



To	Hon David Seymour, Minister for Regulation		
Title	The Regulatory Standards Bill and the Treaty of Waitangi	Number	2024-103
Date	13 September 2024	Priority:	Medium
Action Sought	Agree to the recommended actions	Due Date	16 September 2024
Contact Person	Pip van der Scheer, Manager	Phone	9(2)(a)
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Attachments	Annex 1: Examples of how the Treaty of Waitangi/Te Tiriti o Waitangi is observed in practice in the development and review of legislation in New Zealand	Security Level	IN CONFIDENCE

Executive summary

1. You recently agreed to amend some of the principles of responsible regulation for a new Regulatory Standards Bill to better align them with broadly accepted principles and practices of law-making. Given the 2021 Bill is silent on the Treaty of Waitangi/Te Tiriti o Waitangi (the Treaty) we seek your decision regarding the addition of a principle relating to the Treaty in a revised Bill.
2. We propose a principle be included in the new Bill 9(2)(h) [REDACTED]. This would be consistent with current best practice guidance on legislative design and be consistent with the Regulatory Responsibility Taskforce's intention to reflect broadly accepted principles of good legislation in the Regulatory Standards Bill.
3. In our view, the addition of a principle relating to the Treaty would improve the durability of the Bill. 9(2)(h) [REDACTED].
4. We also recommend that any decisions on the approach and wording of a principle relating to the Treaty be provisional only and be developed in collaboration with iwi/Māori. We have provided you with a separate briefing seeking agreement to a consultation approach on the Bill [2024-064 refers].
5. Your feedback on this briefing will be reflected in the A3s for Ministerial consultation [MFR2024-104 refers].



Recommended action

We recommend that you:

- a** **note** that the 2021 Regulatory Standards Bill is silent on the Treaty of Waitangi/Te Tiriti o Waitangi (the Treaty) *Noted*
- b** **note** that the stated goal of the 2009 Regulatory Responsibility Taskforce report is to develop principles “designed to accord with and reflect broadly accepted principles of good legislation” *Noted*
- c** **note** that current best practice guidance on law-making includes that Māori rights and interests should be identified during policy-making and that legislation should be consistent with the principles of the Treaty *Noted*
- d** **agree** to include a principle in the Bill [REDACTED] *Agree / Disagree*

9(2)(h) [REDACTED]

[REDACTED]
- e** **agree** to include the following initial drafting in the A3s for the purposes of Ministerial consultation: *Agree / Disagree*

9(2)(h) [REDACTED]

[REDACTED]
- f** **note** that if you wish to proceed on the basis of the principle above, we recommend that the approach and wording be developed in collaboration with Māori *Noted*
- g** 9(2)(h) [REDACTED] *Noted*

[REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]



- h **agree** that this briefing will not be made public until proactive release of the final Cabinet paper, to ensure that you have sufficient time to consider and make decisions on the Bill

Agree / Disagree

9(2)(a)

Pip van der Scheer

Manager

Ministry for Regulation

Date: 13 September 2024

Hon David Seymour

Minister for Regulation

Date:



Purpose of report

6. This briefing provides advice on an additional principle relating to the Treaty of Waitangi/Te Tiriti o Waitangi (the Treaty) as part of the principles of responsible regulation in the new Regulatory Standards Bill.
7. Subject to your agreement, this decision will be reflected in the A3s for Ministerial consultation on the new Bill [MFR2024-104 refers].

Background and context

8. On 14 August 2024, we sought your agreement to amend the principles of responsible regulation in the 2021 Bill [MFR2024-095 refers] with the intention to better align them with broadly accepted principles and practices, while still achieving the original intent of the Regulatory Responsibility Taskforce. In that briefing, we noted the 2021 Bill is silent on the Treaty and that further advice would be provided on this.
9. We have subsequently identified options for how the Bill could provide for the Treaty, including developing some initial drafting for such a provision. We have also worked with the Crown Law Office to identify high-level legal risks.
10. Should you agree to include a principle relating to the Treaty in the updated Bill, we would further engage with the Treaty Provisions Oversight Group regarding this possible addition.

Contemporary discussions and debate around the Treaty

11. The Treaty's status continues to evolve along with other constitutional principles and norms. Its place in New Zealand's constitutional arrangements has been a source of continued discussion across various constitutional inquiries and we understand that the Waitangi Tribunal is considering these matters as part of its Constitutional Kaupapa Inquiry.
12. We consider that providing for the Treaty in the Regulatory Standards Bill should focus on well-accepted orthodox treatments of the Treaty in government law-making and centre around appropriately considering obligations, rather than seeking to define the obligations themselves.

Kāwanatanga, tino rangatiratanga, and law-making

13. The Crown's guarantee of tino rangatiratanga in exchange for an authority to exercise kāwanatanga created two spheres of authority under the Treaty partnership. Waitangi Tribunal reports have consistently affirmed that tino rangatiratanga is an equivalent term to autonomy or self-government.
14. Since the assertion of sovereignty and introduction of the New Zealand constitutional framework, there have been varied views about how kāwanatanga and tino rangatiratanga interrelate in the field of law-making. 9(2)(h)
[REDACTED]
15. The Waitangi Tribunal discusses kāwanatanga as 'the right to govern and make good laws for the 'good order and security' of the country' ... and that it 'must be exercised in



accordance with the principle of good government in a way that actively protects and does not diminish rangatiratanga.¹

16. We therefore consider that the inclusion of a principle relating to the Treaty will likely be viewed as significant for Māori and how it acknowledges the respective Crown-Māori tino rangatiratanga and kāwanatanga spheres.

The status of the Treaty as part of current law-making processes in New Zealand

17. This section outlines how the Treaty is observed as part of guidelines for current law-making processes in New Zealand, along with its place in common law, and international commitments.

The Treaty in the development and review of legislation

18. **Annex 1** sets out examples of guidance from the Executive and Parliament for how to consider the Treaty as part of law-making, along with independent review. This includes how the Treaty is observed in practice in the development and review of legislation in New Zealand, including the Legislation Guidelines, the Cabinet Manual and Circulars, RIA process, and Disclosure Statements.
19. The examples illustrate that there is increasing certainty within government guidelines around providing for the Treaty as part of law-making, including the Legislation Guidelines that set out how to consider the Treaty principles, consider how Māori rights and interests may be affected by proposed legislation, and how to legislate consistently with the Treaty.

9(2)(h)

Relevant international standards and obligations

21. New Zealand has expressed its support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In its recent 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*, the Waitangi Tribunal discussed that this declaration supports the constitutional status of the Treaty as requiring recognition in the policy and parliamentary process.³

¹ Waitangi Tribunal, 2024, *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* (Wai 3300), p 71.

² 9(2)(h)

³ Waitangi Tribunal, 2024, *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* (Wai 3300), p 163.



Options for providing for the Treaty of Waitangi

22. We have identified two options below, each with different considerations and risks.

An additional principle relating to the Treaty (recommended approach)

23. Given the constitutional significance of the Treaty, and its well-established status as part of law-making processes in New Zealand, we recommend that the updated Bill include a regulatory responsibility principle that recognises the Treaty. This aligns with the stated goal of the 2009 Regulatory Responsibility Taskforce report to develop principles “designed to accord with and reflect broadly accepted principles of good legislation.”

24. We consider that the inclusion of a Treaty principle will improve the durability of the Bill. It also aligns with the approach taken to some of the other recent amendments to the regulatory principles.

25. This principle would recognise the role of the Treaty as part of law-making 9(2)(h) when developing legislation. Parliament is still supreme, and legislation can still be brought into force that is inconsistent with the Treaty, however Ministers would be required to disclose and justify this.

26. It also recognises the Crown-Māori relationship under the Treaty and the role of the Treaty as part of law-making.

Potential approach to a principle relating to the Treaty

27. We recommend that any decision on the approach and wording of a principle relating to the Treaty be developed in collaboration with Māori through early and ongoing consultation and engagement. We discuss this further in a separate briefing seeking agreement to a consultation approach on the Bill [2024-064 refers].

28. In order to support Ministerial consultation for how this principle could look alongside the other regulatory responsibility principles, we have identified some initial drafting to illustrate how a principle in the Bill could be worded, for your consideration, as follows:

9(2)(h)
[Redacted text block containing multiple paragraphs of proposed principle wording, all obscured by black bars.]



Risks

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

[Redacted]
[Redacted]
[Redacted]
[Redacted]

No additional principle relating to the Treaty

33. 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]

34. There could also be a perception risk that the Crown is attempting to limit the role of the Treaty as part of law-making. It could reduce the credibility of the proposals, impair buy-in, and diminish the ability of the Bill to endure over time.

35. 9(2)(h) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Next steps

36. MFR2024-092 provided to your office on 6 August sets out key next steps and timeframes for work on the Bill. Your feedback on this briefing will be reflected in the A3s for Ministerial consultation.



Annex 1: Examples of how the Treaty of Waitangi/Te Tiriti o Waitangi is observed in practice in the development and review of legislation in New Zealand

Source	Requirement
2021 Legislation Design and Advisory Committee Legislation Guidelines	<ul style="list-style-type: none"> The Legislation Guidelines administered by the Legislation Design and Advisory Committee, and adopted by Cabinet, identify the Treaty as part of New Zealand’s constitutional arrangements. They set out how to consider the Treaty principles consider how Māori rights and interests may be affected by proposed legislation, and how to legislate consistently with the Treaty.
Cabinet Manual and Cabinet Circulars	<ul style="list-style-type: none"> The 2023 Cabinet Manual guides Executive decision-making. It recognises the Treaty of Waitangi is regarded as a founding document of government in New Zealand.⁴ It requires Ministers to confirm that bills comply with certain legal principles or obligations when submitting bills to be included in the legislative programme, including any aspects of a Bill that have implications for, or may be affected by, the principles of the Treaty of Waitangi.⁵ The 2019 Cabinet Circular CO(19) 5: Te Tiriti o Waitangi/Treaty of Waitangi Guidance clarifies the Treaty is one of the major sources of New Zealand’s constitution⁶ and sets out guidelines for policy-makers to consider the Treaty in policy development and implementation.
Te Arawhiti Guidelines, Providing for the Treaty of Waitangi in legislation and supporting policy design	<ul style="list-style-type: none"> The guidelines, as referenced in the Cabinet Manual,⁷ are intended to support 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.
The Regulatory Impact Analysis (RIA) process	<ul style="list-style-type: none"> The RIA requirements apply to any Government regulatory proposal which involve either direct references of the Treaty or principles of the Treaty. The RIA requirements do not, in themselves, ensure that legislation is consistent with the Treaty or its principles, but rather, set out the nature of impact analysis

⁴ Cabinet Office, Cabinet Manual 2023 (Wellington: Department of Prime Minister and Cabinet, 2023), Appendix A, p 155.

⁵ Cabinet Office, Cabinet Manual 2023 (Wellington: Department of Prime Minister and Cabinet, 2023), para 7.68, p 114.

⁶ Cabinet Office, ‘Te Tiriti o Waitangi / Treaty of Waitangi Guidance’, Cabinet circular, 22 October 2019, page 1.

⁷ Cabinet Office, Cabinet Manual 2023 (Wellington: Department of Prime Minister and Cabinet, 2023), para 7.68, p 128.



	required where Treaty clauses are being created, amended, or repealed in legislation.
Disclosure statements	<ul style="list-style-type: none">• Disclosure statements are appended to all Government Bills. They must indicate the steps taken to determine whether the policy to be given effect by a Bill is consistent with the principles of the Treaty of Waitangi. The publication of this information is intended to promote greater attention to existing expectations for the development of legislation, and to support more informed parliamentary and public scrutiny of that legislation.
Waitangi Tribunal	<ul style="list-style-type: none">• The Waitangi Tribunal has jurisdiction to consider whether Acts, regulations or other statutory instruments, policy or practice, and Crown actions or omissions are consistent with the principles of the Treaty of Waitangi.
Judicial review	<ul style="list-style-type: none">• An application for judicial review may be considered for any exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power. 'Statutory power' is widely defined and includes (but is not limited to) the power or right to make regulations and rules, and to exercise a statutory power of decision.^{9(2)(h)} [REDACTED] [REDACTED]

⁸9(2)(h) [REDACTED]