

In Confidence

Office of the Associate Minister of Justice

Cabinet

Policy approvals for progressing a Treaty Principles Bill

Proposal

- 1 This paper seeks Cabinet:
 - 1.1 policy approvals for the development of a Treaty Principles Bill; and
 - 1.2 agreement to issue drafting instructions to the Parliamentary Counsel Office (PCO).

Relation to government priorities

- 2 The proposals in this paper align with the coalition agreement between the National Party and the ACT Party. The coalition agreement includes a commitment to introduce a Treaty Principles Bill, based on existing ACT Party policy, and support it to a select committee as soon as practicable.
- 3 The ongoing decision-making principles in the Government's coalition agreements commit to decisions that are pro-democracy in that they uphold the principles of liberal democracy, including equal citizenship, especially with respect to interpreting the Treaty of Waitangi. The coalition agreements further commit to upholding the principles of liberal democracy, including equal citizenship, by removing co-governance from the delivery of public services.

Executive Summary

- 4 This paper seeks Cabinet policy approvals on the development of a Treaty Principles Bill, per the National-ACT coalition agreement, which includes a commitment to introduce a Treaty Principles Bill and support it to select committee as soon as practicable. The Bill will define what the principles of the Treaty of Waitangi are in statute and includes a commitment to put commencement of the Act to a binding referendum.
- 5 The purpose of this policy is to create certainty and clarity to the meaning of the principles in legislation and to promote a national conversation about the place of the principles in our constitutional arrangements. The ACT Party policy is designed to ensure that the principles of the Treaty reflect the values of our liberal democracy. The Treaty gives all New Zealanders the same rights and duties, it recognises the New Zealand Government's authority to govern, it protects the right of everyone to self-determination, their authority and ownership of land and property, and that all New Zealanders are equal under the law.

- 6 I propose that the draft bill include the following elements:
- 6.1 A set of draft principles, modelled on the texts of the Treaty, as per ACT Party policy;
 - 6.2 A provision putting the commencement of the Act to a binding referendum; and
 - 6.3 A clear statement of its purpose and intent, including that it does not alter or amend the text of the Treaty itself or Treaty settlements.

Background

- 7 The National-ACT coalition agreement included a commitment to introduce a Treaty Principles Bill, based on existing ACT Party policy, and to support it to a select committee as soon as practicable. The ACT Party policy proposes that Parliament define the principles of the Treaty of Waitangi in statute based on the Articles of the Treaty. It also includes a proposal to put the commencement of the Treaty Principles Act to a binding referendum.
- 8 The objective of the policy is for Parliament to set out what the principles are to avoid the courts and the public service from venturing into areas of political or constitutional importance based on amorphous principles. This will help bring more certainty and clarity to the meaning of the principles in legislation and promote a national conversation about the place of the principles in our constitutional arrangements.

Parliament should define what the principles of the Treaty mean

- 9 Parliament introduced the concept of the Treaty principles into legislation in the Treaty of Waitangi Act 1975, partially to reconcile the differences between the two texts. Parliament, however, did not define those principles. That Act also established the Waitangi Tribunal, which was tasked with inquiring into and making recommendations on claims regarding the practical application of the principles and determining whether certain matters were inconsistent with them.
- 10 As a result, the principles have been developed over 40 years of jurisprudence. Some of the key principles as articulated by the Courts and the Tribunal are:
- 10.1 **Partnership** – under which the Crown and Māori both have a duty to act fairly, honourably, and in good faith towards one another.
 - 10.2 **Active Protection** – which places upon the Crown a positive duty to protect Māori interests and taonga.
 - 10.3 **Redress** – which requires the Crown to redress the wrongs it has perpetrated against its Treaty co-signatory.
- 11 The Courts, the Tribunal, and the public service are increasingly referring to a set of principles to justify actions that many New Zealanders view as vague and contrary to democratic values (e.g. equal rights for all citizens), including co-

governance in the delivery of public services and even ethnic quotas within public institutions.

- 12 The evolving nature of the principles' application and interpretation is a source of uncertainty. Considering ongoing apprehension about the Treaty and its principles, the purpose of the Treaty Principles Bill is for Parliament to define the principles of the Treaty. This will help bring more certainty and clarity to the meaning of the principles in legislation and promote a national conversation about their place in our constitutional arrangements.

The principles should affirm the New Zealand Government's authority to govern, rights of Hapū and Iwi Māori, and equality before the law

- 13 The principles I propose to include in the Treaty Principles Bill are set out below. The precise wording of the principles will be developed during the drafting process.
- 14 In my view, these principles are a clear reflection of the intent of the text of the Treaty and allow the Government to satisfy its obligations in a way that is consistent with modern liberal democratic values.
- 15 I propose that principles in the Bill should affirm:
- 15.1 **Civil Government** – the Government of New Zealand 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.
 - 15.2 **Rights of Hapū and Iwi Māori** – The Crown recognises the rights that hapū and iwi had when they signed the Treaty/te Tiriti. The Crown 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.
 - 15.3 **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.

Civil Government

- 16 The principle derived from Article 1 would confirm that the Government of New Zealand has full power to govern, and Parliament has full power to make laws. It would emphasise that the Government and Parliament must balance the interests of everyone when formulating law and policy.

Rights of Hapū and Iwi Māori

- 17 The principle derived from Article 2 would recognise the rights that hapū and iwi, and the members of those hapū and iwi, had when they signed the Treaty/te Tiriti, but it would restrict those rights to those recognised in legislation, Treaty

settlements or other agreement with the Crown. It would acknowledge that the Crown has a duty to protect the rights of hapū and iwi Māori to the extent that is consistent with the rights of everyone.

- 18 This reflects the obligation in Article 2 that hapū and iwi Māori would have legal protection for their physical property (including land) and resources. The Māori text extends to taonga which includes intangibles like language and culture. It must be read with the other principles, especially the principle of equality.
- 19 Officials advise that Principle 2 does not accurately reflect Article 2, which affirms the continuing exercise of tino rangatiratanga. They believe that 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.

Equality before the law

- 20 The principle derived from Article 3 would affirm the idea that everyone is entitled to be treated equally and enjoy substantively the same rights and freedoms. The principle would mean that interpretation and application of laws where the Treaty/te Tiriti is relevant cannot be done in a way that means people do not enjoy the same rights.
- 21 This approach would have fidelity to the meaning of Article 3 because that article conferred the rights of (then) British subjects on Māori. In a modern context, that can be read as a right to equality for everyone. It draws on the right to equality found in comparable overseas jurisdictions.

The Bill can assist the interpretation of any enactment, where the Treaty principles are relevant

- 22 To operate effectively, the Bill will need to state its purpose and application. I have considered three options for the application of the Bill:
- 22.1 **Option One – the principles apply to the interpretation of Acts that refer directly to the principles:** This option would mean the principles defined in the Bill must be used to assist with the interpretation of any enactment that specifically requires consideration of the principles of the Treaty (i.e. those Acts that have a Treaty clause). Public decision-makers would need to consider the defined principles only when required by legislation. The specific legislation would determine the strength of the requirement.
- 22.2 **Option Two (my preferred option) – the principles assist with the interpretation of any Act:** My preferred option would mean the defined principles could be used exclusively to assist with the interpretation of any enactment, where Treaty principles would normally be considered relevant, in addition to legislation that refers to Treaty principles directly. This does not necessarily require Treaty principles 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.

- 22.3 **Option Three – interpretations of Acts that are consistent with the principles must be preferred:** This approach would be modelled on section 6 of the New Zealand Bill of Rights Act 1990. It would mean that, where an Act could be given a meaning that is consistent with the principles in the Bill, that meaning must be preferred over any other meaning. If Parliament intended to legislate contrary to the principles, it would need to do so in clear and unambiguous language.

The Bill should state that it does not alter the Treaty or Treaty settlements

- 23 The Bill is not intended to alter or amend the text of the Treaty itself. I propose that the Bill clearly state that:
- 23.1 the purpose of the Bill is to assist the interpretation of any enactment, where relevant; and
- 23.2 the Bill is not intended to alter the text of the Treaty itself or change any Treaty settlements.
- 24 This may reassure those who are concerned the Crown is attempting to amend or 'repeal' the Treaty. It makes it clear that the Bill is an instrument of Parliament created for the purpose of interpreting its intent when it passes legislation. This will also preserve space for an ongoing national conversation around the place of the Treaty in our constitutional arrangements.
- 25 I understand that Treaty settlements are premised on, and often directly refer to, the Treaty and its principles. The Crown, iwi or hapū had a particular set of ideas in mind when settling claims, that may be materially different to the principles the Bill will set out. To ensure that existing Treaty settlements are upheld, officials will need to undertake further work during the drafting process, to understand the Bill's full impact. This includes consideration of whether defining the principles in statute will introduce uncertainty in existing legal regimes (such as resource management) and impacts on the implementation of settlements.
- 26 Officials will also consider the impact on ongoing and future settlement negotiations. This includes ensuring a fair and equitable approach between existing and new settlements and considering how changing the interpretation of Article 2 rights may limit the scope of historical breaches able to be acknowledged through settlements.
- 27 Officials will identify options to mitigate risks such that settlements continue to be upheld. For example, the Bill could include a savings provision that would ensure existing rights and obligations are not affected by the Bill. I expect to work closely with officials to resolve these types of issue in time to present a draft Bill for approval in November 2024.

The policy proposes the Bill be subject to a referendum

- 28 The ACT Party policy includes a proposal to put the commencement of the Act to a binding referendum. This will allow the New Zealand public to debate the proposed law and ultimately have a say about the meaning of the principles of the Treaty in our constitutional arrangements.
- 29 Officials anticipate that most of the provisions for delivering an in-person referendum can be adapted from the Referendum Frameworks Act 2019 (similar to the End of Life Choice referendum). I propose to commence drafting of the Bill on this basis, but further policy approvals will be needed to confirm the details of any Treaty Principles Bill referendum, such as rules about advertising.
- 30 I recommend that Cabinet invite me to seek policy decisions on the conduct of a referendum from LEG in November 2024. This will include:
- 30.1 Policy approval for the conduct of a referendum;
 - 30.2 Timing: stand-alone or with the general election; and
 - 30.3 Funding for public information campaigns and other related policy decisions, such as advertising rules.
- 31 The Ministry believes 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), and that this is likely to have a negative effect on social cohesion. It is also unlikely to represent a consensus.
- 32 I find this comment from the Ministry disappointing. It suggests that all people of a certain ethnicity think alike. This is the kind of thinking that the Treaty Principles Bill seeks to challenge.
- 33 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. This means public education and engagement takes on more importance to help people consider the principles as a whole.
- 34 The timing of the referendum is particularly important because the coalition agreements of all three parties include developing a bill to enable a referendum to extend the maximum term of Parliament. Like the Bill, the maximum term of Parliament is a constitutionally significant question. A decision to have both questions at the next general election would need to consider the effect on voter behaviour and engagement.
- 35 There is currently no funding for referendums. Any referendum will require additional funding for an information campaign and for the Electoral Commission to operationalise any referendum.

- 36 If you agree, the additional advice around the conduct of a binding referendum in November 2024 will also include more detailed advice around the potential impacts of a referendum, risks, and potential mitigations.

Implementation

- 37 Subject to Cabinet approval, I intend to progress this work according to the following timeline:

Milestone/Activity	Timeframe
Parliamentary Counsel to draft Treaty Principles Bill	2 September 2024 – 9 October 2024
Cabinet LEG Committee	7 November 2024
Seek Cabinet approval on Bill	11 November 2024
Bill introduced	18 November 2024
First reading and referral to Select Committee	21 November 2024
Select Committee report back (6 months)	Week ending 16 May 2025
Remaining House stages	May 2025 – June 2025

- 38 This approach assumes that engagement and analysis of feedback during Select Committee can be completed according to the indicated timeframe. If officials receive an extraordinarily large number of submissions at Select Committee, there is a risk that progression through the timeline may be delayed.

Legislative Implications

- 39 A bid for a Principles of the Treaty of Waitangi Bill has been included in the 2024 Legislation programme (Category 5 – to process to select Committee by the end of the year). The Parliamentary Counsel Office has been consulted on the policy proposals in this paper. The proposed Act will be binding on the Crown.

Impact Analysis

Regulatory Impact Statement

- 40 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.

- 41 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.”
- 42 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.
- 43 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.
- 44 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.

Human Rights and Population Implications

- 45 Māori have a significant interest in the Treaty, particularly as it relates to their rights to tino rangatiratanga. Officials advise that defining the principles of the Treaty in statute will be seen by some as a removal of Māori rights guaranteed under the Treaty and is likely to be the subject of public and legal challenge.
- 46 I note officials’ concerns. However, I also note that their interpretation of the Treaty is precisely what the proposed Bill seeks to address and clarify.
- 47 Officials advise that the Bill would have the effect of substituting new Treaty principles that are significantly narrower for Māori than the current principles developed by the courts and Waitangi Tribunal. Decision-makers and officials taking decisions where the Treaty principles are relevant would need to consider these new principles. Their application in decision-making is determined by the nature of the decision rather than the explicit reference in legislation.

- 48 To the extent that this could result in decision-makers and officials making narrower decisions about the extent of Māori rights and interests in certain areas of law, and acting accordingly, it may result in actions or outcomes that are seen to be discriminatory or inconsistent with international standards and obligations such as those affirmed by the International Convention on the Elimination of All Forms of Racial Discrimination and the United Nations Declaration on the Rights of Indigenous Peoples.
- 49 I disagree with officials' view that this policy is inconsistent with international standards and obligations. The International Convention on the Elimination of all forms of Racial Discrimination states that, 'Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation.' This policy is consistent with the Convention in that it treats all New Zealanders equally under the law.
- 50 The Coalition Government's policy is that the United Nations Declaration on the Rights of Indigenous Peoples has no binding legal effect on New Zealand.

Use of external resources

- 51 Officials expect the number of submissions during Select Committee to be high. Consequently, engaging with a third-party provider for submission analysis may be needed to meet the deadline for completion of this work laid out in this paper.
- 52 As laid out in Te Kawa Mataaho Public Service Commission *Contractors and Consultants Guidance*, Justice officials will report all information relating to the procurement of the supplier to the Public Services Commission.

Consultation

- 53 The following agencies have been consulted on this paper: Te Arawhiti, Te Puni Kōkiri, Treasury, Public Service Commission, Ministry of Foreign Affairs and Trade, and the Electoral Commission. The Department of the Prime Minister and Cabinet was advised.
- 54 In providing comment, agencies have advised that, despite the Bill stating that the intent is not to alter the text of the Treaty itself or the Treaty settlement process, it is likely that this will not be sufficient to mitigate the actual effect of defining the principles in statute. As stated earlier, Justice officials will work closely with agency colleagues in Te Arawhiti, Crown Law and PCO to undertake further work to understand the full impact on both existing settlements and ongoing and future settlement negotiations. The Ministry of Justice, Parliamentary Counsel Office and Te Arawhiti have provided their separate departmental comments on the policy proposals in this paper below.

Departmental comments

Ministry of Justice

- 55 The Ministry believes that the proposed policy is not grounded in the Treaty/te Tiriti or the existing Treaty principles, that the underlying rationale for the principles as described in the ACT party policy relies on a novel reading of the Treaty/te Tiriti that is not supported by the available evidence, and that the policy does not recognise tino rangatiratanga or the distinct political status of Māori as the indigenous people of Aotearoa New Zealand. The Ministry of Justice is also concerned about a non-collaborative process that has not involved Māori in policy development, which does not meet the required Treaty of Waitangi standard of good faith engagement with Māori on matters of importance to them.
- 56 I disagree with officials. The Treaty gives all New Zealanders the same rights and duties, it recognises the New Zealand Government's authority to govern, and it protects the right of everyone to self-determination, their authority and ownership of land and property. The notion that Māori should have a different political status to other New Zealanders is precisely what the proposed Bill aims to address.
- 57 I consider that when coupled with the national conversation that has taken place about a proposed Treaty Principles Bill since 2022, and the six months of consultation that will take place during the select committee process, all New Zealanders, including Māori, will have substantive opportunities to provide feedback on the Bill. The notion that the Crown has a duty to consult Māori differently to other New Zealanders is based on a novel reading of the Treaty by the Courts and the public service and which this Bill aims to address.

Te Arawhiti

- 58 Te Arawhiti supports the comments of the Ministry of Justice and the Parliamentary Counsel Office.
- 59 Te Arawhiti also draws to Cabinet's attention the 16 August 2024 Waitangi Tribunal 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* which, with respect to the Treaty Principles Bill policy, found that the Crown had breached the Treaty principles of partnership and reciprocity, active protection, good government, equity, redress, and the Article 2 guarantee of rangatiratanga. The Tribunal recommended the Treaty Principles Bill policy should be abandoned.
- 60 Te Arawhiti has ventured into areas of political and constitutional importance without the authority, the mandate, or the expertise to do so. Te Arawhiti has no democratic mandate and does not represent or speak for Māori – it is an agent of the Crown. The 'partnership' interpretation of the Treaty which Te Arawhiti, and the public service, argues for to criticise the proposed Bill is precisely what is being challenged and what the Bill seeks to clarify. Parliament

introduced the concept of the Treaty principles into legislation, and it has a right to legislate to define what the principles mean, something Te Arawhiti fails to acknowledge.

Parliamentary Counsel Office

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Legal professional privilege under s 54 of the Evidence Act 2006

Communications

62 The Waitangi Tribunal has conducted an urgent inquiry into the Treaty Principles Bill and the review of Treaty principles references in legislation and published *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* on 16 August 2024. The Tribunal has directed that the Crown file a copy of the Cabinet paper and the Regulatory Impact Statement within 24 hours of Cabinet consideration of the Cabinet paper, along with an update on the Treaty principles review work.

63 As it is an interim report, the Tribunal has reserved its jurisdiction to consider the issue again following the filing of the Cabinet paper and Regulatory Impact Statement, and any further evidence or submissions that might require a response to those documents. The Tribunal also indicated it reserved its jurisdiction to consider these issues following the enactment of any legislation with respect to either the Bill or the review.

64 I propose to issue a media release on this paper.

Proactive Release

65 I will proactively release this Cabinet paper, related Cabinet Minute and substantive advice (including briefings) related to the Treaty principles Bill, with appropriate redactions, in accordance with the Government’s proactive release policy.

Recommendations

66 The Associate Minister of Justice recommends that Cabinet:

- 1 **Note** that a commitment to introduce a Treaty Principles Bill (the Bill) as soon as practicable and support it to a select committee is a commitment in the Coalition Agreement between National and the ACT Party.

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- 2 **Agree** that the principles should assist with the interpretation of any enactment, where treaty principles would normally be considered relevant.
- 3 **Agree** that the Bill should state that it does not alter or amend the text of the Treaty itself or Treaty settlements.
- 4 **Authorise** the Associate Minister of Justice to instruct the Parliamentary Counsel Office to draft the Treaty Principles Bill to implement the principles described in this paper.
- 5 **Agree** that the referendum provisions in the Bill should be similar to the Referendum Frameworks Act 2019, subject to further policy approvals in November 2024.
- 6 **Invite** the Associate Minister of Justice to bring a paper for decision on the conduct of a referendum for the Bill in November 2024.
- 7 **Note** that the proposals in this paper will be given effect through the Treaty Principles Bill, which holds a category five priority on the 2024 Legislation Programme (to be referred to a select committee by the end of the year).
- 8 **Agree** that the Treaty Principles Bill will be considered by a select committee until the week ending 16 May 2025.
- 9 **Agree** that, in accordance with agreed coalition processes, the coalition parties will be free to differentiate publicly regarding the progression of the Bill after the first reading.

Authorised for lodgement

Hon David Seymour

Associate Minister of Justice