

8. Treaties and international obligations

New Zealand is party to a number of treaties that give rise to a diverse range of ongoing international obligations. These cover issues such as human rights, child abduction, human trafficking, the rights of the disabled, refugees, endangered species, trade, transport, communications, and other economic issues. The term “treaty” is used in this chapter to refer to all legally binding international agreements, including bilateral and multilateral treaties, and United Nations conventions to which New Zealand has acceded.

New Zealand must give full effect to a treaty, or it will risk breaching its international obligations. In such instances, considerable resources will be required to remedy any non-compliance with the relevant treaty. Non-compliance places New Zealand’s international reputation at risk and exposes it to any applicable sanctions under the treaty.

Given the breadth of New Zealand’s international obligations, proposed legislation will often affect, or have the potential to affect, one or more of New Zealand’s international obligations. Care must be taken to ensure that any proposed legislation does not inadvertently cause New Zealand to breach any of its existing treaty obligations.

All multilateral treaties and bilateral treaties of particular significance (as the Minister of Foreign Affairs determines) are required to undergo Parliamentary treaty examination. This process includes a National Interest Analysis (“NIA”).⁵³

Once Parliamentary treaty examination is complete, the practice in New Zealand is to pass any domestic legislation necessary for compliance with a treaty before that treaty comes into force for New Zealand.

The Ministry of Foreign Affairs and Trade (“MFAT”) is the Government’s principal adviser on matters relating to treaties and international relations. MFAT maintains the official database of New Zealand’s binding treaty obligations at international law⁵⁴, and should be consulted if a department is considering signing any international instrument that may impose obligations on New Zealand.

The Cabinet Manual requires Ministers, when submitting bills for the legislative programme, to draw attention to any aspects of a bill that have potential implications for, or may be affected by, international obligations (see paragraph 7.60(d)).⁵⁵

⁵³ <http://www.parliament.nz/en-nz/pb/rules/standing-orders/chapter7/00HOHPBReferenceStOrdersChapter7LInternational1/international-treaties#SO395>

⁵⁴ <http://www.treaties.mfat.govt.nz/>

⁵⁵ <http://cabinetmanual.cabinetoffice.govt.nz/node/50#7.60>

Guidelines

8.1. Are any pre-existing treaties or international obligations relevant to the proposed legislation?

New legislation must not be inconsistent with existing international obligations.

MFAT, the Crown Law Office, and the particular department with responsibility for the relevant existing treaty should be consulted to identify any relevant international obligations and whether the proposed legislation will result in any inconsistency.

Where possible, any relevant non-binding international instruments should be identified. Although not binding on New Zealand in international law, they may have wider significance. These may be described as declarations, resolutions, and instruments under negotiation or non-binding international standards. Advice should be sought from MFAT, the relevant department or the Crown Law Office as to their legal significance.

New Zealand is currently party to, and is in the process of negotiating, a number of trade agreements (sometimes called Free Trade Agreements, Closer Economic Partnerships, or Strategic Economic Partnerships). These agreements can have specific provisions in areas such as intellectual property rights (including the use of trademarks and patent rights), and have dispute resolution processes that domestic law must not inadvertently restrict. Further information about existing trade agreements and those currently under negotiation can be found on MFAT's website.⁵⁶

8.2. Are you implementing a treaty?

The appropriate method of incorporating treaty obligations into New Zealand law should be used to ensure that all relevant international obligations are given full effect.

To have effect in New Zealand, international obligations must be incorporated into New Zealand law. In many cases this will require an amendment to domestic law to give effect to a treaty obligation. In other cases it will be necessary to pass entirely new legislation.

The language in treaties is often ambiguous. This is done so that a diverse group of governments can reach agreement. Any terms or language that may be ambiguous should be identified and Parliamentary counsel should be consulted to determine whether or not the language needs to (or can) be adjusted, and what method of incorporation is most appropriate.

The text below is intended only as a brief summary of the main methods of incorporation. Further advice should be sought from legal advisers, MFAT and the PCO as to which method is the most appropriate.

- **Wording method:** This is the most common method. The wording of the treaty is reflected in the body of the legislation, although the legislation may or may not

⁵⁶ <http://mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/index.php>

specify the treaty that it is incorporating. The wording may be reflected verbatim or, if necessary, translated to more accurately reflect local conditions. This method is useful where it is necessary to translate the wording of a treaty to reflect local conditions or where the treaty requires additional steps to be taken in New Zealand law (for example, one purpose of NZBORA⁵⁷ was to implement the ICCPR).

- **Formula method “force of law”:** The full or partial text of the treaty is set out in the legislation, usually in a schedule. The legislation will use a form of words to proclaim that the treaty has the “force of law” and will apply domestically. This method is rarely used, but it is useful where the treaty amounts to a self-contained body of law that does not require any operational structures to support it (see the Sale of Goods (United Nations Convention) Act 1996⁵⁸).
- **Subordination method:** The legislation contains a provision that authorises the making of regulations or rules that give effect to the treaty or particular parts of it. This method is useful where the treaty provides for, or will require, ongoing technical changes that are appropriate to delegate to the executive, or in rare cases that require implementation under strict and compressed timetables (see s 36(1) of the Maritime Transport Act 1994⁵⁹).
- **Hybrid method:** In some cases more than one method may be used. For example, legislation may use the wording method to set out the relevant treaty rights and protections, but use the subordination method to trigger the application of those provisions. Another example is where the formula method is used to give the treaty force of law in New Zealand, but the wording method is used to create the specific mechanisms necessary for the administration of the law. The Adoption (Intercountry) Act 1997⁶⁰ uses the formula method to give effect to the relevant treaty, but uses the wording method to enable the administration of the treaty.

8.3. Does the legislation provide ready access to the treaty that it implements?

Legislation which implements a treaty should provide easy access to the treaty that it implements.

People must have ready access to the primary source of the legislation (for example, by including it in a schedule to the Act). However, treaties can be amended from time to time; so there must be clarity about the effect of any subsequent change to the referenced document, and how to best identify and provide access to the authoritative version of the treaty following any amendment. Part 3, Subpart 2 of the Legislation Act 2012 addresses similar issues regarding the incorporation by reference of material into delegated legislation.⁶¹

⁵⁷ <http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html>

⁵⁸ <http://www.legislation.govt.nz/act/public/1994/0060/latest/whole.html>

⁵⁹ <http://www.legislation.govt.nz/act/public/1994/0104/latest/DLM334660.html>

⁶⁰ <http://www.legislation.govt.nz/act/public/1997/0109/latest/DLM422494.html>

⁶¹ <http://www.legislation.govt.nz/act/public/2012/0119/latest/DLM2997666.html>

It will be necessary to balance the need to provide easy access to the text of the treaty being implemented against any practical difficulties of doing so. For example, it might not be appropriate to annex particularly lengthy or technically complex treaties to legislation.