

BRIEFING: Options for approaches to Treaty provisions in the Corrections Amendment Bill

| | | | |
|------------------------------------------------------|-----------------------------------------------------------------|-----------------------|-----------------------------------------------------------|
| To Hon Mark Mitchell, Minister of Corrections | | | |
| Date | 8 February 2024 | Deadline | 13 February 2024 |
| B number | B4671 | Priority | Medium |
| Key contact | Kerry-Leigh Dougall Deputy Chief Executive, Māori 9(2)(a) | Second Contact | Dr Marian Horan Manager, Legislative Policy 9(2)(a) |

Purpose

This briefing provides you with options for potential approaches to te Tiriti o Waitangi/the Treaty of Waitangi (the Treaty) provisions currently in the Corrections Amendment Bill (the Bill) that is before the House, and proposes that if any changes are needed you agree they are included in a draft Cabinet paper alongside other matters that we have briefed you about [B4673 refers].

Key messages

In addition to the option of maintaining the status quo in the Bill, there are two approaches for considering alignment of the Treaty provisions in the Bill with Government priorities

The Bill currently includes a descriptive Treaty clause that would introduce provisions in the Corrections Act 2004 (the Act) to provide for the Crown's intention to give effect to the principles of the Treaty in the corrections context. The Bill also provides new principles to guide the corrections system. These principles were developed taking into account relevant Treaty principles and aim to give specific guidance to decision makers. The Bill also includes specific requirements, referred to as operative provisions, relating to a Māori strategy and access to cultural activities and mātauranga Māori for prisoners.

These legislative provisions (listed in the anchoring Treaty clause) are specific to the application of the Treaty in the corrections system and are designed to enable pragmatic improvements in outcomes for Māori and to ultimately address the overrepresentation of Māori.

Public submissions to Select Committee that commented on the Treaty provisions in the Bill were supportive of their inclusion in legislation.

Available research shows that culturally responsive rehabilitation has a significant impact on an offender's engagement with an intervention. The provisions in the Bill seek to address the long-standing needs of Māori in the corrections system and the systemic issues that have led to higher reoffending and reimprisonment rates for Māori.

9(2)(g)(i), 9(2)(f)(ii), 9(2)(f)(iv)

9(2)(g)(i), 9(2)(f)(ii), 9(2)(f)(iv)

We recommend you discuss these options with your ministerial colleagues

Following these conversations, we recommend you advise Corrections' officials of your preferred option. Corrections' officials are also available to discuss these options with you prior to consultation, should you wish.

We recommend any necessary amendments to the Bill be made through the departmental report to Select Committee, subject to time constraints

Should you wish to make changes to the current provisions, Cabinet agreement to any amendments to the Treaty provisions would be needed in early March 2024. This will enable the timely delivery of the departmental report to the Justice Committee to support their report back to the House of Representatives on 31 May 2024. As referred to in B4673, should you agree, that paper would also include other proposed amendments to the Corrections Amendment Bill that require Cabinet agreement.

If Cabinet agreement to a preferred option is not achievable in these timeframes, other options are to introduce an Amendment Paper when the Bill is at Committee of the Whole House stage, or for Government to use the select committee membership process to amend the provisions. 9(2)(f)(iv)

9(2)(f)(iv)


Recommendations

It is recommended that you:

9(2)(g)(i), 9(2)(f)(ii)

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------|
| b. Note that Corrections' officials are available to discuss the options for approaches to Treaty provisions in the Corrections Amendment Bill | YES/NO |
| c. Advise Corrections' officials of your preferred approach to the Treaty provisions in the Corrections Amendment Bill: <ul style="list-style-type: none">i. Option one: status quo, retain the Treaty clause and operative provisionsii. Option two: amend the Treaty clause and retain the operative provisionsiii. Option three: remove the Treaty clause and retain the operative provisions | YES/NO YES/NO YES/NO |
| d. Agree , if you decide to make changes to the Treaty provisions, for officials to draft a Cabinet paper for you to take to the Cabinet Social Outcomes Committee in early March 2024 | YES/NO |
| e. Note that the Cabinet paper will also include other proposed changes to the Bill [B4673 refers] | YES/NO |
| f. Note that if it is not possible to get Cabinet agreement to amendments to the Treaty provisions by early March 2024, changes could be made through either an Amendment Paper at the Committee of the Whole House stage, through select committee members 9(2)(f)(iv) | YES/NO |

Sign-off


Hon Mark Mitchell
Minister of Corrections

Date signed:

29/02/2024.


Kerry-Leigh Dougall
Deputy Chief Executive Māori

Date signed:

8 / 02 / 2024

The Corrections Amendment Bill 2023 includes Treaty provisions and is currently before the Justice Committee

- 1 The Corrections Amendment Bill 2023 was introduced into the House on 21 June 2023 and was reinstated by the Government on 6 December 2023. It is currently before the Justice Committee for consideration.
- 2 The Bill includes provisions to give effect to the Crown's Treaty obligations in the corrections system (see Appendix One for relevant extracts from the Bill.)
- 3 These provisions aim to improve rehabilitation and reintegration outcomes for Māori, who are significantly overrepresented in the corrections system, comprising approximately 52 percent of prisoners and approximately 68 percent of women in prison (as at 1 October 2023). Introducing Treaty provisions into the Bill makes it clear that the Crown has a responsibility to address issues in the corrections system that have contributed to the overrepresentation of Māori. They also relate to recommendations from the Waitangi Tribunal in its 2017 *Tū Mai te Rangi!* report into disproportionate reoffending rates for Māori.
- 4 The provisions include new section 6A, which is a Treaty clause that refers to the other provisions that are included in the Bill "in order to provide for the Crown's intention to give effect to the principles of te Tiriti o Waitangi/the Treaty of Waitangi". Framing the operative provisions by reference to Treaty principles provides a clear rationale for their inclusion in legislation.
- 5 The relevant operative provisions provide specific requirements for Corrections to improve outcomes for Māori in the corrections system. These operative provisions are listed in the anchoring Treaty clause and include:
 - five new principles to guide the operation of the corrections system, which require Corrections to consider: equitable rehabilitation and reintegration outcomes for Māori, partnership with Māori, the views of family/whānau, hapū and iwi when making prison placement decisions, the wellbeing of Māori in the corrections system, and approaches to health care for prisoners
 - a requirement for the chief executive to ensure the development, maintenance and implementation of a strategy that is focused on improving outcomes for Māori in the corrections system to address long-standing Māori needs
 - making access to cultural activities a purpose for which prisoners can be temporarily released or temporarily removed from prison
 - providing for prisoners to have access to mātauranga Māori in prison
 - ensuring that prisoners have access to cultural activities regardless of the prison in which they are detained.
- 6 The areas in which the operative provisions are aimed at improving outcomes are where Corrections has existing statutory responsibilities and where significant inequities exist between Māori and non-Māori in the corrections system, including in health and educational outcomes. Available research

shows that cultural responsibility has a significant impact on how offenders engage with interventions, and the operative provisions also aim to increase access to culture for Māori in the corrections system.¹

- 7 The provisions were developed with technical experts and incorporate feedback from public consultation 9(2)(g)(i), 9(2)(f)(ii), 9(2)(f)(iv)
9(2)(g)(i), 9(2)(f)(ii), 9(2)(f)(iv)

Government policy is to use specific wording related to the Treaty in legislation

- 8 Government policy includes a commitment to review legislation 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.
- 9 This means that, before the Bill is passed, there is an opportunity to consider the approach it takes to Treaty provisions, to ensure it aligns with Government policy on incorporating Treaty provisions into legislation.

There are different options for approaches to the Treaty provisions in the Bill

Option one: status quo, retain the current Treaty provisions in the Bill

- 10 The current provisions are specific about the application of the Treaty in the corrections system and describe the ways in which the Crown could give effect to the principles of the Treaty. As such, the Bill may align with Government policy already as it leaves decision-makers clear about the precise nature of their obligations. This is because, although the Treaty clause refers to the principles of the Treaty, it is accompanied by specific requirements in the operative clauses about the application of the Treaty in the corrections system.
- 11 Option one is therefore to retain the Treaty provisions in their current form. The operative provisions would support Corrections to improve outcomes for Māori and all people in Corrections’ management. They would achieve this by clearly stating a set of principles and specific requirements that impact decision-making and operational practice within the corrections system, to improve rehabilitation and reintegration outcomes for Māori

9(2)(g)(i), 9(2)(f)(ii)

Option two: amend the Treaty clause and retain the other Treaty provisions

9(2)(g)(i), 9(2)(f)(ii)

- 14 9(2)(g)(i), 9(2)(f)(ii) option two is to retain the anchoring clause but replace the reference to the principles of the Treaty. This could be done with a reference that is more directly focused on the need to proactively focus on addressing aspects of the corrections system that make it less effective in terms of the rehabilitation of Māori offenders and, as a result, less effective overall for the community as a whole. The exact drafting of this anchoring clause would be worked through with the Parliamentary Counsel Office. Such a focus on the operation of the corrections system, rather than on Treaty principles, will still achieve the policy intent of recognising and respecting the Crown’s responsibility to promote equitable outcomes for Māori (or to prevent inequitable outcomes for Māori).

¹ A. Hughes, Aotearoa New Zealand cultural interventions: Current issues and potential avenues, November 2018. *Practice: The New Zealand Corrections Journal*, “A 2020 evaluation of a kaupapa Māori alcohol and other drug service,” Te Ira Wāhine, also found that the programme was having a positive impact on wāhine inside prison and in the community. For example, of those women who were sentenced, three quarters had progressed to a low security classification since completing Te Ira Wāhine and there was a decline in misconducts across this group. See K. Hamilton and B. Morrison, “Te Ira Wāhine: Aromatawai,” March 2020. It will take time to build a larger evidence base due to some culturally responsive interventions being relatively recently developed and implemented.

9(2)(g)(i), 9(2)(f)(ii), 9(2)(f)(iv)

- 15 An existing example of an approach that is more specific and does not refer to the Treaty is contained in the Kāinga Ora – Homes and Communities Act 2019. Section 4 of that Act includes an anchoring provision that states that other provisions in the Act are “in order to recognise and respect the Crown’s responsibility to consider and provide for Māori interests”.
- 16 Under this option, the operative provisions in the Bill would be retained in their current form. As discussed above, these provisions relate to the relevance and application of the Treaty in the corrections system and will support Corrections to improve rehabilitation and reintegration outcomes for Māori.

Option three: remove the Treaty clause and retain the other Treaty provisions

- 17 Option three is to remove the Treaty clause, which is new section 6A in the Bill that refers to the principles of the Treaty, and retain the operative provisions without an anchoring clause to provide a policy rationale for them. The operative provisions would remain as specific requirements for how the Crown’s Treaty obligations should be given effect to in the corrections system.

18 9(2)(g)(i), 9(2)(f)(ii), 9(2)(h)

- 19 However, the operative provisions will still achieve the policy intent of contributing to improved rehabilitation and reintegration outcomes for Māori, as described in other supporting documents such as the General Policy Statement on the Bill.

9(2)(g)(i), 9(2)(f)(ii), 9(2)(h)

If amendments to the Treaty provisions are needed, there are three options for how to progress decision-making on them

- 24 If the preferred option is not the status quo and amendments to the Bill are sought, our recommended option for progressing any amendments is to seek Cabinet agreement and recommend changes through the departmental report on the Bill to the Justice Committee. Cabinet Social Outcomes Committee (SOU) agreement to these changes would be needed in early March, to enable the timely delivery of the departmental report to the Justice Committee in early April 2024. The Justice Committee would then decide whether to accept the recommended changes.

9(2)(g)(i), 9(2)(f)(ii), 9(2)(h)

- 25 Even if this option is not progressed, the Justice Committee can decide to make any changes to the Bill that it agrees on. If no amendments are recommended through the departmental report, the Select Committee may decide to make its own amendments and officials would provide advice as requested. If this were to occur, there would still be the opportunity for the Government to make further changes to the Bill through an Amendment Paper at Committee of the Whole House stage if necessary.

Changes could also be made through an Amendment Paper at Committee of the Whole House stage

- 26 The second option is to make changes by introducing an Amendment Paper when the Bill is at Committee of the Whole House stage. This would require more Cabinet and PCO drafting time, but if changes cannot be agreed in early March before the departmental report is due to Select Committee in early April then this option can be pursued. This also assumes that the Justice Committee has not made changes.

9(2)(f)(iv)

We recommend that the Bill is passed this year

- 29 There is a risk that any delays to decisions about amendments to the Treaty provisions will delay the progress of the Bill as a whole. We recommend the Bill be passed this year, because it contains both a Government 100 Day commitment in relation to remand prisoners' access to programmes, and because it makes other changes that are important to support the safe and effective operation of the corrections system. The most substantive of these are significant new powers to monitor prisoner activities and communications to support prison safety.

Next steps

- 30 Officials are available to discuss these options with you.

9(2)(g)(i), 9(2)(f)(ii)

- 32 Subject to your agreement to a preferred option for amendments to the Treaty provisions, if amendments are required we can provide you with a draft Cabinet paper seeking agreement to these changes, to circulate for Ministerial consultation in mid-February 2024. This Cabinet paper will also contain recommendations for other changes to the Corrections Amendment Bill that we have briefed you on previously [B4673 refers].
- 33 If agreement to a preferred option cannot be reached prior to early March 2024, officials will be available to discuss with you the other options for processes to amend the Treaty provisions.

You will receive a number of other briefings on the Corrections Amendment Bill in February and March 2024

- 34 Those briefings will cover the progression of the Amendment Paper to achieve the Government's 100 Day commitment, other changes to the Bill that require Cabinet approval, and other papers to support Select Committee processes. Some of these briefings will ask you to make policy decisions. You will receive the majority of these briefings during February and March 2024.

Appendices

- 35 All appendices referenced in this paper are outlined below:
- Appendix One – Current Treaty provisions in the Corrections Amendment Bill and recommended changes.

Minister comments