THE MĀORI WARDS AND CONSTITUENCIES URGENT INQUIRY REPORT

WAI 3365

CONTENTS

1.1 What Is at Issue? 4
1.2 Background to our Inquiry 5
1.2.1 Application for urgency 5
1.2.2 Events since urgency was granted 6
1.2.3 Why urgency was granted 7
1.3 The Positions of the Parties 7
1.3.1 Claimants 7
1.3.2 The Crown 10
1.3.3 Interested parties 11
1.4 Issues for Determination 12
1.5 The Structure of the Report 12
2.1 Tribunal's Jurisdiction 14
2.2 Te Tiriti o Waitangi | The Treaty of Waitangi 16
2.3 The Principle of Partnership 17
2.3.1 The duty of active protection 18
2.3.2 The duty to act reasonably and in good faith 18
2.3.3 The duty to consult 18
2.4 The Principle of Equity 19
2.5 The Principle of Options 19
2.6 The Principle of Mutual Benefit 20
3.1 An Overview of Māori Representation in Local Government since 2001 21
3.2 The Coalition Agreements 23
3.3 Initial Policy Work 23
3.3.1 Preliminary policy advice on 5 December 2023 24
3.3.2 Officials brief the Minister on options for change on 20 December 2023 25
3.3.3 Further advice in January 2024 expands on options for change and their timing. 26
3.3.4 Officials seek Ministerial agreement for the proposed Bill on 1 February 2024 .. 27
3.4 The Cabinet Paper and Departmental Regulatory Impact Statement 28
3.4.1 The Cabinet Paper 28
3.4.2 The Regulatory Impact Statement 30
3.4.3 Cabinet makes its decision 31
3.5 Policy Announcement and Letters to Councils 32
4.1 General Issues with Claims concerning Coalition Agreements 34
4.2 Was the Process prior to 2021 Treaty-Consistent? 35
4.2.1 The process prior to 2021 35
4.2.2 The 2021 amendments removed the poll provisions 37
4.3 Was the Policy Process in 2024 Treaty-Consistent? 38
4.4 Treaty Findings on the Policy Process 40

5.1 Treaty Implication of the Policy Proposals 43
5.2 Treaty Findings – Implications of the Proposed Policy..... 46
6.1 Summary of Findings..... 50
6.2 Recommendations 52

The Honourable Simeon Brown
Minister for Local Government

The Honourable Tama Potaka
Minister for Māori Development

The Honourable Paul Goldsmith
Minister of Justice

The Honourable Judith Collins KC
Attorney-General

Parliament Buildings
WELLINGTON

17 May 2024

Kei ngā tini aituā kua hinga atu rā, koutou kua mōnehunehu i te kanohi tangata, haere, e moe, e oki. Hoki mai ki a tātou te kaupapa tangata, te kaupapa kōrero tīhei mauri ora!

E ngā Minita, mātorotoro mai ana ki ngā kōrero nei.

We enclose our report concerning the proposed amendment to the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 ('the 2021 Amendment Act'). Our inquiry has been carried out pursuant to our jurisdiction set out in section 6 of the Treaty of Waitangi Act 1975. Because of the short timeframes involved, the inquiry has been narrowly focused on the Crown process to amend the 2021 Amendment Act and its consequences. Specifically, we address whether the actions and policy of the government to amend the provisions the 2021 Amendment Act relating to Māori wards is in breach of the principles of the Treaty of Waitangi.

Māori have long been under-represented in local government. The 2021 Amendment Act removed the previous requirement under the Local Electoral Act 2001 that a binding local referendum, known as a poll, be held following a council's decision to establish a Māori ward or constituency. Māori representation in local government has since increased significantly: from three councils with Māori wards or constituencies prior to 2021 to 34 territorial authorities and seven regional councils with Māori wards or constituencies by the end of 2023.

The 2023 coalition agreements contained commitments to reinstate the requirement for binding polls and to require local bodies hold a poll at the 2025 local elections on any Māori wards that have been established without one. This is now government policy. Our report

assesses whether the actions and policies of the government, in reinstating provisions for binding polls, are in breach of the Treaty of Waitangi and its principles.

After assessing the evidence from parties, we have found breaches of the Treaty principles of partnership – which includes the duties of active protection and to act reasonably and in good faith – equity, mutual benefit, and options.

In deciding to reinstate the poll provisions and require select wards to be dissolved or subject to a binding poll, the Crown has prioritised commitments made in the coalition agreement over its obligations to Māori under the Treaty. There has been no discussion or consultation with Treaty partners as to the proposed changes, and Treaty obligations have been treated as if they were optional. The Government does not have a unilateral right to set aside Treaty obligations. In addition, the failure to consult Māori is a clear breach of the Treaty principle of partnership. We consider that this decision-making process is particularly egregious when it concerns measures that were introduced to remove previous discriminatory barriers to Māori political representation and to uphold the Treaty partnership at a local level.

Moreover, policy documents reveal the Government has failed to make a reasonable and informed decision, in breach of the duty to act in good faith. The policy process has been rushed to fit Ministerial timeframes with inadequate consideration of Māori views in official advice. Any discussion of Treaty obligations and analysis of Treaty issues raised by the proposal is almost entirely absent from the Cabinet paper on which the decision to reinstate poll provisions and overturn the decisions of elected local councils was made.

Māori around the country have clearly expressed their preference to be involved in decision-making at the local level as an expression of their tino rangatiratanga. We were provided with evidence from current and former councillors and mayors, as well as former Members of Parliament, of the extensive advocacy and campaigning efforts prior to 2021 for the establishment of Māori wards and constituencies. The Government's decision to prioritise its political agenda over the clearly expressed desires and actions of Māori for dedicated political representation at the local level breaches the Crown's duty to actively protect the rights and interests of Māori.

We consider that the poll provisions are inequitable and discriminatory and a barrier for Māori representation in local government. Reinstating them will make establishing, or re-establishing, Māori wards or constituencies insurmountable. The proposed legislation is also likely to raise human rights issues under The New Zealand Bill of Rights Act 1990.

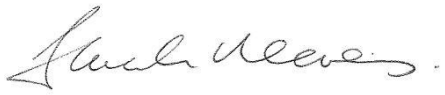
Finally, we found that removing the option for Māori voters to choose whether to be represented by general or Māori ward councillors is a breach of the treaty principle of options.

Reinstating the poll provisions and requiring councils to dissolve wards established since 2021 or hold a binding poll on them will result in the reduction of Māori representation at the local level. Alternative mechanisms for Māori participation in local government are not the same as having a dedicated seat at the decision-making table. Further, these alternative mechanisms have historically seen Māori voices ignored when inconvenient. We also consider the reintroduction of the poll provisions, and negative messaging about Māori wards, will stir division and enable discriminatory and racist rhetoric against Māori, as previously occurred

prior to 2021. We consider that in pursuing this policy the Crown has already done substantial damage to the Māori-Crown relationship and is likely to do more if this legislation is passed.

We recommend the Crown stop the amendment process to allow proper consultation between the Treaty partners with a view to agreeing how Māori can exercise the guarantee of tino rangatiratanga in article 2 to determine their own dedicated representation in local government. We also draw to the Government's attention the existing provisions for representation reviews in sections 19H and 19I of the Local Electoral Act 2001. We consider the approach set out in these provisions better achieves the balance referred to by the Government in their policy documents of enabling the public including Māori to have input into the whole range of representative arrangements in a territorial or regional area without the discriminatory element of the binding polls. We recommend the amendment of the 2021 Amendment Act be stopped to enable these reviews to be carried out.

Nāku noa, nā



Judge Sarah Reeves
Presiding Officer
Nā Te Rōpū Whakamana i te Tiriti o Waitangi

CHAPTER 1 INTRODUCTION

In this chapter we set out what is at issue, the background to this urgent inquiry, including a summary of parties' positions, and the key issue for determination in this inquiry. We also outline the structure of the report.

1.1 WHAT IS AT ISSUE?

This inquiry addresses claims submitted to the Waitangi Tribunal under urgency regarding the Crown's proposed amendment of the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021.[1] The 2021 Amendment Act removed the previous requirement that a local referendum – known as a poll – be held following council decisions to establish a Māori ward or constituency. This legislation was introduced by former Minister for Local Government, the Honourable Nanaia Mahuta, following a petition calling for increased Māori representation in local government.[2] That petition had called for an amendment to the Local Electoral Act 2001 to enable the establishment of Māori wards and Māori constituencies through the same process by which general wards and constituencies could be established.[3] The claimants say the 2021 amendment has contributed significantly to increased Māori representation in local government, while helping the Crown to meet its Treaty obligations.

The genesis of the issue before us in this inquiry lies with the 2023 coalition agreements between the New Zealand National Party, ACT New Zealand and New Zealand First in which the parties outlined their priority to:

> restore the right to local referendum on the establishment or ongoing use of Māori wards, including requiring a referendum on any wards established without referendum at the next local body elections.[4]

Once in government, the new Minister for Local Government, the Honourable Simeon Brown, initiated policy work to give effect to this commitment and Cabinet decided in favour of effectively repealing the 2021 amendments. This repeal would give councils that had established a Māori ward or constituency two options:

- Option A – resolve this year to rescind the decision to create the Māori wards or constituencies by council resolution (to take effect at the 2025 local elections).
- Option B – hold a binding poll on the question of Māori wards/constituencies at the 2025 local elections (to take effect at the 2028 local elections).[5]

---

[1] Wai 3163, 2.5.2, p. 1.
[2] Wai 3365, 3.3.7, p. 8.
[3] Wai 3365, 3.3.7, p. 8.
[4] New Zealand National Party & Act New Zealand, 54th Parliament, Coalition Agreement, 24 November 2023, p. 9; New Zealand National Party & New Zealand First, 54th Parliament, Coalition Agreement, 24 November 2023, p. 10.
[5] Wai 3365, 3.3.5, p. 12.

On 4 April 2024, Minister Brown announced that the government would introduce a Bill 'in the coming months' to effectively repeal the 2021 amendments.[6]

Claimants and interested parties argue that the repeal of the 2021 Amendment Act and its impact on Māori wards is in breach of the Crown's Te Tiriti o Waitangi / Treaty of Waitangi ('the treaty') obligations.[7] The claimants submit that the Crown's proposed policy and actions will prejudicially affect Māori, as well as damage relationships between the Crown, Māori, and local government.[8]

1.2 BACKGROUND TO OUR INQUIRY

This section sets out the application for urgency, events since urgency was granted, the reasons for granting urgency, and summarises the positions of the parties.

1.2.1 Application for urgency

On 19 April 2024, the Tribunal received an amended statement of claim and an application for an urgent hearing in regard to the Crown's proposed amendment of the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 from Anne Waapu and Te Raukura O'Connell Rapira.[9] Further applications were filed on 26 April by Merepeka Raukawa-Tait, 3 May 2024 by Te Rūnanga o Ngāti Hine, and 6 May 2024 by Te Whakakitenga o Waikato Incorporated.[10]

On 23 April 2024, Deputy Chairperson, Judge Sarah Reeves, directed the Crown and any interested parties to respond to the application for an urgent hearing no later than midday 26 April 2024.[11]

A memorandum was filed on 26 April 2024, in which the Crown indicated the proposed amendment to the 2021 Amendment Act would be no earlier than 20 May 2024.[12]

---

[6] Hon Simeon Brown, 'Coalition government to require referendums on Māori wards', 4 April 2024 at Coalition Government to require referendums on Māori wards | Beehive.govt.nz

[7] In referring to te Tiriti o Waitangi / the Treaty of Waitangi, we have followed the practice set out by the Tribunal in its Te Paparahi o te Raki inquiry: we refer to the text in te reo as Te Tiriti o Waitangi and the text in English as the Treaty of Waitangi. When we refer to both texts together we use 'the treaty'. The exception to this usage will be when we refer to the work of others, when we will reproduce the terminology they have used. Waitangi Tribunal, *He Whakaputanga me te Tiriti – the Declaration and the Treaty: the Report on Stage 1 of the Te Paparahi o te Raki Inquiry* (2014), p 2.

[8] See Wai 3365, 3.3.1; 3.3.5; 3.3.6, 3.3.7.

[9] The claim, registered as Wai 3163, made on behalf of 'on behalf of Māori who JustSpeak work with and advocate for rangatahi of today and future generations". Wai 3365, 2.5.7, p 1. Wai 3163 was originally filed on behalf of JustSpeak but this was then changed to the Justice System (Waapu & O'Connell Rapira) claim. Wai 3365, 2.5.6, p 1.

[10] Wai 3365, 2.5.7, pp 1–2.

[11] See Wai 3163, 2.5.1; Wai 3163, 2.5.2

[12] Wai 3163, 3.1.10, p. 4

Due to the compressed timeframe, Judge Reeves directed the applicants to file submissions in reply to the Crown and interested parties by no later than 2 May 2024.[13] In the memorandum, she directed that a virtual judicial conference be held at 11am, 3 May 2024.[14]

On 3 May 2024, Judge Reeves held a virtual judicial conference where she heard submissions from parties and granted urgency later the same day. Reasons were provided later and are set out below.[15]

Given the limited amount of time for the urgent inquiry, Judge Reeves wanted to ensure enough time for parties to file submissions and evidence and for the Tribunal to consider the issues and report before the Bill to amend the 2021 Act was introduced. Therefore, she decided that the urgent inquiry would be conducted on the papers and there would be no in-person hearing.[16]

Urgency was granted to four claims for this inquiry: Wai 3163, Wai 3362, Wai 3314, and Wai 682. The Wai 3163 claimants are Anne Waapu and Te Raukura O'Connell Rapira.[17] The Wai 3314 claimant is Merepeka Raukawa-Tait on behalf of her whānau, hapū, iwi, whānau whānui and whāngai.[18] The Wai 682 claimants are Rewiti Paraone, Erima Henare, Pita Tipene and Waihoroi Shortland on behalf of Te Rūnanga o Ngāti Hine.[19] The Wai 3362 claimant is Tukoroirangi Morgan for and on behalf of Te Whakakitenga o Waikato Incorporated.[20]

Twenty-one applicants were granted interested party status. A list of the interested parties is included in the appendix to this report.

Judge Reeves directed that claimant evidence and opening submissions were to be filed no later than 12pm, 8 May 2024. Additionally, she directed that Crown evidence and opening submissions were to be filed no later than 12pm, 10 May 2024, as well as closing submissions to be filed no later than 12pm, 14 May 2024.[21]

1.2.2 Events since urgency was granted

On 6 May 2024, Chief Judge Caren Fox appointed Judge Reeves as the Presiding Officer for this inquiry. Basil Morrison CNZM JP and Kevin Prime ONZM, MBE, CNZM were appointed as the panel members.[22] The same day, Judge Reeves confirmed that the scope of the urgent inquiry would be narrow due to the compressed timeframe and the Crown's indication that a

[13] Wai 3163, 2.5.2, p. 2
[14] Wai 3163, 2.5.2, p. 2
[15] Wai 3365, 2.5.1, p. 3
[16] Wai 3365, 2.5.1, p. 3
[17] Wai 3365, 1.1.1, Wai 3163, 1.1.1(b), Statement of Claim, Anne Waapu and Te Raukura O'Connell Rapira on behalf of JustSpeak, joint opening submission with Te Rōpū Tautoko Māori (Interested Party), 18 April 2024. Wai 3163 I now registered as the Justice System (Waapu & O'Connell Rapira) claim. Wai 3365, 2.5.6, p 1.
[18] Wai 3365, 1.1.3, Statement of Claim, Merepeka Raukawa-Tait, 26 April 2024.
[19] Wai 3365, 1.1.2, Statement of Claim, Te Rūnanga o Ngāti Hine, 19 January 2024; Wai 3365, 2.5.1, p 2.
[20] Wai 3365, 1.1.4; Wai 3362, 1.1.1. Statement of Claim, Tukoroirangi Morgan for and on behalf of Te Whakakitenga o Waikato Incorporated and for the benefit of the iwi of Waikato-Tainui and all Maaori residing in the rohe of Waikato-Tainui and the wider Waikato region, 6 May 2024.
[21] Wai 3365, 2.5.1, p. 3
[22] Wai 3365, 2.5.2, p. 2

Bill to give effect to the proposed amendments would be introduced to the House of Representatives no earlier than 20 May 2024.[23]

We received claimant evidence and submissions on 8 May 2024, Crown submissions on 10 May 2024, and closing submissions on 14 May 2024.

1.2.3 Why urgency was granted

In her 13 May 2024 memorandum, Judge Reeves gave her reasoning for granting urgency to this inquiry.[24] On 4 April 2024, she said, the Local Government Minister announced that the Government would introduce a Bill 'in the coming months' to amend the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 to reinstate, amongst other provisions, the requirement for binding polls of all voters on Māori ward decisions.[25] Judge Reeves stated that the proposed amendment of the Act is an important current and pending Crown action and policy.[26] She indicated that the proposed amendments are likely to result in a significant decrease in Māori representation and participation in local government as a direct consequence of the proposed amendment.[27] Moreover, she said, the reimposition of polls is likely to act as a significant barrier and disincentive to future Māori representation in local government as well as participation in local government processes.[28] The Crown had also accepted that there had been minimal to no consultation with Māori. For these reasons, Judge Reeves was satisfied that significant and irreversible prejudice could result from the repeal and that there were no alternative remedies available. She therefore confirmed her urgency decision.[29]

1.3 THE POSITIONS OF THE PARTIES

This section sets out the positions of the parties to this inquiry beginning with the four claimants, followed by the Crown and interested parties.

1.3.1 Claimants

The claimants submitted that the Crown's decision to repeal the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 and disestablish Māori wards will disproportionately and prejudicially affect Māori.[30] The claimants submit that the Crown's proposal to disestablish Māori wards lacks Treaty and Te Tiriti analysis, consultation, and is inconsistent with Te Tiriti o Waitangi and its principles.[31] Furthermore, counsel for Wai 3163 and counsel for Wai 3362 submitted that it seems the obligation to meet the government's coalition agreements takes precedence over the impact that the repeal would have on Māori.[32]

---

[23] See Wai 3365, 2.5.3, p. 2; Wai 3163, 3.1.10, p. 4
[24] Wai 3365, 2.5.8, p 1.
[25] Wai 3365, 2.5.8. p 3.
[26] Wai 3365, 2.5.8, p. 4
[27] Wai 3365, 2.5.8, p. 4.
[28] Wai 3365, 2.5.8, p. 4.
[29] Wai 3365, 2.5.8, p. 5.
[30] See Wai 3365, 3.3.1; 3.3.5; 3.3.6; 3.3.7.
[31] See Wai 3365, , 3.3.1; 3.3.5; 3.3.6; 3.3.7.
[32] See Wai 3365 3.3.7, p. 2; 3.3.5, pp. 4–5, 7.

On this point, counsel for Wai 3314 submitted that the coalition government has 'unequivocally positioned its stance of one law for all and that a Māori seat undermines the principle of equal votes'.[33]

As highlighted by counsel for Wai 3163, the establishment of Māori wards and constituencies have historically been subject to limitations such as poll provisions, which ultimately allow the majority vote to determine the establishment of said wards.[34] As a result, counsel for Wai 3163 argued, Māori representation in local government has been minimal.[35] Counsel for Wai 3163 stated that between 2010 and 2020 significant calls to action were made to address the inequitable poll provisions and the significant lack of Māori representation, which resulted in the introduction of the 2021 Amendment Act.[36] The introduction of the 2021 Amendment Act, while limited as a means to provide Māori with the ability to determine whether and how they wish to be represented as Māori, has enabled significant progress in the establishment of Māori wards and has significantly improved Māori representation.[37]

In their submission, counsel for Wai 3163 stated this is further supported by the Human Rights Commission's 2010 report which provides feedback from the Chair of Environment Bay of Plenty, several councillors, council managers, and iwi representatives who all concluded that the system of Māori constituencies helped the council to meet its obligations for Māori participation under the Local Government Act 2002.[38] Therefore, counsel for Wai 3162 and Wai 3362 argued that the Crown's proposal to repeal the 2021 Amendment Act, and the grounds upon which the Crown has made this decision, is 'unconvincing', and signals that the Crown has a problem with the separate representation of Māori as a minority under local government constitutional arrangements.[39]

Counsel for Wai 3163 argued that they do not see reflection of the Cabinet Manual's guidance concerning the balance between majority power and minority rights in the Crown's policy proposing the repeal, but rather, the policy undermines that stated by the Waitangi Tribunal in its 2024 *Oranga Tamariki* report.[40] Additionally, counsel for Wai 3163 drew on the Regulatory Impact Statement (RIS) provided by the Department of Internal Affairs, which set out that the government's objectives are in direct contrast to the Crown's requirement of local authorities to facilitate Māori participation in local government decision-making processes and to give effect to the Crown's treaty obligations as set out in section 4 of the Local Government Act 2002.[41] Counsel for Wai 3362 support this argument in their submission, stating that any proper analysis of the Crown's treaty obligations should have led officials to advise against the proposal to repeal the 2021 Amendment Act.[42] Counsel for Wai 682 further submit that engagement at select committee is far too late in the legislative process for Māori to have meaningful dialogue with the Crown and influence the trajectory of decision-making. In such

[33] Wai 3365, 3.3.1, p. 6.
[34] Wai 3365, 3.3.7, p. 1.
[35] See Wai 3365, 3.3.7, p. 7.
[36] Wai 3365, 3.3.7, pp. 2, 7
[37] Wai 3365, 3.3.7, p. 2
[38] Wai 3365, 3.3.7, p. 5
[39] See Wai 3365, 3.3.7, p. 15; Wai 3362, 3.3.5, p. 4
[40] Wai 3365, 3.3.7, p. 16
[41] Wai 3365, 3.3.7, p. 15
[42] Wai 3362, 3.3.5, p. 8

circumstances, Māori are vulnerable to the preferences of the Crown in both process and substance, and exposed to the impacts of those preferences.[43]

Counsel for Wai 682 said that the Crown cannot maintain that there are other protective mechanisms for Māori participation in local government, when those protective mechanisms existed prior to the 2021 amendments, and Māori experienced disproportionate representation and discrimination.[44] On the 2021 Amendment Act, counsel for Wai 3362 further submit that the new status quo created by the Act provides Māori with better opportunities to be represented in local government decision-making.[45] Therefore, they argue, in seeking to undo the current state made possible by the 2021 Amendment Act, and in the knowledge that the binding polls provisions have been 'historically proven to vote down the establishment of Maaori wards', the Crown's policy 'directly engages the Tiriti principles of participation and active protection'.[46]

The claimants highlight what they see as the breaches and prejudice in regard to the Crown's proposal to repeal the Act. Counsel for Wai 3362 and Wai 3314 submitted that the Crown's policy, and their acts and omissions, are inconsistent with the treaty and its principles, including the principles of partnership, participation and protection.[47] Counsel for Wai 3163 argued that this is a breach of good faith.[48] Counsel for Wai 3362 submitted that failing to consult with Māori on the proposed changes has indicated that the Crown is treating a commitment made in the coalition agreements as if it is above the Crown's responsibilities under the treaty.[49] Moreover, counsel for Wai 3362 argued that the Crown's policy will breach the principle of equity by privileging the rights of those who object to Māori wards, as those who object will have a greater influence on the process over those who are in favour of Māori wards.[50] Counsel for Wai 682 submitted that the Crown's policy for Māori wards is inappropriate and an excessive exercise of kāwanatanga, one which undermines and prevents the exercise of tino rangatiratanga and partnership under the treaty.[51] Counsel for 3314 stated that the Crown has an obligation to Māori to uphold the principles of the treaty, reiterating the Oranga Tamariki Tribunal's finding that it is not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms. The obligation is to honour the treaty and act in good faith towards the treaty partner.[52]

The claimants sought recommendations from the Tribunal on the Crown's policy proposals. Counsel for Wai 3163 stated that their clients seek a recommendation that the Crown take a step back and return decision making and resources to hapū and iwi Māori. They submitted that hapū and iwi Māori should determine how they wish to be represented through Māori wards and constituencies.[53] Additionally, the Wai 3163 claimants sought recommendations in line with the Human Rights Commission's 2010 report that:

---

[43] Wai 3365, 3.3.14, p. 18.
[44] Wai 3365, 3.3.14, p. 14.
[45] Wai 3365, 3.3.20, p. 23.
[46] Wai 3365, 3.3.20, p. 24.
[47] See Wai 3365, 3.3.5, p. 3; Wai 3365, 3.3.1, p. 2.
[48] Wai 3365, 3.3.7, p. 11.
[49] Wai 3365, 3.3.5, p. 17.
[50] Wai 3365, 3.3.5, pp. 17–18.
[51] Wai 3365, 3.3.6, p. 9.
[52] Wai 3365, 3.3.11, p. 4.
[53] Wai 3365, 3.3.7, p 18.

a. Hapū and iwi Māori should discuss whether or not they want Māori seats on their local or regional council; and

b. Councils should support the Māori choice.[54]

Counsel for Wai 3314 sought a Tribunal recommendation that the Crown addresses the inequity proposed by the amendment to the Act and reconsiders its position to introduce legislation to rescind Māori wards from local government.[55] Counsel for Wai 3314 further submits that the Crown must make Māori wards mandatory in local government.[56]

Counsel for Wai 682 sought a recommendation that the Coalition Government's Māori ward policy be abandoned.[57]

Counsel for Wai 3362 did not seek a specific recommendation from the Tribunal and instead offered the following questions to the Crown to consider in its policy development:

a. What are the policy reasons/rationale behind the proposed changes?

b. What was the policy process taken?

c. What advice has the Crown sought or taken regarding its Te Tiriti obligations?

d. Why does the Crown consider that Select Committee submissions are the appropriate level of 'consultation' on the Crown's policy?[58]

We explore these questions in chapter 3 of this report.

1.3.2 The Crown

In regard to the proposed repeal of the 2021 Amendment Act, the Crown acknowledged that Māori participation and representation in local government is important and that the Tribunal's focus in this inquiry is, by necessity, narrow.[59] The Crown submitted that the intention of the poll provisions is to involve the community in local government decision-making, and to provide an avenue for Māori communities to demand that their councils hold polls to establish Māori wards.[60] The Crown stated that restoring the provisions for binding polls is a commitment in both the National-ACT and National–New Zealand First coalition agreements.[61] However, the Crown submitted that the Government has not proposed to remove Māori wards outright. Rather, the proposed repeal concerns the process of establishing Māori wards and reflects a judgement that 'there is an imbalance between the ability for electors to determine their representation arrangements and Māori representation in local government'.[62]

[54] Wai 3365, 3.3.7, p 18.
[55] Wai 3365, 3.3.1, p 6.
[56] Wai 3365, 3.3.1, p 6.
[57] Wai 3365, 3.3.6, p 11.
[58] Wai 3365, 3.3.5, pp 16–17.
[59] Wai 3365, 3.3.10, p. 1.
[60] Wai 3365, 3.3.10, p. 2.
[61] Wai 3365, 3.3.10, p. 3.
[62] Wai 3365, 3.3.10, p. 4.

On consultation, the Crown acknowledged that there has not been a consultation process with its treaty partner leading up to the decision.[63] The Crown submitted that the Crown's conduct should be assessed in this context, and states that the Government's intention is that the proposals are considered at select committee, albeit in a necessarily shorter than usual process owing to the Government's intention for the Bill to come into effect by 31 July 2024.[64] The Crown submitted that consultation is only one aspect of the Crown's duty to be informed of Māori interests.[65] The Crown further submitted that the duty to consult is not absolute. Rather, it is qualified by what is reasonable in the circumstances but may require 'especially vigorous action' where a taonga is in a vulnerable state.[66]

The Crown acknowledged that elected members who identify as Māori increased after the 2022 elections, which can be attributed to the increase in Māori wards following the 2021 amendments.[67] Additionally, the Crown said, the increase in Māori wards and constituencies increased opportunities for Māori to elect people to represent them on councils.[68] The Crown accepted that there is a risk that the proposed policy might remove some opportunities for Māori to be represented on local government. However, the extent of this risk is unclear.[69] The Crown further submitted that it is not currently possible to determine how much of the overall increase in elected members who identify as Māori can be attributed to the new Māori ward and Māori constituency positions and how much is from increased representation in other elected positions.[70]

The Crown submitted that provisions in the Local Government Act 2002 require councils to facilitate participation by Māori in local authority decision-making.[71] Additionally, the Crown said there are further obligations under other legislation, such as the Resource Management Act 1991, which requires local authorities to take the principles of the treaty into account when exercising powers and functions. The Crown therefore submitted that the proposed policy will not affect these provisions.[72] Independent of Māori wards, the Crown said there is a broad spectrum of various participation arrangements between iwi and councils across the motu, some of which are mentioned in claimant evidence.[73]

1.3.3 Interested parties

The interested parties largely support the arguments presented by the four claimants in the urgent inquiry, and agree that the Crown's proposal to repeal the 2021 Amendment Act will remove the platform for Māori voice in local government.[74] Making additional points, counsel for Ngāti Pāhauwera submit that the repeal of the 2021 Amendment Act will jeopardise the Māori wards on four out of the five councils in their rohe.[75] Counsel for Te Kōhao Health and

[63] Wai 3365, 3.3.10, p. 5.
[64] Wai 3365, 3.3.10, p. 5.
[65] Wai 3365, 3.3.10, p. 5.
[66] Wai 3365, 3.3.16, p. 6.
[67] Wai 3365, 3.3.10, p. 5.
[68] Wai 3365, 3.3.10, p. 5.
[69] Wai 3365, 3.3.10, pp. 5–6.
[70] Wai 3365, 3.3.16, p. 12.
[71] Wai 3365, 3.3.10, p. 6.
[72] Wai 3365, 3.3.10, p. 6.
[73] Wai 3365, 3.3.10, p. 6.
[74] See Wai 3365, 3.3.2, p. 1; 3.3.6, p. 9.
[75] Wai 3365, 3.3.3, p. 2.

the National Urban Māori Authority submit that the amendment will have a significant impact on Māori voice on Hamilton City Council.[76] Te Rūnanga o Ngāti Whātua submit that the proposed amendment will impact their ability to establish a Māori ward within the Auckland Council.[77] Finally, Ngāti Korokoro, Ngāti Wharara, Te Pouka hapū, and Patuharakeke hapū submit that the 2021 Amendment Act has significantly helped in addressing the issue of under-representation in local government of Māori in the Hokianga and Te Taitokerau.[78] Therefore, the repeal of the Act will place Māori representatives in their local government at a disadvantage.[79]

1.4 ISSUES FOR DETERMINATION

The key issue for determination in this inquiry is whether the actions and policies of the government to amend the provisions of the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 is in breach of the principles of the treaty.[80]

We confine ourselves to this issue only for the purposes of this urgent inquiry, rather than looking into the wider issues around Māori and local government. Any broader constitutional issues related to Māori representation in local government raised will be considered by the Tribunal's Wai 3300 Tomokia ngā tatau o Matangireia – Constitutional Kaupapa inquiry.

1.5 THE STRUCTURE OF THE REPORT

Our next chapter sets out the context for this issue, setting out our jurisdiction and providing an overview of the aspects of the treaty and its principles engaged by this issue.

In chapter 3, we examine the policy process through which the repeal of the 2021 amendments is taking place. We first discuss the origins of the policy in the coalition agreements between the National Party and the ACT Party and the National Party and the New Zealand First Party. We then explore the policy process, the Cabinet paper and decisions, the Regulatory Impact Statement from the Department of Internal Affairs and public announcements.

In chapter 4, we set out our analysis of the Crown's actions and omissions in the policy process and present our findings. First, we briefly consider the treaty consistency of the pre-2021 regime, to which the 2024 proposals are seeking to return. Next, we examine whether the process to reinstate the Local Electoral Act 2001 provisions and to require councils to dissolve or hold binding polls on Māori wards or constituencies established since 2021 is consistent with the treaty. Finally, we assess whether the process is in breach of the treaty and its principles.

---

[76] Wai 3365, 3.3.2, p1.
[77] Wai 3365, 3.3.9, p 2.
[78] Wai 3365 3.1.18, p 2; 3.1.19, p 2.
[79] Wai 3365, 3.1.18, p 2; 3.1.19, p 2.
[80] Wai 6635, 2.5.3, p 2.

In chapter 5, we consider the treaty implications of the proposed policy and whether it will cause prejudice to Māori. We then set out any findings of breach of the treaty principles.

In chapter 6, we summarise our findings and set out our recommendations.

CHAPTER 2 TE TIRITI | THE TREATY CONTEXT

In this chapter, we briefly set out the Waitangi Tribunal's jurisdiction to hear the claims, as well as the treaty principles relevant to this inquiry. We have been particularly guided by the work of previous Tribunals concerning local government and Māori representation. We note that the Tribunal has consistently found that Māori have rights to representation on local authorities, which make many decisions affecting Māori interests. We use the standards and principles set out below to analyse the Crown's actions and omissions in this policy process.

2.1 TRIBUNAL'S JURISDICTION

Section 6 of the Treaty of Waitangi Act 1975 allows for any Māori to make a claim to the Tribunal that they have been, or are likely to be, prejudicially affected by any legislation, policy, act, or omission made by the Crown after 6 February 1840. A well-founded claim is one which demonstrates that Crown acts and omissions have breached treaty principles, and that this breach has caused or will likely cause prejudice to Māori. If we find a claim to be 'well founded', we may recommend to the Crown ways to compensate for or remove the prejudice, or to ensure others are not similarly affected in the future.

Due to recent concerns related to the principle of non-interference or comity that have emerged for the Tribunal in several urgent inquiries we wish to set out in more detail the extent of our jurisdiction to inquire into this matter. Prima facie, the principle of comity exists to preserve the autonomy of Parliament's actions without undue scrutiny from the Judiciary or Executive, which would interfere with its sovereignty.[81]

While issues of comity have not been specifically raised in this inquiry, we reference it here due to the proximity of this report to the introduction of legislation to repeal the amendments made in 2021 to the 2001 Act. A plain reading of section 6(1)(c) of the Treaty of Waitangi Act 1975 allows the Tribunal to consider 'any policy' of the Crown, including proposed policy, that is claimed to prejudicially affect Māori. Section 6(6) expressly refers to the Tribunal's lack of jurisdiction to consider Bills that have been introduced to the House of Representatives (i.e. Parliament). A cumulative reading of section 6 therefore reflects that the Tribunal has jurisdiction to scrutinise proposed Crown policy right up until a Bill is formally introduced to the House.[82]

The Courts have reiterated this perspective in several cases, overturning past precedent which used to enforce the principle of comity more rigidly,[83] and emphasising the constitutionality of the Treaty of Waitangi and the unique role the Tribunal plays in New Zealand's constitutional

---

[81] P A Joseph *Constitutional and Administrative Law in New Zealand* (2nd ed, Brookers, Wellington, 2001) at 474.

[82] Section 6(6) also allows Parliament to refer Bills 'proposed legislation' to the Tribunal, and section 8 of the Treaty of Waitangi Act 1975, which provides for this process, defines "Proposed legislation" in section 8(2) as a 'Bill before the House', ergo policies at a stage prior to this introduction are not considered 'proposed legislation' requiring a referral under s 6(6).

[83] *Te Runanga o Wharekauri Rekohu Inc v Attorney General* [1993] 2 NZLR 301, notably stated at (16) that '[comity] extended, … to all processes associated with proposed legislation until after its enactment'; upheld in *Milroy v Attorney-General* [2005] NZAR 562; *New Zealand Māori Council v Attorney-General* [2007] NZCA 269.

framework.[84] The interaction between the Tribunal and comity was most recently discussed in the Court of Appeal:

> we do not accept that the principle of comity necessarily applies to limit the power of the Tribunal. It is a principle that typically operates as between the judicial and legislative branches of government, which is a different context from that in which the Tribunal operates. The Tribunal is fulfilling a statutory duty, and s 6(6) of the Treaty of Waitangi Act identifies when its jurisdiction is limited by the proceedings of Parliament. Moreover, even if comity applies it applies to the Crown as well as the Tribunal, and such a duty would involve the Minister voluntarily providing the information that the Tribunal requested. That would also be consistent with the Crown's Treaty obligations.[85]

Apart from the mainstream Courts, we, as the Tribunal, have made our view of our jurisdiction clear in several past inquiries: 'policy' does not become a 'Bill' until the moment it is introduced to the House and examining it falls within the very purpose of the Tribunal.[86]

Another jurisdictional issue relevant to this urgent inquiry is the Tribunal's ability to inquire into the actions of local government. This matter was raised briefly by counsel for Wai 3163 in their submissions in support of the urgency application.[87] The Tribunal's jurisdiction is to evaluate the acts and omissions of the Crown against the principles of the treaty – 'the Crown' here meaning central government. The Tauranga Moana Tribunal (2010) stated that local councils are responsible to local communities within the parameters set by the Crown – but they are not agents of the Crown.[88] However, the Crown retains a duty of active protection to monitor local government policy and practices.[89] The Tribunal can evaluate the Crown's monitoring of local government, and the legislative framework the Crown creates for local government, but not individual decisions made at the local government level.

There is no suggestion by any party that the actions at issue are clearly the Crown's.[90] We concur. This claim is about proposed amendments by the Crown to local government legislation. Many Tribunals before us have evaluated the treaty consistency of local government legislation. We do not consider that the subject matter of the proposed amendments prevents this Tribunal from inquiring into this claim.

Finally, we point out that the timeframes to report on this matter are imposed on us by the Crown's legislative timeframes. Unlike the Oranga Tamariki and Treaty Principles Bill Tribunals in their recent respective urgent inquiries, we have had no opportunity to question witnesses to clarify or amplify the points they have made in their evidence. We have only been able to rely on the submissions and evidence provided to us. As a consequence, our findings in this inquiry will be necessarily high-level.

---

[84] Comity and the Treaty - Ngāti Whātua Ōrakei v Attorney-General [2018] NZSC 84; Ngāti Mutunga o Wharekauri Asset Holding Company Ltd v Attorney-General [2020]; Hata v Attorney-General (No 2) [2023] NZHC 2919; Comity and the Waitangi Tribunal - Attorney-General v Mair [2009] NZCA 625, Baragwanath J.

[85] Colleen Skerret-White & ors. v Minister for Children [2024] NZCA 160 at [2](e).

[86] Wai 2522 #2.5.0009; Wai 2358 #2.6.79 at [41]-[43], [51]-[54]; Wai 3058 #2.5.004 at [21] and [23].

[87] Wai 3365, 3.1.8, p 3.

[88] Waitangi Tribunal, *Tauranga Moana, 1886–2006* (2010), pp 475–476.

[89] *Tauranga Moana, 1886–2006,* p 476.

[90] Wai 3365, 3.1.8, p 3.

2.2 TE TIRITI O WAITANGI | THE TREATY OF WAITANGI

Māori representation in local government engages all three articles of the treaty. The article 1 provision of kāwanatanga relates both to the Crown's responsibilities to ensure that its delegation of authority to local government is treaty consistent and to local government exercising kāwanatanga functions at the local level. Tino rangatiratanga, recognised in article 2, includes the right to participate in local and central government decision-making, while oritetanga or the rights and privileges of British subjects articulated in article 3 extends to voting rights in both local and central government elections.

In its *Tauranga Moana 1886–2006* (2010) report, the Tribunal invoked all three articles of the treaty in its examination of Māori representation in local government in the district. It stated that under the Local Government Act 2002 'local authorities exercise a role akin to kawanatanga over land, resources, and environment'. Similarly, district and regional councils under the Resource Management Act 1991 'exercise a role akin to kawanatanga'.[91] The Tauranga Moana Tribunal found that the exercise of tino rangatiratanga includes representation on local authorities and that such representation must be sufficient to ensure that Māori can 'defend their own rights and interests'.[92] Under article 3 of the treaty, which established citizenship rights for Māori, the Tribunal further found that 'Māori were entitled to equal rights when they participate in democratic election processes'. [93]

The Tauranga Moana Tribunal concluded that the inclusion of Māori constituencies by Environment Bay of Plenty – at that time, the only council in the country with Māori constituencies – was a positive and treaty-compliant means of addressing the consistent under-representation of Māori at the local government level. The Tribunal considered that the best way for the Crown to address the wider issue of Māori under-representation was 'to use its legislation and its departmental machinery to resource and encourage local authorities to assist it to meet its Treaty obligations'.[94] We consider how the 2021 Act gave effect to this recommendation – and how the Crown's proposed policy seeks a return to the situation the Tribunal examined in 2010 – further in our analysis.

More recently, the Te Rohe Pōtae Tribunal (2023) considered Māori representation in local government and assessed the 2001 Act provisions in place before the 2021 amendments. They specifically focused on the poll provisions in the 2001 Act, finding:

> The provisions in the Local Electoral Act 2001 that allow for the establishment of Māori wards or constituencies are undermined by the provisions, in the same Act, that allow a minority to demand a poll to decide the issue, which can then be defeated, especially when Māori are the minority.[95]

The Te Rohe Pōtae Tribunal further found that:

> sections 19ZA to 19ZG of the Local Electoral Act 2001, which allows for polls of electors to decide on the establishment of Māori wards or Māori constituencies are inconsistent with the principles of the Treaty.[96]

---

[91] *Tauranga Moana, 1886–2006,* p 478.
[92] *Tauranga Moana, 1886–2006,* 852–53.
[93] *Tauranga Moana, 1886–2006,* p 487.
[94] *Tauranga Moana, 1886–2006,* p 487.
[95] Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims,* (2023) vol 4 at [19.12].
[96] *Te Mana Whatu Ahuru,* vol 4, at [19.14].

The Tribunal has also considered the treaty articles in respect of Māori representation in central government. We note the finding of the Tribunal in its *Māori Electoral Option* report (1994) that:

> The Maori seats have come to be regarded by many Maori as the principal expression of their constitutional position in New Zealand. They have been seen by Maori as an exercise, be it a limited one, of their tino rangatiratanga guaranteed to them under the Treaty of Waitangi.[97]

This finding relates to the current inquiry in that increased representation at the local government level can be seen in an analogous way as upholding the exercise of tino rangatiratanga guaranteed in article 2 of the treaty.

2.3 THE PRINCIPLE OF PARTNERSHIP

The core treaty principle of partnership was first articulated in the Court of Appeal decision in *New Zealand Maori Council v Attorney-General* [1987] ('the Lands case') and has been cited in several subsequent Tribunal reports. In its Te Rohe Pōtae district inquiry, which examined issues of local government relating to historical rating and representation issues, the Tribunal stated:

> the Treaty established a partnership where the kāwanatanga or governing power of the Crown was limited by the guarantee of tino rangatiratanga to Māori. Likewise, the former absolute authority of Māori encapsulated in the term tino rangatiratanga was limited by the grant of kāwanatanga. Each would operate in their own sphere of influence and negotiate how their chosen institutions would operate where their authorities overlapped. The Crown also accepted a duty to actively protect Māori interests, and Māori acquired all the rights and privileges of British subjects. The practical details of these arrangements were to be worked out over time.[98]

This Tribunal identified that the Crown had breached the principles of partnership, rangatiratanga and equity, along with its duty of active protection, in failing to ensure that local authorities acted consistently with the principles of the treaty.[99]

In its 1994 report on the Māori electoral option for central government the Tribunal commented that the partnership relationship the treaty envisages should be founded on reasonableness, mutual co-operation and trust.[100] The Tribunal's *Tarawera Forest Report* (2003) drew on a 'memorable explanation' of this principle, commenting, 'Maori must recognise those things that reasonably go with good governance just as the Crown must recognise those things that reasonably go with being Maori'.[101]

The good governance obligations on the Crown that arise from this principle include the duty of active protection, the duty to act reasonably and in good faith, and the duty to consult. We summarise these three duties below.

---

[97] Waitangi Tribunal, *Maori Electoral Option,* (1994), p 11.
[98] *Te Mana Whatu Ahuru,* vol 1, p xlv.
[99] *Te Mana Whatu Ahuru,* vol 4, p 2257.
[100] *Maori Electoral Option*, ch 3.8.
[101] Waitangi Tribunal, *Tarawera Forest Report* (2003), p 26. (Referencing Te Runanga o Wharekauri Rekohu Inc v A-G [1993] and Waitangi Tribunal, *Te Whanau o Waipareira Report*).

2.3.1 The duty of active protection

The duty of active protection places proactive responsibilities on the Crown. Its obligation to protect Māori interests is therefore an active not a passive one: failure to protect Māori interests is as much a breach of the treaty and its principles as a positive act that removes rights. The duty to actively protect Māori interests applies to all interests guaranteed to Māori under the treaty and extends to intangible properties, including political representation. It is connected to the Crown's duty to consult and to make informed decisions. The Tribunal in its *Te Tau Ihu* (2007) report stated that '[a]ctive protection requires honourable conduct and fair processes from the Crown, and full consultation with – and, where appropriate, decision-making by – those whose interests are to be protected'.[102]

2.3.2 The duty to act reasonably and in good faith

The Tribunal has repeatedly referred to the finding of the Court of Appeal in the Lands case that partnership requires each partner to act reasonably and with the utmost good faith towards the other. In considering the governance of State healthcare in its *Napier Hospital* (2001) report, the Tribunal found that representation on district health boards – another kind of local authority – was an aspect of both the principle of partnership and the duty to act reasonably and in good faith:

> Our general conclusion is that, to the extent that the governance of State healthcare is devolved to district agencies, consistency with the partnership principle and 'the duty to act reasonably and in the utmost good faith' demands a degree of assurance that Maori are fairly represented.[103]

The Napier Hospital Tribunal later found that 'the failure to provide for Ahuriri Maori inclusion in provincial governance, including any say in the management of Napier Hospital, breached the principles of partnership and equity'.[104]

2.3.3 The duty to consult

The duty to consult is central to good faith partnership. As the Tribunal noted in its *Offender Assessment Policies Report* (2005) '[o]ne element of the Crown's obligations is that it must make informed decisions. Where Crown policies affect Maori, a vital element of the partnership relationship is the Crown's duty to consult with Maori'.[105] The Central North Island Tribunal expanded on this in its *He Maunga Rongo* (2008) report, writing:

> In our view, the obligations of partnership included the duty to consult Maori on matters of importance to them, and to obtain their full, free, prior, and informed consent to anything which altered their possession of the land, resources, and taonga guaranteed to them in article 2. The Treaty partners were required to show mutual respect and to enter into dialogue to resolve issues where their respective authorities overlapped or affected each other.[106]

---

[102] Waitangi Tribunal, *Te Tau Ihu o te Waka o Maui: Report on the Northern South Island claims* (2007), p 6 (referencing the *Lands* case).
[103] Waitangi Tribunal, *The Napier Hospital and Health Services Report* (2001), p 61.
[104] Waitangi Tribunal, *Napier Hospital and Health Services Report,* p 168.
[105] Waitangi Tribunal, *Offender Assessment Policies* (2005), p 10.
[106] Waitangi Tribunal, *He Maunga Rongo: Report on the Central North Island claims* (2008), p173.

2.4 THE PRINCIPLE OF EQUITY

Deriving from article 3 of the treaty, the principle of equity has been described as the Crown's obligation to act fairly between Māori and non-Māori. Equity can also be described as substantive rather than formal equality. Substantive equality means that treating people equally may require treating them differently. Formal equality, by contrast, means treating everyone in the same way. As the Tribunal's *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005) report noted, equity does not necessarily mean 'treating everyone the same, where they have different populations, interests, leadership structures, and preferences'.[107]

This principle requires the Crown to actively intervene to address disparities. The principle of equity directly relates to the situation the 2021 amendments sought to address, which was significant under-representation of Māori in local government. It also relates to the legislative provisions establishing Māori wards and constituencies, which give electors the ability to overturn council decisions by a simple majority, a power that only applies to Māori wards or constituencies and no others.

Māori wards and constituencies can be considered a means to achieve equity of representation for Māori at the local government level, in addition to their function of representing the treaty partnership. The Māori constituencies established at Environment Bay of Plenty in 2001 provide an example of this. Referring to those constituencies, the Tribunal noted in its *Tauranga Moana, 1886–2006* report that the model had 'stood up under scrutiny – Māori have been enfranchised, while non-Māori have not been disenfranchised'.[108]

2.5 THE PRINCIPLE OF OPTIONS

The principle of options derives from both the guarantee of tino rangatiratanga in article 2 and from article 3. It means that Māori have the option to follow the path of tribal authority and self-determination according to their tikanga or to participate in settler society or both. It is therefore related to other treaty principles such as partnership, active protection and equity, as well as to the principle of autonomy. The Crown's obligation in respect of the principle of options is to protect whichever option Māori choose.

In seeking to participate in local decision-making in matters that affect them, Māori have repeatedly sought to be represented on councils. Examining the establishment of Māori wards at Environment Bay of Plenty in 2001, the Tauranga Moana Tribunal found its empowering legislation to 'uphold the principle of options', noting that 'as in national elections, Māori can decide for themselves whether they wish to be represented as Māori, or whether they wish to be incorporated onto the general roll'.[109]

---

[107] Waitangi Tribunal, *Te Arawa Mandate Report: Te Wahanga Tuarua* (2005), p 73.
[108] *Tauranga Moana, 1886–2006,* p 487.
[109] *Tauranga Moana, 1886–2006,* pp 477.

2.6 THE PRINCIPLE OF MUTUAL BENEFIT

The principle of mutual benefit relates to the expected benefits that both Māori and the Crown expected to gain from the treaty partnership. The Tauranga Moana Tribunal (2010) considered that mutual benefit and partnership were closely related in matters of local government and that the model offered at Environment Bay of Plenty gave effect to both principles.[110] Māori would benefit from increased representation as Māori on council and the council would in turn benefit from Māori participation in decision-making, particularly in matters related to resource management and the environment.

[110] *Tauranga Moana, 1886–2006,* p 487.

CHAPTER 3 WHAT PROCESS HAS BEEN FOLLOWED TO REPEAL THE LOCAL ELECTORAL (MĀORI WARDS AND CONSTITUENCIES) AMENDMENT ACT 2021?

This chapter begins by providing an overiew of Māori representation in local government since 2021 to provide context for the current policy proposals. We then look at the commitments made regarding Māori wards in the coalition agreements between the three governing parties. We next consider the initial policy work on the proposed policy by the Department of Internal Affairs once the government was formed, followed by the Cabinet paper, the departmental Regulatory Impact Statement ('RIS') and the Cabinet decision. We then outline Ministerial communications with councils and the public announcements concerning the policy. Finally, we consider whether the policy process has breached the principles of the treaty.

3.1 AN OVERVIEW OF MĀORI REPRESENTATION IN LOCAL GOVERNMENT SINCE 2001

Since 2002, all councils have had the option of establishing Māori wards or constituencies. Prior to this, the only council which had established Māori wards – via its own empowering legislation in 2001 – was Environment Bay of Plenty (the Bay of Plenty Regional Council).[111] Legislation introduced in 2002 amended the Local Electoral Act 2001 ('the 2001 Act') to enable territorial authorities to decide to establish one or more Māori wards and regional authorities to decide that one or more Māori constituencies could be established for electoral purposes. The 2001 Act also provided that once such a decision had been made, councils must notify the public of their right to demand a poll of all voters on the question. To trigger the poll provisions, a petition of 5 per cent of voters was required. Notably, these provisions were not the same as those for establishing general or other wards under the 2001 Act.[112]

Under the existing provisions in the 2001 Act, very few Māori wards or constituencies were established: only two further councils had adopted Māori wards or constituencies between 2002 and 2021: Waikato Regional Council and Wairoa District Council. Of eight decisions to establish a Māori ward between 2011 and 2017, seven were overturned by an elector-demanded poll (a poll was not demanded for the eighth). Councils could also agree to initiate their own

[111] The history of how Māori constituencies were established in the Bay of Plenty is set out in The Human Rights Commission (2010) *Māori Representation in Local Government: the continuing challenge*, pp 9–10 Wai 3163, #A1(a) p 55 TROR-02. The Tribunal in its *Tauranga Moana, 1886–2006* (2010) report also sets out the history behind Environment Bay of Plenty and compared it with other local authorities in the Tauranga Moana inquiry district.

[112] The 2001 Act also requires representation reviews of local authorities' representation arrangements. All councils must undertake a representation review at least every six years, or after a decision is made to establish or disestablish Māori wards or constituencies. The review determines: how many councillors will be elected; whether any councillors will be elected at-large; how many general wards there will be, and the names and boundaries of these; how many Māori wards or constituencies there will be, and the names and boundaries of these; and decisions about community boards. Reviews are one means through which communities can have input into their local electoral arrangements. Wai 3365, #A25, Affidavit of Richard Ward, pp 4–5.

binding polls: of eight council-initiated polls on Māori wards between 2003 and 2016, only one resulted in the establishment of a Māori ward.[113]

Prior to 2021 there were several interventions calling for the establishment of Māori wards and constituencies. In 2010, for example, the Human Rights Commission published a case-study on Environment Bay of Plenty. Based on the largely positive feedback – from both Māori and the council – the Commission recommended that iwi should discuss whether or not they wanted Māori seats on their local or regional council and that councils should support the Māori choice.[114] In 2018, Local Government New Zealand wrote to the government with their concerns about the poll provisions and set out their preference for legislation that would 'enable mature and constructive conversations about options for Māori representation'.[115] Two years later, in 2020, an ActionStation petition – co-led by Te Raukura O'Connell Rapira and Toni Boynton[116] – called for amendments to the 2001 Act to make the process for establishing Māori wards the same as for general wards.[117]

In reponse to the petition, the then government introduced legislation sponsored by the Minister for Local Government, the Honourable Nanaia Mahuta. The Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021 ('the 2021 Act') came into effect on 2 March 2021, removing all mechanisms for holding binding polls on Māori wards or constituencies. Local authorities could continue to hold non-binding polls and were required to make a resolution to establish a Māori ward following the poll result. The final decision-making power concerning the establishment of these wards was given to local authorities. Under the amendments, local authorities could consider establishing Māori wards and constituencies ahead of confirming representation arrangements for the 2022 local elections. These decisions were required to be made by 21 May 2021, and would apply for a minimum of two local government terms.[118] In 2023, the Local Government Electoral Legislation Act 2023 further provided that councils must consider Māori wards every six years during their representation reviews if they had not established Māori wards.[119]

Since the passing of the 2021 Act, councils have been able to decide to establish Māori wards and constituencies without putting it to a poll of voters. As a result, Māori representation in local government has increased significantly. At the 2022 local elections, 29 of the 67 territorial authorities (43.3 per cent) had established Māori wards and six of the 11 regional councils (54.5 per cent) had established Māori constituencies.[120] By the end of 2023, a further 14 councils had decided to establish a Māori ward or constituency at the 2025 local election.[121]

---

[113] Wai 3365, #A20, TROR-04, p 92. Department of Internal Affairs, Regulatory Impact Statement: Improving the mechanism for establishing Māori wards and constituencies at local government (15 June 2021), p 6,
[114] Wai 3365, #A1(a) p 55 TROR-02, p 39.
[115] Wai 3365, #A1(a) p 89 TROR-04 15 June 2021 Department of Internal Affairs Regulatory Impact Statement: Improving the mechanism for establishing Māori wards and constituencies at local government p 2.
[116] Wai 3365, #A20, Brief of Evidence of Te Raukura O'Connell Rapira, p 4.
[117] Wai 3365, #A1 at [24]. The petition had 11,000 signatures and was delivered to Parliament on 3 December 2020.
[118] Wai 3355, #A25, Affidavit of Richard Ward, affidavit, pp 8–10.
[119] Local Government Electoral Legislation Act 2023 No 57.
[120] 'Vote Local – About Māori wards and constituencies' at About Māori wards and constituencies - Vote 22 | Pōti 22 (votelocal.co.nz)
[121] Wai 3365, #A25, Affidavit of Richard Ward, p 10.

3.2 THE COALITION AGREEMENTS

Prior to the general election held on 14 October 2023, the New Zealand National Party had made its opposition to the 2021 amendments to the 2001 Act clear. The National Party stated that it would repeal the legislation if it were elected to government.[122]

Following the election, the National Party entered into coalition agreements with the ACT New Zealand Party and the New Zealand First Party. The National and ACT coalition agreement, dated 24 November 2023, includes a commitment under the heading 'Strengthening Democracy', that in this parliamentary term the coalition government will progress the ACT party's policy to '[r]estore the right to local referendum on the establishment or ongoing use of Māori wards, including requiring a referendum on any wards established without referendum at the next local body elections'. The same list also includes the related commitment to '[r]epeal the Canterbury Regional Council (Ngāi Tahu Representation) Act 2022', which relates to dedicated Ngāi Tahu representation at Environment Canterbury.[123] This latter commitment, aimed at repealing the statutory right of Ngāi Tahu as mana whenua to directly appoint two members to Environment Canterbury, was not the subject of an application for urgency to us.

Similarly, under the heading 'Equal Citizenship', the National and New Zealand First coalition agreement also dated 24 November 2023 includes a commitment that in this parliamentary term the coalition government will '[r]estore the right to local referendum on the establishment or ongoing use of Māori wards, including requiring a referendum on any wards established without referendum at the next Local Body elections'.[124]

These two agreements were endorsed by Cabinet on 28 November 2023 once the new government had been sworn in. A Cabinet circular was issued by the Cabinet Office on 25 March 2024 providing guidance on how the parties are to work together on the basis of these agreements.[125]

3.3 INITIAL POLICY WORK

There were four key briefings provided to the Minister for local government as part of the policy week on these proposals leading up to the Cabinet paper and decisions. We look at each of these briefings in turn.

---

[122] Hon Judith Collins, 'National will overturn undemocratic Māori wards bill', 25 February 2021, https://www.national.org.nz/national-will-overturn-undemocratic-maori-wards-bill While this commitment did not form a major plank of National's pre-election policy commitments in 2023, it was nonetheless part of its wider platform. The commitment to '[r]epeal law establishing Māori wards in local councils, [and] revert back to system where referendum needed' appeared in a New Zealand Herald interactive guide to the two main parties' key policies before the election. The same source also contained the statement that 'National believes the establishing of Māori Wards is a decision for local councils and ratepayers'. See Interactive: Tax, housing, health and more - compare the parties' policies for this election - NZ Herald (10 October 2023).

[123] New Zealand National Party & Act New Zealand, 54th Parliament, Coalition Agreement, p. 9.

[124] New Zealand National Party & New Zealand First, 54th Parliament, Coalition Agreement, p. 10.

[125] Cabinet Office, *National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements* (CO (24) 2, p 1. CO (24) 2: National, ACT and New Zealand First Coalition Government: Consultation and Operating Arrangements - 25 March 2024 - Cabinet Office (dpmc.govt.nz)

3.3.1 Preliminary policy advice on 5 December 2023

On 5 December 2023 the new Minister of Local Government, the Honourable Simeon Brown, received preliminary advice from the Department of Internal Affairs ('the department') entitled 'Coalition policies for local electoral changes'. The advice concerned both the general policy to repeal Māori wards and constituencies and to repeal Ngāi Tahu representation on Canterbury Regional Council. This advice did not contain options for achieving the policy intent indicated by the coalition agreements, focusing instead on outlining the issues associated with it.

In the 5 December briefing, officials gave a timeframe for introducing legislation to reinstate the poll provisions ahead of the 2025 local elections ('by the end of 2024'). They noted that '[l]egislation to reinstate a more permanent polling mechanism could take a slower track, with enactment by the end of 2025, if more time is needed to work through the policy issues'. Making both changes together would, however, 'be more efficient'.[126]

Officials did note that '[r]einstatement of the poll provisions for Māori wards, and the proposed mandatory polls in 2025, is likely to be very unpopular with many local authorities and Māori communities'.[127] They sought agreement from the Minister to consult Local Government New Zealand and Taituarā's Electoral Reference Group (Taituarā is a membership network for local government professionals). No agreement was sought for consultation with Māori in general or Ngāi Tahu in particular.

The briefing paper included a short section on how Māori wards meet the Crown's treaty obligations, though it also noted they 'are not the full picture'. Officials advised the Minister that 'the Crown must ensure that local authorities uphold the Crown's Te Tiriti o Waitangi / Treaty of Waitangi obligations to Māori when councils exercise their delegated authority'. They noted that this includes 'providing avenues for Māori self-determination in decision-making which affects Māori and Māori interests'. Officials considered Māori wards to be one way to achieve this, although they also noted that councils had wider obligations to facilitate Māori participation in council decision-making under the Local Government Act 2002. They commented, 'Māori ward or appointed mana whenua representatives do not replace these core relationships'.[128]

Officials pointed out that councils would likely be 'very concerned' about the reintroduction of the poll provisions and that the reintroduction would be 'very unpopular with Māori communities, especially where wards have been established'.[129] They further noted that reinstating the poll provisions 'may' have New Zealand Bill of Rights Act 1990 ('NZBORA') implications concerning discrimination on the basis of ethnicity.[130] The advice summarised wider issues, including costs of running the polls at the 2025 local body elections, timings and the 'shortcomings' of polls or referenda in determining minority rights. On the last point, officials noted that such polls are 'an instrument of majority rule which can suppress minority

[126] Wai 3365, #3.1.31(a), p 8. Department of Internal Affairs to Hon Simeon Brown, 'Coalition policies for local electoral change', 5 December 2025, p 7.
[127] Wai 3365, #3.1.31(a), p 2. 'Coalition policies for local electoral change', p 1.
[128] Wai 3365, #3.1.31(a), p 5. 'Coalition policies for local electoral change', p 4.
[129] Wai 3365, #3.1.31(a), p 7. 'Coalition policies for local electoral change', p 6.
[130] Wai 3365, #3.1.31(a), p 5. 'Coalition policies for local electoral change', p 4.

interests' as they do not require other safeguards that can protect minority interests, such as human rights legislation, parliamentary debates and the select committee process.[131]

3.3.2 Officials brief the Minister on options for change on 20 December 2023

On 20 December 2023, the department put forward options for changes to Māori ward processes in response to the Minister's request for advice on a broader range of options. They summarised these options into two issues: 1) long-term changes to provide for greater community influence in Māori ward decisions (the government's stated policy objective), and 2) transitional requirements for councils where Māori wards were previously established without the option of a poll.

In considering the first issue, officials provided alternative options or possible adjustments to meet the government's stated policy objective without necessarily reintroducing mandatory poll provisions. These options included:

- Optional binding polls (the same as, or similar to, the pre-2021 position)
    - Electors can demand a poll on a council decision (or absence of a decision) on establishing, disestablishing or continuing Māori wards
    - Councils may also choose to initiate their own poll
    - Outcome is binding
- Mandatory non-binding polls
    - Council must hold a poll on any proposal to establish, or disestablish Māori wards
    - Council must take the outcome into account as part of its decision-making process
    - Outcome is not binding
- Stronger community consultation requirements
    - [there are requirements due to come into effect in 2025 which will require councils that don't have Māori wards to:
        - consider, every 6 years, whether to establish Māori wards, and
        - engage with their communities before making that decision].
    - This could be strengthened to:
        - be more prescriptive on consultation requirements, and/or
        - add a requirement for consultation on whether Māori wards should remain in place.[132]

Among other risks, officials noted that the first of these options 'does not provide for balancing minority interests'. Meanwhile, the second option 'may discourage councils from establishing Māori wards'. The third option, however, was considered to 'enable councils to balance respective interests, informed by general public opinion'.[133]

[131] Wai 3365, #3.1.31(a), p 8. 'Coalition policies for local electoral change', p 7.
[132] Wai 3365, #3.1.31(a), p 23. 'Options for changes to Māori ward processes', A3 attachment, p 2.
[133] Wai 3365, #3.1.31(a), p 23. 'Options for changes to Māori ward processes', A3 attachment, p 2.

In putting forward the options to give effect to the second issue, the department noted that they 'had not yet been tested with the local government sector'.[134] No mention is made of testing the options with Māori. Officials put forward four options to give effect to the policy objective, which were:

- Mandatory binding polls for 45 councils at 2025 local elections
- Mandatory binding polls for 45 councils, but council can choose to do this EITHER at 2025 elections, or in 2026/2027
- Mandatory binding polls for:
    - 32 councils at 2025 local elections
    - 13 councils at 2028 local elections
- Mandatory binding polls before the councils' next representation review. [Emphasis in original][135]

The four options were assessed against four criteria: council costs, wider community challenge, separated debates, and stability of governance. While the third of these criteria does address the possibility of the poll 'becoming politicised' it does not specifically address the impact on Māori – nor do any of the other criteria.[136]

Officials raised timing issues with implementing the proposals by the 2025 elections. They further noted that the four options developed were done so 'without external consultation'. The only impacts explicitly noted about the lack of consultation, however, concerned estimates of council costs between the options. They did note that the Local Government Commission had reviewed the advice.[137] Unlike the previous briefing, this paper is silent on the Crown's treaty obligations and those of local government in exercising delegated authority from the Crown.

3.3.3 Further advice in January 2024 expands on options for change and their timing

On 10 January officials were advised that the Minister intended to take a paper to Cabinet to progress legislation on the proposals.[138] On 18 January 2024, the Minister received the briefing '2025 elections: options for legislation and impacts of potential changes' from officials, which expanded on the legislative timing options for implementing the coalition policies at the 2025 elections. Officials asked for the Minister's agreement for them to discuss the preferred option with Local Government New Zealand and Taituarā. There is no reference to discussing the preferred option with Māori.[139]

This briefing provided advice on the potential impacts for councils of holding polls concerning Māori wards, as well as other logistical issues.[140] It provided two options to the Minister for the reinstated poll provisions to take effect at the 2025 local elections (preparations for which, they noted, are already underway):

---

[134] Wai 3365, #3.1.31(a), p 17. Department of Internal Affairs to Hon Simeon Brown, 'Options for changes to Māori ward processes, 20 December 2023, p 1.
[135] Wai 3365, #3.1.31(a), p 23. 'Options for changes to Māori ward processes', A3, p 2.
[136] Wai 3365, #3.1.31(a), p 19. 'Options for changes to Māori ward processes', p 3.
[137] Wai 3365, #3.1.31(a), p 20. 'Options for changes to Māori ward processes', p 4.
[138] Wai 3665, #A25, Affidavit of Richard Ward, p 13.
[139] Wai 3365, #3.1.31(a), p 24. Department of Internal Affairs to Hon Simeon Brown, '2025 elections: options for legislation and impacts of potential changes', 18 January 2024, p 1.
[140] Wai 3365, #3.1.31(a), p 25. '2025 elections: options for legislation and impacts of potential changes', p 2.

- A two stage-approach with:
    - a Bill to require relevant councils to hold polls on Māori wards, to pass under urgency in May 2024, and
    - a second Bill with all remaining policy objectives to pass between December 2024 and March 2025
- a single Bill to pass in August 2024 with all policy objectives to be included together.[141]

Officials noted that both options would require adjustment to councils' representation review processes and outlined further benefits and risks. They considered that both options posed some constraints on the public submission process, though in the discussion of both options there is no reference to specific consultation with Māori that we can see. We note, however, that there are some redacted sections in the briefing.[142] The only consultation noted on the briefing is again with the Local Government Commission.[143]

Towards the end of this briefing paper, in an 'Other issues' section, officials once again draw the Minister's attention to the treaty and NZBORA issues with reintroducing the poll provisions. They considered that the proposals 'may be found to be inconsistent with the Treaty, even if they were previously in place' and note the possibility of an urgent Waitangi Tribunal claim. They also noted the possibility of a section 7 report from the Attorney-General under NZBORA raising human rights concerns. As previously, officials warned:

> We anticipate that this will get a high level of attention and is likely to be unpopular with councils, the local government sector more broadly, iwi and Māori.[144]

3.3.4 Officials seek Ministerial agreement for the proposed Bill on 1 February 2024

On 1 February, officials provided a further briefing to the Minister entitled '2025 Elections: scope and process for Local Electoral Omnibus Bill' in preparation for the eventual Cabinet paper in March. This briefing sought agreement to the policy content of the proposed Bill and advised 'time savings' that could be made for its passage. One of the time savings outlined in the briefing was to shorten the standard legislative process from up to 18 months to six months, including a maximum of two months for the select committee process (the default time for this process usually being six months). Officials note that '[t]he issues the Bill deals with are likely to attract substantial public interest and there may be a large number of submissions for the Select Committee to deal with'. Once the select committee reports back, 'all remaining stages of the Bill will need to occur under urgency'.[145]

Officials further note that there is 'limited opportunity for consultation on these proposals' before the Parliamentary Counsel Office begins drafting the Bill. They therefore also sought agreement from the Minister for targeted confidential consultation with Local Government New Zealand and Taituarā's Electoral Reference Group as a test group to check workability for councils and understand risks.[146] Again, no consultation with Māori is mentioned.

---

[141] Wai 3365, #3.1.31(a), p 25. '2025 elections: options for legislation and impacts of potential changes', p 2.
[142] Wai 3365, #3.1.31(a), pp 26–7. '2025 elections: options for legislation and impacts of potential changes', pp 3–4.
[143] Wai 3365, #3.1.31(a), p 31. '2025 elections: options for legislation and impacts of potential changes', p 8.
[144] Wai 3365, #3.1.31(a), p 30. '2025 elections: options for legislation and impacts of potential changes', p 7.
[145] Wai 3365, #3.1.31(a), p 35. '2025 elections: scope and process for Local Electoral Omnibus Bill', p 3.
[146] Wai 3365, #3.1.31(a), p 34. Department of Internal Affairs to Hon Simeon Brown, '2025 elections: scope and process for Local Electoral Omnibus Bill', 1 February 2024, p 2.

This briefing set out the policy content of the Bill including the Minister's preferred option to 'require all councils who resolved to create a Māori ward without a poll since 2020 to hold a poll to take effect at [the] 2025 elections' with some options for councils as to how they would do this depending on their particular circumstances, and to 'reinstate the Māori ward poll provisions in the Local Electoral Act 2001'.[147] There are some redacted parts of the briefing relating to the latter requirement and to other proposals. In the non-redacted parts of the briefing, there are no further mentions of treaty obligations or NZBORA.

On 13 February, officials provided the Minister with a draft Cabinet paper for Ministerial and coalition consultation. It was accompanied by a briefing outlining agency feedback on the proposal. We discuss both the Cabinet paper and agency feedback in the next section.

3.4 THE CABINET PAPER AND DEPARTMENTAL REGULATORY IMPACT STATEMENT

This section looks at the Cabinet paper put up by the Minister of Local Government. We then look at the Regulatory Impact Statement put together by the Department of Internal Affairs, which outlined the policy process followed to inform the Cabinet paper. Finally, we set out the decision made by Cabinet.

3.4.1 The Cabinet Paper

In March 2024, Minister Brown lodged a Cabinet paper with proposals to amend legislation on Māori wards, entitled '[d]elivering on coalition agreement commitments on local government representation'.[148] In the paper, he proposed to reinstate binding polls on council decisions to establish Māori wards. He also proposed that councils who have made recent decisions to establish Māori wards without a poll should 'be given the option to reverse their decisions' without going through a further poll process. Councils that do not reverse those decisions would be required to conduct a binding poll on establishing Māori wards.[149]

The section of the Cabinet paper on 'the Government's Treaty of Waitangi obligations' is very short. It simply states, 'Māori wards provide for dedicated, elected representation for New Zealanders on the Māori electoral roll', and makes brief reference to the urgency application in train on the proposals.[150]

Later in the Cabinet paper, the Minister does note that the changes specifically affect those people on the Māori electoral roll, and that '[p]rior to the 2021 legislation changes, Māori were typically underrepresented in local government compared to their proportion of the general population'.[151] The Cabinet paper does not go on to discuss how reversing the 2021 legislative changes could negatively impact Māori representation levels, or the treaty implications of this

[147] Wai 3365, #3.1.31(a), pp 35–6. '2025 elections: scope and process for Local Electoral Omnibus Bill', pp 3–4.
[148] Wai 3365, #A1, Proactive release of Cabinet material about policy decisions on reinstating the Māori wards poll provisions. 6 May 2024. Cabinet paper – Delivering on coalition agreement commitments on local government representation, Office of the Minister of Local Government, 25 March 2024, p 1. All subsequent references will be to the pagination in the Cabinet paper.
[149] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 1.
[150] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 7.
[151] Cabinet paper – Delivering on coalition agreement commitments on local government representation, pp 11–12.

risk. The paper does, however, record that '[m]ore work needs to be done' to determine whether the proposals are consistent with the rights and freedoms contained in the NZBORA or the Human Rights Act 1993.[152] It further noted that '[r]einstating polls on the establishment of Māori wards may raise issues of discrimination on the basis of ethnicity'.[153]

The Minister advised that several agencies were consulted during development of the proposals contained in the Cabinet paper, including the Ministry of Justice, Te Arawhiti and Te Puni Kōkiri.[154] We have received a summary of feedback from these agencies, which we reproduce from the documents supplied to us:

- Te Arawhiti:
    - Considers removing the status quo mechanism (optionality for councils, informed by feedback from communities, including Māori) for establishing Māori wards a breach of the Treaty.
    - Considers polls divisive.
    - Considers Māori wards important for the Crown-Māori relationship at the local level.
    - Notes that restoring binding polls could impact the relationship between councils and Māori communities.
    - Noted there is litigation risk from restoring binding polls as being in breach of the Treaty.
- Ministry of Justice:
    - Raised concerns that polls that reverse council decisions to establish Māori wards may be seen by Māori as discriminatory and likely to decrease trust and confidence in central and local government.
    - Raised concerns about the removal of the Local Government Commission's role in hearing appeals under Māori wards Option One.
    - Recommended including more information about low Māori participation rates in democratic process, including local elections.
    - Recommended including more information about regional rates of Māori representation.
- Te Puni Kōkiri:
    - Raised concerns about the consistency of the proposals in the paper with the Treaty analysis.
    - Notes that Māori representation in local government could be at risk in some areas.[155]

The Minister also advised that due to time constraints consultation with the local government sector was very limited, and there has 'been no public consultation and no consultation with

[152] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 12.
[153] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 12.
[154] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p12.
[155] Wai 3365, #A25(a), Exhibits to the Affidavit of Richard Ward, 10 May 2024, p 9. Appendix B: Summary of departmental feedback received on draft Cabinet paper: *Delivering on coalition agreement commitments on local government representation.* Feedback was also received from the Electoral Commission and Stats NZ on costs and population data accuracy issues.

iwi and Māori'.[156] The Minister said legislative timeframes 'mean this will not be possible before the Bill is introduced'.[157]

3.4.2 The Regulatory Impact Statement

Accompanying the Cabinet paper was a Regulatory Impact Statement ('RIS'), prepared by the Department of Internal Affairs. The intent of the RIS was to inform Cabinet's policy decisions on the proposals.[158] The paper identifies the policy problem at issue as 'determining the correct balance between public input in council representation decisions and facilitating Māori representation and participation in local government'.[159]

The RIS states that options for implementing the legislative changes have not been consulted on outside of Government. However, there is existing feedback from stakeholders on the effect of polls for Māori wards, captured in submissions on the 2021 amendments.[160] Feedback in support of the 2021 amendments argued that removing the polls would:

- provide for fairer electoral representation of Māori in local government;
- support the Crown's Treaty obligations;
- avoid the community division heightened by Māori ward polls; and
- address the discrepancy between the way Māori wards and general wards are treated in law.[161]

The RIS first analyses the proposed reinstatement of binding polls, comparing it to the status quo established in 2021 with several criteria including whether the policy 'supports councils to facilitate Māori representation and participation in local government' and 'supports adequate public input into decisions about local representation'.[162]According to the RIS, reinstating pre-2021 poll requirements would be much worse than the status quo on this front – making it 'much more difficult to establish Māori wards'.[163] While Māori wards are not the only way for councils to facilitate Māori representation, they do provide Māori greater access to local governance mechanisms. Restoring the old legislation would 'create a new barrier to Māori engagement and participation in local government decision-making'.[164] While the proposals would allow for greater public input by giving the most direct control over Māori ward decisions to electors, overall, the RIS found the proposals would be worse than the status quo. The paper further records that:

> [e]vidence from the period of 2002 to 2019 suggests that Option Two could prevent many other councils from establishing Māori wards, even if the council considered that this would strengthen its decision-making processes and relationships with mana whenua. It may also result in the disestablishment of Māori wards for a number of councils, although evidence for this is limited.[165]

---

[156] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 12.
[157] Cabinet paper – Delivering on coalition agreement commitments on local government representation, p 12.
[158] Wai 3365, #A1, Regulatory Impact Statement – Binding polls on the establishment of Māori wards (RIS), 14 March 2024, p 1. All subsequent references will refer to the pagination in the RIS.
[159] RIS – Binding polls on the establishment of Māori wards, p 13.
[160] RIS – Binding polls on the establishment of Māori wards, p 12.
[161] RIS – Binding polls on the establishment of Māori wards, p 12.
[162] RIS – Binding polls on the establishment of Māori wards, p 14.
[163] RIS – Binding polls on the establishment of Māori wards, p 17
[164] RIS – Binding polls on the establishment of Māori wards, p 17
[165] RIS – Binding polls on the establishment of Māori wards, p 20.

Second, the RIS analysed the proposed transitional mechanisms for those 45 councils that have already established or have resolved to establish Māori wards without a poll. Again, the proposals were assessed against a set of criteria, included public input and Māori representation. The RIS noted Option Four (the option to which Cabinet ultimately agreed) would not benefit or negate public input – while electors would have direct influence on Māori wards decisions via mandatory polls, council decisions to rescind or disestablish Māori wards would not allow for public input. One positive of Option Four, however, compared to other proposals, was that it allowed for full representation reviews to occur in the time between the poll in 2025 and the local elections in 2028.[166] In terms of facilitating Māori representation, the proposals rated as 'much worse than doing nothing'.[167] The paper records that '[e]vidence from the 2002–2019 period indicates it is likely that most of the Māori wards established since the 2021 legislative amendment will be disestablished by a binding poll'.[168] The department's preference was the status quo, but it noted that 'does not align with the Government's preferred balance of public input in representation arrangements and Māori representation in local government'.[169]

We note the RIS is not entirely comprehensive. The Department of Internal Affairs Regulatory Impact Analysis panel said the RIS 'partially meets' quality assurance criteria.[170] The panel notes it was developed 'within a very tight, ministerially set, timeframe' to deal with the Government's coalition commitments. This limited the analysis and consultation that could occur in advance of the RIS.[171] As a result, the RIS failed to meet the 'complete' and 'convincing' criteria.[172] The panel found the RIS contained 'insufficient analysis of the relative value of Māori wards as a mechanism for meeting effective representation objectives'.[173] The RIS itself notes 'there has been limited opportunity to investigate the specific impacts on Māori, iwi, and hapū, and any impacts on Treaty of Waitangi settlement agreements'.[174]

3.4.3 Cabinet makes its decision

After considering the Cabinet paper, the Cabinet Economic Policy Committee agreed on 20 March 2024 to several amendments to the Local Electoral Act 2001, the Local Government Act 2002, and the Local Government Electoral Legislation Act 2023, that would essentially result in a repeal of the Local Electoral (Māori Wards and Māori Constituencies) Amendment Act 2021. The amendments would mean that:

- a petition by at least 5 percent of people within a district will require the council to hold a binding poll on the establishment of Māori wards;
- councils may also initiate a binding poll on the establishment of Māori wards; and
- councils do not need to consider establishing Māori wards every six years.[175]

[166] RIS – Binding polls on the establishment of Māori wards, p 28.
[167] RIS – Binding polls on the establishment of Māori wards, p 29.
[168] RIS – Binding polls on the establishment of Māori wards, p 29.
[169] RIS – Binding polls on the establishment of Māori wards, p 36.
[170] RIS – Binding polls on the establishment of Māori wards, p 5.
[171] RIS – Binding polls on the establishment of Māori wards, p 5.
[172] RIS – Binding polls on the establishment of Māori wards, p 5.
[173] RIS – Binding polls on the establishment of Māori wards, p 5.
[174] RIS – Binding polls on the establishment of Māori wards, p 4.
[175] Wai 3365, #A1, ECO-24-MIN-0032 Minute: Delivering on coalition agreement commitments on local government representation, pp 2–4.

The changes would also affect the 45 councils that had chosen to establish a Māori ward without a poll. The legislation would mean:

- councils that established Māori wards since 2020 without a poll can make a resolution before the 2025 local elections to disestablish Māori wards;
- councils that have made a resolution to establish Māori wards in the current local government term can rescind that resolution before the 2025 local elections; and
- councils that established Māori wards since 2020 without a poll and do not choose to disestablish them are required to hold a binding poll at the 2025 local elections, to take effect at the 2028 local elections.[176]

3.5 POLICY ANNOUNCEMENT AND LETTERS TO COUNCILS

On 4 April 2024, the Minister publicly announced that the government would introduce legislation to effectively repeal the 2021 amendments and return the provisions in the 2001 Act to the previous status quo by reintroducing the poll provisions. Furthermore, any local authorities that had established a Māori ward or constituency as a result of the 2021 Act would either be required to dissolve them or to hold a binding poll to canvas voter opinion on whether to retain them alongside the 2025 elections. The results of any such poll would take effect at the 2028 local elections.[177]

The Minister said the government would introduce a bill in 'approximately' May 2024 to be enacted by July 2024.[178] Department of Internal Affairs' General Manager, Policy and Operations Richard Ward explained that the government wished the Bill to come into effect by 31 July 2024. The reason for that is:

> local authorities that have resolved to establish Māori wards or Māori constituencies this term are required to adopt their initial proposals for new representation arrangements (including the Māori wards and constituencies) by 31 July 2024. They must then open the proposal for public submissions within 14 days of the resolution, or in any case by 8 August 2024. To avoid public confusion about being invited to make submissions on a decision that the council intends to reverse shortly afterwards, and unnecessary work for any of these local authorities that wish to rescind their Māori wards or constituencies decision once the Bill is enacted, it is preferable for the Bill to be in effect by 31 July 2024.
>
> If any councils choose to rescind their recent Māori wards or constituencies decision, or disestablish their Māori wards or constituencies, there is a short window for these councils to put in place alternative representation arrangements before they start pre-election processes in April 2025 for elections in October 2025.[179]

On or about 4 April 2024, Minister Brown issued two separate letters to councils providing an update on the Government's progress in implementing the coalition agreement to initiate changes to the legislation for Māori wards and constituencies. The first letter addressed councils that had established Māori wards or constituencies in time for the 2022 local

---

[176] ECO-24-MIN-0032 Minute: Delivering on coalition agreement commitments on local government representation, pp 2–4.
[177] Hon Simeon Brown, 'Coalition government to require referendums on Māori wards', 4 April 2024 at Coalition Government to require referendums on Māori wards | Beehive.govt.nz
[178] Department of Internal Affairs, 'Upcoming changes to local elections' (undated) at Fact-sheet-upcoming-changes-to-local-elections.pdf (dia.govt.nz)
[179] Wai 3365, #A25, Affidavit of Richard Ward, p 16.

elections.[180] The second letter addressed councils that had resolved to establish Māori wards or constituencies in time for the 2025 local elections.[181] The two letters explained the Government's binding polls policy before outlining the transitional arrangements and options available for the respective councils.

The Minister's first letter – addressed to councils that had established Māori wards since 2021 without an opportunity for a binding poll – stated these councils are required to choose from two options:

- Option 1 – resolve this year to disestablish the Māori wards or constituencies by council resolution (to take effect at the 2025 local elections); or
- Option 2 – hold a binding poll on the question of Māori wards/constituencies at the 2025 local elections (to take effect at the 2028 local elections)[182]

Minister Brown's second letter – addressed to councils that resolved to establish Māori wards without an opportunity for a binding poll but have not yet implemented this – stated Government policy is for either:

- Option A – resolve this year to rescind the decision to create the Māori wards or constituencies by council resolution (to take effect at the 2025 local elections); or
- Option B – hold a binding poll on the question of Māori wards/constituencies at the 2025 local elections (to take effect at the 2028 local elections)[183]

The letters then outlined the requirements for completing a representation review process under each option.

Shortly afterwards, the department put out public communications concerning the forthcoming changes, including a factsheet and Frequently Asked Questions, entitled on its website 'Reinstating the ability for polls on Māori wards'. These communications reflected the options put forward in the letters to councils.[184] In addition, the department hosted two information sessions for local government electoral and governance staff on 4 April 2024 and 2 May 2024 and a session with elected members on 19 April 2024. Mr Ward told us that officials 'provided the information that Cabinet had approved about the Bill, the proposed transitional arrangements, and the likely timeframes of both' at these sessions.[185] There were, however, no information sessions for any Māori groups.

---

[180] Wai 3365, 3.3.5(a), Hon Simeon Brown to Mayors and Councils, 'How Cabinet decisions relating to Local Elections 2025 will affect councils with established Māori wards'.
[181] Wai 3365, 3.3.5(b) Hon Simeon Brown to Mayors and Councils, 'How Cabinet decisions relating to Local Elections 2025 will affect councils that resolved to establish Māori wards'.
[182] Wai 3365, 3.3.5(a), p [1].
[183] Wai 3365, 3.3.5(b), p [1].
[184] Department of Internal Affairs, 'Upcoming changes to local elections' (undated) and 'Proposed Local Government (Electoral Legislation and Māori Wards and Māori Constituencies) Amendment Bill – Council FAQs' (as at 1 May 2024) at Council-FAQs-Proposed-Amendment-Bill-May-2024.pdf (dia.govt.nz)
[185] Wai 3364, #A25, Affidavit of Richard Ward, p 16.

CHAPTER 4 WAS THE POLICY PROCESS TREATY-CONSISTENT?

This chapter sets out our analysis of whether the process outlined in chapter 3 was consistent with the treaty and its principles. Due to the time constraints on this inquiry, we have not had the benefit of questioning witnesses in person during a hearing. However, our reading of the Cabinet papers and officials' advice reveals that the government is clearly set on a course of introducing legislation reinstating the poll provisions removed in 2021 as soon as possible and has not followed any contrary advice from officials.

4.1 GENERAL ISSUES WITH CLAIMS CONCERNING COALITION AGREEMENTS

Before we turn to our analysis of these claims, we wish to make the general point that a consistent theme runs through this and other recent urgent applications to the Tribunal: 'an assumption on the part of the government that the coalition agreements that led to its formation override or take precedence over the Crown's obligations under the Treaty of Waitangi'.[186] As the Tribunal recently stated concerning the removal of section 7AA of the Oranga Tamariki Act:

> It is not for us to comment on the coalition agreement between the National party and the ACT party but, once Ministers are sworn in and the government is formed, the executive so constituted are responsible for meeting the Crown's obligations to Māori under the Treaty of Waitangi. It is a Treaty of Waitangi, not a proclamation of Waitangi, and the Crown does not have a unilateral right to redefine or breach its terms. The obligation is to honour the Treaty and act in good faith towards the Treaty partner.[187]

The evidence we have seen in this inquiry in respect of reintroducing the poll provisions concerning Māori wards shows the same prioritisation in operation: in every policy document we looked at, the coalition agreements take precedence over the treaty, in some instances, literally by being placed earlier and more centrally in policy documents; in other cases, the treaty is barely mentioned at all. At every opportunity the Minister has adopted the shortest possible timeframes to progress coalition agreements at the expense of proper treaty-consistent process, including genuine consultation with Māori.

The Cabinet Manual 2023 makes clear that the treaty is a foundational part of New Zealand's constitutional arrangements and can provide a means of limiting majoritarian decision-making that can impact minority rights. As the Oranga Tamariki Tribunal so recently stated, the government does not have the unilateral right to set these obligations aside.

There are other common elements between this policy process to remove the 2021 amendments and those related to other urgent claims the Tribunal has considered so far in 2024. These elements include the speed at which significant change is being made, the lack of consultation with Māori on matters that affect them and the lack of adequate advice around treaty obligations and analysis of the issues from a treaty perspective. As we have outlined in chapter 2, these treaty obligations contain a range of duties for the Crown when it is proposing changes

[186] *Oranga Tamariki (Section 7AA) Urgent Inquiry*, p 27.
[187] *Oranga Tamariki (Section 7AA) Urgent Inquiry*, p 27.

affecting Māori, including partnering with Māori – especially, as in this case, when Māori are seeking an effective role in the process. We observe that in the interests of political pragmatism, treaty obligations have been jettisoned as if they were optional.

The government's treaty duties are particularly heightened where disparities exist. As both existing research and the evidence provided to us for this inquiry has shown, prior to 2021, Māori were consistently under-represented in local government. The overall proportion of self-identified Māori councillors after the 2022 local elections rose to 21.6 per cent (from 13.5 per cent in 2019), with 27 per cent of these elected to Māori wards or constituencies.[188] There are still, however, several councils that have little to no Māori representation at the decision-making table, resulting in an uneven picture around the country.

4.2 WAS THE PROCESS PRIOR TO 2021 TREATY-CONSISTENT?

Before we look further at the policy process informing the decision to reinstate the 2001 poll provisions and require councils that have established Māori wards and constituencies to either dissolve them or hold a binding poll of voters on them, we briefly consider the situation prior to 2021.

4.2.1 The process prior to 2021

We received evidence from several people who had been involved in attempts to establish Māori wards or constituencies prior to 2021. Whakatāne district councillor Toni Boynton, for example, described Whakatāne's initial efforts to establish Māori wards in 2017. While the district council had voted in favour of establishing Māori wards for 2019 – via a slim majority of six to five votes – a petition submitted in February 2018 demanded a poll be undertaken. Ms Boynton told us the outcome of the poll was: 'a. For Māori Wards: 4801 (44.33% of the votes cast) b. Against Māori Wards: 6004 (55.43% of the votes cast)'. The wards were not established at that time.[189] Three Māori wards were, however, established on council in 2022 and Ms Boynton is currently the councillor for the Kāpū-te-Tangi Māori ward.[190]

Similarly, Dinnie Moeahu, who was elected in 2019 to the New Plymouth District Council and is currently the only Māori councillor elected on the General Ward (and only the second Māori person to ever be elected to council), gave evidence about the process there. In 2014 the district council had voted to establish a Māori ward during its mandated representation review. As in Whakatāne, a poll was held in 2015 with the verdict that Māori wards should not be established. Mr Moeahu said this poll, 'was commissioned by a representative of the Grey power community and they subjected Māori, and anyone who supported Māori to death threats, verbal and physical abuse'.[191] In 2021, by contrast, after six years of education and advocacy about Māori wards, a petition urging a poll on a later council decision did not clear the five per cent threshold. Mr Moeahu commented, 'the community had matured through the tough times they

[188] Wai 3365, #A25, Affidavit of Richard Ward, p 11.
[189] Wai 3163 #A3, Brief of Evidence of Toni Boynton, pp 1–2.
[190] Wai 3163 #A3, Brief of Evidence of Toni Boynton, pp 2-3.
[191] Wai 3163 #A4, Reply brief of evidence of Dinnie Moeahu, p 1.

had to overcome, and the world didn't end. Instead, society accepted the value Māori can contribute to the decision-making process in local government'.[192]

Andrew Judd, the Pākehā former mayor of New Plymouth District Council at the time of the 2014 vote and subsequent poll, also provided us with a brief of evidence about the New Plymouth experience. Mr Judd said the proposal for Māori wards had brought much divisiveness and hostility from residents. He recalled:

> going to a kaumatua meeting to explain the process of the referendum and they were in tears. The kaumatua couldn't understand what was wrong. They asked why are they doing this, all we want to do is work together.[193]

Outlining the organised campaign against Māori wards run by Hobson's Pledge, Mr Judd noted:

> They are very well resourced but hidden. We don't know who these people were. I always said – let's front up and have a conversation face to face. My invitation was never taken up because ultimately, they want to maintain that structure of power over Māori.[194]

Mr Judd said no other representative ward seat that a council votes to establish could be petitioned for referendum – this rule only applied to Māori ward seats illustrating a fundamental inequity: '[it] allows Pākehā to determine Māori rights. How can you allow Pākehā to vote in and out a Māori voice when you won't even think about doing this to Pākehā?'[195] He gave an example showing the contradictory views on the legitimacy of rural wards versus Māori wards:

> At one [of] the community events, I met a farmer who said to me – 'none of this race-based crap, those Māori can stand like everybody else.' Following the referendum result, I was out in the community to talk about wards in general. The same man came up to me and had the audacity to say, 'now don't you take away the rural ward. Us farmers deserve a place, and we don't want you townies telling us what to do'.[196]

Based on his experience, Mr Judd said the process of allowing the majority to determine the political and human rights of New Zealand's indigenous minority was 'divisive, hurtful and fuelled by anti-Māori rhetoric'. He further commented that the current proposals 'are not really about the Māori ward seats – it is about Pākehā creating constructs to exclude Māori'.[197] He concluded by sharing the comments of then Prince now King Charles and New Zealand's constitutional head of State:

> During Prince Charles' visit to New Plymouth in 2015, I asked him about Māori ward seats. His response to me was 'Māori must always be at the top decision-making table'. As the King, don't all Ministers swear allegiance to him?[198]

We were also provided evidence of councils trying alternative means before 2021 to establish Māori wards. The Honourable Stephanie Chadwick, the former mayor of Rotorua District Council (and a former MP), described the process taken to advance Māori representation on that council. She told us about the council's partnership with Te Tatau o Te Arawa and Rotorua

---

[192] Wai 3163 #A4, Reply brief of evidence of Dinnie Moeahu, p 2.
[193] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 2.
[194] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 3.
[195] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 4.
[196] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 4.
[197] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 5.
[198] Wai 3365 #A11, Brief of Evidence of Andrew Judd, p 6.

Lakes Council, noting that while it increased participation, the relationship was not enshrined in the Local Government Act 2002. It therefore gave no certainty for Māori representation or participation in the council standing committee. In the council's five-yearly review, a majority of elected members recommended that one Māori seat, one General seat and eight seats at large be created. This proposal was rejected.[199] Finally, Ms Chadwick described a proposed Rotorua District Council Representation Arrangements Bill to allow council to have equal Māori ward and general ward seats. An attempt to mirror the Fenton Agreement 1880 on which Rotorua was initially developed, the Bill was sponsored by MP Tamati Coffey and supported as far as select committee. However, it was not supported by the then Attorney-General on the basis that it was discriminatory against general ward voters and inconsistent with NZBORA. The Bill lapsed due to the 2023 election.[200]

What happened in Whakatāne and New Plymouth also happened in several other places where councils had decided to establish a Māori ward or constituency. Between 2002 and 2021, only two further councils other than Environment Bay of Plenty were able to establish them.

4.2.2 The 2021 amendments removed the poll provisions

It was in the context of this repeated voting down of attempts by democratically elected councils to establish Māori representation at the local level – and repeated calls for increased representation to reflect councils' treaty obligations from voices such as the Human Rights Commission, Local Government New Zealand and an ActionStation petition that the previous government sought to remove the poll provisions from the 2001 Act.

We received evidence in this inquiry from the Honourable Nanaia Mahuta, the previous Minister of Local Government, who led the reform introduced in 2021. In her evidence, Ms Mahuta told us that the system prior to 2021 had a different set of rules for establishing Māori wards compared with that for establishing general wards. Her view was that the process should be the same for all wards and that the poll provisions presented 'nearly insurmountable barriers to council trying to improve democratic representation of Māori interests'. She considered that process 'fundamentally unfair to Māori'.[201] She affirmed that the changes made in 2021 were 'a positive step towards inclusive nation building'.[202]

Similarly, in their Regulatory Impact Statement from 2021, the Department of Internal Affairs stated that the reason for amendments sponsored by Minister Mahuta was that the poll provisions created a barrier to their establishment, 'in part because of the status of Māori—while tangata whenua—, as a minority in New Zealand and the ability of the tauiwi (non-Māori) majority to outvote Māori interests'.[203]

Former Member of Parliament Tamati Coffey, who chaired the Māori Affairs Select Committee which heard submissions on the 2021 Amendment Bill, provided us with evidence concerning the submission process. He said that among the 12,000 submissions received, were those from 'numerous councils, councillors, and council-affiliated groups [who] submitted in support

[199] Wai 3365 #A3, Brief of Evidence of the Hon. Stephanie Chadwick, pp 3–4.
[200] Wai 3365 #A3, Brief of Evidence of the Hon. Stephanie Chadwick, p 4.
[201] Wai 3163 #A2, Brief of Evidence of Nanaia Cybelle Mahuta, pp 1–2.
[202] Wai 3163 #A2, Brief of Evidence of Nanaia Cybelle Mahuta, p 3.
[203] Wai 3365, #A20, TROR-04, p 92. Department of Internal Affairs, Regulatory Impact Statement: Improving the mechanism for establishing Māori wards and constituencies at local government (15 June 2021), p 6.

[and] cited the changes as ways to give effect to the Te Tiriti o Waitangi between the Crown and Māori'. Mr Coffey said many of these groups were convinced the proposed Bill was consistent with their obligations under the Local Government Act 2002, and found the pre-2021 law unfair, as the polling requirements only applied to Māori wards.[204]

4.3 WAS THE POLICY PROCESS IN 2024 TREATY-CONSISTENT?

We begin our analysis of the policy process by considering the problem definition informing the proposed changes and then consider other aspects of the process flowing from that definition.

The Cabinet paper setting out the case for the replacement of the 2021 amendments states that its reason for doing so was to 'deliver on coalition agreement commitments'. The problem definition outlined in the RIS was to determine 'the correct balance between public input in council representation decisions and facilitating Māori representation and participation in local government'. The premise of this problem definition puts Māori rights in opposition to those of the wider community, when Māori are members of that community, as well as treaty partners. It also implies that the presumed right of 'the public' to make decisions about Māori rights and interests takes precedence over the Crown's treaty obligations. This framing of the policy problem works to prioritise the assumed interests of the non-Indigenous majority over the Indigenous minority, in a way that inverts the Cabinet Manual's instruction to protect minority rights and interests. We note that no other wards require 'public input' in this way. Given the lack of consultation to date, we note further that there is an assumption here about what the public would consider an appropriate balance, rather than an overview of what the public have actually said.

We were presented evidence of what 'the public' thought in some local electorates around the country, as some of the councils that established Māori wards or constituencies after 2021 undertook their own consultation to assess local electorate views. Hilda Halkyard-Harawira told us that the Far North District Council undertook informal feedback on Māori wards during their representation review in 2021. In that review, approximately 82 per cent of people were in support of Māori wards. The council therefore resolved to establish Māori wards on 4 May 2021 for the 2022 and 2025 elections.[205] Similarly, Lady Tureiti Moxon told us that Hamilton City Council conducted its own consultation process in 2021 in which an 80 per cent majority was in favour of Māori wards. The council therefore established two Māori wards in 2022.[206] Matthew Mullany gave evidence of a five-month consultation process by Napier City Council in 2021 before it too established Māori wards.[207] These examples suggest that democratically elected local councils are capable of balancing public and Māori interests – the stated policy objective of the current proposals – without the need for binding polls.

---

[204] Wai 3365 #A5, Brief of Evidence of Tamati Coffey, p 5.
[205] Wai 3365 #A2 Hilda Halkyard-Harawiria, p 4.
[206] Wai 3365 #A8, Lady Tureiti Moxon, p 4. In an annex, the council summary of feedback showed that it was 81 per cent of 994 responses, with 16 per cent opposed to the creation of Māori wards. Wai 3365 #A8(a), Hamilton City Council, "Maaori Wards and other means of achieving Maaori representation" (Feedback updated 25 November 2021), p 4.
[207] Wai 3365 #A18, Brief of Matthew Mullany, p 6.

The initial policy advice, the Cabinet paper and the RIS make clear that no consultation with Māori was undertaken in the development of these proposals. In the RIS, officials attempted to address this significant omission by referring to the consultation that was undertaken in 2021. Feedback in support of the 2021 amendments identified that they would provide fairer representation, support the Crown's treaty obligations, avoid community division and address discrepancies between the processes to establish Māori wards and general wards. While referring to the 2021 feedback was clearly an attempt by officials to provide an alternative viewpoint in the time available, it is not a substitute for actual consultation.

The shortened timeframes for passing legislation have also truncated select committee processes from six to two months – a significant reduction given that no consultation with Māori has taken place prior to Cabinet making its decision. It seems as if the government does not wish to hear from Māori about this issue in any form, much less as a treaty partner prior to the development of policy that materially impacts their rights and interests in order to obtain their free, prior and informed consent to it. We note too that our inquiry and report is not a substitute for either consultation or a proper select committee process. At the very minimum, the government should consider extending the select committee process to the usual timeframes.

It is clear from the RIS that officials favoured retaining the status quo established in 2021. The analysis of the four options included in the RIS did include a criterion for 'facilitating Māori representation'. However, no options included for assessment – aside from the status quo – provided opportunities to facilitate that representation. Earlier policy briefings from the department had provided advice to the Minister of other ways the government might meet the stated policy objective of 're-balancing' the interests of the public and Māori in the establishment of Māori wards. The Minister chose not to pursue any of these alternative options and appears to have little interest in anything other than fulfilling the coalition agreement to the letter. At every opportunity the Minister appears to have shortened timeframes, electing to pass these significant amendments under urgency by the end of May this year, rather than in August, as officials advised.

In the policy advice informing the Cabinet paper to make these changes, officials pointed out that the policy would likely undermine treaty obligations, as well as raise NZBORA issues. While the risk of discrimination and NZBORA impacts were still flagged in the Cabinet paper, there was little discussion of treaty implications beyond noting that the mechanism of Māori wards themselves was a means of fulfilling treaty obligations in respect of Māori representation. The warnings concerning breaching treaty obligations contained in two of the early briefing papers do not appear in the Cabinet paper – at least in the non-redacted sections we were provided.

We note the reframing in the department's public communications from April 2024 of the removal of Māori wards and constituencies – for that is, in effect, what will happen if these provisions pass – to 'reinstating the ability for polls on Māori wards' for communities. This phrasing strongly implies that it was the wider community's rights that were infringed by the 2021 amendments rather than, as was the case, Māori rights to greater representation in local government as an expression of tino rangatiratanga were more fully realised. A more accurate rendering of what is currently happening might be 'requiring the rights of an Indigenous minority to once again be subject to the wishes of the non-Indigenous majority' – a majority, we note, which between 2002 and 2021 voted time and time again to overturn the requests of

Māori and decisions of democratically elected councils to establish Māori wards or constituencies. As the Cabinet Manual 2023 sets out:

> A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.[208]

Having reviewed the key elements of the policy process to inform Cabinet decisions on the proposals, we find that there was no consultation with Māori, and little in-depth analysis of treaty obligations (and, relatedly, of NZBORA issues) beyond noting that they were affected. We find that the policy problem definition constructed an opposition between 'the public' and Māori and created a presumed right for the former to determine the latter's right to political representation – a fetter not placed on any other community. The policy objective of the process appears to have simply been to fulfil the coalition agreements rather than to facilitate Māori representation at the local level as is required under the treaty. Cabinet clearly made decisions that ignored initial advice that the status quo established in 2021 best fulfilled the balance between public interests and Māori rights. These acts and omissions indicate that the Crown's policy process and final decisions were not consistent with their treaty obligations.

4.4 TREATY FINDINGS ON THE POLICY PROCESS

In light of our analysis in the previous section, we make the following findings in respect of the treaty and its principles.

Several of the claimants and interested parties submitted that the treaty means the Crown cannot act in a unilateral way, arguing, for example, that 'the proposed amendment … is cynical and is premised on the false belief that the Crown alone can unilaterally make changes in the requisite representational structures'.[209] Having reviewed the evidence provided to us, we agree that the Crown has acted in a unilateral way to prioritise its coalition agreement commitments without any discussion or consultation with its treaty partner. Such unilateral decision-making is particularly egregious when it concerns measures that were introduced to remove previous discriminatory barriers to Māori political representation and to uphold the treaty partnership at the local level. We therefore find the Crown in breach of the principle of partnership and make further findings concerning the duties arising from this principle.

The evidence we have seen demonstrates that there has been no consultation with Māori on any of these proposals. Indeed, Crown counsel acknowledged that there had been 'no consultation with the Treaty partner' in its submissions.[210] The Crown did note that 'the duty to consult was not absolute'. The Wai 682 claimants submitted, however, that '[n]egotiation,

---

[208] Cabinet Office, *Cabinet Manual, 2023* (Wellington : Department of Prime Minister and Cabinet, 2023), p5 cited in Waitangi Tribunal, *Oranga Tamariki (Section 7AA) Urgent Inquiry Report*, p 28.
[209] Wai 3365, #3.3.19, [28].
[210] Wai 3365, #3.3.10, p 5 [14].

discussion, and agreement [were] essential characteristics and practices in the treaty partnership between Māori and the Crown requiring consultation'[211].

The Crown went on to to say that the select committee process is likely 'to provide the claimants, and other Māori with an interest in the matter, with an opportunity to make submissions on the bill'.[212] The Wai 682 claimants were emphatic that:

> Engagement at select committee is far too late in the legislative process for Māori to have meaningful dialogue with the Crown and influence the trajectory of decision-making. In such circumstances, Māori are vulnerable to the preferences of the Crown in both process and substance, and exposed to the impacts of those preferences.[213]

We agree. The select committee process, which in itself has been truncated, is not a substitute for consultation. The treaty duty to consult requires engaging with Māori on matters that affect their rights in order to obtain their free, prior and informed consent *before* policy proposals are developed – not after. We therefore find that the Crown failed in its duty of consultation.

While consultation is 'only one aspect of the Crown's duty to ensure it is informed of Māori interests',[214] as the Crown submitted, the official advice provided does not indicate the government adequately informed itself in any other ways about Māori views on this matter. The initial concerns raised by officials about treaty obligations disappeared from later briefings and advice provided by agencies, including Te Arawhiti and Te Puni Kōkiri, was not heeded. Any discussion of treaty obligations and an analysis of treaty issues raised by the proposal is almost entirely absent from the Cabinet paper on which Cabinet made their decisions.

The departmental RIS did attempt to provide some consideration of treaty issues. In lieu of consultation on the current proposals, officials did include key points raised from the submission process in 2021, which highlighted the beneficial impacts of the 2021 amendments for Māori. While we recognise this was an attempt to ameliorate the shortcomings of the current process and provide some balance to the analysis, we agree with the overall assessment that the RIS was incomplete and lacked proper analysis of the relative value of Māori wards and constituencies in meeting effective representation objectives. We acknowledge, however, that this is largely because officials were operating within 'a very tight, ministerially set, timeframe'.

The Crown acknowledged that the proposals were 'not the outcome of a conventional policy process whereby officials first identify a broad policy issue or problem and then develop and analyse a range of options to address the matter and provide advice to Ministers'. They further acknowledged 'that the policy to introduce such legislation was a commitment forged at a political level' – the role of officials 'has been largely to to advise how to progress and give effect to the coalition commitment'.215 However, the Crown considers this is 'not in itself unorthodox or constitutionally improper''.216 It further noted the judgment that 'there is an

---

[211] Wai 3365, #3.3.14, p 6 [3.9].
[212] Wai 3365, #3.3.16, p 10 [34].
[213] Wai 3365, #3.3.14, p 18 [5.19].
[214] Wai 3365, #3.3.10, p 5 [15].
[215] Wai 3365, #3.3.16, p 7 [23–24].
[216] Wai 3365, #3.3.16, p 8 [28]

imbalance between the ability for electors to determine their representation arrangements and Māori representation in local government' which informed the proposals.217

Interested parties submitted that:

> [T]his approach by the Crown has not arisen as a result of a policy problem identified, as would usually be the case in any policy process. It is submitted that without the coalition agreement, there is no policy problem to fix and no justification (legal or otherwise) for the Crown's current and pending action.[218]

Other interested parties further submitted that 'retrospective reasoning … cannot make up for the absence of a principled, evidence base and Treaty compliant reason to proceed with the proposed amendments'.[219] We agree. Despite efforts to retrofit a policy problem concerning 'lack of balance' where none existed, we consider that the policy process shows inadequate problem definition. The process takes as its starting point enactment of government policy based on the coalition agreements, as the Crown itself admits, rather than ensuring fair and equitable representation in local government that upholds the Crown's treaty obligations. We find that this failure to make reasonable and informed decisions in favour of decisions based on political commitments is a breach of the Crown's treaty duties to act reasonably and in good faith.

[217] Wai 3365, #3.3.16, p 5 [15].
[218] Wai 3365, #3.3.22, p 5 [26].
[219] Wai 3365, #3.3.21, p 13 [45].

CHAPTER 5 WHAT ARE THE TREATY IMPLICATIONS OF THE PROPOSAL?

In this chapter, we consider the treaty implications of the proposal and assess what prejudice it will cause. We then make our findings on whether these implications constitute a breach of the treaty principles.

5.1 TREATY IMPLICATIONS OF THE POLICY PROPOSALS

In their submissions, the Crown acknowledged that 'elected members who identify as Māori increased after the 2022 elections' and that the 2021 amendments contributed to that. They accepted that 'there is a risk that the proposed policy might remove some opportunities for Māori to be represented on local government'. They considered, however, that 'the extent of this risk is unclear', noting that it is not possible to determine how much of the overall increase was directly attributable to new Māori wards and constituencies.[220] We think the way the Crown has expressed this risk conflates two issues: the proportion of those who identify as Māori on councils and the provisions for dedicated Māori representation at council decision-making tables reflecting the treaty partnership. As the claimants submitted to us: '[p]artnership is not determined numerically but by the Crown's intention to promote greater protections and participation by Māori. Māori must have a voice in the local government dialogue'.[221]

It is quite clear that reinstating the poll provisions and requiring councils to dissolve wards established since 2021 or hold a binding poll to determine their fate will result in the reduction of dedicated Māori representation at the local level. We only need look at the situation prior to 2021, when attempts to establish Māori wards and constituencies were defeated in several districts, to see that. While, as the Crown points out, there are other mechanisms that promote Māori participation in local government, these mechanisms – including standing committees, tangata whenua forums and strategic relationships – are not the same as having a seat at the decision-making table. As Mr Moeahu stated in his evidence, other mechanisms for Māori participation, such as advisory groups or sub-committees, not only do not provide an opportunity to have a voice at the decision-making table at the council meeting level, but have also historically meant Māori advice is ignored.[222]

The reversal of the 2021 amendments will not only have an impact on Māori representation at the local level, it will likely also negatively impact Māori and youth engagement with local government altogether. Māori ward councillor on Wellington City Council Nikau Wi Neera described in his evidence, 'the implicit advantage to civic participation for young people as well as Māori to see themselves reflected in decision-making bodies as rangatahi Māori'. Mr Wi Neera told us how his campaign for council had energised and engaged rangatahi in the city: 'we worked hard at the universities and the telephones and used our peer networks to

[220] Wai 3365, #3.3.10, pp 5–6 [17].
[221] Wai 3365 #3.3.1, p 5 [14].
[222] Wai 3163 #A4, p 3.

encourage turnout'.[223] An ActionStation survey respondent's views also supported this evidence:

> The last local body election was the first time i have ever voted, and thats because i had someone worth voting for. Before the formation of Maori Wards there was no reason to engage in local body politics because, more often than not Maori interests were not considered and candidates reflected this. What was the point of voting.[224]

Such engagement is important when political participation at both local and central levels is declining among both Māori and young people. This participation is likely to be undermined by the current government's proposed changes.

The Wai 3362 claimants submitted that Waikato-Tainui would be disproportionately prejudicially affected by the Crown's policy as nearly 20 per cent of those wards are on councils in the Waikato-Tainui rohe and the wider Waikato region.[225] A brief of evidence from Linda Te Aho, Co-Chair of the Joint Management Committee with Waipaa District Council since 2018 (along with several other roles) outlined the lead up to the establishment of Māori wards and how it had provided representation to a community of interest that was underrepresented in local government and, as a result, would provide 'fairer and more inclusive decision-making'.[226] She explained that considerable work had been undertaken to establish Māori wards in councils in the Waikato-Tainui rohe.[227] She further stated that the government's proposed reform:

> directly undermines the decision-making of local government in relation to the establishment of Maaori wards, which has a manifest impact on the councils within the Waikato region which have democratically determined, following public consultation, to establish Maaori wards. The effect on Waikato-Tainui and other Maaori living within the Waikato region is significant and threatens to undermine decades of work by Waikato-Tainui and others to secure Maaori representation in local government.[228]

As was the case prior to 2021, the reintroduction of poll provisions will stir division and enable racist rhetoric of the kind described in several of the briefs of evidence submitted to us for this inquiry. In Whakatāne, for example, Ms Boynton was concerned about the divisive environment the poll will create (as it had done in 2018), stating '[w]e will be forced to again campaign against better resourced groups and enter highly fueled and uninformed debates about who we are as Māori within our own rohe'.[229] Kaipara District Councillor Ihapera Isabella Paniora told us about her experiences as the only Māori councillor of hostility towards Māori led by the mayor. The mayor actively campaigned against the council's 2020 decision to establish a Māori ward and restructured 'race-based' jobs. Ms Paniora is concerned that the current proposals will 'fuel racial tension and create a safety (psychological and physical) risk to Māori and mana whenua, and subject Māori to dangerous and uneducated white supremacist rhetoric'. [230]

---

[223] Wai 3365 #A4, p 2.
[224] A10a, p 9.
[225] Wai 3365, 3.3.5, p 2.
[226] A12, p 7.
[227] A12, pp 7–8.
[228] A12 p 10.
[229] Wai 3163 #A3, p 4.
[230] Wai 3365 #A16, Kōrero Taunaki a Ihapera Isabella Paniora, p 4.

Wai 3163 co-claimant, Te Raukura O'Connell Rapira, shared with us the survey responses from an ActionStation survey conducted in 2024.[231] The survey responses provided to us contained several references to experiences of racism, expressions of antagonism towards Māori and concerted campaigns either during pre-2021 campaigns to establish Māori wards and constituencies or in 2024 in light of the current proposals. Some ActionStation survey respondents described the reaction to council votes to establish Māori wards or constituencies prior to 2021. We cite here examples from Whakatāne and New Plymouth:

> My siblings and I were present in the council chambers [in New Plymouth District Council in 2014] observing elected members debating over the issue. I distinctly remember the venomous hatred frothing from the mouths of old Pākeha men speaking over kaumatua and kui with entitled distain. Old Pākeha men who tried to intimidate, distract, shout over in efforts to prevent Māori from championing council to establish a Māori ward.[232]

> I am a resident of Whakatāne. We had a poll in our area in 2018, following a majority decision by the Whakatane District Council to establish Māori wards in 2017. Hobson's Pledge and others who were outside of our rohe, opposed all Māori wards and managed to secure a poll. The national politicalisation of Māori wards by non-residents of Whakatāne brought to the forefront the ability of well funded, and mobilised national bodies promoting a mono ethnicity approach to local and national politics. … The poll emboldened racists to rant and rave publicly and denigrate Māori and our interests and rights, not just in terms of Māori wards but also any other issues pertaining to Māori e.g. Treaty of Waitangi settlements. While the messages were not new, the reach was wide due to social media and local reporting. Our children were exposed to this racism, and in my family my 5 year old daughter asked me "why do the Pākeha hate us?" [233]

Other survey respondents described what was happening in 2024 in light of the government's proposals:

> These negative messages that surround the marketing of Māori Wards continue to create an undercurrent of misinformation, presenting a picture of 'over' compensation towards Māori.[234]

> As a minority voting for something that should be entrenched in all aspects of governance is heartbreaking. Also, having to justify why Māori positions are needed and good for the country against people who feel justified in letting you know (unasked) why there shouldn't such positions is aggravating and tiring.[235]

> The Coalition lobby groups systematically engage in conducting polls and surveys across various social media platforms. This pattern has continued since the debates over 3 Waters, Māori wards, and Māori street naming within local government, extending to recent electoral activities. These initiatives frequently distribute content that is hateful, harmful, racist, and misleading. Under the pretense of expressing concern for election integrity, these groups often ignore more pressing issues affecting community well-being, such as the harm inflicted upon us. This relentless spread of misinformation is especially prevalent on platforms like Twitter, mail drops and email – [it] is unbearable. [236]

These are only a few examples of division and harm from the survey responses and we note there were many more.

---

[231] A10, p 2.
[232] A10a, p 4.
[233] A10a, p 6.
[234] A10a, p 2.
[235] A10a, p 2.
[236] A10a, p 3.

We were also provided evidence of both the financial and emotional costs for Māori in having to advocate and campaign for dedicated Māori representation, something they thought was no longer necessary after the 2021 amendments. Kelly Stratford, Deputy Mayor of the Far North District Council said '[t]he polls on whether to establish Māori wards are costly, both financially and in terms of the Tiriti relationship; they cause division and fuel further racism towards Māori'.[237] Former councillor-at-large for the Rotorua District Council from 2011 to 2022, Merepeka Raukawa-Tait also told us about the financial outlay of getting elected. These costs, she said, included a candidate's fee and any promotional material, as well as needing the finances to repeat this if running every three years.[238]

Hand in hand with this was the demoralisation of those who had been engaged in these processes, who told us the clear message the current proposals sent about the lack of trust and value that Māori bring to the local government context. Ms Raukawa-Tait told us that 'having trust in councillors and feeling valued is the biggest decider to increased representation of Māori as elected members of local government'. She explained that when Māori are not represented at the council table, they begin thinking that they do not belong – the knowledge that their views were 'valued and sought after' was therefore important.[239] Several councillors from the Far North District Council spoke of the same issue. Ms Stratford told us that having Māori wards 'helped bridge communication gaps and create trust',[240] while Rhonda Tibble, a Māori ward councillor, said at a council meeting in 2021 that having a 'critical mass' of Māori councillors at the table helped to improve trust, access, and equity with voters.[241]

5.2 TREATY FINDINGS – IMPLICATIONS OF THE PROPOSED POLICY

The Crown stated that any prejudice from the policy proposals was, at this stage, speculative 'as the future cannot be known with certainty'.[242] The claimants, by contrast, submitted that the Crown was disingenuous, misrepresenting the extent of the risk the proposals pose to Māori.[243] We consider that not only are there likely to be prejudicial effects with these proposals but some of them are already happening, including exposing Māori to racism and hostility, exacerbating political disengagement, and damaging the Māori-Crown relationship, as we have outlined in the previous section. We find this is a further breach of the duty of active protection.

The claimants submitted that the 'new status quo' (i.e. since 2021) has 'helped create a state of equity in addressing historic underrepresentation of Māori in civic life and local decision-making'.[244] We note that the Crown has said the current proposals will not remove the provisions to establish a Māori ward or constituency altogether and these provisions continue to provide for Māori representation. We agree that the parts of the 2001 Act providing for the establishment of Māori wards and constituencies are, on their face, equitable. However, the reinstatement of the poll provisions, as the pre-2021 experience has shown, will make

[237] A15, p 5.
[238] A6, p 2.
[239] A6, p 2
[240] A15, p 3.
[241] A15(b), p [1]
[242] Wai 3365, 3.3.19, p 10 [35].
[243] Wai 3365, 3.3.11, p 5 [19].
[244] Wai 3365, 3.3.20, p 24 [54].

establishing – or, in many cases, re-establishing – such wards or constituencies nearly insurmountable. Not only are the poll provisions themselves inequitable, but also, as Linda Te Aho pointed out in her evidence, Māori do not have a similar ability to petition for a poll in respect of proposals by local authorities to establish general or rural wards.[245] Neither general nor rural wards require a poll to decide on their establishment.

The Crown submits that the election of local representatives is 'only part of the puzzle', pointing to the provisions in the Local Government Act 2002 requiring councils to facilitate Māori participation and other legislative requirements.[246] The Wai 682 claimants, however, submit:

> The Crown cannot maintain that there are other protective mechanisms for Māori participation in Local Government, when those protective mechanisms existed prior to the 2021 amendments, and Māori experienced disproportionate representation and discrimination.[247]

We agree with the claimants. While participatory bodies play their part in enabling Māori input into council decisions, that is not the same as having a seat at the table where those decisions are made. As the Wai 3163 claimants point out, this is particularly important for unsettled groups and mātāwaka Māori.[248]

Having reviewed the available evidence, it is clear to us that, in breach of the principle of equity, the Crown's current proposals will reinstate the discriminatory poll provisions from the 2001 Act. They will reinstate inequity of process, in that only Māori wards will be subject to the poll provisions, and they will ensure inequity of representation, by requiring those councils that have established Māori wards or constituencies since 2021 to dissolve them or hold a binding poll on them (with the no-doubt justified assumption in light of the evidence prior to 2021 that majoritarian polls will vote to disestablish the wards).

We note too, in respect of the principle of equity, that the proposed legislation is likely to raise human rights issues under NZBORA. At section 19(1), NZBORA provides for the right to be free from discrimination, while section 19(2) provides for measures taken in good faith to assist or advance groups who experience discrimination. Aside from providing a means of representation at the local level for Māori as tangata whenua in line with the guarantee of tino rangatiratanga in the treaty, Māori wards and constituencies could also be viewed as a measure to assist or advance a group that experiences discrimination. We have seen ample evidence of that discrimination in the evidence provided to us in this inquiry.

In relation to human rights, we received submissions concerning the human rights principle of retrogression – human rights are to be progressively realised and governments should not implement regressive measures unless they have been duly justified and weighted against other rights. It was submitted that this human rights principle was relevant to the exercise of kāwanatanga in the treaty context.[249] We agree that removing amendments designed to more fully realise the rights of Māori to political representation without a proper justification and

245 Wai 3362 #A12, Brief of Evidence of Linda Naumai Te Aho, p 5.
246 Wai 3365, #3.3.19, p 14 [42].
247 Wai 3365, #3.3.14, p 14 [5.7]
248 Wai 3363, 3.3.18, p 20 [97].
249 Wai 3365, #3.3.17, pp 3–4 [10–11].

analysis is retrogressive in the way these submissions outlined, and contributes to the breach of the principle of equity.

We turn now to consider the principle of mutual benefit. The claimants submit that the '[t]here are ancillary benefits to the establishment of Maaori wards'. Those councils who have established such wards 'have the benefit of Maaori representation, perspectives and ideas at the council table, which will strengthen local decision-making'.[250] Interested parties further submit that 'the Crown policy disregards the positive impact Māori wards have had and have in their respective communities'.[251] The Crown did not refute this, having already pointed to the original provisions for Māori wards being a fulfilment of its treaty obligations. Indeed, we note that none of the policy papers supplied by the Crown highlighted any policy issue with the way the increased number of Māori wards and constituencies are currently working.

We have also seen evidence that they are in fact working well both for Māori and non-Māori. Hilda Halkyard-Harawira, for example, told us:

> Māori ward councillors bring an expertise from Te Ao Māori into the [Far North District Council] setting; Te Reo Māori, tikanga Māori, whakapapa to signatories of He Whakaputanga and Te Tiriti o Waitangi and our connections and responsibilities to Iwi, hapū, Māori and also to the wider communities. … In some cases, Councils need Iwi to help get some projects over the line. Proper consultation and appropriate engagement processes have long been absent and put in the 'too hard basket', but with Māori ward councillors, we are able to bridge the many gaps, and consult and engage directly with our communities because we understand their needs.[252]

Respondents to a 2024 ActionStation survey provided further evidence of benefits for both Māori and non-Māori, with several noting improved and strengthened relationships within the community and between Māori and councils. We cite just two examples here:

> (Benefits for Māori)
>
> Non-Maori councillors do not go to the marae to talk to constituents and do not have the same networks. Maori councillors are comfortable in that space, speak Maori and know all of the locals either by name [or] association within iwi.[253]
>
> (Benefits for non-Māori)
>
> Our New Plymouth District Council functions really well with Māori representation on it. We are able to have open frank discussions on all topics including an indigenous perspective on land, marine and health issues. This creates better decision making on a local level. More balanced governance with representation from all members of our community. To have a successfully functioning council all members of our community needs a voice. Women, Men young, old and Māori.[254]

From these examples and others provided to us, we consider that after the 2021 amendments, the principle of mutual benefit was starting to be observed at the local level. No doubt Māori wards and constituencies are not perfect in practice nor a panacea for all the issues Māori have with local government, as documented in several previous Tribunal reports. They do, however, establish a means by which the principle of mutual benefit can be realised at the local level.

---

[250] Wai 3365, #3.3.20, p 13 [31].
[251] Wai 3365, #3.3.22, p5[24].
[252] Wai 3365 #A2, Brief of Evidence of Hilda Halkyard-Harawira, pp 10–11.
[253] Wai 3365, #A10 (a), p 13.
[254] Wai 3365, #A10(a), p 16.

Reinstating the poll provisions making it harder in the future to establish Māori wards and constituencies – and requiring that councils dissolve or hold a binding poll concerning those established since 2021 without a poll – undoes that promising start. We therefore find that the Crown's policy proposals breach the principle of mutual benefit.

Finally, the Crown submitted that Māori 'may choose to participate in local decision-making in different ways', refering to principle of options.[255] While it is true that not all Māori seek to be represented in this way, many Māori around the country have clearly expressed their preference to be involved in decision-making at the local level as an expression of their tino rangatiratanga – as the sustained effort to achieve Māori representation at the local level over the past two decades shows. In line with the Tauranga Moana Tribunal, we therefore find that removing the option for Māori voters at the local level to choose whether to be represented by general or Māori ward councillors – as they can do at the central government level – is a breach of the treaty principle of options.

[255] Wai 3365, 3.3.19, p 14 [42].

CHAPTER 6 SUMMARY OF FINDINGS AND RECOMMENDATIONS

This chapter summarises our findingsand sets out our recommendations to the Crown.

6.1 SUMMARY OF FINDINGS

Due to the time constraints imposed on us by the Crown's legislative programme, our urgent inquiry process has been necessarily narrowly focused and truncated to allow us to report before the legislation is introduced into the House on or about 20 May 2024. By necessity, we have focused on the Crown process to amend the 2021 Amendment Act and its consequences. Broader constitutional issues of Māori representation in local government will be considered by the Tribunal's Wai 3300 Tomokia Ngā Tatau o Mātangireia – Constitutional Kaupapa Inquiry. We had insufficient time to hold a hearing or question witnesses and only limited time to consider all the evidence and submissions we have received.

Nonetheless a clear picture has emerged of a flawed Crown policy process proceeding at speed towards what appears to be a pre-determined legislative outcome. Officials have provided only limited advice and analysis concerning the Crown's treaty obligations. There has been no consultation with Māori or other key stakeholders. There appears to be no other reason for the speed of reform other than the Crown's wish to tick off another of its coalition policy agreements. This is in circumstances where the proposed legislative amendments will have prejudicial effects on the representation and participation of Māori in local government, will likely expose Māori communities to the divisive effects and racist rhetoric that has accompanied local referendums in the past and will cause lasting damage to the Māori–Crown relationship.

We firstly identified that the article 2 guarantee of tino rangatiratanga guarantees to Māori in this context the right to be represented and to participate in decision-making at local and central government levels. We agreed with the findings of previous Tribunals that the process to establish Māori wards and constituencies prior to 2021 was discriminatory and inconsistent with treaty principles. The evidence clearly shows that the removal of the requirement for local binding referendums or polls in 2021 removed an almost insurmountable barrier to the continuation of Māori wards created by council decisions. The removal of the poll provions and has resulted in a significant increase from three councils with Māori wards or constituencies prior to 2021 to 45 councils that have either established or resolved to establish Māori wards or constituencies. We consider this went a long way towards ensuring that the mechanisms for Māori representation and participation in decision-making at the local government level were treaty consistent.

By contrast, in considering the government's current policy process and its consequences, we have found clear breaches of the principle of partnership. This arises in the unilateral way the Crown has yet again proceeded to prioritise its commitments made in the coalition agreements over its obligations to Māori under the treaty. Also, in the Crown's almost complete failure to consult with Māori or other stakeholders such as councils or territorial authorities about what is proposed. We consider the Crown's suggestion that a truncated two-month select committee

process will allow for sufficient consultation to be risible. We find this to be a clear breach of the duty to consult. The advice from officials, whilst attempting to address the evident process issues had significant limitations. There were efforts to address some of the gaps in evidence and analysis by referring to the previous policy process in 2021, but the advice from officials has been clearly compromised by the extremely tight ministerially set timeframes. We find that by failing to make reasonable and informed decisions the Crown has breached its duty to act in good faith.

In the context of Māori representation to local government, the principle of partnership requires that the Crown has a primary duty to actively protect the tino rangatiratanga of Māori to determine how and by whom they are represented. As a panel, we have concluded that the way the government has prioritised its coalition commitments over and above the aspirations and actions of Māori to determine their own dedicated representation at local government is a breach of the Crown's treaty duty to actively protect Māori rights and interests. We note that while the provision to include Māori wards will not be removed from the legislation, the amendment will have largely the same effect because of the reinstatement of the previously insurmountable poll provisions.

We consider that the poll provisions from the 2001 Act were discriminatory and inconsistent with treaty principles. Therefore, the reinstatement of similar poll provisions that require binding polls only in respect of Māori wards and not of any other general or rural wards or constituencies is discriminatory and we find it to be in breach of the principle of equity.

Lastly, we turn to the principle of mutual benefit and the principle of options. We have received much evidence of the benefits to Māori, councils, and communities of having Māori wards. Whole communities have benefitted because of the improved and strengthened relationships within communities and between Māori and councils by having Māori represented around the decision-making table. This is a practical expression of how the principle of mutual benefit can be lived out in local communities. The amendment of the law to require councils to resile from their decisions to establish Māori wards or hold binding polls will undo that mutuality and is a breach of the principle of mutual benefit. Removal of the option for Māori voters to choose whether to be represented by general or Māori wards councillors is a breach of the principle of options.

We have found that the primary prejudice from the rushed and arbitrary amendment of the 2021 Amendment Act is that Māori have been shut out of the process, with no opportunity for consultation as treaty partner or to make any input other than via the shortened select committee process. It is very clear to us that the most significant prejudice will be the likely dramatic reduction of dedicated Māori representation once the amendments come into effect. The Crown has said that the extent of the reduction is speculative, but the history of similar polls in the past has shown them to be virtually insurmountable.

We note the submissions of Te Whakakitenga o Waikato Incorporated that Waikato-Tainui is likely to be disproportionately prejudicially affected because nearly 20 per cent of the wards and constituencies established since 2021 are in the Waikato-Tainui rohe or wider Waikato region. The other significant prejudice we have identified is the likely divisive effects on communities of binding polls, including exposure of Māori communities to racist rhetoric, as described in the evidence we have received of experiences of previous binding polls.

We find the claims to be well-founded.

6.2 RECOMMENDATIONS

We turn now to our recommendations, conscious that the Crown has confirmed that it intends to introduce its Bill most likely on 20 May 2024. We embarked upon this inquiry in the knowledge that time would be short for us to provide some practical recommendations to the Crown in the event we found their conduct failed to live up to their obligations under the treaty. Nonetheless our primary recommendation is that the amendment of the 2021 Amendment Act be halted to allow proper consultation between the treaty partners with a view to agreeing how Māori can exercise the guarantee of tino rangatiratanga in article 2 to determine their own dedicated representation in local government.

We wish to draw the government's attention to sections 19H and 19I of the Local Electoral Act 2001. These sections set out a robust process for reviews of representative arrangements for both territorial and regional authorities and provides for all such arrangements in an area to be considered at the same time, including Māori wards. We consider the approach set out in these sections better achieves the stated policy objective of balancing council decisions about their representative arrangements with public input without the discriminatory element of binding polls for Māori wards. We commend this approach to the Crown for consideration and recommend that the amendment of the 2021 Amendment Act be halted to enable these reviews to be carried out.

Dated at Wellington this 17th day of May 2024.

Kaiwhakawā Sarah Reeves, presiding officer

Basil Morrison CNZM, JP

Kevin Prime ONZM, MBE, CNZM

THE SEAL OF THE WAITANGI TRIBUNAL

Appendix List of Interested Parties

#	**Interested parties**
1	Te Runanga o Ngāti Whatua
2	Dennis Greenland and Tim Tukapua on behalf of the Muaūpoko Tribunal Authority (Wai 2139, the Muaūpoko Tribal Authority claim)
3	Tamati Cairns, Mathew Shayne Walker, Tania Eden, Matthew Mullany and Hori Reti on behalf of Taiwhenua o Te Whanganui a Orotū (Wai 3051, the Taiwhenua o Te Whanganui a Orotū claim)
4	Te Rōpū Tautoko Māori
5	Edward Parahi Wilson for and on behalf of Ngāti Tamainupō (Wai 775, Whaingaroa Harbour and Other Waikato Waters claim)
6	Cheryl Turner, John Klaricich, Harerei Toia (deceased), Ellen Naera, Fred Toi, Warren Moetara, and Hone Taimona on behalf of Ngāti Korokoro, Ngāti Wharara and Te Pouka hapū (Wai 2003, Ngāti Korokoro, Ngāti Wharara and Te Pouka (Turner and Others) Resource Management claim)
7	Luana Pirihi and the late Paki Pirihi on behalf of the hapū of Patuharakeke and a claim by Ngawaka Pirihi and others of Pukekauri 1B1, 1B2, 1B3, 1B4 and 1B5, and Takahiwai 4C, 4CD1, 4E, 7A, 7B2, and 7C (Wai 745 Patuharakeke Hapu Lands and Resources claim)
8	Luana Pirihi and the late Paki Pirihi on behalf of the hapū of Patuharakeke and a claim by Ngawaka Pirihi and others of Pukekauri 1B1, 1B2, 1B3, 1B4 and 1B5, and Takahiwai 4C, 4CD1, 4E, 7A, 7B2, and 7C (Wai 1308 Patuharakeke Hapuu Ki Takahiwai claim)
9	Nora Rameka which has been brought on behalf of Te Rūnanga o Ngāti Rēhia for and on behalf of the hapū of Ngāit Rēhia (Wai 1341, Te Rūnanga o Ngāti Rehia)
10	Lady Tureiti Moxon and governors of Te Kōhao Health Ltd
11	Wai 2880, the Local Electoral Act (Heihei) claim
12	Ms Denise Messiter (Wai 3331, the Constitutional (Messiter) claim)
13	Dr Rapata Wiri (Wai 3330, the Constitutional (Wiri) claim)
14	Teina Boasa-Dean (Wai 3341, the Constitutional (Boasa-Dean) claim)
15	Nicola Dally-Paki (Wai 3319, the Constitutional (Dally-Paki) claim)

16	Mihirawhiti Searancke, Renee Hinerangi Searancke, Doreen Hinemania Richards, Kingi Tuheka Hetet, Boyce Te Wharemaru lhakara II Taylor and Sharon Bettina Searancke-Rakena and other (Wai 1504, the Constitutional (Searancke & Others) claim)
17	Natasha Willison-Reardon on behalf of Iwi me Hapuu Ki Marokopa incorporating Ngaati Rarua ki Marokopa, Ngaati Toa Tupaahau, Ngaati Peehi, Ngaati Te Kanawa and Ngaati Kinohaku ki Marokopa me Kiritehere ("nga haukainga o Marokopa me Kiritehere")
18	Mike Tana
19	Cr Kerrin Leoni and Deputy Chair Will Flavell
20	Leonia Pihama, Ani Mikaere, Angeline Greensill, Mereana Pitman, Hilda Halkyard-Harawira and Te Ringahuia Hata (Wai 2872 the Mana Wāhine (Pihama and Others) claim)
21	Toro Waaka, Gerald Aranui, Chaans Tumataroa- Clark, Thomas Keefe, Charlie Lambert, Theresa Thornton and Siobhan Storey as the Trustees of the Ngāti Pāhauwera Development Trust, on behalf of the members of Ngāti Pāhauwera