

6 January 2025

Justice Committee  
C/- Justice Committee Secretariat  
Parliament Buildings  
Private Bag 18041  
Wellington 6160

Email: [TreatyPrinciples@parliament.govt.nz](mailto:TreatyPrinciples@parliament.govt.nz)

### ***Submission on the Principles of the Treaty of Waitangi Bill***

Tēnā koutou

1. The Trust Democracy committee, which is elected to represent Trust Democracy's members, has written this submission on the Principles of the Treaty of Waitangi Bill (Bill).
2. Trust Democracy (TD) was established as a non-profit incorporated society in 2019. TD's purpose is to foster democratic innovation for a fair, just and inclusive society.
3. The structure of this submission uses the overarching objectives stated in the Bill's explanatory note. We address objective 1 first and then address objectives 2, 3 and 4 together.

#### ***Objective 1: Create greater certainty and clarity to the meaning of the principles in legislation***

4. While creating greater certainty and clarity to the meaning of the principles of the Treaty of Waitangi in legislation sounds like a worthy objective, the meaning of Te Tiriti o Waitangi, its English drafts and copies, and any principles for interpreting them have been evolving over time. Their meaning should be allowed to continue to evolve in the light of changing social conditions, research, jurisprudence and ongoing dialogue between the representatives of the signatories and the public.
5. TD does not believe the principles should be defined in legislation. However, if they are to be codified in legislation then they should be crafted to accurately reflect relevant history and current knowledge. As noted by multiple authorities, the principles proposed in the Bill do not meet this standard.<sup>1</sup>
6. In relation to the proposed principles, TD makes the following points:
  - a. The Treaty of Waitangi in English was used as the basis for the British Crown to establish a Parliament and a system of government in New Zealand. However, Te Tiriti o Waitangi in Māori is the authoritative document, since this is the text that was debated and signed by almost all parties in 1840, and it does not cede sovereignty.<sup>2</sup>

---

<sup>1</sup> See, for example, the Waitangi Tribunal report *Ngā Mātāpono – The Principles: The Interim Report of the Tomokia Ngā Tatau o Matangireia – The Constitutional Kaupapa Inquiry Panel on The Crown's Treaty Principles Bill and Treaty Clause Review Policies*, [https://forms.justice.govt.nz/search/Documents/WT/wt\\_DOC\\_217933408/Nga%20Matapono%20W.pdf](https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_217933408/Nga%20Matapono%20W.pdf)

<sup>2</sup> Dame Anne Salmond (2021), 'Part 2: Te Tiriti' in 'Iwi vs Kiwi' series of essays, Newsroom, <https://newsroom.co.nz/2021/05/03/dame-anne-salmond-iwi-and-kiwi-beyond-the-binary>

- b. Recent scholarship concludes that the colonial officials who framed the English text intended Māori to have continuing rights to self-government (rangatiratanga) and ownership of their lands. This original understanding of the Treaty, however, was subsequently lost as hostility towards indigenous peoples grew alongside less tolerance of plural systems of government across the British Empire.<sup>3</sup> Te Tiriti is an agreement between political nations, not racial groups.
  - c. “The third Ture [of Te Tiriti] ... is a pledge of equality and balance between the tikanga of the everyday inhabitants of New Zealand and the Queens’ subjects, and of equal return in the exchanges between the rangatira and the Queen.”<sup>4</sup> This is about a future based on reciprocity and mutual respect, not about legal rights or equality before the law (*Right to equality* principle).
7. As well as calling into question the *Right to equality* principle, these points raise issues with the:
- a. *Civil government* principle: Te Tiriti is not a basis for Parliament to claim sole and full law-making powers/sovereignty.
  - b. *Rights of hapū and iwi Māori* principle: Te Tiriti provides for the absolute and continuing authority of the rangatira and Māori people generally over their lands, dwelling places and taonga. This is not limited to conceptions of legal rights as they stood in 1840 or as defined in Treaty settlements.

***Objectives 2, 3 and 4: Promote a national conversation about the place of the principles in our constitutional arrangements; Create a more robust and widely understood conception of New Zealand’s constitutional arrangements, and each person’s rights within them; Build consensus about the Treaty/te Tiriti and our constitutional arrangements that will promote greater legitimacy and social cohesion***

8. Three of the Bill’s four objectives related to public understanding of, and discussion about, constitutional arrangements and how they relate to legitimacy and social cohesion. TD agrees that these are important issues as New Zealand is not immune to global trends such as declining trust in elected politicians and democratic institutions, increasing polarisation and disinformation, and concerns about the ability of established democracies to address contemporary issues.<sup>5</sup> However it is hard to see how the passage of the Bill towards legislation has contributed in a positive way to these objectives.
9. The former Race Relations Commissioner, Joris de Bres, says that he has "never seen a government bill which is so damaging to our race relations and so comprehensively inimical to the human rights of Indigenous people". He also notes that the Bill:
- a. Is overwhelmingly opposed by the majority of government members
  - b. Has caused the largest ever political protest demonstration at Parliament
  - c. Has received condemnation from past and present leaders across the political spectrum

---

<sup>3</sup> Ned Fletcher (2022), *The English Text of the Treaty of Waitangi*, Bridget Williams Books.

<sup>4</sup> Dame Anne Salmond (2021), ‘Part 2: Te Tiriti’ in ‘Iwi vs Kiwi’ series of essays, Newsroom, <https://newsroom.co.nz/2021/05/03/dame-anne-salmond-iwi-and-kiwi-beyond-the-binary>

<sup>5</sup> Trust Democracy (2024), Mixing Democracy and Pleasure, <https://trustdemocracy.nz/2024/12/democracy-and-pleasure/>

- d. Is contrary to the advice provided to government by the Ministry of Justice and the Waitangi Tribunal
  - e. Is a breach of the United Nations Declaration on the Rights of Indigenous Peoples."<sup>6</sup>
10. TD considers that the processes used for developing and considering the Bill were/are ill-suited to achieving the overarching objectives for the Bill. For complex and/or contested issues, and especially for constitutional ones, processes based on inclusive public dialogue and deliberation are much more likely to result in mutual respect and understanding, learning and common ground.<sup>7</sup> For such processes being seen as legitimate, they must be inclusive, independent and transparent. They must also consider all the main points of view before searching for areas of common ground and solutions.<sup>8</sup>
11. In line with OECD recommendations,<sup>9</sup> many countries are using citizens' assemblies and other mini-public and online processes based on dialogue and deliberation to augment conventional policy and decision-making processes on complex and contested issues. Examples include the UK Climate Assembly<sup>10</sup> and the Irish Citizens Assembly.<sup>11</sup> In Mongolia, Deliberative Polling<sup>®</sup> is used as part of the prescribed process for constitutional amendments.<sup>12</sup> These sorts of processes should be considered for New Zealand 'national conversations' too.
12. In contrast to such processes, the coalition Government has decided to promote a small party's constitutionally significant bill even though the party received only 8.6% of the votes at the last election with little-to-no consultation with affected parties about the bill's content. This decision is raising questions about the legitimacy of the Bill, processed used to form coalitions and our MMP electoral system. A group of citizens would need support from at least 10% of electors to force a non-binding referendum.<sup>13</sup>
13. To conclude, TD recommends that:
- a. The principles should not be defined in legislation
  - b. The Bill should not proceed any further through the legislative process
  - c. Democratic innovations based on inclusive dialogue and deliberation are needed to address issues of trust and legitimacy, and our ability to address complex and contested issues.

---

<sup>6</sup> E-Tangata (2024), 'The Crown Can't Decide on It's Own', <https://e-tangata.co.nz/comment-and-analysis/the-crown-cant-decide-on-its-own/>

<sup>7</sup> National Coalitions for Dialogue and deliberation, 'What are dialogue and deliberation?', <https://www.ncdd.org/what-are-dd.html>

<sup>8</sup> Rowe, Frewer and Marsh (2004), Evaluation of a Deliberative Conference, *Science, Technology and Human Values*, 29:1:88-121.

<sup>9</sup> OECD (2020) Innovative Citizen Participation and New Democratic Institutions: catching the deliberative wave, OECD

<sup>10</sup> See <https://www.climateassembly.uk>.

<sup>11</sup> See "A hunger for democratic innovation: the Irish Citizens' Assembly and Polis in the words of their 'creators'" at <https://trustdemocracy.nz/2023/07/democratic-innovation-hunger/>

<sup>12</sup> 'Deliberative Polling<sup>®</sup> Leads to new Constitutional Amendment in Mongolia', Stanford Center on Democracy, Development and the Rule of Law, <https://deliberation.stanford.edu/national-deliberative-poll-leads-constitutional-amendment-mongolia>

<sup>13</sup> See <https://www.parliament.nz/en/get-involved/have-your-say/seek-a-referendum/>