Regulatory Impact Statement: Providing certainty on the Treaty principles

Coversheet

Purpose of Document	
Decision sought:	*Cabinet decision to develop a Treaty Principles Bill that will define the principles of the Treaty of Waitangi*
Advising agencies:	*Ministry of Justice*
Proposing Ministers:	*Hon David Seymour, Associate Minister of Justice*
Date finalised:	*28 August 2024*

Problem Definition

The coalition Government has agreed to introduce a Treaty Principles Bill (the Bill), based on existing ACT Party policy and support it to a Select Committee as soon as practicable. The problem as described in the relevant ACT Party 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 Bill would define the principles to stop this from happening.

Executive Summary

Parliament first introduced the concept of Treaty principles in the Treaty of Waitangi Act 1975, and there are now approximately 40 statues that refer to them (excluding settlement legislation and secondary legislation). Parliament did not define the content of the principles, but this has been done over time by the courts and the Waitangi Tribunal using the framework established by Parliament.

On 28 November 2023, Cabinet endorsed the two coalition agreements between coalition parties as the basis on which the Coalition Government will operate.[1] A key point of the Cabinet circular were instructions to Chief Executives and their respective offices that they were to have processes in place to implement coalition agreements.[2]

The coalition agreement between the National Party and ACT New Zealand includes 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 we understand it, the objectives of the policy are to:

a. create greater certainty about how our constitutional arrangements reflect the rights and obligations in the Treaty/te Tiriti;

[1] Cabinet Office Circular "National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements" (25 March 2024) CO 24/2 at [3].

[2] At [4.3].

b. have an open debate about our constitutional future and the place of the Treaty/te Tiriti where alternative interpretations of what the Treaty says can be heard and debated;

c. create a more robust and widely understood conception of New Zealand's constitutional arrangements, and each person's rights within it; and

d. build consensus about the Treaty/te Tiriti and our constitutional arrangements that will promote greater legitimacy and social cohesion.

We have analysed two policy options:

a. Option 1 – status quo: The courts and the Waitangi Tribunal would continue to articulate the meaning of the Treaty principles in line with existing practice; and

b. Option 2 – define the principles in legislation: This option would use principles set out in legislation.

For this RIS, we used the following criteria to analyse the two options:

a. upholds Treaty/Tiriti obligations;

b. creates greater clarity and certainty;

c. promotes social cohesion and consensus; and

d. maintains constitutional legitimacy.

Although the proposal to introduce the Bill could have some value, we consider the status quo is more beneficial. Under this option, the courts and the Waitangi Tribunal would continue to articulate the meaning of the Treaty principles in line with the existing legislation and practice. This option would uphold Treaty obligations to the same extent as they are now.

The final content of the principles in the proposed Bill is yet to be determined and it might be possible to develop principles that align with established law and the spirit and intent of the Treaty/te Tiriti. However, their description in the policy proposal is inconsistent with the Treaty/te Tiriti. It does not accurately reflect Article 2, which affirms the continuing exercise of tino rangatiratanga. Restricting the rights of hapū and iwi to those specified in legislation, or agreement with the Crown, implies that tino rangatiratanga is derived from kāwanatanga. It reduces indigenous rights to a set of ordinary rights that could be exercised by any group of citizens.

An interpretation of Article 2 that does not recognise the collective rights held by iwi and hapū, or the distinct status of Māori as the indigenous people of Aotearoa New Zealand, calls into question the very purpose of the Treaty and its status in our constitutional arrangements.

The status quo also provides a higher degree of certainty about what the Treaty principles are and how they operate in New Zealand law. The existing principles have been developed over years of jurisprudence and by the actions of successive Governments. Defining the principles of the Treaty/te Tiriti in legislation might provide a level of clarity about the intent of Parliament when it refers to the principles, but it could also introduce more uncertainty

into our constitutional arrangements because it would unsettle the established jurisprudence about the effect of the principles.

The status quo might also minimise the risk of damaging Māori-Crown relations because the proposed Bill could be seen as an attempt to limit the rights and obligations created by the Treaty. This would present a significant risk to the Māori-Crown relationship and could have flow-on effects into other parts of the relationship. We note that neither the status quo, nor the proposed Bill, will address broader questions about how the Treaty/te Tiriti shapes our constitutional arrangements. However, the status quo preserves space for future engagement with iwi and hapū as the Crown's Treaty partner about our constitutional arrangements in a process that prioritises public engagement, social cohesion, transparency, and the legitimacy of the outcome.

The Waitangi Tribunal has released its interim report on the urgent inquiry into the Treaty Principles Bill. In the 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*, it found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of the Treaty and contrary to the article 2 guarantee of tino rangatiratanga. It also found that it will be significantly prejudicial to Māori. The findings have informed our analysis.

Limitations and Constraints on Analysis

The Associate Minister of Justice directed a process that did not include public consultation on policy. Instead, public engagement will occur as part of the select committee process. The limited timeframes and lack of consultation to date have left gaps in the analysis. These gaps will need to be addressed prior to the introduction of a Bill. Cabinet will need to provide policy approval and final approval of the Bill for introduction.

The RIS includes the findings from the Waitangi Tribunal urgent inquiry. The evidence from the Waitangi Tribunal urgent inquiry, although not representing all possible views, is highly relevant and has assisted our analysis.

A side effect of limited consultation means that we have relied on costs from previous initiatives. Those costs are accurate and can be taken with a high degree of confidence. However, predictions of future costs and benefits are not fully informed by engagement with affected groups. Where possible, costs have been provided in a range. Therefore, costings for future events can be taken with a moderate degree of confidence. With additional time we would have gathered more precise costs and assessed benefits to the Crown, Māori, and the public.

Constrained scope of options considered

The time and scope constraints have limited our ability to conduct in depth analysis to:

a. test assumptions underpinning the problem definition and proposed response;

b. investigate and understand the intended or unintended consequences; and

c. undertake consultation with iwi and hapū (as the Treaty partner) and the broader public to understand their views and shape additional policy options.

Constrained timeframes and limitations on process

The coalition agreement requires the Treaty Principles Bill to be introduced "as soon as practicable". Due to this constraint, our analysis is limited to the status quo (option 1) and the option agreed to in the coalition agreement between the National Party and ACT New Zealand (option 2). Engaging with iwi and hapū as the Treaty partner, and the public as key stakeholders, would help identify and refine the policy problem and develop options.

Limitations on the types of options considered

The Cabinet and Ministerial direction focussed on the implementation of the policy in the National-ACT Party coalition agreement.[3] Due to the scope of the policy being tightly defined, we did not consider approaches that involve broader consideration of the Treaty and our constitutional arrangements (e.g. deliberate engagement with Māori, relevant experts, and the rest of New Zealand about how the Treaty can be given effect other than through the principles). As that would not meet the requirements of the Cabinet Circular, we focussed on the option that aligned with the government's coalition commitments and assessed this against the status quo.

Options that defined the principles in legislation through a process of partnership with iwi and hapū or possible methods for facilitating public debate on the policy were not possible to consider due to the directions as to the scope of the policy process.

In conclusion, the constraints placed on the policy development process means the analysis in this RIS should be considered with a moderate degree of confidence.

Responsible Manager(s) (completed by relevant manager)
Rajesh Chhana *Deputy Secretary - Policy* *Ministry of Justice*  29 August 2024

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry for Regulation and Ministry of Justice
Panel Assessment & Comment:	A quality assurance panel with members from the Ministry for Regulation and Ministry of Justice has reviewed the Regulatory Impact Statement (RIS): Providing certainty on the Treaty principles, produced by the Ministry of Justice, dated 28 August 2024. The panel considers that it "does not meet" the Quality Assurance criteria. The RIS clearly acknowledges "that Ministerial direction and time constraints have limited the range of options considered and the depth of analysis." This has limited the scope of options considered and the "ability to conduct in-depth analysis to: "a) test the assumptions underpinning the problem definition and proposed response, b) investigate and understand the intended or unintended consequences, and c) undertake consultation."

[3] Above n 2.

	However, the panel considers that full consultation on a broader range of options is required for the analysis to be considered complete. Although some proxies have been provided for consultation, this is not sufficient. Given the constitutional significance of this proposal and the impacts on the Crown-Māori relationship, the panel would expect the analysis to be based on full consultation with iwi and hapū (as the Crown's Treaty partner), constitutional experts and the broader public to understand their views and shape additional policy options. The costs and benefits also need to be informed by engagement with affected groups. The RIS contains only two policy options: the status quo and the proposed Bill defining the Treaty principles in legislation. Within this limited scope, the objectives and assessment criteria have been clearly outlined and applied, and where possible use has been made of available evidence to make a logical and coherent case. The RIS indicates that neither option would fully achieve the objectives because they do not address the wider issue of differences of opinion about the interpretation and application of the Treaty principles. The Ministry of Justice has expressed a preference for the status quo because it preserves the opportunity for wider consultation on how our constitutional arrangements should reflect the rights and obligations in the Treaty. The panel's view is that should this Bill proceed to enactment, more consideration would need to be given to implementation issues and addressing the risks identified in the RIS.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Treaty of Waitangi/te Tiriti o Waitangi

1. The Treaty of Waitangi/te Tiriti o Waitangi (referred to as '**the Treaty/te Tiriti**' for the purposes of this document) is regarded as a founding document of government in New Zealand[4]. The Treaty/te Tiriti was signed by Rangatira Māori and representatives of the Crown at Waitangi on 6 February 1840 and on subsequent occasions around the country.

2. The Treaty/te Tiriti was an exchange of promises between sovereign peoples, with rights and obligations for each party. The Crown gained the authority to govern in Aotearoa New Zealand and guaranteed the tino rangatiratanga of Māori in return. The Crown promised to protect Māori rights to their lands and other possessions[5] and matters of particular significance to them.[6] Māori were also extended the same rights and privileges as British citizens.[7]

3. In *New Zealand Māori Council v Attorney General*, the Court of Appeal described the Treaty relationship as "akin to a partnership" and one where each party acts in "the utmost good faith which is the characteristic obligation of partnership."[8]

Treaty principles

4. Parliament first introduced the concept of Treaty principles in the Treaty of Waitangi Act 1975. The purpose of that Act, set out in the long title, is "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty."

5. The Waitangi Tribunal is a standing Commission of Inquiry established to consider Māori claims about breaches of the principles of the Treaty by the Crown. The Act confers on the Tribunal exclusive authority to determine the meaning and effect of the Treaty. That includes deciding issues raised by the differences between the Māori and English texts of the Treaty.

6. Parliament referred to the principles again in the State-Owned Enterprises Act 1986. Section 9 of that Act states that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. This is significant because it was the first time an Act restricted actions of the Crown to measures that are consistent with the principles of the Treaty. This provided the courts with a specific basis on which to assess Crown actions against the principles.

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4 Cabinet Office *Cabinet Manual 2023* at [1].

5 Te Puni Kōkiri *He Tirohanga ō Kawa ki te Tiriti o Waitangi*. Wellington, New Zealand 2001.

6 Cabinet Office *Cabinet Office Circular CO (19) 5 Te Tiriti o Waitangi/Treaty of Waitangi Guidance 2019* at [37].

7 Te Puni Kōkiri, above n 4, at 14.

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

7. There are now approximately 40 statues that include reference to the Treaty principles (excluding settlement legislation and secondary legislation). These range from general operative clauses[9] to more specific descriptive clauses[10] setting out how the Treaty is to be given effect in the Act.[11]

8. The principles themselves have been developed by the Tribunal and courts through years of jurisprudence. The Treaty principles developed by the Tribunal are, in part, to settle the differences between the Māori and English texts of the Treaty. The principles are designed to reflect the spirit and intent of the Treaty as whole and the mutual obligations and responsibilities of the parties.[12]

9. Although there is no single set of principles, some of the core principles that have emerged through the courts and Tribunal reports are:

    9.1. Partnership - under which the Crown and Māori both have a positive duty to act fairly, honourably, and in good faith towards one another.[13]

    9.2. Active Protection - which places upon the Crown a positive duty to protect Māori interests and taonga.[14]

    9.3. Redress - which requires the Crown to redress the wrongs it has perpetrated against its Treaty partner.[15]

How the Treaty principles are applied

10. When inquiring into Treaty claims, the Waitangi Tribunal must determine whether any Crown act or omission, including any policy or practice adopted or proposed to be adopted was or is inconsistent with the principles of the Treaty. Each Tribunal panel determines which principles apply to the claims before it and then determines whether the Crown has acted in breach of the Treaty principles.

11. The Treaty principles can also:

    11.1. help reconcile differences between the Māori and English texts and give effect to the spirit and intent of the Treaty when applied to contemporary issues;[16]

    11.2. apply to policy and operational decisions by government (exactly what this requires depends on the context and there is guidance available to assist decision-makers);[17]

    11.3. be used in the interpretation of legislation;[18] and

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9 General operative clauses require decision makers under the relevant Act to consider, place a particular statutory weight on, or act in accordance with the Treaty principles. They can apply generally to all decisions under an Act or be limited to certain decisions.

10 Descriptive clauses expressly reference the Crown's Treaty responsibilities and describe how these are given effect in the Act. They provide greater certainty for decision-makers than operative clauses, but it can be less flexible in application.

11 Te Arawhiti *Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design. Questions for policy-makers* (March 2022) at [54].

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

13 *Lands* case.

14 *Broadcasting Assets* case, at 517.

15 Te Puni Kōkiri, above n 4, at 100.

16 Waitangi Tribunal. *Motunui-Waitara Report* (Wai 6, 1983) at 1.

17 Above, n 3, 4 and 5.

18 Legislation Design and Advisory Committee *Legislation Guidelines 2021 Edition* at ch 5.

11.4. be used by the Tribunal to review proposed Crown action or inaction, policies, and legislation against the principles.

12. The principles have also underpinned the relationship between the Crown and Māori. This includes, but is not limited to, negotiation of redress in Treaty settlements, as well as the implementation of settlements. The maintenance of the current ongoing relationship between the two parties is a key part of the settlements process.

What is the policy problem or opportunity?

13. Parliament created the concept of the Treaty principles, but it did not define those principles. This has been done over time by the courts and the Tribunal using the framework established by Parliament. In its party policy, the ACT Party has expressed a concern that the courts and the public service are increasingly making reference to vague Treaty principles as justification for actions that are contrary to other matters (such as equal voting rights).

14. This concern has been expressed as being driven by a sense of uncertainty about the content of the principles and, more broadly, the place of the Treaty in our constitutional arrangements. It has also been expressed that our constitutional arrangements are changing without the explicit consent of the people of Aotearoa New Zealand.

15. Although there is no exhaustive list of principles, there is a degree of certainty about what the principles are and how they operate.[19] This information is publicly available and provides guidance to assist decision-makers.[20]

16. The views of the Constitutional Advisory Panel (the Panel), which completed its report in November 2013, remain relevant. The Panel found that the current flexibility in applying the Treaty concerns some people. It found some uncertainty among the public about what the Treaty's principles are, who should apply them and what the outcomes might be. This perceived uncertainty has made some people apprehensive about the Treaty. Alternatively, for some, the current flexibility allows the Māori-Crown relationship to continue to develop and address issues as they arise.[21]

17. More broadly, there are significant differences of opinion about what the Treaty means in our constitutional arrangements. The Panel found that although there are various visions for the Treaty, there is little detail about how this might be achieved. Uncertainty about what the future might hold appears to have led to a level of apprehension. Some fear the potential undermining or negation of Treaty rights, others fear their implementation.[22]

What objectives are sought in relation to the policy problem?

18. The objectives sought to address the policy problem are to:

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19 Waitangi Tribunal *The Treaty Principles Bill Urgent hearings: Briefing of Evidence of Professor Andrew Geddis* (Wai 3300 #A19, 2024) at [24].

20 See for example: *The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal* produced by the Waitangi Tribunal and Cabinet Office Circular CO (19) 5: *Te Tiriti o Waitangi / Treaty of Waitangi Guidance*.

21 Constitutional Advisory Panel New Zealand's Constitution: *A Report on a Conversation | He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013) at 31.

22 At 33.

18.1. create greater certainty about how our constitutional arrangements reflect the rights and obligations in the Treaty of Waitangi;

18.2. have an open debate about the Treaty and its place in our constitutional future, where alternative interpretations of what the Treaty actually says can be heard and debated openly;

18.3. create a more robust and widely understood concept of New Zealand's constitutional arrangements, and each person's rights within it;

18.4. build consensus about the Treaty and our constitutional arrangements that will promote greater legitimacy of our institutions and social cohesion.

Section 2: Deciding upon an option to address the policy problem

What criteria was used to compare options to the status quo?

19. For the purpose of this RIS, we used the following criteria to analyse options:

a. **Upholds Treaty/Tiriti obligations:** The proposal upholds the rights and obligations of the Māori and the Crown under the Treaty/te Tiriti.

b. **Clarity and certainty:** The changes create greater certainty and understanding about how our constitutional arrangements reflect the rights and obligations contained in the Treaty of Waitangi/te Tiriti o Waitangi. The law is certain and predicable.

c. **Promotes social cohesion and consensus:** everyone can discuss the Treaty/te Tiriti and our constitutional arrangements in a way that helps build consensus.

d. **Maintains constitutional legitimacy:** different communities and people trust New Zealand's constitutional arrangements and see them as legitimate.

20. We have applied greater weighting to the criterion to *maintain constitutional legitimacy*. Trust in our constitutional arrangements, including the Treaty/te Tiriti, is fundamental to our liberal democracy and serves as the foundation on which all other regulatory systems rely.

What scope were the options considered within?

21. In the Cabinet circular National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements, Cabinet endorsed the two coalition agreements between coalition parties as the basis on which the Coalition Government will operate.[23] A key point of the Cabinet circular were instructions to Ministers and Chief Executives and their respective offices that they were to have processes in place to implement coalition agreements.[24]

22. The scope for analysing options was limited because the purpose is to give effect to policy in the coalition agreement between the National Party and ACT New Zealand.

[23] Cabinet Office, above n 1.

[24] Cabinet Office, above n 2.

23. The time and scope constraints have limited our ability to conduct in depth analysis to:

    23.1. test assumptions underpinning the problem definition and proposed response;

    23.2. investigate and understand the intended or unintended consequences; and

    23.3. undertake consultation with iwi and hapū (as the Treaty/te Tiriti partner) and the broader public to understand their views and shape additional policy options.

24. Due to these constraints, our analysis is limited to the status quo (option 1) and the option in the coalition agreement between the National Party and ACT New Zealand (option 2).

25. With more time, we would have engaged with iwi and hapū as the Treaty/te Tiriti partner, and the public as key stakeholders, to help identify and refine the policy problem and develop options. As we have not done any public consultation, we have relied on existing information as a proxy for Māori and public opinions.

26. We have also relied on the The Waitangi Tribunal's interim report on the urgent inquiry into the Treaty Principles Bill. In the 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*, it found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of the Treaty and contrary to the article 2 guarantee of tino rangatiratanga. The findings have informed our analysis.

27. We consulted agencies with a particular interest in the proposals: Crown Law, Ministry of Foreign Affairs and Trade, Te Arawhiti, The Treasury and Te Puni Kōkiri. The Electoral Commission was consulted on the delivery of binding referendums.

Options not considered, or considered but discounted

28. We did not consider options that involve broader consideration of the Treaty/te Tiriti and our constitutional arrangements (e.g. deliberate engagement with Māori as the co-signatories of the Treaty/te Tiriti, relevant experts, and the rest of New Zealand about how the Treaty/te Tiriti can be given effect other than through the principles). This would involve significant planning and resources and is outside the scope of the ACT Party policy. We acknowledge that investing in a public conversation has the potential to develop the status quo in an alternative way.

29. We considered options that defined the principles in legislation through partnership with iwi and hapū. We also considered possible methods for facilitating public debate on the policy including independent panels or citizen assemblies. These options were discounted due to the directions as to the limited scope of the policy process.

What were considered?

30. We analysed two policy options for preparing the Bill. These are:

    a. **Option 1 – Status Quo:** The courts and the Waitangi Tribunal would continue to articulate the meaning of the Treaty principles in line with existing practice and statutory responsibility (in the case of the Waitangi Tribunal). The Crown would continue to look to the current principles to articulate how the Treaty/te Tiriti applies.

The application and interpretation of the principles would continue to develop as contemporary issues arise.

b. **Option 2 - Define the principles in legislation:** This option would use principles set out in legislation. This approach would draw on additional sources to provide for a more comprehensive articulation of Treaty principles.

Option One – Status Quo

31. Under this option, the courts and the Waitangi Tribunal would continue to articulate the meaning of the Treaty principles in line with the existing legislation and practice. This would include how the principles apply to statutory interpretation and decision-making. The Crown would continue to look to the current principles to articulate how the Treaty/te Tiriti applies. The application and interpretation of the principles will continue to develop as contemporary issues arise.

Upholds Treaty/te Tiriti obligations

32. This option would uphold Treaty/te Tiriti obligations to the same extent as they are now. For example, the existing obligations on the Treaty partners to operate in good faith towards one another, and the positive duty on the Crown to protect Māori interests and taonga, would continue to apply unchanged.

33. However, this option does not address broader concerns about the Treaty/te Tiriti and our constitutional arrangements. The Panel recommended continuing the conversation about the Treaty/te Tiriti in our constitutional arrangements because of the different views on its role in our constitution.

34. As previously mentioned, we have not consulted with Māori on the policy development but there are reports and academic writing that reflect community-based conversations and engagement. Matike Mai[25] is an example of one such report. That report brought together three years of engagement and conversations around the country. Its report provides valuable insight on the issue of constitutional change from a Māori perspective. It also recognised the broader concerns about the Treaty/te Tiriti and our constitutional arrangements.

35. Matike Mai Aotearoa observed that "…a more fundamental imbalance existed between the Crown's exercise of constitutional authority and the constitutional powerlessness of Māori".[26] The report recommended that iwi, hapū, and other lead Māori organisations promote ongoing discussions among Māori, and initiate dialogue with other communities and the Crown, about constitutional transformation.

36. Leaving the Treaty principles unchanged will not reduce the uncertainty, apprehension and disagreement around the Treaty/te Tiriti.

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[25] Matike Mai Aotearoa is an independent working group on constitutional transformation. It was first promoted at a meeting of the Iwi Chairs' Forum in 2010. Its membership includes constitutional experts and other Māori leaders who facilitated 252 hui with Māori communities and 70 wananga from around the country between 2012 and 2015.

[26] The Independent Working Group on Constitutional Transformation *The Report of Matike Mai Aotearoa* (2015) at 12.

Clarity and certainty

37. This option does provide some certainty about what the Treaty principles are and how they operate in New Zealand law. The existing Treaty principles have been developed over years of jurisprudence and by the actions of successive Governments.

Social cohesion and consensus about our constitutional arrangements

38. If the status quo continues, our current constitutional arrangements will continue to cause a level of dissatisfaction among Māori and other groups. The status quo is unlikely to lead to greater consensus and a broader public discussion without some other measures in the form of (likely government) intervention. Some examples of possible interventions that could support that discussion include an independent panel, community engagement, discussion documents, or citizen assemblies. However, the status quo does preserve the relationship and potential opportunity for the Crown and iwi and hapū to partner meaningfully in a forward-focused discussion about the Treaty.

Option 2: Define the principles in legislation

39. This option would introduce a Bill that would define the principles of the Treaty of Waitangi and specify how they apply in law (e.g. in the interpretation of legislation). Those principles would replace any that have been articulated by the courts and the Tribunal (and prevent the development of any new principles). The Bill would specifically exclude Treaty settlement legislation and processes.

40. The precise content of the principles is yet to be developed but would be based on:

    40.1. **Civil Government** – The New Zealand Government has full power to govern, and Parliament has full power to make laws. They do so in the best interests of everyone, and in accordance with the rule of law and the maintenance of a free and democratic society.

    40.2. **Rights of Hapū and Iwi Māori** – The Crown recognises the rights that hapū and iwi had when they signed the Treaty/te Tiriti, and will respect and protect those rights. Those rights differ from the rights everyone has a reasonable expectation to enjoy only when they are specified in legislation, Treaty settlements, or other agreement with the Crown.

    40.3. **Right to Equality –** Everyone is equal before the law and is entitled to the equal protection and equal benefit of the law without discrimination. Everyone is entitled to the equal enjoyment of the same fundamental human rights without discrimination.

41. The commencement of the Bill would be subject to a binding referendum, meaning it would not come into force without the support of a majority of voters. The intention of a referendum would be to:

    41.1. reflect the Bill's constitutional importance;

    41.2. generate public discussion about the Treaty and our constitutional arrangements; and

    41.3. improve understanding about New Zealand's constitutional arrangements and each person's rights within it.

Upholding Treaty/te Tiriti obligations

42. Article 2 of the Treaty/te Tiriti is generally understood to guarantee the rights of Māori as the indigenous people of Aotearoa New Zealand. It affirms their tino rangatiratanga over their lands, property, and taonga (tangible and intangible).

43. This option is inconsistent with the Treaty/te Tiriti. It does not accurately reflect Article 2, which affirms the continuing exercise of tino rangatiratanga. Restricting the rights of hapū and iwi to those specified in legislation, or agreement with the Crown, implies that tino rangatiratanga is derived from kāwanatanga. The Tribunal made a similar statement in their report when they referenced expert evidence that stated rangatiratanga was not something "the Crown has the power to bestow". For the Crown to assert that "overstates the kāwanatanga powers of the Crown". It reduces indigenous rights to a set of ordinary rights that could be exercised by any group of citizens.

44. An interpretation of Article 2 that does not recognise the collective rights held by iwi and hapū, or the distinct status of Māori as the indigenous people of Aotearoa New Zealand, would, in effect, just restate rights established elsewhere in law. This calls into question the very purpose of the Treaty/te Tiriti and its status in our constitutional arrangements.

45. The Waitangi Tribunal found that the Treaty Principles Bill policy is unfair, discriminatory, and inconsistent with the principles of the Treaty, contrary to the article 2 guarantee of tino rangatiratanga and will be significantly prejudicial to Māori.[27]

46. It might be possible to develop principles that align more closely with established law and the spirit and intent of the Treaty/te Tiriti. There is scope to adjust the principles through the drafting process. It may be possible that Treaty/Tiriti experts and practitioners are able and willing to work with officials throughout this process or through select committee. That group may include some who identify to iwi and hapū. However, it is not appropriate to assume they will speak on behalf of their entire iwi/hapū. This approach is unlikely to ever meet the expectations of Māori about constitutional arrangements that truly reflect the Treaty/te Tiriti.[28]

Clarity and certainty

47. Defining the principles of the Treaty/te Tiriti in legislation might provide a level of clarity about the intent of Parliament when it refers to the principles. It could also provide the courts, the Tribunal, and decision-makers with a relatively predictable and easy to understand direction for statutory interpretation.

48. As is the case with any legislation, the courts and the Waitangi Tribunal would interpret and apply the Treaty principles in their new form to individual facts. The existing case law and established jurisprudence will need to be re-evaluated. This will lead to a period of uncertainty about the application of the new principles, reducing the predictability of outcomes.[29]

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[27] Waitangi Tribunal, *Ngā Mātāpono – The Principles*, pp 138, 141.

[28] See for example, Waitangi Tribunal *The Treaty Principles Bill Urgent Inquiry: Briefing of Evidence of Professor Margaret Shirley Mutu* (Wai 3300 #A14, 2024) at [17].

[29] Waitangi Tribunal *The Treaty Principles Bill Urgent Inquiry: Kōrero Taunaki a Natalie Ramarihia Coates* (Wai 3300 #A6, 2024), at [67].

49. The policy would exclude existing settlement legislation, which mitigates the risk of re-opening settlements and litigation. However, we expect that negotiating groups will still want to understand how redress connects to other Acts. For example, decisions under the Resource Management Act 1991, the Conservation Act 1987, the Hauraki Gulf Marine Park Act 2000, and the Crown Mineral Act 1991 will likely need to consider both the new principles and satisfy arrangements provided for under settlements underpinned by the current principles.

50. This option could also mean that historical Treaty claims yet to be addressed by the Tribunal, or settled directly with the Crown, may be considered on a different basis than those already completed. The full impact of the Bill on the Treaty settlement process is not known. We will continue to work with the relevant agencies to understand and mitigate as many issues as possible through the drafting process.

Social cohesion and consensus about our constitutional arrangements

51. One objective of this option is to have an open debate about the Treaty/te Tiriti and its place in our constitutional future, where alternative interpretations of the Treaty/Te Tiriti can be heard and debated openly. The aim of such a debate would be to build consensus about the Treaty/te Tiriti and our constitutional arrangements. As reflected in the Panel's report, there is an openness to have a conversation about the Treaty/te Tiriti and identify where improvements can be made. The Waitangi Tribunal agreed that having a conversation about the Treaty/te Tiriti is important. However, the Tribunal noted that how such a conversation is facilitated is the issue.[30]

52. The scope of the Bill is relatively small compared to the wider constitutional issues related to the Treaty/te Tiriti. This means the Bill is unlikely to facilitate the type of national conversation that will achieve consensus about the place of the Treaty/te Tiriti in our constitutional arrangements. The Tribunal concluded that the Bill, if enacted based on existing ACT policy, would have a profound impact on the mana of the Treaty/te Tiriti and its constitutional status. The Tribunal stated, "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.[31]

53. There is also 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/te Tiriti unilaterally.[32] The Tribunal concluded that adopting the Treaty Principles Bill policy meant the Crown had agreed to circumscribe the parameters of that constitutional conversation without engaging the Treaty partner.[33] It stated that this would present a significant risk to the Māori-Crown relationship, "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".[34] We believe this is likely to have flow-on effects into other parts of the relationship.

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[30] Waitangi Tribunal, *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* (pre-publication version, 2024), p 132.

[31] Waitangi Tribunal, *Ngā Mātāpono – The Principles*, p 141.

[32] Coates, above n 27, at [77]. Geddis, above n 18, [33].

[33] Waitangi Tribunal, *Ngā Mātāpono – The Principles*, p 131.

[34] Waitangi Tribunal, *Ngā Mātāpono – The Principles*, p 137

54. The lack of consultation with Māori on policy development is likely to leave Māori feeling alienated and excluded from meaningful participation in the direction of Aotearoa New Zealand's constitutional arrangements.[35]

55. The proposal, and the debate surrounding the Bill, could generate further division posing a threat to social cohesion.[36] The Tribunal concluded that Māori will suffer the impacts of division and social disorder, bearing the brunt of blame for it.[37] Further, putting decision making on Treaty/te Tiriti matters to the wider public through a referendum brings a significant risk that the will of a non-Māori majority will impose on the minority partners (who are also most likely to be affected by the policy).[38,39]

[35] See for example "Rātana: Prime Minister Christopher Luxon warned over te Tiriti o Waitangi" <https://www.rnz.co.nz/news/political/507456/ratana-prime-minister-christopher-luxon-warned-over-te-tiriti-o-waitangi>

[36] Interview with Emanual Kalafatelis, Managing Partner at Rangahau Aotearoa Research New Zealand (Jim Mora, Sunday Morning, Radio New Zealand, 11 February 2024); Coates, above n 27, at [88].

[37] Waitangi Tribunal, *Ngā Mātāpono – The Principles*, p 140.

[38] Mutu, above n 26, at [23(a)].

[39] Statements from Dr Carwyn Jones, Radio New Zealand "New government plans to review Treaty of Waitangi principles" (24 November 2023) <www.rnz.co.nz>.

How do the options compare to the status quo?

	Option One – Status quo	**Option Two –** Define the principles in legislation
Upholds the Treaty/te Tiriti Upholds the rights and obligations of the Māori and the Crown under the Treaty/te Tiriti.	0 Upholds Treaty/te Tiriti obligations to the extent they are supported by the current operation of the principles.	- It might be possible to develop principles that align with established law and the spirit and intent of the Treaty/te Tiriti, however this option is likely to raise significant disagreement about its consistency with the Treaty/te Tiriti.
Clarity and certainty create greater certainty and understanding about how our constitutional arrangements reflect the rights and obligations contained in the Treaty of Waitangi.	0 A degree of certainty about what the Treaty principles are and how they operate in New Zealand law.	- This option might provide clarity about Parliament's intent when it refers to the principles, but could also create additional uncertainty by displacing existing case law about how the principles should be applied.
Promotes social cohesion and consensus Promotes social cohesion and consensus: everyone can discuss the Treaty and our constitutional arrangements in a way that helps build consensus.	0 Public discussion about the Treaty principles will continue. They are unlikely to lead to greater consensus without other measures to facilitate a broader public discussion	- Lack of consultation with Māori on policy development is likely to leave Māori feeling alienated and excluded from meaningful participation in the direction of Aotearoa New Zealand's constitutional arrangements. Asking the public to decide Treaty/te Tiriti matters, through a referendum, risks imposing the will of a non-Māori majority on the minority partner. The results will likely not promote social cohesion or represent a consensus.
Maintains constitutional legitimacy Maintains constitutional legitimacy: different communities and people trust New Zealand's constitutional arrangements and see them as legitimate.	0 Constitutional legitimacy is maintained but broader concerns about the Treaty/te Tiriti and our constitutional arrangements identified by the Constitutional Advisory Panel and Matike Mai are not addressed.	- The Crown changing its understanding of the principles, without engaging in a broader discussion, could undermine confidence in our constitutional arrangements.
Overall assessment	0	-

Example key for qualitative judgements:

++	much better than status quo
+	better than the status quo
0	about the same as the status quo
-	worse than the status quo
- -	much worse than status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

58. Based on our assessment neither option sufficiently address the wider issue of significant differences of opinion about what the Treaty/te Tiriti means in our constitutional arrangements. However, of the two options considered, option 1 - status quo would best meet the policy objectives. The benefits include:

    58.1. preserves the opportunity for the Crown and iwi and hapū to partner meaningfully in a forward-focused discussion about the Treaty/te Tiriti;

    58.2. upholding Treaty/te Tiriti obligations to the extent they are supported by the current operation of the principles; and

    58.3. constitutional legitimacy is maintained but broader concerns about the Treaty/te Tiriti and our constitutional arrangements identified are not addressed.

What are the marginal costs and benefits of the option?

59. The marginal costs and benefits of option 2 (defining the principles in legislation) compared with option 1 (status quo) are outlined below. Due to time, scope and consultation limits, we were unable to assess the monetary cost of this approach. We have instead provided an indication based on an initial assessment. We were unable to identify any monetary benefits to the proposed change.

Affected groups *(identify)*	**Comment** *nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.*	**Impact** *$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.*	**Evidence Certainty** *High, medium, or low, and explain reasoning in comment column.*
Costs of redefining the Treaty principles in legislation compared to the status quo			
Additional costs of the coalition agreement policy option compared to taking no action			
Crown	• All agencies are likely to be affected to the extent they exercise decision making on behalf of the Crown. The impact will not be the same across all agencies. • Expected increase to litigation costs as Courts determine application of the new principles.	• 0**.200 - 0.300 per year**[40] **–** agencies general budget for claimant costs in engaging with the Waitangi Tribunal per year. Agencies are already expected to absorb the costs of participating in kaupapa inquiries within baselines or to seek additional funding.[41]	Low Claimant costs in the Tribunal process were taken from the Waitangi Tribunal mini-inquiry into the funding of claimant participation in Tribunal processes – Whakatika ki Runga. We do not know the cost associated with litigation in the Courts.
Māori	• Resources necessary to fully understand how the change will affect their interests	Not available	Low
Wider public	• Expected minimal monetary costs.	Low	Low The cost of potential disruption to social cohesion is unclear.
Commencement including a referendum	• Cost of running (potentially) two referendums – this includes the cost of providing an information campaign and running the referendum	**11.746** – the total of running a referendum for the End of Life Choice Act 2019, and legalisation of cannabis during a General Election.	Low This figure should not be taken as an indication of future costs. For example, the inflationary environment means the actual costs will be higher;

[40] The basis for this number is the Waitangi Tribunal mini-inquiry into the funding of claimant participation in Tribunal processes – Whakatika ki Runga.

[41] The Cabinet Office Circular "Better Co-ordination of Contemporary Treaty of Waitangi Issues" (2 April 2019) CO 19(3) at [20].

			and the delivery of different referendums might not be directly comparable.
Total monetised costs		11.95 – 12.85	Low We have little evidence and low certainty for this estimate. Our understanding of the costs associated with the change is circumscribed due to the limited time available and the lack of consultation with affected parties.
Non-monetised costs	Potential for tension between Māori and the Crown relations. The public may experience disruption of social cohesion. This may inflame tensions across several issues, leading to a range of responses.	Low/Medium	*Low*
Additional benefits of the coalition agreement policy option compared to taking no action			
Crown		--	Low
Māori		--	Low
Wider Public		--	Low
Commencement based on a referendum		--	Low
Total monetised benefits		--	Low
Non-monetised benefits	Parliament will be providing a level of clarity about the intent of Parliament when it refers to the principles. Courts, Waitangi Tribunal and Executive decision-makers have exclusive direction for statutory interpretation.	Low	*Low*

Section 3: Delivering an option

How will the new arrangements be implemented?

60. In this section, we have exclusively focussed on the implementation of option 2 because the Government has committed to introduce a Bill and refer it to Select Committee as soon as practicable. The proposal is to put the commencement of the Treaty Principles Act to a binding referendum.

61. Operationally, the principles defined in the proposed Bill could be used to assist with interpreting any enactment, where they are relevant, in addition to legislation that refers to them directly. This does not necessarily require them to be explicitly referenced in the legislation in question. Their application in decision-making is determined by the nature of the decision rather than the explicit reference in legislation.

62. The Bill will also not be retrospective in its application. Time would be required to develop guidance, templates, and systems to make consequential changes to the Cabinet Manual, Cabinet's requirements and to various policy guidance. Again, this may lead to a dual set of principles for:

    62.1. settlements pre-dating the Bill; and

    62.2. settlements post-dating the Bill.

63. There are around 30-50 hapū and iwi groups yet to reach final settlement. Fairness between claims is one of the Crown's negotiating principles. There needs to be consistency in the treatment of claimant groups. 'Like should be treated as like' so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.[42] As part of negotiations the Crown considers fairness and consistency between settlements. This means that settlements should consider the particular context of each iwi but not be unequal as a result of the Crown's actions, particularly without the input of iwi.

64. It is likely that change required across the necessary agencies and institutions can be met within existing operational baselines. Costs will include the resources necessary to ensure the expected speed of implementation and levels of compliance are met.

Commencement of Bill under option 2

65. Under option 2, the commencement of the Bill would be subject to a referendum. Holding a referendum in conjunction with the general election usually secures a higher turnout. It also enables the Electoral Commission to use the voting facilities and services already in place for the election to deliver the referendum, which can lower costs compared to a stand-alone referendum.

66. A referendum is usually preceded by an extensive information campaign to inform the public on the issue. However, holding a referendum with an election may risk public education campaigns for referendums and the general election having to compete, potentially affecting the quality of public debate and engagement in both the

[42] Office of Treaty Settlements *Healing the past, building a future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown* (June 2018) at 25.

referendum and the election. This risk can be mitigated through the design and co-ordinated delivery of the respective education campaigns.

67. The public may have differing views on each principle within the Bill. A referendum will not allow for an expression of those views, as people are required to vote 'yes' or 'no', accepting either all the principles in the Bill, or none of them. Consequently, the public education and engagement takes on more importance to help people consider the principles as a whole.

Consideration of other government priorities and necessary funding

68. The Government also plans to introduce a Bill that would enable a referendum to extend the maximum term of Parliament. Like the Bill, the maximum term of Parliament is a constitutionally significant question. Having both questions at the next General Election would need to consider the effect on voter behaviour and engagement, as well as the financial and operational implications.

69. We anticipate that most of the provisions for delivering an in-person referendum could be adapted from the Referendum Frameworks Act 2019. These provisions could be included in the Treaty Principles Bill itself or as a standalone statute. However, some policy work will be needed to confirm the details of any Treaty Principles Bill referendum, such as rules about advertising. If a referendum is also needed for the term of Parliament, then the framework legislation can be drafted to provide for both.

70. A separate bill outlining the relevant referendum framework could be progressed at a slower pace than the substantive Treaty Principles Bill. A separate bill will need to be in place sufficiently in advance for the referendum to be operationalised successfully by the Electoral Commission.

71. Funding will also need to be provided for the Electoral Commission to deliver the referendum. Funding is also required for the appropriate agency to run a public information programme. This would need to be sought through a Budget Bid well in advance of any referendum because there is no baseline funding for referendums.

How will the new arrangements be monitored, evaluated, and reviewed?

72. The proposed legislation would establish a new approach to how the Treaty/te Tiriti is interpreted as new law and regulations are created and applied under existing law that references the Treaty/te Tiriti.

73. This legislation would be administered by Ministry of Justice, which will monitor the legislation in line with its regulatory stewardship obligations. The impact of the proposed legislation will be considered in monitoring of Māori outcomes by Te Puni Kōkiri and the Māori Crown relationship by Te Arawhiti.

74. There are no plans for an evaluation of the policy after enactment. Subject to budget funding, outcome and/or process evaluations may be undertaken. It is our intention to include the necessary resources to conduct an evaluation as part of the budget bid required for the referendum.

75. An outcomes evaluation would assess progress towards achieving the intended outcomes and impacts of the new law. A process evaluation would assess whether the new law has been administered and implemented as intended and identify any areas for improvement and guidance.

76. A monitoring plan might include questions such as:

76.1. Have there been changes in the Crown fulfilling its obligations under the Treaty/te Tiriti?

76.2. Are Treaty settlements still upheld?

76.3. What impact has this Bill had on Māori-Crown relations and outcomes?