New Zealand Law Society
Te Kāhui Ture o Aotearoa

Principles of the Treaty of Waitangi Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

7 January 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Principles of the Treaty of Waitangi Bill (**Bill**).

1.2 For the reasons set out in this submission, the Law Society considers there are strong constitutional, public law, natural justice and process reasons why this Bill should not proceed further.

1.3 This submission has been prepared with assistance from the Law Society's law reform committees.[1]

1.4 The Law Society **wishes to be heard** on this submission.

2 Summary of the Law Society's submission

2.1 The Law Society does not typically comment on a Bill's underlying policy, unless it raises constitutional, rule or law, or rights issues. In this instance, the Bill raises fundamental issues in all three areas. This submission identifies those concerns, as well as significant procedural deficiencies.

2.2 The submission commences with a brief but necessary survey of the current principles of the Treaty of Waitangi. In summary, the Law Society considers the Bill:

(a) proposes to unilaterally impose newly created principles of the Treaty, which bear no resemblance to the terms of te Tiriti/the Treaty or the existing Treaty principles but which appear to be improperly oriented by reference to the three Articles of te Tiriti/the Treaty;

(b) in doing so, diminishes the rights of Māori under te Tiriti/the Treaty, and undermines the stability and relative certainty of the existing Treaty principles;

(c) uses general language to equate the rights of 'everyone' with those of Treaty partners, and adopts language of procedural equality, which is likely to create uncertainty;

(d) introduces complexity and uncertainty, including through the operation of two 'sets' of Treaty principles, competing clauses within the Bill, and the 'legal fiction' of clause 9;

(e) would result in significant constitutional change, following a deficient process for a Bill of this magnitude; and

(f) overall, is fundamentally inconsistent with the existing principles of the Treaty of Waitangi, and the text of te Tiriti/the Treaty itself. Those inconsistencies arise from both substance and procedure, as detailed in this submission.

3 The development of the principles of the Treaty of Waitangi

3.1 Parliament first introduced the concept of the 'principles of the Treaty of Waitangi' (**Treaty principles**) into legislation in the Treaty of Waitangi Act 1975, although that Act

[1] See the Law Society's website for information about its law reform committees: https://www.lawsociety.org.nz/branches-sections-and-groups/law-reform-committees/.

did not define the Treaty principles. This development occurred against the background of large Māori-led demonstrations as to the level of recognition of the Treaty/te Tiriti in the law (in particular relating to whenua Māori (Māori land) and te reo Māori (Māori language)). The enactment of the Treaty of Waitangi Act[2] represented a deliberate compromise between the exercise of interpreting (or attempting to interpret) the provisions of the two texts of the Treaty/te Tiriti and giving effect to the underlying spirit or principles of the Treaty.[3]

3.2 The Treaty of Waitangi Act, which also created the Waitangi Tribunal as a standing commission of inquiry with recommendatory jurisdiction to inquire into claims of Crown breaches of the Treaty principles, did not define the Treaty principles but did acknowledge the differing texts.[4] The Parliamentary Debates record that the absence of a definition of the principles was a concern held by opponents of the proposed legislation.[5]

3.3 Since 1975, Parliament has enacted legislation referring to the Treaty principles, across different areas of law. Given its subject-matter jurisdiction, the Waitangi Tribunal has been principally responsible for making findings and recommendations as to the meaning and application of the Treaty principles and has done so in relation to a variety of claims.[6]

3.4 Courts of general and specialist jurisdictions have also developed a body of jurisprudence about the Treaty principles, which has tended to emphasise three interrelated and overlapping Treaty principles: partnership, active protection and

---

2 (8 November 1974) 395 NZPD 5728; (16 September 1975) 401 NZPD 4496.

3 The conventional approach in Aotearoa was and still is that the terms of the 1840 agreement between the Crown and Māori, te Tiriti o Waitangi/the Treaty of Waitangi are not enforceable: *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC). Very recent decisions issued by the appellate courts in New Zealand suggest *Te Heuheu* may no longer reflect current constitutional norms. See for example *Smith v Attorney-General* [2024] NZCA 692 at [141]: "… [*Te Heuheu*] is now questionable in light of legal developments in the law in the 83 years since [that case] was decided".

4 The Treaty of Waitangi Act 1975 contains in its Long Title, Preamble and other sections the first references to the principles, and the role of the Waitangi Tribunal to determine whether certain matters are inconsistent with the principles. The jurisdiction is recommendatory only, except in narrow and defined circumstances: ss 5-6.

5 See for example: 'Treaty of Waitangi Bill', 8 November 1974, New Zealand Parliamentary Debates, vol 395 and 'Treaty of Waitangi Bill', 10 September 1975, New Zealand Parliamentary Debates, vol 401 cited in 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 57 (**Wai 3300: Ngā Mātāpono**).

6 Treaty principles as found in the Waitangi Tribunal include: tino rangatiratanga (Waitangi Tribunal *Tino Rangatira me te Kāwanatanga* (Wai 1040, 2022) at 75–76 and Ngāi Tahu Report (Wai 27) Vol III at 824), kāwanatanga (*Hautupua* (Wai 2575, 2024) at 19), mutual benefit and the right to development (*Whaia te Mana Motuhake* (Wai 2417, 2015) at 32 and Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) at 195), equity (*Hauora* (Wai 2575, 2019) at 33-35), the right to pursue options (*Hauora* (Wai 2575, 2019) at 35–36). There is no "comprehensive or authoritative list": *Carter Holt Harvey v Te Runanga o Tuwharetoa Ki Kawerau* [2003] NZLR 349 at [27].

redress.[7] The Law Society agrees with the suggestion by leading commentators that the courts' supervisory jurisdiction has contributed to the orthodox approach to interpreting the Treaty principles in comparison to that of the Tribunal.[8]

3.5 The Law Society observes that courts generally approach their interpretive function cautiously and with a view to establishing consistent jurisprudence, unless the circumstances justify a departure. In this regard, the Law Society shares the view that the courts' development of Treaty jurisprudence has been "inherently conservative" and "far from pushing the boundaries".[9] This "dialogue" between the limbs of government about the Treaty principles is in accordance with the doctrine of comity and consistent with the rule of law.[10]

3.6 The Law Society accordingly considers that *not* defining the Treaty principles in legislation thus far has had the benefit of enabling an incremental development of principles with broad public acceptance, and this has in turn contributed to their stability and relative certainty. This approach to the Treaty principles, then, is typical of the law's development within the system of government in Aotearoa and this is especially important given the special constitutional status of the Treaty/te Tiriti.[11]

3.7 Against that background, this submission turns to consider the substance of the Bill as well as the process it has already taken, and proposes to follow (if enacted).

4 The principles proposed in the Bill

4.1 Clause 6 of the Bill proposes three principles (**proposed principles**) that appear to style themselves in terms of the three Articles of te Tiriti/the Treaty.[12] The three Articles of te Tiriti/the Treaty, simplistically, address:

(a) recognition of Crown's government/kāwanatanga;

(b) the protection of Māori authority/tino rangatiratanga (and the scope of that protection); and

(c) equity between Māori and the people of England (New Zealand) as a result of entering into te Tiriti/the Treaty.

---

7 Hille, Jones and Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at [1.13]; for a recent espousal of these Treaty principles see *Wairarapa Moana Ki Poākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142 at [104]. See also *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) *(Lands*), New Zealand Māori Council v Attorney-General [2013] NZSC 6.

8 Hille, Jones and Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at [1.13].

9 P G McHugh "'Treaty principles': constitutional relations inside a conservative jurisprudence" (2008) 39 VUWLR 39 at 66.

10 Hille, Jones and Ward *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Thomson Reuters, Wellington, 2023) at [1.14] and Geoffrey Palmer "The Treaty of Waitangi — Principles for Crown Action" (1989) 19 VUWLR 335 at 345.

11 The Law Society also acknowledges the perspective that the lack of definition of the Treaty principles has been a way in which the direct obligations of the Crown as recorded in the text of the Treaty/te Tiriti have not been 'enforced': see discussion in Wai 3300: Ngā Mātāpono at p 57.

12 See for example Office of the Associate Minister of Justice *Cabinet Paper: Policy approvals for progressing a Treaty Principles* Bill (**RIS**) at [19] and [21].

4.2 Each of the three Articles of te Tiriti/the Treaty conveys a promise between the Crown and Māori. The Law Society acknowledges that the policy proposal preceding the Bill was for "Parliament [to] define the principles of the Treaty of Waitangi in statute based on the Articles of the Treaty". However, the Bill does not do this. The Law Society does not consider te Tiriti/the Treaty or the Treaty principles bear on or resemble in any way the proposed principles of the Bill. Instead, the three proposed principles in the Bill purport to elevate the rights of "everyone", and in doing so would restrict the rights of Māori in relation to te Tiriti/the Treaty except in very narrow circumstances.

4.3 The Law Society acknowledges and agrees with the positions taken in official advice,[13] by the Waitangi Tribunal[14] and by other submitters such as Te Hunga Rōia Māori o Aotearoa[15] who have assessed the proposed principles as unilateral statements which are unrelated to and fundamentally inconsistent with the Treaty principles and te Tiriti/the Treaty itself.

4.4 The Law Society does not repeat that analysis but suggests in addition that the Bill is inconsistent *generally* with the rule of law and the fabric of the constitutional framework in Aotearoa. Those inconsistencies can be distilled succinctly: the Bill fashions unusual principles that are in one respect simple statements of general rights or constitutional principle, which in isolation may seem unexceptional, but are problematic when viewed in context of the Bill's stated objective to "define what the principles of the Treaty of Waitangi are in statute."[16]

4.5 The Law Society sets out these concerns in more detail below by reference to each of the three proposed principles and other provisions in the Bill.

Proposed principle 1

4.6 Proposed principle 1 specifies that the Executive Government has "full power to govern" and that Parliament has "full power make laws." Proposed principle 1 purports to be a statutorily defined "principle of the Treaty of Waitangi," but does not refer to te Tiriti/the Treaty or the Treaty principles.

4.7 The Law Society identifies three primary difficulties proposed principle 1 raises.

4.8 First, proposed principle 1 appears to expressly remove the constitutional fetter that te Tiriti/the Treaty and the Treaty principles has placed on Executive decision-making and Parliament's law-making, as those principles have developed over time.[17] The Law Society observes that, in addition to legislation, the constitutional importance of te

---

13 See, for example, Ministry of Justice *Regulatory Impact Statement: Providing certainty on the Treaty principles* (28 August 2024) (Regulatory Impact Statement) at 13.

14 Ngā Mātāpono: Part II of 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) (**Wai 3300: Ngā Mātāpono Part II**) at 104.

15 Submission dated 12 December 2024

16 Explanatory Note, General Policy Statement.

17 The Law Society notes that the Treaty principle of partnership has always recognised that the Crown has the right to govern and make laws, but the 'legitimacy' of that right is qualified in recognition of the peaceful settlement of Aotearoa te Tiriti/the Treaty as an agreement between the Crown and Māori provided for: see for example *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) *(Lands)* at 673 and 680 per Richardson J.

Tiriti/the Treaty and the Treaty principles are now deeply rooted in other instruments which shape Executive decision-making and Parliament's law-making.[18] The Bill does not purport to affect those instruments and, if enacted, would create inconsistency with them, in particular around how the Executive guides its own policy-making, which must be in accordance with the Treaty principles. This outcome would conflict with one of the Bill's stated purposes to "create greater certainty and clarity to the meaning of the principles in legislation."[19]

4.9 Secondly, proposed principle 1 applies to "everyone." "Everyone" is a vague and ambiguous term, as set out in further detail below at [4.15] – [4.21]. Additionally, in the context of draft legislation, which on its own terms has te Tiriti/the Treaty and the Treaty principles at its core, the Law Society observes that as an agreement between the Crown and Māori, te Tiriti/the Treaty does not apply to "everyone" and its impact is limited accordingly.

4.10 The Law Society also observes that proposed principle 1 was not drafted in consultation with Māori, the Crown's Treaty partner. This submission addresses the lack of consultation in section 5, where the Law Society sets out its submissions relating to procedural aspects of the Bill.

Proposed principle 2

4.11 Proposed principle 2 differentiates the rights of hapū and iwi who entered into te Tiriti/the Treaty with the Crown ('Treaty rights' – subclause (1)) from "the rights of everyone" (subclause(2)). Proposed principle 2 would, if enacted, restrict the Crown's obligations in respect of those rights of hapū and iwi to only "those rights" agreed in the settlement of a historical Treaty claim under the Treaty of Waitangi Act.[20]

4.12 The Law Society observes that the distinction between 'Treaty rights" and the "rights of everyone" would likely be of no consequence because 'Treaty rights" are inherently different from "the rights of everyone" (again, because te Tiriti/the Treaty does not apply to "everyone"). In the Law Society's view, subclause (1) is obsolete as a matter of legislative drafting, leaving subclause (2) as the operative provision of proposed principle 2.

4.13 Subclause (2) then appears to further limit "those rights" ('Treaty rights') to the terms agreed between hapū and iwi who have already completed a settlement of their historical claims with the Crown. In other words, the Bill narrowly acknowledges Māori rights only to the extent negotiated and agreed in existing Treaty settlements. The Law Society considers that limitation is problematic for three principal reasons.

(a) First, it is not the case that Treaty settlements create or bestow on the hapū and iwi counterparties the full spectrum of rights they hold under te Tiriti/the Treaty

---

18 These include: Cabinet Office *Cabinet Manual 2023* (Department of the Prime Minister and Cabinet, Wellington, 2023), Legislation Design and Advisory Committee (LDAC) 'Legislation Guidelines' and Cabinet Office Circular CO 19 (5): Te Tiriti o Waitangi / Treaty of Waitangi Guidance.

19 Explanatory Note, General Policy Statement.

20 The Bill does not define or further specify the term "those rights" in subclause (2) of proposed principle 2.

or other sources of legal rights. Te Tiriti/the Treaty is not a source of tikanga Māori[21] or other aboriginal or customary rights. Rather, Treaty settlements are "quintessentially political processes"[22] upon which redress is negotiated against the background of an agreed historical account, which is a "summary" only.[23] Treaty settlements are also limited in scope to historical breaches of te Tiriti/the Treaty that occurred prior to September 1992, and do not bear on any 'contemporary' Treaty claims. The Crown's own policy guide to Treaty settlements acknowledges these distinctions,[24] as do the Treaty settlement instruments themselves.[25] The Law Society therefore expresses its concern that the Bill, if enacted, may support an interpretation that the only rights hapū and iwi who signed te Tiriti/the Treaty have are those that the Crown has agreed to acknowledge in a historical Treaty settlement. That outcome would be inconsistent with the rule of law, in that the Bill may override the fundamental tikanga, indigenous, customary or other pre-existing and ongoing legal rights held by those hapū and iwi in terms that are not clear or explicit.[26]

(b) Secondly, not all Treaty settlements of historical claims are complete.[27] Hapū and iwi who have not yet entered into a Treaty settlement would have different rights to those hapū and iwi who have, even though both 'unsettled' and 'settled' hapū and iwi were (for the most part) signatories to te Tiriti/the Treaty. The Law Society acknowledges that 'settled' iwi already enjoy different rights in relation to their Treaty settlements than 'unsettled' iwi do, but 'unsettled' iwi may presently rely on the Treaty principles as developed by the Tribunal and courts (as outlined in section 3 of this submission) where required. The Bill, if enacted, would distinguish between hapū and iwi groups who have all entered into te Tiriti/the Treaty settlements. The Law Society is similarly concerned this distinction is inconsistent with the rule of law.

(c) Thirdly, the concerns set out at (a) and (b) above are exacerbated by clauses 7 and 8 of the Bill, which respectively provide that the proposed principles must be used to interpret legislation if te Tiriti/the Treaty and its principles are relevant (expressly or impliedly) to its interpretation (clause 7), but do not apply to the interpretation of existing and future Treaty settlement legislation (clause 8). The Law Society observes that the operation of subclause (2) together with clauses 7 and 8 would effectively endorse two different sets of Treaty principles, the

21 Tikanga is acknowledged as a "system of law and custom" in and of itself (*Ellis v R* [2022] NZSC 114 at [22], [120] and [122] per Glazebrook J, [181] per Winkelmann CJ and [270]–[272] per Williams J), and certainly a source of legal rights independent of Treaty settlements (*Ngāti Whātua Ōrākei Trust v Attorney-General* [2019] NZLR 116, [2018] NZSC 84 at [78]).

22 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2022] NZHC 843 at [564], albeit not always immune from judicial review.

23 Office of Treaty Settlements *Ka Tika ā Muri, Kā Tika ā Mua: Healing the past, building a future* (June 2018) at 79.

24 Office of Treaty Settlements *Ka Tika ā Muri, Kā Tika ā Mua: Healing the past, building a future* (June 2018) at 23-27.

25 See for example Waikato Raupatu Claims Settlement Act 1995, s 8 and Whakatōhea Claims Settlement Act 2024, s 14.

26 *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA) at [99], [148], [154], [162] and [185].

27 See Te Arawhiti Year to Date Progress Report 1 July to 20 September 2024 at 4.

existing principles and the proposed principles. From a rule of law perspective, this raises a risk that jurisprudence developed by the courts on the two sets of Treaty principles would create uncertainty: the Bill, if enacted, would expressly prevent any further development of Treaty jurisprudence in relation to (for example) the Resource Management Act 1991, which would be replaced with the proposed principles for interpretive purposes. The Law Society observes that many Treaty settlements (to which existing Treaty principles continue to apply) contain commitments relating to the RMA which require those exercising functions under the RMA to take the principles of Te Tiriti o Waitangi into account (to which the proposed principles would apply). This is one example of the inconsistency and complexity that the Bill would introduce.

4.14 If the Bill is enacted, the Law Society considers proposed principle 2 together with clause 7 would materially change how te Tiriti/the Treaty and the Treaty principles are interpreted and applied by the courts in particular. The Law Society observes this outcome would not achieve two of the Bill's stated objectives: to "create greater certainty and clarity to the meaning of the principles in legislation" and to "build consensus about the Treaty/te Tiriti and our constitutional arrangements that will promote greater legitimacy and social cohesion".[28]

Proposed principle 3

4.15 Like proposed principle 1, the Law Society observes that proposed principle 3 purports to be a statutorily defined "principle of the Treaty of Waitangi" but does not refer to te Tiriti/the Treaty or the Treaty principles. It uses general language to equate the rights of "everyone" with the rights of hapū and iwi, who are a Treaty partner to the Crown.

4.16 Proposed principle 3 focuses on "equality". The concept of equality finds four different expressions within proposed principle 3:

(a) Subclause (1): "everyone is equal before the law";

(b) Subclause (2)(a): "equal protection … of the law";

(c) Subclause (2)(a): "equal benefit of the law"; and

(d) Subclause (2)(b): "equal enjoyment of the same fundamental human rights".

4.17 The Law Society makes three observations about the concept of equality.

4.18 First, equality is an established feature of international and domestic human rights instruments that affirm the equal rights of all human beings, while also recognising that equal enjoyment of rights by some groups may require specific protection and distinct, targeted action.[29] The Law Society considers the Treaty principles are an example of that required specific action, and that the courts' incremental approach to their interpretation has reinforced the relative certainty and consensus the Treaty principles

28 Explanatory Note, General Policy Statement.

29 Human Rights Commission *Principles of the Treaty of Waitangi Bill* (Submission, 8 November 2024) at 15-17.

have established across successive governments. The Bill, if enacted, would undermine those legal commitments.

4.19 Secondly, proposed principle 3 restates existing domestic and international protections for the rights to equality, but at the same time does not advance equality. For example, proposed principle 3 is on its face inconsistent with other clauses in the Bill (proposed principle 2 and clauses 7 and 8 in particular), which appear to establish and endorse two different (unequal) approaches to references to te Tiriti o Waitangi and its principles in legislation. The Bill accordingly expressly diminishes the rights of Māori but does not appear to change or improve the "rights of".

4.20 Thirdly, use of the phrase "equal before the law and entitled to equal protection before the law" is likely to create uncertainty. That phrasing was initially considered, having been used in overseas jurisdictions, in the White Paper Proposal for the New Zealand Bill of Rights.[30] The phrase was not adopted in the New Zealand Bill of Rights Act because the authors of the White Paper thought the meaning of the term "equal" was "elusive and its significance difficult to discern," and would bind Parliament in an unmanageable way.[31] The Law Society agrees with this observation. The Bill appears to assume that equality means individuals being treated the same (formal equality) as opposed to adopting policies that recognise the impact of individuals' circumstances to ensure equal outcomes (substantive equality).

4.21 The Bill then further conflates that notion of sameness with the rule of law. The rule of law requires equality before the law, meaning that like cases will be treated alike. It does not require that all cases are assumed to *be alike:* the law is not blind to the impact that history, culture and individual circumstances have on the rights of people, their status and other opportunities in society. The Law Society considers the existing Treaty principles are consistent with the rule of law in this respect, while the proposed principles are not.

The legal effect of the Bill

4.22 Taken together, the above concerns demonstrate that the Bill as drafted is fundamentally inconsistent with te Tiriti/the Treaty and its principles, and explicitly undermines the Crown's commitment to the rule of law in Aotearoa.

4.23 Further, the Law Society considers it is inaccurate for clause 9 of the Bill to specify that "nothing in this Act amends the text of the Treaty of Waitangi/te Tiriti o Waitangi". This is likely to cause further complexity when considered alongside clause 7. In reality, the proposed principles would significantly change how the Treaty is to be interpreted and applied.

5 Process for constitutionally significant change

5.1 If enacted, this Bill would create a significant constitutional change, and effectively reinterpret te Tiriti/the Treaty in a manner that is inconsistent with its spirit and texts.

---

30 Geoffrey Palmer *"A Bill of Rights for New Zealand: A White Paper"* [1984–1985] I AJHR A6 *(White Paper)*, see Article 26 at page 116.

31 White Paper, at p 86, para [10.81].

However, the process for making that change has simply involved the Crown introducing the Bill to the House without any prior consultation or engagement with Māori (the Crown's Treaty partners), or any experts (such as constitutional experts and pūkenga), and ultimately leaving the decision of whether to enact the Bill in the hands of the general public (who would need significantly more information and time to be in a position to make a decision that significantly affects New Zealand's constitutional arrangements, and which has both social and legal consequences). This is inappropriate and inconsistent with the good processes and best practices discussed below.

5.2 The process for achieving constitutional change is important, as it affects both the constitution and acceptance of the proposed changes by society.[32] This process should therefore, among other things:[33]

(a) allow ample time for the reform proposals to be designed, carefully considered (including against alternative options which may be better suited to achieving the policy objectives), debated, and modified (for example, to reflect input from affected parties and the public);

(b) follow a non-partisan and non-political approach;

(c) involve comprehensive and balanced information campaigns (including about the issues which need to be addressed through reform);

(d) allow for public debate and input prior to making any decisions to proceed with a particular reform proposal;

(e) involve meaningful consultation and engagement with Māori, iwi and hapū throughout the policy development process; and

(f) seek input from constitutional advisors who can present options for reform and explain their implications.

5.3 Past constitutional changes have typically adhered to such processes, and, in particular, involved meaningful public consultation and engagement on reform options prior to finalising the reform proposals.[34]

Lack of consultation & meaningful engagement with Māori

5.4 The Regulatory Impact Statement confirms there was no public consultation or targeted engagement with Māori prior to the introduction of this Bill, and that this has left gaps in the policy analysis.[35]

5.5 Meaningful consultation with Māori is important in the context of these reforms because the current principles place an obligation on the Crown to consult its Treaty partner on

32 CI Magallanes "Making comments on making constitutions" (2002) *Victoria University of Wellington Law Review*, *33*(3-4), 621–630 at 627.

33 Magallanes, above, n 33 at 627-629; Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation He Kōtuinga Kōrero mō Te Kaupapa Ture o Aotearoa* (November 2013) at page 13.

34 For example, the White Paper the preceded the enactment of the New Zealand Bill of Rights Act 1990, which explained the policy rationale for introducing such a Bill and explored the impacts of introducing the legislation.

35 Regulatory Impact Statement, at 3.

constitutionally significant reform proposals.[36] Meaningful consultation would require, among other things, consultation occurring before a proposal is fully decided, and for decision-makers to consider feedback provided during the consultation process before making decisions[37] (see 5.2(a), above).

5.6 Consultation with iwi and hapū is also one of the principal mechanisms through which the Government discharges its responsibility to make informed decisions to act in good faith towards Māori.[38] It is a minimum requirement where Crown actions affecting tino rangatiratanga are concerned. Practically, the Crown must engage with Māori on important policies and recognise and give effect to the guarantee of tino rangatiratanga in statute law.[39] Presenting Māori with a predetermined decision, or a 'fait accompli', would be inconsistent with the 'spirit of the partnership which is at the heart of the principles of the Treaty', and seen as a failure to act in good faith towards Māori.[40]

5.7 The absence of meaningful consultation and engagement with Māori, as well as the wider public, has resulted in a flawed policy process, and a quality assurance panel comprised of members from the Ministry for Regulation and Ministry of Justice has determined that the policy analysis in the Regulatory Impact Statement does not meet relevant Quality Assurance criteria.[41]

5.8 As a result, the Bill now represents an approach that does not reflect the historic development of the current principles or the views and interests of key affected parties. While the select committee process allows an opportunity for public input, it will not inform the design of the legislation and its underlying policies, or allow consideration of the various options available to address the policy problem (if there is one) or to meet the policy objectives.

5.9 This is in stark contrast to how the current principles have been developed over time with input from Māori, the Crown, judges, academics, legal experts and pūkenga.

Defining the principles via a referendum

5.10 The premise of the Bill is that the Treaty principles must be democratic – i.e., the public must have a say in their meaning. This aspect, too, raises a number of concerns:

(a) If the principles are understood to 'flow from the Treaty's words',[42] it would follow that their articulation is a task involving expertise and nuance, which

---

36 *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152.

37 *Wellington International Airport v Waka Kotahi* [2022] NZHC 954 at [44]–[45]; see also *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA), at 675–683.

38 Wai 3300: Ngā Mātāpono at 94.

39 Waitangi Tribunal *He Kura Whenua Ka* Rokohanga*: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016) at 235.

40 New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142 (CA) at 152; see also *Ngai Tahu Maori Trust Board v D-G of Conservation* [1995] 3 NZLR 553 at 560, which notes that mere consultation or a 'hollow requirement' is not sufficient to fulfil the Crown's obligations.

41 Regulatory Impact Statement, at 4-5.

42 Janine Hayward "Flowing from the Treaty's words: the principles of the Treaty of Waitangi" in Janine Hayward and Nicola Wheen (eds) *The Waitangi Tribunal: Te Roopu Whakamana i te Tiriti o Waitangi* (Bridget Williams Books, Wellington, 2004) at 29–40; Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) at 388.

requires knowledge of reo Māori, of tikanga, of the historical context, and of the law. The courts and the Tribunal comprise and benefit from these kinds of expertise. By contrast, neither tikanga Māori nor te reo Māori experts have been involved in the development process for the Bill.[43]

(b) The *Cabinet Manual* also recognises that te Tiriti/the Treaty 'may indicate limits in our polity on majority decision-making' – it states:[44]

> A balance has to be struck between majority power and minority right, between the sovereignty of the people exercised through Parliament and the rule of the law, and between the right of elected governments to have their policies enacted into law and the protection of fundamental social and constitutional values. The answer cannot always lie with simple majority decision-making. Indeed, those with the authority to make majority decisions often themselves recognise that their authority is limited by understandings of what is basic in our society, by convention, by the Treaty of Waitangi, by international obligations and by ideas of fairness and justice.

(c) The proposal to enact the Bill via a referendum ignores the fact that the te Tiriti/Treaty is an exchange of promises between sovereign peoples, with rights and obligations for each party.[45] The Treaty principles are therefore not a matter of public opinion but of contract and of international law. By asking the public to determine Treaty matters through a referendum, the Crown risks imposing the will of a non-Māori majority on its minority Treaty partners (who are the ones who will be most affected by these proposed reforms).

(d) As discussed above, a process which sees a fully drafted Bill put to a referendum, without any prior consultation with Māori or the general public, is inconsistent with good processes and best-practice for making constitutional changes.

(e) It is likely members of the public will have differing views on each of the proposed principles in the Bill, and a binary referendum, which only allows votes for or against the Bill as a whole, will not allow for any expression of those views.

(f) The lack of robust policy development processes and meaningful engagement with Māori means it inappropriate for the Bill to be passed by referendum. If it were ever to proceed in a referendum, such significant constitutional reform should be the subject of a robust policy and legislative development process proportionate to the impact the Bill could have on the constitutional, legal and social fabric of New Zealand.

6 The Bill should not proceed

6.1 For the reasons set out in this submission, the Law Society considers this Bill should not proceed.

---

43 Wai 3300: Ngā Mātāpono at 115 and 168.

44 Cabinet Office *Cabinet Manual 2023* at 5.

45 Regulatory Impact Statement, at 6.

6.2 If the Treaty principles were to be codified, or otherwise identified and set out in a single instrument, it should only be done following proper and meaningful consultation with Māori, reflect the Crown's obligations under Te Tiriti/the Treaty and the rights guaranteed to Māori under Te Tiriti/the Treaty, and reflect the current principles which have been developed by the courts, and the Waitangi Tribunal over time. Given the constitutional significance of such an exercise, it should also involve consultation with constitutional experts, pūkenga and the broader public to understand their views, and include an assessment of the costs and benefits of such an exercise informed by engagement with affected groups.[46] The Law Society has not seen any persuasive argument that such an exercise is necessary or constitutionally appropriate at this time.

Jesse Savage
Vice-President

46 As recommended in the Regulatory Impact Statement, at 5.