



**WAI 3553 THE EDUCATION AND TRAINING AMENDMENT ACT  
AND TE MĀTAIAHO URGENT INQUIRY**

**Index**

<b>Doc</b>	<b>Title</b>	<b>Page</b>
1	Cabinet Paper “Review of References to the Principles of the Treaty of Waitangi in Legislation: Next Steps” SOU-25-SUB-0184	1 - 13
2	Appendix A to that Cabinet Paper “Table of proposed changes to each Act”	14 - 15
3	Appendix B to that Cabinet Paper “Report of the Advisory Group to Ministers on references to Treaty principles in legislation” (August 2025)	16 - 87
4	Regulatory Impact Statement “Providing certainty on legislative references to the Treaty of Waitangi” (13 November 2025)	88 - 142
5	Cabinet Minute “Review of References to the Principles of the Treaty of Waitangi in Legislation: Next Steps” (23 February 2026) CAB-26-MIN-0048.01	143 - 146



**IN CONFIDENCE / CABINET**

- 5.2. [REDACTED]  
[REDACTED]  
[REDACTED]
- 5.3. [REDACTED]  
[REDACTED]  
[REDACTED]
- 5.4. [REDACTED]  
[REDACTED]  
[REDACTED]
- 5.5. making the strength of the direction to decision-makers no higher than to “take into account” the Crown’s Treaty obligations; and
- 5.6. reducing the variation of Treaty provisions by using standard terminology for references to the Treaty, and other standardisation changes.
6. I propose the approach to standardisation of Treaty provisions agreed by Cabinet be applied to future legislation except where it is inappropriate to do so. This includes a preference for the use of descriptive clauses.
7. There are currently 23 Acts included in the review. This paper proposes further scope refinements to include additional Education and Training Act 2020 provisions,  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
8. I intend that a Bill will be introduced in the first quarter of 2026.

**Background**

9. In September 2024, Cabinet agreed that the purpose of the review is to ensure that where it is appropriate to encapsulate the Treaty or the Treaty relationship in legislation, the provisions are clear as to how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance [CAB-24-MIN-0346 refers]. Cabinet also agreed that the review will not impact the upholding of agreed Tiriti o Waitangi | Treaty of Waitangi settlement commitments.
10. Acts that have a relationship with Treaty settlements and are therefore not well-suited to this process have been excluded from the review. Decisions have been made to exclude Acts that include provisions for which policy work is underway by responsible agencies, or where replacement this term is expected.
11. On 5 May 2025, Cabinet agreed to establish a Ministerial Oversight Group of myself as Minister of Justice, Attorney-General, Minister for Regional Development, and Minister for Māori Crown Relations: Te Arawhiti, to make in principle policy decisions, subject to Cabinet confirmation [CAB-25-MIN-0144 refers].

## IN CONFIDENCE / CABINET

12. Cabinet also agreed to establish an advisory group to provide advice to the Oversight Group on whether to retain, amend, or repeal references to the Treaty principles to achieve greater certainty, and on engagement processes, including with Māori [CAB-25-MIN-0144 refers]. A list of provisions included in the review which indicates how they will be amended is attached at **Appendix A** and the Advisory Group's finalised report is attached at **Appendix B**.
13. Cabinet noted that, following advice from the Advisory Group, I would report back to Cabinet on behalf of the Oversight Group to seek decisions on an approach to engagement on the basis of the Oversight Group's initial positions [CAB-25-MIN-0144 refers].

### Advisory Group recommendations

*The Advisory Group focused on increasing certainty and standardisation*

14. The Advisory Group has advised that the significant variation of drafting across Treaty provisions should be addressed to increase certainty and improve clarity. It made the following general recommendations:
  - 14.1. converting general operative provisions<sup>1</sup> to descriptive provisions<sup>2</sup> which identify specific provisions to be complied with;
  - 14.2. replacing vague or rarely used directions to those acting under or interpreting Acts (for example "honour", "acknowledge" etc) with more objective and common terms (for example "take into account", "give effect") while retaining policy intent;
  - 14.3. standardisation of the description of the Treaty itself;
  - 14.4. standardisation of appointment provisions.
15. The Advisory Group also made several additional minor and technical recommendations and suggestions. Its specific recommendations for each provision in scope of the review are outlined in its report attached at **Appendix B**.

*The Advisory Group does not recommend repeal of references to the "Treaty principles"*

16. The Advisory Group did not recommend removing references to the "Treaty principles". It considers that the phrase "Treaty principles" now has fifty years of jurisprudence behind it, and that any change would be likely to increase uncertainty rather than decrease it.

---

<sup>1</sup> Operative provisions are provisions requiring Treaty principles to be considered or given effect in applying an Act. Operative provisions are described as "general" when they apply to all decisions or functions in an Act, or "specific" when they relate to a specific action or by specified persons.

<sup>2</sup> Descriptive provisions specify how the Treaty (or its principles) is provided for in an Act by cross-referencing other provisions that operationalise and reflect Treaty obligations.

**IN CONFIDENCE / CABINET**

*Advice on engagement*

- 17. The Advisory Group recommended engagement be undertaken by way of a meeting between Ministers and the National Iwi Chairs Forum or other national-level organisations, and that targeted engagement also be undertaken with settled iwi/hapū and groups relevant to each Act.

**Proposals to repeal or amend Treaty provisions**

- 18. I have now considered the Advisory Group’s report. After discussion with the Ministerial Oversight Group, I propose a range of changes to the Treaty provisions under review.

*Ministers recommend certain Treaty provisions be repealed*

- 19. [Redacted text]

- 20. The Minister of Education has proposed that Treaty references be removed from section 536A(1) of the Education and Training Act 2020. This provision requires Dispute Resolution Service operators to perform their functions in a manner that contributes to an education system that honours the Treaty and supports Māori Crown relationships. The Minister of Education and I consider that, as private entities, it is not appropriate for DRS operators to have this type of Treaty requirement.

[Redacted text]

[Redacted text]

[Redacted text]

[Redacted text]

[Redacted text]

**IN CONFIDENCE / CABINET**

- [REDACTED]
- [REDACTED]
- [REDACTED]
24. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
25. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
26. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

*Strength of obligations no higher than to “take into account” the Treaty*

27. I propose that in situations where a standard of Treaty obligation is needed, no higher standard than “take into account” should be used. “Treaty standards” are the words used in a provision that indicate the strength or nature of the Treaty obligation. For example, a Treaty provision might require someone to “give effect” to the Treaty principles, and this standard is considered stronger than one that requires someone to “take into account” the Treaty principles. In my view, requirements to “give effect” to the Treaty principles do not promote the balanced consideration of all relevant factors in decision-making and “take into account” is the more appropriate standard.
28. The “take into account” standard will not work in all instances. For example, no standard at all is likely to be required in provisions requiring persons appointed to an entity to have certain capabilities in relation to Treaty principles, long titles, or purpose provisions. The change would therefore primarily apply to descriptive and operative provisions which are, in any case, the most common types.

*Reducing the variation of language*

29. I propose that to reduce uncertainty, a reference to both the Treaty of Waitangi and te Tiriti o Waitangi is preferable and should be used in all instances.
30. I accept the Advisory Group’s advice that removing existing references to “Treaty principles” while retaining a reference to the Treaty (or using a new phrase) would be likely to introduce legal uncertainty rather than decrease it, as such a change may be interpreted in novel ways by the courts.

**IN CONFIDENCE / CABINET**

- 31. The Advisory Group has recommended other minor technical amendments to some provisions and has made observations on other matters requiring further consideration – for example, it has suggested clarifying the extent and nature of Treaty responsibilities imposed on Crown Entities or non-Crown actors. It also recommended standardising the formulation for appointment provisions.<sup>3</sup>
- 32. I will receive further advice on these matters from my officials, who will work with Crown Law and the Parliamentary Counsel Office as a Bill progresses.

*Application to future legislation*

- 33. I consider that the approach to standardisation agreed by Cabinet should be applied to other legislation projects currently underway and to future legislation to ensure the benefits of increased certainty across the statute book is maintained.
- 34. I also recommend that for future legislation, where the Treaty is considered to be relevant, a standard-form descriptive Treaty provision should be included as the presumed preference, unless it is inappropriate in the circumstances.

**Decisions on engagement**

- 35. I propose to consult the National Iwi Chairs Forum (NICF) on Cabinet’s decisions following Cabinet approval, while this Bill is being drafted and prior to final approval of the Bill. The scope and breadth of this work will be relevant to all NICF priorities.

**Further scope refinements**

*Including Education and Training Act 2020 provisions*

- 36. In July of this year, the Minister of Education and I agreed, subject to Cabinet confirmation, that an additional eight provisions that only refer to the Treaty (but not the principles) be included in the review<sup>4</sup> for consistency. The Minister of Education has since sought Cabinet decisions on two of these provisions; section 127(1)(d) relating to school boards of trustees and section 281(1)(b) relating to the duties of councils.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

[REDACTED]

[REDACTED]

<sup>4</sup> This includes the section 9 descriptive provision and its subsections. While subsections 9(2)(d) and 9(2)(g) were originally included in the review, section 9 contains additional references to the Treaty that were not originally included in the review.

**IN CONFIDENCE / CABINET**

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

**Officials advise that there are issues that will need to be taken into account**

*Māori Crown relationship*

43. Officials advise that the lack of engagement prior to policy decisions will have adverse effects on the Māori Crown relationship. However, I consider the opportunity to provide input during Select Committee, and the targeted engagement during drafting, will be sufficient to ensure any views are considered before enactment.

*Legal challenges to the review*

44. The Waitangi Tribunal, in its interim Ngā Mātāpono/The Principles Report, found that:

44.1. the review will likely remove or narrow existing Treaty provisions and remove existing Treaty protections in the law, which will impact on rights of Māori to

[Redacted text block]

**IN CONFIDENCE / CABINET**

access justice and to realise their rights under te Tiriti o Waitangi | the Treaty of Waitangi;

44.2. the proposed purpose and process for the review, as set out in the May 2025 Cabinet paper, would breach the Treaty principles and could prejudice all Māori; and

44.3. there is risk to the durability of Treaty settlements if redress is undermined by changes to provisions, and risk to future Treaty settlement negotiations if the Crown is not able to offer redress equivalent to what was offered in earlier negotiations.

45. The Tribunal made several recommendations to the Crown and found that the review could be made consistent with Treaty principles if it was:

45.1. focused on clarity of provisions (including removing the possibility of repealing ‘unnecessary’ Treaty clauses from the review to enable it to better achieve the aim of clarity of provisions);

45.2. conducted in good faith through extensive engagement and involvement of Māori in decision-making; and

45.3. carried out over an extended timeframe to enable robust policy analysis.

46. I acknowledge these findings and recommendations. However, I consider that the purpose and process of the review, as agreed by Cabinet, are necessary to effectively address the issue of certainty in legislation and to better support compliance. I therefore do not consider it necessary to make changes to the review in line with the Tribunal’s recommendations.

47. Further claims may be brought to the Waitangi Tribunal in relation to proposals to repeal or amend specific Treaty principles provisions, along with the possibility of related litigation in the courts. Those claims are likely to allege the lack of engagement prior to policy decisions was inconsistent with Treaty principles. This would have cost implications in terms of time, focus, resources and, potentially, interruption to policy programmes that will already be reprioritised to enable this review.

[Redacted]

[Redacted]

## IN CONFIDENCE / CABINET



### Cost-of-living implications

49. It is unlikely that the review has any cost-of-living implications.

### Financial implications

50. The financial implications for the government of conducting and implementing the review are expected to be met within the baselines of the agencies administering relevant legislation. This will continue to require some reprioritisation of other initiatives within officials' work programmes.
51. There is likely to be an increase in litigation costs for the Crown and Māori as Māori may file new claims with the Waitangi Tribunal and the Courts.
52. Decisions to repeal or reduce obligations under Treaty provisions have the potential for wide-ranging impacts on Māori interests. It has not been possible to fully explore or quantify those impacts in the time available and without consultation with Māori.
53. There may be financial and other resource implications for iwi, hapū, and other Māori groups and stakeholders in obtaining expert advice on the potential implications.

### Legislative implications

54. The References to the Treaty of Waitangi Legislation Bill is priority category 6 on the 2025 legislative programme – drafting instructions to be issued by the end of 2025.
55. My officials will work with the Office of the Clerk and PCO on options for legislative vehicles, including one or more omnibus bills, numerous separate bills, or a combination of both models. I will report to Cabinet on options for legislative vehicles.

### Regulatory impact analysis

56. A Regulatory Impact Statement has been developed by the Ministry of Justice in consultation with responsible agencies and is attached as **Appendix C**.
57. The Ministry of Justice's Regulatory Impact Assessment Quality Assurance Panel (QA Panel) has reviewed the Regulatory Impact Statement: Providing certainty on legislative references to the Treaty of Waitangi prepared by the Ministry of Justice. The QA Panel considers that the information and analysis summarised in the RIS does not meet the quality assurance criteria.
58. The review has considered a broad range of legislation. The QA Panel considers that the constraints and limitations imposed by Ministerial direction in terms of the options to be considered, timeframes, and the lack of consultation, especially with iwi and hapū as Treaty partners, are material. The Panel considers these constraints have meant that the analysis is not sufficiently developed to form a basis for Ministers to make informed decisions. This has been exacerbated by the late inclusion of several significant proposals.

## IN CONFIDENCE / CABINET

### Population implications

59. Treaty provisions can act as a safeguard for Māori rights and interests in the relevant legislative context. As such, decisions to repeal or reduce obligations under Treaty provisions will disproportionately affect Māori. The degree to which Māori will be affected depends on the nature and significance of Māori interests in the context of each Act, and the extent of legislative change proposed.

### Human rights

60. Māori, as the indigenous people of New Zealand, are entitled to all the rights and freedoms available to all New Zealanders. Depending on the nature of each specific change, amending provisions could, in effect, lead to a narrower interpretation of Māori rights in the context of specific legislation. The draft bill will be assessed for NZBORA consistency prior to introduction.

### Consultation

61. Parliamentary Counsel Office, Crown Law, and the Department of the Prime Minister and Cabinet have been informed of the proposals to repeal Treaty provisions, change the strength of most provisions to “take into account”, and seek policy decisions without prior engagement.
62. The following agencies were consulted on an earlier version this paper which did not include these proposals: Te Tari Whakatau, Ministry for the Environment, Department of Conservation, Oranga Tamariki, Ministry for Children, Ministry of Health, Ministry of Business, Innovation and Employment, Land Information New Zealand, Department of Internal Affairs, Ministry of Transport, Ministry of Housing and Urban Development, Ministry of Education, Department of Internal Affairs, Ministry of Foreign Affairs and Trade, Statistics New Zealand, Ministry for Primary Industries, Parliamentary Counsel Office, and Crown Law. The Department of the Prime Minister and Cabinet was informed.
63. The Legislation Design and Advisory Group (LDAC) was consulted on early iterations of some proposals. The Advisory Group met with TPOG during the development of its report.

### Communications

64. All communications will be managed through the Office of the Minister of Justice, including responses to requests for information through parliamentary questions and media enquiries.

### Proactive release

65. I do not plan to proactively release this paper.
66. I note that, to date, documents relating to the review have been directed to be provided to the Waitangi Tribunal as part of its inquiry process. With the inquiry having now concluded, this is no longer required.

**IN CONFIDENCE / CABINET****Recommendations**

The Minister of Justice recommends that the Committee:

*Background*

1. **note** in May 2025, Cabinet agreed to establish a Ministerial Oversight Group for the review and an advisory group to provide advice to the Oversight Group [CAB-25-MIN-0144 refers];
2. **note** in May 2025, Cabinet invited the Minister of Justice to report back to Cabinet on behalf of the Ministerial Oversight Group to seek decisions on an approach to engagement with Māori groups and relevant stakeholders, based on the Oversight Group's initial proposals [CAB-25-MIN-0144 refers];

*Advisory Group recommendations*

3. **note** that the Advisory Group delivered its final report to the Ministerial Oversight Group on 8 August 2025;
4. **note** that the Advisory Group made general recommendations and specific recommendations for each provision in scope of the review, which are outlined in its report attached at **Appendix B**;

*Proposals to repeal or amend Treaty provisions*

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
9. **note** that the relevant Ministers will receive advice on any legal risk arising from the proposed repeals in recommendations 5 – 8 to inform their agreement and will report back to Cabinet with any material new information;
10. **agree** that section 536A(1) of the Education and Training Act 2020 should be amended or repealed so that dispute resolution service operators, which are private entities, do not have Treaty requirements;
11. [REDACTED]

**IN CONFIDENCE / CABINET**

- █ [REDACTED]
- █ [REDACTED]
- █ [REDACTED]

15. **agree** that references within scope of this review should be amended so that in situations where a “Treaty standard” is needed, which indicates the strength or nature of the Treaty obligation, no higher standard than “take into account” is used;
16. **agree** that, to standardise Treaty provisions, a reference to both the Treaty of Waitangi and te Tiriti o Waitangi should be used in all instances, and provisions should retain references to Treaty principles;
17. **note** that the Advisory Group made further technical observations relating to drafting, appointment provisions, and clarifying Treaty duties on actors who are not core-Crown, and I will receive advice from officials on these further standardisation changes as drafting of a Bill progresses;

*Application to future legislation*

18. **agree** that the approach to standardisation agreed by Cabinet will (unless it is inappropriate to do so) be applied to future legislation to ensure that the benefits of increased certainty across the statute book is maintained;
19. **agree** that, where the Treaty is found to be relevant to future legislation, a standard form descriptive Treaty provision should be included as the presumed preference unless it is inappropriate in the circumstances;

*Engagement decisions*

20. **note** that I intend to consult the National Iwi Chairs Forum on Cabinet’s decisions following Cabinet approval and prior to final approval of the Bill;

*Further scope refinements*

21. [REDACTED]
- █ [REDACTED]

**IN CONFIDENCE / CABINET**

[REDACTED]  
 [REDACTED]  
 [REDACTED]

22. **agree** that provisions referring to the Treaty itself in the Education and Training Act 2020 also be included in the review;

*Legal challenges to the review*

23. **note** that the Waitangi Tribunal has concluded its urgent inquiry into the review, and has found that the Cabinet-agreed purpose and process of the review would breach the Treaty principles;
24. **note** that further claims may be brought to the Waitangi Tribunal in relation to proposals to repeal or amend specific Treaty principles provisions;

*Drafting of legislation*

25. **invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office;
26. [REDACTED]  
 [REDACTED]  
 [REDACTED]  
 [REDACTED]
27. **authorise** the Minister of Justice, in consultation with the Ministerial Oversight Group and the Minister responsible for each Act, to make further decisions, in line with the policy decisions agreed by Cabinet, where necessary;
28. **authorise** the Minister of Justice to make further decisions, in line with the policy decisions agreed by Cabinet, on any minor and technical issues that arise during drafting of the Bill;
29. **note** that I propose introducing amending legislation to give effect to the outcome of the review within this Parliamentary term;

*Communications*

30. **note** that all communications will be managed through the Office of the Minister of Justice;
31. **note** that I do not plan to proactively release this paper.

Hon Paul Goldsmith  
 Minister of Justice

Appendix A – Table of proposed changes to each Act

ACT	PROVISION	CURRENT TREATY WEIGHTING	Proposal to amend the Treaty weighting where it is higher than 'take into account'	Proposal to standardise unintended variation in language	Proposal to make general Treaty provisions more specific	Proposal that the provisions referring to Treaty principles be removed from the Act	
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]				
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
Education and Training Act 2020	Section 3(2)(e)	n/a – no Treaty weighting	n/a	✓			
	Section 4(d)	Honours (purpose provision)	n/a	✓			
	Section 5(4)(c)(iii)	n/a – non-substantive	n/a	✓			
	Section 6(2)	n/a – non-substantive	n/a	✓			
	Section 9	Give effect	✓	✓			
	Section 32(h)	Honouring (cross-reference)	✓	✓			
	Section 398B	Gives effect (purpose provision)	n/a	✓			
	Section 476(4)(b)(v)	Have regard (appointment provision)	n/a	✓			
	Section 535B(a)	Honours	✓	✓			
	Section 536A(1)	Is consistent with	Proposed for repeal			✓	
	Schedule 13 clause 4(d)(i)	Give effect	Proposed to be replaced as part of the Education and Training (Vocational Education and Training System) Amendment Bill.				
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			■	
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■			
[REDACTED]	[REDACTED]	[REDACTED]	■	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			■	
[REDACTED]	[REDACTED]	[REDACTED]	■	■			

ACT	PROVISION	CURRENT TREATY WEIGHTING	Proposal to amend the Treaty weighting where it is higher than 'take into account'	Proposal to standardise unintended variation in language	Proposal to make general Treaty provisions more specific	Proposal that the provisions referring to Treaty principles be removed from the Act
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			■
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			■
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]			■
[REDACTED]	[REDACTED]	[REDACTED]	■	■		
[REDACTED]	[REDACTED]	[REDACTED]	■	■		

**Report of the Advisory Group to Ministers on references to  
Treaty principles in legislation**

**August 2025**

## Contents

1. Executive summary
2. Introduction
3. General advice
4. Engagement
5. Assessment of legislation

Appendix A. Terms of reference

Appendix B. Table of Acts covered by, or excluded from, this review

Appendix C. Table of recommendations

The Honourable Paul Goldsmith  
Minister of Justice

The Honourable Judith Collins KC  
Attorney-General

The Honourable Tama Potaka  
Minister for Māori Crown Relations: Te Arawhiti

The Honourable Shane Jones  
Minister for Regional Development

Parliament Buildings

**WELLINGTON**

8 August 2025

E ngā Minita, tēnā koutou,

We are pleased to present the report of the Ministerial Advisory Group on references to Treaty principles in legislation. This report provides the Ministerial Oversight Group with advice on how to reduce uncertainty and improve compliance with references to the principles of te Tiriti o Waitangi / the Treaty of Waitangi in legislation. The report includes general advice that applies to Treaty provisions broadly, as well as specific advice for each provision referred to us. The report also provides you with advice on an approach to engagement.

Overall, we consider the variation in Treaty provisions to be one of the major sources of uncertainty and legal risk. We advise that this be addressed through the standardisation of terminology and form of provisions. We also consider that some provisions are too general and recommend ways to make them more specific. In general, we do not recommend the repeal of entire provisions. Doing so will rarely achieve the goal of reducing uncertainty and supporting better compliance. In the majority of cases, it would leave a gap that would be filled over time by further case law.

We trust this report will assist you in making in-principle decisions for the relevant provisions, ahead of engagement and Cabinet confirmation. We are available to meet and discuss the contents of this report.

Nāku noa nā

Ministerial Oversight Group on references to Treaty principles in legislation



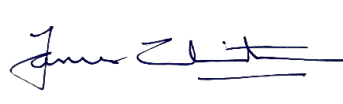
David Cochrane (Chair)



John Walters



Marama Royal



James Christmas

## 1: Executive summary

1. Our task in preparing this report has been to advise Ministers about how to reduce uncertainty and support better compliance with legislation that refers to principles of the Treaty of Waitangi/te Tiriti o Waitangi.<sup>1</sup>
2. Overall, we recommend amendments to the majority of provisions in scope of the review. In some instances, we recommend converting broad operative provisions into descriptive provisions, although if no relevant provisions can be identified in the Act, and if none can be formulated, then we recommend they be repealed.
3. As we have worked through the legislation referred to us, we have favoured:
  - the specific ahead of the general;
  - standardisation ahead of variety; and
  - clear intention ahead of good intention.
4. We therefore see little future for general or operative clauses, which provide limited to no direction to decision-makers or users of legislation.
5. If Ministers decide to amend operative clauses and replace them with descriptive clauses, that will require Ministers to decide what they consider to be the Treaty interests in legislation, how they should be reflected, and then to specify them if that has not happened already. The descriptive clause then describes what those provisions are. Our role has not been to make recommendations about the underlying policy. Those are questions for Ministers with advice from agency officials and the Treaty Provisions Oversight Group (TPOG). There may be implications for any Settlement Acts that refer to those Acts.
6. Where legislation already contains descriptive clauses, our recommendation is for these be amended for consistency of language and approach and standardised so that they better indicate Parliament's intent and signpost specific (rather than general) duties. We consider this approach will reduce uncertainty and support better and more efficient compliance.
7. In considering the provisions referred to us, we have assessed that the mere repeal of a Treaty principles provision will rarely achieve the goal of reducing uncertainty and supporting better compliance. In the majority of cases, doing so would simply leave a gap to be filled over time by further case law. Above all, we consider there is an opportunity for Parliament to be clearer about its intentions and to make amendments in order to increase clarity. Where a provision has no practical effect, and repealing it will not increase uncertainty, then we believe it should be repealed.
8. It might be possible to repeal some descriptive provisions along with the references to them. That is because what they require need not be legislated at all. Those matters can be dealt with operationally. However, it must be remembered that, unless clearly explained, the repeal of a provision may send a message to the Courts or users which may not be intended.

---

<sup>1</sup> We use 'the Treaty' as shorthand for the various formulations, except where quoting others, citing Acts, or where a longer form is necessary to make a point.

9. While it is not our role to provide legal advice, even with the repeal of a provision, it is unlikely that under current jurisprudence the courts would read the intention of Parliament as intending to exclude the application of Treaty principles altogether. Parliament would probably have to say so directly, either by stipulating that the Treaty provisions in a specific Act serve as a full and limited scheme that nothing else can be added or read in to, or by specifying that the Treaty has no application to the Act at all.
10. The establishment of TPOG happened for good reason and has identified a surprising number of formulations of the standard applying to the implementation of the Treaty. Even in describing what we generally call “the Treaty”, there are statutes that refer to “the Treaty of Waitangi”, “te Tiriti o Waitangi”, “the Treaty of Waitangi/te Tiriti o Waitangi”, “the Treaty of Waitangi (te Tiriti o Waitangi)”, and “te Tiriti o Waitangi (the Treaty of Waitangi)”.
11. Finally, we observe that uncertainty and subtle variations in legislation create risks and cost not only for the Crown, but for Māori and other users of legislation. References to the Treaty and Treaty principles should not be automatically included in legislation as a catch-all, but should only be included where there is a clear policy reason to do so and, in a formulation, consistent with that policy. Otherwise, the Treaty risks being devalued and reference to it becomes a check-box exercise.

## 2: Introduction

### A. Background

1. The coalition agreement between New Zealand First and the National Party of 24 November 2023 committed to:

*Conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes “The Principles of the Treaty of Waitangi” and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references.*

2. In September 2024, Cabinet agreed the purpose of the review is:

*To ensure that where it is appropriate to encapsulate te Tiriti o Waitangi | the Treaty of Waitangi in legislation, these provisions are clear about how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance.*

3. Cabinet agreed to exclude Treaty Settlement legislation from the review, as well as a number of other Acts being reviewed through separate processes. In April 2025, Cabinet agreed to further changes to the specific legislation subject to the review. **Appendix B** includes a table of Acts covered by, or excluded from, the review.
4. Cabinet also agreed in April 2025 to establish a Ministerial Oversight Group (**MOG**) to:
  - a. agree in-principle decisions on whether to maintain, amend or repeal in-scope provisions;
  - b. in the case of amendments, agree in-principle decisions on proposed new provisions; and
  - c. finalise the terms of reference for an advisory group.
5. The members of the MOG are Hon Paul Goldsmith (Chair), Hon Judith Collins KC, Hon Tama Potaka, and Hon Shane Jones.
6. Finally, Cabinet agreed in April 2025 that we, the advisory group (**MAG**), are to report directly to the MOG, and our role is to advise, as requested by the MOG, on:
  - a. engagement processes with Māori and relevant stakeholders; and
  - b. proposals to maintain, amend, or repeal in-scope provisions.

7.

[REDACTED]

8. The MOG expanded our role regarding the Education and Training Act 2020 and two related bills to considering all Treaty references in them, and confirmed we should consider directive provisions and the various descriptions of the Treaty in all the Acts referred to us.

### B. The role of the MAG

9. Cabinet has been clear about the role of the MAG, which is to advise the MOG to assist it in forming an initial position on a preferred option for each provision to reduce uncertainty and support better compliance. Ministers will then receive further advice

from officials (including legal advice), and Cabinet agreement will be sought on those preferred options and on a process for engagement.

10. Therefore, we as the MAG have the task of providing advice at an early stage of a process that will then involve preliminary decisions by Ministers, Cabinet consideration, engagement with Māori and other stakeholders, followed by a legislative process.
11. Any legislative reform process involves political decisions, which are for Ministers to make and prioritise. Our role is to ensure that, in doing so, Ministers have the benefit of independent advice on how best to reduce uncertainty and support better compliance with Treaty provisions, where it is appropriate to encapsulate the Treaty or the Treaty relationship in legislation.

### **C. How we have approached this report**

12. In forming our advice, we have considered a range of material, including but not limited to:
  - a. the text of Acts;
  - b. Cabinet papers and minutes;
  - c. analysis provided by officials, particularly the assessment framework and analysis developed by the Ministry of Justice with input from other agencies;
  - d. Crown documentation and guidelines, including material from the former Te Arawhiti and TPOG;
  - e. Legislation Design and Advisory Committee (LDAC) guidelines
  - f. Cabinet Office circulars
13. For completeness, we have also noted the findings of the Waitangi Tribunal in Chapter Five of its 2024 *Ngā Mātāpono* report that the Treaty clause review “has pre-determined outcomes”<sup>2</sup> and that the “rationale and pre-determined outcomes of the review are inconsistent with the principles of the Treaty of Waitangi/te Tiriti o Waitangi”.<sup>3</sup>
14. These findings are for the Crown to respond to if it wishes. For its part, the MAG has approached our task from a first principles basis, with no predetermination, and with a focus on the text and context of legislation rather than political or other considerations. We have not been asked to reach any predetermined conclusion in our advice and we have approached our advice to Ministers on the basis that genuine engagement with Māori will take place once preliminary decisions have been agreed by Ministers.
15. We emphasise that we carried out our contribution to the Treaty clauses<sup>4</sup> review in accordance with our terms of reference and with no direction from Ministers or officials as to conclusions that we should reach.
16. We also note that we have been referred a set of specific Acts. Other Acts are being reviewed in separate processes (for example, the Conservation Act 1987 and the Resource Management Act 1991). In making decisions, we also consider it is important that Ministers consider the direction of travel in those review processes, along with any

<sup>2</sup> Wai 3300, *Ngā Mātāpono*, at 5.5.1, p. 181.

<sup>3</sup> Wai 3300, *Ngā Mātāpono*, at 5.5.2, p. 182.

<sup>4</sup> We use the term “Treaty clause” because that is the colloquial term commonly used by the Waitangi Tribunal and others. Technically, as the provisions are in enacted statutes they are sections or just “provisions”.

other legislation on the statute books that references the Treaty and has not been referred to us. That will be key to ensuring we achieve maximum certainty.

17. While we have met with the Treaty Principles Oversight Group (**TPOG**) and a senior Ministry of Education official who asked to brief us, the analysis and recommendations are ours alone. We wish to record our gratitude for the support received from the Ministry of Justice at all levels, and in particular from [REDACTED]
18. We record that we have seen advice from the Crown Law Office and Parliamentary Counsel Office under a limited privilege waiver. We have no issues with that advice and found it helpful, but do not comment further lest we inadvertently cause a waiver of privilege, which we do not intend.

#### **D. Assessment of legislation**

19. Our terms of reference make it clear that for each provision referred to us, we must assess:
- whether the provision is clear about how the Treaty applies in the context of the legislation; and
  - how best to reduce uncertainty and support better compliance.

##### ***a. Clarity as to how the Treaty applies***

20. The question of whether a provision is clear about how the Treaty applies in the context of the legislation requires an assessment of the text and operation of the Act as a whole. It is not enough to take a superficial look at just the section that refers to “Treaty principles”. As noted earlier, there are many Treaty clauses that do not refer to “principles” and are out of scope of the review.
21. It also has to be noted that how the Treaty applies to particular legislation is also in the hands of the Courts.<sup>5</sup>
22. We have pointed out areas lacking clarity for decision-makers and users of Acts, looked at inconsistencies across the statute book, and tried to make practical suggestions about how to improve Acts, both individually and as a whole.

##### ***b. Reducing uncertainty and supporting better compliance***

23. The questions of uncertainty and supporting better compliance are linked to the clarity of a provision, but there is also a broader question of reducing uncertainty across the statute book as a whole. As we worked through the Acts referred to us, common issues and inconsistencies emerged across different Acts. We have made separate general recommendations to address these.

##### ***c. Appropriateness***

24. We note that the terms of reference use the language “where it is appropriate to encapsulate te Tiriti o Waitangi | the Treaty of Waitangi in legislation”.

---

<sup>5</sup> See, for example, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127; *Smith v Attorney-General* [2024] NZCA 692; *Hart v Marlborough District Council* [2025] NZCH 47.

25. Given the legislative provisions referred to us exist, Parliament obviously judged it appropriate to do so at the time each Act was passed. The question of the appropriateness of including a reference to the Treaty is ultimately a question for Ministers and Parliament.
26. The advice we have received from the Ministry of Justice and responsible agencies is that, in most instances, the reference to the Treaty in the Acts referred to us is considered appropriate by officials. This does not mean that arguments cannot be made about how relevant the Treaty is in each context. There will sometimes be strong political positions in favour or against. These arguments are outside the scope of this report. What we can say is that we have not identified any Acts referred to us where the Treaty is clearly irrelevant.
27. We have been tasked with focussing on Treaty principles provisions themselves, and it is not our role to decide or recommend decisions on the specific policies or provisions that underly them nor to engage with or attempt to resolve the divergent political views that exist about them or the various versions of the Treaty itself. Those questions are for Ministers and ultimately for Parliament. In many cases there will be a range of political views as to whether it is appropriate to include a Treaty reference or not.
28. We doubt we would add value by further analysing Court decisions or recommendations by the Waitangi Tribunal in this area.

***d. Structure of report***

29. We structure our advice in three parts:
- a. Section 3; advice on overarching issues for the MOG to consider.
  - b. Section 4; advice on engagement.
  - c. Section 5; an assessment of the legislation referred to us.
30. We have reached a consensus decision on our advice on each Act. Where members have notified potential, perceived or actual conflicts of interest, they have stood aside from consideration of specific legislation. This is noted at the relevant place.

**Recommendations**

31. In reviewing the provisions across the 19 Acts referred to us, we have found the term principles of the Treaty (and its variations) being used together with a variety of language and expression. There are Acts where some and perhaps all the expectations Parliament has decided the Treaty imposes are clear, and others where they are not. The underlying reasons for the subtle differences are not obvious to us. In sum, however, the variation in and apparent randomness of provisions across the statute book poses challenges and risks to applying the Acts.
32. What is immediately obvious from a review of relevant provisions is that a wide variety of approaches to Treaty clauses has been taken across different Acts. Some contain descriptive clauses, which show how Parliament has specifically decided to identify Treaty obligations within legislation. Whether Parliament intended them to be exhaustive or merely illustrative is not always clear. Others contain operative (or general) provisions that impose broad obligations, requiring decision makers to consider or act in accordance with the principles of the Treaty. A few Acts contain both.

33. This has led us to recommend that, where possible, specific duties and policies should be spelled out in detail, where possible, rather than leaving them for development under operative or general clauses. Those clauses typically impose a general duty on all persons making decisions to give effect to or have regard to the principles of the Treaty of Waitangi, whether as a direct obligation or in furtherance of the Crown's Treaty obligations. In some cases, we have recommended converting an operative clause into a descriptive clause.

34. In summary, we recommend:

- That operative (or general) provisions referring to Treaty principles in the Acts referred to us be converted to descriptive clauses identifying specific provisions to be complied with. If no specific provisions can be identified or inserted, the general clause should be repealed so long as the potential for sending an unintended signal is assessed. Specific recommendations for those Acts and the other Acts referred to us appear in the detailed analysis in Section 5 of this report.
- Appointment provisions, like descriptive provisions, are specific about what is required and as such are not problematic. There should be standardisation of the direction provision (where one is necessary) and careful consideration should be given as to whether one person must have the required knowledge of Treaty (and te ao Māori matters) or whether the collective as a whole should have that capacity
- Standardisation of the direction to those acting under and interpreting those Acts could also be addressed at the same time, as part of the remit to reduce uncertainty.
- Standardisation, ideally throughout the statute book, of the description of the Treaty itself. If Parliament wants one version preferred over the other, that needs to be made clear.

35. If a more succinct recommendation is required, it would be that there is much to be gained by eliminating what one person described as "inexplicable inconsistencies".

36. We know that the final two recommendations above go beyond the 19 statutes referred to us. We make them in the hope they may assist Ministers in making policy decisions. We recognise that there will likely be a need for specific legal advice and that the Ministries and Departments with responsibility for administering the Acts will need to assess the policy implications.

37. While these observations are outside our original Terms of Reference, they have arisen from our work under the Terms of Reference, and we agree it is appropriate to record them.

- a. There should be standardisation of the directions under Acts in future. "Have regard to" or "take account of" where various competing considerations are at play, or the person directed is not part of the Crown. "Recognise and respect" the Crown's obligations or "give effect to the Treaty" where the directed person is part of the Crown, or the direction is absolute are our suggestions, but there is already a plethora of options to choose from in the statute book.

- b. Whether that applies only to future legislation or amendments are to be made to existing Acts is a policy decision, and the priorities of the legislative programme and the resources of the Parliamentary Counsel Office will be very relevant.
- c. We do not see references to Treaty principles as the primary problem in and of themselves. The various descriptions of the Treaty and the multitude of direction standards identified by the TPOG are greater contributors to uncertainties in interpretation. If we are correct that the principles do not vary materially according to which version of the Treaty is under consideration, then there may even be merit in making more references to Treaty principles.
- d. Whether that should be the approach going forward, or if existing statutes should also be amended, will be subject to the observations in paragraph b, and any concerns that amendments might be construed as intending a change in interpretation. However, including references to the principles at the same time might reduce that risk.

[REDACTED]

### 3: General advice

#### A. Descriptive clauses preferable to operative clauses

1. We consider that descriptive clauses provide certainty by explaining why Parliament has enacted the sections and parts referred to in the provisions, and by directing a user of the legislation to those sections and parts.
2. It is of course open to Parliament to change the specific sections to which descriptive clauses refer.
3. We do not consider that repeal of descriptive provisions would increase certainty or serve a useful purpose. The sections that each provision refers to would still exist in each Act but would no longer be sign-posted. There could also be unintended interpretation and legal effects as to Parliament's intention in making any repeal. As they stand, descriptive provisions indicate what Parliament intended in order to address the relationship between the Treaty and the Act.
4. Descriptive provisions should guide the courts, but more importantly in routine administration, provide guidance to officials and in effect they serve as something of a "safe harbour" for them and Ministers designing and implementing policy. Just how much of a safe harbour the descriptive provisions prove to be depends on the extent to which the courts develop the proposition that the Treaty is an overlay over the entire statute book and the common law. At least for now, the clauses provide a measure of certainty, if only by requiring claimants to show they are not exhaustive of the Treaty duties under the relevant Act.<sup>6</sup>
5. Nonetheless, we consider there would be benefits in standardising the approach taken to these provisions and, where possible, to provide further signposting of Parliament's intention in enacting the sections to which they refer, in line with the standardisation recommendations in this section.
6. The Court of Appeal in *Smith v Attorney General*<sup>7</sup> at paras 149 and 150 analysed the extensive descriptive provision in the Climate Change Response Act 2002 and concluded that, where Parliament has decided to give effect to the Crown's Treaty obligations in that way, there is no scope for enforcement of the Treaty through a wider duty. In practical terms, so long as those administering the Act comply with the specified sections, they have a "safe harbour" from assertions of wider Treaty obligations under the Act.
7. It is notable that none of the Acts with descriptive provisions referred to us list the relevant provisions as "including" or with any other wording that might suggest that the list is not intended to be exhaustive.
8. This approach seems to us to be a limitation or "gloss" on the wider proposition derived from the Supreme Court decision in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*<sup>8</sup> that legislation as whole must be construed consistently with the

---

<sup>6</sup> *Smith v Attorney-General* [2024] NZCA 692.

<sup>7</sup> [2024] NZCA 692.

<sup>8</sup> [2021] NZSC 127.

Treaty, which the Supreme Court considers to be a general overlay over legislation and the Common Law.

9. We need not take this further in our task (beyond noting that the appeal of the *Smith Case* to the Supreme Court has been withdrawn) and note that the Government is sure to be well briefed on the implications of the decisions of the Senior Courts in this area.

## B. Appointment clauses should be consistent in their expectations

10. As is so often the case, there is a variety of formulations:

- When selecting the board's members, the chief executive must ensure that members of the board include people who have expert knowledge of... the principles of te Tiriti o Waitangi/the Treaty of Waitangi.<sup>9</sup>
- When considering whether to appoint a member of the Teaching Council, the Minister must have regard to the collective skills, experience, and knowledge of members of the Teaching Council, including (without limitation) the candidate's knowledge and experience in any of the following areas: ... understanding of the partnership principles of Te Tiriti o Waitangi.<sup>10</sup>
- The responsible Minister must appoint members to the board who, collectively, have knowledge and experience of, and capability in... the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles.<sup>11</sup>
- If the Minister initiates a review under section 160(1) or 269(1) and appoints an independent panel under section 160(3) or 269(3), the Minister must ensure that the review panel has at least 1 member who, in the Minister's opinion, has the appropriate knowledge, skill, and experience relating to the principles of the Treaty of Waitangi and tikanga Māori to conduct the review.<sup>12</sup>

11. Other Acts refer to knowledge of, skills in, etc. the Treaty without reference to the principles.<sup>13</sup> Some go further and refer to tikanga Māori,<sup>14</sup> Māori-Crown relationships, or other related issues, which are related but legally distinct from Treaty issues.

12. We recommend standardisation on a common formulation of the requirement, narrowed to the Treaty principles, or the Treaty except where the context clearly warrants something beyond that (such as tikanga). We believe the requirement should be applied to the collective Board, or whatever, and not focused on individuals.

## C. Standardising provisions

13. We recommend that all Treaty-signalling provisions be **amended** as necessary to:

- standardise text and provide further indication as to Parliament's intention (recognising that there will be variations but supported by considered analysis);
- ensure there is one provision in each Act rather than multiple provisions;

<sup>9</sup> Digital Identity Services Trust Framework Act 2023, section 47.

<sup>10</sup> Education and Training Act 2020, section 476.

<sup>11</sup> Taumata Arowai—the Water Services Regulator Act 2020, section 12.

<sup>12</sup> Climate Change Response Act, section 3A(d)(i).

<sup>13</sup> For example, section 13(b) of the Children and Young People's Commission Act 2022; section 89(2)(b) of the Housing Accords and Special Housing Areas Act 2013; section 11(1)(a)(iii) of the Human Rights Act 1993.

<sup>14</sup> Climate Change Response Act, section 3A(d)(i).

- standardise headings;
- ensure all descriptive provisions signpost specific parts/sections; and
- standardise the description of the Treaty.

#### **D. Text of provisions**

14. Current provisions contain a variety of language to describe what they are doing, including:

- In order to recognise and respect the Crown’s responsibility to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi, this Act—
- In order to recognise and respect the Crown’s responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
- In order to recognise and respect the Crown’s responsibility to take appropriate account of the principles of the Treaty of Waitangi and to maintain and improve opportunities for Māori to contribute to [policy area], [the sections/parts listed] provide principles and requirements that are intended to facilitate participation by Māori in [policy area]
- This Act recognises and respects the Crown’s obligations under the principles of Te Tiriti o Waitangi/the Treaty of Waitangi in relation to [policy area], through [relevant parts/sections].
- This Part recognises and respects the Crown’s obligations under the principles of Te Tiriti o Waitangi/the Treaty of Waitangi through [policy] protecting kaitiaki relationships with taonga species and mātauranga Māori in the plant variety rights system, by [sections/parts listed]—
- In order to provide for the Crown’s intention to give effect to the principles of te Tiriti o Waitangi (the Treaty of Waitangi), this Act—
- In achieving the purpose of this Act, all persons exercising responsibilities, powers, or functions under it must take into account— the principles of the Treaty of Waitangi.
- All persons exercising functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- Subject to subsections (2) and (4), the provisions of Part 3 relating to the Park must be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- When carrying out its functions under Part 2, the Forum must have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- All persons exercising powers and functions under this Act shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
- In order to recognise and respect the Crown’s responsibility to give effect to the principles of the Treaty of Waitangi,—

- The Commission’s procedures must be consistent with the rules of natural justice and the principles of the Treaty of Waitangi (te Tiriti o Waitangi).
- In order to recognise and respect the Crown’s responsibility to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi, the Crown— must...
- In acting under this Part, the Commissioner must (to the extent that those matters are applicable) take into account—the principles of the Treaty of Waitangi...
- The Statistician must,— in performing the Statistician’s functions under this Act, recognise and respect the Crown’s responsibility to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi by recognising the interests of Māori in
- A board’s primary objectives in governing a school are to ensure that—the school gives effect to Te Tiriti o Waitangi, including by—
- It is the duty of an institution’s council, in performing its functions and exercising its powers,— to acknowledge the principles of Te Tiriti o Waitangi:
- A DRS operator must perform and exercise its functions, powers, and duties in a manner that contributes to an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships by—resolving disputes in a way that—is consistent with the principles of Te Tiriti o Waitangi; and
- The board must ensure that the Commission maintains systems and processes to ensure that, for the purposes of carrying out its functions under this Act, the Commission has the capability and capacity—to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles; and
- The board must ensure that Taumata Arowai—maintains systems and processes to ensure that, for the purposes of carrying out its functions under this Act, Taumata Arowai has the capability and capacity—to uphold the Treaty of Waitangi (Te Tiriti o Waitangi) and its principles; and
- The purpose of this Act is to—recognise and respect the Crown’s responsibility to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi by providing for the interests of Māori in—
- The purpose of this Part is to provide for the establishment, modification, and administration of wānanga in a manner that gives effect to the principles of Te Tiriti o Waitangi and supports Māori-Crown relationships and, in particular, that—
- The purposes of this Act are to promote the well-being of children, young persons, and their families, whānau, hapū, iwi, and family groups by—providing a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi):
- An Act to—ensure that, in the management of natural and physical resources, full and balanced account is taken of—the principles of the Treaty of Waitangi; and

15. The problems presented by the variety of terms used has been long recognised, and is one reason why TPOG was established, along with questions such as whether “have regard to” and “take account of” are synonyms and, if not, how they are to be distinguished.
16. Where Acts go further and require actions to give effect to the Treaty there is a question of whether it is appropriate to impose that obligation on a person or entity that is not the Crown. In some cases,<sup>15</sup> there is a reference to recognising and respecting the Crown’s responsibility to either take account of or give effect to the Treaty. But sometimes they refer to the Crown itself, and at other times to what are clearly third parties.

**a. Principles of the Treaty of Waitangi**

17. Undoubtedly, the Treaty principles are important. The Privy Council has said:

*“In Their Lordships’ opinion the “principles” are the underlying mutual obligations and responsibilities which the Treaty places on the parties. They reflect the intent of the Treaty as a whole and include, but are not confined to, the express terms of the Treaty. (Bearing in mind the period of time which has elapsed since the date of the Treaty and the very different circumstances to which it now applies, it is not surprising that the Acts do not refer to the terms of the Treaty.) **With the passage of time, the “principles” which underlie the Treaty have become much more important than its precise terms.**”<sup>16</sup>*

18. All Acts we considered contain reference to the principles of the Treaty either once or multiple times. Under orthodox principles of interpretation, Parliament has to be taken as specifically reflecting what the Crown considered, at the time the legislation was passed, its obligations were towards the principles of the Treaty in the context of that Act. As identified by the TPOG, the reality is a much more haphazard process.<sup>17</sup>
19. While descriptive provisions do not provide guidance on what the principles of the Treaty are, they make it clear the sections to which each descriptive provision refers are the way Parliament has addressed the Treaty of Waitangi in that specific Act. This provides more certainty than the high-level, general Treaty principles clauses found in other legislation.
20. It would be possible to list in the descriptive sections the names of the principles of the Treaty developed by the Courts to which each Act intends to give effect to or take account of. Below the level of headings, the principles have various formulations depending in part on whether one focuses on court decisions or Waitangi Tribunal reports and recommendations. Neither forum has indicated that their interpretative role is nearing a conclusion.

<sup>15</sup> For example, section 4 of the Local Government Act 2002 and section 3(e) of the Data and Statistics Act 2002

<sup>16</sup> *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, at 517.

<sup>17</sup> See the TPOG guidance document Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design, at para 9:

*A recent proliferation of Treaty clauses, however, has raised questions about the extent to which they are the product of well-considered policy and careful analysis of their legal and practical effect. If Parliament’s intended effects of a Treaty clause are not clear there is a risk they will not be implemented, potentially leading to unintended or adverse consequences both in the portfolio area and for the Māori Crown relationship.*

21. We do not consider that an approach specifying some principles and omitting others depending on each Act would increase certainty as some overlap. We note that, except for one example,<sup>18</sup> Treaty principles have not been named in legislation to date (at least in the legislation we have considered). Instead, our recommendation below is that Parliament provide further signposting of its intentions in including the provisions.
22. We also considered whether there are alternatives to the words “Treaty principles” which could be included. There are a number of other options, such as “the Crown-Māori relationship”, the “Treaty of Waitangi” (in its various descriptions, but without mentioning principles), or other constructions. There are a number of Acts that include direct reference to the Treaty, rather than to the principles.
23. We note, however, that the phrase “Treaty principles” now has fifty years of legislation and jurisprudence behind it, and that any change would be likely to increase legal and interpretive uncertainty rather than decrease it. While these options are open to Ministers to develop, we do not recommend them because introducing new statutory phrases would probably increase uncertainty. This would particularly be the case where long-standing general provisions were replaced.
24. Similarly, we do not consider that omitting reference to “Treaty principles” while retaining a reference to the Treaty would increase certainty. That could increase uncertainty rather than decrease it, especially if the Courts decide that Parliament must have had an intention when it removed references to principles and try to discern that intention.
25. So far as we are aware, no Court has held that the principles vary materially depending on which version of the Treaty is being considered. The debate about the versions of the Treaty remains. That, and the Privy Council’s observations quoted above suggest that if widespread standardisation of the statute book involving descriptive clauses occurs, in every case, references to the principles should be included rather than excluded.
26. If Ministers retain reference to Treaty principles, we **recommend** standardising the language, regardless of the formulation chosen.

***b. Recognise and respect, provide for***

27. Eight of the descriptive provisions use the language “recognise and respect the Crown’s Treaty obligations”, and one uses “provide for”.
28. We consider that, although it is somewhat vague, the language “recognise and respect” has a heritage now and that it works – that has been reinforced by the High Court in *Hart v Marlborough District Council*<sup>19</sup> which interpreted section 4 of the Local Government Act 2002.
29. The Judge said:

*[101] While s 4 of that Act clarifies that the responsibilities pursuant to the Treaty of Waitangi fall upon the Crown, rather than local government, the Act places a concomitant responsibility on local government to ensure that the Crown’s responsibilities are recognised and respected. This must be the case, given that an*

---

<sup>18</sup> Section 476(4)(b)(v), Education and Training Act 2020, which identifies the “partnership principle”.

<sup>19</sup> [2025] NZHC 47.

*intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made explicit.*

*[102] In such circumstances, I do not think that it could properly be said that the Council may not have appropriate regard for the Treaty of Waitangi and its principles in making decisions pursuant to the Local Government Act or the Land Transport Act.*

30. The responsibility on local authorities (and other bodies with the “recognise and respect” obligation) is clearly to help the Crown with its obligations, and not a case of the Crown abdicating or transferring them.
31. It does not follow that “recognising and respecting” a Crown obligation of itself requires action by a non-Crown entity. We think a more direct and accurate terminology would be to say that the local authority or other non-Crown entity has a duty to “assist the Crown to meet its Treaty obligations”, then describe how that is to be done using descriptive provisions.

***c. Give effect, take appropriate account, have regard to***

32. The provisions use the language “give effect to”, “take appropriate account of”, and sometimes “have regard to”, or otherwise simply refer to the Crown’s obligations.<sup>20</sup>
33. The phrasing “give effect to” suggests not only a higher standard, but also that the operation of the sections referred to is considered sufficient by Parliament to discharge the Crown’s Treaty obligations. This indicates Parliament may regard the specific provisions in an Act as meeting those obligations, though this might be subject to extension by any generalised overlay imposed by the courts. “Take appropriate account of” is a lesser standard and suggests there may be countervailing considerations. A general reference to obligations simply acknowledges that the Crown has obligations but does not indicate how the legislation achieves them.
34. Different standards may be appropriate for different purposes. For example, an official may be able to “give effect to” a Treaty principle. However, it may be more appropriate for a Crown entity or non-Crown organisation to “take account of” Treaty principles rather than “give effect to” them because there may be other relevant factors to be taken account of.
35. A clause will have different effects depending on the context. In some situations, a direct obligation should apply to the Crown, while in others, such as where a non-Treaty partner is required by law to assist the Crown, it may be more suitable to require that entity to “take account of” or “have regard to” the Treaty or Treaty principles. The extent of what amounts to the Crown in 2025 is an interesting and important question, but not one we address here.
36. There has been judicial commentary on the definitions of these phrases and the duties they impose on decision-makers, but that is outside the scope of this report. However, we do consider that there should be greater consistency in the use of language in relation to Treaty principles. Should statutes recognise a Crown obligation to “give effect to” the Treaty in all cases? Or is it more correct to require the Crown to “take appropriate account of” the Treaty where there are other relevant factors? The Treaty

---

<sup>20</sup> We have deliberately used “take (appropriate) account of” and “have regard to” interchangeably in this section. That is because we are not aware of any authoritative distinction between them.

of Waitangi Act 1975 does not make the Treaty part of the law of New Zealand, and we are not aware of any other Act that does. So the extent of the Crown's obligations and rights remains open to debate. Parliament can use legislation to refine that and guide the Courts and the Tribunal in their interpretive work.

37. It may be that different language is suitable for different legislation. For example, it may be appropriate for non-Crown entities to "have regard to" Treaty principles when exercising a function delegated from the Crown, but for a higher standard to apply when the Crown is dealing directly with a Treaty interest. These are policy matters for the Crown. Our view is that, as far as possible, consistency would add to certainty.

***d. Signposting intentions***

38. In all the Acts we have considered, Parliament has made the judgment that the subject matter requires consideration of the Treaty for that policy area.

39. Some sections provide specificity about Parliament's intentions in including the provisions referred to, while others are silent.

40. For example, section 4 of the Land Transport Management Act refers to the Crown's responsibility to maintain and improve opportunities for Māori to contribute to land transport decision-making processes, and states the sections referred to that are intended to facilitate participation by Māori in land transport decision-making processes.

41. Section 4 of the Local Government Act and section 54 of the Plant Varieties Act provide similar evidence of intentions and impose duties.

42. We consider that providing further information about Parliament's intention in including specific Treaty provisions would be a useful approach for all Acts and would increase certainty.

43. We therefore **recommend** amending provisions where necessary to provide similar direction as to the intention of the provisions and the reason for their inclusion. If no relevant provisions can be found in an Act that has just a general (or operative) clause, that is an indication that the clause itself is ineffective, and should be repealed.

***e. Headings***

44. There is inconsistency in the headings of provisions, which currently include:

- Te Tiriti o Waitangi/Treaty of Waitangi
- Treaty of Waitangi
- Principles of Treaty of Waitangi
- Te Tiriti o Waitangi (the Treaty of Waitangi).

45. Headings are now aids to interpretation.<sup>21</sup> As noted above, these variations also occur in the substantive provisions themselves.

46. We recommend standardising these headings to take one approach.

---

<sup>21</sup> Section 10(4) Legislation Act 2019.

*f.* [REDACTED]

### **E. One provision in each Act**

49. With the exception of the Plant Variety Rights Act 2022, all descriptive provisions are single provisions that occur near the start of each Act.
50. Unless there is a reason identified not to in a particular case (for example, due to the requirements of a free trade agreement or international treaty which may be the case here), we think one provision near the start of each Act increases the utility of a descriptive clause. It also reduces scope for argument about the effect of the Treaty on the Act.

### **F. Extent and Timing of any Amendments**

51. The amendments we suggest would mainly be to the standards of the obligations imposed on those implementing the Acts referred to us, and the standardisation of the description of the Treaty. Both those concepts would go far further through the statute book than the Acts referred to us.
52. Additionally, there would be comparatively minor (from a drafting perspective) amendments to wording, or repeals, around the term “principles of the Treaty” itself. We do not know how so many variations found their way into the statute book, but the confusion created is undesirable. That has been recognised for some years and is one of the reasons the TPOG was established. However, as we understand it, the TPOG has mainly a forward-looking role, testing proposals for Treaty clauses, and assisting agencies to choose the most appropriate formulation. TPOG is not directive (though it probably should be in respect of agencies, if only to bring greater discipline to the process) and does not have a mandate to suggest changes to existing provisions.
53. We are doing the latter, but we believe the changes need to include all affected live statutes, not just those referred to us. That will be a major drafting task, but something similar has been done before; see for example Schedule 2 of the District Court Act 2016. In some respects, this task will be more complex in some respects so far as the standard of the obligation is concerned. This is because some changes might involve policy changes, and we recommend that very vague terms such as “uphold”, and “honour” not

---

<sup>23</sup> Section 11 Legislation Act 2019.

be used at all. They may well be appropriate in Treaty Settlement Acts, but not generally.

54. The priority that should be given to this task is not something that we can opine on. Ten years on, technology should make identifying affected provisions much easier. Overall, it will depend on agency and PCO resources, and the priorities of the Government. Ideally, all changes would be done sooner rather than later, and in some omnibus legislation. But we recognise that doing everything at once may well be impractical within any foreseeable, acceptable, timeline.
55. An option might be to address first the amendments we have suggested, plus amendments to Acts and Bills identified as having “principles clauses” but that are excluded from our remit because they are being addressed elsewhere. Then could follow a separate Bill addressing the remaining statutes.
56. Potentially, the matter could be left to be addressed on an individual statute basis as they come up for other amendments. However, this is not our recommendation because of the impact on the integrity of the statute book. We note here that the vast majority of statutes with various standards of obligations have been passed in the past 25 years, which means they probably are still current and in regular use.
57. We wish to anticipate a potential argument that may be raised regarding comity, because it is rare that Treaty matters are not before some Court or another. Expert advice could and should be obtained on this, but in our view, it would be unfortunate if the concept of comity were misused to prevent action. Our understanding is that comity requires mutual respect as between the Executive, the Legislature, and the Judiciary. However, it does not give any of them a legal or moral expectation of a veto over any other. To us as observers, a clear example is currently available. The Uber Drivers’ employee/contractor case is currently before the Supreme Court, but that has not prevented the Executive introducing to Parliament an Employment Relations Amendment Bill addressing the same subject matter.
58. So, in the event that changes to Treaty provisions are proposed and have the appropriate priority, we hope they would not be deferred because any matter relating to Treaty clause interpretation might be before a Court, although that would obviously be a relevant consideration for the Crown in deciding whether to proceed.

## **G. Wording suggestions**

59. Precise wording is for policymakers and PCO to determine, but we offer the following suggestions:
  - a. “give effect to” where those acting under the Act are part of the Crown, and must give effect to the Treaty. The wording might be “In order to implement the Crown’s obligation to give effect to its obligations under [the Treaty]”
  - b. “assist the Crown to give effect to its obligations under the Treaty” where those acting under the Act are not part of the Crown (such as local government) but Parliament wants to direct them (or delegate to them) the implementation of some of the duties of the Crown.
  - c. we acknowledge that “recognise and respect” has often been used without adverse comment from the Courts, but without detailed analysis either. That term

seems a vague description by Parliament of the Crown's relationship to its Treaty obligations, but if its familiarity is a virtue, then its use could continue.

- d. "have regard to" or "take into account" (use one or the other throughout; unless someone can define a material distinction) where either Crown or non-Crown entities may well have other factors as well as the Treaty to weigh up under the Act.
- e. For a standard description of the Treaty, we suggest either "te Tiriti o Waitangi/the Treaty of Waitangi" or "the Treaty of Waitangi/te Tiriti o Waitangi". The choice is one of personal or political preference; we do not think that the legal consequences would vary depending on which formulation is chosen.
- f. Remove vague or aspirational terms such as "honour" and "uphold"; except in Settlement Acts where they may well be appropriate.

## H. Relevance of Acts that have been excluded from our review

60. A number of significant pieces of legislation have been excluded from our remit, including the Treaty of Waitangi Act 1975, State-Owned Enterprises Act 1986, Resource Management Act 1991, Crown Research Institutes Act 1992, Conservation Act 1987, Crown Minerals Act 1991, and a number of other pieces of legislation subject to separate review or reform processes.
61. These are some of the most significant Acts that contain Treaty clauses. We advise that, as far as is possible, the review and reform of these Acts should aim to contribute to consistency and certainty across the statute book.
62. We have noted that the Crown already has a direction of travel established in some of these reforms. For example, public statements indicate the Government will propose the replacement Resource Management Act will have a clause respecting Treaty settlements, but will not replicate section 8 of the Resource Management Act 1991.<sup>24</sup>
63. Treaty provisions were once rare. Treaty principles were referred to in the Treaty of Waitangi Act 1975, then not again until the State-Owned Enterprises Act 1986. That provision was added during the passage of the Bill under urgency and without debate, followed by more detailed provisions after the Court of Appeal's hearing of the *Lands Case* in 1987. After that, the Resource Management Act 1991 was enacted with a Treaty clause, but significant statutes relating to whenua/land have no Treaty clause. For example, the National Parks Act 1980 and Reserves Act 1987 do not mention the Treaty, though section 4 of the Conservation Act 1987 applies to them. Nor does the Constitution Act 1986. These are outside the scope of our advice but might not be out of scope of any comprehensive response to the inclusion of references to principles, or the plethora of different standards identified by TPOG.
64. As we understand it, the references to the Treaty principles in the Treaty of Waitangi Act 1975 and section 9 of the State-Owned Enterprises Act 1986 are not being reviewed and we would not recommend reviewing them. The former refers to the principles in its Long Title, Preamble, and section 6(1) which is fundamental to the jurisdiction of the Waitangi Tribunal. The latter is a unique formulation adopted nearly 40 years ago that was followed by a seminal Court decision and we see no reason to disturb it.

<sup>24</sup> [www.beehive.govt.nz/speech/speech-nz-planning-institute-conference](http://www.beehive.govt.nz/speech/speech-nz-planning-institute-conference)

## 4: Engagement

1. We begin by acknowledging that the Crown and claimants have agreed in the Waitangi Tribunal's Ngā Mātāpono Inquiry that the principle of partnership is relevant to the Treaty clause review and that consultation will be required.
2. We recommend general and targeted engagement.
3. There should be targeted engagement with settled iwi / hapū where changes to Acts referred to in Settlement Acts could have an impact on the settlement itself. The most obvious example of this is likely the Conservation Act 1987, which is outside our remit, but caution is required with other legislation. For example, the Crown Pastoral Land Act 1998 refers specifically to nine iwi, all of whom have settlements with the Crown. It is important that any engagement proceeds with that in mind.
4. There should also be targeted engagement with groups relevant to a particular Act. For example, it would make sense to undertake targeted engagement with Te Mana Raraunga – the Māori Data Sovereignty Network, regarding any proposed changes to the Data and Statistics Act 2022.
5. In terms of general engagement, we think this can most usefully occur through organisations such as the National Iwi Chairs Forum, or other organisations like the Federation of Māori Authorities.
6. We are available to assist with engagement and/or respond to outcomes from engagement if Ministers wish. We acknowledge that consultation fatigue is real. Once Ministers have made their initial decisions, it should be possible to decide whether engagement should be a separate law reform exercise or done by Ministries and Departments using their established relationships, and whether separately or as part of business as usual. We note the Government's intention that legislation be introduced this term.

## 5: Assessment of legislation

1. We were referred provisions of the following Acts for our consideration:
  1. Climate Change Response Act 2002
  2. Criminal Cases Review Commission Act 2019
  3. Crown Pastoral Land Act 1998
  4. Data and Statistics Act 2022
  5. Digital Identity Services Trust Framework Act 2023
  6. Education and Training Act 2020
  7. Energy Efficiency and Conservation Act 2000
  8. Environment Act 1986
  9. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
  10. Hazardous Substances and New Organisms Act 1996
  11. Land Transport Management Act 2003
  12. Local Government Act 2002
  13. Mental Health and Wellbeing Commission Act 2020
  14. Oranga Tamariki Act 1989
  15. Organic Products and Production Act 2023
  16. Pae Ora (Healthy Futures) Act 2022
  17. Plant Variety Rights Act 2022
  18. Smokefree Environments and Regulated Products Act 1990
  19. Taumata Arowai – the Water Services Regulator Act 2020
2. References to Treaty principles occur in these Acts in a variety of respects and using a variety of language. The Education and Training Act 2020 also includes direct reference to the Treaty.
3. The use of Treaty principles in Acts falls into four broad categories:

### A. Descriptive provisions

4. These provisions list the specific provisions of an Act that Parliament considers assists the Crown in meeting its Treaty responsibilities. They do not themselves require anything to be done or not done but point to the parts of the Act that do. They therefore provide an interpretative device to indicate that certain measures in the Act are aimed at addressing what Parliament has recognised as the Crown’s Treaty obligations. These clauses generally reduce uncertainty about Parliament’s intent. As discussed already, whether or not these provisions amount to a comprehensive scheme will depend on judicial developments.

### B. Operative (or General) provisions

5. These provisions require people exercising functions or making decisions to consider or act in accordance with the principles of the Treaty. They directly impose obligations though quite what they are and what is required to discharge them is usually undesirably unclear.
6. They may require decision-making to “take account of” or “give effect” to Treaty principles.

7. They can be general (relating to anyone performing functions under an Act) or specific (applying to a specific person or group, a particular type of decision or the performance of a particular function).
8. By their design, there can therefore be a greater element of discretion and potential uncertainty as to the application of these provisions. On the other hand, they may better reflect a Parliamentary intention for a wide and flexible impact of the Treaty on the statute.

### **C. Appointment provisions**

9. Some provisions require knowledge of Treaty principles as a prerequisite for a statutory appointment, or require the appointor (often a Minister) to ensure that overall, the Board (or whatever) collectively has knowledge of the principles of the Treaty etc.

### **D. Purpose/Long Title provisions**

10. Finally, some Acts refer to Treaty principles in purpose and long title provisions.<sup>25</sup>

### **Retain/Repeal/Amend**

11. For each provision, we have recommended that it be retained, repealed, or amended. We have done so purely on the basis of our analysis of each provision. There will be other considerations for the Crown to consider in making a decision, for example the impact of litigation before the courts, or upcoming amendment Bills. In some cases, it may make sense to consider amending a provision in the context of an imminent wider review of the Act. In others, it could be straightforward to amend the provision in an omnibus Bill.

<sup>25</sup> For example, the Environment Act 1986.





















## 5.1.6 Education and Training Act 2020

### Additional context and background

We have been asked to look at all Treaty clauses in this Act, though several do not mention the principles. The following provisions were originally included in the review, which refer to Treaty principles:

- Section 9(2)(d)
- Section 281(1)(b)
- Section 398B
- Section 476(4)(b)(v)
- Section 536A(1)(a)(ii)

The following additional provisions were later referred to us, which do not refer to Treaty principles:

- Section 3(2)(e)
- Section 4(d)
- Section 5(4)(c)(iii)
- Section 6(2)
- Section 9
- Section 32(h)
- Section 127(d)
- Section 535B(a)
- Schedule 13(4)(d)(i)

The following provisions also mention the Treaty but relate to Waitangi Tribunal's processes (largely for resumption proceedings) and are therefore closely tied to Treaty settlements. Our view is these provisions would remain excluded from the review, and we do not comment on them:

- Section 398ZC(2)(b)(i)
- Section 567
- Section 568(1)
- Section 569
- Section 570
- Section 571(4)
- Schedule 15, clause 569

We note, we have not had the benefit of full contributions from the Ministry of Education on additional provisions not referring to Treaty principles, specifically on how they are operationalised in practice. If the MOG requests that we provide further advice in respect of these provisions, based on further information from the Ministry of Education, we are available to do so.

We also comment briefly on the effect of Amendment Bills currently before the House, again without input from the Ministry of Education.

While we make comments on each of the sections referred to us, we also make the following overarching comments.

We are not in a position to offer policy advice as that is outside our remit. It is a question for the Crown and for Parliament about how they wish the Treaty to be reflected within the Act and the extent to which that should be the case.

However, what is clear from the present Act is that it uses a confusing and inconsistent array of references to the Treaty. The policy intent for these inconsistencies is not clear. For example:

- Section 4(d) refers to one of the purposes of the Act being to establish and regulate an education system that *honours Te Tiriti o Waitangi* and supports Māori-Crown relationships. It is unclear what a system that honours the Treaty actually does. Other formulations such as *recognises and respects*, *gives effect*, or even *takes account of*, or *have regard to* (whichever is preferred) would seem to provide more certainty.
- Section 127(d) requires a school board to ensure that the school *gives effect to Te Tiriti o Waitangi, including by* doing certain things – suggesting the list provided is not complete.
- Section 281(1)(b) requires an institution’s council to *acknowledge the principles of Te Tiriti o Waitangi*. This appears not to require any action at all other than accepting that the principles form part of law.
- Section 476(4)(b)(v) requires the Minister to have regard to a candidate’s understanding of the partnership principles of Te Tiriti o Waitangi. It is unclear why only the partnership principles are considered to be of relevance.
- Section 535B(a) requires a code administrator to *exercise and perform all of its functions, powers and duties in a manner that honours Te Tiriti o Waitangi and supports Māori-Crown relationships*, and section 536A(1)(ii) requires a DRS operator to *perform and exercise its functions, powers, and duties in a manner that contributes to an education system that honours Te Tiriti o Waitangi and supports Crown-Māori relationships*.

It is unclear why there is such significant variation in duties, language and references to the Treaty and Treaty principles.

It is also unclear to us why a school board is required to ensure a school gives effect to the Treaty, but a DRS operator has the more onerous duty of performing and exercising its functions, powers and duties in a manner that contributes to an education system that honours the Treaty and supports Crown-Māori relationships.

We see a need for a coherent policy analysis as to what is being sought to be achieved through each of these sections, and the reasons for the inconsistencies between them. In some sections, it appears the Treaty is being mentioned as a checkbox exercise (e.g., acknowledging the Treaty rather than doing anything demonstrable as a consequence). In other sections the duties are as significant as can be found in any Act of Parliament, yet they are imposed on DRS operators (which are private sector dispute resolvers rather than school boards).

For example, we believe that a DRS operator, dealing with an issue between an overseas student and an institution, should be given guidance on how the Treaty applies to that matter, and what related action, if anything, the DRS operator has to take to comply with the legal obligation.

	As far as our terms of reference go, in terms of decreasing uncertainty and ensuring legislation is useable, it is not apparent to us that the Education and Training Act 2020 provides any real clarity to users of the Act, whether they be the Crown, Māori, school boards or other entities with functions, obligations or powers under the Act. That exercise is beyond the scope of our report, but we offer these comments as a starting point.
<b>Section text</b>	<p><b>Section 3(2)(e) Outline of Act</b></p> <p>(1) This Act, which sets out New Zealand’s education and training system (the system), is divided into 6 Parts.</p> <p>(2) This Part (Part 1) covers the following preliminary matters:</p> <p>...</p> <p>(e) Te Tiriti o Waitangi:</p>
<b>Type of provision</b>	Non-substantive (outline of Act)
<b>Discussion</b>	This provision signposts the rest of the Act. If Part 1 of the Act continues to cover the Treaty, then it should be signposted.
<b>Recommendation</b>	<b>Amend</b> to standardise the reference to the Treaty – at present, the provision only refers to Te Tiriti o Waitangi.

<b>Section text</b>	<p><b>Section 4(d) Purpose of Act</b></p> <p>The purpose of this Act is to establish and regulate an education system that—</p> <p>...</p> <p>(d) honours Te Tiriti o Waitangi and supports Māori-Crown relationships.</p>
<b>Type of provision</b>	Purpose provision
<b>Discussion</b>	<p>The inclusion of this provision is a policy matter for the Crown and Parliament. If it is Parliament’s intention that the education system should honour Te Tiriti o Waitangi and support Māori-Crown relationships, then what that requires of those with roles within the system needs to be indicated somewhere.</p> <p>We do note, however, that the language of ‘honour’ is vague and seems inappropriate for the context. Much the same can probably be said of “supporting Māori-Crown relationships”</p> <p>Without reference somewhere to descriptive provisions, participants will surely struggle to work out the parameters of their legal obligations.</p>
<b>Recommendation</b>	<b>Amend</b> to replace “honours” and standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 5(4)(c)(iii) Minister may issue statement of national education and learning priorities</b></p> <p>(4) The education and learning objectives for early childhood education, primary education, and secondary education are—</p> <p style="padding-left: 40px;">(c) to instil, in each child and young person, an appreciation of the importance of—</p> <p style="padding-left: 80px;">(iii) Te Tiriti o Waitangi and te reo Māori.</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	The inclusion of this objective is a policy matter for the Crown and Parliament.
<b>Recommendation</b>	<b>Amend</b> to standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 6(2) Statement of expectations</b></p> <p>(1) The Minister and the Minister for Māori Crown Relations: Te Arawhiti may, for the purposes of providing equitable outcomes for all students, jointly issue a statement that sets out expectations for the following agencies:</p> <p style="padding-left: 40px;">(a) the Ministry;  (b) TEC;  (c) NZQA;  (d) the Education Review Office;  (e) Education New Zealand.</p> <p>(2) The statement must specify what those agencies must do to give effect to public service objectives (set out in any enactment) that relate to Te Tiriti o Waitangi.</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	The inclusion of this objective is a policy matter for the Crown and Parliament.
<b>Recommendation</b>	<b>Amend</b> to standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 9 Te Tiriti o Waitangi</b></p> <p>(1) The main provisions of this Act that recognise and respect the Crown's responsibility to give effect to Te Tiriti o Waitangi are—</p> <p style="padding-left: 40px;">(a) section 4, which states that the purpose of this Act includes establishing and regulating an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships; and  (b) section 5(4)(c)(iii), which provides that any statement of national education and learning priorities issued by the Minister must be consistent with objectives for early childhood, primary, and secondary education and learning that include instilling in each child and young person an appreciation of the importance of Te Tiriti o Waitangi and te reo Māori; and</p>
---------------------	---

	<p>(c) section 6, which provides that the Minister and the Minister for Māori Crown Relations: Te Arawhiti may, for the purpose of providing equitable outcomes for all students, and after consulting with Māori, jointly issue and publish a statement that specifies what the Ministry, TEC, NZQA, the Education Review Office, and Education New Zealand must do to give effect to public service objectives (set out in any enactment) that relate to Te Tiriti o Waitangi; and</p> <p>(d) section 127(1)(d), which provides that one of a board's primary objectives in governing a school is to ensure that the school gives effect to Te Tiriti o Waitangi, including by—</p> <ul style="list-style-type: none"> <li>(i) working to ensure that its plans, policies, and local curriculum reflect local tikanga Māori, mātauranga Māori, and te ao Māori; and</li> <li>(ii) taking all reasonable steps to make instruction available in tikanga Māori and te reo Māori; and</li> <li>(iii) achieving equitable outcomes for Māori students; and</li> </ul> <p>(e) subpart 6 of Part 3, which provides for the establishment and operation of Kura Kaupapa Māori, Te Aho Matua, and te kaitiaki o Te Aho Matua; and</p> <p>(f) subpart 3 of Part 4 and Part 4A, which provide for the establishment and operation of wānanga; and</p> <p>(g) clause 4(b) and (d) of Schedule 13, which provides that Te Pūkenga—New Zealand Institute of Skills and Technology must operate in a way that allows it to develop meaningful partnerships with Māori employers and communities and to reflect Māori-Crown partnerships to ensure that its governance, management, and operations give effect to Te Tiriti o Waitangi and to respond to the needs of, and improve outcomes for, Māori learners, whānau, hapū, and iwi.</p> <p>(2) Other provisions related to Te Tiriti o Waitangi in the context of the regulation of the education system include—</p> <ul style="list-style-type: none"> <li>(a) the definition of school community in section 10(1), which includes a Māori community associated with a school; and</li> <li>(b) section 17(2)(a), which provides that before the Minister may grant approval to apply for an early childhood service, the Minister must take into account the availability of services in the area with different offerings, for example, the provision of te reo Māori; and</li> <li>(c) sections 278(2)(a), 320(1)(c), 325(1) and (3), 326(2), and 363(3)(b), which provide for Māori contribution to decision making in tertiary education and vocational education and training; and</li> <li>(d) section 281(1)(b), which provides that councils of institutions have a duty, in the performance of their functions and the exercise of their powers, to acknowledge the principles of Te Tiriti o Waitangi; and</li> <li>(e) section 315(f), which provides that one of the functions of Te Pūkenga—New Zealand Institute of Skills and Technology is to improve outcomes for Māori learners and Māori communities in collaboration with Māori and iwi partners and interested persons or bodies; and</li> </ul>
--	---

	<p>(f) section 402, which provides that TEC comprises members appointed in accordance with section 28(1)(a) of the Crown Entities Act 2004 after consultation with the Minister for Māori Development; and</p> <p>(g) section 476(4)(b)(v), which provides that when considering whether to appoint a person as a member of the Teaching Council, the Minister must have regard to the collective skills, experience, and knowledge making up the overall composition of the Teaching Council, including understanding of the partnership principles of Te Tiriti o Waitangi; and</p> <p>(ga) section 535B, which provides for how a code administrator must exercise and perform its functions, powers, and duties in relation to Te Tiriti o Waitangi; and</p> <p>(gb) section 536A(1), which provides for how a DRS operator must exercise and perform its functions, powers, and duties in relation to Te Tiriti o Waitangi; and</p> <p>(h) section 597(2)(d), which provides that a good employer in the education service is an employer who operates an employment policy containing provisions requiring recognition of the aims and aspirations of Māori, the employment requirements of Māori, and the need for greater involvement of Māori in the education service</p>
<b>Type of provision</b>	Descriptive
<b>Discussion</b>	<p>While this clause is classified as descriptive it is more of an index that lists sections and broadly summarises them in a way that probably does not affect their interpretation.</p> <p>The Education and Training Amendment Bill (No. 2) (No 2 Bill), at clause 6, consequentially repeals a reference to section 5 (which is being repealed) and amends the reference to section 127 which we address in the context of that section.</p>
<b>Recommendation</b>	<p><b>Amend</b> to standardise the reference to the Treaty.</p> <p>Both Amendment Bills amend section 9. The Education and Training (Vocational Education and Training System) Amendment Bill (VE and TE Bill), at clause 4, adds four new section references that are essentially no more than cross-references or signposts to substantive provisions that are changed. We address them in our consideration of the proposed substantive provisions.</p>

<b>Section text</b>	<p><b>Section 32(h) Purpose of Part 3</b></p> <p>The purpose of this Part is to establish a schooling system that supports all learners/ākonga to gain the skills and knowledge they need to be lifelong learners/ākonga and fully participate in the labour market, society, and their communities by—</p> <p>...</p> <p>(h) honouring Te Tiriti o Waitangi and supporting Māori-Crown relationships that make a difference to learning; and...</p>
<b>Type of provision</b>	Purpose
<b>Discussion</b>	The inclusion of this purpose is a policy matter for the Crown and Parliament. We note again that the language of ‘honour Te Tiriti o Waitangi’ is vague and inappropriate in this context.
<b>Recommendation</b>	<b>Amend</b> to replace “honour” and standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 127(1)(d) Objectives of boards in governing schools</b></p> <p>(1) A board’s primary objectives in governing a school are to ensure that—</p> <p>(d) the school gives effect to Te Tiriti o Waitangi, including by—</p> <p>(i) working to ensure that its plans, policies, and local curriculum reflect local tikanga Māori, mātauranga Māori, and te ao Māori; and</p> <p>(ii) taking all reasonable steps to make instruction available in tikanga Māori and te reo Māori; and</p> <p>(iii) achieving equitable outcomes for Māori students.</p>
<b>Type of provision</b>	Blend of operative/general and descriptive
<b>Discussion</b>	<p>The No 2 Bill replaces the present section 127. Treaty matters are one of four primary objectives in the current Act. Under the No 2 Bill there will be one paramount objective, no primary objectives, and a long list of supporting objectives. Supporting objectives in relation to the Treaty remain but are reworded.</p> <p>In both provisions the obligation of the Board is to give effect to the Treaty by taking various actions, but the references to “local curriculum” is replaced with “teaching and learning programmes”. From the perspective of our analysis, that change is not material. We classified this provision as a blend of operative and descriptive because the descriptions are vague and subjective; “equitable outcomes”, “working to ensure” and “all reasonable steps”.</p> <p>In context, and given the discretion available to Boards, it may be that no greater specificity is possible. But greater certainty might be achieved if the</p>

	<p>provisions (proposed section 127(2)(e)) referred to “in the opinion of the Board”.</p> <p>Use of the term “including by” should be reviewed. It suggests more things are required but gives no hint as to what they might be. We do not endorse that drafting approach for that reason.</p> <p>In the wider context, we suggest that the obligation to “give effect to” Te Tiriti o Waitangi (or both descriptions) may be too strong. Boards are Crown entities (section 153) but at least partially elected at local level. Whether it is appropriate to treat them as part of the Crown in the context of a Treaty partner is worthy of analysis.</p> <p>We are obviously aware of commentary around the change from several primary objectives to one paramount objective and supporting objectives. From our perspective that is a legitimate policy change to be debated in that context and we have no particular insights to contribute.</p> <p>Ultimately, these matters are policy questions for the Crown and for Parliament.</p>
<b>Recommendation</b>	As well as the broader policy considerations and suggestions set out above, <b>amend</b> to standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 281(1)(b) Duties of councils</b></p> <p>(1) It is the duty of an institution’s council, in performing its functions and exercising its powers,—</p> <p style="padding-left: 40px;">(b)to acknowledge the principles of Te Tiriti o Waitangi:</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	<p>This provision is unreasonably vague. We do not know what “acknowledge” means in this context. Also, there is no indication of what must be done to acknowledge Te Tiriti.</p> <p>We do not believe councils (made up of a mix of Ministerial appointments and appointees by the council itself) should have such vague obligations with no statutory direction as to how to perform their duty.</p> <p>We recognise that there is some vagueness in the other duties described in section 281(1), but those duties are more clearly expressed, and it should be possible to ascertain whether a council is doing enough in any particular case. Section 281(1) has the additional problem of vagueness as to what “acknowledge” might mean.</p>
<b>Recommendation</b>	<p><b>Amend</b> to convert the provision into a descriptive clause identifying how the provision is complied with. If what is required cannot be articulated, the clause should be repealed.</p> <p>This will require Ministers to decide what they consider to be the Treaty interests in the context, how they should be reflected, and then to specify them. Those are policy questions for Ministers with advice from agency officials and TPOG as appropriate.</p>

<b>Section text</b>	<p><b>Section 398B Purpose of Part 4A</b></p> <p>The purpose of this Part is to provide for the establishment, modification, and administration of wānanga in a manner that gives effect to the principles of Te Tiriti o Waitangi and supports Māori-Crown relationships and, in particular, that—</p> <ul style="list-style-type: none"> <li>(a) better reflects the unique characteristics, functions, and purposes of wānanga in the tertiary education system for delivering the best possible education outcomes for ākonga; and</li> <li>(b) recognises the interests of iwi or Māori in ensuring the effective governance and administration of wānanga; and</li> <li>(c) enables direct accountability to iwi or Māori for the performance of wānanga.</li> </ul>
<b>Type of provision</b>	Purpose
<b>Discussion</b>	This provision is vague, but in the context of wānanga that is probably appropriate as a purpose statement applying to all of Part 4A. It also seems to be a response to a Waitangi Tribunal claim. <sup>28</sup>
<b>Recommendation</b>	<b>Amend</b> to standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 476(4)(b)(v) Ministerial appointment as member</b></p> <p>(4) When considering whether to appoint a member of the Teaching Council, the Minister must—</p> <ul style="list-style-type: none"> <li>(a) take into account each candidate’s ability to carry out the duties of a member of the Teaching Council and represent the public interest; and</li> <li>(b) have regard to the collective skills, experience, and knowledge of members of the Teaching Council, including (without limitation) the candidate’s knowledge and experience in any of the following areas: <ul style="list-style-type: none"> <li>(i) education:</li> <li>(ii) governance:</li> <li>(iii) leadership experience and skills:</li> <li>(iv) financial skills:</li> <li>(v) understanding of the partnership principles of Te Tiriti o Waitangi.</li> </ul> </li> </ul>
<b>Type of provision</b>	Descriptive/Appointment
<b>Discussion</b>	We are concerned that this section singles out one Treaty principle (partnership principles) for exclusive mention. This seems to be unique, and was presumably a considered decision, but the rationale is not apparent to us. It seems at least arguable that an understanding of other principles such

<sup>28</sup> The Crown has acknowledged its Treaty obligations to wānanga specifically through the Deeds of Settlement for WAI 718, and through the signing of the WAI 2698 Relationship Protocol with Te Wānanga o Raukawa. Part 4A of the Act is the result of work arising from the Whakatupu Mātauranga (WAI 2698) claim filed by Te Wānanga o Raukawa in 2017 and was co-designed with the three wānanga.

	<p>as the Crown duties of active protection and engagement could also be relevant.</p> <p>Unless policy analysis shows that an understanding of partnership principles is all that is required, the reference should be removed. We add that this is an appointment provision, and it would surely be odd that an appointee would have an understanding of some of the principles and not others?</p>
<b>Recommendation</b>	<p><b>Amend</b> to standardise the reference to the Treaty.</p> <p><b>Review</b> the policy behind the reference to “partnership principles”.</p>

<b>Section text</b>	<p><b>Section 535B(a) Further obligations of code administrator</b></p> <p>A code administrator must—</p> <p>(a) exercise and perform all of its functions, powers, and duties in a manner that honours Te Tiriti o Waitangi and supports Māori-Crown relationships; and</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	<p>The inclusion of this provision is a policy matter for the Crown and Parliament. If it is Parliament’s intention that a code administrator should honour Te Tiriti o Waitangi and support Māori-Crown relationships, then what that requires of those with roles within the system needs to be indicated somewhere.</p> <p>We do note, however, that the language of ‘honour’ is vague and seems inappropriate for the context. Much the same probably can be said of “supporting Māori-Crown relationships”.</p> <p>Without reference somewhere to descriptive provisions, participants will surely struggle to work out the parameters of their legal obligations.</p>
<b>Recommendation</b>	<b>Amend</b> to replace “honours” and standardise the reference to the Treaty.

<b>Section text</b>	<p><b>Section 536A(1)(ii) How DRS operator must perform role</b></p> <p>(1) A DRS operator must perform and exercise its functions, powers, and duties in a manner that contributes to an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships by—</p> <p>(a) resolving disputes in a way that—</p> <p>(i) has regard to tikanga Māori; and</p> <p>(ii) is consistent with the principles of Te Tiriti o Waitangi; and</p> <p>(b) responding to the concerns and interests of Māori in the administration and operation of the scheme.</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	<p>The DRS operators appear to have a degree of independence from the Crown and the institutions, and even if what “honours Te Tiriti” means in this context can be identified, there must be doubt as to whether it is appropriate to impose that duty on a DRS operator in every case.</p>

<b>Recommendation</b>	<p>As well as the broader policy considerations and suggestions set out above, <b>amend</b> to standardise the reference to the Treaty.</p> <p>Consider whether the requirement to honour the Treaty and support Māori-Crown relationships is appropriate for DRS operators; and if so, word it appropriately.</p>
<b>Section text</b>	<p><b>Schedule 13, clause 4(d)(i) Te Pūkenga—New Zealand Institute of Skills and Technology’s charter</b></p> <p>4 Te Pūkenga—New Zealand Institute of Skills and Technology must operate in a way that allows it to—</p> <p style="padding-left: 40px;">(d) reflect Māori Crown partnerships in order to—</p> <p style="padding-left: 80px;">(i) ensure that its governance, management, and operations give effect to Te Tiriti o Waitangi; and...</p>
<b>Type of provision</b>	Operative
<b>Discussion</b>	<p>This provision inserts yet another formulation: to reflect Māori Crown partnerships in order to ensure that its governance, management, and operations give effect to Te Tiriti o Waitangi.</p> <p>We do not know why this formulation is used here in this Act, nor whether any interpretation distinction is intended by referring to “reflecting” Māori-Crown relationships here, as compared to supporting them in the previous provisions considered.</p>
<b>Recommendation</b>	<p><b>Amend</b> to standardise the reference to the Treaty.</p> <p>Consider whether the language of <i>reflect</i> in order to <i>give effect</i> is appropriate.</p>













	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
	[REDACTED]
	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
	[REDACTED]
	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] standardise the reference to the Treaty and the formulation of the duty.</p>

















	<p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <ul style="list-style-type: none"><li style="background-color: black; margin: 0;">[REDACTED]</li><li style="background-color: black; margin: 0;">[REDACTED]</li><li style="background-color: black; margin: 0;">[REDACTED]</li><li style="background-color: black; margin: 0;">[REDACTED]</li></ul> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p>
	<p style="background-color: black; margin: 0;">[REDACTED]</p>
	<p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p>
	<p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p> <p style="background-color: black; margin: 0;">[REDACTED]</p>
	<p style="background-color: black; margin: 0;">[REDACTED] replace the reference to the Crown's <i>intention</i> to the Crown's <i>obligation</i>.</p>







## Appendix A: Terms of Reference

### Advisory Group on references to the Treaty principles in legislation Terms of Reference

#### Context

The Ministerial oversight Group of the Minister of Justice (Hon Goldsmith), the Minister for Regional Development (Hon Jones), and the Attorney General (Hon Collins) intend to convene an advisory group to provide Ministers with advice relating to the review of references to the Treaty principles in legislation (“the review”).

The purpose of the review is ‘to ensure that where it is appropriate to encapsulate te Tiriti o Waitangi | the Treaty of Waitangi or the Treaty relationship in legislation, these provisions are clear about how the Treaty applies in the context of each legislative regime’.

#### Functions and objectives

The function of the advisory group is to provide advice to the oversight group on:

- engagement processes, including with Māori.
- proposals to maintain, amend, or repeal references in legislation to the Treaty principles.

The objective of the advisory group is to provide advice on possible legislative changes to meet the purpose of the review.

#### Status

The advisory group will report to the Ministerial oversight group.

The Privacy Act, Official Information Act 1982 and Public Records Act applies to all workings of the advisory group.

#### Membership

The advisory group will have a maximum of five members, including a Chair, appointed by the Ministerial oversight group for a term commencing on the date of appointment, and concluding once final policy decisions have been made by Cabinet.

The advisory group’s membership must have between them experience and expertise in Māori issues, economic development, and the Treaty of Waitangi.

The appointment of members will be subject to the Cabinet Fees Framework, at group 4, level 2.

The Chair or a member may resign, in writing, to the Ministerial oversight group.

The Ministerial oversight group may advise, in writing, the Chair or a member that their term is to expire on such earlier date as specified.

The Ministerial oversight group may from time to time alter or reconstitute the advisory group or discharge any member of the advisory group or appoint new members to the group for the purpose of decreasing or increasing the membership or filling any vacancies.

### **Chair**

The Ministers will appoint a member of the advisory group to be its Chair. The Chair will preside at every meeting of the advisory group at which they are present. The Chair may appoint a member as Deputy Chair, in consultation with the Ministerial oversight group. The Deputy Chair may exercise the powers of the Chair in situations where the Chair is not present or is unable to act (e.g., if the Chair has a conflict of interest).

### **Conflicts of interest**

The advisory group needs to retain public confidence. Members must perform their functions in good faith, honestly and impartially, and avoid situations that might compromise their integrity or otherwise lead to conflicts of interest. They must also be, and be seen to be, independent of the Ministerial oversight group.

Members attend meetings and undertake advisory group activities as independent persons responsible to the advisory group as a whole. Members are not appointed as representatives of professional organisations or groups. The advisory group should not assume that a particular group's interests have been taken into account because a member is associated with a particular group.

Members are required to disclose any actual or perceived interests to the full advisory group. The advisory group will then determine whether or not the interest represents a conflict, and if so, what action will be taken.

The Chair will ask members to declare any actual or perceived interests at the start of each meeting.

### **Working arrangements**

Secretariat support will be provided by the Ministry of Justice.

Requests for additional support from the Ministry of Justice, such as administration, policy advice or access to information, must be channeled through the Minister of Justice.

### **Consultation**

In delivering its objectives, the advisory group may be asked by the Ministerial oversight group to consult with:

- iwi, hapū, or other Māori groups
- other stakeholders
- relevant government bodies
- other parties with interests in the review of references to the Treaty principles in legislation, as may be necessary.

## **Appendix B: Table of Acts covered by, or excluded from, this review**

### **Acts covered by the review**

1. Climate Change Response Act 2002
2. Criminal Cases Review Commission Act 2019
3. Crown Pastoral Land Act 1998
4. Data and Statistics Act 2022
5. Digital Identity Services Trust Framework Act 2023
6. Education and Training Act 2020
7. Energy Efficiency and Conservation Act 2000
8. Environment Act 1986
9. Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
10. Hazardous Substances and New Organisms Act 1996
11. Land Transport Management Act 2003
12. Local Government Act 2002
13. Mental Health and Wellbeing Commission Act 2020
14. Oranga Tamariki Act 1989
15. Organic Products and Production Act 2023
16. Pae Ora (Healthy Futures Act 2022
17. Plant Variety Rights Act 2022
18. Smokefree Environments and Regulated Products Act 1990
19. Taumata Arowai—the Water Services Regulator Act 2020

### Acts not included and going through separate processes

Act title	Reason for exclusion or separate treatment of relevant provision/s
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

Appendix C: Table of recommendations

	Act title	Provision	Recommendation
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]
■	[Redacted]	[Redacted]	[Redacted]

■	████████████████████ ████████████████████	██████████	██████████████████ ██████████████████ ██████████████████ ██████████████████
■	████████████████████ ████████████████████	██████████	██████████████████ ██████████████████ ██████████████████ ██████████████████
■	████████████████████ ████████████████████	██████████ ██████████	██████████████████ ██████████████████ ██████████████████ ██████████████████
11.	Education and Training Act 2020	Section 3(2)(e)	<b>Amend</b> to standardise the reference to the Treaty.
12.	Education and Training Act 2020	Section 4(d)	<b>Amend</b> to replace ‘honours’ and standardise the reference to the Treaty.
13.	Education and Training Act 2020	Section 5(4)(c)(iii)	<b>Amend</b> to standardise the reference to the Treaty.
14.	Education and Training Act 2020	Section 6(2)	<b>Amend</b> to standardise the reference to the Treaty.
15.	Education and Training Act 2020	Section 9	<b>Amend</b> to standardise the reference to the Treaty.
16.	Education and Training Act 2020	Section 32(h)	<b>Amend</b> to replace ‘honour’ and standardise the reference to the Treaty.
17.	Education and Training Act 2020	Section 127(1)(d)	As well as the broader policy considerations and suggestions set out in the report, <b>amend</b> to standardise the reference to the Treaty.
18.	Education and Training Act 2020	Section 281(1)(b)	<b>Amend</b> to convert the provision into a descriptive clause identifying how the provision is complied with. If what is required cannot be articulated, the clause should be <b>repealed</b> .
19.	Education and Training Act 2020	Section 398B	<b>Amend</b> to standardise the reference to the Treaty.

20.	Education and Training Act 2020	Section 476(4)(b)(v)	<b>Amend</b> to standardise the reference to the Treaty. <b>Review</b> the policy behind the reference to “partnership principles”.
21.	Education and Training Act 2020	Section 535B(a)	<b>Amend</b> to replace ‘honours’ and standardise the reference to the Treaty.
22.	Education and Training Act 2020	Section 536A(1)(ii)	As well as the broader policy considerations and suggestions set out in the report, <b>amend</b> to standardise the reference to the Treaty. <b>Consider</b> whether the requirement to honour the Treaty and support Māori-Crown relationships is appropriate for DRS operators.
23.	Education and Training Act 2020	Schedule 13, clause 4(d)(i)	<b>Amend</b> to standardise the reference to the Treaty. <b>Consider</b> whether the language of <i>reflect</i> in order to <i>give effect</i> is appropriate.
■	██████████ ██████████	██████████	██████████ ██████████ ██████████ ██████████ ██████████ ██████████
■	██████████	██████████	██████████ ██████████
■	██████████ ██████████ ██████████	██████████	██████████ ██████████
■	██████████ ██████████ ██████████	██████████	██████████ ██████████ ██████████
■	██████████ ██████████	██████████	██████████ ██████████







## Regulatory Impact Statement: providing certainty on legislative references to the Treaty of Waitangi

<b>Decision sought</b>	Analysis produced for the purpose of informing Cabinet policy decisions.
<b>Agency responsible</b>	Ministry of Justice
<b>Proposing Ministers</b>	Hon Paul Goldsmith, Minister of Justice, in discussion with the Ministerial Oversight Group, also including: <ul style="list-style-type: none"> <li>• Hon Shane Jones, Deputy Leader, New Zealand First</li> <li>• Hon Judith Collins KC, Attorney General</li> <li>• Hon Tama Potaka, Minister for Māori Crown Relations.</li> </ul>
<b>Date finalised</b>	13 November 2025

The Minister of Justice's substantive proposals for changes to references to the Treaty principles in legislation are:

- repeal the following Treaty provisions, subject to the agreement of each responsible Minister as appropriate:

[REDACTED]

- in situations where a Treaty weighting standard is needed, no higher standard than "take into account" should be used. This change impacts the [REDACTED] provisions set out on page 49.

### Summary: Problem definition and options

#### What is the policy problem?

The Government is concerned that some existing Treaty provisions do not appear to be based on robust and detailed Treaty and policy analysis, resulting in indeliberate variability between provisions and uncertainty as to their legal application.<sup>1</sup> The Government considers that this

<sup>1</sup> CAB-24-MIN-0346.

uncertainty may increase the risk of litigation and non-compliance, and may discourage economic investment.

**What is the policy objective?**

The objective is to give effect to Cabinet’s decision to ensure that where it is appropriate to encapsulate the Treaty or the Treaty relationship in legislation, the provisions are clear as to how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance.

**What policy options have been considered, including any alternatives to regulation?**

For each provision in scope of the review, the following options have been considered:

**Option One – Retain (Status Quo)**

The existing provision is retained as currently drafted. Provisions would be reviewed gradually over time as legislation is updated or replaced. The Treaty Provisions Oversight Group (TPOG) would continue to undertake its function of supporting more considered and coherent approaches to providing for the Treaty in new legislation.

**Option Two – Non-legislative change**

The existing provision is retained and non-legislative measures are implemented to improve clarity on the purpose and effect of the provision.

**Option Three – Amend to be more prescriptive**

The provision is amended (or replaced) to prescribe how the Treaty is relevant to the Act e.g. by:

- being more prescriptive about what actions are required to meet the Crown’s Treaty obligations. This could include providing more detail about how the Treaty is provided for under the Act already, or introducing additional operative measures; and/or
- specifying which Treaty principles and/or specific Māori rights and interests are considered relevant.

Further policy work would be required to develop more defined policy proposals in line with this option.

**Option Four – Repeal**

The existing provision is repealed in its entirety.

**Option Five – Amend all Treaty standards to be no higher than “take into account”**

This option was a late addition proposed by the Minister for Justice. Under this option the provision is amended so that the standard of Treaty obligation is no higher than to “take into account” the Treaty. This option is relevant to provisions where the current standard is higher than “take into account”, specifically those with the Treaty standard “give effect to” or “honour”. It does not apply to purpose provisions, long titles, and appointment provisions as those provisions do not typically impose standards or obligations.

**What consultation has been undertaken?**

The Minister of Justice directed a process that has not included engagement with iwi and hapū (as Treaty partners), the general public, or external stakeholders.

Consultation with iwi and hapū is one of the principal mechanisms through which the Government discharges its responsibility to make informed decisions and act in good faith towards Māori. There is a strong argument that the Treaty and Treaty relationship gives rise to

an obligation to consult Māori early on this review, including as part of the policy development process.

In its report, *Ngā Mātāpono*, the Waitangi Tribunal made the following findings relating to consultation with Māori on the review:<sup>2</sup>

- a lack of Māori engagement in the process and involvement in decision-making on clauses would be inconsistent with the principle of partnership.
- the timeframe proposed for the review, and lack of adequate time for engagement with Māori would be inconsistent with the principle of partnership.

**Is the preferred option in the Cabinet paper the same as preferred option in the RIS?**

[REDACTED]

For the following provisions the preferred option in the Cabinet paper is Option Four (repeal) and the preferred option in this RIS is Option Three (amend to be more prescriptive):

- *Section 536A(1)(ii), Education and Training Act 2020.*

[REDACTED]

Option Five is not a preferred option in this RIS. Option Five is the preferred option (or one of a combination of preferred options) in the Cabinet paper for the [REDACTED] provisions set out on page 49.

## Summary: Minister's preferred option in the Cabinet paper

### Costs (Core information)

In summary, costs of the preferred options in the Cabinet paper include:

- damage to the Māori-Crown relationship as Māori have not been consulted on any of the proposals and because in some instances the preferred options in the Cabinet paper may negatively impact Māori interests.
- option Five has the potential for wide-ranging impacts on Māori social, cultural, economic, and environmental interests. It has not been possible to fully explore or quantify those impacts in the time available.
- proposed repeals may reduce legal certainty as it will become less clear how Parliament considers the Treaty to be relevant to each Act.

<sup>2</sup> These findings are based on a May 2025 Cabinet paper which had proposed Māori engagement prior to Cabinet policy decisions (CAB-25-MIN-0144).

- [REDACTED]
- expected increase in litigation costs for the Crown and Māori as Māori may file new claims with the Waitangi Tribunal and the Courts.
- fiscal costs for Crown agencies, Crown entities, and other statutory bodies related to implementation and administration.
- fiscal costs for Māori to understand how proposed changes will affect their interests.

### **Benefits (Core information)**

[REDACTED]

### **Balance of benefits and costs (Core information)**

Overall, the suite of proposals in the Cabinet paper carries significant risks due to the lack of consultation with Treaty partners and the potential for some proposals to negatively affect Māori interests. The potential benefits of the proposals are low and do not outweigh costs to the Māori-Crown relationship and Māori interests.

There is limited evidence available to support the assumption that existing provisions are causing uncertainty and that the proposals would result in greater certainty. In all instances, repeal is likely to increase, rather than decrease, uncertainty. This is consistent with advice from the independent Advisory Group to the review which was provided to officials.

Option Five has no apparent benefits and carries significant risk to the Māori-Crown relationship, including because it is likely to be seen as intended to reduce the legislative Treaty protections available to Māori. As this was a late proposal from the Minister of Justice, there has been insufficient time to fully understand the impacts of this proposal for each provision affected.

### **Implementation**

If Cabinet approves the proposed measures, a Bill or Bills will likely be enacted in mid-2026. Following commencement, any changes would need to be implemented by those responsible under each Act.

Where repeals are proposed, the individuals, groups and entities who are currently responsible for complying with those provisions will need to consider how/whether this impacts current operations under each Act. As identified in the analysis, repeal would have uncertain legal effect meaning in most instances it would be unclear if it would require a change to current operations.

[REDACTED]

Decisions on how to effectively implement these amendments would benefit from consultation with key stakeholders, including Māori as Treaty partners and other statutory bodies that will be directly responsible for the ongoing operation and/or enforcement of any changes.

### **Limitations and Constraints on Analysis**

The Minister of Justice directed a process that has not included engagement with iwi and hapū (as Treaty partners) or relevant stakeholders to understand their views and shape policy options.

The timeframes for analysis have been limited for a review of such a broad range of legislation (19 Acts sitting across 13 agencies). Cabinet agreed to the purpose and scope of the review in September 2024. In May 2025, Cabinet agreed to a process for the review, and established an independent advisory group to advise Ministers on whether to retain, amend or repeal provisions with the Ministry of Justice acting as secretariat. The Advisory Group met for the first time in June 2025 and reported back to the Minister of Justice on 8 August 2025. The limited time available for the Ministry of Justice to conduct in-depth analysis has meant:

- there has been limited opportunity to test assumptions underpinning the problem definition and proposed response, and to investigate and understand intended or unintended consequences.
- it has not been possible to undertake a first principles Treaty analysis of all relevant Acts to determine whether the Treaty is being appropriately provided for or not. In place of this, the approach taken has been to identify what information is available about the reasoning behind the provision at the time it was introduced alongside some basic Treaty analysis.

Option Five was added recently and has increased the number of provisions in scope of this RIS by 13. It has not been possible in the time available to undertake in-depth analysis of the impact of this change for each provision affected, or to consult with impacted agencies.

The suite of proposals to repeal provisions (other than section 536A(1)(ii) of the Education and Training Act 2020) was also a recent proposal from Ministers.

I have read the Regulatory Impact Statement and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the preferred option.

Responsible Manager's signature:



Caroline Greaney  
Deputy Secretary – Policy  
Ministry of Justice  
13/11/2025

### Quality Assurance Statement

Reviewing Agency: Ministry of Justice

QA rating: Does not meet

**Panel Comment:**

The Ministry of Justice's Regulatory Impact Assessment Quality Assurance Panel (QA Panel) has reviewed the *Regulatory Impact Statement: Providing certainty on legislative references to the Treaty of Waitangi* prepared by the Ministry of Justice. The QA Panel considers that the information and analysis summarised in the RIS does not meet the quality assurance criteria.

The review has considered a broad range of legislation. The QA Panel considers that the constraints and limitations imposed by Ministerial direction in terms of the options to be considered, timeframes, and the lack of consultation, especially with iwi and hapū as Treaty partners, are material. The Panel considers these constraints have meant that the analysis is not sufficiently developed to form a basis for Ministers to make informed decisions. This has been exacerbated by the late inclusion of several significant proposals.

## Section 1: Diagnosing the policy problem

---

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

### Background to the Review

1. The 2023 coalition agreement between the National Party and New Zealand First included a commitment to “conduct a comprehensive review of all legislation (except when it is related to, or substantive to, existing full and final Treaty settlements) that includes ‘The Principles of the Treaty of Waitangi’ and replace all such references with specific words relating to the relevance and application of the Treaty, or repeal the references”.<sup>3</sup>
2. Following this, in September 2024, Cabinet agreed to a review for the purpose of ensuring that where it is appropriate to encapsulate Te Tiriti o Waitangi | the Treaty of Waitangi or the Treaty relationship in legislation, these provisions are clear about how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance.<sup>4</sup>
3. In May 2025, Cabinet agreed to establish a Ministerial Oversight Group to make in principle policy decisions on the review, subject to Cabinet confirmation. Cabinet also agreed to establish an independent Advisory Group to advise Ministers on whether to retain, amend, or repeal references in legislation to the Treaty principles. The Advisory Group delivered its final report on 8 August 2025. The Minister for Justice is now seeking Cabinet agreement to policy proposals, in discussion with the Ministerial Oversight Group.

### Te Tiriti o Waitangi | The Treaty of Waitangi

4. Te Tiriti o Waitangi | the Treaty of Waitangi (referred to as ‘the Treaty’ for the purposes of this document) is regarded as a founding document of government in New Zealand.<sup>5</sup> The Treaty was an exchange of promises between sovereign peoples, with rights and obligations for each party. The Court of Appeal has described the Treaty relationship as “akin to a partnership” and one where each party acts in “the utmost good faith which is the characteristic obligation of partnership.”<sup>6</sup>

### The Treaty Principles

5. The Treaty principles were first mentioned by Parliament in the Treaty of Waitangi Act 1975. The Treaty principles themselves were not defined in that Act and have instead been developed by the Tribunal and courts through years of jurisprudence. The Courts and Tribunal have emphasised that the Treaty principles are not set in stone and that they may change as the Treaty partnership evolves.
6. Although there is no single set of principles, some of the core principles that have emerged through the courts and Tribunal reports are:

---

<sup>3</sup> At page 10.

<sup>4</sup> CAB-24-MIN-0346.

<sup>5</sup> Cabinet Office Cabinet Manual 2023 at [1].

<sup>6</sup> *New Zealand Māori Council v Attorney General* [2013] NZSC 6.

- *Partnership* - under which the Crown and Māori both have a positive duty to act fairly, honourably, and in good faith towards one another.
- *Active Protection* - which places upon the Crown a positive duty to protect Māori interests and taonga.
- *Redress* - which requires the Crown to redress the wrongs it has perpetrated against its Treaty partner.

#### *Application by the Courts*

7. The Treaty itself is not directly justiciable in the courts unless given force of law by an Act of the New Zealand Parliament. However, the Courts have indicated that when interpreting ambiguous legislation, they would not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. The Courts may consider relevant legal or moral obligations arising from the Treaty which the Crown as a Treaty partner should comply with as far as it is reasonable and practicable to do so.<sup>7</sup>
8. In some contexts, the Treaty principles have been found to be a mandatory consideration for decision makers even where there is no statutory reference.<sup>8</sup>

#### **Treaty provisions in legislation**

##### *History*

9. Following the Treaty of Waitangi Act in 1975, Parliament next referred to the Treaty principles in the State-Owned Enterprises Act 1986. Section 9 of that Act states that nothing in the Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. This was significant because it was the first time an Act restricted actions of the Crown to measures that are consistent with the principles of the Treaty. This provided the courts with a specific basis on which to assess Crown actions against the principles.
10. Since then, the incorporation of the Treaty and its principles into legislation has become a common method by which Parliament has given legal effect to the responsibilities of the Crown under the Treaty.
11. Since the late 1980s, Treaty provisions have appeared in a wide range of legislation touching on matters from environmental planning and climate change to public finance, education, health, and housing. These provisions have been incorporated either when Acts are originally passed or when they are amended.
12. From the late 1980s until 2000, Treaty provisions tended to refer to the principles of the Treaty rather than the texts of the Treaty. However, from 2001 onwards, both the principles of the Treaty and the Treaty texts have been referred to in legislation. There are a small number of Acts that refer to both.
13. Differences in the standards of Treaty obligations in these provisions have also emerged over time. Treaty “standards” are the words used in a provision that indicate the strength or the nature of the Treaty obligation. For example, some provisions might require

---

<sup>7</sup> *Huakina Development Trust v Waikato Valley Authority* (1987).

<sup>8</sup> *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127.

someone to “give effect to” the Treaty principles. This standard is considered stronger than one that requires someone to “have regard to” or “take into account” the Treaty principles.

#### *Current state*

14. There are now approximately 40 statutes that refer specifically to the Treaty principles (excluding settlement legislation and secondary legislation). There are also approximately 22 statutes that refer to the Treaty more broadly.
15. Treaty provisions generally come under one of the following categories:
  - **Operative Treaty provisions** create obligations on decision makers or persons performing functions under an Act to do certain things with respect to the Treaty or the principles of the Treaty. They may be either *general* (relating to anyone making decisions or performing functions under an Act) or more *specific* (applying only to a specific person or group, a particular type of decision or the performance of a particular function). There are several long-standing operative Treaty provisions with well-established jurisprudence.
  - **Descriptive Treaty provisions** describe how the Crown’s Treaty responsibilities are given effect to in the Act. They are intended to provide clarity by setting out the actions or considerations Parliament has determined are required in order for the Crown to comply with its Treaty obligations in the particular context.

Despite a generally higher degree of specificity compared to operative provisions, descriptive provisions are unlikely to codify or exhaust the relevance of the Treaty, as the courts generally resist constraining the relevance of the Treaty in statutory interpretation.<sup>9</sup>

- **Purpose and long title provisions** may also refer to the Treaty and its principles. Purpose provisions have a legal effect on the nature of powers and duties under legislation. Long titles act similarly to purpose provisions in that they explain the reasons or background to the legislation. These provision types do not require anything specific of decision-makers or actors in the legislative regime but do bear on the interpretation of substantive provisions that require things of legislative actors.
- **Capability provisions** (sometimes known as appointment provisions) requiring an individual (such as a commissioner), or one or more members of a group (generally agencies or boards), to have capability in relation to the Treaty have also become common.

#### *Design*

16. The Legislation Design and Advisory Committee (LDAC) suggests that where legislation has the potential to come into conflict with the rights or interests of Māori under the Treaty, additional measures should be considered to ensure recognition of the principles of the Treaty or the particular rights concerned.<sup>10</sup>
17. What is required to achieve consistency with the Treaty and its principles or prevent inconsistency is a fact-specific exercise based on the specific context of each legislative

<sup>9</sup> *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* (2021) NZSC 127.

<sup>10</sup> *Legislation Guidelines*, Legislation Design and Advisory Committee, 2021, 31.

regime. LDAC advises that well-designed legislation can provide certainty as to Treaty rights and obligations but also build in sufficient flexibility to enable them to adapt over time.

18. Cabinet established the Treaty Provisions Oversight Group (TPOG) in 2022 to support more considered and coherent approaches to providing for the Treaty in legislation and to help address concern that there was unexplained variation between provisions.<sup>11</sup> Cabinet guidance states that if proposals include legislation that specifically refers to, or proposes a clause relating to, the Treaty of Waitangi, then TPOG must also be consulted.<sup>12</sup>
19. TPOG helps agencies apply its guidelines. A central principle guiding TPOG’s advice is that there is no “one-size-fits-all” approach to Treaty provisions and which measures are required is a matter to be worked out in the context of each Bill.

#### *Application*

20. The development of Treaty provisions draws from and contributes to the broader Māori—Crown relationship and inherently touches on legal and constitutional matters.<sup>13</sup> Treaty provisions are significant because they impact understanding of the Treaty and its place in the legal system.<sup>14</sup>
21. How Treaty provisions are subsequently operationalised or implemented comes down, in the first instance, to those responsible under a given Act. This covers a range of different actors, including chief executives, statutory boards, independent commissions, commissioners, and Crown entities.
22. Many Crown agencies and other bodies with relevant responsibilities have developed operational guidance to support their implementation of these provisions, especially those which provide for greater discretion. The approach taken may also be influenced by emerging jurisprudence from the Waitangi Tribunal or the Courts, or as the result of feedback from Treaty partners.
23. The courts play an important role in interpreting Treaty provisions. Where Treaty provisions are considered by the courts in the context of judicial review of decision-making under an act, the courts will not attempt to dictate a particular solution, rather they will review the proposed or actual Crown action to assess its consistency with the provision. Where the decision challenged is judged reasonable, the challenge tends to fail.<sup>15</sup>
24. The courts will generally resist constraining the relevance of Treaty principles in statutory interpretation. For instance, descriptive provisions are unlikely to codify or exhaust the relevance of Treaty principles to decision-making.<sup>16</sup>

Nonetheless, the choice of words used in a Treaty clause

<sup>11</sup> CAB-22-MIN-0064.

<sup>12</sup> See CabGuide, at [www.dpmc.govt.nz](http://www.dpmc.govt.nz).

<sup>13</sup> *Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design*, Te Arawhiti, 2022, 4.

<sup>14</sup> *Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design*, Te Arawhiti, 2022, 18.

<sup>15</sup> Matthew SR Palmer, *Indigenous Rights, Judges and Judicial Review in New Zealand*, published in *The Frontiers of Public Law* (2019).

<sup>16</sup> *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* (2021) NZSC 127.

remains significant, and tailored drafting is an important means of communicating parliamentary intent.

### **What is the policy problem or opportunity?**

*The Government has provided its view on the policy problem*

25. The Government is concerned that some existing Treaty provisions do not appear to be based on robust and detailed Treaty and policy analysis, resulting in indeliberate variability between provisions and uncertainty as to their legal application.<sup>17</sup> The Government considers that this uncertainty may increase the risk of litigation and non-compliance, and may discourage economic investment.
26. The Government considers there is an opportunity to ensure that, where it is appropriate to encapsulate the Treaty or Treaty relationship in legislation, these provisions are clear about how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance.<sup>18</sup>
27. The Cabinet paper states that, in most cases, requirements to “give effect” to the Treaty principles do not promote the balanced consideration of all relevant factors in decision-making. It proposes that where a Treaty standard is needed, no higher standard than “take into account” should be used.

*There has been limited opportunity to test the assumptions underpinning these views*

28. As indicated in the Limitations and Constraints section at page 5 above, timing of the Advisory Group’s advice has limited the extent to which officials have been able to further investigate the problem as defined by the Government, including through consultation with hapū and iwi (as Treaty partners), and the general public.
29. Understanding the views of Māori and the general public is particularly pertinent in this context given the constitutional relevance of Treaty provisions, which impact our collective understanding of the Treaty and its place in the legal system.
30. The purpose and process of the review that is the subject of this RIS was recently considered by the Waitangi Tribunal. The Tribunal’s report, *Ngā Mātāpono*, highlights that Māori claimants consider Treaty provisions to provide some protection for Treaty interests, and there is concern over any change that would seek to limit or remove Treaty provisions from legislation.
31. The 2013 report of the Constitutional Advisory Panel highlights that there is some tension between members of the public who are apprehensive about the perceived uncertainty of the Treaty principles, and those who see benefit in allowing flexibility for the Māori-Crown relationship to continue to develop and to address issues as they arise.<sup>19</sup> This report reflects a range of public views gathered by the Panel at over 100 meetings, on its Facebook page, and from 5,259 written submissions.

*Fundamental constitutional principles are a well-established feature of New Zealand law*

---

<sup>17</sup> CAB-24-MIN-0346.

<sup>18</sup> Ibid.

<sup>19</sup> Constitutional Advisory Panel New Zealand’s Constitution: *A Report on a Conversation | He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013) at 31.

32. The Treaty principles are one aide to statutory interpretation and are not too dissimilar to the range of constitutional principles in New Zealand law (such as the rule of law and rights now affirmed in the Bill of Rights Act 1990). As with the Treaty, many of these principles exist in the common law and are reflected in legislation to varying levels of abstraction.<sup>20</sup>

*In many cases, variability of Treaty provisions is by design*

33. The variability between Treaty provisions can be understood in part as a reflection of the broad and flexible nature of the Treaty and Treaty principles, and the ongoing constitutional dialogue about how they should be given effect.
34. A particular formulation of a Treaty provision may reflect how much was understood about what a Treaty-consistent approach in a particular context looked like at the time the provision was designed, and the particular Treaty-related issues Parliament was seeking to address. New Treaty-related issues, and ways of addressing them through legislation, continually emerge.
35. For more recent provisions, flexibility can be deliberate. Current best practice guidance for legislative design recommends bespoke provisions that seek to provide certainty as to rights and obligations but also build in sufficient flexibility so that they are enduring.<sup>21</sup>
36. That said, not all variability across recent provisions appears to be by design. This is related to the problem TPOG was set up to address. However, while TPOG deals with any new legislation or amendments on a case-by-case basis, it is not tasked with undertaking a comprehensive review of all existing references to the Treaty in legislation.

*There is limited evidence available about the scale of impact of this problem*

37. Legal claims can and do arise as a result of these provisions, which involve legal costs for the Crown and claimants. However, while historically the courts undertook significant work to interpret the meaning of these provisions (particularly general operative provisions) the jurisprudence is now relatively well settled. Cases of judicial review invoking the Treaty are most often unsuccessful.<sup>22</sup>
38. Consultation with public service agencies indicates that most agencies are broadly comfortable operationalising the Treaty provisions in the legislation they administer. While in some instances there is built in flexibility or discretion in the legislation, such as with general operative provisions, many agencies noted specific contexts where flexibility to apply the principles is necessary and practical to achieve the intended policy outcome.
39. Where there is uncertainty in how a provision should be given effect, it follows that there is a risk it will not be well implemented, with potential flow on effects for the Māori-Crown relationship and Māori communities. The scale of this impact has not been investigated due to the timing and process constraints already identified.
40. The Government's view that variability or uncertainty in Treaty provisions can impact economic investment has also not been tested in the time available. However, legislation most likely to interface with economic investment (including the Resource Management

---

<sup>20</sup> See the Legislation Design and Advisory Committee Guidelines (2021), page 22.

<sup>21</sup> *Providing for the Treaty of Waitangi in Legislation and Supporting Policy Design*, Te Arawhiti, 2022, 17.

<sup>22</sup> Matthew Palmer, *Indigenous Rights, Judges and Judicial Review in New Zealand* (2019).

Act 1991, the Crown Minerals Act 1991, and the Conservation Act 1987) is being reviewed separately to this Review and is not in scope of this RIS.

41.



#### **What objectives are sought in relation to the policy problem?**

42. The objective is to give effect to Cabinet’s decision to ensure that where it is appropriate to encapsulate the Treaty or the Treaty relationship in legislation, the provisions are clear as to how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance.

#### **What consultation has been undertaken?**

43. As indicated above, the Minister of Justice directed a process that has not included engagement with iwi and hapū (as Treaty partners), the general public or other external stakeholders.
44. Consultation with iwi and hapū is one of the principal mechanisms through which the Government discharges its responsibility to make informed decisions and act in good faith towards Māori. There is a strong argument that the Treaty and Treaty relationship gives rise to an obligation to consult Māori early on this review, including as part of the policy development process.
45. In its report, *Ngā Mātāpono*, the Waitangi Tribunal made the following findings relating to consultation with Māori on the review<sup>23</sup>:
- a. a lack of Māori engagement in the process and involvement in decision-making on clauses would be inconsistent with the principle of partnership.
  - b. the timeframe proposed for the review, and lack of adequate time for engagement with Māori, would be inconsistent with the principle of partnership.
46. The Tribunal recommended expanding the timeframe of the review to enable extensive engagement with Māori and the involvement of Māori in decision-making, either through a co-design process or full reflection of Māori views in any amendments to Treaty clauses of high importance to Māori. The Tribunal also recommended that Māori be provided the resources necessary to participate fully.

---

<sup>23</sup> These findings are based on a May 2025 Cabinet paper which had proposed Māori engagement prior to Cabinet policy decisions (CAB-25-MIN-0144).

## Section 2: Assessing options to address the policy problem

---

### What criteria will be used to compare options to the status quo?

- *Upholds Treaty obligations*: the approach upholds the rights and obligations of Māori and the Crown as Treaty partners.
- *Certainty*: the approach provides clarity and certainty on how the Treaty applies in the context of the specific legislative regime, including for Treaty partners, regulated parties, and regulators. There is a degree of trade-off between the benefits of certainty and the benefits of flexibility included in the ‘durability’ criterion.
- *Feasibility*: the approach can be implemented effectively and efficiently.
- *Durability*: the approach should have broad buy-in and acceptability while having sufficient flexibility to evolve with changes in the Māori Crown relationship to enable an enduring impact over time. There is a degree of trade-off between the benefits of flexibility and the benefits of certainty included in the ‘certainty’ criterion.

### What scope will options be considered within?

47. Previous Cabinet policy decisions have narrowed the scope of the Review in the following ways:
- To only include provisions that reference “the principles of the Treaty” (as opposed to just “the Treaty”).
  - To exclude provisions related to, or substantive to, existing full and final Treaty settlements.
  - To exclude the following Acts: the Treaty of Waitangi Act 1975; section 9 of the State-Owned Enterprise Act 1986; section 45Q of the Public Finance Act 1989; section 4 of Te Rūnanga o Ngāi Tahu Act 1996; section 24 of the Royal Society of New Zealand Act 1997; and the Resource Management Act 1991; the Crown Research Institutes Act 1992.
  - To exclude the Conservation Act 1987 and the Crown Minerals Act 1991 at this time as they are undergoing separate review processes led by their respective agencies.
48. Further Cabinet policy decisions are currently being sought to also:
- Exclude the Harbour Boards Dry Land Endowment Revesting Act 1991; the Hauraki Gulf Marine Park Act 2000; the Urban Development Act 2020; and the Kāinga Ora Homes and Communities Act 2019.
  - Include all provisions in the Education and Training Act that reference “the Treaty”, except ss 127 and 281.
49. Some provisions (set out at **Appendix A**) have also been removed from the scope of this RIS because:

- proposals would have a minor or limited impact and are therefore exempt from RIA requirements This includes provisions where Ministers’ preferred option is to standardise terminology while retaining their existing policy intent and legal effect; or
- they provide a cross-reference to substantive provisions, and therefore would only require consequential amendments.

50. This RIS provides analysis of the following operative provisions against all options identified in this RIS:

- [REDACTED]
- Section 536A(1) of the Education and Training Act 2020.

- [REDACTED]
- [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]

52. Cabinet agreement is being sought to amend all provisions (except purpose provisions, long titles, and appointment provisions) so that the standard is no higher than “take into account”. Option Five below has been drafted to reflect that proposal. A table of provisions proposed to be amended in line with this option is provided on page 49.

#### *Option considered and discounted*

53. The Ministerial Oversight Group requested advice on the option to amend provisions to remove the words “the principles of” and instead refer to just “the Treaty”. The legal effect of this option is unclear, so it is unlikely to meet the objective of this review. The courts might continue to use principles (or similar concepts) to interpret and apply the Treaty or take a more literal interpretation of the text of the Treaty. The Treaty principles have been designed to help settle the differences between the Māori and English texts of the Treaty, and to operationalise the Treaty for contemporary decision making.

#### **What options are being considered?**

54. For each of the provisions in scope of the review, the following options have been considered:

##### **Option One – Retain (Status Quo)**

55. The existing provision is retained as currently drafted. Provisions would be reviewed over time as legislation is updated or replaced. TPOG would continue to undertake its function of supporting more considered and coherent approaches to providing for the Treaty in new legislation.

### **Option Two – Non-legislative change**

56. The existing provision is retained and non-legislative measures are implemented to improve clarity on the purpose and effect of the provision.

### **Option Three – Amend to be more prescriptive**

57. The provision is amended (or replaced) to prescribe how the Treaty is relevant to the Act e.g. by:

- being more prescriptive about what actions are required to meet the Crown’s Treaty obligations. This could include providing more detail about how the Treaty is provided for under the Act already, or introducing additional operative measures; and/or
- specifying which Treaty specific Māori rights and interests are considered relevant.

58. For this option there is a range of choices about what could be prescribed and in what level of detail. Further policy work will be required to identify specific measures and, depending on the extent of additional work required in each case, it is possible these amendments will need to be progressed through future legislative change processes.

### **Option Four – Repeal**

59. The existing provision is repealed in its entirety.

### **Option Five – Amend all Treaty standards to be no higher than “take into account”**

60. The provision is amended so that the standard of Treaty obligation is no higher than to “take into account” the Treaty. This option is relevant to provisions where the current standard is higher than “take into account”, namely those with the Treaty standard “give effect to” or “honour”. It does not apply to purpose provisions, long titles, and appointment provisions as those provisions do not typically impose standards or obligations.

61. Option Five was added recently and has increased the number of provisions in scope of the RIS by 13. Given the limited time available, analysis of these additional provisions in this RIS has been limited to Options One and Five. Analysis of this option has also been dealt with collectively.

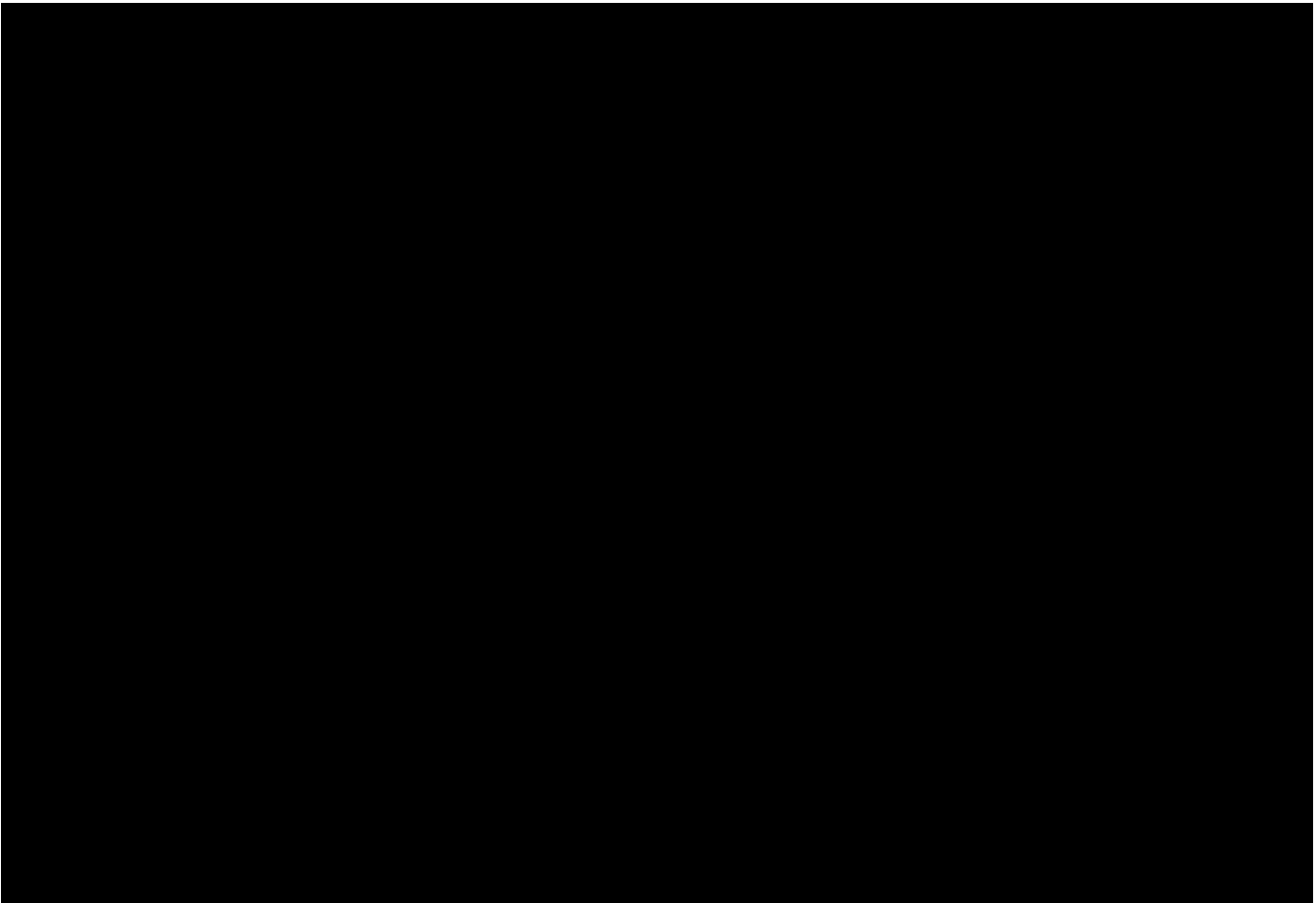












## Section 536A(1), Education and Training Act

### Overview of provision:

72. Section 536 is a specific operative provision that establishes a student contract dispute resolution scheme (DRS) to resolve disputes between tertiary and international students and providers on:
- contractual or financial matters, and
  - claims for redress for any loss or harm suffered by a student as a result of a breach by a provider or signatory provider of a wellbeing and safety code of practice issued under the Act.
73. Section 536A(1) requires that a DRS operator must perform and exercise its functions, powers, and duties in a manner that contributes to an education system that honours Te Tiriti o Waitangi and supports Māori-Crown relationships by:
- resolving disputes in a way that has regard to tikanga Māori and is consistent with the principles of Te Tiriti o Waitangi; and
  - responding to the concerns and interests of Māori in the administration and operation of the scheme.

### Relevant Treaty interest:

74. Section 536A is intended to ensure that DRS operator processes are aligned with the section 4 purpose of the Act. Section 4 provides that one of the purposes of the Act is to establish and regulate an education system that honours Te Tiriti o Waitangi/the Treaty of Waitangi and supports Māori-Crown relationships. Section 536A(1) was intended to address the concern that a DRS operator, which is appointed by the responsible Minister, is a private entity and is therefore not automatically bound by the Crown's Te Tiriti obligations. MoE has advised that it considers DRS operators should provide services in a manner that recognises the Treaty as they provide services to tamariki and rangatahi Māori.

### How do the options compare to the status quo/counterfactual?

	Option One – Retain (Status Quo)	Option Two – Non-legislative change	Option Three – Amend to be more prescriptive	Option Four – Repeal
<b>Upholds Treaty obligations</b>	0	It is challenging to identify an effective non-legislative option to provide more certainty on the purpose and effect of the provision as the Education (Domestic Tertiary Student and International Student Contract Dispute Resolution Scheme) Rules 2023 (DRS rules) already exist as secondary legislation made under s 539 of the Act. The DRS rules effectively operationalise the intent of s 536A(1) of the Act and provide specific functions that an operator must follow in relation to Māori. This option is therefore unlikely to have any impact on the Crown's ability to meet its Treaty obligations in this context. 0	The provision could be amended to replace the broad operative obligations with specific measures that DRS operators must comply with for the Crown to meet its Treaty obligations. The existing DRS rules could be used as a starting point. The approach of DRS operators under this option may be substantially similar to the status quo so it may not have a discernible impact on the Crown's ability to uphold its Treaty obligations. 0	Repealing the provision would reduce the ability to legally challenge decisions made by the Crown that do not appear to meet its Treaty obligations in the way it provides for the operation of a dispute resolution service. If the provision is repealed, the DRS rules would also need to be amended for consistency The Waitangi Tribunal found that any repeals resulting from a process with constrained timing that reduces the scope for robust policy analysis and engagement with Māori would be inconsistent with the principles of partnership and active protection. -
<b>Certainty</b>	0	Any non-legislative option would likely duplicate what is already provided in the DRS rules. This would create some uncertainty as to how any new guidance or direction and DRS rules should interact. -	DRS operators are private entities and not bound by the Crown's Treaty obligations. Replacing broad operative obligations on DRS operators with specific measures would increase certainty on what Parliament considers is required for the Crown to meet its Treaty obligations. +	If the provision is repealed, there may be some uncertainty about whether/how the section 4 purpose provision relates to the functions of DRS operators. As a purpose provision, section 4 provides an aid to interpretation of other provisions in the Act. -
<b>Feasibility</b>	0	It is difficult to identify what meaningful guidance could be provided under this option as guidance is already provided in the DRS rules. -	This option would likely be as feasible to implement as the status quo as it may not require a significant change in approach compared to what is already required under the DRS rules. 0	Repeal of this provision may be challenging to implement as it may not be clear if it would require a change in approach. The section 4 Treaty provision may still be considered relevant to the duties and functions of DRS operators. -

<b>Durability</b>	0	This option would be as durable as the status quo. As DRS rules already exist under the Act, it is likely that new operational guidance or direction would be disregarded or abandoned over time. As with the status quo, the provision and rules would continue to endure.	The durability of this option would be similar to the status quo. Primary legislation is marginally more durable than secondary legislation as amendments are subject to more rigorous scrutiny.	Repeal could increase the risk of regulatory churn by creating legal uncertainty and a risk of lower protection for Māori interests.
<b>Overall assessment</b>	0	-2	+1	-4

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

75. Option Three is the preferred option. Option Three enables Parliament to provide certainty on how it considers DRS operators should assist the Crown in meeting its Treaty obligations. This would provide certainty for all relevant parties and enable scrutiny of the specific requirements for DRS operators. Fiscal costs for this option may be minimal as it may not require a significant change in approach compared to the status quo.
76. Repealing the provision would result in uncertainty about whether/how the section 4 purpose provision “to establish and regulate an education system that honours Te Tiriti o Waitangi/the Treaty of Waitangi and supports Māori-Crown relationships” relates to the functions of DRS operators. As a purpose provision, section 4 provides an aid to interpretation of other provisions in the Act. Repealing the provision would also reduce the ability to legally challenge decisions made by the Crown that do not appear to meet its Treaty obligations in the way it provides for the operation of a dispute resolution service.
77. Progressing any options for change without undertaking good faith engagement with Māori is not recommended as it risks damage to the Māori-Crown relationships that could outweigh any benefits of improved certainty.

### Is the Minister’s preferred option in the Cabinet paper the same as the agency’s preferred option in the RIS?

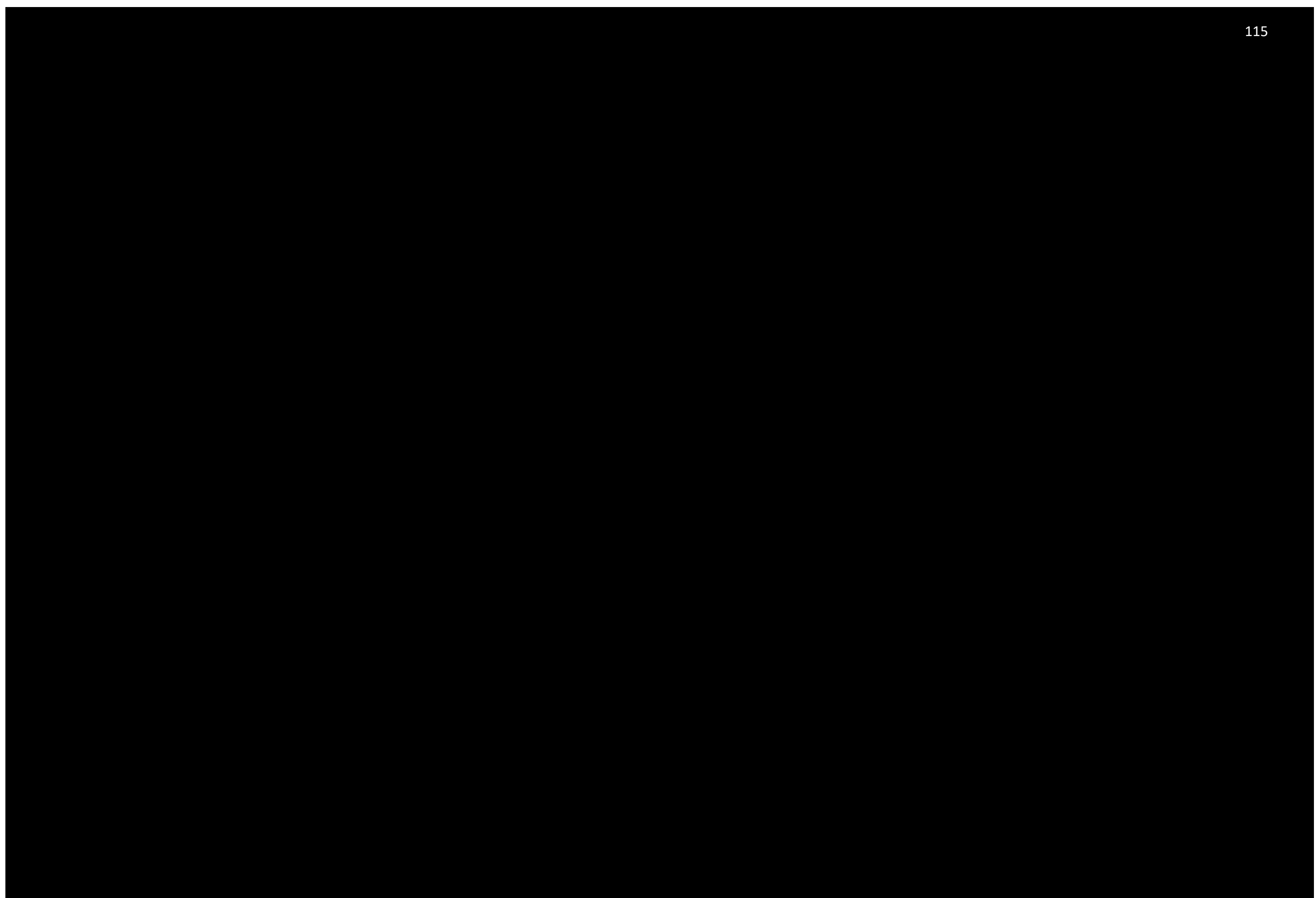
78. The preferred option in the Cabinet paper is broadly aligned with Option Four, repeal. Cabinet agreement is sought to amend or repeal the provision so that DRS operators, as private entities, do not have Treaty requirements. The Minister of Justice and Minister for Education consider that, as private entities, it is not appropriate for DRS operators to have the Treaty requirements set out in this provision.

### What are the marginal costs and benefits of the preferred option in the Cabinet paper?

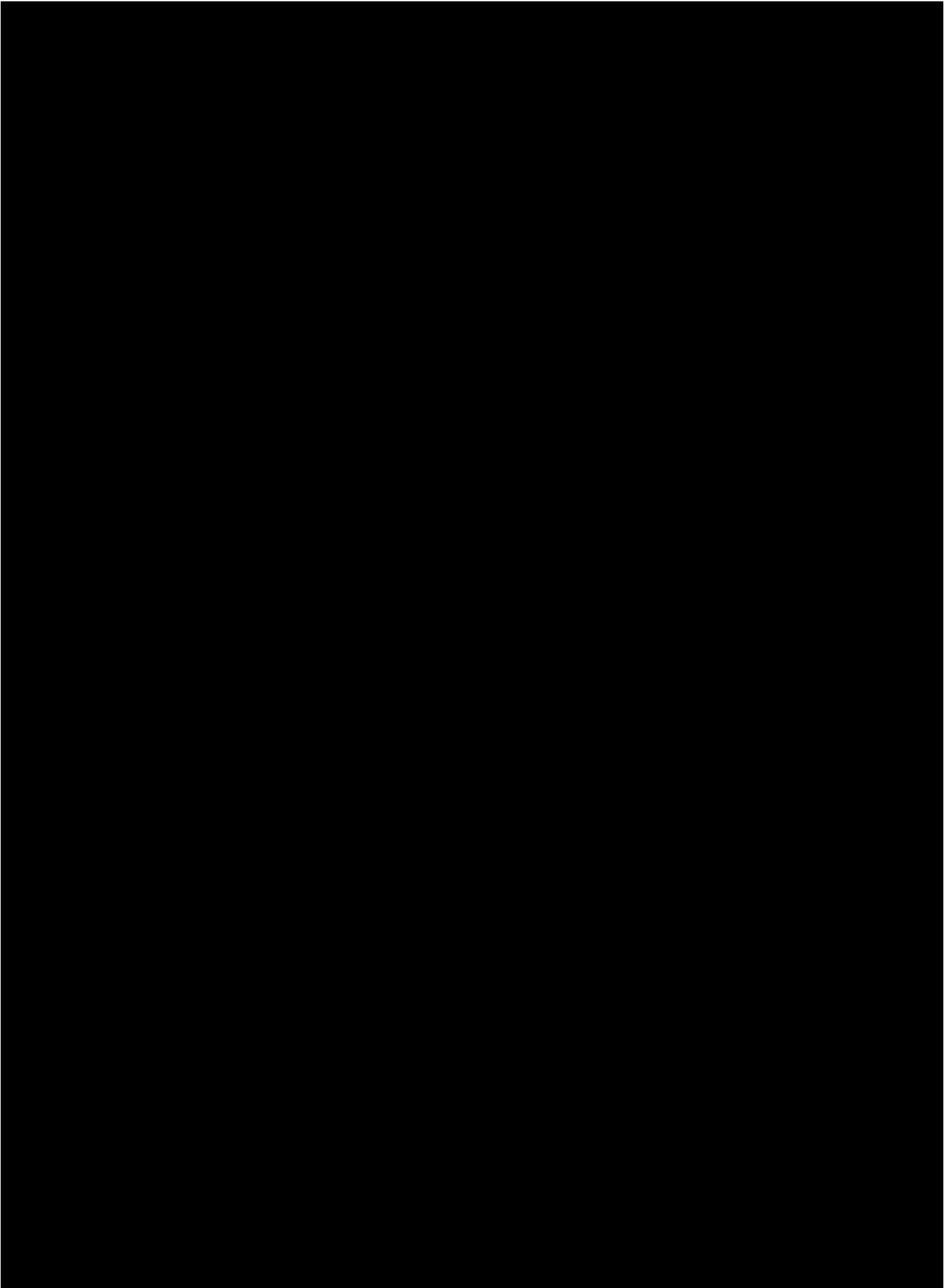
Affected groups (identify)	Comment <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			
MoE	One-off fiscal costs related to ensuring DRS operators understand how the changes will affect their current approach (e.g. updating the DRS rules, information sessions, legal fees to help mitigate legal uncertainty of repeal).	Not available	Low Will depend on exact amendments which will be worked through following Cabinet policy decisions.

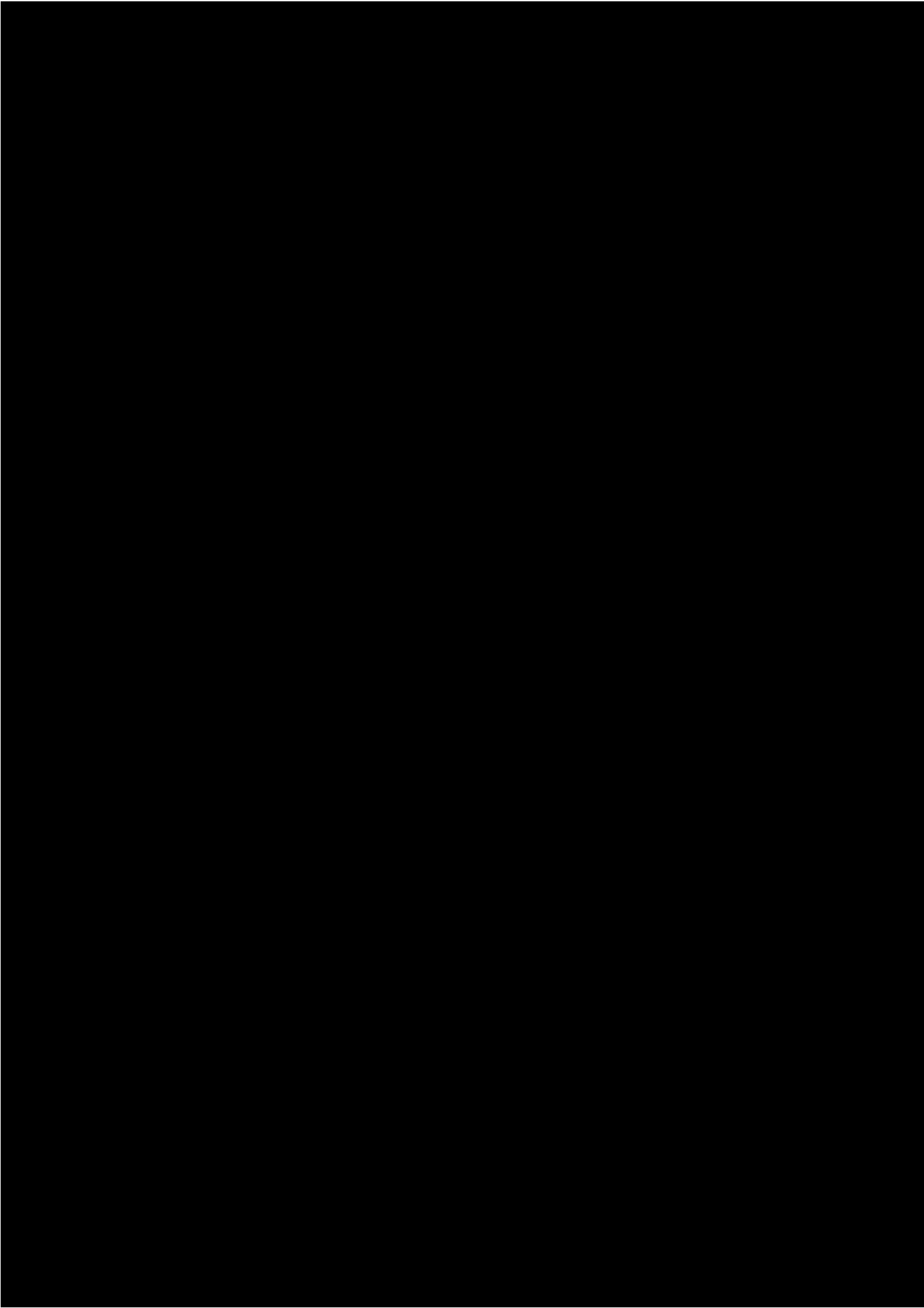
DRS operators	One-off costs associated with changing current practice approaches (e.g. any for any re-training).	Not available	Low There has been no consultation with DRS operators.
Crown	Damage to the Māori-Crown relationship as Māori have not been involved in developing policy proposals and repealing the provision may negatively impact the Crown's ability to ensure DRS operators are supporting the Crown's Treaty obligations in this context.	Medium/High	Medium Lack of engagement is contrary to Treaty principles and Waitangi Tribunal recommendations. The Waitangi Tribunal found that repeals through this process would be inconsistent with the principles of partnership and active protection.
	Expected increase in litigation costs as Māori may file new claims with the Waitangi Tribunal.	Not available	Low This has not been quantified in the time available.
Māori	Resources necessary to fully understand how the change will affect their interests.	Not available	Low There has been no consultation with Māori.
	Damage to the Māori-Crown relationship (as set out above).	Medium/High	Medium As above.
	Costs for Māori associated with participating in Waitangi Tribunal inquiries, including time, energy, legal and financial costs.	High	Medium It is uncertain if Māori will file further claims.
Wider public	Expected minimal monetary costs.	Low	Low There has been no public consultation.
<b>Total monetised costs</b>	Possible one-off costs for MoE, and DRS operators associated with implementing the changes. Costs for Māori to understand how the change will affect their interests. Possible costs for the Crown and Māori associated with participating in Waitangi Tribunal proceedings.	Not available	Low Our understanding of the costs associated with this change is limited due to the lack of consultation with Māori, and DRS operators.
<b>Non-monetised costs</b>	Potential for damage to the Māori-Crown relationship as Māori have not been involved in developing policy proposals.	Medium/High	Medium Lack of engagement is contrary to Treaty principles and Waitangi Tribunal recommendations. The Waitangi Tribunal found that

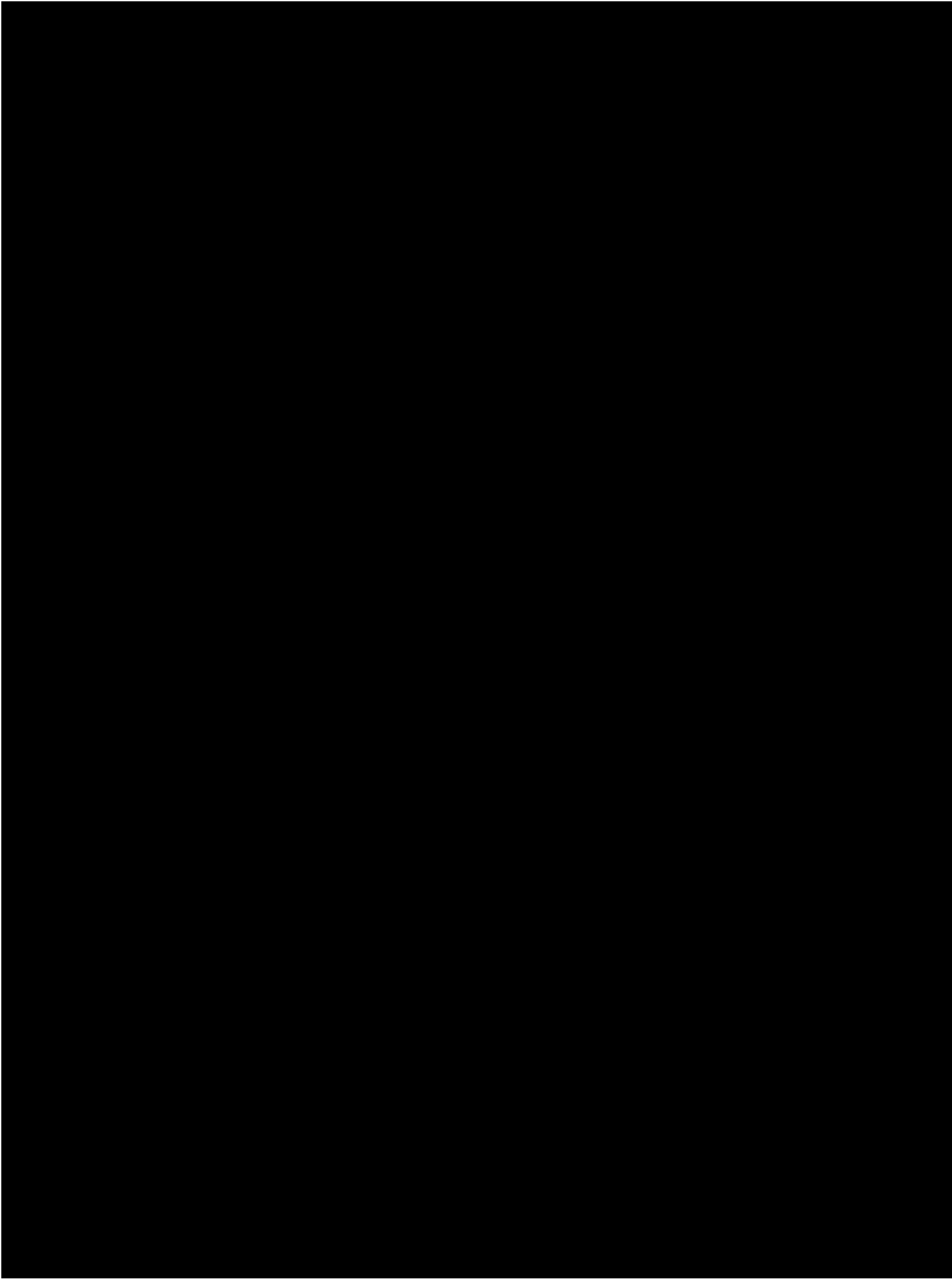
			repeals through this process would be inconsistent with the principles of partnership and active protection.
<b>Additional benefits of the preferred option compared to taking no action</b>			
MoE	--	--	--
DRS Operators	Possibility of greater administrative simplicity if requirements are removed. However, the legal effect of repeal is uncertain which negates this to some extent.	Low	Low There has been no consultation with DRS operators and the legal effect of repeal is unclear.
Crown	--	--	--
Māori	--	--	--
Wider public	--	--	--
<b>Total monetised benefits</b>	--	--	--
<b>Non-monetised benefits</b>	Possibility of greater administrative simplicity if requirements are removed. However, the legal effect of repeal is uncertain which negates this to some extent.	Low	Low There has been no consultation with DRS operators and the legal effect of repeal is unclear.



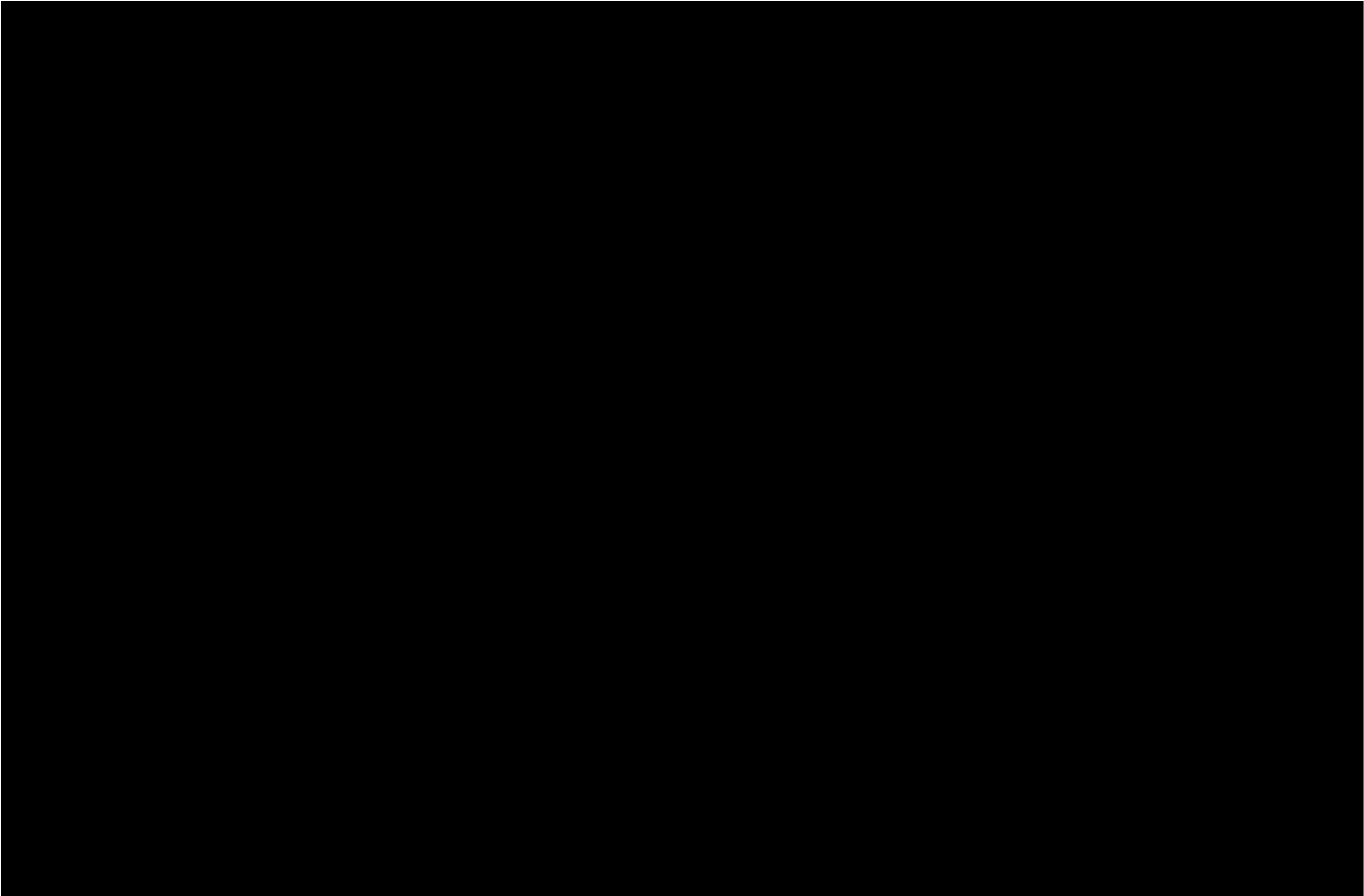




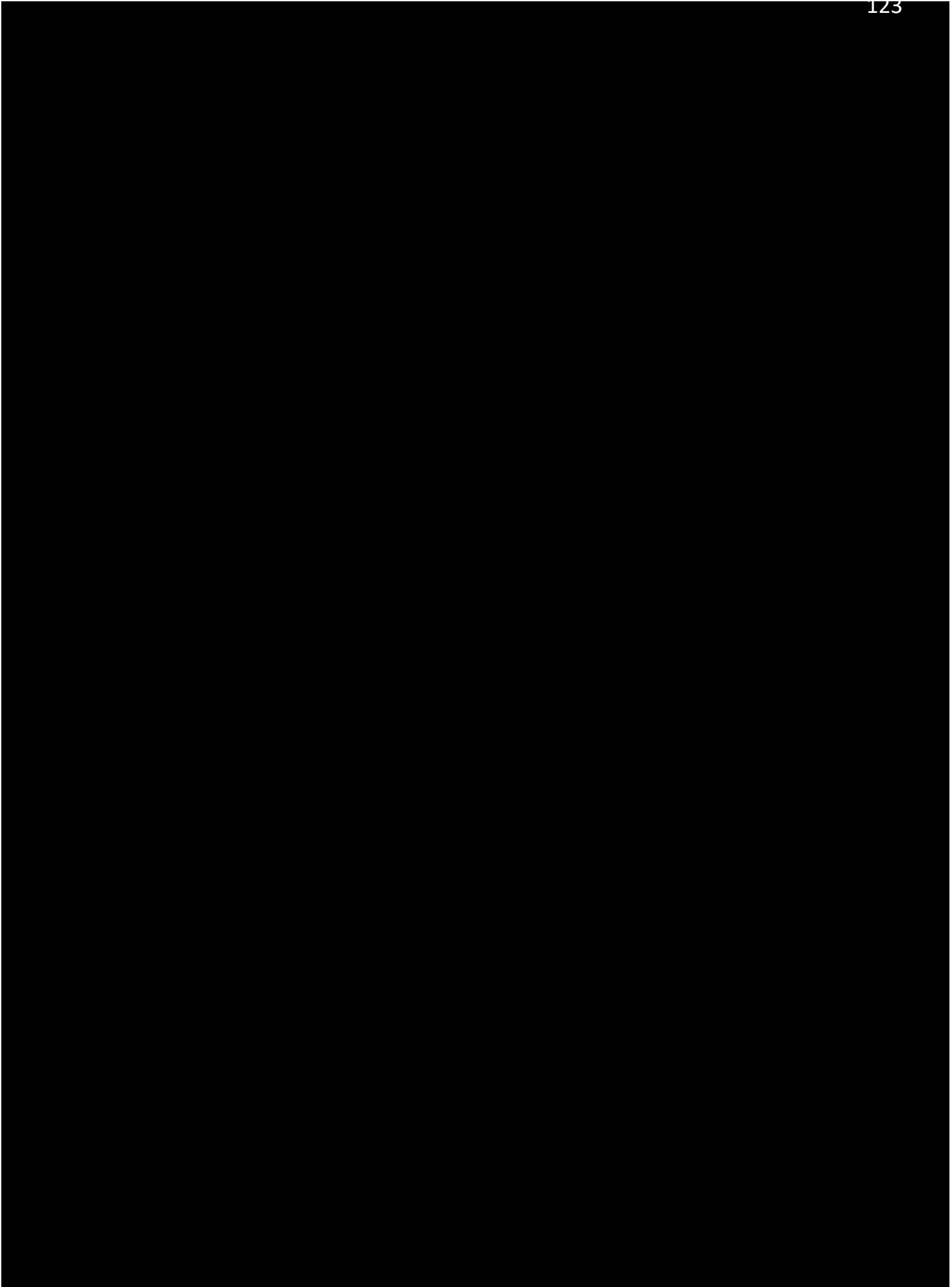


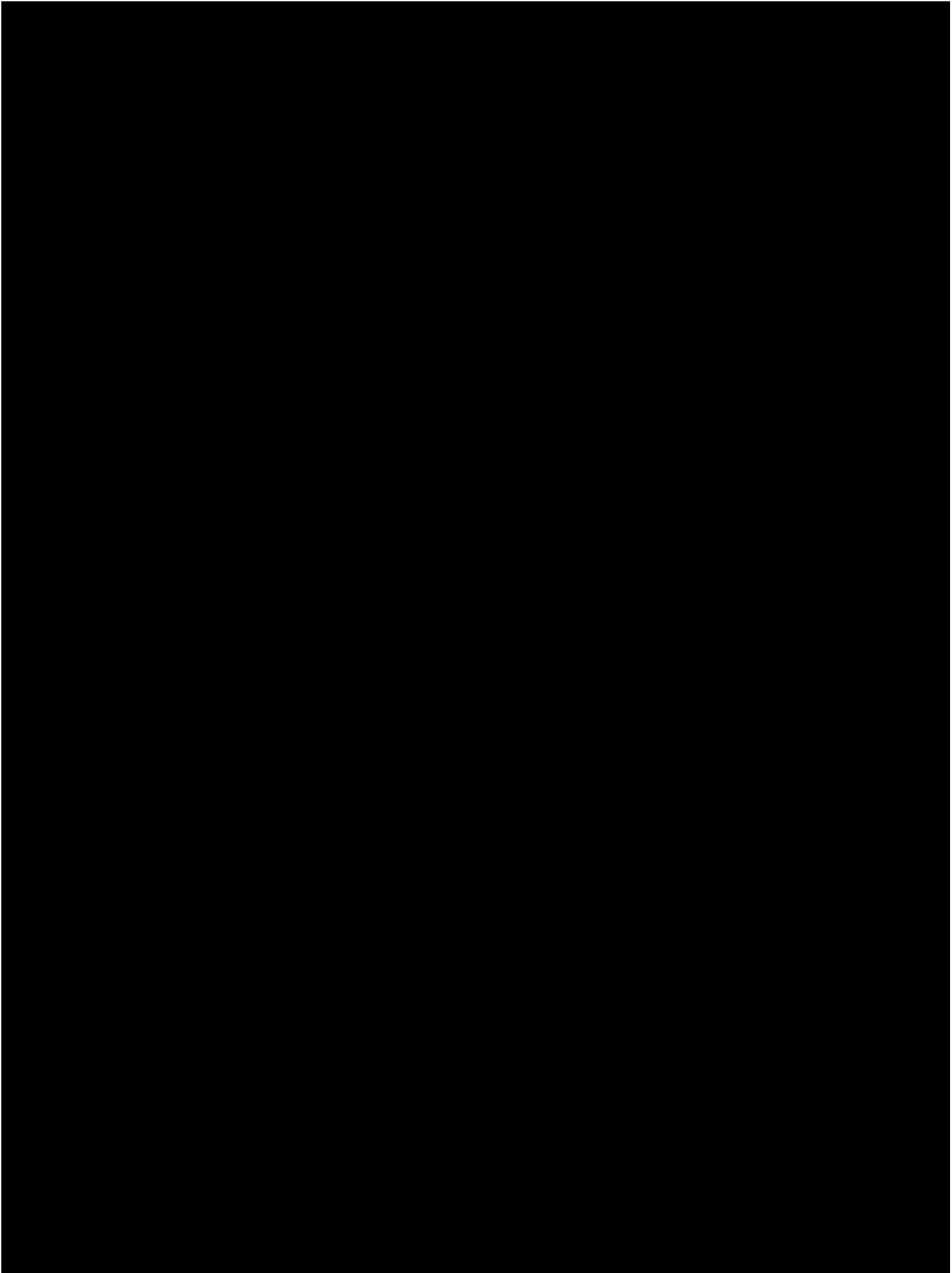


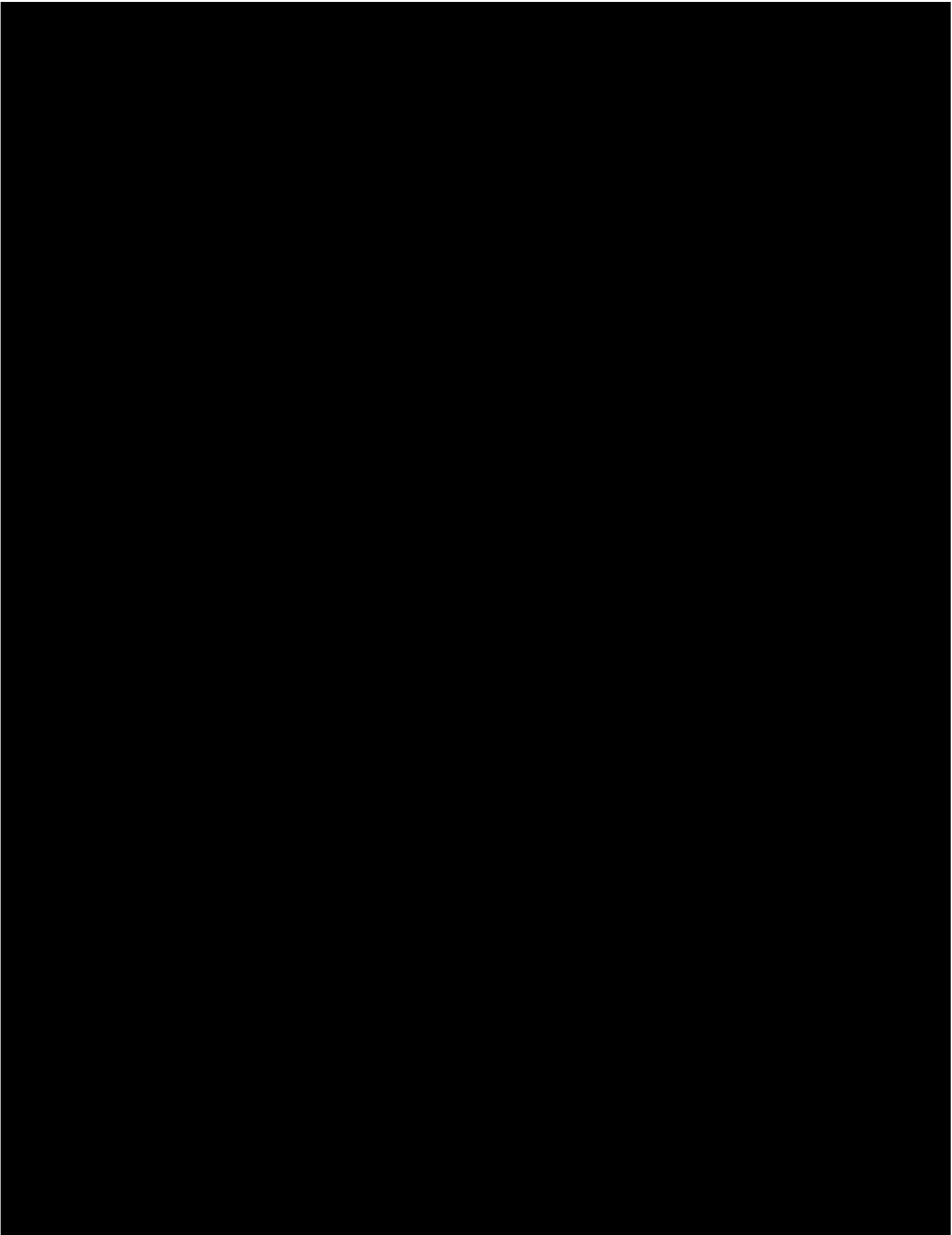


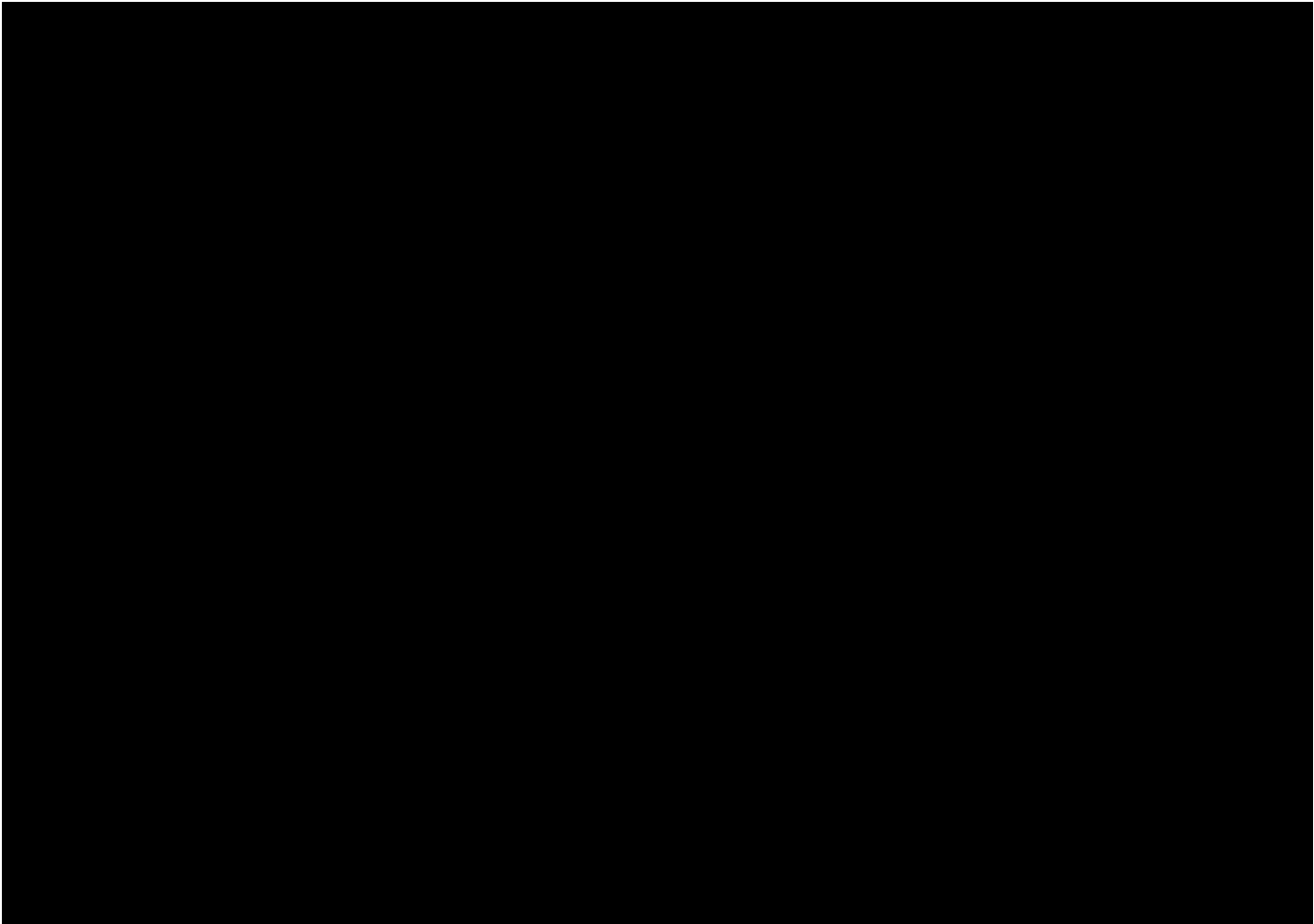


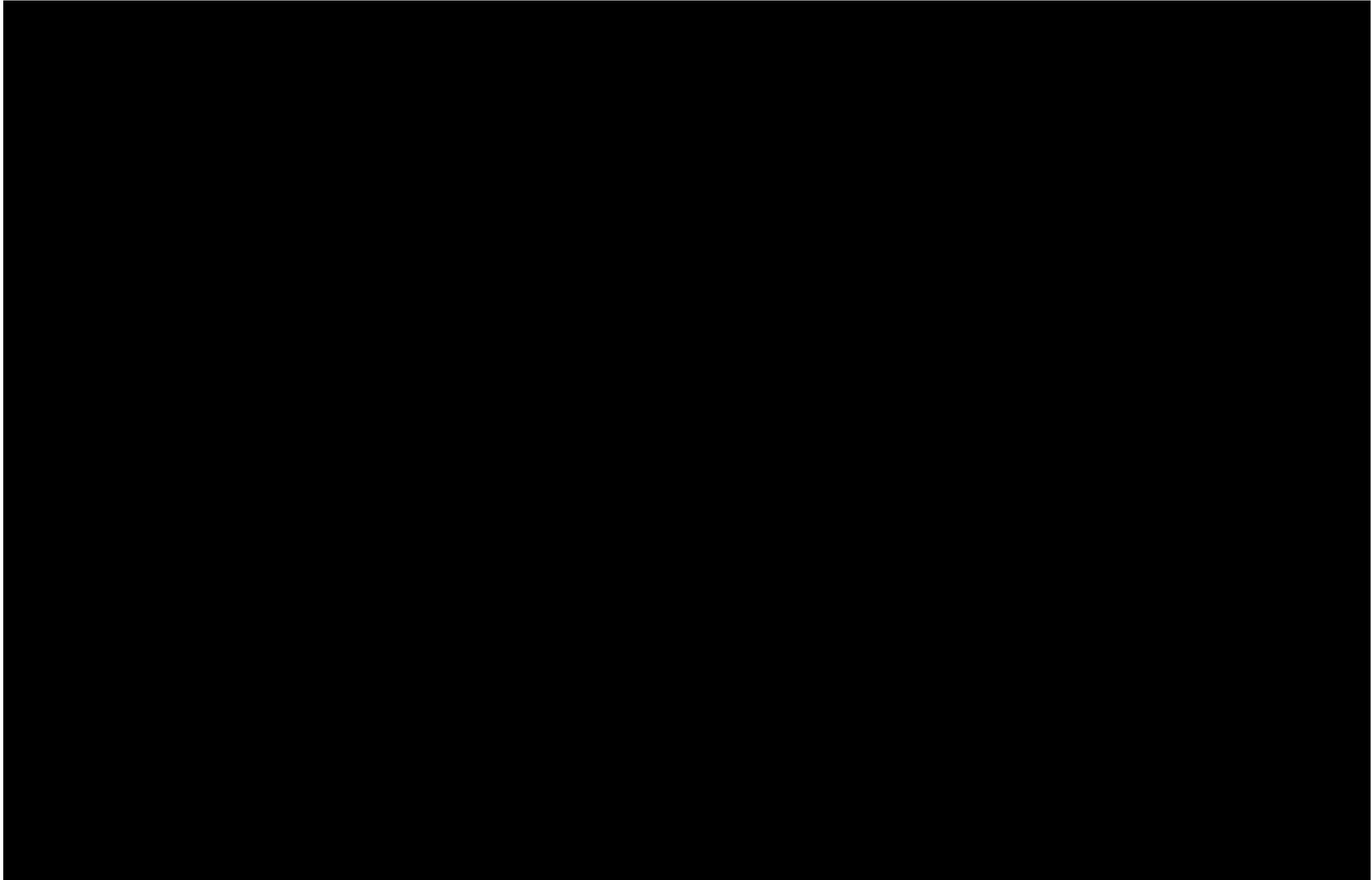


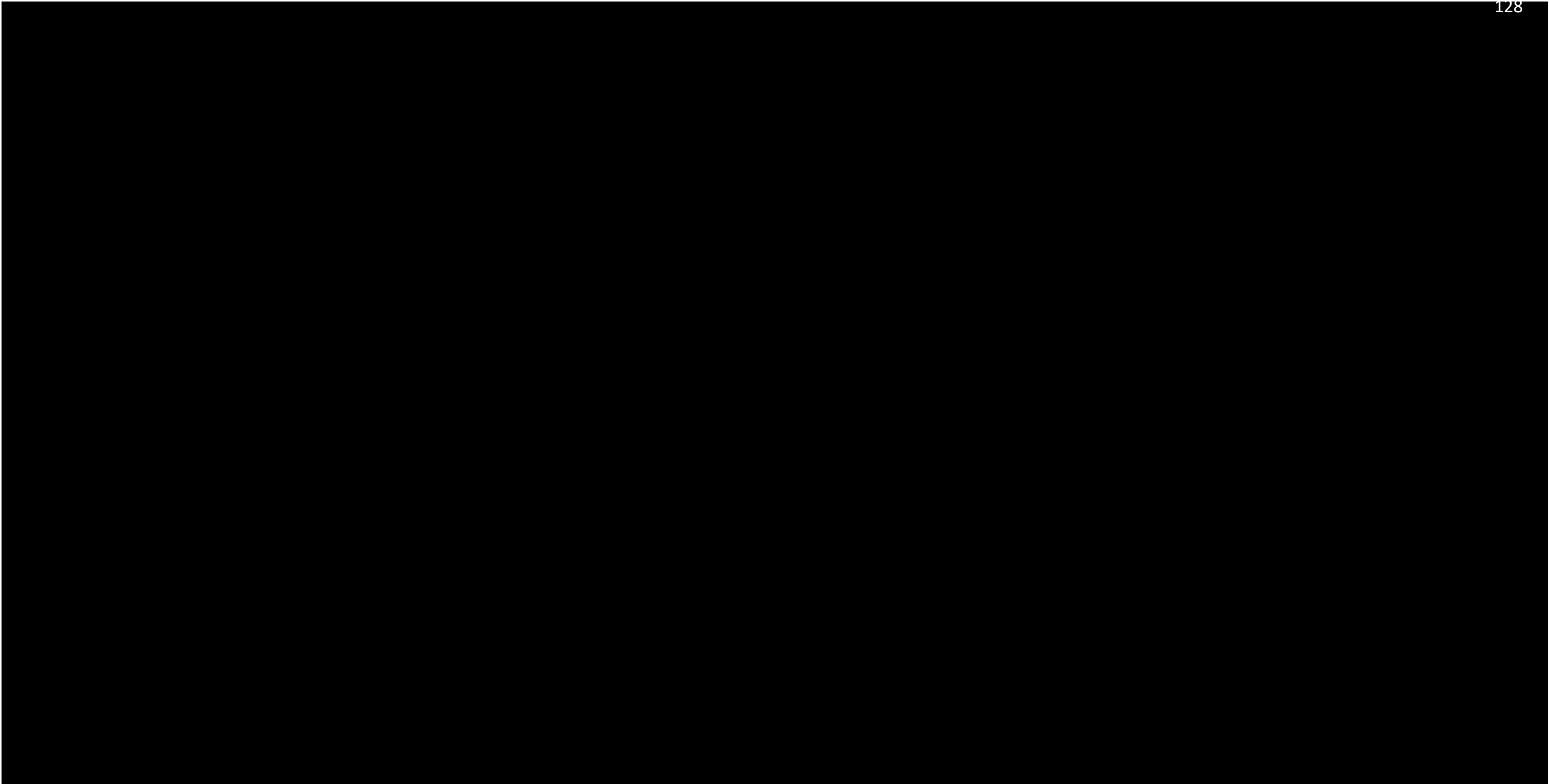


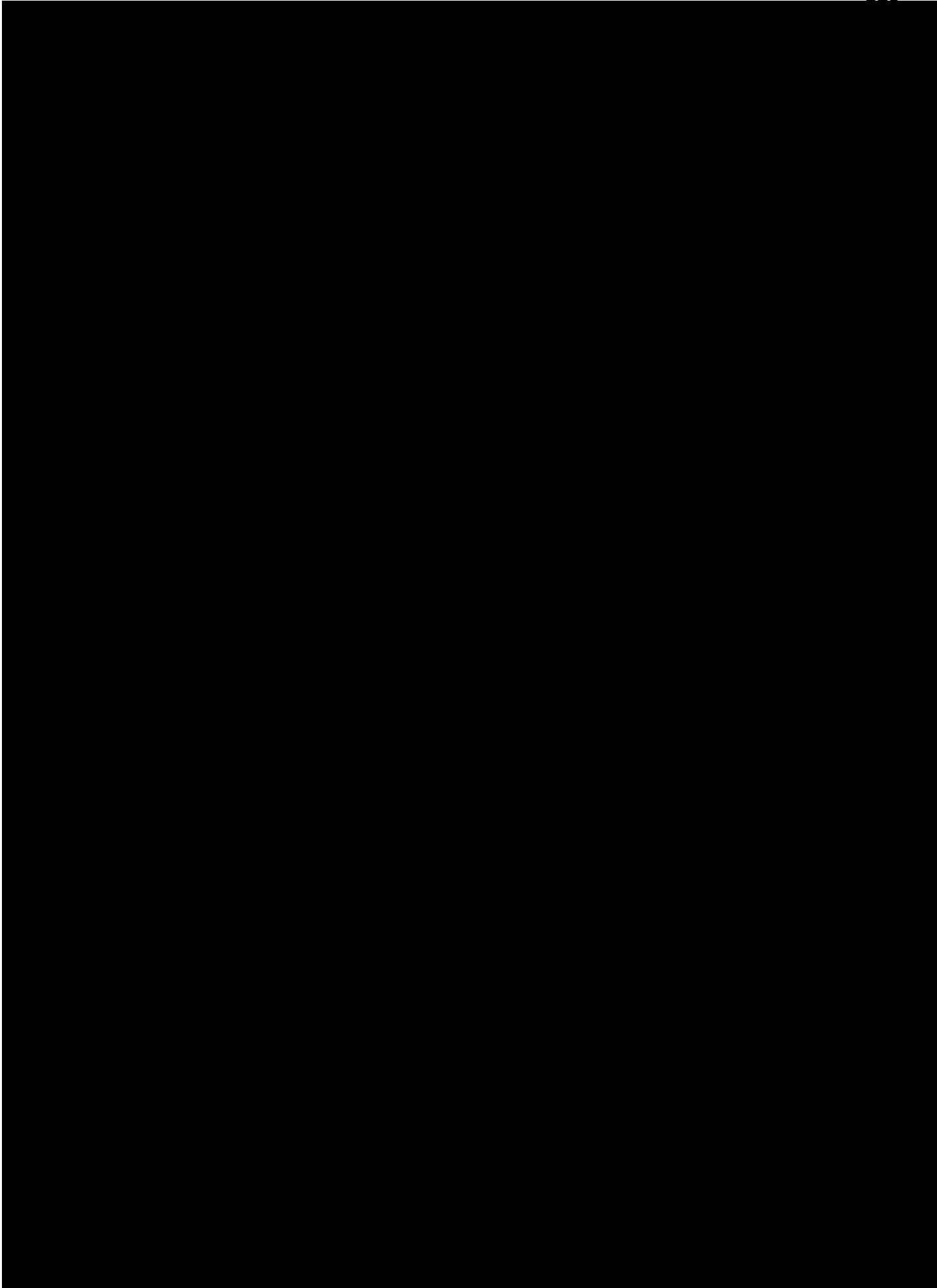


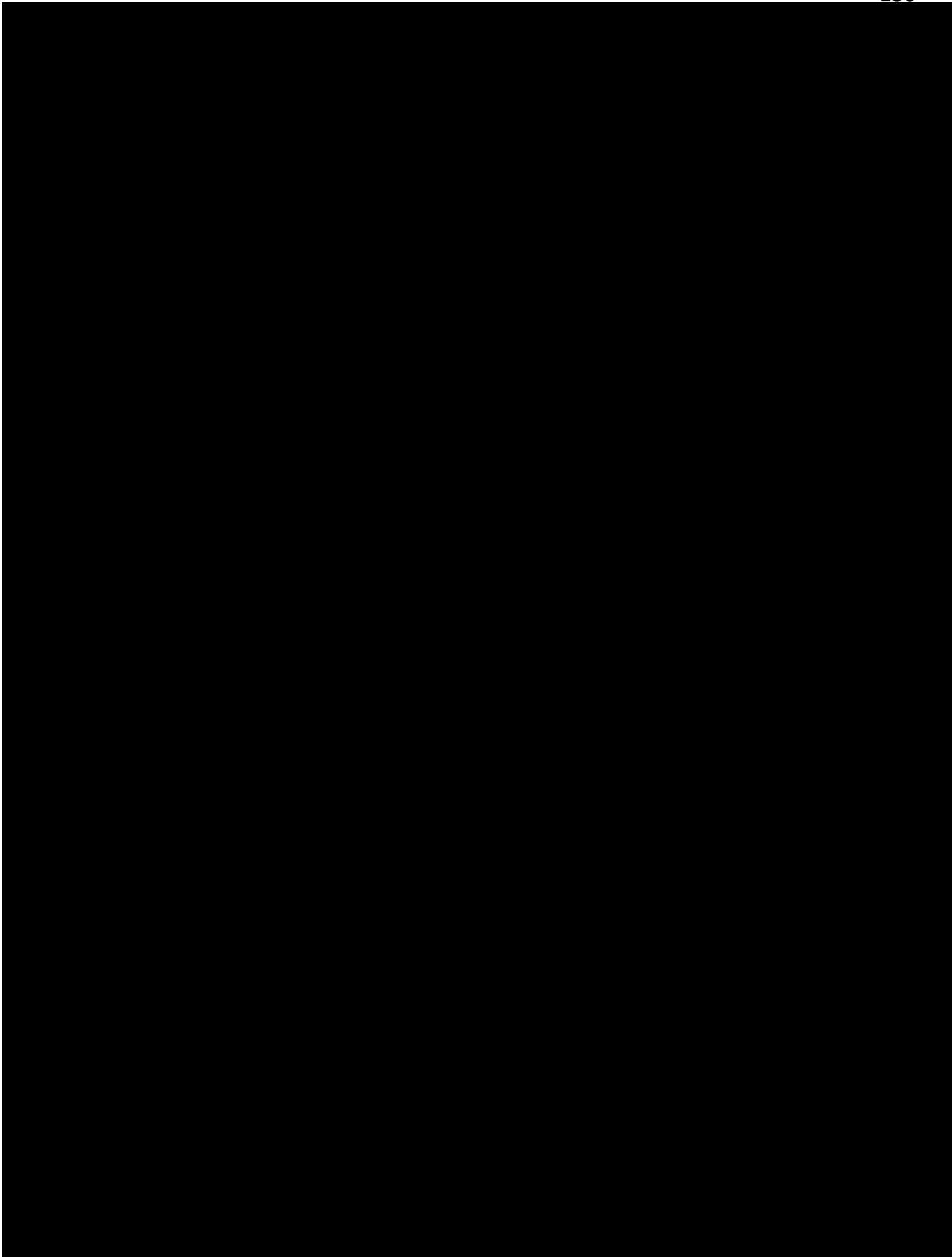


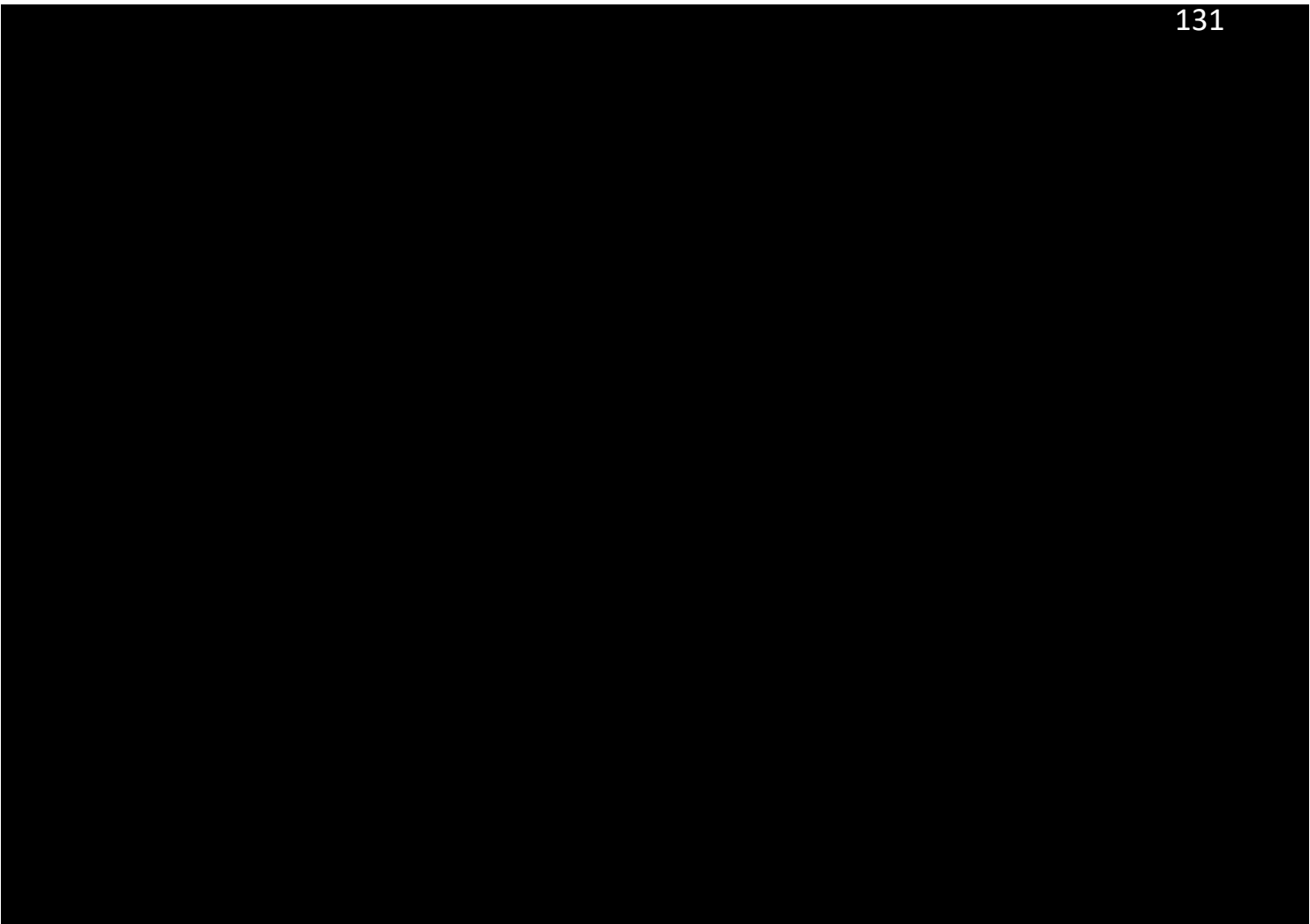














		<p>While the impact of this change on the Crown's ability to uphold its Treaty obligations in the context of each affected legislative regime is unclear, it is likely to at least be seen to signal a shift in the Crown's position on the status and importance of the Treaty. This could reduce the importance decision-makers place on Treaty considerations.</p> <p style="text-align: center;">-</p>
<b>Certainty</b>	0	<p>Agency engagement has highlighted that those who make decisions under or administer Acts broadly understand how to implement existing provisions and that in most instances the weightings of different Treaty standards are supported by well-established practice approaches and a significant body of case law. Having some Treaty directions impose more onerous obligations than others can also helpfully indicate where Parliament considers Treaty obligations to be most strongly engaged.</p> <p>Changing the weighting of the direction of existing provisions risks increasing uncertainty and litigation, at least in the short- to medium-term while new practice approaches are established and some new provisions may be tested by the Courts. [REDACTED]</p> <p>[REDACTED] As stated above, the impact of this change would be context specific and depend on the nature of the Treaty interest(s) and the provision type.</p> <p style="text-align: center;">--</p>
<b>Feasibility</b>	0	<p>The feasibility of this option would vary depending on the specific provision and requires closer consideration. This change could impact the interpretation and/or operative effect of a broad range of provisions in an Act. Establishing how this change could be implemented may therefore not be straightforward for some provisions, particularly long-standing provisions that are supported by well-established practice approaches and operational guidance.</p> <p style="text-align: center;">-</p>
<b>Durability</b>	0	<p>The Waitangi Tribunal's report, <i>Ngā Mātāpono</i>, indicates that Māori claimants are particularly concerned over any changes that would seek to reduce or remove existing Treaty protections in legislation. This suggests that this option is unlikely to be well-received by Māori, particularly given the lack of engagement to date. This indicates that this option may be less durable than the status quo. This option may also be less durable in situations where the Crown's Treaty duty is found to be higher than the direction provided in legislation, e.g. by the Waitangi Tribunal.</p> <p style="text-align: center;">-</p>
<b>Overall assessment</b>	0	<b>-5</b>

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

103. Retaining the status quo is the preferred option. The weighting of existing provisions is generally well-understood and often supported by well-established practice approaches and significant case-law. Having some Treaty directions impose more onerous obligations than others can helpfully indicate where Parliament considers Treaty obligations to be most strongly engaged.
104. Option Five is unlikely to meet the objective of ensuring Treaty provisions are clear as to how the Treaty applies in the context of each legislative regime, to reduce uncertainty and support better compliance. [REDACTED]
105. The effect of Option Five on the Crown’s ability to uphold its Treaty obligations is unclear. Impacts would be context specific and depend on the nature of the Treaty interest(s) and the provision type. At a high-level, this change is likely to be seen to signal a shift in the Crown’s position on the status and importance of the Treaty, which could have a cooling effect on the importance decision-makers place on Treaty considerations.
106. Option Five has no apparent benefits and risks significant damage to the Māori-Crown relationship as it is likely to be seen as reducing existing Treaty protections in legislation. This negative impact is likely to be exacerbated by the lack of consultation with Treaty partners.

**Is the Minister’s preferred option in the Cabinet paper the same as the agency’s preferred option in the RIS?**

107. The preferred option in the Cabinet paper is in line with Option Five. The Minister of Justice proposes that in all situations where a standard is needed, no higher standard than “take into account” should be used. The Minister considers that, in most cases, requirements to “give effect” to the Treaty principles do not promote the balanced consideration of all relevant factors in decision-making.
108. The Minister also considers that the “take into account” standard will not work in all instances and should primarily apply to descriptive and operative provisions. It does not apply to purpose provisions, long titles, and appointment provisions as those provisions do not typically impose standards of obligations.

**What are the marginal costs and benefits of the preferred option in the Cabinet paper?**

<b>Affected groups</b> (identify)	<b>Comment</b> <i>nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks.</i>	<b>Impact</b> <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	<b>Evidence Certainty</b> <i>High, medium, or low, and explain reasoning in comment column.</i>
<b>Additional costs of the preferred option compared to taking no action</b>			

Government agencies	One-off legal costs to better understand the impact of the change on operations under each affected Act.	Unknown	Low Impacted agencies have not been consulted on this proposal. Costs are likely to vary depending on the specific Act.
	One-off costs associated with updating/redesigning existing practice approaches and operational guidance.	Unknown	Low As above.
	Costs associated with providing information and/or training to those impacted by the change.	Unknown	Low As above.
Crown entities and other statutory bodies	Likely similar costs to those for Government agencies.	Unknown	Low Impacted parties have not been consulted on this proposal.
Crown	Risk of damage to the Māori-Crown relationship as the proposal is likely to be seen as reducing existing Treaty protections in legislation and because Treaty partners have not been consulted.	High	Medium Ngā Mātāpono, highlights that claimants are concerned over any change that would seek to limit or remove Treaty provisions from legislation. Lack of engagement to date is contrary to Treaty principles and Waitangi Tribunal recommendations. <sup>28</sup>
	Expected increase in litigation costs as Māori may file new claims with the Waitangi Tribunal and because updated provisions may be re-litigated in the Courts.	Not available	Low This has not been quantified in the time available.
Māori	Possibility for wide ranging impacts on Māori social, cultural, economic, and environmental interests.	Unknown	Low Analysis of the impact of this change is incomplete and will be context-specific. In some cases where there is a significant Māori interest, the particular formulation may make little practical difference to the Court's interpretation.

<sup>28</sup> Ngā Mātāpono, 2024.

	<p>Resources necessary to fully understand how the change will affect Māori interests.</p> <p>Damage to the Māori-Crown relationship (for reasons set out above).</p> <p>Costs for Māori associated with participating in Waitangi Tribunal inquiries, including time, energy, legal and financial costs</p> <p>Any litigation costs as updated provisions are tested by the courts.</p>	<p>Unknown</p> <p>High</p> <p>High</p> <p>Low</p>	<p>Low</p> <p>There has been no consultation with Māori on this proposal.</p> <p>Medium</p> <p>See above.</p> <p>Medium</p> <p>It is uncertain if Māori will file further claims.</p> <p>Low</p> <p>There has been no consultation with Māori on this proposal.</p>
Wider public	<p>Expected minimal monetary costs.</p> <p>Any litigation costs as updated provisions are tested by the courts.</p>	<p>Low</p> <p>Low</p>	<p>Low</p> <p>There has been no public consultation.</p> <p>Low</p> <p>As above.</p>
<b>Total monetised costs</b>	<p>A range of implementation costs for government agencies and statutory bodies. Possible costs for Māori to understand how the change will affect their interests. Possible costs for the Crown and Māori associated with participating in Waitangi Tribunal proceedings and potential litigation in the Courts.</p>	<p>Not available</p>	<p>Low</p> <p>Our understanding of the costs associated with this change is limited due to the lack of consultation and the limited time available.</p>
<b>Non-monetised costs</b>	<p>Potential for damage to the Māori-Crown relationship. Possibility for wide ranging impacts on Māori social, cultural, economic, and environmental interests. Potential for disruption of social cohesion.</p>	<p>Medium/High</p>	<p>Medium</p> <p>Ngā Mātāpono highlights that claimants are concerned over any change that would seek to limit or remove Treaty provisions from legislation. Lack of engagement to date is contrary to Treaty principles and Waitangi Tribunal recommendations. Recent</p>

			nation-wide protests in response to the Treaty Principles Bill suggests the Māori-Crown relationship is currently in a fragile state.
<b>Additional benefits of the preferred option compared to taking no action</b>			
Government agencies	--	--	--
Crown Entities and other statutory bodies	--	--	--
Crown	--	--	--
Māori	--	--	--
Wider public	--	--	--
<b>Total monetised benefits</b>	--	--	--
<b>Non-monetised benefits</b>	--	--	--

## Section 3: Delivering an option

---

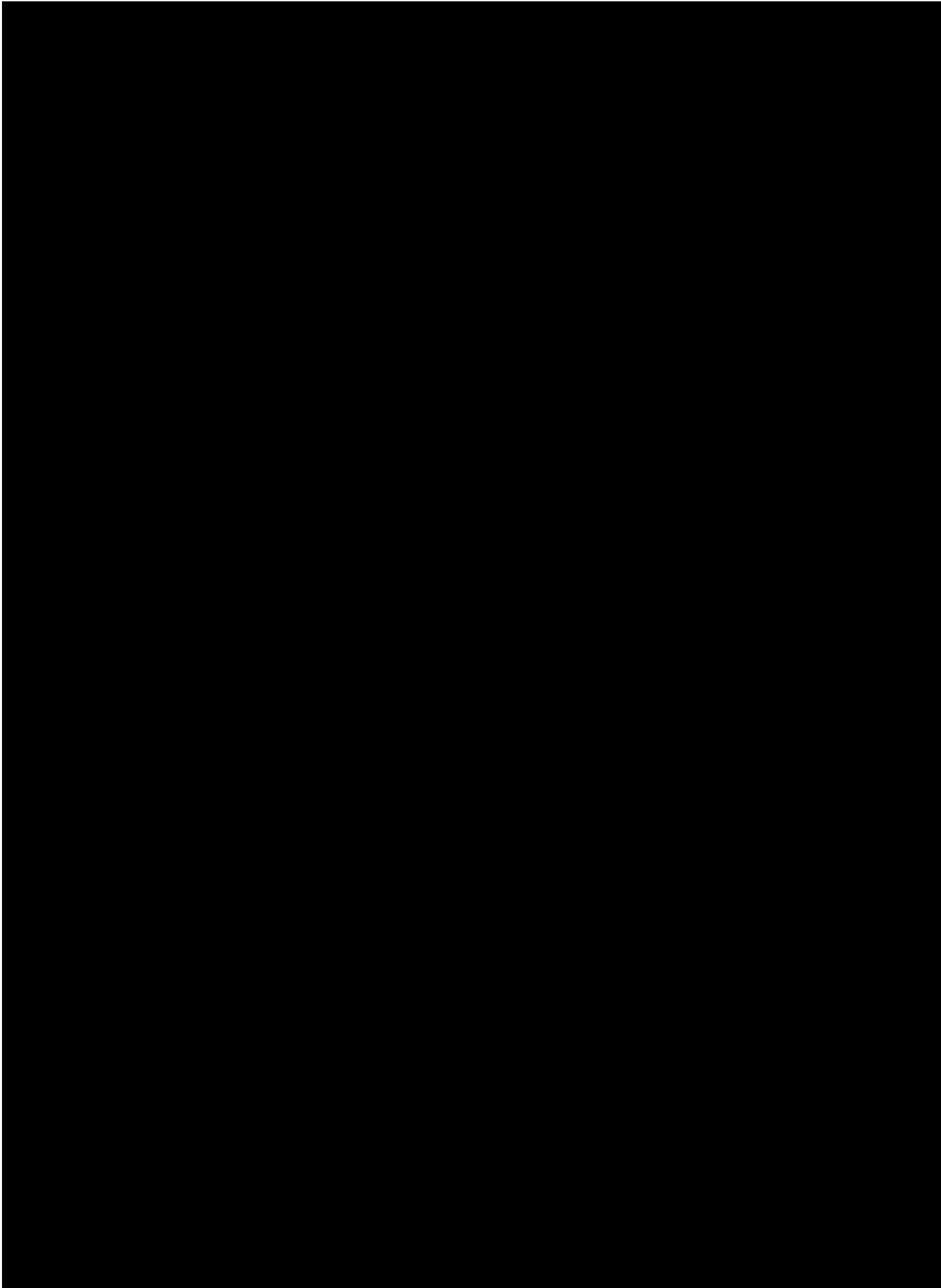
### How will the proposal be implemented?

109. If Cabinet approves the proposed measures, a Bill or Bills will likely be enacted in mid-2026. Following commencement, any changes would need to be implemented by those responsible under each Act.

110. Decisions on how to effectively implement these amendments would benefit from consultation with key stakeholders, including Māori as Treaty partners and other statutory bodies that will be directly responsible for the ongoing operation and/or enforcement of any changes.

111. The table below provides high-level comments on arrangements for the implementation of each proposal, if agreed to:

Proposal	Comment
<p><b>Repeal section 536A(1) of the Education and Training Act 2020.</b></p>	<p>The Cabinet paper leaves it open as to whether the provision would be repealed in its entirety, or just the references to the Treaty and Treaty principles would be removed. The Minister of Justice, in consultation with the Ministerial Oversight Group and the Minister responsible for each Act is seeking Cabinet authorisation to make further decisions on such matters.</p> <p>If the provision is amended or repealed, the DRS rules may also need to be amended. DRS operators would then be required to adjust their practice approaches.</p> <p>MoE will provide implementation support as appropriate and will be responsible for communicating any changes and their implications to relevant Māori groups.</p>



	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
<p><b>Amend all Treaty standards to be no higher than “take into account”</b></p>	<p>If amendments are progressed in line with this proposal, each responsible agency will be responsible for considering how these changes impact current operations under their Act(s). The Ministry of Justice can support this process as steward of the constitutional system.</p> <p>Where appropriate, operational guidance would need to be either issued or updated and key stakeholders (including Treaty partners) would need to be notified of the changes and their implications. Educational materials and communications strategies may also be effective for minimising implementation risks.</p>

### **How will the proposal be monitored, evaluated, and reviewed?**

112. As part of its regulatory stewardship function, the Ministry of Justice will be responsible for monitoring the impact of these changes on legal certainty. This can be achieved within baseline funding and will involve monitoring emerging case law.
113. The agencies responsible for each of the relevant Acts will primarily be responsible for overseeing the effectiveness of any changes. This may involve seeking the views of relevant statutory bodies and Māori stakeholders, which can likely be achieved through existing channels.
114. More detailed information on monitoring and evaluation would require further consultation with relevant agencies and statutory bodies. The Minister for Justice has directed a process that has not enabled this consultation to occur to date.

## Appendix A – Proposals exempt from Regulatory Impact Statement requirements

The Ministry for Regulation has determined that the following proposals are exempt from the requirement to provide a Regulatory Impact Statement on the grounds that they have no or only minor economic, social, or environmental impacts:

	PROPOSAL	RELEVANT ACT(S)	COMMENT
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
	[REDACTED]	[REDACTED]	[REDACTED]
5.	Amend several acts to standardise the language used to describe the Treaty itself (ie ‘the Treaty’/’te Tiriti’), in a policy-neutral fashion.	Amendments of this nature are an option for all in scope Acts.	The intention of this proposal is to standardise the drafting of Treaty provisions to address unexplained variation, while retaining the policy intent of the provisions. The Parliamentary Counsel Office would develop

			appropriate wording to meet this object through drafting.
6.	Amend several acts to clarify the extent and nature of Treaty responsibilities imposed on Crown Entities or non-Crown actors.	<p>Amendments of this nature are an option for:</p> <ul style="list-style-type: none"> <li>■ [REDACTED]</li> <li>• Education and Training Act 2020</li> <li>■ [REDACTED]</li> <li>■ [REDACTED]</li> <li>■ [REDACTED]</li> <li>■ [REDACTED]</li> </ul>	The intention of this proposal is to clarify the status quo. It is not intended to be a policy change.
7.	Standardise the formulation for appointment provisions.	[REDACTED] the Education and Training Act 2020 (section 476(4)(b)(v)).	The intention is to standardise the language used. For the Education Act this may involve amending the requirement for “understanding of the partnership principles” to be in line with other capability requirements that do not single out one specific Treaty principle. We do not consider this would have more than a minor impact as all Treaty principles are interrelated and the Treaty as a whole is based on a promise of partnership between Māori and the Crown.



# Cabinet

## Minute of Decision

---

*This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.*

---

### Review of References to the Principles of the Treaty of Waitangi in Legislation: Next Steps

Portfolio                      Justice

On 23 February 2026, following reference from the Cabinet Social Outcomes Committee, Cabinet:

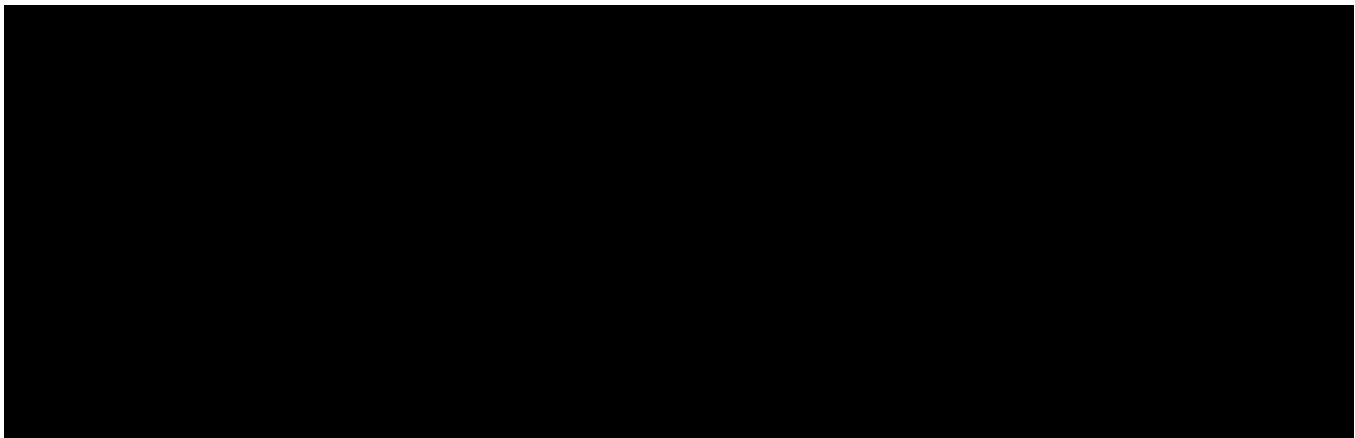
#### Background

- 1        **noted** that in April 2025, the Cabinet Social Outcomes Committee (SOU) agreed to establish a Ministerial Oversight Group for the review of references to the Treaty principles in legislation (the review) and an Advisory Group to provide advice to the Oversight Group [SOU-25-MIN-0105];
- 2        **noted** that in April 2025, SOU also invited the Minister of Justice to report back to Cabinet on behalf of the Ministerial Oversight Group to seek decisions on an approach to engagement with Māori groups and relevant stakeholders, based on the Oversight Group's initial proposals [SOU-25-MIN-0105];

#### Advisory Group recommendations

- 3        **noted** that the Advisory Group delivered its final report to the Ministerial Oversight Group on 8 August 2025;
- 4        **noted** that the Advisory Group made general recommendations and specific recommendations for each provision in scope of the review, which are outlined in its report attached at Appendix B to the submission under SOU-25-SUB-0184;

#### Proposals to repeal or amend Treaty provisions



9 [Redacted]

10 [Redacted]

11 **agreed** that section 536A(1) of the Education and Training Act 2020 should be amended or repealed so that dispute resolution service operators, which are private entities, do not have Treaty requirements;

12 [Redacted]

13 [Redacted]

14 [Redacted]

15 [Redacted]

16 **agreed** that references within scope of this review should be amended so that in situations where a “Treaty standard” is needed, which indicates the strength or nature of the Treaty obligation, no higher standard than “take into account” is used;

17 **agreed** that, to standardise Treaty provisions, a reference to both the Treaty of Waitangi and te Tiriti o Waitangi should be used in all instances, and provisions should retain references to Treaty principles;

18 **noted** that the Advisory Group made further technical observations relating to drafting, appointment provisions, and clarifying Treaty duties on actors who are not core-Crown, and that the Minister of Justice will receive advice from officials on these further standardisation changes as drafting of a Bill progresses;

**Application to future legislation**

19 **agreed** that the approach to standardisation agreed by Cabinet will (unless it is inappropriate to do so) be applied to future legislation to ensure that the benefits of increased certainty across the statute book is maintained;

20 **agreed** that, where the Treaty is found to be relevant to future legislation, a standard form descriptive Treaty provision should be included as the presumed preference unless it is inappropriate in the circumstances;

**Engagement decisions**

21 **noted** that the Minister of Justice intends to consult the National Iwi Chairs Forum on Cabinet’s decisions following Cabinet approval and prior to final approval of the Bill;

**Further scope refinements**

22 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

23 **agreed** that provisions referring to the Treaty itself in the Education and Training Act 2020 also be included in the review;

**Legal challenges to the review**

24 **noted** that the Waitangi Tribunal has concluded its urgent inquiry into the review, and has found that the Cabinet-agreed purpose and process of the review would breach the Treaty principles;

25 **noted** that further claims may be brought to the Waitangi Tribunal in relation to proposals to repeal or amend specific Treaty principles provisions;

**Drafting of legislation**

26 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions;

27 [REDACTED]

28 **authorised** the Minister of Justice, in consultation with the Ministerial Oversight Group and the Minister responsible for each Act, to make further decisions, in line with the policy decisions agreed by Cabinet, where necessary;

29 **authorised** the Minister of Justice to make further decisions, in line with the policy decisions agreed by Cabinet, on any minor and technical issues that arise during drafting of the Bill;

30 **noted** that the Minister of Justice proposes introducing amending legislation to give effect to the outcome of the review within this Parliamentary term;

**Communications**

- 31 **noted** that all communications will be managed through the Office of the Minister of Justice, in consultation with the Office of the Leader of New Zealand First;
- 32 **noted** that the Minister of Justice does not plan to proactively release the paper under SOU-25-SUB-0184.

Rachel Hayward  
Secretary of the Cabinet

*Secretary's Note: This minute replaces SOU-25-MIN-0184. Cabinet agreed to amend paragraph 9.*

---