



Preliminary Treaty Impact Analysis for the proposed Regulatory Standards Bill

1. The Ministry for Regulation is undertaking a preliminary, high-level Treaty Impact Analysis (TIA) for policy proposals that would be contained in the proposed Regulatory Standards Bill (the Bill). The purpose of this analysis is to provide an indication of the possible Treaty impacts of the policy proposals, the nature of Māori rights and interests, and implications for Treaty settlements. It follows guidance for policy makers set out in Cabinet Circular CO (19)5¹ and is informed by advice from the Crown Law Office.
2. While public consultation has been undertaken for previous iterations of the Bill, this is the first time the proposed features in this particular version of the Bill are proposed for engagement through the public release of a discussion document, along with targeted stakeholder consultation.
3. This preliminary analysis serves as an initial early review of policy proposals by officials and will be further refined following proposed consultation on a public discussion document. We note, however, that the nature and extent of feedback to support this analysis will likely be impacted by a ministerial decision to include some targeted engagement with specific Māori stakeholders within a general engagement strategy, rather than undertaking a broad Māori engagement strategy.
4. This preliminary TIA covers:
 - identification of Treaty of Waitangi/te Tiriti o Waitangi principles relevant to the proposal
 - assessment of the proposed principles of responsible regulation against Treaty of Waitangi/te Tiriti o Waitangi principles
 - assessment of the proposed recourse mechanism against Treaty of Waitangi/te Tiriti o Waitangi principles
 - assessment of implications of the proposal for Treaty of Waitangi/te Tiriti o Waitangi settlement commitments
 - the relevance of current and upcoming matters before the Waitangi Tribunal and the Constitutional Kaupapa inquiry.

¹ Cabinet Office, *Cabinet Office Circular CO (19) 5 Te Tiriti o Waitangi/Treaty of Waitangi Guidance 2019*.



Summary of analysis

5. The Treaty of Waitangi/te Tiriti o Waitangi (referred to as ‘the Treaty/te Tiriti’ for the purposes of this document) is recognised as a founding document of government in New Zealand² and of “vital constitutional importance”.³ The provisions in the proposed Bill focus on the setting and application of selected standards for good law-making, legislative design, and regulatory stewardship. 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
6. 9(2)(h) [REDACTED]
[REDACTED]
7. Of significance is that the proposals do not include a principle related to the Treaty/te Tiriti and its role as part of good law-making, meaning that the Bill is effectively silent about how the Crown will meet its duties under the Treaty/te Tiriti in this space. While this does not prohibit the Crown complying with the Bill in a manner consistent with the Treaty/te Tiriti, we anticipate that the absence of this explicit reference may be seen as politically significant for Māori and could be perceived as an attempt by the Crown to limit the established role of the Treaty/te Tiriti as part of law-making.
8. 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
9. With regard to Treaty/te Tiriti settlements, the proposals would exclude legislation that gives effect to or is otherwise related to, full and final Treaty/te Tiriti settlements. This may provide certainty for claimant groups on the impact of the Bill on current and future settlements.
10. 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

² Cabinet Office, Cabinet Manual 2023 (Wellington: Department of Prime Minister and Cabinet, 2023), Appendix A, p 155.

³ Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition*, p 24.



Relevant Treaty of Waitangi/te Tiriti o Waitangi principles

11. Treaty/te Tiriti principles have evolved over years of jurisprudence by the courts and the Waitangi Tribunal with a view to reflecting the spirit and intent of the Treaty/te Tiriti as a whole and the mutual obligations and responsibilities of the parties.⁴

12. Some of the core principles that have emerged through this process are:

- **Partnership** – under which the Crown and Māori both have a positive duty to act fairly, honourably, reasonably, and in good faith towards one another.⁵
- **Active Protection** – which places upon the Crown a positive duty to take reasonable steps to protect Māori interests, rangatiratanga, and taonga.⁶
- **Redress** – which requires the Crown to redress the wrongs it has perpetuated against its Treaty/te Tiriti partner.⁷

13. We have also identified three further Treaty/te Tiriti concepts of particular relevance in the context of this preliminary analysis:

- **Kāwanatanga** – which stems from Article 1 of the Treaty/te Tiriti that the Government gained the right to govern in return for the Crown’s guarantee that Māori tino rangatiratanga over lands, people and taonga would be protected.
- **Tino rangatiratanga** - which recognises Māori autonomy and self-determination, as guaranteed in Article 2 of the Treaty/te Tiriti. Waitangi Tribunal reports have consistently affirmed that tino rangatiratanga is an equivalent term to autonomy or self-government.⁸
- **Equity** - which derives from Article 3 of the Treaty/te Tiriti, and confirms that Māori have the rights and privileges of British subjects (in the modern context, the same as all other New Zealand citizens).⁹ The Waitangi Tribunal has asserted that the

⁴ *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) (*Broadcasting Assets case*).

⁵ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at p 655 (*Lands case*).

⁶ *Broadcasting Assets case*, at p 517.

⁷ The Courts and the Tribunal have both acknowledged the principle of redress and that past wrongs give right to a right of redress : *Te Puni Kōkiri He Tirohanga o Kawa ki te Tiriti o Waitangi*, Wellington, 2001, p 100.

⁸ Waitangi Tribunal, *Tauranga Moana, 1886–2006 : Report on the Post-Raupatu Claims*, Wai 215, 2 vols (Wellington : Legislation Direct, 2010), vol 1, pp 22–23; Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report*, Wai 2490 (Wellington : Legislation Direct, 2015), p 23; Waitangi Tribunal, *Te Whanau o Waipareira Report*, Wai 414 (Wellington : GP Publications, 1998), p 215.

⁹ Waitangi Tribunal, *Kāinga Kore: The Stage One Report of the Housing Policy and Services Kaupapa Inquiry on Māori Homelessness*, Wai 2750 (Wellington: Legislation Direct, 2023), p 33.



principle requires “the Crown to act fairly to both settlers and Māori and to ensure that settlers’ interests were not prioritised to the disadvantage of Māori.

Where disadvantage did occur, the principle of equity, along with those of active protection and redress, required that there be active intervention to restore the balance.”¹⁰

Assessment of principles of responsible regulation in relation to Treaty of Waitangi/te Tiriti o Waitangi principles

14. The Bill includes principles of responsible regulation that the Government be required to consider when developing legislative proposals or exercising stewardship over regulatory systems. There are a range of principles in the Bill that will likely have implications for Māori rights and interests, including (but not limited to) principles related to the taking of property, liberties, equality before the law, and good law-making. These are discussed in further detail below.
15. Generally, because the Bill does not explicitly refer to the Treaty/te Tiriti or its principles, there may be uncertainty for how law-makers will be required to consider Māori cultural values and collective rights as tangata whenua (as opposed to individual rights) across the different principles and uphold tino rangatiratanga under Article 2.

Absence of a principle relating to the Treaty/te Tiriti

16. In addition to not referring to the Treaty/te Tiriti, the proposal does not include a principle relating to the Treaty/te Tiriti in relation to the development (or stewardship) of regulation.
17. The Courts and the Waitangi Tribunal have given significant consideration to the balancing of the concepts of kawanatanga and tino rangatiratanga.¹¹ The Waitangi Tribunal has recently noted its view that these concepts create a duty on the Crown to foster tino rangatiratanga, not to undermine it, and to ensure that its laws and policies adequately give effect to Treaty/te Tiriti rights and guarantees.¹²

18. 9(2)(h)

¹⁰ Waitangi Tribunal, *Tino Rangatiratanga me te Kaawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, vol 1, (Wai 1040), (Wellington: Legislation Direct 2022), p 52

¹¹ Te Puni Kōkiri *He Tirohanga o Kawa ki te Tiriti o Waitangi*, Wellington, 2001, p 49.

¹² Waitangi Tribunal, *Tino Rangatiratanga me te Kaawanatanga: The Report on Stage 2 of the Te Paparahi o Te Raki Inquiry*, vol 1, (Wai 1040), (Wellington: Legislation Direct 2022), p 69.



9(2)(h)

19. Further, the Crown has an obligation to actively protect the rights and interests of Māori under the Treaty/te Tiriti. The intent of the proposals is to set clear standards for regulatory quality and publicly hold responsible Ministers and departments to account in relation to them. 9(2)(h)

20. The absence of a principle relating to the Treaty/te Tiriti may be seen as implying that it is of lesser importance, with no obligation for Ministers to disclose and justify inconsistencies with the Treaty/te Tiriti as part of law-making.

21. 9(2)(h)

22. 9(2)(h)

Taking of property

23. The proposed principle relating to taking of property is:

Legislation should not take or impair, or authorise the taking or impairing of, property without the consent of the owner unless:

- *there is good justification for the taking or impairment*
- *fair compensation for the taking or impairment is provided to the owner*
- *compensation is provided to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment.*

24. New Zealand does not have set down in legislation a general protection of property rights from expropriation. 9(2)(h)



9(2)(h)

This may also encourage the seeking of protection for Māori rights to own and use property currently recognised under legislation (such as the Marine and Coastal Area (Takutai Moana) Act 2011) when that legislation is reviewed in the future.

25. 9(2)(h)

26. Given the Bill does not explicitly refer to the Treaty/te Tiriti or tino rangatiratanga, there may be uncertainty as to how law-makers would be required to consider Māori cultural values and systems of law relating to property, including tikanga. This critique also applies to how the Bill would protect the rights and wellbeing of whānau, hapū and iwi, (including future generations) or the environment. Finally, the Bill is not clear how the proposed principles could apply to protected Maori land.

Liberties

27. The proposed principle relating to liberties is:

Legislation should not unduly diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person.

28. New Zealand does not have set down in legislation a description of “liberties” or a statutory recognition of liberties in this form. Providing for liberties in the Bill could be interpreted as not only aligning with Article 2 of the Treaty/te Tiriti, but also actively supporting the strengthening of Māori rights.



29. 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

30. 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

31. 9(2)(h) [Redacted]
[Redacted]
[Redacted]

The rule of law

32. The proposed principle relating to the rule of law is:

The importance of maintaining consistency with the following aspects of the rule of law:

- *the law should be clear and accessible*
- *the law should not adversely affect rights and liberties, or impose obligations, retrospectively*
- *every person is equal before the law*
- *there should be an independent, impartial judiciary*
- *issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion.*

33. New Zealand currently has no equivalent formal statutory recognition for observing the right to equality before the law. While this principle appears to be focused on equality in the administration of the law, the Bill does not clearly delineate whether its interpretation favours equality in the administration of the law, or substantive equality.

- *Equality in the administration of the law* emphasises that all individuals, including Māori, should be treated the same under legal frameworks, ensuring uniformity in legal processes and protections and upholding Article 3 (for example, voting rights legislation).



- *Substantive equality* aims for equitable outcomes rather than just equal treatment and would therefore acknowledge unique disparities faced by Māori. This could be seen to uphold the Crown's obligations under Article 2 and the concepts to actively support Māori self-determination under the Treaty/te Tiriti principles of active protection and equity. It would also align with the recognition in Cabinet Office Circular CO (24)5¹³ that where there is good evidence there is a disparity in outcomes for Māori populations, services targeted to Māori populations may well be appropriate.

34. This means the Treaty/te Tiriti impacts of the proposed principle will depend upon which of those two interpretations of 'equality' is the most relevant in particular circumstances. 9(2)(h)

35. 9(2)(h)

Good law-making

36. The proposed principle relating to good law-making is:

The importance of consulting, to the extent practicable, the persons or representatives of the persons that the Government considers will be substantially affected by the legislation.

The importance of carefully evaluating:

- *the issue concerned*
- *the effectiveness of any relevant existing legislation and common law*
- *whether the public interest requires that the issue be addressed*
- *any options (including non-legislative options) that are reasonably available for addressing the issue*
- *who is likely to benefit, and who is likely to suffer a detriment, from the legislation.*

¹³ Cabinet Office, *Cabinet Office Circular CO (24) 5 Needs based service provision Guidance 2024*.



Legislation should be expected to produce benefits that exceed the costs of the legislation to the public or persons.

Legislation should be the most effective, efficient, and proportionate response to the issue concerned that is available.

37. The Treaty/te Tiriti principles create an expectation of properly informed and good faith decision making, and that of partnership generally, which indicates that the Crown should take reasonable steps to make informed decisions on matters that affect Māori interests.

38. 9(2)(h)

Regulatory stewardship

39. The proposed principles relating to regulatory stewardship are:

Legislation should continue to be the most effective, efficient, and proportionate response to the issue concerned that is available.

The system should continue to be fit for purpose for the people, area, market, or other thing that is regulated.

Unnecessary regulatory burdens and undue compliance costs should be eliminated or minimised.

Any regulator should have the capacity and the capability to perform its functions effectively.

Any conflicts or adverse interactions with other regulatory systems should be eliminated or minimised.

The importance of monitoring, reviewing, and reporting on the performance of the system.

40. There are currently relatively few formal checks and balances in place in relation to the performance of existing regulation, or monitoring of department's stewardship of their regulatory systems.



41. The proposed principle relating to regulatory stewardship would recognise and provide for these oversight arrangements in legislation. 9(2)(h)

42. 9(2)(h)

Assessment of potential impacts of proposed recourse mechanism

43. The proposed Bill would establish a Regulatory Standards Board in the Executive branch of government to consider the consistency of regulation with the principles of responsible regulation in response to complaints.

44. Such a recourse mechanism could enable Māori to raise concerns about regulation that may adversely affect Māori rights and interests under the Treaty/te Tiriti. The process of providing another avenue to raise these concerns may support the Treaty/te Tiriti principle of active protection.

45. However, given that the Board would only be able to make non-binding recommendations, it is likely to have limited impact in relation to the principle of redress.

46. Further, because the proposals do not set out the detailed design of the Board at this stage, it is unclear how the skills and experience of the Board will be representative of Māori perspectives or Treaty/te Tiriti rights and obligations under Article 2, along with the principles of active protection and partnership. There may also be uncertainty for how the Board will support the capability and capacity of Māori to participate in recourse under the principle of redress.

Assessment of implications of the proposals for Treaty of Waitangi/te Tiriti o Waitangi settlement commitments

47. The impact on Treaty/te Tiriti settlement commitments are detailed below:

- The proposals would exclude legislation that gives effect to or is otherwise related to, full and final Treaty/te Tiriti settlements. This may provide certainty to post settlement governance entities and negotiating groups around the impact of the Bill on current and future settlements.



- Requiring the government to transparently assess the consistency of existing regulation with the principles of responsible regulation may result in uncertainty around the durability of redress negotiated in the context of various types of legislation. For example, in the context of the Resource Management Act 1991 or Conservation Act 1987.

- 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Current and upcoming matters before the Waitangi Tribunal and the Constitutional Kaupapa inquiry

48. The Bill may be relevant to current and upcoming matters before the Waitangi Tribunal, including the Constitutional Kaupapa inquiry (Wai 3300) which pertains to claims that include grievances relating to the constitution and self-government.¹⁴

49. The Waitangi Tribunal has made an indication that some of the central themes of the inquiry will likely include tino rangatiratanga, mana motuhake, autonomy, and self-governance; kāwanatanga, constitutional legitimacy and sovereignty; parliamentary sovereignty and systems; tikanga tuku iho me ngā ture pākehā; national models of Māori self-government; and the United Nations Declaration on the Rights of Indigenous Peoples and te Tiriti o Waitangi.

50. 9(2)(h) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The Office for Māori Crown Relations/Te Arawhiti

51. The feedback from the Office for Māori Crown Relations/Te Arawhiti has been incorporated throughout this paper with further comments detailed below:
- Many of the potential impacts of the Bill on Māori rights and interests and the Māori-Crown relationship could be mitigated by ensuring that good faith engagement with appropriate Māori groups occurs prior to policy decisions being

¹⁴ <https://www.justice.govt.nz/justice-sector-policy/tomokia-nga-tatau-o-matangireia-constitutional-kaupapa-inquiry-wai-3300> (accessed 6 October 2024)



made on either new regulations or legislation, or reviews of existing regulations and legislation undertaken under the Bill; also through ensuring the engagement that occurred was consistent with the consultation principle.

- Whether engagement will be successful in mitigating risks will depend in part upon whether the relevant Māori group accepts the principles contained in the Bill as genuinely representing good law-making and supporting appropriate approaches to achieving economic efficiency.
- The fact that the Bill arises from an undertaking in a coalition agreement to pass a Regulatory Standards Act as soon as practicable may impact the level at which Māori engage on the discussion document.