

Submissions on the Principles of the Treaty of Waitangi Bill by the Auckland Women Lawyers' Association

- 1 The Auckland Women Lawyers' Association (**AWLA**) firmly opposes the Principles of the Treaty of Waitangi Bill (**Bill**). AWLA is of the view that the Select Committee should recommend to the House that the Bill be abandoned and that the recommendations of the Waitangi Tribunal in *Ngā Mātāpono*¹ be endorsed.
- 2 The Bill undermines the agreement entered into between the Crown and Rangatira in 1840, the constitutional standing of te Tiriti and the Treaty, and the development of jurisprudence in interpreting the texts of te Tiriti and the Treaty. Further, the proposal of the Bill itself reflects a clear failure to adequately engage in good faith with tangata whenua and those with the appropriate relevant expertise.
- 3 AWLA is a representative charitable organisation for lawyers identifying as women in the Auckland region. AWLA's constitution sets out the following objectives, inter alia:
 - (a) to make suggestions and work for the reform of the law and the administration of the law particularly as it affects women and children;
 - (b) to participate as a body in matters of interest to the legal profession; and
 - (c) any other matters that AWLA determines to be an objective.
- 4 Submitting on this Bill is within the scope of AWLA's objectives due to the significant constitutional implications and the foreseeable consequences of the Bill.
- 5 The Crown's pursuit of the Bill has significantly damaged, and continues to damage, the Crown-Māori relationship in Aotearoa. AWLA considers that has a negative impact on all women and children in Aotearoa - wāhine and tamariki Māori, as well as non-Māori women and children who call Aotearoa home.

The proposed principles

- 6 Clause 6 of the Bill seeks to establish the following three principles to replace the existing legal meaning and interpretation of the Treaty of Waitangi:
 - (a) "Principle 1" provides the Executive Government full power to govern, with Parliament having full power to make laws that are in the best interests of everyone and in accordance with the rule of law to maintain a free and democratic society.
 - (b) "Principle 2" sets out that the Crown will recognise, respect and protect the rights that hapū and iwi had under the Treaty of Waitangi and te Tiriti o Waitangi at the time it was signed. However, where these rights differ from the

¹ Waitangi Tribunal *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* (Wai 3300, 2024) at 188 - 189.

rights of 'everyone' this principle only applies in the circumstances of agreed settlements of a historical treaty claim.

- (c) "Principle 3" outlines that everyone is equal before the law and entitled, without discrimination, to equal protection and benefit of the law, and equal enjoyment of fundamental human rights.

- 7 Clause 7(1) of the Bill provides that the principles in clause 6 must be used when interpreting any enactment where principles of the Treaty of Waitangi are relevant. Further, clause 7(2) of the Bill sets out that principles of the Treaty of Waitangi other than those set out in clause 6 must not be used in interpreting any enactment.

Inappropriate forum to engage in public discussion regarding the constitutional framework of Aotearoa New Zealand

- 8 The Bill seeks to make dramatic constitutional change. To act in good faith, the preparation of this Bill should have involved comprehensive engagement with Māori, to ensure informed involvement as a treaty partner. Māori should have had the opportunity to lead any consultation themselves across iwi and hapū in accordance with tikanga and te ao Māori. The appropriate engagement between treaty partners has not taken place.
- 9 Further, relevant experts have not been adequately engaged to consult on the Bill. As has taken place in the preparation of this Bill, engaging experts under short time frames without adequate notice is unsatisfactory for a Bill with such a significant constitutional impact.
- 10 The Bill should not be put to a public referendum (as set out in clause 2 of the Bill). Public referenda are rarely used in democracies for constitutional questions where a majority of voters can determine minority rights. Māori are a minority in Aotearoa New Zealand. Referenda are blunt tools that when used to determine constitutional rights, tend to erode social cohesion. The use of a referendum to oppress minority rights by an electoral majority is inappropriate, and arguably would not be a justifiable limit to rights of minorities protected under s 20 of the New Zealand Bill of Rights Act 1990.
- 11 Significant jurisprudence has developed in interpreting and applying the principles contained in te Tiriti and the Treaty. To codify a set of 'principles' that differ substantially from the academic and judicial interpretations will create ambiguity in the law as the application of the Bill, as with any other law, takes place with regard for the existing legal framework and understandings.

Issues with the principles

- 12 Even if it was appropriate for Parliament to create such a constitutional change through this process, the principles themselves have significant issues.
- 13 The three principles set out in the Bill undermine the purpose, meaning, and spirit of te Tiriti by seeking to legislate an alternative meaning of the articles in te Tiriti and the Treaty. It is clearly unfair and inappropriate for one party to an agreement to seek to redefine the meaning of that agreement.

- 14 The agreement between the Crown and Rangatira in 1840 was for the Crown to exercise kāwanatanga over its British subjects in Aotearoa New Zealand, while protecting the right of Māori to tino rangatiratanga. The intention of Māori to retain absolute sovereignty and self-determination over its own people is clearly reflected in both the first and second articles of te Tiriti and the earlier foundational document of He Whakaputanga o te Rangatiratanga o Nu Tirenī/The Declaration of Independence of New Zealand signed in 1835.
- 15 The first two principles in clause 6 of the Bill would have the effect of entirely distorting the meaning of te Tiriti in respect of Māori rights to tino rangatiratanga over their people, their land, and their taonga. It effectively rewrites the words of te Tiriti.
- 16 The Bill's interpretation completely disregards the historical context that Rangatira did not cede their sovereignty to the Crown in 1840.² Prior to signing te Tiriti, Rangatira had full sovereignty over Aotearoa New Zealand as set out in He Whakaputanga. He Whakaputanga was formally acknowledged by the Crown in 1836. In 1840, five years after the signing of He Whakaputanga, Rangatira agreed to *share* authority with the Crown, whereby the Crown would have governing power over its British subjects.
- 17 The second principle in clause 6 of the Bill would provide that the rights of hapū and iwi agreed in te Tiriti/the Treaty are limited if they are not rights held by 'everyone' (unless provided for in a Treaty settlement). It is unfair and immoral of the Crown to consider that it can simply choose to not provide some of the rights provided for in te Tiriti/the Treaty. Principle 2 also creates an inherent unfairness between iwi and hapū who have settled with the Crown and those who have not yet negotiated a Treaty settlement.
- 18 The third principle in clause 6 of the Bill reflects the equal treatment of all in respect of the law and human rights. This principle does not add any meaningful protection for equality under the law further to the existing legal mechanisms which safeguard equality in Aotearoa New Zealand.
- 19 However, in the context of this Bill, this principle reads as a reframing of article three of te Tiriti and the Treaty which specifically granted Māori the Crown's protection and the same rights and privileges of British subjects. It is unclear how Parliament would intend the Courts to apply this clause, when placed in the context of this Bill, and where it does not reflect how these rights should be provided against the landscape of the systemic disadvantage Māori have historically and continue to face in part due to breaches of te Tiriti and the Treaty.

Recommendation

- 20 AWLA urges the Select Committee to recommend to the House that the Bill be abandoned. The Select Committee should undertake a comprehensive review of the Waitangi Tribunal's *Ngā Mātāpono* report in preparing its recommendation. AWLA further urges the Select Committee to consider what steps the Crown can now take

² See Waitangi Tribunal *He Whakaputanga me te Tiriti, The Declaration and the Treaty: Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 436, 526, 527, and 529.

to restore some of the damage done to the Crown-Māori relationship via the introductions of this Bill.

- 21 AWLA welcomes the opportunity to make oral submissions to the Select Committee on this Bill.

Nāku noa, nā



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