# Cabinet Office

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## Circular

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**Intended for**

All Ministers
All Chief Executives
All Senior Private Secretaries
All Private Secretaries
All officials involved in policy development

RECEIVED
Waitangi Tribunal
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# Te Tiriti o Waitangi / Treaty of Waitangi Guidance

## Introduction

1 This circular sets out guidelines agreed by Cabinet for policy-makers to consider the Treaty of Waitangi in policy development and implementation.

## Background

2 The Treaty of Waitangi (the Treaty) is one of the major sources of New Zealand's constitution[1].

3 Much has been thought, written and said about the Treaty, the circumstances of its creation, the differences between the English and Māori texts and the consequent difficulties of understanding its meaning and implications in the modern day. The texts of the Treaty (from the Treaty of Waitangi Act 1975 and a translation by Sir Hugh Kawharu) are attached to this guidance as **Appendix 3**.

## Te Tiriti o Waitangi/The Treaty of Waitangi

4 The Treaty consists of a preamble and three articles. The influence of the Treaty on New Zealand's constitution has fluctuated in the years since its signing. Since 1975, however, reference to the Treaty has been included in many laws passed by Parliament, and the courts and Waitangi Tribunal have developed a considerable body of Treaty jurisprudence.

5 The Cabinet Manual states the Treaty of Waitangi is regarded as a founding document of government in New Zealand and that it:

> "may indicate limits in our polity on majority decision-making. The law may sometimes accord a special recognition to Māori rights and interests such as those covered by Article 2 of the Treaty. And in many other cases the law and its processes should be determined by the general recognition in Article 3 of the Treaty that Māori belong, as citizens, to the whole community. In some situations, autonomous Māori institutions have a role within the wider constitutional and political system. In other circumstances, the model provided by the Treaty of Waitangi of two parties negotiating and agreeing with one another is appropriate. Policy and procedure in this area continues to evolve." [Cabinet Manual 2017, p. 2]

[1] Other major sources include The Constitution Act 1986, the prerogative powers of the Queen, the State Sector Act 1988, the Electoral Act 1993, the Senior Courts Act 2016, the New Zealand Bill of Rights Act 1990 and other relevant New Zealand, English and United Kingdom statutes, relevant decisions of the courts and the conventions of the constitution (Cabinet Manual, p. 2).

6 For further discussion see the Te Puni Kōkiri booklet '*Key concepts in the Treaty exchange*'[2].

**Context is important**

7 The Treaty creates a basis for civil government extending over all New Zealanders, on the basis of protections and acknowledgements of Maori rights and interests within that shared citizenry.

8 Any specific meaning of the Treaty, and its implications for particular issues, is not easy to specify in advance as it depends on circumstances and views that surround any issue at the time it arises.

**The Treaty must be considered 'on the whole'**

**9** No article of the Treaty stands apart from the others. Consideration of how the Treaty applies in any situation will require consideration of the applicability of all articles and the relationship each has to the others.

## Existing government guidance on the Treaty of Waitangi

10 There are sources of information about the appropriate policy tools to use in developing policy and the Treaty and its place in the New Zealand constitution that policy makers should be aware of. They include:

10.1 the Department of Prime Minister and Cabinet's Policy Project website, including the policy methods toolbox;

10.2 the Cabinet Manual (the authoritative guide to central government decision making for Ministers, their offices, and those working within government);

10.3 Legislation Design and Advisory Committee's Legislation Guidelines (2018 Edition).

11 Since the government last provided broad Treaty guidance to the public service in 1989 over 70 Treaty settlements have been negotiated between Māori and the Crown. The courts have recognised tikanga Māori as part of New Zealand common law and as a value that informs development of the common law. While their precise impact on the common law and statute will vary, rights at tikanga may have a relevance in legal disputes independent of statutory incorporation of the Treaty.

12 Treaty settlements settle claims relating to, and provide redress for, historical acts and omissions of the Crown. The Māori Crown relationship continues post-settlement, and past conduct (even if settled) may inform what a reasonable and honourable Treaty partner will do in the future.

13 A number of government agencies have guidance about applying the Treaty (and more commonly, its principles) in the course of their work. The New Zealand Productivity Commission reviewed 10 examples in 2014. More information can be found on the Commission's report '*Regulatory institutions and practices*.

## Guidance provided by the Courts and Waitangi Tribunal

14 The body of Treaty jurisprudence developed by the courts and the Waitangi Tribunal focusses on principles derived from the Treaty. For more information on this see the Te Puni Kōkiri booklet '*The principles of the Treaty of Waitangi as expressed by the Courts and the Waitangi Tribunal*'[3].

[2] https://www.tpk.govt.nz/documents/download/179/tpk-treatykeyconcepts-2001-en.pdf
[3] https://www.tpk.govt.nz/documents/download/179/tpk-treatyprinciples-2001-en.pdf

15 New Zealand courts have held that Māori rights might be recognised by the common law, without statutory expression, and a decision maker may be required to weigh the Treaty rights/interest even where there is no Treaty reference in statute. The courts will generally presume that Parliament intends to legislate in accordance with Treaty principles[4].

16 The Waitangi Tribunal plays an important role in providing advice to government on the application of Treaty principles in relation to acts or omissions of the Crown which Māori allege breach the principles of the Treaty.

## This guidance

17 While the courts and previous guidance have developed and focussed on principles of the Treaty, this guidance takes the texts of the Treaty as its focus.

18 A glossary of Māori terms used throughout this guidance is attached as **Appendix 1**.

19 This guidance does not:

19.1 rewrite the Treaty. It provides guidance on how the terms and concepts in the texts of the Treaty should be applied by government officials in undertaking their work;

19.2 create new legal obligations on Crown agencies. It should instead guide and support Crown agencies processes and decision-making. Agencies will consider the specific context of the relevant issue, policy or initiative;

19.3 replace all previous government guidance on the Treaty. It sets out questions for policy-makers to consider in developing policy proposals so that the resulting policy appropriately recognises the influence the Treaty should have in the circumstances.

20 Answering the questions in this circular will allow policy makers to demonstrate an appreciation of kawanatanga, rangatiratanga and other key Treaty concepts and their applicability to their work.

21 A quick reference '*Treaty guidance at a glance*' is attached as **Appendix 2** for use when policy-makers are more familiar with the guidance.

22 The courts will continue to have a role in interpreting laws where the Treaty is relevant to a matter.[5]

[4] The Treasury, 'Consistency with the government's Treaty of Waitangi obligations'

[5] Specifically, in relation to the Supreme Court, see ss66(1) and 74(3) of the Senior Courts Act 2016

## Article One

23 Put simply, by Article One the government gained the right to govern.

| English version | Māori version | Back translation of Māori text by Sir Hugh Kawharu[6] |
|---|---|---|
| **Article the First**<br>The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof. | **Ko te Tuatahi**<br>Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o ratou wenua. | The first<br>The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government[7] over their land. |

### Questions to guide policy-makers:

1. How does the proposal/policy affect all New Zealanders? What is the effect on Māori (if different, how and why?)
   1.1. Will the proposal affect different Māori groups differently?
   1.2. What could the unintended impacts on Māori be and how does the proposal mitigate them?
2. How does the proposal demonstrate good government within the context of the Treaty?
   2.1. Have policy-makers followed existing general policy guidance?
   2.2. Are there any legal and/or Treaty settlement obligations for the Crown?
3. What are the Treaty/Māori interests in this issue?
   3.1. How have policy-makers ascertained them?
4. How does the proposal demonstrate that policy-makers are meeting the good faith obligations of the Crown?
5. To what extent have policy-makers anticipated Treaty arguments that might be made?
   5.1. And how does the proposal respond to these arguments?

[6] Sir Hugh Kawharu's translation sets out to show how Māori would have understood the meaning of the text they signed. It was published in the book *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, edited by Michael Belgrave, Merata Kawharu and David Williams (Oxford University Press, 1989)

[7] 'Government': 'kawanatanga'. Sir Hugh's view was that "there could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty': ie, any understanding on the basis of experience or cultural precedent." This view is not universally held. For more discussion of the views and understandings of participants at 1840 see He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry, particularly chapter 10 (Waitangi Tribunal 2014).

## How does the proposal/policy affect all New Zealanders? What is the effect on Māori (if different, how and why)?

24 The Treaty may justify different treatment of Māori interests or involvement of Māori in an issue, but it does not confer greater rights on Māori than the government owes to all New Zealanders.

25 This question asks that policy-makers consider whether, having properly assessed the Māori/Treaty interest in an issue, the proposal demands an approach/approaches for Māori that differs to the approach/approaches for other New Zealanders. If it does, then policy-makers should be able to articulate how and why.

26 There are two secondary questions to ask in relation to this question:

26.1 Will the proposal affect different Māori groups differently?

26.2 What could the unintended impacts on Māori be and how does the proposal mitigate them?

## How does the proposal demonstrate good government within the context of the Treaty?

27 In a Treaty context, 'good government' means government properly conducted with due regard to the range of obligations a government has to the people it governs, and particularly in regard to Treaty obligations.

28 In essence, this question asks whether work towards the policy under development appropriately acknowledges the right of government to make laws with the right of Māori to retain authority over certain things.

29 There are two supplementary questions to ask in relation to this question:

29.1 Have policy-makers followed existing general policy guidance?

29.2 Are there any legal and/or Treaty settlement obligations for the Crown?

Throughout all phases of a policy project, policy-makers should assemble and review what they know about the economic, social, technical, cultural and other important forces causing or perpetuating the policy problem. The question in paragraph 29.1 above asks whether the existing guidance referred to in paragraph 10 has guided policy development. If it has, then policy-makers can have some confidence that the outcome has accounted for a Treaty interest to an extent.

30 There are other tools available to policy-makers who may be unaware of whether there are existing legal obligations for the Crown to Māori in relation to many issues, among them:

**The Settlement Portal – Te Haeata**

Te Haeata is an online record of Treaty settlement commitments, to help agencies and settled groups search for and manage settlement commitments.[8]

**List of Treaty references in primary legislation**

Pages 160-163 of the New Zealand Productivity Commission's 2014 report '*Regulatory institutions and practices*' lists 36 Principal Acts with references to the Treaty or Treaty Principles.

[8] http://www.tearawhiti.govt.nz/te-kahui-whakamana-settlement-commitments/

31 Even where "Treaty clauses" are not present in legislation or regulations, the particular context may require the Crown to have regard to the Treaty.

32 Statutes with references to the Treaty or Treaty principles often contain regulatory provisions and create obligations on a range of parties that are not the Crown (e.g. local government, Crown entities, Officers of Parliament and body corporates).

## What are the Treaty/Māori interests in this issue?

33 Identifying the Treaty/Māori interest in a given issue is critical to being able to answer the question of the extent to which Māori retain the right to control and/or implement the policy being developed.[9]

34 The extent of the Māori interest in an issue will vary from issue to issue.

35 There is a secondary question to ask in relation to this question:

35.1 How have policy-makers worked out the Treaty/Māori interests?

36 Following Te Arawhiti's engagement framework and guidelines will give policy-makers confidence that they have appropriately determined the Treaty/Māori interests in an issue.

## How does the proposal demonstrate that policy-makers are meeting the good faith obligations of the Crown?

37 The courts and Waitangi Tribunal have described the Treaty generally as an exchange of solemn promises about the ongoing relationships between the Crown and Māori with qualifications. By signing the Treaty, Māori expected the Crown to act honourably towards them; they expect the Crown to protect their interest in everything it promised to, and they expect the Crown to respect their right to make decisions over matters of significance to them.

38 Put more simply, this question asks policy-makers to consider whether the policy being developed keeps the promise the Crown made to Māori to protect their interests and allow for Māori retention of decision-making in relation to them.

39 Because the Māori Crown relationship is a continuing one, the Crown and Māori should act reasonably and in good faith towards each other, consulting with each other and compromising where appropriate.

## To what extent have policy-makers anticipated Treaty arguments that might be made?

40 There is a supplementary question to ask in relation to this question:

40.1 How does the proposal respond to these arguments?

41 Māori have long had recourse to the courts to challenge Crown decisions and actions. The courts have made significant decisions in relation to the application of the Treaty in New Zealand, particularly over the last 35 years. The Waitangi Tribunal is also an important forum where Treaty arguments may be made by Māori and the Crown.

[9] Legislation Design and Advisory Committee, legislation Guidelines (2018 Edition), Chapter 5.1, page 28, http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/

42 In recent years the Courts have indicated they may take particular care where Māori rights and interests are raised in cases, including when interpreting laws passed by Parliament. This reinforces the constitutional importance the Treaty has grown to have in New Zealand. It is important that policy-makers conduct their work in such a manner as to make Treaty consistent decisions. This in turn will assist in any response to litigation.

43 This question requires policy-makers to consider what arguments could be made that their work is inconsistent with the Treaty. When considered early in policy development the answer to this question may lead policy-makers to modify their intended course of action.

44 This question does not imply a Māori right to veto government decisions. It is a means of testing whether the proposed actions/decisions are cognisant of the obligations the Treaty conferred on the Crown. Care must be taken to weigh and balance the relevant considerations in a particular issue.

45 This question points to the importance of a Minister and/or department being able to have confidence that they have appropriately considered the range of relevant factors in relation to a certain issue, and specifically the Treaty/Māori interest in the case of challenge by Māori.

## Article Two

46 Put simply, by Article Two the Crown promises that Māori will have the right to make decisions over resources and taonga which they wish to retain.

| English version | Māori version | Back translation of Māori text by Sir Hugh Kawharu |
|---|---|---|
| **Article the Second**<br>Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf. | **Ko te Tuarua**<br>Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona. | The second<br>The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise[10] of their chieftainship over their lands, villages and all their treasures.[11] But on the other hand the Chiefs of the Confederation and all the Chiefs will sell[12] land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent. |

**Questions to guide policy-makers:**

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

[10] 'Unqualified exercise' of the chieftainship — would emphasise to a chief the Queen's intention to give them complete control according to their customs. 'Tino' has the connotation of 'quintessential'.

[11] The Waitangi Tribunal has stated that "the Māori interest is not absolute. The degree of protection must be decided on a case-by-case basis, and may be overridden in appropriate circumstances following a proper balancing of kaitiaki and competing interests. There may be some circumstances in which access and benefit sharing arrangements cannot be justified even where matauranga Maori is used." (Ko Aotearoa Tenei: Report on the Wai 262 Claim).

[12] Māori 'hokonga', literally 'sale and purchase'. 'Hoko' means to buy or sell.

## Does the proposal allow for the Māori exercise of rangatiratanga while recognising the right of the Crown to govern?

47 Māori were guaranteed rangatiratanga by the Treaty. This promise holds true today. It is the duty of the Crown to respect the right of Māori to control decisions in relation to their lands and the things of value to them. These rights are exercised within the context of the Crown's right to govern.

48 The Crown has, at times in New Zealand history, ignored or denied the right of Māori to control their affairs. Not all such efforts have been based on ignorance of the Treaty – in many cases the government relied on its right to make decisions affecting Māori that it considered would be in their best interests, but without respecting the right of Māori to be involved in those decisions.

49 There are two secondary questions to ask in relation to this question:

49.1 Can/should the proposal, or parts of it, be led by Māori?

49.2 What options/mechanisms are available to enable rangatiratanga?

50 The question in paragraph 49.1 above requires policy-makers to consider the role Māori should have in relation to proposed policy.

51 By way of example, Whānau Ora is a public sector initiative that devolves funding decisions for services to community-based commissioning agencies. It is not limited to Māori but it does put whānau and families in control of the services they need to build on their strengths and achieve their aspirations. It recognises the collective strength and capability of whānau to achieve better outcomes in areas such as health, education, housing, employment and income levels.[13]

52 Similarly, the Māori pathways programme aims to provide a wrap-around service for those leaving prison and greater engagement with whanau and iwi from pre-sentence through to release. The values underpinning the programme are universal, and non-Māori are also able to be a part of the programme.

53 The question in paragraph 49.2 above requires policy-makers to consider existing options/mechanisms to enable rangatiratanga. This can relate to Māori entities that can, together or alone depending on the issue, formulate policy, and it can also relate to Māori entities implementing a properly developed policy.

54 If policy-makers consider the development of policy can and should be led by Māori in accordance with paragraph 49.1, then it will help to answer the question set out in paragraph 49.2 - what options/mechanisms are available to enable rangatiratanga?

## Have Māori had a role in design/implementation?

55 The Treaty guarantees and promises apply to all Māori – as individuals, whānau, hapū and iwi. Depending on the issue, it may be appropriate for policy-makers to engage with Māori individuals, whānau, hapū or iwi, or a combination thereof.

56 Because the Treaty guaranteed Māori the control and enjoyment of those resources and taonga, policy-makers must consider what responsibilities Māori already have in relation to the matter. Importantly, Treaty interests are not confined to resources and taonga that Māori have retained possession of. For example, even where land has been alienated Māori interests may still be engaged.

[13] https://www.tpk.govt.nz/en/whakamahia/whanau-ora

57 There are two supplementary questions to ask in relation to this question:

57.1 If so, who?

57.2 If not, should they?

58 The engagement framework and guidelines will help policy-makers answer a question that flows from question in paragraph 57.2 above – if Māori have not had a role in design and implementation, but it is considered that they should, then policy-makers will need to consider who could participate in this.

## Does the proposal: a) enhance Māori wellbeing; and b) build Māori capability or capacity?

59 It has been common, in New Zealand history, for government to not recognise or protect the right of Māori to be involved in aspects of government of the country. Increasingly, government is looking to work with non-government parties on issues of common purpose.

60 In thinking about how a proposal can enhance Māori wellbeing and build Māori capability or capacity, the response of the government should reflect the nature and extent of the interests involved.

## Is there any aspect of this issue that Maori consider to be a taonga?

61 The scope of things that may be considered taonga, from a Māori perspective, are broad. At its most broad taonga can be said to be anything considered to be of value - including socially or culturally valuable objects, resources, phenomenon, ideas and techniques.

62 For more discussion of the views of the courts and Waitangi Tribunal on taonga see pages 60-64 of the Te Puni Kōkiri booklet '*Key concepts in the Treaty exchange*'[14]. The Waitangi Tribunal report *Ko Aotearoa Tenei* contains important discussion of how laws have side-lined Māori and Māori cultural values from decisions of vital importance to their culture which have left Māori unable to fulfil their obligations as kaitiaki (cultural guardians) towards their taonga –obligations which are central to the survival of Māori culture.

63 There are two supplementary questions to ask in relation to this question:

63.1 How have policy-makers come to their view of whether the issue is a taonga, and is there consensus?

63.2 What effect does that have on the proposal

64 There is not always consensus between the Crown and Māori on whether an issue or thing is a taonga. It is important for policy-makers to be able to demonstrate that they have considered the question openly and considered Māori perspectives in their thinking.

65 Absence of consensus on whether an issue or thing is a taonga need not prevent the Crown and Māori agreeing on how to develop a policy in relation to it.

[14] https://www.tpk.govt.nz/documents/download/179/tpk-treatykeyconcepts-2001-en.pdf

## Article Three

66 Put simply, by Article Three the Crown promises that its obligations to New Zealand citizens are owed equally to Māori.

| English version | Māori version | Back translation of Māori text by Sir Hugh Kawharu |
|---|---|---|
| **Article the Third**<br>In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects. | **Ko te Tuatoru**<br>Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani. | The third<br>For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties[15] of citizenship as the people of England.[16] |

**Questions to guide policy-makers:**

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

### Does the proposal aim to achieve equitable outcomes?

67 Article Three has an important significance in the implicit assurance that rights would be enjoyed equally by Māori with all New Zealanders of whatever origin. Special measures to attain that equal enjoyment of benefits are allowed by international law.

68 Consideration should be given to how Māori and the Crown define and measure equitable outcomes, and policy-makers must be live to the likelihood engagement with Māori may be required to align views on this.

### How does the proposal differ from previous efforts to address the issue?

69 Few challenges faced by government are entirely new or have not been tackled by government before. This question prompts the Minister and/or department to examine how a current proposal to address an issue is different to previous attempts.

70 It is possible (and potentially likely) that previous government attempts to address an issue did not give due regard to Treaty obligations and/or appropriately acknowledge the rights and duties of Māori in the matter.

[15] 'Rights and duties': Māori at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly, this attitude has been held towards the person of the Crown down to the present day — hence the continued expectations and commitments entailed in the Treaty.
[16] Sir Hugh's view was that "there is, however, a more profound problem about 'tikanga'. There is a real sense here of the Queen 'protecting' (ie, allowing the preservation of) the Māori people's tikanga (ie, customs) since no Māori could have had any understanding whatever of British tikanga (ie, rights and duties of British subjects). This, then, reinforces the guarantees in article 2." More recent scholarship suggests that Sir Hugh underestimated the knowledge of British tikanga that some Māori had.

71 In essence this question asks why would the outcome of the current effort be any different to previous outcomes?

**How does the proposal demonstrate that policy-makers have looked at the proposal from the perspective of legal values such as natural justice, due process, fairness and equity?**

72 Article Three contains a promise by the Crown to extend to Māori all the rights and privileges/duty of British subjects, which can be read today as New Zealand citizens.

73 Considering proposals through the lens of the legal values listed as examples in this question is a means of demonstrating that the Crown is upholding the promises in Article Three of the Treaty.[17]

**How does the proposal demonstrate that policy-makers have looked at the issue from the perspective of tikanga values?**

74 This question recognises that courts have, in recent years, considered tikanga values to be important to the consideration of matters relating to Māori and should be given appropriate weighting in decision-making.

75 Tikanga values that could offer perspective on an issue include:

75.1 Mana: enduring power and authority that can be derived from ancestry, from possession of lands and acquired by individuals according to their ability to develop skills and gain knowledge;

75.2 Whakapapa: the genealogical descent of all living things;

75.3 Whānaungatanga: relationship, kinship, sense of family connection - a relationship through shared experiences and working together, which provides people with a sense of belonging;

75.4 Manaakitanga: hospitality, kindness, generosity, support - the process of showing respect, generosity and care for others.[18]

76 The courts have recognised tikanga Māori as part of New Zealand common law and as a value that informs development of the common law. The precise impact of tikanga Māori on the common law and statute will vary, however, tikanga may have a relevance in legal disputes independent of statutory incorporation of the Treaty.

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[17] Legislation Design and Advisory Committee, legislation Guidelines (2018 Edition), Chapter 5.3, page 29, http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/

[18] Further discussion of a wide range of tikanga values can be found at Hirini Moko Mead, *Tikanga Māori: Living by Māori Values* (particularly chapter 3), Huia Publishers, 2016 edition and Cleve Barlow, *Tikanga Whakaaro: Key concepts in Māori culture,* Oxford University Press.

## Appendix 1: Glossary of terms

The Māori dictionary contains the following definitions:

Hapū

> **(noun)** kinship group, clan, tribe, subtribe - section of a large kinship group and the primary political unit in traditional Māori society. It consisted of a number of whānau sharing descent from a common ancestor, usually being named after the ancestor, but sometimes from an important event in the group's history. A number of related hapū usually shared adjacent territories forming a looser tribal federation (iwi).

Iwi

> (**noun**) extended kinship group, tribe, nation, people, nationality, race - often refers to a large group of people descended from a common ancestor and associated with a distinct territory.

Mana:

> 1. (**verb**) to be legal, effectual, binding, authoritative, valid.
>
> 2. (**noun**) prestige, authority, control, power, influence, status, spiritual power, charisma - mana is a supernatural force in a person, place or object. Mana goes hand in hand with tapu, one affecting the other. The more prestigious the event, person or object, the more it is surrounded by tapu and mana. Mana is the enduring, indestructible power of the atua and is inherited at birth, the more senior the descent, the greater the mana. The authority of mana and tapu is inherited and delegated through the senior line from the atua as their human agent to act on revealed will. Since authority is a spiritual gift delegated by the atua, man remains the agent, never the source of mana. This divine choice is confirmed by the elders, initiated by the tohunga under traditional consecratory rites (tohi). Mana gives a person the authority to lead, organise and regulate communal expeditions and activities, to make decisions regarding social and political matters. A person or tribe's mana can increase from successful ventures or decrease through the lack of success. The tribe give mana to their chief and empower him/her and in turn the mana of an ariki or rangatira spreads to his/her people and their land, water and resources. Almost every activity has a link with the maintenance and enhancement of mana and tapu. Animate and inanimate objects can also have mana as they also derive from the atua and because of their own association with people imbued with mana or because they are used in significant events. There is also an element of stewardship, or kaitiakitanga, associated with the term when it is used in relation to resources, including land and water.
>
> 3. (**noun**) jurisdiction, mandate, freedom.

Manaakitanga:

> **(noun)** hospitality, kindness, generosity, support - the process of showing respect, generosity and care for others.

Ōritetanga

> (**noun**) equality, equal opportunity.

Rangatiratanga:

> 1. **(noun)** chieftainship, right to exercise authority, chiefly autonomy, chiefly authority, ownership, leadership of a social group, domain of the rangatira, noble birth, attributes of a chief.
>
> 2. **(noun)** kingdom, realm, sovereignty, principality, self-determination, self-management - connotations extending the original meaning of the word resulting from Bible and Treaty of Waitangi translations.

Taonga:

(**noun**) treasure, anything prized - applied to anything considered to be of value including socially or culturally valuable objects, resources, phenomenon, ideas and techniques. Examples of the word's use in early texts show that this broad range of meanings is not recent, while a similar range of meanings from some other Eastern Polynesian languages support this (e.g. Tuamotuan).

Tikanga:

**(noun)** correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol - the customary system of values and practices that have developed over time and are deeply embedded in the social context.

Whakapapa:

(**noun**) genealogy, genealogical table, lineage, descent - reciting whakapapa was, and is, an important skill and reflected the importance of genealogies in Māori society in terms of leadership, land and fishing rights, kinship and status. It is central to all Māori institutions. There are different terms for the types of whakapapa and the different ways of reciting them including: tāhū (recite a direct line of ancestry through only the senior line); whakamoe (recite a genealogy including males and their spouses); taotahi (recite genealogy in a single line of descent); hikohiko (recite genealogy in a selective way by not following a single line of descent); ure tārewa (male line of descent through the first-born male in each generation).

Whānau

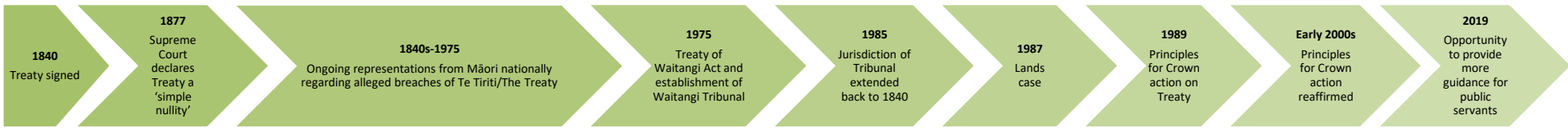
(**noun**) extended family, family group, a familiar term of address to a number of people - the primary economic unit of traditional Māori society. In the modern context the term is sometimes used to include friends who may not have any kinship ties to other members.

Whanaungatanga:

**(noun)** relationship, kinship, sense of family connection - a relationship through shared experiences and working together which provides people with a sense of belonging. It develops as a result of kinship rights and obligations, which also serve to strengthen each member of the kin group. It also extends to others to whom one develops a close familial, friendship or reciprocal relationship.

# Appendix 2: Treaty of Waitangi guidance at a glance

## Treaty timeline




## The Treaty

**The Preamble**
The preamble to the English version states that the British intentions were to:

- protect Māori interests from the encroaching British settlement
- provide for British settlement
- establish a government to maintain peace and order.

The Māori text suggests that the Queen's main promises to Māori were to:

- secure tribal rangatiratanga
- secure Māori land ownership.

| | Article 1 | Article 2 | Article 3 |
|---|---|---|---|
| Māori text | Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o o ratou wenua. | Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona. | Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata Māori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani. |
| English text | The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof. | Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf. | In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects. |
| Kawharu translation | The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government over their land. | The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent. | For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England. |
| Simple modern encapsulation | The government has the right to govern | Māori have the right to make decisions over resources and taonga which they wish to retain | The obligations that the Crown has to all New Zealand citizens are also owed equally to Māori. |

## Treaty Guidance

### Article One

1. How does the proposal/policy affect all New Zealanders? What is the effect on Māori (if different, how and why?)
   a. Will the proposal affect different Māori groups differently?
   b. What could the unintended impacts on Māori be and how does the proposal mitigate them?
2. How does the proposal demonstrate good government within the context of the Treaty?
   a. Have policy makers followed existing general policy guidance?
   b. Are there any legal and/or Treaty settlement obligations for the Crown?
3. What are the Treaty/Māori interests in this issue?
   a. How have policy makers ascertained them?
4. How does the proposal demonstrate that policy makers are meeting the good faith obligations of the Crown?
5. To what extent have policy makers anticipated Treaty arguments that might be made?
   a. And how does the proposal respond to these arguments?

### Article Two

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

### Article Three

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

*Consult Te Arawhiti early for guidance on engaging with Māori*

*Definition of key Treaty terms can be found in the Glossary of CO circular (19) 5*

*Examples of agency specific guidelines can be found in the Productivity Commission report Regulatory institutions and practices*

*Consult Crown Law early to assist identification of interests*

This guidance does not create new legal obligations on Crown agencies or override existing statutory obligations or duties. It should instead guide and support Crown agencies processes and decision-making. Agencies will consider the specific context of the relevant issue, policy or initiative.

## Appendix 3: The Treaty of Waitangi

| | English version | Māori version | Back translation of Māori text by Sir Hugh Kawharu[1] |
|---|---|---|---|
| Preamble | HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands—Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorize me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions. | Ko Wikitoria, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua, a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.<br>Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.<br>Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia ki nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei. | Victoria, the Queen of England, in her concern to protect the chiefs and the subtribes of New Zealand and in her desire to preserve their chieftainship[2] and their lands to them and to maintain peace[3] and good order considers it just to appoint an administrator[4] one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands[5] and also because there are many of her subjects already living on this land and others yet to come. So the Queen desires to establish a government so that no evil will come to Māori and European living in a state of lawlessness. So the Queen has appointed 'me, William Hobson a Captain' in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents[6] to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here. |
| Article One | **Article the First**<br>The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof. | **Ko te Tuatahi**<br>Ko nga Rangatira o te Wakaminenga me nga Rangatira katoa hoki ki hai i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu-te Kawanatanga katoa o ratou wenua. | The first<br>The Chiefs of the Confederation and all the Chiefs who have not joined that Confederation give absolutely to the Queen of England for ever the complete government[7] over their land. |
| Article Two | **Article the Second**<br>Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf. | **Ko te Tuarua**<br>Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira ki nga hapu-ki nga tangata katoa o Nu Tirani te tino rangatiratanga o ratou wenua o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua-ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona. | The second<br>The Queen of England agrees to protect the chiefs, the subtribes and all the people of New Zealand in the unqualified exercise[8] of their chieftainship over their lands, villages and all their treasures.[9] But on the other hand the Chiefs of the Confederation and all the Chiefs will sell[10] land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent. |
| Article Three | **Article the Third**<br>In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects. | **Ko te Tuatoru**<br>Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini-Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani. | The third<br>For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties[11] of citizenship as the people of England.[12] |
| Post script | Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof: in witness of which we have attached our signatures or marks at the places and the dates respectively specified.<br>Done at Waitangi this Sixth day of February in the year of Our Lord One thousand eight hundred and forty. | Na ko matou ko nga Rangatira o te Wakaminenga o nga hapu o Nu Tirani ka huihui nei ki Waitangi ko matou hoki ko nga Rangatira o Nu Tirani ka kite nei i te ritenga o enei kupu, ka tangohia ka wakaaetia katoatia e matou, koia ka tohungia ai o mātou ingoa o matou tohu.<br>Ka meatia tenei ki Waitangi i te ono o nga ra o Pepueri i te tau kotahi mano, e waru rau e wa te kau o to tatou Ariki.<br>Ko nga Rangatira o te wakaminenga. | So we, the Chiefs of the Confederation of the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and our marks thus.<br>Was done at Waitangi on the sixth of February in the year of our Lord 1840. |

[1] Sir Hugh Kawharu's translation sets out to show how Māori would have understood the meaning of the text they signed. It was published in the book *Waitangi Revisited: Perspectives on the Treaty of Waitangi*, edited by Michael Belgrave, Merata Kawharu and David Williams (Oxford University Press, 1989)

[2] 'Chieftainship': this concept has to be understood in the context of Māori social and political organisation as at 1840. The accepted approximation today is 'trusteeship'.

[3] 'Peace': Māori 'Rongo', seemingly a missionary usage (rongo — to hear: ie, hear the 'Word' — the 'message' of peace and goodwill, etc).

[444] Literally 'Chief' ('Rangatira') here is of course ambiguous. Clearly, a European could not be a Māori, but the word could well have implied a trustee-like role rather than that of a mere 'functionary'. Māori speeches at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly this attitude has been held towards the person of the Crown down to the present day — hence the continued expectations and commitments entailed in the Treaty.

[5] 'Islands': ie, coastal, not of the Pacific.

[6] Literally 'making': ie, 'offering' or 'saying' — but not 'inviting to concur'.

[7] 'Government': 'kawanatanga'. Sir Hugh's view was that "there could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty': ie, any understanding on the basis of experience or cultural precedent." This view is not universally held. For more discussion of the views and understandings of participants at 1840 see He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry, particularly chapter 10 (Waitangi Tribunal 2014).

[8] 'Unqualified exercise' of the chieftainship — would emphasise to a chief the Queen's intention to give them complete control according to their customs. 'Tino' has the connotation of 'quintessential'.

[9] 'Treasures': 'taonga'. As submissions to the Waitangi Tribunal concerning the Māori language have made clear, 'taonga' refers to all dimensions of a tribal group's estate, material and non-material — heirlooms and wahi tapu (sacred places), ancestral lore and whakapapa (genealogies), etc.

[10] Māori 'hokonga', literally 'sale and purchase'. 'Hoko' means to buy or sell.

[11] 'Rights and duties': Māori at Waitangi in 1840 refer to Hobson being or becoming a 'father' for the Māori people. Certainly, this attitude has been held towards the person of the Crown down to the present day — hence the continued expectations and commitments entailed in the Treaty.

[12] Sir Hugh's view was that "there is, however, a more profound problem about 'tikanga'. There is a real sense here of the Queen 'protecting' (ie, allowing the preservation of) the Māori people's tikanga (ie, customs) since no Māori could have had any understanding whatever of British tikanga (ie, rights and duties of British subjects). This, then, reinforces the guarantees in article 2." More recent scholarship suggests that Sir Hugh underestimated the knowledge of British tikanga that some Māori had.