

# HEI WHAKATAU | BRIEFING

## Scoping a review of the Waitangi Tribunal legislation

<b>Date:</b>	26 April 2024	<b>Priority</b>	Medium
<b>Classification</b>	In Confidence	<b>Tracking Number</b>	48217

<b>Action sought</b>	<b>Date action required by</b>
It is recommended that you:  1. Meet with officials to discuss initial options proposed in this briefing.	3 May 2024

Contact for telephone discussion (if required)				
Name	Position	Telephone	Mobile	1 <sup>st</sup> contact
Paula Rawiri	Deputy Secretary, Policy Partnerships		S 9(2)(a)	
Laine Fisher	Kaiwhakahaere, Policy Partnerships			√

Other Agencies Consulted					
<input type="checkbox"/> MBIE	<input type="checkbox"/> MoJ	<input type="checkbox"/> NZTE	<input type="checkbox"/> MSD	<input type="checkbox"/> TEC	<input type="checkbox"/> MoE
<input type="checkbox"/> MFAT	<input type="checkbox"/> MPI	<input type="checkbox"/> MfE	<input type="checkbox"/> DIA	<input type="checkbox"/> Treasury	<input type="checkbox"/> MoH
<input type="checkbox"/> MHUD	<input type="checkbox"/> Other				

<b>Attachments</b>	1. A3 – Systems Landscape of Te Tiriti o Waitangi/The Treaty of Waitangi.
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- |                                               |                                              |
|-----------------------------------------------|----------------------------------------------|
| <input type="checkbox"/> Approved             | <input type="checkbox"/> Declined            |
| <input type="checkbox"/> Noted                | <input type="checkbox"/> Needs change        |
| <input type="checkbox"/> Seen                 | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn           |



26 April 2024

Te Minita Whanaketanga Māori

## Coalition Agreement – Waitangi Tribunal

### Purpose

1. To seek your initial direction on the scope of the Government's Coalition Agreement to "amend the Waitangi Tribunal legislation to refocus the scope, purpose and nature of its inquiries back to the original intent of that legislation".<sup>1</sup>
2. We have identified three potential options for the scope of a review based on a range of policy rationale for reviewing the Waitangi Tribunal. We recommend we discuss these options with you to understand the intended scope. These options note the broader system around the Waitangi Tribunal, the related pieces of work within this system as well as key roles and responsibilities.

### Background

3. The Waitangi Tribunal (the Tribunal) was established through the Treaty of Waitangi Act 1975 (the Act) as a permanent commission of inquiry. The purpose of the Act provided the Tribunal with jurisdiction to inquire into contemporary issues relating to acts or omissions of the Crown, make findings and non-binding recommendations.
4. Amendments were made to the Act in 1985 to extend the Tribunal's jurisdiction to be able to consider historical Te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty) breaches back to 1840. The inclusion of historical claims has been a useful mechanism to support progress in Treaty negotiations and settlements.
5. Subsequent amendments have sought to further utilise the Tribunal to address remaining historical Treaty breaches and progress towards a post-settlement environment. The Tribunal can inquire into two types of claims:
  - a) Historical claims - matters that occurred **before** 21 September 1992.<sup>2</sup>
  - b) Contemporary claims - matters that occurred on or **after** 21 September 1992.<sup>3</sup>
6. Any person of Māori descent may submit a claim, including on behalf of a 'group'. The claim must allege that they are, or are likely to be, prejudicially affected by any legislation, policies, actions, or omissions that were inconsistent with the principles of the Treaty.<sup>4</sup>

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<sup>1</sup> Coalition Agreement New Zealand National Party and New Zealand First 54<sup>th</sup> Parliament.

<sup>2</sup> The Treaty of Waitangi Act 1975, s2.

<sup>3</sup> The Treaty of Waitangi Act 1975, s2.

<sup>4</sup> The Treaty of Waitangi Act 1975, s2.



7. The Tribunal's strategic focus over the past 10 years have sought to assist the restoration and health of the Crown–Māori Treaty relationship and enhance access to justice for all claimants by ensuring that:
  - a) all historical Treaty claims are resolved;
  - b) disputes arising from the settlements process are heard and resolved;
  - c) any urgent claims are heard and reported on;
  - d) the backlog of kaupapa claims is addressed;
  - e) the backlog of contemporary claims is addressed; and
  - f) new contemporary claims are able to be heard and reported on expeditiously.<sup>5</sup>

### **Responsibilities and broader system relating to the Waitangi Tribunal**

8. The Treaty of Waitangi Act 1975 is administered by Te Puni Kōkiri, and as such, is within your portfolio as the Minister for Māori Development. The Act sits within a broader constitutional system relating to how the Crown gives effect to the Treaty by:
  - a) acknowledging the signing and wording of the Treaty (both versions);
  - b) providing the Waitangi Tribunal as a 'dispute resolution' mechanism; and
  - c) giving practical application of the Treaty principles through the Tribunal's consideration of claims and recommendations.
9. The **attached** A3 sets out the systems landscape of the Treaty. It illustrates related priority work programmes that will be necessary to consider when undertaking a review of the Act. The attached A3 also includes an overview of the broad options for review, which are described below.

### **Proposed Options for Consideration**

10. We have considered the wording of the coalition agreement relating to the Waitangi Tribunal. In order for us to advise you on options for giving effect to this commitment, we seek your steer on the scope of the review. We have identified three potential scopes for the review based on general policy rationale for reviewing the Waitangi Tribunal as a permanent commission of inquiry.
11. The consideration of the Waitangi Tribunal and its functions is a process that forms part of the Crown's good governance and stewardship responsibilities. However, the process for undertaking the review must consider the constitutional nature of the Treaty as well as the link between the Tribunal and a healthy Māori Crown partnership. Following your steer on the scope, we can provide you with advice and options on how to undertake such a review, including the level of independence of such a review.

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<sup>5</sup> Te Rōpū Whakamana i te Tiriti o Waitangi. The Waitangi Tribunal. *Strategic Direction 2014-2025*.



***Option 1: A review of the substantive amendments to the Act***

12. This option would be a review of the substantive changes to the Act since its enactment. This focuses on the wording in the coalition agreement to “amend the Waitangi Tribunal legislation to refocus the scope, purpose and nature of the Tribunal’s inquiries back to the original intent of the legislation.”<sup>6</sup>
13. Our interpretation of the wording of the coalition agreement is that the Tribunal would refocus its inquiries to investigate contemporary claims. The objective for this form of review could be to determine whether the substantive changes made to the legislation have been effective in achieving the intent of the legislation.
14. Consideration would need to be given to the few remaining historical claims which are yet to be completed. The district inquiry programme, which considers the historical claims, is well-advanced with only three active inquiries left. The review of these provisions should consider how the remaining historical claims can be addressed in a timely manner.
15. A similar scoped review was the review of the 2014 Family Justice Reforms. An independent panel worked with key groups involved in the broader family justice sector to assess the impact of the 2014 changes to the Family Court and made recommendations on how to improve outcomes for families. These recommendations were then considered by government, with many leading to legislative changes to the Family Court.

***Option 2: A review to modernise the Act***

16. This option would involve reviewing the Act to identify ways to modernise the Tribunal’s inquiries and legislated processes. The objective for this form of review could be to determine whether the components of the legislation are no longer achieving the intent of the legislation and need to be modernised.
17. The review would be technical in its focus and would seek to address the increasing number and complexity of contemporary claims. This would result in improvements to the efficiency and effectiveness of the Tribunal.
18. This option would also give effect to the Coalition Agreement by being focused on effectively addressing contemporary claims. The review should also ensure that historical claims can be completed in a timely manner.
19. This review would be analogous to the Judicature Modernisation work. This was initially undertaken by the Law Commission and focused on reorganising and modernising judicial processes. This included appointment of judges, judicial reporting, electronic operation of court processes and other procedural matters. The recommendations were then considered by the Government, with many being passed into legislation.

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<sup>6</sup> Coalition Agreement New Zealand National Party and New Zealand First 54<sup>th</sup> Parliament.



### ***Option 3: A Future-Focussed Review of the Waitangi Tribunal***

20. This option would involve a comprehensive review of what form of dispute resolution mechanism is needed for Treaty claims in a post-settlement environment. The objective for this form of review could be to determine whether the dispute resolution mechanism model, outlined in the legislation, could be improved to better achieve desired Māori/Crown outcomes.
21. This would consider what the next evolution of the Tribunal is needed, including the form, role, purpose, functions, jurisdiction and operation under the Act. As such, it would be a significant review and likely require significant resource to undertake. If this scope of review is undertaken, it is likely to have fiscal implications while requiring notable time and engagement to complete.
22. We would look to domestic examples, such as the establishment of the Supreme Court or work undertaken by the Constitutional Advisory Panel in 2011. We would also consider international examples to support our advice on such a review. The international examples would focus on the insights and learnings from other jurisdictions given the unique elements of the Treaty.
23. A clear scope for this review will also be vital to ensure that such a review could be completed in a timely manner.

### **The review processes for each option**

24. All of the options provided seek to complete the Coalition Agreement commitment by the end of the Parliamentary Term. However, given the interconnected nature of this work, we would recommend consideration of how this work is sequenced alongside other work across the system. Following discussions with you on the general options, we can provide you with further information on timing and processes for conducting the work.
25. Subject to your direction, we would design the details of your preferred option for your further consideration. We are likely to recommend a level of independence to the review processes. This would then allow Te Puni Kōkiri to focus on the policy development work following any review. We will also likely suggest a level of collaboration and engagement across interested parties and Treaty partners to form the full picture of the Tribunal's work.
26. Ongoing engagement with the Tribunal Chairperson will be important for all options. We understand that the chairperson of the Tribunal has raised an interest in doing a review of the Tribunal's Strategic Direction 2014-2025. The intended review would assess progress against the current strategic direction and determine what work priorities and planning should be to 2035. The Chairperson notes that this review could also recommend what the Tribunal's role should become after 2035, and how it could discharge its statutory duties in the most efficient manner.

### **Next Steps**

27. We recommend that we discuss these initial options with you as the first step in the process. Following your initial direction, we would then provide you with further information and considerations on your preferred approach. This would include



materials for engagement and discussion with key Ministers and other stakeholders you may wish to socialise the approach with.

**Recommended Action**

28. It is recommended that you:

- 1) **agree** to discuss the general options provided with officials at your earliest convenience. **Yes / No**

Paula Rawiri  
Hautū – Te Puni Hononga Kaupapa Here

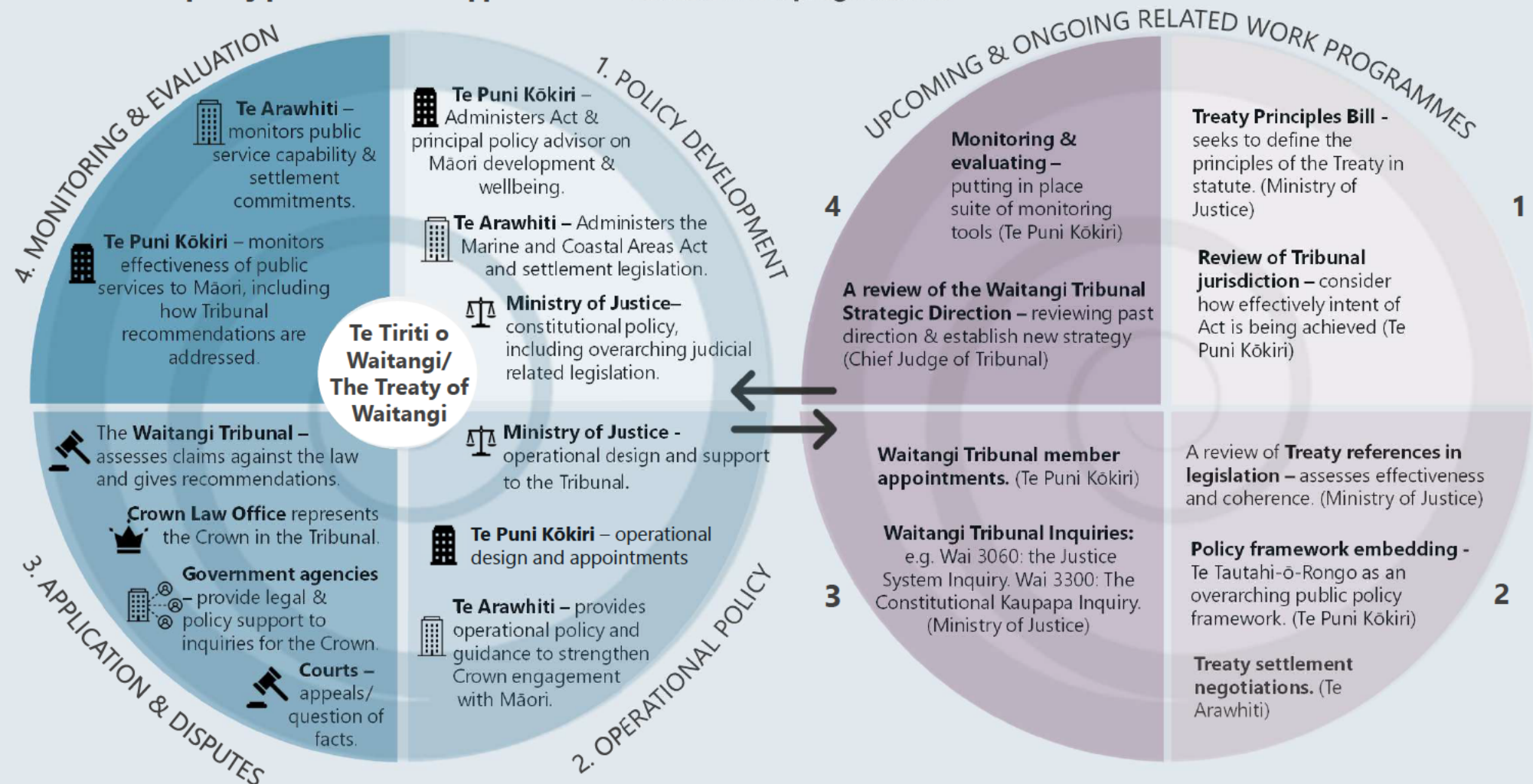
Hon Tama Potaka  
Te Minita Whanaketanga Māori

Date: \_\_\_\_ / \_\_\_\_ / 2024



# Systems landscape of the Te Tiriti o Waitangi/Treaty of Waitangi

## Initial view of policy processes and application to related work programmes



## Proposed options for consideration:

**Option 1: Review of the substantive amendments to the Act** - a review of changes made to the Treaty of Waitangi Act since enactment. This would assess the effectiveness of the changes to the Act to achieve the intent of the legislation.

**Option 2: Review to modernise the Act** - a review of the Waitangi Tribunal Act to improve the **efficiency and the effectiveness** of the Tribunal. This would assess how the Tribunal could be modernised to meet its intent.

**Option 3: Future-focused review of the Act** - a substantive review of the Waitangi Tribunal's role, purpose, function and jurisdiction. This would assess how the Tribunal could evolve to meet the changing Māori/Crown landscape.