

# Submission on the Principles of the Treaty of Waitangi Bill

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To: The Justice Select Committee

From: Liam Hehir

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## 1 Introduction: a real issue and a deficient solution

1.1 The Principles of the Treaty of Waitangi Bill arises out of a legitimate concern: the careless and frequent insertion of references to Treaty principles in legislation, which has become a charter for judicial activism and overreach.

1.2 Courts have often leveraged these ambiguities to exert undue influence over public policy, creating uncertainty and diminishing democratic accountability. At the same time, a lack of legislative definition makes this inevitable. Without legislated principles, the courts are bound to ascertain their meaning somehow.

1.3 Nevertheless, the measures proposed in this Bill is fundamentally flawed. It attempts to resolve these issues by imposing statutory definitions of Treaty principles that create a legal fiction that conflates liberal democratic values with historical Treaty commitments.

1.4 This fiction will mislead New Zealanders in terms of the original purpose of the Treaty while deepening social divisions. More honest solutions are available, It is possible to respect both the Treaty's historical integrity and the universal values of liberal democracy.

1.5 Unlike other critics, I do not deny that there are significant issues surrounding the current state of Treaty principles in legislation, nor do I overlook the detrimental impact the resulting ambiguities have on our social cohesion. The frequent and careless insertion of references to Treaty principles without clear legislative definitions have contributed to mistrust and social discord. In responding to this problem, however, the aim should be to address them thoughtfully and honestly, without resorting to oversimplifications or historical distortions.

## 2 Overall objection: the law should not be used to bury the truth

2.1 Aleksandr Solzhenitsyn's essay *Live Not by Lies* provides a powerful framework for understanding the dangers of accepting falsehoods. Solzhenitsyn wrote:

*Our way must be: Never knowingly support lies! Having understood where the lies begin (and many see this line differently)—step back from that gangrenous edge!*

*Let us not glue back the flaking scales of the Ideology, not gather back its crumbling bones, nor patch together its decomposing garb, and we will be amazed how swiftly and helplessly the lies will fall away, and that which is destined to be naked will be exposed as such to the world.*

2.2 Solzhenitsyn went on to articulate a number of principles for how an honest man should conduct himself to ensure he is not living by lies. Such a man will not, for example:

- *Write, sign, nor publish in any way, a single line distorting, so far as he can see, the truth...*
- *Utter such a line in private or in public conversation, nor read it from a crib sheet, nor speak it in the role of educator, canvasser, teacher, actor...*
- *Cite in writing or in speech a single "guiding" quote for gratification, insurance, for his success at work, unless he fully shares the cited thought and believes that it fits the context precisely...*

2.3 The Bill attempting to define the principles of the Treaty of Waitangi to align with modern liberal values, namely:

- (a) **Civil Government:** The Government of New Zealand has full power to govern, and Parliament has full power to make laws in the best interests of everyone, consistent with the rule of law and a free, democratic society.
- (b) **Rights of Hapū and Iwi Māori:** The Crown respects the rights of hapū and iwi, but ensures these rights are balanced with equality for all New Zealanders, applying only as confirmed in Treaty settlements.
- (c) **Equality Before the Law:** All individuals are entitled to equal protection, benefit, and enjoyment of the law and fundamental human rights without discrimination.

2.4 In this way, the Bill risks undermining the historical truth of the Treaty. It imposes a form of official conformity by redefining historical truths to serve modern ideological purposes. In doing so, it asks New Zealanders to participate in lies by codifying principles that misrepresent the historical context and intent of the Treaty.

2.5 The simple fact is that the principles articulated in the Bill fail to capture the fundamental tenor and intent of the Treaty of Waitangi, which are defined by historical context rather than legislative imposition. The Treaty of Waitangi allowed the Crown the right to form a government while the chiefs retained their prerogatives. The precise boundaries of these rights and prerogatives remain unclear, reflecting the Treaty's inherent complexity and ongoing historical interest.

2.6 What we can say is that the Treaty was not intended as a charter for liberal-democratic ideas then in their infancy.

- 2.7 This is why the Treaty of Waitangi does not work as legislation. It is why reference to it in legislation has become such a corrosive issue. However, the solution is not to impose an ahistorical overlay and declare it as the official historical doctrine. That distorts the Treaty's original intent and insults those among us who see the document as a covenant guaranteeing their ongoing and unique place in this country.

### **3 Alternative approaches: introduction to three options**

- 3.1 I propose three alternative approaches in descending order of preference:

- (a) Enshrining the principles as separate and superior doctrines.
- (b) Removing the jurisdiction of the courts to determine the meaning of the Treaty.
- (c) Making clearer the nature of the principles as a legal fiction.

- 3.2 Each approach seeks to address judicial overreach, provide clarity in the application of Treaty principles, and ensure honesty in how New Zealand's legal and constitutional frameworks interact with the Treaty:

### **4 Affirming the Principles as Overriding Principle**

- 4.1 The most effective and honest approach would be to affirm the three principles in the Bill—not as the principles of the Treaty of Waitangi, but as overriding principles of that take precedence over any Treaty considerations where inconsistencies arise.

- 4.2 This approach would:

- (a) Clearly articulate the primacy of universal liberal democratic values (such as equality before the law and non-discrimination) in New Zealand's governance.
- (b) Avoid conflating these values with the historical Treaty, preserving the Treaty's integrity as a distinct bicultural agreement.
- (c) Ensure clarity and consistency in the interpretation of legislation, providing a robust framework for democratic accountability.

- 4.3 For example, the operative parts of the Bill could be replaced with the following:

(1) *Neither the common law nor any enactment referring to the principles of the Treaty of Waitangi, the Treaty of Waitangi, or te Tiriti o Waitangi may be invoked or relied upon to justify:*

- (a) *Any impairment or limitation of the right of the Crown to govern New Zealand or exercise sovereignty, which is affirmed to be absolute.*
- (b) *Any impairment or restriction of the rights of any person to use, enjoy or dispose of private property.*

(c) *Any advantage or disadvantage being conferred or imposed on any citizen of New Zealand relative to any other citizen of New Zealand.*

(2) *The prohibitions in this section are to be given the widest possible interpretations to unequivocally protect the Crown's sovereignty, preserve individual property rights, and uphold equal treatment of all citizens.<sup>1</sup>*

## **5 Declaring Treaty Principles Non-Justiciable**

5.1 The next best approach would be to legislate that the principles of the Treaty of Waitangi are non-justiciable.

5.2 This approach would:

- (a) Address judicial overreach by removing courts' ability to interpret and apply Treaty principles in ways that extend beyond legislative intent.
- (b) Maintain the Treaty's status as a foundational document without allowing it to become a tool for judicial activism.
- (c) Provide clarity in legislative interpretation by reserving the application of Treaty principles to the executive branch of government (which includes the Waitangi Tribunal as a standing commission of inquiry).

5.3 For example, the operative parts of the Bill could be replaced with the following:

- (1) *Neither the common law nor any enactment shall grant the courts the authority to interpret, define, or apply the principles of the Treaty of Waitangi.*
- (2) *Responsibility for determining the meaning, scope, and application of the principles of the Treaty of Waitangi shall rest with the individual or entity acting on behalf of the Crown in an executive capacity, who shall carry out such determinations in negotiation and consultation with iwi, hapū, and any other parties as that person or entity deems appropriate.*
- (3) *The process of consultation, negotiation, or any determination made under subsection (b) shall not be subject to review or challenge in any court.*
- (4) *The prohibitions in this section are to be given the widest possible interpretations to unequivocally ensure that the authority to interpret, define, or apply the principles of the Treaty of Waitangi is confined to the Crown in its executive capacity.*

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<sup>1</sup> This phrasing precludes narrow judicial or administrative interpretations that might undermine the prohibitions' purpose.

## 6 Making the Legal Fiction Explicit through Deeming Provisions

6.1 As a final option, if the Bill retains its current framework, it should explicitly acknowledge the legal fiction it creates by using the term "deemed" and clarifying that the principles are defined solely for the purpose of interpreting legislation.

6.2 This approach would:

- (a) Acknowledge that the principles defined in the Bill are not a reflection of the historical Treaty but are instead modern constructs intended for specific legal purposes; and
- (b) Reduce the risk of public misunderstanding by being transparent about the nature and scope of the principles.

6.3 The introductory statement to the enumerated principles in section 6 is currently worded as:

*"The principles of the Treaty of Waitangi are as follows:"*

6.4 This should be changed to:

*"For the purposes of interpreting any enactment, the principles of the Treaty of Waitangi are deemed to be as follows:"*

6.5 This approach does not resolve all the issues inherent in the Bill but provides greater transparency and honesty in its application. It acknowledges the constructed nature of the principles and avoids misleading the public about their origins or scope.

## 7 Additional observation - which treaty?

7.1 The Bill's approach to defining the principles of the Treaty of Waitangi in statute fails to account for the fact that te Tiriti o Waitangi (the Māori text, signed by most chiefs) and the Treaty of Waitangi (the English translation) are increasingly asserted to be distinct documents with differing meanings and implications.

7.2 Should this Bill become law, the argument will be made that te Tiriti carries its own mana and authority, rooted in tikanga Māori and reflecting the understanding of the Māori signatories independently of the Treaty of Waitangi. The implication of this is that the courts should interpret te Tiriti as a standalone document imposing obligations on the Crown, circumventing the statutory framework the Bill seeks to establish.

7.3 This argument has been prefigured by the claims made in the letter from the 42 King's Counsel of 20 November 2024. This makes clear the elite view that Parliament's sovereignty is subject to te Tiriti in ways that are not constrained by the statutory definition of Treaty of Waitangi principles. This is the more serious attack on Parliamentary sovereignty and legal certainty and is unaddressed by the Bill, meaning that if the Bill progresses the resulting social division and alienation will not even be mitigated by the clarity and finality the Bill purports to provide.

- 7.4 This is not an issue that can be addressed by the imposition of a “too-clever-by-half” interpretive framework that does not honestly and forthrightly address the issue it seeks to resolve.

## **8 Conclusion – doing it right, doing it once**

- 8.1 I recognise that some of the proposed changes may not be suitable for implementation as amendments through the committee process, with the insertion of a deeming provision being the obvious exception as a smaller, more technical change.
- 8.2 If my other solutions are preferred, or none of them are, I submit that the Bill should not advance. Instead, a more thorough and historically honest approach should be adopted to what is a legitimate constitutional issue.