witnesses as to the prejudice which has arisen as a result of these issues. The Crown has attempted to assist the Tribunal through the evidence it has

put forward from senior officials by seeking to update and respond to the Tribunal on progress with the policy proposals, and through these submissions.[336]

Thus, the Crown has not challenged the evidence as to prejudice, and indeed the advice of senior MOJ officials to Ministers has identified significant potential prejudice, which must already be evident from the preceding discussion and findings.

(1) *Ngā whakaaweawenga ki te whānaungatanga i waenganui i te Karauna me te iwi Māori*

Impacts on the Māori–Crown relationship

The Crown's Treaty Principles Bill policy has already harmed the Māori–Crown relationship established by the Treaty/te Tiriti, whether the Bill proceeds beyond select committee or not, and this prejudicial impact will only continue to grow the longer the policy continues to exist. The evidence is clear on this point. Ms Coates, for example, stated that 'the introduction of such a Bill undermines the Crown Māori relationship' and 'undermines and erodes the trust and faith . . . built up in the honour of the Crown'.[337] Many claimant witnesses referred to how the policy has damaged the relationship and will damage it further to the detriment of both partners. Also, senior MOJ officials advised the Minister in December 2023 that the Bill could generate division and posed a 'significant risk to the Māori–Crown relationship'.[338] This risk is not limited to the particular policy at issue but will have flow-on effects across all the areas of the Māori–Crown interface, prejudicing Māori and damaging the Treaty partnership.

(2) *Ngā whakaaweawenga o te whānaungatanga pāpori*

Impacts on social cohesion

The Crown's Treaty Principles Bill policy will foster division and damage social cohesion, with significant prejudicial impacts on Māori (and on society).

Introducing a Bill based on ACT policy and sending it to a select committee process would force Māori to expend their limited resources of time and money, and subject them to harm and ridicule. Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted that, even if the Bill were not enacted, it 'will have caused great emotional harm to Māori and fostered a toxic environment in which hostile, anti-Tiriti and anti-Māori views are legitimised, even normalised'.[339] The claimant witnesses saw the threat very clearly. Emeritus Professor Kelsey, for example, argued that 'this Bill is going to be a fundamental part of fomenting those further divisions and that to me is the prejudice whether this goes through this Select Committee or not'.[340] She referred to previous periods of unrest in Aotearoa

336. Submission 3.3.23, pp 14–15
337. Transcript 4.1.6, p 190; submission 3.3.13, p 3; see also submission 3.3.15, p 9; submission 3.3.20, p 17
338. Document A7, pp [6], [10]
339. Submission 3.3.21, p 29
340. Transcript 4.1.6, p 253

New Zealand's history, such as the Springbok Tour of 1981, commenting: 'that's what really worries me that we as a country may live through those times again'.[341] Addressing the risk of social unrest and constitutional crisis, she stated that 'it's not going to be something that can be put back into the box'.[342]

The risk of fomenting social division was also highlighted by senior MOJ officials in their briefing to the Minister of Justice. As noted above in section 4.10.2, they advised of a 'significant risk that the Bill could generate division that undermines social cohesion'.[343] They added that there was a 'substantial risk the Bill could generate further division, which poses a threat to social cohesion and could undermine legitimacy and trust in institutions'.[344] As we stated earlier in the chapter, this advice from the Ministry responsible for administering the justice system is extremely serious. Māori will suffer the impacts of division and social disorder, bearing the brunt of blame for it.

A responsible Crown should take heed of these warnings as to the prejudicial impacts of its policy and seek consensus, not division and disorder.

(3) *Ngā whakaaweawenga ki te kāwhaki i te whakakoretanga mai o te mōtika nō te Tiriti me ngā herenga o te Karauna*

Impacts of removing Treaty rights and Crown obligations

The Bill, if enacted based on existing ACT policy, would remove Crown obligations under the existing Treaty principles, and remove Treaty/te Tiriti guarantees, rights, and protections for Māori at law, replacing them with statements about the rights of the Crown and all New Zealanders. The detail of this, including the analysis of ACT's principles 1 to 3, has already been explained in earlier sections. Just the threat of wiping out their Treaty/te Tiriti rights in this manner, without even talking to them about it, made the claimants feel like second-class citizens in their own country.[345]

The seriousness of these prejudicial impacts for Māori cannot be overstated. If enacted, the Bill will completely change the meaning and effect of every Treaty clause in legislation (at least 36 Acts not including Treaty settlements) in a manner that is highly prejudicial to all Māori. Section 8 of the RMA, for example, would have to be interpreted to protect the rights of property developers rather than the interests of Māori. This change to the legal effect of the Treaty/te Tiriti will extend beyond statutory regimes to all policy development, again in a manner that will be entirely prejudicial to Māori. The courts and the Tribunal would also need to apply the new principles which would result in injustice to Māori, as we explained above.

While Māori communities would still be able to exercise their tino rangatiratanga, which predated the Treaty/te Tiriti and was guaranteed and not created by

341. Transcript 4.1.6, p 254
342. Transcript 4.1.6, p 257
343. Document A7, p [6]
344. Document A7, p [10]
345. Document A17, pp 4–5

it, their ability to have that rangatiratanga respected or given force will be lessened to their significant prejudice, where formerly the Treaty partnership and references to the principles of the Treaty in law should have empowered it.

(4) *Ngā whakaaweawenga mo te pōkaku o te ture*
Impacts of uncertainty in the law

The claimants' evidence and the advice of senior MOJ officials to the Minister was in broad agreement that one of the prejudicial impacts of the Bill, if enacted, would be the creation of uncertainty in the law as the longstanding existing principles are replaced with new principles. This in turn would entail enormous costs of time and expense for Māori in litigation.

(5) *Ngā whakaaweawenga e pā ana ki ngā whakataunga Tiriti a tōna wā*
Impacts in respect of future Treaty settlements

As we have already found, the Bill (if enacted based on existing ACT policy) would likely affect the ability of the Crown to negotiate future Treaty settlements due to its inability to make the kinds of breach concessions which underlie the redress and apologies made in previous settlements. Crown and claimant evidence agreed on this point. The Treaty settlement process is the principal mechanism by which the Crown has acknowledged its historical wrongdoing in breach of the principles of the Treaty of Waitangi/te Tiriti o Waitangi and thereby started to restore its relationships with Māori. This Bill signifies a complete U-turn by undermining the principal reason for such settlements. For future negotiations, the basis for achieving settlement will rest upon the legal fictions created by the Bill. Claimant groups who have not yet entered into settlement negotiations or whose negotiations have not yet been completed at the time of enactment would suffer significant prejudice.

(6) *Ngā whakaaweawenga o te kaupapa ture*
Constitutional impacts

The Bill, if enacted based on existing ACT policy, would have a profound impact on the mana of the Treaty/te Tiriti o Waitangi and its constitutional status. Although the Te Tiriti sheets in the National Library will not be changed, the words and spirit of the Treaty/te Tiriti will be stated in law to be something that they are not, thereby disturbing the constitutional foundation of this country and the legitimacy of the Crown (see section 4.7.1 and our findings of breach above). This would have serious prejudicial effects on the Māori Treaty partner, including Ngāpuhi who consider themselves the guardians of te Tiriti o Waitangi.[346]

Our findings about the combined prejudicial impact of the Bill policy and the Treaty clause review are stated in the next chapter.

346. See doc A17, p 1

UPOKO 5
Chapter 5

TE AROTAKENGA I TE WHAKARITENGA E PĀ ANA KI TE TIRITI
The Treaty Clause Review

5.1 He Kupu Whakataki
Introduction

In this chapter, we discuss the claims in respect of the Crown's Treaty clause review policy. References to the principles of the Treaty have been inserted in legislation since 1975, and can be either general or specific in nature. In brief, the Treaty clauses require the Crown or other decision makers such as local government to give effect to, honour, take appropriate account of, or act consistently with the principles of the Treaty/te Tiriti in a statutory regime. Section 4 of the Crown Minerals Act 1991, for example, states: 'All persons exercising functions or powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).' At the time the coalition Government took office, there were about 40 Acts which contained these clauses.[1]

The policy to review all Treaty clauses originated from the coalition agreement between National and New Zealand First, which was signed by the two party leaders on 24 November 2023. It states that the 'Coalition Government will reverse measures taken in recent years which have eroded the principle of equal citizenship' by agreeing, among other measures, to

> conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi' and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references.[2]

We refer to this policy as the 'Treaty clause review'.

On 28 November 2023, Cabinet endorsed this coalition agreement (and the coalition agreement between National and ACT) as the basis on which the coalition Government would operate.[3] As we noted in previous chapters, a Cabinet circular was issued on 25 March 2024 with guidance on the consultation and operating arrangements agreed to by the coalition Government. It stipulated that all

1. Document A22(c), p 6
2. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10
3. Paper 6.2.6, p 1

'Ministers, Parliamentary Under-Secretaries, chief executives, and their respective offices need to be familiar with the two [coalition] agreements and ensure that they have processes in place to implement them'.[4]

The terms of the coalition agreement as mandated by this Cabinet circular set the rationale, purpose, and broad outcomes of the Treaty clause review as Crown policy. The Crown submitted that this gives rise to a 'potential tension' because the Government must carry out the commitments in the coalition agreement and pursue the 'policies which are at [the] core of Government formation' but, once Ministers were sworn in and the Government was formed, Ministers became responsible for 'the application of the Treaty to those policies'.[5] In the Crown's view, therefore, the 'Tribunal's analysis may be directed to addressing how Government might pursue the policies to which it has committed in a Treaty-consistent manner'.[6]

The claimants, however, argued that Māori opposed the review and did not agree that the review was in and of itself Treaty-consistent. Counsel for Wai 682, for example, submitted:

> The claimants do not accept the Crown's position and say the Crown's policies are not Treaty-compliant and cannot be progressed in a Treaty-compliant way. The Crown's policies have been agreed and developed within the confines of the kāwana, and in ways which are fundamentally at odds with te Tiriti.
>
> To attempt to reroute the policies in a more Treaty-compliant way does not change the purpose, policy directives or te Tiriti breaches which continue to sit behind the Crown's policies. The Crown makes this clear where it reiterates its commitment to the coalition agreements and its intention to implement them.[7]

The Crown and claimants agreed that the principle of partnership is relevant to the Treaty clause review and that consultation is required but otherwise disagreed. It is therefore necessary to engage in detail with the purpose, rationale, and desired outcomes of the review and with the Crown's proposal for the future process and governance of the review (the latter is contained in the 23 May 2024 briefing to the Minister of Justice and the Minister's decisions on 28 May 2024).

We begin this chapter by summarising what has currently been decided and what is proposed about the review. We do so by examining the contents of the 4 December 2023 Te Arawhiti briefing and the 23 May 2024 Ministry of Justice (MOJ) briefing. We then set out a brief account of the parties' arguments and identify the key issues for analysis in this chapter. We discuss these issues in detail before drawing conclusions and making Treaty/te Tiriti findings in the final section of this chapter. Next, having made findings on both policies individually (in chapter 4 and in this chapter), we then make findings on the joint review and

4. Paper 6.2.6, p 2
5. Submission 3.3.23, p 14
6. Submission 3.3.23, p 14
7. Submission 3.3.26, p 4

Treaty Principles Bill policies and their combined impacts, followed by our recommendations to the Crown for the removal of prejudice.

5.2 Kaupapa Here mō te Arotakenga i te Whakaritenga e Pā Ana ki te Tiriti

The Treaty Clause Review Policy

5.2.1 Te hui whakamōhio o te 4 o Tihema 2023

The 4 December 2023 briefing

The Treaty clause review is a separate workstream from the Treaty Principles Bill. It was initially led by Te Arawhiti – The Office for Māori Crown Relations. The Ministers responsible for Te Arawhiti are the Honourable Tama Potaka and the Honourable Paul Goldsmith. The former is responsible as the Minister for Māori Crown Relations and the latter is responsible as the Minister for Treaty of Waitangi Negotiations.

On 4 December 2023, Te Arawhiti provided a briefing to their two Ministers regarding the Treaty clause review.[8] Te Arawhiti provided the briefing 'proactively' on the assumption Ministers Potaka and Goldsmith would 'have portfolio interests in, and potentially responsibility for, the review'.[9] Te Arawhiti took this step, in part due to its role as Chair of the Treaty Provisions Oversight Group (TPOG).[10]

The briefing paper, described as an 'initial analysis' only, suggested potential parameters for a Treaty clause review. The briefing was a stocktake, identifying 40 Acts and 5 Bills that included references to the Treaty principles (excluding settlement legislation and secondary legislation).[11] A further 22 Acts with references to the Treaty of Waitangi (and/or te Tiriti o Waitangi) were identified.[12] Officials noted that their analysis was undertaken using the New Zealand Legislation website. The appendices used resources produced by TPOG and the Parliamentary Counsel Office (PCO).[13] The figures were to be treated as approximate until further checks and consultation with PCO could be undertaken.[14]

Of those 40 references, the briefing paper stated 21 were part of 'operative' Treaty clauses, 15 were part of 'descriptive' or 'specific' Treaty clauses, and four related to 'other measures such as requirements to build capability' (we discuss the meaning of these designations below).[15]

The briefing described how Treaty principles have been incorporated into legislation over time beginning with the Treaty of Waitangi Act 1975. It categorised them as:

8. Document A22(a)
9. Document A22, p 3
10. Document A22, p 3
11. Document A22(a), p 2, apps A, B
12. Document A22(a), p 24
13. Document A22(a), p 2
14. Document A22(a), p 2
15. Document A22(a), p 2

- Operative references creating positive obligations on decision makers to give effect to the principles of the Treaty. Examples include 'nothing in this Act shall permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi' or decision makers must 'take into account the principles' or 'have regard to' or 'give effect to' the principles (such as section 4 of the Conservation Act 1987).[16]
- Descriptive references which describe or enumerate how the Crown's Treaty responsibilities are given effect to in the Act (for example, section 4 of the Data and Statistics Act 2022 and see also section 3A of the Climate Change Response Act 2002).[17]
- Other references used in capability requirements (for example, section 12 of Taumata Arowai – the Water Services Regulator Act 2020, which requires members appointed to Taumata Arowai to have knowledge of the Treaty/te Tiriti and its principles).[18]

With respect to operative Treaty clauses, officials noted that the impact of the review would be significant and would involve working with several different administering agencies, and their Ministers, 'to determine the practical application and relevance of the Treaty in the context of their specific legislation'.[19]

For descriptive Treaty clauses, officials noted that these already have 'specific words relating to the relevance and application of the Treaty' and therefore they could be deemed out of scope.[20] Alternatively, their review could be done without significantly altering the intent of the legislation.[21] There was no specific comment made regarding other Treaty clauses but presumably the same approach as that described for operative or descriptive clauses could apply.

Officials recommended that the Ministers:

- note the information in the briefing and attached appendices to support discussion about the coalition agreement commitment pertaining to Treaty Principles in legislation; and
- direct Te Arawhiti to provide further advice on options to progress this work.[22]

The briefing paper referred to TPOG being chaired by Te Arawhiti. It comprises officials from Te Puni Kōkiri, PCO, MOJ, the Department of the Prime Minister and Cabinet (DPMC), and the Crown Law Office.[23]

The Minister for Treaty of Waitangi Negotiations, Minister Goldsmith, agreed to the recommendations contained in the December 2023 briefing on 18 February

16. Document A22(a), p 3; app A, p [1]; app B, p 17
17. Document A22(a), p 3; app A, p [1]; app B, pp 8–9, 20
18. Document A22(a), pp 3–4; app A, p [1]; app B, p 18
19. Document A22(a), p 4
20. Document A22(a), p 4
21. Document A22(a), p 4
22. Document A22(a), p 5
23. Document A22(a), p [49]

2024.[24] The Minister for Māori Crown Relations, Minister Potaka considered but did not sign the briefing.[25]

5.2.2 I muri i te hui whakamōhio o te 4 o Tihema 2023

Post 4 December 2023 briefing

Lilian (Lil) Anderson, Tumu Whakarae – Chief Executive of Te Arawhiti, and Warren Fraser, Deputy Chief Executive, Strategy Policy and Legal, of Te Arawhiti, provided evidence to this inquiry regarding the work of Te Arawhiti on the Treaty clause review.

Ms Anderson explained that Te Arawhiti commenced a stocktake of Treaty clause references in legislation under the then Labour government as part of its TPOG mandate.[26] Mr Fraser said Te Arawhiti sought to provide this information to Ministers to elicit guidance on the potential scope and objectives of a review, and to inform Ministers of the potential scale of this work.[27]

Te Arawhiti began developing its thinking on how a coalition agreement review programme could proceed, in line with the recommendation in the 4 December 2023 briefing paper.[28] In weekly reports to the Minister for Treaty of Waitangi Negotiations and the Minister for Māori Crown Relations (dated 28 March 2024 and 1–5 April 2024, respectively), officials identified a number of matters relevant to the progression of the review including meeting with TPOG.[29]

On 28 March 2024, in a weekly briefing to Minister Goldsmith, Te Arawhiti highlighted 'key matters' relevant to how the Treaty clause review might proceed, which had been discussed with TPOG. Namely:

a. confirming the scope of the review (our December 2023 advice noted 40 Acts and five Bills referencing the Treaty principles);
b. understanding whether Ministers see particular provisions as priorities for review;
c. how to balance portfolio agency responsibility for their legislation against maintaining a consistent approach across the review;
d. managing engagement with Māori; and
e. the interaction between the review work and that relating to the separate Treaty Principles Bill sponsored by the Associate Minister of Justice.[30]

Te Arawhiti repeated these 'key matters' communicated to Minister Goldsmith in its weekly briefing to Minister Potaka for the week 1 to 5 April 2024.[31] The briefing also noted Pou Tikanga of the National Iwi Chairs Forum had expressed an

24. Document A22, p 3
25. Document A22, p 3
26. Transcript 4.1.6, p 50
27. Transcript 4.1.6, pp 64–65
28. Document A22, p 4
29. Document A22, p 4; doc A22(b), p 4
30. Document A22(c), p 6
31. Document A22(b), p 4

interest in being involved in the Government's work related to the Treaty clause review.[32]

In both briefings, Te Arawhiti officials also advised their Ministers that DPMC was asked to clarify who would lead the review.[33]

On 10 April 2024, Te Arawhiti received oral confirmation that the Minister of Justice, advised by MOJ, would lead the Treaty clause review, with support from Te Arawhiti as Chair of TPOG.[34] This confirmation of ministerial responsibility resolved a period of uncertainty regarding which responsible Minister and Crown agency would lead the Treaty clause review.[35]

Ms Anderson and Mr Fraser advised that Te Arawhiti ceased working on the Treaty clause review after it transferred to MOJ.[36] As far as they understood, decisions regarding the scope and conduct of the review are yet to be made.[37] However, Ms Anderson said Te Arawhiti continue to provide advice to Minister Potaka regarding the Treaty clause review, including relaying informal feedback received by Te Arawhiti in the course of their normal work programme from Māori on the proposed review.[38]

5.2.3 Te whakawhiti ki te Manatū Ture

The transfer to the Ministry of Justice

Andrew Kibblewhite, Secretary for Justice and Chief Executive of MOJ, and Rajesh Chhana, Deputy Secretary, Policy at MOJ also provided a joint brief of evidence for the Crown in this inquiry. They advised that, at the time of the urgent hearing, MOJ was 'yet to do any work' and had not received any directions from the Minister of Justice on the review since assuming responsibility from Te Arawhiti.[39] Mr Chhana further advised that no advice on the review had been provided by MOJ officials to Cabinet.[40]

In terms of timing, Mr Kibblewhite stated that the Treaty clause review work would follow sequentially from work MOJ was actively undertaking regarding the Treaty Principles Bill.[41]

5.2.4 Te whakamohio-a-pukapuka o te 23 o Mei 2024

The 23 May 2024 briefing

On 23 May 2024, MOJ officials provided a briefing to the Minister of Justice, asking him to decide on the scope and purpose of the review. They also sought his agreement to the establishment of a Ministerial Oversight Group, and his feedback on

32. Document A22(b), p 4
33. Document A22(c), p 6; doc A33(b), p 4
34. Document A22, pp 3–4
35. Transcript 4.1.6, pp 24–25
36. Document A22, p 4
37. Transcript 4.1.6, p 38
38. Transcript 4.1.6, pp 57–58, 73–74
39. Document A23, p 9
40. Document A23(d), p 4
41. Transcript 4.1.6, pp 95–96, 99

the priorities for the review. Officials also sought direction to prepare a Cabinet paper on the 'scope and purpose of the review, consultation expectations, and proposed oversight'.[42]

(1) *Te kaupapa o te arotakenga*
Purpose of the review

In respect of the purpose of the review, officials recommended that the Minister seek Cabinet approval for the following definition of the review's purpose:

> The *purpose* of the review is for legislation to state more clearly how the Treaty applies in a specific legislative context, to reduce uncertainty and support better compliance, where it is appropriate to encapsulate the Treaty or the Treaty relationship in legal terms. [Emphasis in original.][43]

While this expressed the terms of the coalition agreement in more neutral language, it still provided for either the replacement of Treaty references with 'specific words relating to the relevance and application of the Treaty' or the repeal of Treaty references (which was now worded as reviewing legislation to state more clearly how the Treaty applied '*where it is appropriate to encapsulate the Treaty or the Treaty relationship in legal terms*' (emphasis added).[44]

(2) *Te raru kaupapa here kua whāki atu i te take mo te pire*
The policy problem identified as requiring the review

Te Arawhiti had drawn a parallel between the review and the work of the existing TPOG, which is described further below. MOJ officials noted in May 2024 that TPOG was established in 2022 to 'support more considered and coherent approaches to providing for the Treaty in legislation and to help address the concern that there was unexplained variation between clauses making for uncertain outcomes'.[45]

TPOG had therefore advised departments and agencies on how to 'clearly articulate in legislation how the Treaty will be upheld' or whether in fact no Treaty clause was required at all.[46] MOJ officials advised the Minister that the proposed purpose of the review, as set out in the briefing paper (quoted above), would simply 'follow the mission of TPOG'. The review would support agencies to develop legislation that 'clearly articulates how the Treaty [would] be upheld', and this would include an assessment of whether a Treaty clause was actually needed for that purpose.[47]

Under this understanding of the purpose of the review, and the policy reason for its establishment, the difference between the review and 'TPOG's mission' would be that the review was retrospective; that is, it would help government agencies to decide to either (a) amend legislation to more clearly explain how the Treaty

42. Document A26, pp 1–2
43. Document A26, p 3
44. Document A26, p 3
45. Document A26, p 2
46. Document A26, p 2
47. Document A26, p 3

should be upheld in the statutory scheme or (b) repeal the Treaty clause because it was not really needed for that purpose.

At the time the briefing was written in May 2024, some of the original 40 Acts identified by Te Arawhiti had been repealed or were about to be repealed. There were now 17 Acts with operative clauses (defined above) such as 'take account of' the principles of the Treaty. We have already discussed the Resource Management Act 1991 (RMA) in chapter 4, which is one such Act. On this kind of Treaty clause, the policy rationale for the review was the New Zealand First expression of concern that these 'generic' clauses led to litigation, which had allowed the courts to expand the meaning beyond what Parliament had intended. Thus, stated MOJ officials, the operative clauses might not be well implemented because they could be 'interpreted broadly'. For descriptive clauses (also defined above), the problem identified by the Ministry was that their specific wording might not be broad enough to deal with new circumstances, and this could also involve litigation.[48]

In defining the policy problem and the purpose of the review in these ways, the Ministry did not engage with the stated policy rationale in the coalition agreement, which was that it was necessary to carry out the review (among other things) to 'reverse measures taken in recent years which have eroded the principle of equal citizenship'.[49] We discuss this further below.

(3) *Te aronga o te arotakenga*

The scope of the review

Following on from the advice of Te Arawhiti, the Ministry sought clarification as to which kinds of Treaty clauses would fall within the scope of the review. Officials suggested that the 13 Acts with descriptive clauses might not be a priority since 'they already contain specific words relating to the relevance and application of the Treaty'. On the other hand, reviewing both operative and descriptive clauses would allow for some consistency across all Acts. There would also, as noted above, be an 'assessment as to whether reference to the Treaty in legislation is required at all'.[50]

In addition, officials noted that Treaty settlement legislation would be outside the scope of the review of Treaty clauses (as per the coalition agreement). They suggested that the Treaty of Waitangi Act 1975 and the State-Owned Enterprises Act 1986 should also be excluded 'as they raise similar issues to Treaty settlement legislation'.[51] The thinking is not clear here because part of the text was blanked out for legal privilege purposes. It seems that officials considered some Acts with Treaty clauses 'related to Crown Māori agreements and/or reach[ed] a constitutional status' and would need to be excluded from the review. This would be assessed as the review progressed.[52]

48. Document A26, pp 1–3, 7
49. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10
50. Document A26, pp 3–4
51. Document A26, p 3
52. Document A26, p 4

(4) *Te wā o te arotakenga*

Timing of the review

Officials suggested that the timing of the review would depend on other work already underway. If the Treaty Principles Bill enacted 'new and substantially different principles', for example, that would change how the Treaty applied to any particular statutory regime. It would be better, therefore, for the Bill to proceed before the substantive work of the review.

The Fast Track Bill raised another timing factor; it might be better to prioritise the Acts with Treaty clauses covered in that Bill, supporting a consistent approach for decision-making within the single fast track process established by the Bill.[53]

The other timing issue discussed in the briefing was the time it would take to undertake the review, given the proposed purpose and scope was accepted by Cabinet. Officials suggested that the review would be extremely complex and there were different ways of approaching it.

First, confirmation of the approach, roles within the review, and oversight of the review, would take about two months. Officials recommended the establishment of a Ministerial Oversight Group. TPOG could also play a role: 'Aligning with TPOG's approach would support a consistent approach to revising and more specifically elucidating Treaty clauses.'[54]

Secondly, it would take about a year for policy analysis by agencies and their Ministers. They would need to analyse existing Treaty clauses, and determine the relevance of the Treaty and how it applied practically to their legislation for the purposes of a new clause. In the case of complex regimes, agencies would need to work out how to clearly articulate the practical application of the Treaty across multiple functions, and they would need to consider the consequences of replacing or repealing the current Treaty clauses. Ministers would need to be involved in considering risks and options. Then all this work would need to feed into the broader review to develop proposals for Cabinet. Officials recommended that there be engagement with Māori before policy decisions were made (this is discussed further below).

Thirdly, legislative drafting and the enactment of legislation would take place. Revising all the legislation would require a complex and lengthy drafting and parliamentary process.

Officials predicted that it would take longer than the parliamentary term to complete the review.[55]

(5) *Ngā hīraunga o te kaupapa here me te whakapāpātanga ki te te iwi Māori*

Constitutional implications and engagement with Māori

MOJ officials advised the Minister that the review had constitutional implications due to the constitutional significance of the Treaty and of the Treaty clauses themselves:

53. Document A26, p 4
54. Document A26, p 6
55. Document A26, p 5

> The Treaty is a constitutional document and Treaty clauses are part of an ongoing constitutional dialogue. Reviewing Treaty principles clauses across a large number of Acts will have implications for the way the Treaty of Waitangi is reflected, understood and applied in New Zealand's legal system.[56]

Officials advised that the approach to the review would need to 'consider the significance of the issues involved to Māori'.[57] Māori would be the 'most affected group in this review and should be consulted accordingly to ensure the intent of the review is met within the purpose of each Act, and to support a positive Crown–Māori relationship'. Officials recommended engagement with Māori (and stakeholders) during the policy development process, before decisions were made.[58]

Under the heading 'Issues and Risks', officials added there was significant Māori interest in the review, that the review would need to consider the importance of the issues to Māori, and that '[g]ood faith engagement with Māori will support the delivery of legislative change that meets the intent, and mitigate risks to the Crown Māori relationship.'[59]

Officials recognised, therefore, that the review posed a risk to the Māori–Crown relationship, and that good faith engagement with Māori would support the intent of the review and mitigate the risks. There was no suggestion in the briefing paper that Māori would be opposed to the review. This seems to have been based on three propositions: (a) the review would recognise the constitutional significance of the Treaty clauses; (b) Māori would be consulted before decisions were made; and (c) the review would ensure the practical application of the Treaty to statutory regimes was better reflected in legislation. We discuss below whether these propositions reflect the policy rationale and purpose of the review as stated in the coalition agreement.

Also under the heading of 'Issues and Risks', officials noted the concern of New Zealand First that the operative clauses generated litigation, and that the courts had then broadened the scope of the clauses 'beyond Parliament's mandate'. MOJ commented that the courts would 'read the Treaty in anyway' even if Treaty clauses were removed from legislation:

> If the purpose of the review were to focus the courts and decision makers on matters agreed by Parliament when considering how the Treaty applies in any given case, then it is unlikely that removing Treaty principles from clauses will limit the courts' consideration. As the Supreme Court indicated in *Trans-Tasman Resources Limited v the Taranaki–Whanganui Conservation Board* [2021, NZSC 127], the courts will read the Treaty in anyway if it is not specifically addressed.[60]

56. Document A26, p 5
57. Document A26, pp 6–7
58. Document A26, p 5
59. Document A26, pp 6–7
60. Document A26, p 7

(6) *Ngā hīkoi anga whakamua o te arotakenga*
Next steps in the review

Subject to the Minister's approval, MOJ proposed to draft a Cabinet paper stating the purpose and scope of the review, expectations in respect of consultation, and proposed oversight by a Ministerial Oversight Group. Once the purpose and scope were agreed, MOJ would engage with agencies to organise the review and prepare an engagement plan, working closely with Te Arawhiti while doing so.[61]

(7) *Te whakataunga a te Minita, 28 o Mei 2024*
The Minister's decisions, 28 May 2024

As recorded in the copy of the briefing paper provided to the Tribunal, the Minister indicated his decisions on 28 May 2024. Minister Goldsmith:

- agreed that the purpose of the review was to 'state more clearly how the Treaty applies in specific legislative regimes to reduce uncertainty and support better compliance, where it is appropriate to encapsulate the Treaty or the Treaty relationship in legal terms';
- indicated that the review would include both operative and descriptive clauses;
- agreed that the Treaty of Waitangi Act 1975 and the State-Owned Enterprises Act 1986 were out of the review's scope;
- agreed to establish a Ministerial Oversight Group with 'relevant Ministers and coalition partners'; and
- directed officials to prepare a Cabinet paper on the scope and purpose of the review, issues about the approach to the review such as 'consultation expectations', and the proposed oversight of the review.[62]

5.3 Ngā Take
Issues

5.3.1 Te tūranga mataaho o ngā kaikerēme me ngā kaitono e whai pānga ki te kaupapa
The claimants' and interested parties' position

Counsel submitted that the Crown's decision to pursue the Treaty clause review and subsequent policy work has been unilateral and excluded Māori, inconsistent with the Treaty/te Tiriti principles of tino rangatiratanga, partnership, kāwanatanga, active protection, and mutual recognition and respect.[63] Counsel for Wai 682 submitted the review was 'an inappropriate and excessive exercise of the Crown's kāwanatanga; with all power, authority and influence sitting squarely with the Crown'.[64] Further, counsel submitted: 'Ngāti Hine say unequivocally that the

61. Document A26, p 7
62. Document A26, pp 7–8
63. Submission 3.3.17, pp 31–39; submission 3.3.21, p 25
64. Submission 3.3.13, p 19. See also submission 3.3.14, p 11, and submission 3.3.15, p 4. The latter called the review policy 'an abuse of power' by the Crown and 'avaricious power grab'.

Crown's policies and actions overstep and undermine the rangatiratanga of Māori and therefore, do not provide for the partnership that was created and envisioned by te Tiriti.'[65]

Counsel noted that no consultation had occurred with Māori on the review.[66] They submitted the constitutional and Treaty/te Tiriti issues raised by the review are such that the Crown must obtain the 'free, prior, and informed consent before policy proposals are developed'.[67]

Counsel for Wai 2214 submitted that 'Ngāti Kahu tino rangatiratanga means they should have final decision-making authority on whether the Treaty clauses should be replaced or repealed.'[68] Accordingly, they noted, the Crown is required to continually engage with Māori regarding whether a review is (a) required, and (b) Treaty compliant, but it has done neither.[69] In their view, it was not enough for officials to say that there is 'nothing to lead', and the Crown should be engaging with Māori now.[70]

Counsel for 18 interested parties submitted that consultation on the review should be 'widespread and comprehensive to match the scale and context of the change proposed'.[71] Further, counsel stated that Te Arawhiti should have engaged Māori earlier, independently – noting that it had engaged with TPOG without ministerial oversight previously and submitting that Māori 'rely on Te Arawhiti to provide the Māori perspective amongst government agencies'.[72]

Similarly, counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 argued that officials' approach to advising on the Treaty clause review fell short of active protection.[73] In their submission, the Crown should have engaged with Māori before the first decisions were made, and officials' 'wait and see' approach to the review's policy destination was inadequate.[74] They also argued officials' advice failed to challenge head-on the unconstitutionality of the proposed policy: 'None of the Crown officials considered it their role as independent public servants to defend Te Tiriti against this assault'.[75] Further, they submitted,

> Māori, as one party to Te Tiriti, have not sought either of these measures [the review or the Bill], they have been excluded from decisions on whether or not they should proceed, and they have had no input on appropriate processes or their proposed implementation. Any involvement would occur only after the Crown has made the decisions in Cabinet.[76]

65. Submission 3.3.13, p 20
66. Submission 3.3.22, p 21
67. Submission 3.3.22, p 20
68. Submission 3.3.17, p 35
69. Submission 3.3.17, p 35
70. Submission 3.3.17, pp 35, 39
71. Submission 3.3.18, p 75
72. Submission 3.3.18, pp 68–69
73. Submission 3.3.21, p 26
74. Submission 3.3.21, p 26
75. Submission 3.3.21, p 15
76. Submission 3.3.21, p 13

Several counsel raised an issue with the transfer of responsibility for the review from Te Arawhiti to MOJ. Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 alleged that the decision to transfer responsibility was a 'political decision to marginalise Te Arawhiti'.[77] Similarly, counsel for Wai 682 said it was concerning that the review had been allocated to MOJ when Te Arawhiti had stronger and more established relationships with Māori and an existing role in TPOG.[78]

Counsel also submitted that the rationale for the Treaty clause review was political and ideological in nature.[79] They stated that there is no genuine problem to be solved by the review, and that the Crown instead simply seeks to implement political commitments made in the coalition agreement.[80] Counsel for Wai 1341/3077 submitted that officials are confined to working within the parameters of the coalition agreement, limiting their ability to provide free and frank advice and support the Crown in its relationship with Māori under the Treaty.[81] As with the Treaty Principles Bill, counsel for Wai 682 referred to the disestablishment of Te Aka Whai Ora and proposed repeal of section 7AA of the Oranga Tamariki Act 1989. These examples, they submitted, show the Crown 'considers that the coalition agreements take precedence, and the policy process is just a way to arrive at a pre-determined outcome.'[82]

Further, counsel submitted that the 'erasure of Te Tiriti' in the policy-making process was symbolised by the abolition of the Cabinet Māori Crown Relations – Te Arawhiti Committee,

> which had an oversight role on Tiriti policies, by a Social Outcomes Cabinet Committee whose terms of reference are to 'consider matters relating to improving social outcomes, including healthcare, social housing access, and law and order'. There is no reference to Te Tiriti. Yet that is the Cabinet Committee responsible for both these measures. As a consequence of portfolio allocations and lead agencies made responsible for these measures, the Minister for Māori-Crown Relations has also been marginalised from these decisions.[83]

Counsel noted it was unclear yet how the review would be undertaken or its scope. Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted it is 'unclear who would make these decisions using what criteria, what understanding of Te Tiriti [they] would apply and how they would understand the context of the individual statutes.'[84]

Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 noted that the New Zealand First and National coalition agreement provided for two alternatives:

77. Submission 3.3.21, p 26
78. Submission 3.3.13, p 21
79. Submission 3.3.21, p 24; submission 3.3.22, p 16
80. Submission 3.3.21, p 24
81. Submission 3.3.22, pp 17–18; submission 3.3.13, p 13
82. Submission 3.3.13, pp 22–23
83. Submission 3.3.21, p 16
84. Submission 3.3.21, p 24

'greater specification or removal of references to the "principles of the Treaty of Waitangi"'.[85] They stated: 'This indicates that Treaty compliance is not a purpose of the review.'[86] Similarly, counsel for Wai 1341/3077 stated that the claimants had no confidence the Crown would seek to protect Māori interests or engage honourably and in good faith with them.[87]

Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted that, at its narrowest, the review

> would remove any reference to the 'principles of the Treaty' from statutes and replace them with specific references of an unspecified kind or remove them altogether. As most references to Te Tiriti in statutes involve the 'principles', that would potentially remove many or most statutory references that currently recognise some form of Māori Tiriti responsibilities and rights across a swathe of matters that are governed by legislation. While these references are inadequate, they are something.[88]

Additionally, counsel submitted that the review has the capacity to expunge all references to 'the principles of the Treaty of Waitangi' from legislation, with the Crown the sole arbiter of 'what would constitute an adequate reference where it considers that appropriate'.[89] Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted:

> Whether this review ends up with a narrow or broad application, it would continue to deny rangatiratanga, because it is not authentically recognised in references to Treaty principles or other statutes; [it] far exceeds the authority of kāwanatanga, by unilaterally deciding to remove statutory references; offers no recognition of Tiriti relationships or mutual respect; makes no pretence of partnership; and delivers no active protection, except in the unknown instances where the Crown may accept that some specific recognition is justified.[90]

Counsel for Wai 2214 also submitted that this is not just any review but 'an unbridled re-evaluation of the founding constitutional document of this country' and therefore 'the outcomes of the review become gravely more concerning for Māori.'[91]

Counsel noted the review could result in outcomes inconsistent with the principle of redress, by removing from Māori access to redress 'for past and future breaches of te Tiriti by the Crown'.[92] It could alter the jurisdiction of the Tribunal if statutory references to the 'principles' are removed from the Treaty of Waitangi

85. Submission 3.3.21, p 28
86. Submission 3.3.21, p 28
87. Submission 3.3.22, p 29
88. Submission 3.3.21, p 24
89. Submission 3.3.21, p 17
90. Submission 3.3.21, p 25
91. Submission 3.3.17, p 37
92. Submission 3.3.21, p 17

Act 1975. It would also 'remove or erode existing recourse to the courts' where statutes refer to Treaty principles or even the Treaty/te Tiriti.[93] A review could also affect redress avenues under local government, international treaties, and statutory bodies exercising delegated functions.[94] Counsel for Wai 3319, Wai 3330, Wai 1504, and Wai 3314 stated the review could constrain judges from 'fill[ing] the gaps' in statutory wording and that the 'removal of Treaty Clauses by Parliament unilaterally hamstrings the Courts and undermines democratic legitimacy'.[95] Counsel also submitted a review 'allows further breaches of the Treaty by limiting the incorporation of Treaty Clauses in legislation'.[96]

Counsel also submitted that the review policy is contrary to the Crown's own standards for making policy and engaging with Māori as a Treaty partner, citing the evidence of Crown witnesses:

> Mr Fraser conceded that the Treaty clause review was not a 'normal review'. The normal policy process starts with problem definition by officials who then consider options to address the problem and put that to ministers for decision. A 'good policy will engage the people it affects' and Treaty partners are typically one of those groups. There was no clear problem for this policy to solve. Nor was there any engagement.[97]

Finally, counsel urged the Tribunal to see the Bill and the review not as isolated policies, but as part of 'an established pattern of bad faith' by the coalition government and hostility towards the Treaty/te Tiriti.[98] Counsel for Wai 1341/3077 submitted Māori have no confidence in the Crown's ability and willingness to honour its obligations in respect of the Bill and the review.[99] Counsel similarly submitted they believe Māori are unlikely to be able to influence the process ahead.[100] They referred to the Crown's unilateral introduction of legislation to repeal section 7AA of the Oranga Tamariki Act 1989, and legislation requiring referenda on Māori wards in local government.[101]

5.3.2 Te tūranga mataaho o te Karauna

The Crown's position

The Crown acknowledged the submissions and evidence presented on behalf of claimants and interested parties in this inquiry, and the 'particular significance' of the review to them (and those they represent).[102] It further acknowledged that

93. Submission 3.3.21, p 18
94. Submission 3.3.21, p 18
95. Submission 3.3.15, pp 6, 7
96. Submission 3.3.15, p 8
97. Submission 3.3.27, p 10
98. Submission 3.3.21, pp 8, 15
99. Submission 3.3.22, p 31
100. Submission 3.3.13, p 21
101. Submission 3.3.21, pp 8–9
102. Submission 3.3.23, p 1

there is 'significant concern' about the proposed review.[103] In the Crown's view, however, the question of how Treaty principles 'should be reflected in legislation, and indeed the legitimacy of the concept of Treaty principles, are complex matters on which there are a range of issues, and which the Tribunal may consider are worthy of serious attention'.[104]

Further, the Crown argued that no decisions have been made by Cabinet on 'how the Review workstream will progress', and therefore the Tribunal should focus on 'what *is* known and on how the policies that are the subject of this inquiry might be progressed in a Treaty-compliant manner' (emphasis in original).[105] On that point, the Crown submitted that the review policy originated in the coalition agreement, and the 'Government is under an obligation to pursue the commitments recorded in the Coalition Agreements which constitute the basis on which Government is formed'. Nonetheless, the Crown acknowledged that, once the Government is sworn in and formed, the Executive is responsible for meeting the Crown's Treaty obligations.[106] 'At the heart of this inquiry', therefore, are the 'potential tensions between [the] pursuit of policies which are at [the] core of Government formation, and the application of the Treaty to those policies or proposed policies'.[107]

On the application of Treaty principles to the review, the Crown submitted that partnership is the relevant principle. This principle 'imposes on the Treaty partners mutual obligations to act reasonably and in good faith', which the Crown accepted would require it to 'consult on "truly major" issues affecting Māori'. The Crown accepted that there was a 'strong Māori interest' in this case but, due to the 'early stage' of the review's policy development, the Crown argued that 'decisions have not yet been made about consultation'.[108] On the current stage of policy development, the Crown submitted that the review is a political commitment contained in the coalition agreement, and that the provenance of the review in this agreement is 'relevant to the Tribunal's task of identifying any relevant Crown action "done or omitted" (or "proposed to be done or omitted")'.[109] Since the urgent hearing, MOJ has provided advice to the Minister on the purpose, scope, and conduct of the review, and the Minister's decisions have been recorded on the briefing paper. MOJ officials were drafting a Cabinet paper at the time the Crown's closing submissions were filed on 9 July 2024.[110] The Crown concluded that, given the stage of policy development, the Tribunal's analysis might best be directed to 'addressing how Government might pursue the policies to which it has committed in a Treaty-consistent manner'.[111]

103. Submission 3.3.23, pp 14–15
104. Submission 3.3.23, pp 13–14
105. Submission 3.3.23, p 14
106. Submission 3.3.23, p 14
107. Submission 3.3.23, p 14
108. Submission 3.3.23, p 13
109. Submission 3.3.23, pp 3–4
110. Submission 3.3.23, p 13
111. Submission 3.3.23, p 14

5.3.3 Ngā whakautu tāpaetanga kōrero o ngā kaikēreme me ngā kaitono e whai pānga ki te kaupapa

The claimants' and interested parties' reply submissions

We note that, due to the application of arguments to both the Treaty Principles Bill and review policies, there is some duplication in this section and its counterpart in chapter 4.

Counsel submitted that the Crown's sole reliance on the principle of partnership and associated obligations failed to address the other principles engaged by the inquiry and the development of jurisprudence since the *Lands* and *Forests* cases.[112] Counsel for Wai 682 stated that it was 'concerning' that the Crown's position was 'based solely on Court findings which are over 35 years old, without any mention of more recent, and more relevant, Tribunal jurisprudence'.[113] In their view, this 'demonstrates how detached the Crown is from te Tiriti in both its understanding of its te Tiriti obligations and its decision-making'.[114] Counsel for Wai 1341/3077 similarly submitted this was 'demonstrative of the Crown's inaccurate and outdated understanding of its te Tiriti obligations'.[115]

Counsel for the claimants and interested parties noted the Crown's argument that no decisions on consultation had been made because the review policy was still in the early stages of development. Counsel for Wai 3319, Wai 3330, Wai 1504, and Wai 3314 submitted that the Crown has breached its obligations to engage with Māori due to the lack of consultation at the early stages of policy development. Counsel for Wai 682 also submitted that consultation must take place *prior* to decision-making, not after.[116] Counsel for Wai 3319, Wai 3330, Wai 1504, and Wai 3314 submitted that consultation should have occurred when the coalition Government was sworn into office.[117]

Responding to the Crown's cited articulation of the duty to consult on 'truly major' issues for Māori, counsel submitted that the review was a truly major issue for Māori. Counsel for Wai 58, Wai 1312, and Wai 1684 asked: 'What . . . could be more "truly major" an issue between the Crown and Māori than the evisceration of te Tiriti?'[118] Counsel for Wai 682 stated that the relevant Treaty/te Tiriti standard for the review was 'negotiation, discussion and agreement rather than the Crown merely being "sufficiently informed when making decisions that affect Māori"'.[119] Counsel for Wai 3316, Wai 3343, Wai 3321, Wai 3320, Wai 3318, and Wai 3317 identified an apparent contradiction within the Crown regarding consultation: while the Crown submitted that it did not have an 'absolute, open-ended duty to consult',

112. See submission 3.3.25, pp 7–8; submission 3.3.26, pp 2–3; submission 3.3.27, pp 3, 6; submission 3.3.29, pp 7–9
113. Submission 3.3.26, p 3
114. Submission 3.3.26, p 3
115. Submission 3.3.29, p 8
116. Submission 3.3.25, pp 8–9 (citing *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671 (CA))
117. Submission 3.3.28, p 1
118. Submission 3.3.25, p 8
119. Submission 3.3.26, p 3; see also submission 3.3.25, p 8

the December 2023 briefing paper provided to the Minister by officials stated that a failure to engage with Māori would result in the Crown 'failing to meet the obligation under the Treaty to act reasonably, honourably, and in good faith.'[120]

Counsel also responded to the Crown's argument that the results of the review were not yet known. Counsel for Wai 682 submitted that the Tribunal did not need to know the exact content and/or implications of the review 'in order to make findings of te Tiriti breach where the Crown's policies are concerned'. Rather, the issue could be determined 'by assessing the applicable te Tiriti principles, and asking – if the Crown had followed a te Tiriti compliant process, would the Crown's policies exist in their current forms?'[121] Counsel for Wai 1194/Wai 1212, Wai 2494, and Wai 2872 also noted that the Tribunal had jurisdiction to consider measures the Crown proposes to adopt, not just measures already adopted.[122]

Counsel opposed the Crown's suggestion that the Tribunal focus its inquiry on how the policies might be progressed in a Treaty-compliant manner. Counsel for Wai 1341/3077 stated that there was '*no* te Tiriti-consistent way in which to pursue and implement' these policies because they 'are fundamentally at odds with te Tiriti, te Tiriti jurisprudence and historical accounts of te Tiriti' (emphasis in original).[123] Counsel for Wai 682 agreed the review could not be progressed in a Treaty-compliant way. They submitted:

> To attempt to reroute the policies in a more Treaty-compliant way does not change the purpose, policy directives or te Tiriti breaches which continue to sit behind the Crown's policies. The Crown makes this clear where it reiterates its commitment to the coalition agreements and its intention to implement them.[124]

Counsel for Wai 1341/3077 submitted that it was 'disingenuous of the Crown to ask the Tribunal to redivert the focus of its inquiry in the manner suggested as opposed to taking active steps as to te Tiriti compliancy in the first instance.'[125] Counsel for Wai 3316, Wai 3343, Wai 3321, Wai 3320, Wai 3318, and Wai 3317 submitted that the Tribunal has a wide jurisdiction and is 'not restricted to "helping" government pursue its policies where those policies so flagrantly and egregiously breach te Tiriti/the Treaty and its Principles.'[126]

Counsel also disagreed with the Crown's submission that it had been as helpful as possible. Counsel for Wai 1341/3077 described the Crown's approach as 'unhelpful and obstructive' referring to (among other actions) the Crown's opposition to the applications for urgency, its refusal to provide documents requested by the presiding officer, threatening judicial review of the presiding officer's decision on

120. Submission 3.3.30, pp 5- 6
121. Submission 3.3.26, p 5
122. Submission 3.3.27, p 6
123. Submission 3.3.29, pp 2, 6
124. Submission 3.3.26, p 4
125. Submission 3.3.29, p 7
126. Submission 3.3.30, p 2

confidentiality, and its failure to provide indicative timeframes for when a Cabinet paper will be available.[127]

Counsel for Wai 3316, Wai 3343, Wai 3321, Wai 3320, Wai 3318, and Wai 3317 further rejected the Crown's submissions that the Government is under an obligation to pursue the commitments recorded in the coalition agreements, noting that the Crown is also subject to 'te Tiriti/the Treaty obligations' and that 'legally these must be complied with.'[128] Counsel also emphasised that 'the Claimants do not accept that there can ever be a democratic mandate that can legally override Māori rights and interests which are protected under te Tiriti/the Treaty'.[129]

Finally, counsel argued that the Crown's submissions had failed to engage with central issues raised in this inquiry. This included, for example, the relationship between the proposed review and the Treaty, te Tiriti, and Treaty principles.[130]

5.3.4 Ngā take e whiriwhiri ana i tēnei ūpoko

The issues for discussion in this chapter

Having considered the evidence and submissions for this urgent inquiry, we consider that the issues for consideration in this chapter are:

- What is the policy rationale for the Treaty clauses review and is it reasonable?
- How does the rationale in the coalition agreement relate to the rationale of the TPOG to introduce greater consistency in Treaty clauses in new legislation?
- How does the review measure up against the Crown's official guidance to policy-makers on Treaty of Waitangi/te Tiriti o Waitangi matters?
- Does the Crown intend to engage with its Māori Treaty/te Tiriti partner on the need for the review or the proposed purpose, scope, conduct, and governance of the review?
- What is the proposed scope of the review – will it include descriptive as well as operative Treaty clauses?
- What is the proposal for how the review will be conducted and the role of the Māori Treaty/te Tiriti partner in the review?
- What are the constitutional implications of the review?
- Are the policy rationale and the proposed scope and conduct of the review consistent with the principles of the Treaty/te Tiriti?

In this chapter, we address these issues in the discussion section before making our Treaty/te Tiriti findings at the end of the chapter.

127. Submission 3.3.29, p 2
128. Submission 3.3.30, p 7
129. Submission 3.3.30, p 9
130. Submission 3.3.27, pp 2–3

5.4 Matapaki

Discussion

5.4.1 He aha te pūtake o te arotakenga, ā me pehea taua arotakenga ka tohu ai i ngā whakaaweawe?

What is the rationale for the review, and how does that indicate its likely effects?

(1) Te pūtake o te arotakenga kei te whakaaetanga a te kāwanatanga tūhono

The coalition agreement's rationale for the review

The first question we must address is whether there is a valid policy rationale that justifies the Treaty clause review, because the policy rationale will dictate how the review is carried out and what its effect will be; that is, a review might have the effect of better expressing Treaty/te Tiriti obligations in legislation or it might not. Mr Kibblewhite and Mr Chhana both acknowledged at the urgent hearing that the purpose of the review had not been articulated at that time beyond what was contained in the coalition agreement between National and New Zealand First.[131] They reiterated that the proposal for a Treaty clause review came from the coalition agreement and was not arrived at based on a policy proposal or problem identified by Te Arawhiti or MOJ.[132]

It is important, therefore, to reiterate the rationale for the review as set out in the coalition agreement. This document stated:

> **Equal Citizenship**
>
> - The Coalition Agreement will defend the principle that New Zealanders are equal before the law with the same rights and obligations, and with the guarantee of the privileges and responsibilities of equal citizenship in New Zealand.
> - The Coalition Government will work to improve outcomes for all New Zealanders, and will not advance policies that seek to ascribe different rights and responsibilities to New Zealanders on the basis of their race or ancestry.
> - The Coalition Government will honour the undertakings made by the Crown through past Treaty of Waitangi settlements.
> - The Coalition Government will reverse measures taken in recent years which have eroded the principle of equal citizenship, specifically we will:
>
> . . . . .
>
> - Conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes 'The Principles of the Treaty of Waitangi' and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references.[133]

Further information can be found in New Zealand First's 2023 election manifesto, although this did not contain a single reference to the Treaty of Waitangi/

131. Document A23, p 9
132. Document A23, p 10; doc A23(d), p 2
133. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10

te Tiriti o Waitangi or to the principles of the Treaty. The only wording of direct relevance to our inquiry is this statement:

> **Fighting against racist Separatism**
> - New Zealand means New Zealand and not, 'Aotearoa New Zealand.' Legislate to make English the primary official language of New Zealand.
> - All public service departments, Crown Entities and SOEs will be required to communicate in English except those specifically related to Māori.
> - Rule out working with any political party that promotes separatism.
> - Withdraw from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as it removes the rights of New Zealand citizens to write their own laws.[134]

The Tribunal was also referred to certain statements made by the Honourable Shane Jones who currently holds several ministerial portfolios in the current coalition Government.[135] Minister Jones' statements demonstrated a desire on his part to limit the effect of Treaty clauses to prevent Treaty litigation in the environmental sphere and to reduce the role of lawyers.[136] Counsel for Wai 3342, Wai 1194/1212, Wai 2494, and Wai 2872 submitted that, in order to 'appreciate the full implications of this coalition commitment to New Zealand First', it needed to be read alongside the statement of Deputy Leader Shane Jones that there would be no more 'generic' or operative Treaty references in new legislation, and 'the absence of any Tiriti reference in the Fast Track Approvals Bill 2024'. Counsel submitted: 'If that is to inform the review, as well as prospective legislation, as is entirely possible, Te Tiriti could effectively be excised from statute law'.[137]

We concur that this is relevant context, and combined with the text of the coalition agreement, these statements suggest a policy rationale guided by a belief that Māori are receiving something not available to other New Zealand citizens. That ideology is coupled with a desire to address 'uncertainty' in the law created by 'open-ended treaty clauses' or, more accurately, to reduce litigation. These reasons and potentially a fear of separatism appear to be the rationale for the Treaty clause review policy.

With respect to the separatism fear, UNDRIP is a declaration of standards of human rights for indigenous peoples. It cannot be used to stop an elected government using the parliamentary process to make laws. What it does do is support the constitutional status of the Treaty/te Tiriti requiring recognition of its terms in the policy and parliamentary process. It also requires States to have regard to the standards listed in UNDRIP. However, if a government is intent on passing laws

134. New Zealand First Party, 'New Zealand First 2023 Policies', https://www.nzfirst.nz/2023_policies, accessed on 4 June 2024
135. See memo 3.1.82(c)(i)
136. Document A9, pp 30–31
137. Submission 3.3.21, pp 24–25; memo 3.1.82(c)(i)

that undermine the rights of its indigenous peoples, UNDRIP cannot be used to stop the process.

Dr Harris addressed the equality of citizenship justification with respect to the Treaty Principles Bill.[138] His same logic applies to the Treaty clause review. To summarise, the rights of all New Zealanders are protected by a combination of international instruments, domestic statutes, and the common law. The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 protect the rights of all New Zealanders and give domestic expression to a range of international instruments, as we explained more fully in chapter 4 (see section 4.7.4(3)(b)). In respect of the concern about litigation, Dr Harris stated:

> The rationales that open-ended Treaty clauses could lead to excessive litigation, and could result in rule by lawyers and the usurpation of legislative power, are overblown and unfounded. Litigation arises out of genuine disputes and the Crown must surely accept that there is a place for it at some times and in some places.[139]

Lawyers and judges will always have a role in the interpretation of law no matter what amendments or repeals may result from the Treaty clause review.[140] Officials noted this point in their May 2024 advice on the scope and purpose of the review, stating:

> Concern has been expressed by [the] New Zealand First Party, that 'generic' clauses have led to litigation, and this in turn has led to the courts broadening the scope of these clauses beyond Parliament's mandate. If the purpose of the review were to focus the courts and decision makers on matters agreed by Parliament when considering how the Treaty applies in any given case, then it is unlikely that removing Treaty principles from clauses will limit the courts' consideration. As the Supreme Court indicated in *Trans-Tasman Resources Limited v the Taranaki-Whanganui Conservation Board* [2021, NZSC 127], the courts will read the Treaty in anyway if it is not specifically addressed.[141]

Moreover, since 1975, an easily discoverable list of the core principles has been articulated by lawyers, the judiciary, and the Tribunal as discussed in the evidence of Ms Coates. She listed the core principles as partnership, active protection, options, good government, equity, and redress.[142]

Therefore, to suggest there is uncertainty does not reflect the reality of how easily discoverable the principles of the Treaty/te Tiriti have been to Crown and other decision makers. Both rationales for the policy, therefore, lack substantive justification.

138. Document A9, pp 31–32
139. Document A9, p 34
140. Document A9, p 34
141. Document A26, p 7
142. Document A6, pp 19–21

The claimants were very worried about these different rationales on which the purpose of the review is based, and feared that Treaty references in legislation would be watered down or removed altogether with enormous impact on the Treaty partnership, the exercise of tino rangatiratanga, and the active protection of their rights and interests. Those effects will have ramifications across all aspects of Māori communities.

On the issue of 'equal citizenship', we note that the discrimination, injustices, and inequality suffered by Māori in the nineteenth century have been acknowledged in many Tribunal reports, scholarly publications, and Treaty settlements. Those include the waging of war by the Crown against its Māori citizens, the confiscation of millions of acres, the imposition of individualised titles, the Crown's unfair purchasing practices, the Crown's favouring of settler interests over Māori interests, and many other Crown acts and omissions in breach of Treaty principles.[143] Pākehā New Zealanders developed a myth of racial equality in this country (especially in comparison to other countries),[144] but discrimination against Māori, and inequalities between Māori and non-Māori, continued in the twentieth century. Despite the Government's rhetoric of equality in the 1930s, for example, major social reforms failed to bring about significant improvements for Māori. At the onset of the Second World War, a large portion of the Māori population lived in inadequate and disgraceful conditions, leading to poorer health outcomes and higher mortality rates compared to non-Māori.

During the First World War, Māori were denied a prominent role in the frontline, but they requested and were granted the opportunity to serve on equal terms during the Second World War. The article 3 guarantee, understood in this instance to require an equality of sacrifice, served as the foundation for many tribes who willingly allowed their young men to enlist in the 28 (Māori) Battalion. North Auckland iwi even proposed naming the battalion 'Treaty of Waitangi' to emphasise the shared obligations of Māori and Pākehā.

Sir Āpirana Ngata, regarded as the father of the Māori Battalion, emphasised the importance of recognising the value of Māori contributions to the country. He urged society to acknowledge Māori as valuable assets, as their worth had been proven in the crucible of war, noting:

> The men of the New Zealand Division have seen it below the brown skins of their Maori comrades. Have the civilians of New Zealand, men and women, fully realised the implications of the joint participation of Pakeha and Maori in this last and greatest demonstration of the highest citizenship?[145]

143. See, for example, Waitangi Tribunal, *Te Raupatu o Tauranga Moana* (Wellington: Legislation Direct, 2004), pp 119–120, 171–174, 197–200, 351–353, 401, 404; and Ngā Hapū o Ngāti Ranginui and Trustees of the Ngāti Ranginui Settlement Trust and the Crown, *Deed of Settlement of Historical Claims*, 21 June 2012, pp 31–34.

144. Michael King, *The Penguin History of New Zealand* (Auckland: Penguin Books Ltd, 2003), pp 471–472

145. Āpirana Turupa Ngata, *The Price of Citizenship: Ngarimu VC* (Wellington: Whitcombe & Tombs, 1943), p 18

The sad reality, however, is that Māori did not attain equality as a result of their voluntary service in war. Ms Coates spoke about the long-standing inequalities that Māori still faced in the 1960s and 1970s. 'The reality at that stage for many Māori', she said, was that they were 'alienated from both their traditional whenua as well as the wider kinship collectives to which they belonged', and inequality was 'widespread across socio-economic metrics, and deep wounds, inflicted by active systemic and social assimilation, were festering'.[146] A 'staunch generation of Māori . . . came out fighting and vocally demanded the recognition of te Tiriti and Māori rights . . . to pull Māoridom back from the brink of cultural and language extinction'. This was the beginning of the Māori renaissance that sought the systemic redress of inequalities, and of the first recognition of the Treaty/te Tiriti in legislation.[147]

The coalition agreement's rationale for the review seems to turn this history on its head and argue that it is non-Māori who suffer inequalities because inequalities for Māori are being very gradually redressed. Yet all Governments since the 1980s have recognised that there have been serious Treaty/te Tiriti breaches in New Zealand's past, and that equity requires the settlement of valid Treaty claims and the restoration of the Māori–Crown relationship. The coalition Government is no exception on this point.

Ms Coates noted that Treaty/te Tiriti references are now present in many Acts, mostly related to natural resources, the environment, social services, and local government.[148] This can make a significant difference for Māori communities. Kipa Munro, for example, told us that Ngāti Rehia works with many Government agencies, local government, and community groups. These relationships and their successes (however modest) have been based on 'te Tiriti o Waitangi (and its principles) and an understanding of our status and role as tangata whenua'.[149] There has also been an understanding, he said, of the 'rights and promises confirmed by te Tiriti o Waitangi and of the principles as confirmed in Tribunal and Court jurisprudence'. The Treaty clauses in the Conservation Act 1987 and the Heritage New Zealand Pouhere Taonga Act 2014 have resulted in 'many gains', and the relationships with the Crown and community have matured. But the relationships between Māori and the Government are now put at 'serious risk' when references to te Tiriti are 'meddled with', and the 'Treaty policies of the government will set us all backwards'.[150]

Pita Tipene told us that Māori are extremely concerned about a 'tsunami of change' which, he said, has a 'focus on undermining Māori and the inclusive approach that has been built over many generations and successive governments of different stripes', whether National-led or Labour-led.[151] He stated:

146. Document A6, p 8
147. Document A6, p 8
148. Document A6, pp 8–9
149. Document A3(a), p 11
150. Document A3(a), p 12
151. Document A11, p 5

> I do not think the majority of New Zealanders are against the vision of what is embodied in the treaty, I just think they are uncertain and afraid, and political parties have been scaremongering to exacerbate those fears.
>
> In people's minds it is far too radical for Māori, over the last 10–15 years (maybe even 20 years), to have swung the pendulum towards the nation that was envisaged when te Tiriti was first signed in 1840. A bicultural, bilingual society, where Māori and Pākehā cohabited in New Zealand and lived within the values and mores of both cultures. This is what I call our own unique kind of democracy, here in the South Pacific and not that inherited from Westminster.[152]

Instead of biculturalism and empowerment, he said, the intent is to undermine 'Māori authority, and . . . the positive and proactive changes that have been progressive over many years now'.[153]

We do need to address the issue of biculturalism and monoculturalism here. We thought that the long era of monocultural assimilation had come to an end but there is a real risk that the review will lead our laws and through them our society back to the philosophy that there is no room for difference in Aotearoa New Zealand. In this context, we quote the prescient letter of transmittal for the Wai 262 report, *Ko Aotearoa Tēnei*, which has an important message for the Crown and for all New Zealanders:

> We have called this report *Ko Aotearoa Tēnei* – meaning either 'This is Aotearoa' or 'This is New Zealand', or both. The ambiguity is intentional: a reminder, if one is needed, that Aotearoa and New Zealand must be able to co-exist in the same space.
>
> New Zealand sits poised at a crossroads both in race relations and on our long quest for a mature sense of national identity. These issues are not just important in themselves; they impact on wider questions of economic growth and social cohesion.
>
> We are propelled here by many factors: the enormous progress that has been made toward the settlement of historical Treaty claims and the resulting reincarnation of tribes as serious players in our economic, political, social, and cultural fabric; continuing growth in the Māori population and the seemingly intractable social and economic disparity between that community and the rest of New Zealand; the Māori cultural 'renaissance' and the rise of Māori creativity in the arts, music, and literature contrasted with ongoing cultural loss; and the extraordinary increase in wider cultural diversity in New Zealand through immigration over the last 30 years.
>
> A crossroads in history offers choices. The Wai 262 claimants really asked which of the many possible paths into the future New Zealand should now choose, and in this report we provide an answer based on the principles of the Treaty of Waitangi.
>
> It is clear to us, as it will be to anyone who cares to think about the subject, that a future marked by interracial rancour must be emphatically rejected. We say that not just because to choose a path of conflict is morally wrong, nor even just because it is the antithesis of the Treaty's vision. We say this because it would be economically and

152. Document A11, pp 4–5
153. Document A11, p 5

> socially destructive for the country. Demographers tell us that to assure the economic well-being of New Zealand in the next generation, the growing Māori workforce and Māori capital must move from the margins to the core of our economy, and quickly. It is obvious that law and policy must be developed with the express and urgent objective of capturing – not squandering – Māori potential. Our collective future will depend on that objective being achieved. This choice is not about pandering to the Māori grievance industry or preying on Pākehā guilt, as the detractors would have it. It is about gearing up to meet the challenges of a future that our grandparents could not have predicted.[154]

These issues remain as relevant today as they were when the Wai 262 report was released in 2011. In our view, Crown is about to take an extremely retrograde step.

(2) *Me pēhea i hono ai te arotakenga ki ngā paerewa whakaaetanga kāwanatanga a te Karauna, ā he aha te pūtake mō te Kāhui Tūtei Mātāpono Tiriti?*
How does the review relate to the Crown's official standards and the rationale for the Treaty Principles Oversight Group?

Having assessed the rationale for the review in the coalition agreement, we turn next to consider how or whether the review relates to the rationale posed by TPOG since its establishment in 2022. This is a crucial issue because MOJ's proposed purpose for the review has aligned it with TPOG's purpose, which might take the review in a more constructive direction. That was a post-hearing development. MOJ's 23 May 2024 briefing paper has been summarised above. In this section, we also assess the review in light of the Crown's official standards for the making of policy and law relating to the Treaty/te Tiriti. Those standards have been developed by Te Arawhiti, LDAC, and others, and they provide a useful yardstick against which to assess the review.

At the time of the hearing on 9–10 May 2024, not much was certain about the review other than what was stated in the coalition agreement. According to Mr Kibblewhite and Mr Chhana, the Crown had not analysed what impact amending or repealing specific Treaty clauses would have on the rights of Māori and the Crown's responsibilities under the Treaty/te Tiriti. The policy process had not advanced that far.[155] Their evidence was also that they had not sought legal advice from te reo Māori, tikanga, or constitutional experts and they had not undertaken any analysis on access to justice issues for Māori.[156] No other public service agencies, including PCO, had been consulted.[157] Nor had officials from MOJ advanced

154. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuatahi* (Wellington: Legislation Direct, 2011), pp xvii–xviii

155. Document A23, p 10

156. Document A23, pp 11–14

157. Document A23, pp 10–11

the policy work sufficiently to consider consultation options with Māori and to advise Ministers or Cabinet on those options.[158]

Prior to the current Government assuming office, there was no identifiable policy problem that would justify the Treaty/te Tiriti clause review.[159] Rather, all the existing policy work from at least 2019–22 led by Te Arawhiti and TPOG had been focused on providing guidance on Treaty policy. The policy documents for this period were attempts at providing advice or direction on legislative or policy design, engagement with Māori, and the delivery of services to Māori.[160]

TPOG was established by Cabinet as an officials' advisory group to 'support more considered and coherent approaches to providing for the Treaty in legislation'.[161] Notably, a central principle guiding its advice was that it accepted that 'no "one-size-fits-all"' approach should be applied to Treaty provisions.[162] Rather, its advice focused on 'ensuring if agencies do propose that Treaty provisions are part of a Bill, they have a strong policy rationale and reflect a coherent, considered approach'.[163] This role was considered necessary to prevent 'unexplained variation between proposed [Treaty] clauses making for uncertain outcomes'.[164] If the Crown's intention in a Treaty clause was not clear enough, there was a risk of that it would not be effective, which would be damaging for both the statutory regime and the relationship between the Treaty partners.[165] Mr Fraser also confirmed that TPOG exists to have an open conversation with other agencies to help them in their policy thinking about what might be the 'right way' to provide for the Māori–Crown relationship.[166]

Te Arawhiti prepared written guidelines, entitled 'Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design',[167] which was filed on the Tribunal's record.[168] These guidelines explained:

> This document seeks to guide policy-makers 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.
>
> Use of this guidance should lead to:

158. Document A23, p 11
159. Document A23, p 10
160. Papers 6.2.3–6.2.10
161. Document A22(a), p [48]
162. Document A22(a), p [48]
163. Document A22(a), p [48]
164. Document A22(a), p [49]
165. Paper 6.2.3, p 3
166. Transcript 4.1.6, p 40
167. Document A23(a), p [49]
168. Paper 6.2.3

- 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.

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.[169]

The intention was thus not to prescribe outcomes but to improve policy making and achieve more certainty. The advice of Te Arawhiti pointed out that Treaty clauses in legislation were often requested by the Māori partner, which was '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'.[170] Nor was the intent to act unilaterally or rule out all operative clauses: 'The way the Treaty is recognised in each policy should be the product of genuine engagement with relevant iwi/Māori groups, analysis and debate.'[171] There was a place for operative clauses still but Te Arawhiti advised that descriptive clauses were more explicit:

> 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.[172]

Under the previous government, there was a Cabinet Māori Crown Relations: Te Arawhiti Committee to which all Ministers contemplating engagement with Māori regarding significant changes to policy, regulation or public services had to report.[173] There is no such Cabinet committee in existence under the new coalition Government.

In terms of contemporary Treaty/te Tiriti issues, and as detailed in chapter 2, in April 2019 all agencies were directed by Cabinet circular to be proactive in ensuring their policy, regulatory, and service delivery functions were consistent with the Treaty of Waitangi.[174] We have also previously noted the directive issued in October 2019, whereby policy makers were advised that the Treaty of Waitangi is regarded

169. Paper 6.2.3, p 1
170. Paper 6.2.3, p 3
171. Paper 6.2.3, p 4
172. Paper 6.2.3, p 18
173. Paper 6.2.5, p 1
174. Paper 6.2.5, p 2

as 'a founding document of government in New Zealand'.[175] They were directed to Cabinet Office sources of information to use in developing Treaty policy and to follow the guidance provided before promoting policy proposals.[176] The guidance provided was based upon the text of the Treaty, rather than the 'principles'.[177]

According to Ms Anderson this guidance for policy, legislative, and service delivery continues to exist under the new coalition Government.[178] The role of Te Arawhiti also continues as 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'.[179] Mr Fraser noted that it is the role of public officials to give free and frank advice, and that that gives scope for officials to provide advice on a range of matters that Ministers should consider in policy.[180]

However, and as counsel for Wai 2214 submitted, officials are required to provide advice on the review no matter what the policy imperatives are or whether there are indications the policy imperative may breach the Treaty/te Tiriti.[181] They saw this as a 'clear flaw in the current system' as it means there is 'no mechanism in the process available to Māori to halt or pause the review.'[182] This is because the priority previously afforded to such matters is undermined by the directive in the Cabinet Office circular dated 25 March 2024. As noted in chapter 2, this circular provides: 'All Ministers, Parliamentary Under-Secretaries, chief-executives, and their respective offices need to be familiar with the two agreements and ensure that they have processes in place to implement them.'[183]

Further, Mr Kibblewhite stated that the March 2024 Cabinet circular provides

> context as to what the policy agenda is, effectively. It sets out a list of things that are going to be implemented by this Government, and my role as a public servant is to give my free and frank advice on the best way of doing that, including highlighting some of the risks of it and what are the mitigations of some of those things.[184]

For the Treaty clause review, this means that Crown agencies will be considering the implications of the coalition agreement on legislation they administer and how, pending decisions on the scope and conduct of the review, they might implement that review. While there may be opportunities to provide alternative advice about how to go about implementation, scope and the extent of the review,

175. Paper 6.2.4, p 1
176. Paper 6.2.4, p 3
177. Paper 6.2.4. p 3
178. Transcript 4.1.6, pp 24, 28, 32–34
179. Paper 6.2.3, p 4; transcript 4.1.6, p 34
180. Transcript 4.1.6, p 38
181. Submission 3.3.17, p 36
182. Submission 3.3.17, pp 36–37
183. Paper 6.2.6, p 2
184. Transcript 4.1.6, p 108

ultimately all officials need to put in place processes to implement the coalition agreements.

Mr Fraser alluded to this with respect to the Cabinet circulars of 2019 that Te Arawhiti had a hand in drafting. He saw the circulars as complementary to the Cabinet circular of 25 March 2024. The 2019 documents would require officials and Ministers to consider the impact on the Māori–Crown relationship while implementing processes to give effect to the coalition agreements.[185] By logical extension, if due regard were had to the Māori–Crown relationship, the Ministers would have to be aware that the Treaty clause review policy development is contrary to prior Executive guidance on the Treaty/te Tiriti.[186] In Ms Coates' words:

> The Government's actions are a significant departure from both the 2019 Circular and the Cabinet Manual of 2023 and when the Government ignores its own te Tiriti guidance with such ease, it erodes any trust and faith that Māori have built with the Crown where te Tiriti is concerned.[187]

Having set out this context and the Crown's official standards, we note that MOJ officials have now provided advice to the Minister in respect of the purpose and scope of the review and a process for conducting the review. This advice was received after the urgent hearing. We summarised the contents of MOJ's 23 May 2024 briefing to Minister Goldsmith above in section 5.2.4.

Officials proposed to the Minister that the review's purpose should be defined as follows: legislation would 'state more clearly how the Treaty applies in its specific legislative context', which would 'reduce uncertainty and support better compliance, where it is appropriate to encapsulate the Treaty or the Treaty relationship in legal terms'.[188] This expression of the review's purpose provided for the outcomes mandated by the coalition agreement: to either replace all Treaty references with 'specific words relating to the relevance and application of the Treaty, or repeal the references'.[189] Officials advised, however, that the purpose of the review could be seen as the same as or compatible with the purpose of TPOG. Aligning the review with 'TPOG's approach' would mean a 'consistent approach to revising and more specifically elucidating Treaty clauses'.[190] Officials further advised that the proposed purpose of the review would 'follow the mission of TPOG to develop legislation that clearly articulates how the Treaty will be upheld, including an assessment of whether reference to the Treaty in legislation is required at all'.[191]

On this reasoning, repeal of Treaty clauses could result from a good faith approach when, after engagement with Māori, there was agreement that a Treaty

185. Transcript 4.1.6, p 48
186. Document A6(b), p [1]
187. Document A6(b), p [1]
188. Document A26, p 3
189. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10
190. Document A26, p 6
191. Document A26, p 3

clause might not be the best way to protect Māori rights and interests in a particular statute. Te Arawhiti advised policy-makers on this approach to Treaty clauses in the 2022 guidelines cited above:

> 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?[192]

Much depends, therefore, on what is the underlying rationale and intent of the review. Does the 'TPOG mission' truly align with the policy rationale in the coalition agreement?

Ms Coates stated in her brief of evidence that 'a review of legislation in and of itself is not a major cause for concern.'[193] She clarified this point at the hearing:

> In terms of the review, I am relatively short on that in my brief, but I did want to clarify a comment that I made at paragraph 83 [of my brief] where I say: 'A review of legislation in and of itself is not major cause for concern.' I understand that was a comment that was picked up yesterday by the Crown . . . I don't want that comment to be taken out [of] context and I just wish to make a couple of clarificatory comments in that respect.
>
> I am unbelievably concerned with what we know thus far about the proposed review. There is a clear coalition objective informing that review that speaks to removing or limiting provisions rather than strengthening them. It is therefore a review with a predetermined objective that is likely to be harmful and completely change our legislative landscape in the way that Treaty principles are currently used in legislation.
>
> I acknowledge that there is still quite a lot of unknowns in that particular review tranche of work, but on the face of it, you've got one party to the Treaty setting the parameters of the review and setting the process of the review on a fundamental constitutional issue of how Te Tiriti o Waitangi is given real practical legal effect in Aotearoa. That needs to be done, led by Māori or at the very least done in partnership.[194]

In sum, MOJ's May 2024 briefing suggests that there *was* a policy problem identified before the coalition agreement was signed, and that this policy problem was the need for a coherent approach to Treaty clauses which allowed for the possibility of omitting a Treaty clause if it was not the best way to protect Māori rights and interests in a new Act. TPOG's role was to assist with a coherent and consistent approach to Treaty clauses in new legislation.

192. Paper 6.2.3, p 12
193. Document A6, p 29
194. Transcript 4.1.6, pp 190–191

Having considered all the evidence and submissions in this inquiry, our view is that the rationale for the review is not motivated by the TPOG rationale of consistency, coherence, and certainty in drafting laws while actively protecting Māori interests. The coalition agreement makes it clear that the review is designed to remove alleged inequalities based on race. Otherwise, there would be no need or comparatively little need to include descriptive Treaty clauses in the review. These clauses already specify how the Treaty/te Tiriti applies to a statutory regime, although improvement is always possible of course with any statutory provision. The Minister confirmed on 28 May 2024 that descriptive clauses would be included in the review (pending Cabinet approval). Clarifying the Treaty clauses to strengthen them and provide more effectively for the Māori–Crown relationship is not the objective of the review.

As we have set out above, our view is that the rationale for the review is not based on sound and reasonable policy analysis. The rights of New Zealanders are guaranteed and protected in international law and in domestic legislation such as the New Zealand Bill of Rights Act 1990 (see chapter 4 for our full analysis on this point). What the Treaty clauses have attempted to do is:

- redress the exclusion or inequalities Māori have experienced (and still experience);
- provide for tino rangatiratanga and the active protection of Māori rights and interests guaranteed by the Treaty/te Tiriti; and
- provide for the constitutional significance of the Treaty/te Tiriti by giving it effect in statute law where appropriate.

We turn next to address the issue of pre-determined outcomes for the review, which is highly relevant to assessing its policy rationale and purpose.

(3) *Ngā putanga i whakatauria kētia*
Pre-determined outcomes

It is clear to us that the outcomes of the review have been predetermined by the coalition agreement. All 17 operative clauses, such as section 4 of the Conservation Act 1987, will be replaced, regardless of the Māori Treaty partner's views, their merits, or whether they comply with the Treaty/te Tiriti. Alternatively, these clauses could be repealed without being replaced. In addition, all 13 descriptive clauses are going to be reviewed; since they already meet the coalition agreement's rationale in terms of specificity, some will presumably be repealed.

The description of the review in the coalition agreement did not specify criteria for when Treaty clauses would be repealed rather than replaced. The relevant rationale contained in the coalition agreement is that the National Party and New Zealand First 'will not advance policies that seek to ascribe different rights and responsibilities to New Zealanders on the basis of their race or ancestry', and that they will 'reverse measures taken in recent years which have eroded the principle of equal citizenship'.[195] These are the agreed positions from which the Crown will

195. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10

conduct the review (among other measures), and these considerations are wholly unrelated to the coherence and consistency of Treaty references sought by TPOG. We do not accept them as valid for the reasons already set out above in this chapter and in chapter 4. Also, the Crown has Treaty/te Tiriti obligations and duties which must be met in a good faith, reasonable, and honourable manner. This is made clear by the LDAC guidelines, the Te Arawhiti guidelines, numerous Tribunal and court decisions, the settlement of Treaty claims, and indeed the Crown's practice of inserting Treaty principles in legislation for the last 50 years. It is too late to resile from these Treaty/te Tiriti obligations and duties in the twenty-first century.

5.4.2 He aha te tikanga kia whakahaerea te arotakenga i te whakaritenga e pā ana ki te Tiriti?

What is proposed for how the Treaty clause review will be conducted?

Treaty clauses have constitutional significance, as MOJ officials acknowledged in their 23 May 2024 briefing. They noted that the Treaty is a 'constitutional document and Treaty clauses are part of an ongoing constitutional dialogue'. Further, the review would have 'implications for the way the Treaty of Waitangi is reflected, understood and applied in New Zealand's legal system'.[196] There has, however, been no engagement or shared decision-making with Māori about whether this review is needed and, if so, its purpose and parameters. One partner to the 'ongoing constitutional dialogue' has simply been excluded. Although the Crown submitted that it is too early in the policy process for consultation,[197] the reality is that the review and its purpose have been agreed between National and New Zealand First, and the obligation for officials across all departments is to carry out the review for the purpose agreed. That is what they will do. Further, officials have not proposed any consultation on the scope, process, or governance of the review, and the Minister of Justice has accepted this position for the upcoming Cabinet paper, as we discuss in this section.

Following the hearing, MOJ officials provided advice to the Minister on 23 May 2024 about the purpose, scope, and conduct of the review for approval to draft a Cabinet paper. Officials advised the Minister that the review poses a risk to the Māori–Crown relationship. That is unquestionable. Māori will be the most affected by the review. They stand to lose significantly if their tino rangatiratanga is not respected and their rights and interests are not provided for in legislation.

If the process proposed in the 23 May 2024 briefing is approved by Cabinet, the first stage of the review is to confirm (a) the Ministers, officials, and stakeholders who will need to be involved in the review, and (b) the oversight of the review. No consultation is proposed about the review itself, who will be involved, or the oversight of the review.

In terms of oversight, MOJ officials proposed that their Ministry would lead the review with a Ministerial Oversight Group consisting of 'relevant Ministers

196. Document A26, p 5
197. Submission 3.3.23, p 13

and coalition partners'.[198] There has been no suggestion that Māori would play a leadership role, either through a Ministerial advisory group or by Māori groups and organisations co-designing Treaty provisions in the sectors for which they represent Māori on the national stage.

Rather, the proposed process is for Government agencies to begin by analysing the existing Treaty clauses in the statutes relevant to their jurisdiction. Officials would consider the intent of the clauses, any jurisprudence about their meaning and effect, and whether the clauses clearly articulate 'how the Treaty will be upheld in their specific context'.[199] MOJ officials recommended engagement with 'Māori and stakeholders before policy decisions are made'. Māori would need to be consulted to ensure that 'the intent of the review is met within the purpose of each Act'.[200] We take it that what was meant here was the intent of the review that aligned with 'TPOG's mission', since Māori do not support the coalition agreement's purpose for the review.[201] Officials also advised: 'Good faith engagement with Māori will support the delivery of legislative change that meets the intent [of the review], and mitigates [the] risks to the Crown Māori relationship.'[202]

If Cabinet approves this proposed process, therefore, officials expect that there will be good faith engagement with Māori before decisions are made about each Act. We agree that this is essential. Whether this approach has any chance of success, however, will depend on several factors, including:

- whether Māori accept that the rationale for, and purpose of, the review are consistent with the good faith and honourable conduct required of the Crown, which are pre-requisites for positive engagement; and
- whether the Māori Treaty partner will have a voice commensurate with the partnership in decisions about retaining existing clauses, the repeal of clauses, and the content and effects of replacement clauses.

Limiting the meaning and effect of Treaty clauses or wholesale repeals could damage the Treaty relationship and race relations in this country with significant impacts for the future of Aotearoa New Zealand.

We turn next to make our findings on the Crown's Treaty clause review policy.

5.5 Ngā Kupu Whakamutunga me ngā Whakakitenga Tiriti

Conclusions and Treaty Findings

5.5.1 Ngā Kupu Whakamutunga

Conclusions

In this section, we set out our conclusions and Treaty/te Tiriti findings on the Treaty clause review policy.

198. Document A26, p 8
199. Document A26, p 5
200. Document A26, p 5
201. See transcript 4.1.6, pp 190–191
202. Document A26, p 7

We note first that we did not receive as much evidence or as many specific submissions on this policy as for that on the Treaty Principles Bill. Some evidence and submissions referred to both together. At the hearing, Mr Kibblewhite and Mr Chhana told us that MOJ had not worked on the review since assuming responsibility from Te Arawhiti. This has since changed with the filing of the 23 May 2024 memorandum, which provided advice that will be the basis of a Cabinet paper. The Minister has approved certain options about the scope and conduct of the review for submission to Cabinet for final approval. We are able to report at this stage because the March 2024 Cabinet circular has made the policies recorded in the National–New Zealand First coalition agreement Crown policies: 'All Ministers, Parliamentary Under-Secretaries, chief executives, and their respective offices need to be familiar with the two [coalition] agreements and ensure that they have processes in place to implement them.'[203] Thus the decision to have a review, the rationale for the review, and the nature and intent of the review have already been set by the coalition agreement and made mandatory for all Ministers and Crown agencies by the March 2024 Cabinet circular. These are Crown acts (and omissions) on which we may make findings.

One of the first things we wanted to establish is why Treaty clauses have to date been included in legislation. Lil Anderson, Chief Executive of Te Arawhiti, said she 'hoped' that it was done to reflect agency and Ministerial commitment to the Treaty/te Tiriti.[204] Her choice of the word 'hoped' was interesting in this context – we take that to mean she believes that agencies and Ministers (in other words, the Crown) would include a Treaty clause in good faith: to give greater effect to the Treaty/te Tiriti partnership and greater realisation of the rights of iwi, hapū, and whānau subject to the particular piece of legislation. By expressing her hopes in this way, Ms Anderson was careful to note this did not mean that all such clauses achieve consistency with the Treaty/te Tiriti,[205] and we note in that respect the many Tribunal reports that have found section 8 of the RMA to be in breach of Treaty principles. In *The Ngawha Geothermal Resource Report 1993*, for example, the Tribunal found that the RMA is 'inconsistent with the principles of the Treaty in that it omits any provision which ensures that any person exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty'.[206]

203. Paper 6.2.6, p 2
204. Transcript 4.1.6, p 58
205. Transcript 4.1.6, p 58
206. Waitangi Tribunal, *The Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 145, 146–147; see also Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), pp 330–332; Waitangi Tribunal, *The Stage 2 Report on the National Freshwater and Geothermal Resources Claims – Pre-publication Version* (Wellington: Waitangi Tribunal, 2019), p 66

Ms Anderson further considered that Treaty clauses should 'reflect the duties owed by that [Crown] partner to its Māori Treaty partner'.[207] We also note she agreed 'that is the reason that most Treaty clauses are provided in legislation'.[208]

It is very clear to us that the Treaty/te Tiriti clauses have constitutional significance, and the language of those clauses supports Ms Anderson's evidence about why they have been inserted in legislation. We note a few examples here, taken from Ms Anderson's evidence:

- 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi';
- 'give effect to the principles of the Treaty of Waitangi';
- 'recognise and provide a practical commitment to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)';
- 'have regard to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)';
- 'observe and encourage the spirit of partnership and goodwill envisaged by the Treaty of Waitangi';
- 'recognise and respect the principles of the Treaty of Waitangi';
- 'recognise and respect the Crown's responsibility to take appropriate account of the principles of the Treaty of Waitangi';
- 'take account of the Treaty of Waitangi';
- 'specifies how the Crown's responsibility to give effect to the principles of the Treaty of Waitangi is recognised and respected';
- 'recognise and provide a practical commitment to the Treaty of Waitangi (te Tiriti o Waitangi)';
- 'recognise and respect the Crown's responsibility to give effect to the Treaty of Waitangi (Te Tiriti o Waitangi)':
- 'to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles';
- 'honours Te Tiriti o Waitangi and supports Māori–Crown relationships';
- 'recognise and respect the Crown's responsibility under the Treaty of Waitangi/te Tiriti o Waitangi';
- 'recognises and respects the Crown's obligations under the principles of te Tiriti o Waitangi/the Treaty of Waitangi'; and
- 'recognise and respect the Crown's obligations to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi'.[209]

Thus, the legislative commitment to the Treaty/te Tiriti and its principles uses terms like 'recognise and respect', 'take appropriate account of', 'give effect to', 'honour', 'uphold', 'practical commitment', 'spirit of partnership and good will', the Crown's 'responsibility', the Crown's 'obligations to give effect to the principles of the Treaty', and other such words. These indicate the Crown's intention to honour its Treaty/te Tiriti obligations in legislation. MOJ officials advised the Minister that the Treaty/te Tiriti is a 'constitutional document' and the 'Treaty clauses are part of an ongoing constitutional dialogue'. The review, they said, would therefore

207. Transcript 4.1.6, p 58
208. Transcript 4.1.6, p 58
209. Document A22(a), pp [9]–[45]

'have implications for the way the Treaty of Waitangi is reflected, understood and applied in New Zealand's legal system'.[210] We agree. Most Acts do not have Treaty clauses, of course, and those that do have not always been consistent with the principles despite their wording, but the Treaty clauses by and large have represented a good faith commitment to carry out the Crown's Treaty/te Tiriti obligations in statute law. To renege from that commitment is a serious matter.

The Tribunal asked both Ms Anderson and Mr Fraser what they considered would be the benefits of the review to the Māori Treaty partner. Ms Anderson suggested that a 'review, in and of itself, isn't damaging'. She considered the way the review would be undertaken might be what Māori would be concerned about.[211] The claimants' concerns, however, go well beyond how the review might be conducted. As cited above, Ms Coates stated:

> I am unbelievably concerned with what we know thus far about the proposed review. There is a clear coalition objective informing that review that speaks to removing or limiting provisions rather than strengthening them. It is therefore a review with a predetermined objective that is likely to be harmful and completely change our legislative landscape in the way that Treaty principles are currently used in legislation.[212]

Ms Anderson acknowledged that the review and other matters in the coalition agreements 'have caused great distress in Māori communities'.[213] She accepted that the review will have an effect on the Māori–Crown relationship but suggested that its impact is still unclear.[214] Mr Fraser made similar observations, stating that he has not personally spoken to Māori about the review but that Te Arawhiti will be advising Government to undertake a process that would be Treaty compliant.[215] It is unclear to the Tribunal how that is possible without speaking to Māori. However, neither witness could provide an answer on what the benefit of the review was to Māori.

We agree to an extent with Mr Fraser and Ms Anderson that in the normal course of events the mere fact of a review is not necessarily a concern. However, this review has been proposed in the context of a raft of measures targeted at Māori rights and interests and directly impacting the Treaty/te Tiriti relationship. It was proposed by a political party that has on several previous occasions attempted to 'delete' Treaty principles via Members Bills and, as Ms Anderson acknowledged, even the proposal of the review is currently causing 'distress' in Māori communities. This seems to us something that should be of concern to the Crown.

An even more significant concern is that this review is designed to amend or repeal Treaty clauses to address the policy rationales in the coalition agreement, which are not concerned with providing for Māori rights and interests or

210. Document A26, p 5
211. Transcript 4.1.6, p 26
212. Transcript 4.1.6, p 191
213. Transcript 4.1.6, p 52
214. Transcript 4.1.6, p 52
215. Transcript 4.1.6, p 39

recognising the Crown's Treaty/te Tiriti obligations. The exception is past Treaty settlements, which the coalition agreement has made exempt from amendment or repeal as part of the review. The policy rationales for the review are to defend the equality of all New Zealanders by stopping policies that 'seek to ascribe different rights and responsibilities to New Zealanders on the basis of their race or ancestry' and 'revers[ing] measures taken in recent years which have eroded the principle of equal citizenship'.[216]

We have discussed these policy rationales above in section 5.4.1 and in chapter 4; the rationales for the review and the Bill are essentially the same. In brief, our view is that the rights of New Zealanders are already protected under international instruments and domestic law. The rights of indigenous peoples, including Māori, are to be protected under UNDRIP but that instrument has not been given effect in domestic law unless partially though Treaty clauses and other measures that are now targeted in the coalition agreements. Yet MOJ officials have advised the Associate Minister that equality before the law in Treaty terms includes 'equal enjoyment of fundamental human rights without disadvantage or discrimination', and that any definition of Treaty principles in legislation should include this meaning of equality.[217]

Māori have fought for the Crown in two world wars precisely to achieve their promised citizenship and equality with other New Zealanders, yet no one who is familiar with the history of this country could claim that Māori were treated equitably compared with settlers in the nineteenth century. Inequalities persisted in the twentieth century and the statistics show that Māori still suffer disadvantage and discrimination today across various areas of life, including health, justice, housing, child protection services, education, employment, and poverty.[218] To state that the review is necessary to reverse measures that have eroded equal citizenship is to misunderstand the true balance of equality and inequality in Aotearoa New Zealand.

In their 23 May 2024 advice to the Minister, however, officials did not specifically address the rationale stated in the coalition agreement. Rather, they suggested that the purpose of the review would be to 'state more clearly how the Treaty applies in its specific legislative context', which would 'reduce uncertainty and support better compliance, where it is appropriate to encapsulate the Treaty or the Treaty relationship in legal terms'.[219] In other words, the purpose might align with

216. New Zealand National Party and New Zealand First Party, 'Coalition Agreement', 24 November 2023, p 10

217. Document A7, p [19]

218. See, for example, Waitangi Tribunal, *Tū Mai te Rangi!: Report on the Crown and Disproportionate Offending Rates* (Lower Hutt: Legislation Direct, 2017), pp 8–10, 27–28; Waitangi Tribunal, *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Lower Hutt: Legislation Direct, 2019), pp 17–25; Waitangi Tribunal, *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamarki Urgent Inquiry* (Lower Hutt: Legislation Direct, 2021), pp 93–95; and Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness* (Lower Hutt: Legislation Direct, 2024), pp 25, 29, 33–35, 59.

219. Document A26, p 3

that of TPOG in seeking a 'consistent approach to revising and more specifically elucidating clauses'.[220] On this approach, the rationale for the review would be that operative clauses may be interpreted too broadly whereas descriptive clauses may not be 'broad enough to deal with circumstances as they arise', and either of these could lead to litigation.[221]

For the reasons given in sections 5.4.1(2) and 5.4.1(3) (and in chapter 4), we do not accept that uncertainty about the meaning of the Treaty principles is a valid rationale for the review. The weight of evidence from the Crown and claimants suggests that litigation would continue regardless of the review's outcomes. Nor do we accept that the purpose of the review is aligned with the policy purpose of TPOG. The review has predetermined outcomes; regardless of the merits or effectiveness of the clauses or the wishes of the Māori partner, all 17 operational clauses must be replaced and some of them may be repealed.[222] Given the rationale in the coalition agreement, some repeals seem inevitable. Some of these operational clauses, such as section 4 of the Conservation Act 1987, have been in force for decades without the need for amendment. Further, the Minister has confirmed that all 13 descriptive clauses will be included in the review, even though they already meet the coalition agreement's purpose of having specific words as to the relevance and application of the Treaty. Again, some repeals seem inevitable unless the intention is simply to remove the word 'principles' from the descriptive clauses; this seems unlikely given the 'equality' rationale of the review.

We agree, therefore, with Ms Coates that the purpose of the review is to limit or remove Treaty clauses rather than strengthen them; it is a 'review with a predetermined objective that is likely to be harmful and completely change our legislative landscape in the way that Treaty principles are currently used in legislation'.[223]

Thus, the effect of the Cabinet circular of 25 March 2024 is that the Treaty clause review will have to be implemented by the Crown and, as a result, it will lead to the amendment or repeal of statutory enactments that are consistent with the Crown's obligations under the principles of the Treaty of Waitangi, or take account of the principles, or specify Treaty obligations of the Crown, or provide access for Māori to the courts. That is a reductionist approach to the Treaty/te Tiriti. The Government's policy will reduce the impact and relevance of the Treaty/te Tiriti across the whole landscape of the statute book without regard for the status of the Treaty/te Tiriti as the source and constitutional foundation which legitimates the Government itself.

Further, MOJ has proposed that the purpose, scope, design, and process of the review should be set solely by the Crown without reference to its Treaty partner – their proposal limits consultation to later in the review when specific Acts are under consideration by their respective agencies. The Minister having signified his

220. Document A26, pp 2–3, 6; see also paper 6.3.10
221. Document A26, p 3
222. This figure was correct as at 23 May 2024 although we note that the Minister agreed to exempt the Treaty of Waitangi Act 1975 and the State-Owned Enterprises Act 1986 from the review.
223. Transcript 4.1.6, p 191

approval, this is the proposed process that will be included in the forthcoming Cabinet paper. The claimants submitted that the Crown was acting unilaterally in pursuing this policy and had not consulted with Māori. We agree. Good faith partnership requires open and honest communication between Treaty partners on whether the review should occur and – if so – its purpose, design, governance, and parameters. Māori have not sought this review and, indeed, along with the Treaty Principles Bill, have been vocal in their opposition to it.

In respect of the conduct of the review, officials have recommended that there be consultation with Māori and 'stakeholders' before decisions are made about each statute to 'ensure the intent of the review is met within the purpose of each Act, and to support a positive Crown–Māori relationship'.[224] Officials added, under the heading 'Issues and Risks', that 'good faith engagement with Māori will support the delivery of legislative change that meets the intent [of the review], and mitigate risks to the Crown Māori relationship'.[225] We agree that good faith engagement on each Act would be essential. In our view, however, it is unlikely to deliver the outcomes sought in the coalition agreement (which are now Crown policy), nor is it likely to avert the serious risk to the Māori–Crown relationship, unless the review is given a more constructive purpose, and Māori are given a partnership role in decision-making about the Acts that most affect them.

5.5.2 Ngā whakakitenga mō ngā wāwāhinga ture Tiriti o Waitangi

Findings of breach

For the Crown to unilaterally pursue the Treaty clause review, based upon the policy rationale in the coalition agreement, will result in amendments or repeals. There can be no doubt that it is pre-determined in its intent. Yet the justification for the policy, premised as it is on the equal rights of all citizens and 'uncertainty' in the law, ignores the Treaty/te Tiriti guarantee of rangatiratanga, and the principles of partnership, active protection, equity, and good government. It also fails to address the constitutional nature of the Treaty/te Tiriti and the rights that emanate from its terms. Nor does it address the contractual nature of the Treaty/te Tiriti which raises issues of fiduciary obligations on the part of the Crown.[226] We therefore find that the rationale and pre-determined outcomes of the review are inconsistent with the principles of the Treaty of Waitangi/te Tiriti o Waitangi.

As noted earlier, the particular effect of the Cabinet circular of 25 March 2024 is that the Treaty clause review will have to be implemented. As a result, it will lead to the amendment or repeal of statutory enactments that are consistent with the Crown's obligations under the principles of the Treaty of Waitangi, or take into account the principles, or specify Treaty obligations of the Crown, or provide access for Māori to the courts. That is a reductionist approach to the Treaty/te Tiriti. The Crown's policy will reduce the impact and relevance of the Treaty/te Tiriti across the whole statute book without regard for the status of the

224. Document A26, p 5
225. Document A26, p 7
226. Document A9, p 32

Treaty/te Tiriti as the source and constitutional foundation which legitimates the Government itself.

This is evident in the context of the work that the coalition government has already commenced to dismantle the scaffolds of the Treaty/te Tiriti law landscape, for example with the introduction of legislation to repeal section 7AA of the Oranga Tamariki Act 1989. The cursory Treaty clause review in that case was justified by reference to the rights of children who are cared for by non-Māori caregivers, while obscuring the impact on most Māori children of removing that provision.[227]

We also consider that the Crown has not to date acted honourably and in good faith in pursuing the review. It has not consulted with Māori on a matter of great significance to them. This contravenes Te Arawhiti's own Engagement Guidelines and Framework. The failure to fulfil these duties already constitutes a breach of the principle of partnership and fails to provide for Māori tino rangatiratanga. Further, no consultation is proposed by MOJ on the scope, process, and governance of the review. If Cabinet accepts this proposal, the failure to engage with Māori and seek consensus on these matters will perpetuate and compound the Treaty/te Tiriti breach.

The review is likely to remove or narrow existing Treaty clauses which will in turn remove Treaty/te Tiriti protections that currently exist in New Zealand law. While these protections are imperfect, they nonetheless provide a means for iwi, hapū, and whānau to both hold the Crown to account and seek redress through the courts. Reducing these protections would therefore impact the rights of Māori to access justice to have their rights under the Treaty/te Tiriti realised, which is in breach of the principles of equity and redress. The Crown also has an obligation to actively protect the rights and interests of Māori. To remove or limit the effect of the Treaty/te Tiriti protections contained in Treaty clauses is a self-evident breach of the principle of active protection.

We remain concerned that the effect of such a review will be to remove Treaty/te Tiriti safeguards from decision-making. These safeguards are extremely important, particularly in resource and environmental management, matters which are of significant concern to Māori. In the case of conservation, for example, the role of the Department of Conservation (DOC) covers eight million hectares of 'precious landscapes and ecosystems', marine reserves, and all species of indigenous flora and fauna. DOC's role is crucial to Māori because 'DOC has charge of much of the remaining environment in which mātauranga Māori evolved, and which Māori culture needs for its ongoing survival'.[228] Treaty clauses play an important role in safeguarding and protecting our natural environment to ensure that it remains as a resource for future generations, both tangata whenua and tangata Tiriti. This is

227. Waitangi Tribunal, *The Oranga Tamariki (Section 7AA) Urgent Inquiry 10 May 2024 Report – Pre-publication Version* (Wellington: Waitangi Tribunal, 2024), pp 28, 30, 31–33

228. Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, *Te Taumata Tuarua*, 2 vols (Wellington: Legislation Direct, 2011) *Te Taumata Tuarua*, vol 1, p 297

evident in section 4 of the Conservation Act 1987, which states: 'This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi'. This is a strong legislative requirement in a statutory regime of great importance to Māori. A review of such protections is not a matter that should be taken lightly nor pursued in a pre-determined and politicised way.

Furthermore, if the Treaty Principles Bill passes – and the review succeeds in narrowing or removing existing Treaty clauses – this will limit the ability of future governments to enact *meaningful* Treaty clauses into law. Contrary to Crown officials, we think these are matters of grave concern indeed.

For the reasons outlined in this section, we find that the Treaty clause review policy is inconsistent with the principles of the Treaty of Waitangi/te Tiriti o Waitangi.

5.5.3 Ngā whakakitenga o te whakahāweatanga

Findings of prejudice

The predetermined outcomes of the Treaty clause review will prejudice Māori across all the sectors governed by legislation that has a reference to Treaty principles or to the Treaty/te Tiriti. These include the health sector, the environment, the marine and coastal area, the conservation estate, resource management, education and training, child protection services, climate change response, local government, the public service, land transport management, energy and Crown minerals, urban development, and others.[229] The prejudicial impacts for Māori will be far reaching if the Treaty provisions in some, many, or all of these statutory regimes are weakened or removed. Corrections would have been included in this list but the Crown has already decided to remove the Treaty clause from the Corrections Amendment Bill,[230] a sign of things to come under the review.

In addition to the particular impacts of removing Treaty clauses from statutory regimes, Māori will be prejudiced because their access to the courts for regime-specific relief will be impacted if there is no longer a Treaty reference in the relevant Act.

To add insult to injury, the failure to engage with Māori about whether there should be a review and, if so, the purpose, scope, and conduct of it, has prejudiced them further. If they are not accorded a role in decision-making for each statutory regime as it is reviewed, the prejudice will be compounded.

Finally, we find that there is a risk to the Māori–Crown relationship that will prejudice Māori and their place in this country. The claimants could not envisage positive outcomes from a review that will replace or repeal Treaty clauses, based on a rationale that equality means sameness. The Crown's policies are tending in a monocultural direction with no place for difference; as the rhetoric puts it, 'Aotearoa New Zealand' must become 'New Zealand'. The breaches and prejudice

229. Document A22(a), pp [7]–[37]

230. Office of the Minister of Corrections, 'Removing the Treaty of Waitangi provisions from the Corrections Amendment Bill', Department of Corrections, 10 April 2024, Removing_the_Treaty_of_Waitangi_Provisions_from_the_Corrections_Amendment_Bill.pdf

from the review policy and other policies are beginning to have a cumulative effect that is of great concern to the claimants and worries us greatly for the future of this country.

We turn next, therefore, to the overall impacts of the Treaty Principles Bill policy and the Treaty clause review policy which were the joint subjects of the claims before us.

5.5.4 Ngā whakakitenga whānui mo Te Pire o te Mātāpono Tiriti me ngā kaupapa here mō te arotakenga i te whakaritenga e pā ana ki te Tiriti me ā rātou pānga ngātahi

Overall findings on the Treaty Principles Bill and Treaty clause review policies and their combined impacts

In chapter 4 and in this chapter, we have found that the Crown's Treaty Principles Bill policy and Treaty clause review are inconsistent with the principles of the Treaty of Waitangi/te Tiriti o Waitangi. Having considered both policies separately and made findings of breach and prejudice, we find that the claims in this urgent inquiry are well-founded.

We now consider the two policies together, as did much of the evidence and submissions. In our view, Dr Harris captured the essence of these Crown policies when he said:

> The Treaty Principles Bill and the Treaty clause review contort the very concept of the Treaty principles that is meant to be the touchstone for the Tribunal. One policy or act of the Crown's, the Treaty Principles Bill, reinterprets and redefines the principles in a way that shows no fidelity or respect for the original treaty. The other policy or act of the Crown seeks to eliminate or whittle down the Treaty principles as they appear across the statute book. One policy or act drills deep into the foundations of New Zealand's constitutional order to tamper with those foundations. The other policy or act spreads a net across the landscape and aims to drag and catch all references to the principles, so that they can be lifted off that landscape. It is worth returning to Casey J's words about what the principles are: an account of the Treaty's 'terms understood in the light of the fundamental concepts underlying them'; precepts that call for an assessment of the relationships the parties hoped to create by and reflect[ed] in Te Tiriti o Waitangi. It can hardly be said that Treaty or Te Tiriti relationship are being assessed, let alone respected, where one side is unilaterally seeking to redefine the terms of the Treaty. Where proposed principles lose any plausible or defensible connection to the terms of the text the Crown cannot be said to [be] upholding the principles at all.[231]

As a result of the impact of the Treaty Principles Bill and Treaty clause review on Māori rangatiratanga, we agree with Emeritus Professor Kelsey that this is a constitutional moment bordering on a constitutional crisis.[232]

231. Document A9, p 40
232. Transcript 4.1.6, p 252

We also agree with the claimants and interested parties that they are unlikely to be able to influence the process ahead.[233] To support that position, they referred to what they called an 'established pattern of bad faith' on the part of the coalition Government and its evident hostility towards the Treaty/te Tiriti.[234] In support of this contention, counsel for the claimants and interested parties referred to the Crown's unilateral introduction of legislation to repeal section 7AA of the Oranga Tamariki Act 1989, and introduction of legislation requiring referenda on Māori Wards in local government.[235]

We agree that the rapid abolition of Te Aka Whai Ora, the repeal of section 7AA of the Oranga Tamariki Act 1989, the amendment to the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 regarding referendums on Māori wards, and the policy processes adopted for the Treaty Principles Bill and Treaty clause review, together demonstrate an emerging pattern of policy and law making. That pattern does not include engagement processes for consultation with Māori. To date the Government has wilfully failed to engage with its Treaty partner. It has not even met the Crown's own standards for engagement with Māori as set out in the Te Arawhiti documents provided to the Tribunal in this inquiry and discussed in chapters 2, 4, and earlier in this chapter.[236]

We consider that in requiring Ministers and officials through the Cabinet Circular of 25 March 2024 to advance the Treaty Principles Bill and Treaty clause review, the coalition agreements will be implemented. That logically means that the Crown has and will act in a manner inconsistent with the text and principles of the Treaty/te Tiriti, despite good faith attempts by officials to provide free and frank advice contrary to the direction that the coalition Government seems determined to pursue.[237]

All the evidence suggests that, at best, the actions of the Crown in pursuing these policies amount to a reckless disregard of the Māori–Crown relationship. At worst, they represent a cynical weaponisation of the policy process and the doctrine of parliamentary sovereignty to introduce legislation that will reduce the rights of Māori and limit the Treaty/te Tiriti obligations of the Crown.

If the failure to follow the commitments in the coalition agreements will result in disintegration of the coalition and possibly a bringing down of the Government, our response is that the Crown must uphold the Treaty of Waitangi/te Tiriti o Waitangi. That is the right thing to do and no Ministers of the Crown, regardless of their political parties, are exempt from the Crown's duty to act honourably and in good faith.

Unfortunately for the Māori–Crown relationship, the Crown's actions and its two policies in this inquiry (which are inconsistent with Treaty principles), are causing justifiable distrust in the Māori community. As Dr Harris noted, the

233. Submission 3.3.13, p 21
234. Submission 3.3.21, pp 8, 15; see also submission 3.3.13, pp 22–24
235. Submission 3.3.21, pp 8–9
236. Papers 6.2.7, 6.2.9
237. Transcript 4.1.6, p 222

Crown's actions 'threaten to disfigure or rupture' the Crown–Māori relationship and 'could set back the foundational relationships of Aotearoa New Zealand for decades'.[238]

Evidence of this is reflected in the statement of Waihoroi Shortland:

> People who find themselves trying to rewrite the pathway forward in a way that serves their political agendas is nothing new to Māori. It is something that has consistently been part of our experience. The speed at which things with a Māori focus are being repealed, is faster by comparison, because they are the easiest things for the Government to undo. This Government can dismiss the Māori concern, simply on the fact that, by their estimation, Māori have done little collectively to put them in power, they for their part lose little by doing anything [to] us.
>
> The current Government's state of play confirms for Māori what is already a high state of distrust.
>
> It takes little courage to repeal the Māori initiatives that are on the books. In fact, it takes no courage at all.[239]

Such actions with respect to the Crown's two policies are inconsistent with the principles of the Treaty/te Tiriti and are in breach of the Crown's duties to act in good faith, act honourably, and reasonably. Rather than upholding the principles, the Crown is utilising the policy and parliamentary process to enact legislative enactments that are contrary to the constitutional nature of the Treaty/te Tiriti itself. As Moe Milne put it, the Government is 'feeling a loss of power . . . so their only weapon against that is to change legislation'.[240]

We also agree with counsel for Wai 1341/3077, who noted that the result is that Māori no longer have confidence in the Crown's ability and willingness to honour its Treaty/Tiriti obligations with respect to the Bill and the review.[241] This lends force to the following statement from the grandchild of Sir James Henare, Rowena Tana. Ms Tana quoted Sir James' son, Erima, as follows:

> [Erima] said: 'the legal status of the Treaty depends entirely upon the political will of the government of the day no matter how temporary they may be.' He went on to say that 'the problem for the Māori is compounded further by the political process and the political impotence and powerlessness of Māori in Parliament.' This is the situation we are faced with today and we plead with the Tribunal to stay the course.
>
> . . . . .
>
> No Government should be able to tamper with te Tiriti.
>
> The partnership that was created by te Tiriti o Waitangi compels the Crown to stand by what was agreed to:

238. Document A9, p 41
239. Document A10, p 5
240. Document A13, p 2
241. Submission 3.3.22, p 31

> 'Te Tiriti o Waitangi should be paramount in every law enacted by Parliament, so as to give full binding, lawful and moral status. The principles of Te Tiriti are many and I suggest, the real way to deal with them, special note to the Government, is to stand by them when they are unpopular as well as when they are popular.'[242]

Ms Milne and Mr Tipene go so far as to suggest that Māori are under attack, with Mr Tipene stating:

> The attack on Māori by the Coalition Government is overwhelming Māori and our capacity to deal with a number of issues across many fronts.
>
> The Government's approach has the same thread woven throughout all of their legislative changes since they came into power, which is undermining Māori authority, and undermining the positive and proactive changes that have been progressive over many years now.
>
> The Government does not have a right to single handedly legislate on matters concerning us. The Government should not be able to do the things it is doing to Māori and use parliamentary process to do it.[243]

We thus find that, considered jointly, these policies show an alarming pattern of using the policy process and parliamentary sovereignty against Māori instead of meeting the Crown's Treaty/te Tiriti obligations, in breach of Treaty principles, and that the combined impacts of the policies and of this breach are highly prejudicial to Māori.

We turn next to make our recommendations for the removal or prevention of prejudice.

5.6 Ngā Tūtohunga

Recommendations

Having made findings of breach and prejudice, we now make recommendations that flow from those findings and from the evidence and submissions before us:

- 1. We recommend that the Treaty Principles Bill policy should be abandoned.
- 2. We recommend that the Crown should constitute a Cabinet Māori–Crown relations committee that has oversight of the Crown's Treaty/te Tiriti policies. We do not consider it appropriate that these matters are considered by the Social Outcomes Cabinet Committee.
- 3. We recommend that the Treaty clause review policy be put on hold while it is re-conceptualised through collaboration and co-design engagement with Māori.
- 4. We recommend that the Crown consider a process in partnership with Māori to undo the damage to the Māori–Crown relationship and restore confidence in the honour of the Crown. While the issue is wider than the

242. Document A12, p 3
243. Document A11, pp 5–6; see also doc A13, p 3

two specific policies before us in this urgent inquiry, we make this recommendation based on the findings we have made and the redress that is necessary to remove the prejudice and prevent similar prejudice in the future.

In making these recommendations, we are reminded of the words of Waihoroi Shortland to the Crown: 'It takes a whole lot of real courage to examine what you have done to Māori and what you could do for Māori prospects. I am yet to see what is in store right now that raises Māori prospects.'[244]

We note the importance of informed public conversations on the Treaty/te Tiriti and its constitutional significance. We have not at this stage made recommendations about how the Crown could address this issue or the issue of social cohesion. That may need to be a matter for early consideration in the wider constitutional kaupapa inquiry outside of the haste and speed required for this urgent inquiry.

As this report is an interim report, we reserve our jurisdiction to consider the issues again following the filing of the Cabinet paper and regulatory impact statement, and any further evidence or submissions that might be required in response to those documents.

We also reserve our jurisdiction to reconsider these issues should the Treaty Principles Bill be enacted and/or should the Treaty clause review proceed as planned and result in statutory amendments or repeals.

244. Document A10, p 5

Dated at Wellington this 15th day of August 2024.

Chief Judge Dr Caren Fox, presiding officer

Derek Fox, member

Prue Kapua, member

Dr Grant Phillipson, member

Kevin Prime ONZM, MBE, CNZM, member

Dr Monty Soutar ONZM, member

Professor Emeritus David V Williams, member

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(3) Dr Season-Mary Downs, Chelsea Terei-Tipene, Heather Jamieson, and Majka Cherrington, Relevant findings from Wai 1040 Te Paparahi o Te Raki Stage 1 and 2 reports, 22 May 2024

3.3.14 Amy Chesnutt, Alisha Castle, and Toni Talamaivao, closing submissions on behalf of Druis Barrett and te Ropu Wāhine Māori Toko I te Ora – the Māori Women's Welfare League Incorporated, its members, and all wāhine Māori of Aotearoa (Wai 2959), 22 May 2024

3.3.15 Ārama Ngāpō, closing submissions on behalf of Nicola Dally-Paki on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3319), Dr Rapata Wiri on behalf of his whānau, hapū, iwi, whānau whānui and whāngai (Wai 3330), Ms Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3314), and Mihirawhiti Searancke, Renee Hinerangi Searancke, Doreen Hinemania Richards, Kingi Tuheka Hetet, Boyce Te Wharemaru lhakara II Taylor, Sharon Bettina Searancke-Rakena, and others on behalf of her whānau (Wai 1504), 22 May 2024

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3.3.19 Michael Sharp, closing submissions on behalf of Ngāti Muriwai Hapū (Wai 3329), 22 May 2024

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3.3.24 Darrell Naden, Victoria Tumai, Lauren Oliver, and Sally Rickard, reply submissions on behalf of David Hawea, for and on behalf of the Hawea whānau and Te Whānau a Kai iwi (Wai 892), Jasmine Cotter-Williams, for and on behalf of her whānau and Ngāti Taimanawaiti iwi (Wai 2063), Stephanie August, for and on behalf of the late Robert Charles William James Farrar and her whānau (Wai 3096), Robert Gabel, for and on behalf of Ngāti Tara of Ngāti Kahu (Wai 1886), April Grace, for and on behalf of her whānau, Ngā Wahapū o Te Rarawa, Ngāti Whātua and Ngāpuhi Nui Tonu (Wai 2206), Annette Hale, for and on behalf of the Wikotu whānau of Te Upokorehe (Wai 2743), Te Enga Harris and Lee Harris, for and on behalf of the Wiremu Hemi Harris and Meri Ōtene whānau, and on behalf of members of Ngāti Rangi, Ngāti Here, Ngāi Tūpoto, Ngāti Hōhaitoko, Ngāti Kōpuru, Te Rarawa and Ngāti Uenuku (Wai 1531), Tasilofa Huirama, for and on behalf of the Huirama whānau and members of Ngāti Ueoneone and Ngāti Tautahi of Ngāpuhi (Wai 2890), Te Urunga Evelyn Aroha Kereopa, for and on behalf of the Kereopa whānau and members of Te Ihingārangi, hapū of Ngāti Maniapoto (Wai 762), Richard Nathan, for and on behalf of the Mangakahia Hapū Claims Collective (Wai 861), Diane Marie Paekau for and on behalf of her whānau and members of Ngāti Hounuku, Ngāti Houa, Ngāti Poua, Ngāti Mahuta, Ngāti Te Ata and Ngāti Whātua (Wai 3131), John Pikari, for and on behalf of the descendants of Hone Karahina and members of the hapū of Te Uri o Hua and Ngāti Torehina (Wai 2394), Rueben Taipari Porter, for and on behalf of the hapū of Ahipara (Wai 1968), Audrey Okeroa Rogers, for and on behalf of her whānau and members of Ngāti Koheriki (Wai 2869), Jane Stevens, for and on behalf of her whānau and Ngāi Tahu iwi (Wai 2671), Violet Eva Walker, for and on behalf of her whānau and members of Ngāti Rangi o Waiapu ki Tawhiti and Ngāti Kahu ki Whangaroa (Wai 2382), Kahura James Watene and Elizabeth Watene, for and on behalf of Ngāi Tukōkō and Ngāti Moe of Rangitāne me Ngāti Kahungunu (Wai 2778), and Michael Williams and Jessica Williams, for and on behalf of their whānau, and members of Ngaitūpango, hapū of Ngāpuhi (Wai 2838), 15 July 2024

3.3.25 Dr Bryan Gilling and Henry Foubister, reply, reply submissions on behalf of Patricia Tauroa and Robyn Tauroa on behalf of ngā hapū o Whangaroa (Wai 58), the late Karanga Pourewa, Hinemoa Pourewa, the late Tarzan Hori, and William Hori on behalf of themselves and the descendants of Whakaki and Te Hapū o Ngāti Kawau (Wai 1312), and Doreen Puru, Anna Kahukura Hotere, the late Louie Katene, Emma Torckler, and William Puru on behalf of themselves, Te Hoia, Ngāti Rangimatamomoe and Ngāti Rangimatakaka (Wai 1684), 15 July 2024

3.3.26 Dr Season-Mary Downs, Chelsea Terei-Tipene, and Majka Cherrington, reply submissions on behalf of Rewiti Paraone, Erima Henare, Pita Tipene, and Waihoroi Shortland on behalf of Te Rūnanga o Ngāti Hine for and on behalf of descendants of Torongare and Hauhaua (Wai 682), 15 July 2024

3.3.27 Annette Sykes, Kalei Delamere-Ririnui, and Maia Te Hira, reply submissions on behalf of Ngāti Te Rangiunuora who are supported by Ngāti Pikiao (Wai 1194 and Wai 1212), Pita Tipene, Moana Maniapoto, George Laking, Veronica Tawhai, Donna Kerridge and India Logan Riley on behalf of Ngā Toki Whakarururanga (Wai 3342), Donna Awatere-Huata of Ngāti Porou, Ngāti Whakaue and Ngāti Hine, on behalf of herself and

all Māori (Wai 2494), and Dr Leonie Pihama, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira and Te Ringahuia Hata (Wai 2872), 15 July 2024

3.3.28 Ārama Ngāpō and Hussain Sabori, reply submissions on behalf of Nicola Dally-Paki on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3319), Dr Rapata Wiri on behalf of his whānau, hapū, iwi, whānau whānui and whāngai (Wai 3330), Ms Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau whānui and whāngai (Wai 3314), and Mihirawhiti Searancke, Renee Hinerangi Searancke, Doreen Hinemania Richards, Kingi Tuheka Hetet, Boyce Te Wharemaru lhakara II Taylor and Sharon Bettina Searancke-Rakena and others on behalf of her whānau (Wai 1504), 15 July 2024

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4 Transcripts and Translations

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4.1.6 National Transcription Service, draft transcript of urgent hearing (Waitangi Tribunal offices, Wellington, 9–10 May 2024)

6 Other Papers in Proceedings

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6.2.3 Te Arawhiti, 'Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design: Questions for Policy-makers', March 2022

6.2.4 Cabinet Office, 'Te Tiriti o Waitangi/Treaty of Waitangi Guidance', Cabinet circular, 22 October 2019

6.2.5 Cabinet Office, 'Better Co-ordination of Contemporary Treaty of Waitangi Issues', Cabinet circular, 2 April 2019

6.2.6 Cabinet Office, 'National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements', Cabinet circular, 25 March 2024

6.2.7 Te Arawhiti, 'Crown engagement with Māori', not dated

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6.2.9 Te Arawhiti, 'Building closer partnerships with Māori', not dated

6.2.10 Legislation Design and Advisory Committee, 'Legislation Guidelines 2021 Edition', September 2021

6.2.11 The Independent Working Group on Constitutional Transformation, 'He Whakaaro Here Whakaumu Mō Aotearoa: Report of Matike Mai Aotearoa – The Independent Working Group on Constitutional Transformation', not dated

6.2.13 Apirana Ngata, *The Treaty of Waitangi: An Explanation/Te Tiriti o Waitangi: He Whakamarama* (Christchurch: Maori Purposes Fund Board, [1950])

6.2.14 – Claire Charters, Kayla Kingdon-Bebb, Tāmati Olsen, Waimirirangi Ormsby, Emily Owen, Judith Pryor, Jacinta Ruru, Naomi Solomon and Gary Williams, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand* (Wellington: Te Puni Kōkiri, 2019)

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A2 Doreen Puru, brief of evidence, 26 February 2024

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(a) William Skipper (Kipa) Munro, brief of evidence, 30 April 2024

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pp 1–4: Office of the Minister of Justice, 'Principles of the Treaty of Waitangi Bill: Request for priority in the 2024 Legislation Programme', not dated
pp [5]–[15]: Ministry of Justice, 'Developing a Principles of the Treaty of Waitangi Bill', 14 December 2023

pp [16]–[24]: Ministry of Justice, 'Policy options for progressing a Principles of the Treaty of Waitangi Bill', 12 March 2024

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A25 Ministry of Justice, 'The New Zealand Constitution, Democracy and Open Government', 28 November 2023

A26 Ministry of Justice, 'Review of Clauses Referring to the Treaty of Waitangi Principles: Purpose and Scope of the Review', 23 May 2024

GLOSSARY

arikitanga chiefly lineage, aristocratic rank, high birth
ā-ringa by hand
atua the gods, spirit, supernatural being
ā-waewae by feet
ā-waha by mouth

hapū kinship group, clan, tribe, subtribe
hui gathering, meeting, assembly

iwi tribe, people

kāinga home, village, settlement
kaitiakitanga the obligation to nurture and care for the mauri of a taonga; ethic of guardianship, protection
karauna the Crown, Government
kaumātua elder
kaupapa matter for discussion, subject, topic, agenda, theme, issue, initiative
kawenata covenant, compact
kawenata tapu sacred covenant, sacred compact
Kiingitanga the Māori King movement
kōrero story, stories; discussion, speech, to speak
Kotahitanga the Māori Parliament movement

mana authority, prestige, reputation, spiritual power
mana motuhake separate identity, autonomy, self-government, self-determination, independence, sovereignty, authority – mana through self-determination and control over one's own destiny
mana taketake indigenous authority
mana whenua customary rights and prestige and authority over land
mātauranga Māori Māori education, knowledge, wisdom, understanding, skill
mokopuna child, grandchild
muru plunder, forgive, absolve

Papatūānuku Earth, Earth mother and wife of Ranginui

rangatahi younger generation, youth
rangatira chief, tribal leader
rongoā medicine, medicinal purposes
rūnanga council, board, assembly

tamariki children (normally used only in the plural)
tāngata people, human beings
tangata Tiriti people of the Treaty (ie, other than tangata whenua)
tangata whenua people of the land, the indigenous people of Aotearoa New Zealand
taonga treasured possession, including property, resources, and abstract concepts such as language, cultural knowledge, and relationships
taonga tuku iho heirloom, something handed down, cultural property, heritage
te ao Māori the Māori world
te reo Māori the Māori language
tika correct, proper, fair, just, according to traditional ways
tikanga custom, method, rule, law, rules for conducting life
tīpuna ancestors, forebears
tuku presentation, offering, release, submission
tūpuna ancestors, forebears

wāhi tapu sacred place, place of historical and cultural significance
wāhi tūpuna ancestral areas
whakapapa ancestry, lineage, family connections, genealogy
whānau family, extended family
whanaungatanga relationship, kinship, sense of family connection
whenua land, ground