



Intended for All Ministers
All Chief Executives
All Senior Private Secretaries
All Private Secretaries
All officials involved in contemporary Treaty of Waitangi issues

Better Co-ordination of Contemporary Treaty of Waitangi Issues

Introduction

- 1 This circular sets out guidelines and requirements agreed by Cabinet for Ministers and departments involved in contemporary Treaty of Waitangi issues, including:
 - 1.1 processes for appointing lead Ministers and agencies for contemporary Treaty of Waitangi-related proceedings in the Waitangi Tribunal or Courts, including kaupapa inquiries;
 - 1.2 a requirement for Ministers leading kaupapa inquiries to report to the Cabinet Māori Crown Relations: Te Arawhiti Committee (MCR) to seek Cabinet agreement on their proposed approach to those inquiries; and
 - 1.3 a requirement for Ministers to seek agreement from MCR before they (or their agencies) make decisions, or enter into formal discussions with Māori, about significant changes to policy, regulation, or public services that:
 - 1.3.1 respond to a contemporary Treaty of Waitangi issue; or
 - 1.3.2 are intended to specifically improve outcomes for Māori.
- 2 Nothing in this circular takes away from the Cabinet Directions for the Conduct of Crown Legal Business [CO (16) 2].

Background

- 3 As the historical Treaty of Waitangi settlement process concludes, conversations between Māori and the Crown around contemporary Treaty of Waitangi issues will become more frequent. This creates a significant opportunity for the Crown to engage positively with Māori and understand how it can improve the effectiveness of Crown policy and actions.

- 4 Cabinet has agreed to a number of mechanisms to help coordinate the Crown's responses to contemporary issues in order to take advantage of these opportunities, which are set out in this circular.

Contemporary Treaty of Waitangi issues

- 5 Contemporary Treaty of Waitangi issues are not limited to situations that have escalated into formal claims lodged with the Waitangi Tribunal or the courts. They include any situation where the Treaty partners are exploring whether Crown actions, omissions or policies are consistent with the principles of the Treaty of Waitangi.
- 6 Contemporary Treaty of Waitangi issues, in contrast to historical issues, are those relating to acts or omissions of the Crown after 21 September 1992.
- 7 All agencies should be proactive in ensuring their policy, regulatory, and service delivery functions are consistent with the Treaty of Waitangi.
- 8 In general, contemporary Treaty of Waitangi issues and claims should continue to 'lie where they fall' in terms of their subject matter and which Ministers and agencies have responsibility for the Crown policies or practices in question.

Kaupapa inquiries

- 9 The Waitangi Tribunal is conducting a series of inquiries into issues of pan-Māori or national significance; these are called the 'kaupapa inquiries'. Although they can cover both historical and contemporary issues, many of the inquiries are likely to have a significant contemporary policy aspect.
- 10 These stand apart from the regional district inquiries, and any discrete contemporary claims the Tribunal might consider.
- 11 The inquiry topics listed below are those set out by the Chairperson of the Waitangi Tribunal in the 2015 memorandum establishing the kaupapa inquiries process.

Kaupapa Inquiry Topics

- Māori military veterans
- Health services and outcomes
- Marine and Coastal Area (Takutai Moana) Act
- Mana Wāhine
- Housing Policy and Services
- Mana Tāne
- Constitution, self- government, electoral system
- Education services and outcomes
- Identity and culture
- Natural resources and environmental management
- Social services, social development
- Economic development
- Justice system
- Citizenship rights and equality

Process for appointing lead Ministers and agencies for kaupapa inquiries

- 12 Cabinet has agreed to a process and considerations for determining the lead Ministers and agencies for kaupapa inquiries [MCR-18-MIN-0003].
- 13 Lead agencies will be responsible for instructing the Crown Law Office (CLO) during the inquiry and leading the policy response to inquiry findings.
- 14 CLO will make an initial determination of the lead agency(s), as they are responsible for the conduct of Crown litigation¹ and they have experience of how inquiries are likely to evolve and which agencies will be best placed to respond.
- 15 Specifically, the process for appointing lead agencies and Ministers is:
- 15.1 CLO make an initial determination as to the lead agency (or joint lead agencies) for kaupapa inquiries, taking into account the agencies administering or responsible for the legislation, policy, or Crown actions/omissions most relevant to the proceedings; then
- 15.2 the Office for Māori Crown Relations - Te Arawhiti and CLO (in consultation with Te Puni Kōkiri and the proposed lead agencies) report jointly to the Minister for Māori Crown Relations: Te Arawhiti, the Minister for Māori Development, and the proposed lead Minister(s) for confirmation of this determination.

Reporting requirements for lead Ministers and agencies of kaupapa inquiries

- 16 Lead Minister(s) for kaupapa inquiries should report to MCR early in the preparation phase of an inquiry to seek approval to a Crown approach.
- 17 The exact timing of this report to MCR will be subject to the specific circumstances of the inquiry. The report should occur once it is clear what issues the inquiry is likely to focus on, but before the Crown is required to make significant or strategic decisions that could impact on the process or outcome of the inquiry.
- 18 These reports should include all information necessary for Ministers to make an informed decision about the Crown's approach, which could include (but is not limited to):
- 18.1 the issues the inquiry is likely to focus on, and the views the claimants are likely to adopt about these issues and their aspirations for what the Crown should do in response;
- 18.2 an assessment of the current and proposed Crown policy, regulatory, or service interventions relevant to the issues;
- 18.3 an assessment of the consistency of those interventions with the Treaty of Waitangi, and the broad scope to change those interventions to better respond to the issues raised, taking into account the public interest and the interests of non-Māori; and

¹ See for example CO (16) 2 Annex 1, paragraphs 2 and 9.1.3 where the Attorney-General and the Solicitor-General are noted as having constitutional responsibility for: determining the Crown's view of what the law is; ensuring that the Crown's litigation is properly conducted; and confirming that Treaty of Waitangi and Crown/Māori relationship matters are a core Crown legal matter.

18.4 a broad proposal as to how the Crown should approach the inquiry given all of the above considerations (including any relevant principles, bottom lines, significant choices, early Crown acknowledgements, alignment with current or pending reforms and limitations).

19 MCR can then consider the mandate it wishes to give the lead agencies around the Crown's approach, and any further reports it would like to receive as the inquiry progresses.

Costs of kaupapa inquiries

20 In general, agencies will be expected to absorb the costs of participating in kaupapa inquiries within baselines, as they represent the business-as-usual activity of ensuring policy is consistent with the Treaty of Waitangi.

21 Where absorbing costs within baselines is considered unmanageable, a case for additional funding can be put to Ministers during the lead agency appointment process or when reporting to MCR, for consideration through the Budget process.

Other Matters

Process for appointing lead Ministers and agencies for formal contemporary Treaty of Waitangi proceedings in the Waitangi Tribunal or Courts

22 CLO will make an initial determination of the lead agency (or joint lead agencies) for significant contemporary Tribunal proceedings and Court actions on contemporary Treaty of Waitangi issues, taking into account:

22.1 the agencies administering or responsible for the legislation, policy, or Crown actions/omissions most relevant to the proceedings; or

22.2 (for Court actions) which Ministers of the Crown are defending the action, or which actions of Ministers are at issue.

23 For contemporary Tribunal proceedings or significant Court actions, the Attorney-General will confirm the lead agency in discussion with the Minister for Māori Crown Relations: Te Arawhiti and relevant Ministers.

Reporting requirements for contemporary Treaty of Waitangi issues or policy changes

24 Ministers should report to MCR when they or their agencies are considering options or entering into formal discussions with Māori about the resolution of contemporary Treaty of Waitangi claims; or changes to policy, regulation, or service provision in the interests of Treaty of Waitangi consistency or effectiveness for Māori; **AND**

24.1 there is a Waitangi Tribunal finding of, or an expectation that the Crown will concede, a contemporary breach of the Treaty of Waitangi; **OR**

24.2 the changes being considered (or that are anticipated by Māori) are likely to be significant and precedent setting; including:

24.2.1 significant changes to institutional arrangements;

24.2.2 the provision of new or dedicated services, or direct funding to Māori with a significant fiscal impact;

- 24.2.3 regulatory change of a scale that would be likely to significantly exceed the threshold for a regulatory impact statement; or
- 24.2.4 having a significant impact on New Zealand's international relationships or obligations.

- 25 It is expected that a large-scale, delegated service model, or a comprehensive review of an agency's services (in terms of their effectiveness for Māori) would meet these thresholds. Conversely, a proposal to make an individual service, practice, or policy more effective for Māori would not.
- 26 This report should occur once agencies have a clear sense of Māori aspirations but before agencies or Ministers make statements or concessions that would commit the Crown to (or raise Māori expectations of) the actions described in paragraph 24 above.
- 27 This report should contain analysis of:
- 27.1 the issues and aspirations presented by Māori;
 - 27.2 the current or proposed Crown policy, regulatory, or service interventions relevant to these issues, including the consistency of these interventions or proposals with the Treaty of Waitangi; and
 - 27.3 a clear proposal for the Crown's position and proposed approach (including engagement strategy) to the issue in question, taking into account the wider public interest and the interests of non-Māori.
- 28 Where such a report would otherwise have gone to another Cabinet Committee, the responsible Minister(s) should discuss, with the Minister for Māori Crown Relations: Te Arawhiti and the relevant Committee Chair, the best way to ensure members of both relevant Committees can review and have input into the paper. Options could include referring the paper through both Committees before it goes to Cabinet or inviting those members from one Committee who are not members of the other to attend a specific meeting.

Regular contemporary Treaty of Waitangi issues update

- 29 The Minister for Māori Crown Relations: Te Arawhiti will present a regularly updated report to MCR on significant contemporary Treaty of Waitangi issues. This report will be prepared with input from agencies involved in contemporary Treaty of Waitangi issues.

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Note: This circular has been updated with minor edits to clarify the application of the requirements in paragraphs 22-23.