Te Kāhui Tika Tangata
Human Rights Commission

PRINCIPLES OF THE TREATY OF WAITANGI BILL

SUBMISSION

8 NOVEMBER 2024

Contents

Introduction

All people need a sense of belonging to thrive. Te Tiriti is the core agreement that affirms a place to belong and a place to stand for everyone in Aotearoa. It is "the promise of two peoples to take the best possible care of each other."[1]

Te Kāhui Tika Tangata Human Rights Commission is committed to building a future Aotearoa where everyone feels they belong, and we respect each other's mana, dignity, and rights. The pathway to this future will be built on everyone in Aotearoa understanding, valuing, and protecting Te Tiriti o Waitangi; Tangata Whenua and Tangata Tiriti maintaining healthy relationships; and Tangata Whenua exercising tino rangatiratanga.

In 2023, a Horizon Research survey conducted for the Commission found that 70 per cent of New Zealanders believe it is important for Māori and non-Māori to decide together on an equal footing how te Tiriti o Waitangi is honoured. We reiterate and support this sentiment.

The Commission firmly opposes the Principles of the Treaty of Waitangi Bill (the Bill), and regards the Bill as unnecessary, unworkable, and in breach of numerous human rights and Te Tiriti obligations.

Commission's position

While the Commission has a number of reasons to oppose the Bill, our chief concerns are summarised as follows:

a. That the Government has unilaterally developed legislation that directly and significantly affects its Tiriti partners, undermining the obligations that were jointly agreed, without meaningfully engaging with them, and in the face of strong opposition being voiced by Māori communities.
b. That the interpretation of Te Tiriti being advanced is flawed and ignores critical issues of historical context, language, and treaty interpretation, and the substantial body of jurisprudence that has been developed over decades by the courts and Waitangi Tribunal. It also ignores the Tribunal's direct findings and clear advice, that it will breach multiple Tiriti obligations, amount to "the worst, most comprehensive breach of the Treaty / Te Tiriti in modern times, and if not repealed could mean the end of the Treaty/Te Tiriti".[2] The interpretation being put forward under the Bill departs further from the rights and obligations agreed under Te Tiriti than has ever been the case, flouting the unequivocal directions of the expert judicial body with the statutory mandate to interpret Te Tiriti.
c. Furthermore, the Bill's selective focus on some rights, while actively overriding others, most particularly the rights of Indigenous peoples that are fundamental to Te Tiriti, is an unhelpful and erroneous approach to human rights. This approach will undermine human rights, rather than advance them.
d. That even if the Bill does not proceed beyond Select Committee to become law, progressing a Bill that is based on and promotes such flawed interpretations and

[1] Waitangi Tribunal *Te Roroa Report* (Wai 38, 1992) citing Bishop Manuhuia Bennett at p 30.
[2] Waitangi Tribunal *Ngā Mātāpono - The Principles: 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, 5 November 2024) at p xiv.

information, will not help to advance a constructive national conversation on these important issues, but rather is likely to foster misinformation, anti-Māori rhetoric and risks undermining the rights of Māori and Te Tiriti itself. A referendum would be similarly, if not more, divisive.

e. That proceeding in this manner contravenes international human rights standards, as set out most comprehensively in the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) and elaborated on in other international human rights instruments.
f. That in proceeding with the Bill, the Government is unduly prioritising agreements between political parties over respecting, protecting, and upholding its obligations contained in Te Tiriti and New Zealand's human rights commitments.

In making this submission, the Commission is offering a domestic and international human rights perspective on the implications of the Bill, while acknowledging and supporting the findings of the Waitangi Tribunal's *Ngā Mātāpono*[3] and *He Whakaputanga me Te Tiriti*[4] reports, and the public letter issued by Te Hunga Rōia Māori.[5]

In the Commission's view, proceeding with the Bill would be an unconstitutional overreach of power and breach both Te Tiriti and human rights standards recognised in international law. As the Waitangi Tribunal's *Ngā Mātāpono* report concludes, this piece of proposed legislation brings New Zealand to "a constitutional moment bordering on a constitutional crisis."[6] In unprecedented terms, the Tribunal's final chapter to its *Ngā Mātāpono* report reaffirms the deliberate exclusion of Māori Tiriti partners, and flagrant breaches of the Tiriti agreement, of good government and good faith, that this Bill represents. We agree that such strong language and direct warnings are warranted in the face of such serious human rights breaches.

The implications and negative impacts of the Bill – for New Zealand's constitutional foundations, its human rights record and international reputation, its commitment to fairness, honour and equity, for harmonious race relations and for prevention of social discord and harm to its citizens, most particularly to Tangata Whenua – cannot be understated and should not be ignored by this Select Committee, by Government, by Parliament or by the New Zealand public.

Recommendations

The Commission firmly opposes the Bill and urges the Select Committee to recommend:

1. Halting the Bill immediately, and that the government show respect to the mana, dignity, and rights of all by continuing a constructive, respectful, and informed

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[3] Waitangi Tribunal *Nga 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, 15 August 2024); Waitangi Tribunal *Ngā Mātāpono - The Principles: 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, 5 November 2024).

[4] Waitangi Tribunal *He Whakaputanga me te Tiriti: the Declaration and the Treaty* (Wai 1040, 2014).

[5] Letter from Te Hunga Rōia Māori to the Rt Hon Christopher Luxon, Prime Minister (12 September 2024).

[6] Waitangi Tribunal *Nga 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, 15 August 2024) at p 185.

national conversation.

2. The government take active steps to correct the false and misleading interpretations that the Bill presents, by disseminating the *Ngā Mātāpono* findings and recommendations; and supporting initiatives to raise awareness and understanding of Te Tiriti, the Declaration, and human rights.

3. Implementation of the repeated recommendations made to New Zealand by the United Nations Committee on the Elimination of Racial Discrimination (CERD) and Committee on Economic, Social and Cultural Rights (CESCR), and the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), and the UN Human Rights Council's Universal Periodic Review (UPR) recommendations, to progress constitutional conversations in partnership with hapū and iwi, through an inclusive process which is:
   - informed by the reports of the Constitutional Advisory Panel and Matike Mai Aotearoa;
   - underpinned by a robust public education programme; and
   - aimed at strengthening constitutional protections for Te Tiriti and human rights.

4. The full implementation of the Waitangi Tribunal's *Ngā Mātāpono* recommendations and halting any review of the Tribunal that is not aimed at strengthening and better resourcing the Tribunal, as per recommendations made to New Zealand by the CERD and CESCR Committees and EMRIP.

5. Implementation of recommendations made to New Zealand through the UPR, to resume work on a national action plan for the Declaration in partnership with Tangata Whenua.

The role of Te Kāhui Tika Tangata

Te Kāhui Tika Tangata Human Rights Commission is the Aotearoa New Zealand National Human Rights Institution (NHRI), with duties and functions set out in the Human Rights Act 1993 (HRA).

Within the international human rights system, the Commission is accredited as an "A" status NHRI in accordance with the Paris Principles.[7] This means the Commission meets requirements including independence from government,[8] having a broad mandate and functions, and representing pluralism within Aotearoa society. As an "A" status NHRI, the Commission has standing to engage with United Nations bodies in all matters regarding human rights in Aotearoa.

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[7] Principles relating to the Status of National Institutions (The Paris Principles), adopted by UN General Assembly resolution 48/134 (20 December 1993).

[8] The Commission is an independent Crown entity under the Crown Entities Act 2004. While the Commission receives its funding from central government and sits within the wider public service, it operates independent of government policy and in accordance with its specific functions under the Human Rights Act 1993. For more information see: https://www.publicservice.govt.nz/system/crown-entities.

Within domestic legislation, the long title of the HRA states that the Commission's purpose is to "provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants and Conventions on Human Rights." This confirms the broad mandate of the Commission to address the entire spectrum of human rights.

The Commission's primary functions are outlined in s 5(1) of the HRA, which include:

- advocating and promoting respect for, and understanding and appreciation of, human rights in Aotearoa society;
- encouraging the maintenance and development of harmonious relations between individuals and diverse groups in Aotearoa society; and
- promoting racial equality and cultural diversity.

To carry out these primary functions, the Commission has more detailed functions which are outlined in s5(2) of the HRA. These detailed functions relevantly include:

- promoting a better understanding of the human rights dimension of Te Tiriti o Waitangi;
- advocating for human rights;
- making public statements about any matters that may affect or infringe human rights; and
- reporting to either the Prime Minister or the responsible Minister on any existing or proposed legislation or government policy which may affect human rights.

In addition to its general functions under section 5 of the HRA, the Commission can also receive complaints about unlawful discrimination by both public[9] and private entities,[10] and offer dispute resolution services such as mediation.[11] The 13 prohibited grounds of discrimination currently covered under section 21 of the HRA relevantly include colour, race, ethnic or national origin.

Part 2 of the HRA also prohibits "other forms of discrimination" which includes incitement of racial disharmony (commonly referred to as the "hate speech" provision),[12] and racial harassment.[13] In addition, section 65 of the HRA provides that "indirect discrimination", that is actions that are facially neutral but have a discriminatory effect, also constitutes unlawful discrimination. Measures to achieve equality (or affirmative action measures) are protected under section 73 of the HRA and section 19(2) of the New Zealand Bill of Rights Act 1990 (NZBORA).

Te Tiriti o Waitangi

Te Tiriti is the principal text. There are two texts of Te Tiriti o Waitangi, one in te reo Māori (Te Tiriti) and the Treaty of Waitangi (The Treaty) in English. Despite many efforts to compare them, the texts do not readily equate in translation.[14]

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[9] Human Rights Act 1993, Part 1A; New Zealand Bill of Rights Act 1990, s 19.
[10] Human Rights Act 1993, Part 2.
[11] Human Rights Act 1993, Part 3.
[12] Human Rights Act 1993, s 61.
[13] Human Rights Act 1993, s 63.
[14] Letter from professional translators of te reo Māori to the Coalition Government of Aotearoa (4 July 2024).

A human rights approach supports the substantial evidence that Te Tiriti is the principal authoritative text. From history, it is clear that the understanding of the Rangatira who signed Te Tiriti in 1840 was based on discussions framed on the text in te reo Māori.[15] Moreover, it is the text in te reo Māori which Lieutenant-Governor William Hobson and more than 500 Rangatira signed in hui held in 1840[16] which holds weight legally, and for Tangata Whenua, compared to the 39 Rangatira who signed the English treaty.

Accepting Te Tiriti as the authoritative text is congruent with the principle of contra proferentem which states that where there is an ambiguity in the terms of an agreement between parties, specifically in the circumstances of unequal bargaining, the interpretation of the agreement should be read against the party who provided the wording.

The text of Te Tiriti is clear

The text of Te Tiriti is clear and does not need further clarification.

Article 1 of Te Tiriti extended kāwanatanga rights to the Crown, granting the Crown the authority to reside in Aotearoa and govern its peoples under its own laws, subject to the pre-existing tino rangatiratanga of Tangata Whenua (absolute authority, including self-determination). Tino rangatiratanga stems from inherent rights and whakapapa connections to land and the natural environment, and thus calls for Tangata Whenua to manaaki (care for) and tiaki (protect) whānau, hapū, iwi and communities.

Article 2 of Te Tiriti reaffirmed that Tangata Whenua continue to have the right to undisrupted tino rangatiratanga, including autonomy and authority in relation to their territorial rights; their homes, lands, seas, systems, and all things they valued as taonga.

Article 3 of Te Tiriti ensured Tangata Whenua were able to participate as equals in society without discrimination and required active protection of Tangata Whenua interests.

The oral statement known as article 4 affirmed ongoing rights to Māori custom and religious freedom.

Te Tiriti is not a treaty of cession. The Waitangi Tribunal, in its *Te Paparahi o te Raki* 2014 report,[17] affirmed the long-standing position of many iwi Māori that the Rangatira that signed Te Tiriti in 1840 did not cede their sovereignty to Britain. That is, Rangatira and their hapū (and iwi) did not cede their authority to make and enforce law over their people or their territories.

It is clear from the text of Te Tiriti that it was envisioned that the two systems of authority would operate in unison simultaneously. Both partners to Te Tiriti understood that Tangata Whenua remained the sovereign authority and maintained their tino rangatiratanga to govern and enforce their own tikanga (including laws) within Aotearoa.[18]

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[15] Waitangi Tribunal *He Whakaputanga me te Tiriti: the Declaration and the Treaty* (Wai 1040, 2014) at pp 517-525.
[16] Ibid, at p 386
[17] Ibid.
[18] Tangata Whenua Caucus of the National Anti-Racism Taskforce and Te Kāhui Tika Tangata Human Rights Commission, *Maranga Mai!* (Wellington, New Zealand Human Rights Commission, 2022), citing *He Whakaaro Here Whakamu mō Aotearoa: The report of Matike Mai Aotearoa - The independent working group on constitutional transformation*, at p 46.

Human rights and Te Tiriti

Te Tiriti is the founding constitutional and human rights document of Aotearoa. The text of Te Tiriti aligns with core human rights principles, subsequently enshrined in international human rights instruments including the Universal Declaration of Human Rights,[19] the International Bill of Rights,[20] and other United Nations instruments.[21] These principles include fundamental rights to self-determination, equality and non-discrimination, participation in decision-making, and cultural and property rights.

United Nations bodies recognise the status of Te Tiriti and its correlation with upholding human rights in Aotearoa. This is evident from consistent and repeated recommendations urging successive governments to recognise the fundamental right to Māori self-determination, to progress constitutional protection for Te Tiriti o Waitangi in partnership with Māori, to ensure Māori participation in decision-making, to implement Waitangi Tribunal recommendations, and to ultimately uphold obligations under both Te Tiriti and the Declaration on the Rights of Indigenous Peoples (the Declaration). These recommendations are consistently received from both generalist United Nations human rights mechanisms, and those with expertise in Indigenous peoples' rights.

United Nations mechanisms – Indigenous peoples' rights

Following its mission to Aotearoa in 2019, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) issued advice to support development, in partnership with Māori, of a National Action Plan to implement the Declaration within the constitutional arrangements of Aotearoa, which include Te Tiriti.[22] EMRIP provided clear advice about how to ensure fundamental rights contained in Te Tiriti and affirmed in the Declaration are adequately recognised, protected, and realised for Māori in Aotearoa through the development and implementation of a National Action Plan, including rights to self-determination; participation, partnership, and consultation; and education, health, and justice.[23] EMRIP urged that such measures be "maintained across political cycles."[24]

EMRIP acknowledged that while there has been increasing recognition of Te Tiriti and the Declaration in judicial decisions, there remains challenges with respect to the place of Te Tiriti

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[19] Adopted by the United Nations General Assembly on 10 December 1948 (A/Res/217(III)).
[20] Which refers to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (UN General Assembly resolution 2200A (XXI), both ratified by New Zealand on 28 December 1978).
[21] Including the United Nations Declaration on the Rights of Indigenous Peoples, the Convention on the Elimination of All Forms of Racial Discrimination (ratified by New Zealand on 22 November 1972), the Convention on the Elimination of All Forms of Discrimination Against Women (ratified by New Zealand on 10 January 1985), the Convention against Torture (ratified by New Zealand on 10 December 1989), the Convention on the Rights of the Child (ratified by New Zealand on 56 April 1993), and the Convention on the Rights of Persons with Disabilities (ratified by New Zealand on 25 September 2008).
[22] Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) *Country Engagement Mission (8 – 13 April 2019) – New Zealand* (14 July 2019) at [4]. Available at https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples/country-engagement.
[23] Ibid, at [14] - [23].
[24] Ibid, at p.10.

in the domestic legal order and its interpretation. It was noted that the Waitangi Tribunal and courts have not strictly applied the entirety of the te reo Māori text of Te Tiriti, instead developing "principles", and that the Tribunal lacks authority to make binding decisions and is significantly under-resourced.[25] EMRIP reiterated the right of Māori, enshrined in article 37 of the Declaration, to:[26]

> … the recognition, observance, and enforcement of treaties and States must honour and respect them. In interpreting these treaties, it is important to "emphasise and assert indigenous peoples' own understanding of the treaties negotiated by treaty nations, as documented and evidenced by indigenous people's oral histories, traditions and the concepts expressed in their own languages."

Likewise, the Special Rapporteur on the Rights of Indigenous Peoples produced on a report on the situation experienced by Māori in New Zealand, following a country engagement mission in 2010, as a follow-up to a 2005 mission.[27] The Special Rapporteur observed that:[28]

> Despite significant protections for Māori rights enshrined in the provisions and principles of the Treaty of Waitangi, during most of the nineteenth and part of the 20th century, the British colonial and successor New Zealand governments carried out a series of acts and omissions…[that] are now widely recognised as breaches of the Treaty.

The Special Rapporteur's report recognised Te Tiriti as establishing real partnership between Māori and government, consistent with obligations under the Declaration.[29] On this basis, the Special Rapporteur urged the government to uphold Māori rights to partnership and participation in decision-making, to strengthen Waitangi Tribunal processes and implement its recommendations, and to provide "security within the domestic legal system…so that [the rights contained in Te Tiriti] are not vulnerable to political discretion."[30] The report observed that more must be done to achieve social and economic parity between Māori and non-Māori, "to move forward as true partners in the future, as contemplated under the Treaty of Waitangi".[31] The Special Rapporteur is due to return to Aotearoa for a follow-up visit in 2025.

United Nations mechanisms – broader human rights obligations

Recommendations from EMRIP and the Special Rapporteur are supported by United Nations Treaty Bodies which focus on the broader spectrum of human rights.

In the fourth cycle Universal Periodic Review of Aotearoa (April 2024) the government received recommendations to, in consultation and agreement with Māori, implement constitutional

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[25] Ibid, at [25]. See also recommendations at [27].
[26] Ibid, at [24].
[27] All three reports of the Special Rapporteur (2005, 2010 and 201) are available at: https://www.ohchr.org/en/special-procedures/sr-indigenous-peoples/country-visits.
[28] Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya *The situation of Māori people in New Zealand* (A/HRC/18/35/Add.4, 31 May 2011) at [10].
[29] Ibid at [11], citing the Declaration's preamble, which recognises that "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States".
[30] Ibid at [69], [70] – [72], [77].
[31] Ibid at p 2.

processes to recognise, respect and give effect to Te Tiriti (from seven states);[32] advance a National Action Plan to implement the Declaration (from 13 states);[33] and ensure Māori participation and representation in decision-making (from four states).[34] Twenty-five States called on New Zealand to uphold Te Tiriti and to implement the Declaration.[35]

United Nations treaty bodies frequently make similar recommendations. In its sixth periodic review of New Zealand in 2016 under the International Covenant on Civil and Political Rights, the Human Rights Committee raised concerns about the lack of steps taken to implement recommendations from the Waitangi Tribunal's Wai 262 *Ko Aotearoa Tēnei* report, and urged the government to:

1. Strengthen the role of Te Tiriti o Waitangi in constitutional arrangements;
2. Guarantee the informed participation of Māori in all relevant national and international consultation processes, including those directly affecting them; and
3. Implement technical capacity programmes aimed at the effective participation of Māori in all relevant consultation and decision-making processes.[36]

These recommendations were affirmed by the Committee that monitors implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[37] in its fourth periodic review of New Zealand in 2018.[38] In addition, the ICESCR Committee recommended that the government:

- Implement proposals put forward in the Matike Mai Aotearoa report;
- Develop a national strategy for implementation of the Declaration into domestic law;
- Provide adequate financial and human resource to the National Independent Monitoring Mechanism for the Declaration; and
- Take effective measures to ensure compliance with the requirements of free, period, and informed consent of Māori, notably in the context of extractive and development activities.

The Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee) has also emphasised the need for government to uphold obligations contained in Te Tiriti and reflected in the Declaration. In its combined 21st and 22nd periodic review of Aotearoa in 2017, the CERD Committee observed that little had been done to secure Māori rights to self-determination under Te Tiriti or to advance the power-sharing arrangements between hapū and

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[32] Report of the Working Group on the Universal Periodic Review – New Zealand A/HRC/57/4 (11 June 2024) at [132.27] (Mexico); [132.28] (Russian Federation); [132.29] (Germany); [132.30] (Brazil); [132.31] (Slovenia); [132.32] (Norway); and [132.33] (Indonesia).

[33] Ibid, at [132.27] (Mexico); [132.45] (Philippines); [132.49] (Greece); [132.51] (Plurinational State of Bolivia); [132.221] (Malawi); [132.222] (Honduras); [132.223] (Switzerland); [132.224] (Malaysia); [132.225] (Egypt); [132.226] (Peru); [132.227] (Togo); [132.228] (Czechia); and [132.234] (Norway).

[34] Ibid, at [132.229] (Plurinational State of Bolivia); [132.230] (Bahamas); [132.231] (Estonia); and [132.238] (Italy).

[35] *Report of the Working Group on the Universal Periodic Review – New Zealand* A/HRC/57/4 (11 June 2024).

[36] Human Rights Committee *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (26 April 2016) at [45] – [46].

[37] Ratified by New Zealand on 28 December 1978.

[38] Committee on Economic, Social and Cultural Rights *Concluding observations from the fourth periodic review of New Zealand* E/C.12/NZL/CO/4 (1 May 2018) at [6], [8] and [9].

the Crown as required by Te Tiriti.[39] The CERD Committee recommended that the government act without delay to process discussions, in partnership with Māori, about recommendations contained in the Matike Mai Aotearoa report, to implement the Tribunal's recommendations in its WAI 262 report, and to uphold rights to participation in decision-making, self-determination and shared governance.[40] Māori rights to "own, develop, control and use their communal lands, territories and resources" and to "intellectual and cultural property rights and Māori treasured possessions, including language, culture and knowledge" were also affirmed by the CERD Committee.[41] In addition to its recommendations made directly to New Zealand, the CERD Committee has also urged States, regardless of their position on the Declaration, to use it "as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples".[42] The CERD Committee, along with other UN treaty bodies, routinely use the Declaration as a standard of reference when monitoring States' compliance with the core human rights conventions.

In October 2024, the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) noted with concern that the government's actions may be seen as a reinterpretation of the provisions of Te Tiriti.[43] The CEDAW Committee urged the government to reaffirm its commitment to the Declaration, to ensure its policies and legislation are consistent with the Declaration, and:[44]

> *...to ensure the free, prior, and informed consent of Indigenous women is obtained before the approval of any project or legislative measure that affects their lands, territories, and resources, including meaningful consultations and participation in decision-making processes through their own representative institutions. The Committee also recommends that the State party recognise the role of Indigenous women as custodians of Indigenous culture, promote the cultural rights and identity of Indigenous women and protect their right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters, and coastal seas.*

The CEDAW Committee also urged the government to address the intersecting forms of discrimination experienced by Māori women and girls, and noted its concern that about the misrepresentation of measures to ensure equality as discriminatory in public discourse.[45] Similar recommendations have been reiterated by United Nations Committees on the Rights of

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[39] Committee on the Elimination of All Forms of Racial Discrimination *Concluding observations on the combined twenty-first and twenty-second periodic reports of New Zealand* CERD/C/NZL/CO/21-22 (22 September 2017) at [12].
[40] Ibid, at [13] and [17]. See also recommendations at [14] to [15] regarding Treaty settlement processes.
[41] Ibid, at [15] and [16].
[42] Committee on the Elimination of Racial Discrimination *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America* CERD/C/USA/CO/6 (8 May 2008) at [29].
[43] Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) *Concluding observations on the ninth periodic report of New Zealand* (Advance unedited version) CEDAW/C/NZL/CO/9 (29 October 2024) at [42].
[44] Ibid, at [43].
[45] Ibid, at [16] - [17].

the Child[46] and on the Rights of Persons with Disabilities,[47] recognising the right of Māori to self-determination and participation in decision-making, and the impact that failure to uphold such rights has had on exacerbating intersectional vulnerabilities experienced by Māori.

Human rights and Te Tiriti concerns regarding the Bill

As mentioned at the outset of our submission the Commission regards this Bill as unnecessary, unworkable, and in breach of numerous human rights and Te Tiriti obligations. The Commission urges the Committee to halt the Bill for several reasons, which are outlined below.

Unilateral action and lack of engagement with Te Tiriti partners

Treaties, by their nature, are agreements made between two or more parties. For one party to unilaterally reinterpret a treaty without recourse to the other(s), is not only an extreme and illegitimate overreach of power and breach of agreement, but the height of impropriety and bad faith. As the Waitangi Tribunal noted:[48]

> *Thus, the Crown has agreed to a proposal that will unilaterally redefine the manner in which the constitutional status of the Treaty/te Tiriti is applied in law, and it does so in favour of a distortion of the Treaty/te Tiriti and its two texts. We agree with the claimants and interested parties that the pursuit of the policy is an unbridled exercise of kāwanatanga power.*

Most New Zealanders would easily recognise that such unilateral action is both unfair and against the spirit of partnership and manaaki that our country, through Te Tiriti, is founded on. Indeed, our research[49] has found that a majority of New Zealanders believe that decisions about how Te Tiriti o Waitangi is honoured should be made by Māori and non-Māori together on an equal footing (70%). Most New Zealanders (64%) believe that what is needed is more careful listening and understanding and less political rhetoric. A majority (51%) do not want politicians inflaming race relations through these debates.

As well as an issue of fairness and reasonableness, international human rights standards recognise and affirm the notion that States and Indigenous peoples should work cooperatively in good faith, especially when States are contemplating actions that impact upon the rights of Indigenous peoples.[50]

Human rights standards, as set out most comprehensively in the Declaration, affirm that Indigenous peoples have the right to participate in decision-making that would affect their

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[46] Committee on the Rights of the Child *Concluding observations on the sixth periodic report of New Zealand* CRC/C/NZL/CO/6 (28 February 2023) at [39] to [40].
[47] Committee on the Rights of Persons with Disabilities *Concluding Observations on the combined second and third reports of New Zealand* CRPD/C/NZL/CO/2-3 (26 September 2022) at [6(b)].
[48] *Ngā Mātāpono*, above n 6, at p 134.
[49] Horizon Research prepared for Te Kāhui Tika Tangata Human Rights Commission *Human rights and Te Tiriti / Treaty issues* (November 2023).
[50] For example, United Nations Declaration on the Rights of Indigenous Peoples articles 18, 19, 32, 38.

rights, and that States have obligations to consult and cooperate in good faith with Indigenous peoples before adopting legislative measures that may affect them.[51]

As outlined above (with reference to the EMRIP report on Aotearoa), the Declaration further affirms that Indigenous peoples have the right to have their treaties with States recognised, observed and enforced, and that States have obligations to honour and respect such treaties.[52]

Detailed guidance on the meaning and application of these standards has been provided by the UN Expert Mechanism on the Rights of Indigenous Peoples.[53] This guidance includes clear advice to States to honour and respect treaties in good faith, according to their spirit and intent. The EMRIP Advice includes the specific recommendation that States should avoid acting unilaterally in ways that undermine these agreements and the rights they affirm.[54]

Since the incorporation of Te Tiriti principles through legislation is a key mechanism through which the government recognises and gives effect to its Te Tiriti obligations, unilaterally changing these principles effectively and fundamentally changes the implementation of that agreement. The Government is going about this without adequate engagement, consent, or rationale (as discussed further below).

Flawed interpretation and approach

Both the Waitangi Tribunal and numerous reo and legal experts, and government officials among others, have identified significant flaws inherent in the Bill.[55]

The Commission shares these concerns and are of the view that the new 'principles' proposed under the Bill create a deeply problematic basis for a public discussion of our founding document. We are concerned that a conversation aimed at significantly redefining or reinventing the Treaty principles – which are already a step removed from the Te Tiriti text agreed to by the vast majority of signatories – is an unhelpful, and indeed harmful basis for this important constitutional conversation. Relying on inaccurate interpretations lacking in any authority or credibility, as well as having the parameters of the conversation unilaterally determined and defined solely by one Te Tiriti partner, even further compound this.

The proposed principles are not only a fundamental reinterpretation of Te Tiriti rights and responsibilities, undertaken without engagement with or consent of the parties to the agreement, their effect is to shrink the responsibilities of the Crown and grossly diminish the rights of Tangata Whenua, including in relation to tino rangatiratanga and rights of self-determination.

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[51] United Nations Declaration on the Rights of Indigenous Peoples, articles 18 - 19.
[52] United Nations Declaration on the Rights of Indigenous Peoples, article 37(1).
[53] EMRIP *Study on treaties, agreements and other constructive arrangements, between indigenous peoples and States* A/HRC/51/50 (28 July 2022).
[54] Ibid at *Annex: Advice No. 15*, [3].
[55] *Ngā Mātāpono*, above n 6.

As the Waitangi Tribunal noted:[56]

> *[T]he 'principles' proposed to be used to define Treaty principles in statute do not accord with existing jurisprudence on the Treaty principles, or the historical circumstances or text and spirit of the Treaty/te Tiriti. The development of these 'principles' is not an exercise designed to better recognise or give fuller effect to the Treaty/te Tiriti or the rights of Māori and obligations of the Crown therein. In sum, the substance of the Bill and the process proposed by the Crown for its development mean that the Crown's attempt to define the Treaty principles in statute would be an abuse of its kāwanatanga powers.*

Particularly worrying from a human rights perspective is the Tribunal's finding that:[57]

> *The Treaty Principles Bill if enacted would likely replace or at least severely narrow the consideration of Māori rights and interests.*

For these reasons, the Commission strongly opposes the proposed principles and the Bill overall.

Lack of policy rationale

The Commission supports and reiterates the Waitangi Tribunal's *Ngā Mātāpono* findings that the Bill lacks a policy imperative and is based on flawed policy rationales.[58]

The policy rationales advanced for the Bill are: (a) certainty, (b) equality, and (c) a national conversation on Aotearoa New Zealand's constitution. Each of these was examined in turn by the Tribunal, which considered evidence and arguments from both claimants and the Crown and determined that none provided a legitimate or persuasive rationale for the current Bill.

Certainty

Claimants, expert witnesses, and Crown officials largely concurred on the question of certainty, leading the Tribunal to conclude that "the problem of 'uncertainty' does not exist but would, as officials advised, *be the consequence* of enacting a Bill based on the proposed ACT policy" (emphasis added).[59]

The Commission agrees and considers it is not in fact a lack of certainty or clarity that prevents the promises of Te Tiriti being achieved, but a deliberate and sustained lack of political will by the Crown to uphold its agreed obligations.

The Tribunal found that the coalition agreement's characterisation of existing Treaty principles as 'vague' is misleading, and that "[a] significant degree of certainty already exists regarding the content and application of the principles of the Treaty/ te Tiriti as found in the reports of the Tribunal, decisions of the courts and in public sector policy guidance."[60]

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[56] *Ngā Mātāpono*, above n 6, at p 127.
[57] *Ngā Mātāpono*, above n 6, at p 130.
[58] *Ngā Mātāpono*, above n 6, at p 134.
[59] *Ngā Mātāpono*, above n 6, at p 130.
[60] *Ngā Mātāpono*, above n 6, at p 128-129.

The Commission agrees with the Tribunal further, where they note, that "no argument has been given as to why certainty and clarity are supreme values that trump fidelity to the text or meaning of the Treaty/te Tiriti."[61]

The Commission's view is that Te Tiriti o Waitangi is neither unclear nor in need of cherrypicked principles and that the clarification rationale is unfounded and erroneous. We agree with the Tribunal's findings and with the advice of Crown officials that the proposed legislation will create uncertainty, unpredictability, and confusion. As outlined further above we also believe that it will merely further obscure the original agreement and give rise to systemic racism.

If clarity were lacking, the Declaration (and the growing body of guidance and jurisprudence around it) provides further clarity, from an international human rights perspective, on what the promises of Te Tiriti mean and how they may be achieved.

Indeed, it is arguably misplaced for politicians to consider they are better placed than the Tribunal, courts, or academic/legal scholars to provide clarity, were it lacking. This is particularly so given the Tribunal's finding that government Ministers' failure to inform themselves of relevant Te Tiriti jurisprudence and interpretation is a Te Tiriti breach in itself.[62]

Equality

The second policy rationale advanced for the Bill is that it is necessary to protect New Zealanders' rights to equality.

Again, the Commission concurs with the Tribunal's consideration of this question and reiterates that an array of international and domestic human rights instruments recognise and protect the equal rights of New Zealanders. These include (to name a few) the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the UN Convention on the Elimination of Discrimination Against Women, UN Convention on the Elimination of all forms of Racial Discrimination and the UN Convention on the Rights of Persons with Disabilities. It also includes the Indigenous peoples' rights Declaration, which provides that: "Indigenous peoples and individuals are free and equal to all other peoples and individuals[63]

The Declaration further provides that:[64]

> *In the exercise of the rights enunciated in the present Declaration, human rights, and fundamental freedoms of all shall be respected… The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance, and good faith.*

Rights to equality and non-discrimination are also reflected in domestic law, including the NZBORA and HRA.[65]

We cannot state the issue more simply and clearly than the Waitangi Tribunal, that:[66]

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[61] *Ngā Mātāpono*, above n 6, at p 129.
[62] *Ngā Mātāpono*, above n 6, at p 136.
[63] United Nations Declaration on the Rights of Indigenous Peoples, article 2.
[64] United Nations Declaration on the Rights of Indigenous Peoples, article 46.
[65] New Zealand Bill of Rights Act 1990, s 19. Human Rights Act 1993, s 21.
[66] *Ngā Mātāpono*, above n 6, at p 131.

> *The assertion that the equal rights of New Zealanders are not already protected without the Bill or are threatened by guarantees to Māori under the Treaty/te Tiriti is* ***a fiction*** (emphasis added)

The Commission considers that a better option would be to make the most of the valuable potential offered by the Declaration – rather than rejecting it out of hand (as per coalition agreements) and take concrete steps to implement and apply it, and to increase public understanding of it.

While affirming the equal rights of all human beings, international human rights instruments recognise that the equal enjoyment of rights by some groups may require specific protection and distinct, targeted action. Recognition of tino rangatiratanga through Te Tiriti, or the rights of Indigenous peoples to self-determination does not undermine or conflict with rights to equality. Rather, they recognise and seek to address the entrenched discrimination and denial of equal rights that Tangata Whenua experience.

Giving effect to the promises of Te Tiriti, and to New Zealand's human rights obligations under the Declaration, are not only matters of honour and international responsibility, but in turn they provide a framework for addressing the systemic oppression and discrimination experienced by Māori through the historic and ongoing effects of colonisation.

It is a core role of human rights to provide a check on the power of the State, and to protect disadvantaged and marginalised groups from the tyranny of the majority. This is not something that conflicts with democratic principles of equality but is rather accepted as a core feature of a well-functioning democracy. It is in this aspect particularly that the Bill reflects a flawed understanding of human rights.

The Commission agrees with the Tribunal's description of the irony of a situation where "[i]n a bizarre twist, the concepts of democracy and equality are being advanced to take away rights and discriminate against Māori".[67]

Not only does the Bill not advance equality as it purports to, but it actively seeks to distort and diminish the rights of just one race within the population. It is race-based legislation, by definition it applies only to Māori rights and interests and how they will be regarded (or disregarded) by the State. Rather than advance equality, the proposed legislation actively undermines human rights standards and seeks to limit fundamental rights.

The point is well made in the *Ngā Mātāpono* report as follows:[68]

> *Conversely, the Treaty Principles Bill policy is contrary to the fundamental rights and freedoms of Māori as indigenous peoples as it seeks to limit their right to self-determination, the development of their own institutions, policy, and laws within the parameters of the nation state. Yet at the international level, these rights and freedoms are protected or affirmed as declared in ICCPR, ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD), and UNDRIP. These instruments are attempts to address inequalities based upon race and/or indigenous status, respectively.*

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[67] *Ngā Mātāpono Part II*, above n 2, at p 109.
[68] *Ngā Mātāpono*, above n 6, at p 131.

Again, we find the Tribunal's summation on this proposed rationale clear and helpful:[69]

> *To reiterate, the rights of all New Zealanders and equality before the law are protected by a combination of domestic statutes, the common law, and international instruments. Yet by engaging with this policy the Crown is sanctioning a process that will take away indigenous rights and reduce the Crown's Treaty/ te Tiriti obligations across the statutory landscape. It has adopted a policy that is contrary to fundamental human and indigenous rights and international law, including ICERD and UNDRIP. It is subjugating the Māori–Crown relationship with little regard to the normative value of the Treaty/te Tiriti in our constitutional framework. It is an attempt to utilise Parliament's law-making authority to alter Aotearoa New Zealand's constitutional foundation predicated upon a legal fiction and an attempt to oust the judiciary. There may be limits on Parliamentary sovereignty which could be reviewable by the courts.*

As we have discussed in this submission, above at page 10 (in relation to international human rights), recognition of the distinct rights of Indigenous peoples is neither radical nor discriminatory, but is an accepted feature of globally agreed human rights norms. As noted at page 9, the UN Committee responsible for monitoring the ICERD routinely uses the Declaration as a standard of reference and urges States to use and apply it, and to give particular attention to the rights of Indigenous peoples, as part of their ICERD obligations.

The need for a national constitutional conversation

The Commission agrees that a public conversation is needed. Since at least 2013 the Commission has urged successive governments to to progress a national conversation on how Te Tiriti and human rights may be best implemented and constitutionally protected. [70] As detailed above, international human rights bodies have made repeated recommendations to New Zealand to this end. A critical component of these recommendations is that this must be done in partnership with Māori.

Furthermore, in undertaking a national constitutional discussion of this nature, it is imperative that it is solidly anchored in human rights standards and framed within good quality information and education. To participate effectively, all New Zealanders need to be adequately informed. A longer, deliberate, and inclusive constitutional discussion should include the development of education materials, in cooperation with Te Tiriti partners and experts. Treaty education via media soundbites is a poor basis for inclusive, enduring, or responsible constitutional reform.

We are in agreement with the Waitangi Tribunal, which noted:[71]

> *Having a conversation about the Treaty/te Tiriti is important. How it is facilitated is the issue. The problem with the Treaty Principles Bill is that it has been unilaterally instigated by a minor political party and then adopted as Crown policy. In adopting that policy, the Crown has agreed to circumscribe the parameters of that constitutional conversation without engaging its Treaty partner.*[72]

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[69] *Ngā Mātāpono*, above n 6, at p 135.
[70] See for example: Te Kāhui Tika Tangata | Aoteaora Human Rights Commission *Submission to Aotearoa New Zealand's Fourth Periodic Review* (October 2023) at p 4.
[71] *Ngā Mātāpono*, above n 6, at p 132.

The Constitutional Kaupapa Inquiry currently underway before the Tribunal offers one existing mechanism and basis for such a conversation. The reports of the Constitutional Advisory Panel and Matike Mai Aotearoa offer others. Each of these provides a more robust basis for a planned, fair, and informed national constitutional conversation. Forcing the conversation amid heightened racial tensions and misinformation, and without reference to existing processes is both unwise and disingenuous.

The work underway in recent years to develop a national action plan to implement the Declaration offered another such opportunity for an informed and inclusive, human rights- and Te Tiriti-based national conversation on these issues. Stopping that work was not only a significant missed opportunity, but contrary to recommendations and advice to New Zealand by international human rights bodies.[73] The Commission urges the Government to recommence that work with priority, and to include Te Tiriti partners in shaping the design of that work programme.

Appropriately prioritising human rights and Te Tiriti obligations

The Commission notes that respect for human rights has been cited as a motivation for this Bill. While we welcome efforts to advance and promote human rights, we are concerned that the approach taken in the Bill solely focusses on some rights while ignoring and overriding others.

For example, while the Bill purports to advance the right to equality for all New Zealanders, it fails to adequately acknowledge or observe the recognised legal rights of Indigenous peoples, particularly their collective rights to self-determination, autonomy, self-government, territorial integrity and to have their historic treaties honoured. Given that these are integral to Te Tiriti, we feel that this omission creates a fallacy around the human rights underpinnings of the legislation. It is a disingenuous and incomplete approach to human rights.

While the Bill includes reference to iwi and hapū rights, this does not alleviate our concerns regarding the overall basis and approach of the Bill. These references do little to alleviate the gross inequality created and facilitated by the proposed legislation, given how limited their application is intended to be. To be clear, this falls shamefully short of the guarantees contained in Te Tiriti, for example in regard to the Article 2 guarantees to hapū and iwi of territorial integrity, and the promise that they would enjoy the "the full, exclusive and undisturbed possession" of their indigenous territories and the maintenance and protection of their tino rangatiratanga, or right to self-determination.

In the Commission's view, the Bill is likely to do more to undermine human rights than advance them, and it is nonsensical to assert this Bill is motivated by the protection of human rights. We note that Te Kāhui Tika Tangata Human Rights Commission, as the national human rights institution, comprised of several recognised human rights experts, has not been consulted by the Government in the development of the proposed legislation.

While we appreciate that the Government has been formed on the basis of commitments made between coalition partners, we strongly caution against prioritising these agreements over New Zealand's human rights obligations and the commitments enshrined in Te Tiriti.

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[73] See for example: *Report of the Working Group on the Universal Periodic Review – New Zealand* A/HRC/57/4 (11 June 2024).

Human rights and Crown obligations under Te Tiriti o Waitangi do not yield depending on the government of the day; they are legal obligations which are not discretionary. Human rights are intrinsic and inherent, not derived from the goodwill of the State. To make human rights' recognition and implementation subject to popularity or political will would render them most vulnerable and set an extremely dangerous precedent.

Potentially harmful impacts

As outlined in the introductory sections of this submission, one of the Commission's primary statutory functions is to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society (HRA, s5(1)(b)).

The Commission is concerned that the Bill risks inflaming racist rhetoric and hate speech that will damage social cohesion, communities, and harmonious relations in New Zealand.

As the Waitangi Tribunal very clearly pointed out:[74]

> *The Crown's Treaty Principles Bill policy will foster division and damage social cohesion, with significant prejudicial impacts on Māori (and on society) …*

Māori will suffer the impacts of division and social disorder, bearing the brunt of blame for it. Given the breadth of legislation the Bill would affect, the Tribunal further noted that "Māori would be impacted negatively in almost every area of life".[75] A responsible Crown should take heed of these warnings as to the prejudicial impacts of its policy and seek consensus, not division and disorder.

The Commission reiterates the Tribunal's unambiguous urging that:

> *The seriousness of these prejudicial impacts for Māori cannot be overstated.*[76]

Global trends of increasing social and political polarisation, with declining national pride and belonging, can cause tears in social fabric, to the detriment of us all.[77] For example, research on social cohesion in Australia indicated that the Voice referendum accelerated polarisation and reduced support for the Voice, even though Australians were overwhelmingly positive about multiculturalism, migrant diversity and the importance of the relationship to its First Nations peoples.[78] Similarly, studies in the United Kingdom suggested increasing racial discrimination during the Brexit referendum, in part because racists felt more confident expressing their views.[79]

Locally, through events such as the national Kotahitanga hui, Waitangi Day, as well as through our engagements with various rōpū, and approaches and complaints made to the Commission's dispute resolution service, we have heard a clear message that Tangata Whenua feel that their rights are under attack by this Bill and the associated anti-Te Tiriti and anti-Māori rhetoric that it aligns with.

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[74] *Ngā Mātāpono*, above n 6, at p 139.
[75] *Ngā Mātāpono Part II*, above n 2 at p 95.
[76] *Ngā Mātāpono*, above n 6 at p 140.
[77] Scanlon Foundation Research Institute 2023 Mapping Social Cohesion Report at p12.
[78] Ibid.
[79] Opinium *Racism rising since Brexit vote* (21 May 2019).

As outlined, the Commission has also heard a clear message that a majority of New Zealanders do not support this type of rhetoric, or politicians inflaming race relations, but rather are in favour of informed and respectful discussion involving Te Tiriti.[80]

Conclusion

Te Tiriti o Waitangi provides a foundation of belonging for all, grounded in mutual care, respect, and the right of Tangata Whenua to exercise tino rangatiratanga.

A thriving, inclusive future for Aotearoa depends on honouring Te Tiriti as a commitment between Tangata Whenua and the Crown, where decisions are not unilaterally made by one for the other. The pathway that this Bill sets us on is one of broken promises, breaches of human rights, and the creation of conflict, uncertainty and ongoing grievances, that future generations will be left to resolve.

Māori have reiterated time and time again their efforts to honour their obligations under Te Tiriti. The text, spirit and meaning of Te Tiriti are already well defined and understood. What remains outstanding is the political will of the Crown to recognise they are legally bound by the document they rely on for legitimacy, and to commit to honourably implementing their ongoing and substantive obligations under that agreement. That is a necessary pre-condition for the development of a robust programme of education and a national conversation.

The Commission remains committed throughout this process to fulfilling its statutory mandate to "promote by research, education, and discussion a better understanding of the human rights dimensions of the Treaty of Waitangi and their relationship with domestic and international human rights law" and we look forward to continuing to ensure New Zealand's human rights obligations, including those anchored in Te Tiriti o Waitangi, are well understood and fully implemented.

The Commission requests the opportunity to also make an oral submission to the Select Committee.

Ia manuia | Nā mātou noa, nā
Te Kāhui Tika Tangata New Zealand Human Rights Commission

Saunoamaali'i Karanina Sumeo
Te Amokapua (Rangitahi)
Chief Commissioner (Acting)

Dayle Takitimu
Rongomau Taketake
Indigenous Rights Governance Partner

[80] Horizon Research prepared for Te Kāhui Tika Tangata Human Rights Commission *Human rights and Te Tiriti / Treaty issues* (November 2023).