Primer on the Principles of the Treaty of Waitangi Bill

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This primer focuses specifically on the Principles of the Treaty of Waitangi Bill that was introduced into the House of Representatives on 7 November 2024.

For more background on the concept of 'the principles of the Treaty of Waitangi' in New Zealand law, see the Primer on Treaty Principles (March 2024), available here.

1. What is the Principles of the Treaty of Waitangi Bill?

The Principles of the Treaty of Waitangi Bill is a proposed law that aims to redefine 'the principles of the Treaty of Waitangi', a concept which has been used in New Zealand law and government since 1975.

The Bill was introduced to Parliament on 7 November 2024 and had its first reading on 14 November 2024. The first reading of a Bill is one stage in the law-making process. It is the first opportunity that MPs have to debate the proposed law and to vote on whether it progresses to the next stage.

The three parties in the coalition government (National, New Zealand First, and ACT) agreed to introduce this Bill and vote to support it at this first reading stage. The Bill therefore passed this stage with all the MPs of the coalition parties supporting it (68 votes) and all the MPs from the opposition parties voting against it (54 votes).

2. What are the coalition government's proposed principles of the Treaty that are set out in the Bill?

The Bill proposes three new principles to replace the principles that are currently used. The established principles that are currently used include partnership, active protection, redress, mutual benefit, and equity. The three new principles proposed by the coalition government are set out in clause 6 of the Bill:

6 Principles of Treaty of Waitangi
The principles of the Treaty of Waitangi are as follows:

Principle 1

The Executive Government of New Zealand has full power to govern, and the Parliament of New Zealand has full power to make laws,—

(a) in the best interests of everyone; and

(b) in accordance with the rule of law and the maintenance of a free and democratic society.

Principle 2

(1)The Crown recognises, and will respect and protect, the rights that hapū and iwi Māori had under the Treaty of Waitangi/te Tiriti o Waitangi at the time they signed it.

(2)However, if those rights differ from the rights of everyone, **subclause (1)** applies only if those rights are agreed in the settlement of a historical treaty claim under the Treaty of Waitangi Act 1975.

Principle 3

(1)Everyone is equal before the law.

(2)Everyone is entitled, without discrimination, to—

(a) the equal protection and equal benefit of the law; and

(b) the equal enjoyment of the same fundamental human rights.

3. What is the problem with the proposed principles?

The main problem with the proposed principles is that they do not reflect the agreement made in Te Tiriti o Waitangi. The Bill presents a false picture of Te Tiriti.

Under Te Tiriti, Māori leaders granted the British Crown the authority of kāwanatanga (governmental authority in relation to British subjects in New Zealand). This authority is limited by the ongoing exercise of Māori authority, guaranteed in Te Tiriti as tino rangatiratanga. The new 'Principle 1' proposed in the Bill ignores the guarantee of tino rangatiratanga.

The effect of the proposed 'Principle 2' also ignores the guarantee of tino rangatiratanga. This newly created principle means that Te Tiriti o Waitangi offers no recognition or protection of Māori rights. Under that principle, Māori rights would depend on settlement legislation or recognition by some other instrument that applies to everyone. Not only does this subordinate tino rangatiratanga to kāwanatanga but it erases the recognition of Māori rights altogether, contrary, not only to Te Tiriti, but to international standards set out in the United Nations Declaration on the Rights of Indigenous Peoples.

The proposed 'Principle 3' also seeks to erase Māori from Te Tiriti. Article 3 of Te Tiriti is a promise made specifically to Māori that Māori would enjoy the rights and privileges of British subjects. Te Tiriti does not make such a promise to anyone else. There are, however, plenty of mechanisms within the New Zealand legal system that are aimed at protecting all citizens from discrimination and ensuring equality before the law. The new 'Principle 3' does not add anything to those protections. All it would do is remove a mechanism that would help Māori to enjoy the equal rights and equal protection of the law.

The proposed principles are also completely different from established principles that have been used for decades as the main way in which government tries to give effect to its obligations under Te Tiriti.

4. But the Bill won't change Te Tiriti itself, will it?

The Bill cannot, of course, change the words that were written in 1840 and agreed to as Te Tiriti.

However, the Bill is seeking to fundamentally change the legal meaning and effect of Te Tiriti.

5. *Has the Government engaged with Māori about this Bill?*

No. Through this Bill, the Government has proposed to fundamentally change the meaning of Te Tiriti without any engagement with its treaty partner.

6. *Is the Bill likely to become law?*

The coalition agreements state that the Government will support the Bill to pass the first reading stage. Now that stage is complete, there is no further commitment to support the Bill to become law. National and New Zealand First have indicated that they will vote against the Bill becoming law. If they maintain that stance then it seems unlikely that this Bill will become law. However, despite their stated opposition to the Bill, those two parties both agreed to include this Bill in the coalition agreements and have supported the introduction of the Bill and voted in support of it at the first reading. There are no guarantees that they will oppose the Bill at later stages of the process, particularly if they perceive some political advantage to supporting it.

In any case, the ACT leader, David Seymour, has been clear that, even if this Bill does not become law, it will have laid the foundation to propose similar laws and/or referenda in the future.

7. What will happen if the Bill does become law?

If the Bill becomes law, a referendum will be held that would ask voters whether they support the law coming into force. If a majority of voters agree, then the law will come into force six months later.

That would mean that the newly created principles in the Bill would replace the established principles that the courts and government have been working with for decades. The new interpretation of the principles would apply whenever the concept of 'the principles of the Treaty of Waitangi' arises in the context of other legislation. This would create considerable uncertainty in the law. It is likely that prolonged and costly litigation would result as the meaning and application of these new principles is worked out.

As noted above, the new principles would also effectively erase the recognition of tino rangatiratanga and remove the primary mechanism by which government provides for Indigenous rights here in Aotearoa.

8. What has the Waitangi Tribunal said about the Bill?

The Waitangi Tribunal has issued a two-part report which addresses both this Bill and the Government policy to review references to 'the principles of the Treaty of Waitangi' in 28 pieces of legislation. Part 1 of the Tribunal's *Ngā Mātāpono* report can be found here. Part 2 can be found here.

The Waitangi Tribunal was highly critical of both the process and content of the Bill.

In terms of process, the Tribunal noted, amongst other things, the lack of engagement with Māori:

> *This complete disempowerment of Māori in a process to rewrite the principles is unprecedented. It goes against the tenets of good government that Māori are entitled to expect as citizens, let alone as the Crown's Treaty/te Tiriti partner. This exclusion from any say in a process to abrogate fundamental rights is extremely prejudicial, and the impacts will not fade for a long time even if the Bill does not proceed beyond the select committee.*

In relation to the proposed 'Principle 1', the Tribunal stated:

> *In our view, Principle 1 is not consistent with the words, meaning, or intent of article 1 of the Treaty/te Tiriti. Rather, it is a statement of a new principle that bears no relation to article 1, overstates the kāwanatanga of the Crown, and ignores the two spheres of Crown and Māori authority that the Treaty/te Tiriti established, where overlaps must be resolved by good faith cooperation between the partners.*

In relation to the proposed 'Principle 2', the Tribunal stated:

> *We find that principle 2 is the complete antithesis of article 2, and Cabinet's approval of it for the Bill breaches the Treaty/te Tiriti. If enacted, Principle 2 would formally revoke in a statute the promises and guarantees the Queen made to Māori in 1840. It tramples underfoot the mana of the Treaty/te Tiriti and the mana of all Māori. It would have devastating prejudicial impacts…*

The Tribunal also found that Principle 3 bears no resemblance at all to the texts and meaning of Article 3 for a number of reasons, including the following:

- *The Crown's solemn promises in article 3 were made to Māori, not 'everyone', in recognition of their agreement to the Crown's kāwanatanga and pre-emption powers.*
  […]

- *Māori face barriers to equality that others do not, and many of those barriers were of the Crown's making, which means that Māori do not always have a level playing field with other New Zealanders, and equitable treatment is required to ensure outcomes that are more equal. Equality without equitable treatment does not capture the promises made in article 3 or the meaning of the Treaty/te Tiriti as a whole.*

- *People in a modern liberal democracy can and do have different rights. Both officials and the Associate Minister interpreted the right to equality to mean that whenever the Treaty/te Tiriti is relevant to interpreting the law, it 'cannot be done in a way that means people do not enjoy the same rights'. In our view that is not equality, that is a negation of legitimate rights with assimilative intent.*

Overall, the Tribunal concluded:

> *If this Bill were to be enacted, it would be the worst, most comprehensive breach of the Treaty/te Tiriti in modern times. The Crown would be turning the clock back to 1877 and the decision in* Wi Parata *that the Treaty/te Tiriti is a 'simple nullity'. If the Bill remained on the statute book for a considerable time or was never repealed, it could mean the end of the Treaty/te Tiriti.*

9. *What have Ministry of Justice officials said about the policy underlying the Bill?*

The Ministry of Justice prepared a Regulatory Impact Statement on this policy. This is a standard process, designed to assist Cabinet in considering new laws or other proposed regulations. They provide a high-level summary of the problem being addressed, the options and their associated costs and benefits, the consultation undertaken, and the proposed arrangements for implementation and review. The Regulatory Impact Statement on the Treaty principles policy can be found here.

In relation to the policy underlying the Principles of the Treaty of Waitangi Bill, the Ministry of Justice advised:

> *The final content of the principles in the proposed Bill is yet to be determined and it might be possible to develop principles that align with established law and the spirit and intent of the Treaty/te Tiriti. However, their description in the policy proposal is inconsistent with the Treaty/te Tiriti. It does not accurately reflect Article 2, which affirms the continuing exercise of tino rangatiratanga. Restricting the rights of hapū and iwi to those specified in legislation, or agreement with the Crown, implies that tino rangatiratanga is derived from kāwanatanga. It reduces indigenous rights to a set of ordinary rights that could be exercised by any group of citizens.*
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> *An interpretation of Article 2 that does not recognise the collective rights held by iwi and hapū, or the distinct status of Māori as the indigenous people*

of Aotearoa New Zealand, calls into question the very purpose of the Treaty and its status in our constitutional arrangements.

The status quo also provides a higher degree of certainty about what the Treaty principles are and how they operate in New Zealand law. The existing principles have been developed over years of jurisprudence and by the actions of successive Governments. Defining the principles of the Treaty/te Tiriti in legislation might provide a level of clarity about the intent of Parliament when it refers to the principles, but it could also introduce more uncertainty into our constitutional arrangements because it would unsettle the established jurisprudence about the effect of the principles.

10. What happens next?

The Bill has been referred to the Justice Select Committee. This is a committee made up of 11 MPs that includes representation from all the parties in Parliament. The committee will gather information and prepare a report on the Bill for the House of Representatives. That report may include recommendations for changes to the Bill. The Justice Select Committee is due to report back to the House by 14 May 2025. MPs will consider the Committee's report and after that will vote to determine whether the Bill continues to the next stage of the law-making process.

11. *How can I have my say on the Bill?*

The Select Committee will call for public submissions on the Bill to inform their report. Anybody can make a submission on the Bill. There is no required form of submission and they do not need to be long or detailed.

If you wish to make a submission, one approach might be to set out whether you support or oppose the Bill, then provide the reasons for your position, and then suggest specific recommendations of changes to the Bill, if you have any.

Submitters can also ask to speak to the committee. This could be in person or online. The committee will decide who it will hear from and how that will be managed. If you do wish to speak, individuals will usually only be allocated 5 minutes to speak to the committee and organisations may be allocated 10 minutes.

There is guidance on making a submission here. Following the online submission process on Parliament's website and using the online submission form is relatively easy way of making a submission.

The Justice Select Committee page is a good place to view the Bill, see when submissions open, watch proceedings of the Committee, and access other information about the Bill. The Justice Select Committee page can be found here.