4. The Treaty of Waitangi and Treaty settlements

The Treaty of Waitangi ("the Treaty") has been described as "part of the fabric of New Zealand society" and is of vital constitutional importance. The development process of policy and legislation, as well as the final product, should show appropriate respect for the spirit and principles of the Treaty.

The Treaty requires that the Government and Māori act towards each other reasonably and in good faith—akin to a partnership. Two important ways to achieve this is through informed decision making (which includes effective consultation by government) and through the active protection of Māori rights and interests under the Treaty by the Government.

Due to its constitutional significance, in the absence of clear words to the contrary the courts will presume that Parliament intends to legislate in a manner that is consistent with the principles of the Treaty and interpret legislation accordingly. The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, the Treaty [7.60(a)].

Guidelines

4.1. Does the proposed legislation affect, or have the potential to affect, the rights or interests of Māori under the Treaty?

Māori interests that will be affected by the proposed legislation should be identified.

Legislation may affect the rights and interests of Māori if it impacts on the relationship between the Government and Māori, or the possession, use or ownership of land, waterways, forests, fisheries, taonga and other resources. Taonga may include tribal heirlooms or weapons, as well as intangible treasures such as language, cultural practices and traditions.

The Treaty is a "living document". This refers to the common understanding that the intent and application of the Treaty will change as society and circumstances evolve, and that the interests of Māori to be protected under the Treaty are not only those that existed when the Treaty was signed. A Māori interest may arise in respect of the right to develop a resource that was either undiscovered or unexploited at the time the Treaty was signed. Interests might also be affected by the use of new technology, such as the ability of Māori to have access to television and radio broadcasts to promote culture and language.

4.2. Does the proposed legislation affect any matters that are the subject of an existing Treaty settlement?

New legislation must not be inconsistent with an existing Treaty settlement.

The Government is party to, and continues to negotiate, a number of Treaty settlements to provide redress for historical acts or omissions towards particular groups of Māori, and to improve their relationship with the Government.

Individual Treaty settlements are final, meaning the historical claims they settle and the settlement itself (with the exception of disputes over interpretation) may not be the subject of a further historical claim to the Waitangi Tribunal or the courts. The detail of each settlement is reflected in a Deed of Settlement that is given effect by legislation. Thorough consultation must take place with the relevant settlement group if new legislation has the potential to affect an existing Treaty settlement.

The Office of Treaty Settlements ("OTS")[24] is a unit within the Ministry of Justice responsible for negotiating Treaty settlements on behalf of the Government. The Post Settlement Commitments Unit within the Ministry of Justice was established to safeguard the durability of Treaty settlements. These units should be consulted if there is a possibility that the rights or interests concerned may be the subject of a prospective or existing settlement.

4.3. Are any of the rights and interests affected by the legislation potentially recognised at common law?

Any land, bodies of water or other resources potentially subject to customary title (or rights), and that might be affected by proposed legislation, should be identified.

The common law recognises Māori customary title (akin to a property right) and customary rights (which may include rights of use and access) in land and other natural features. Customary title and customary rights pre-date the Government's acquisition of sovereignty.

Recognition of Māori customary title and customary rights at common law is not dependent on the Treaty. Express language is required to extinguish any subsisting Māori customary title or customary rights. A statement that Parliament intends to legislate inconsistently with the principles of the Treaty will therefore not be sufficient to extinguish customary title.

The courts will generally hold that, unless voluntarily surrendered, abandoned or expressly extinguished in clear terms by legislation, customary title and customary rights will continue to have legal effect. Legislation that is intended to extinguish or apply to customary title and customary rights will require clear and precise wording to that effect.

Extra care must be exercised when dealing with customary title or rights relating to riverbed, lakes, the foreshore and seabed, as these often pose difficult legal issues.

4.4. Should Māori be consulted?

The Government must make informed decisions where legislation will affect, or have the potential to affect, the rights and interests of Māori.

Consultation is not required in all cases; however, it is one of the principal mechanisms through which the Government (via Ministers and government agencies) discharges its responsibility to make informed decisions to act in good faith towards Māori. A failure to effectively consult may be seen as a breach of the principles of the Treaty and harm the relationship between Māori and the Government.

[24] http://www.ots.govt.nz

A failure to consult may also result in Parliament passing legislation without appreciating fully the variety of views and interests that may be relevant. This may result in difficulties in applying and interpreting the legislation at a later date.

4.5. Who should be consulted?

Consultation must target Māori whose interests are particularly affected.

Government policies and legislation will have the ability to affect different groups of Māori in different ways. It is therefore important to identify who might be specifically affected and ensure their views are sought and fully considered. As no one body speaks for all Māori on all matters, iwi or entities that are specifically affected must be identified and consulted. For matters concerning particular regions, it may be appropriate to focus consultation on the iwi who have customary interests in that area.

The OTS will also be able to advise on which iwi have a representative body recognised by the Crown for Treaty settlement purposes.

The CabGuide webpage on "Consultation with government agencies"[25] notes that departments should, after making their own initial assessments, consider consulting Te Puni Kōkiri on proposals that may have implications for Māori as individuals, communities or tribal groupings; and the Crown Law Office for constitutional issues including Treaty issues.

4.6. In the event of a conflict between the proposed legislation and the principles of the Treaty of Waitangi, does the legislation include additional measures to safeguard Māori interests?

When legislation has the potential to 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.

Two general classes of measures may be included in legislation to acknowledge or safeguard Māori rights and interests under the Treaty:

- **General measures:** These measures relate to the manner in which the legislation is administered or the way a power is exercised: For example, s 4 of the Conservation Act 1987[26] provides "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi". Section 9 of the State-Owned Enterprises Act 1986[27] provides "Nothing in this Act shall permit the Government to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

- **Specific measures:** The interests affected should be identified in the legislation along with the specific means of protecting them, such as the obtaining of consents if

[25] http://cabguide.cabinetoffice.govt.nz/procedures/consultation/departmental-consultation
[26] http://www.legislation.govt.nz/act/public/1987/0065/latest/DLM103610.html
[27] http://www.legislation.govt.nz/act/public/1986/0124/latest/DLM97377.html

consultation is deemed insufficient. For example, s. 4 of the Environmental Protection Authority Act 2011[28] provides:

"In order to recognise and respect the Government's responsibility to take appropriate account of the Treaty of Waitangi, -

(a) section 18 establishes the Māori Advisory Committee to advise the Environmental Protection Authority on policy, process, and decisions of the EPA under an environmental Act; and

(b) the EPA and any person acting on behalf of the EPA must comply with the requirements of an environmental Act in relation to the Treaty, when exercising powers or functions under the Act".

4.7. Does Parliament intend to legislate inconsistently with the principles of the Treaty of Waitangi?

Clear language is required where legislation is intended to be inconsistent with the principles of the Treaty.

In some circumstances the Government may wish to legislate in a manner that is inconsistent with the principles of the Treaty. In such circumstances it is essential for the legislation to clearly express this intention in the Act by the use of appropriate wording. The intention should also be reflected in the policy documentation that underlies the Act. If the intention is not clear, the courts will presume that Parliament intended to legislate consistently with the principles of the Treaty. This may yield results inconsistent with the intended policy outcome.

[28] http://www.legislation.govt.nz/act/public/2011/0014/latest/DLM3366813.html