

## Primer on Treaty principles

March 2024

Carwyn Jones

### 1. *What does the phrase "the principles of the Treaty of Waitangi" mean?*

Simply, "the principles of the Treaty of Waitangi" means the key *ideas* that underpin the treaty agreed between Māori and the Crown in 1840, rather than the words of the document itself.

When people talk today about "the Crown's Tiriti obligations", they are referring to the New Zealand government's obligations to uphold those promises made in 1840.

The phrase "the principles of the Treaty" now has a specialised meaning through its use in law and government. There is a significant body of law around this concept and so, like many legal terms, it carries a particular, technical meaning when used in that context.

### 2. *Where does the concept of "Treaty principles" come from?*

Since the mid-1970s, Parliament has included the phrase "the principles of the Treaty of Waitangi" in numerous laws.

In 1975, Parliament enacted the Treaty of Waitangi Act to establish the Waitangi Tribunal as a body that could inquire into claims relating to Te Tiriti. The Treaty of Waitangi Act gives the Tribunal the power to inquire into actions of the Crown which are claimed to be "inconsistent with the principles of the Treaty". Therefore, it is "the principles of the Treaty" that the Tribunal uses as its measure to assess claims.

### 3. *Are "the principles of the Treaty" the same as the articles of Te Tiriti?*

No. The articles of Te Tiriti are simply what make up the Māori text of Te Tiriti. The meaning of the treaty agreement can be determined through understanding the Māori text of Te Tiriti in the context in which it was signed.

### 4. *What about the English text?*

The English text, the Treaty of Waitangi, ought to be thought of as a draft version of Te Tiriti. It was the text in Te Reo Māori, Te Tiriti o Waitangi, which was signed by Hobson and the vast majority of the rangatira - only 39 signed the English draft, out of approximately 540 rangatira. But also the debate and discussion which took place around the signing of Te Tiriti related to the key concepts expressed in Te Reo Māori. The rangatira agreed to the Māori terms of Te Tiriti o Waitangi, not the draft English text.

5. *Does the concept of 'the principles of the Treaty' just focus on Te Tiriti, the Māori text?*

No. The Treaty of Waitangi Act 1975, requires that the Waitangi Tribunal look to both the Māori text of Te Tiriti and the English draft in order to determine how "the principles of the Treaty" should be applied.

6. *Why does legislation use "the principles of the Treaty"? Why not just use the words of Te Tiriti?*

The use of the phrase "the principles of the Treaty" is an attempt to reconcile the Māori text of Te Tiriti with the English draft.

More specifically, the concept attempts to reconcile Te Tiriti with the view that Crown sovereignty is absolute and exclusive and does not allow space for the exercise of other authority. Exclusive and absolute Crown sovereignty is not consistent with the guarantee of tino rangatiratanga to Māori in Te Tiriti. In this way, Treaty principles reflect a significantly watered-down version of Te Tiriti.

7. *Are there other laws which refer to "the principles of the Treaty"?*

Yes. There are now many pieces of legislation that have incorporated "the principles of the Treaty" in some way.

For example, the State-Owned Enterprises Act 1986 includes a section that says "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". Other legislation have similar provisions, or require certain decision-makers to have regard to the principles of the Treaty. Perhaps the strongest language is in the Conservation Act 1987, which states "This Act shall so be interpreted and administered as to give effect to the principles of the Treaty of Waitangi".

8. *Is there a defined list of Treaty principles?*

There is no definitive or exhaustive list of Treaty principles. Parliament did not set out a specified list in the Treaty of Waitangi Act 1975, nor has it done so in other pieces of legislation that refer to "the principles of the Treaty". Some laws do provide some guidance about how and when Parliament intends Treaty principles to apply.

9. *So nobody really knows what "the principles of the Treaty" means?*

Actually, we now have a pretty clear idea about what the term "the principles of the Treaty" means and a great deal of certainty about how that term will apply.

The application of "principles" rather than more specifically or exhaustively prescribed rules is not unusual in the law. The courts will often look to identify broad legal principles in order to understand how best to interpret and apply the law to a specific

case. It is not surprising that, in 1975, Parliament decided that the interpretation and application of "the principles of the Treaty" ought to be left to an expert body to determine in the context of particular cases as they arise.

#### 10. What are some Treaty principles that have been recognised?

Some Treaty principles that have been identified and applied are:

- Partnership - The Treaty established a relationship akin to a partnership and imposed on both Treaty partners an obligation 'to act towards each other reasonably and with the utmost good faith'.<sup>1</sup> The principle of partnership is about the balancing of the concepts of *kāwanatanga* and *tino rangatiratanga*.
- Active protection - the Crown has positive obligations to deliver on the guarantee of *tino rangatiratanga*. The capacity of Māori to exercise authority over their own affairs 'as far as practicable within the confines of the modern State' is key to the active protection of *tino rangatiratanga*.<sup>2</sup>
- Redress - where there has been a breach of Treaty principles, there ought to be "a fair and reasonable recognition of, and recompense for, the wrong that occurred".<sup>3</sup>
- Mutual benefit - The basic concept was that a place could be made for two people of vastly different cultures, of mutual advantage, and where the rights, values and needs of neither would necessarily be subsumed ... It is obvious however that to achieve the objective, compromises on both sides are required and a balance of interests must be maintained.<sup>4</sup>
- Options - requires that the Crown must adequately protect the availability and viability of kaupapa Māori solutions in the social sector as well as so-called mainstream services in such a way that Māori are not disadvantaged by their choice.<sup>5</sup>
- Equity - freedom from discrimination, also obliges the Crown to positively promote equity.<sup>6</sup>

---

<sup>1</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA), p 667.

<sup>2</sup> Waitangi Tribunal, *The Ngāpuhi Mandate Inquiry Report* (2015), p 23.

<sup>3</sup> *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA), p 693.

<sup>4</sup> Waitangi Tribunal, *Mangonui Sewerage Claim Report* (1988), p 4.

<sup>5</sup> Waitangi Tribunal, *Hauora* (2023), pp 35-36.

<sup>6</sup> Waitangi Tribunal, *Hauora* (2023), pp 33-35.

*11. So, it's the Waitangi Tribunal that gets to determine what are "the principles of the Treaty"?*

Yes and no. The Waitangi Tribunal is the specialist body that has, for nearly fifty years, been responsible for inquiring into claims that "the principles of the Treaty" have been breached. In doing so, it has built up a considerable body of work that analyses what Treaty principles are and how they ought to apply in specific circumstances. In relation to its own work, the Tribunal has "exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide on issues raised by the differences between them". So, the Tribunal is a significant source of information for our understanding of Treaty principles.

However, the Tribunal's findings and recommendations are, generally, not binding on the Crown.

The courts have also been required to identify Treaty principles when they have been faced with cases involving Treaty principles provisions in legislation. One of the earliest and best known examples of this was when the Court of Appeal in 1987 needed to interpret and apply the Treaty principles provision in the State-Owned Enterprises Act in order to determine whether the proposed government policy was legal.

There is also now a considerable body of law from the courts which identifies and applies Treaty principles. Decisions from the courts create binding precedent. The courts are not bound by the Waitangi Tribunal's findings, but may refer to the Tribunal's analysis of Treaty principles, and, where appropriate, may defer to the Tribunal's expertise as the subject matter specialists.

Some government agencies have also made statements from time to time on how they understand the principles of the Treaty applying to their work. And in 1989, the then government published a set of Treaty principles intended to guide its action on matters relating to Te Tiriti.

So, Treaty principles have been developed by the Waitangi Tribunal, the courts, and government.

*12. Why am I hearing all this talk about Treaty principles now?*

The Government's coalition agreements include significant and controversial proposals relating directly to the application of Treaty principles.

The National-New Zealand First agreement includes a proposal to review all references to Treaty principles in legislation and remove or replace them, as well as a proposal to review the Waitangi Tribunal.

The National-ACT agreement states that the parties in the coalition will "Introduce a Treaty Principles Bill based on existing ACT policy and support it to a Select Committee as soon as practicable".

### *13. What is the proposed Treaty Principles Bill?*

ACT policy is to hold a referendum to create a new legal definition of "the principles of the Treaty of Waitangi". Introducing a Bill based on ACT policy and supporting it to a Select Committee would mean taking the first steps towards holding such a referendum.

ACT policy is to set out three newly created 'Treaty principles' which voters could either adopt or reject in a referendum.

### *14. What principles are being proposed?*

ACT policy is to redefine "Treaty principles" as:

- The New Zealand Government has the right to govern all New Zealanders.
- The New Zealand Government will honour all New Zealanders in the chieftainship of their land and all their property.
- All New Zealanders are equal under the law with the same rights and duties.

### *15. Do those proposed principles reflect the content of Te Tiriti?*

No. The proposed principles do not at all reflect the meaning of Te Tiriti.

The authority given to the Crown is expressed as 'kāwanatanga'. An analysis of the text and a thorough review of the historical record and the context make it clear that this authority was for the Crown to exercise over its own citizens who were in Aotearoa. 'Kāwanatanga' is not an authority over Māori.

That interpretation is reinforced by the guarantee that the rangatira would retain their own authority, expressed as 'tino rangatiratanga'. 'Tino rangatiratanga' reflects a constitutional and political authority that is significantly broader than a property right. The guarantee of tino rangatiratanga is a guarantee to Māori. There is no credible suggestion that this is a guarantee to anyone other than Māori.

The third article of Te Tiriti provides that Māori will have all the rights of other New Zealanders. That is, in addition to the guarantee of tino rangatiratanga, Māori can access all the rights of citizenship. This is quite different to what is proposed in the ACT policy.

Te Tiriti o Waitangi is an agreement between Māori and the Crown. It reflects an exchange in which certain protections are guaranteed to Māori in exchange for creating a space for the Crown to exercise authority (over its own subjects and, subsequently, other Tangata Tiriti - those whose right to be in Aotearoa rests on Te Tiriti). The principles created by ACT do not mention Māori. Whatever one thinks of the substance of those principles, they cannot derive from a treaty which is ONLY about rights granted by, or guaranteed to, Māori.

*16. Will these newly imagined principles be put to a referendum?*

The coalition agreement commits the Government parties to support the Treaty Principles Bill to the Select Committee stage. The National Party has indicated that it does not support the idea of putting this question to a referendum and has no commitment to support the Bill becoming law and a referendum taking place.

However, ACT Party leader, David Seymour has made it clear that he thinks he can persuade his coalition partners to support the Bill progressing through the final stages of the parliamentary process to become law. Given that the National Party has already agreed to support the first stages of this Bill, despite having voiced strong opposition to a referendum throughout the 2023 election campaign, it seems likely that the National Party will continue to support the Bill if it thinks that there will be some political advantage in doing so. In that case, a referendum would take place.

*17. But what is the harm of having a referendum anyway? Wouldn't it be good to have more public discussion about Te Tiriti?*

A good faith public discussion, grounded in good information would be helpful. This is not what is being proposed by the Treaty Principles Bill.

A referendum such as the one proposed is not an appropriate vehicle for such a discussion. It purports to reduce a range of complex legal, social, political, and constitutional issues to a yes or no proposition, likely to produce much more 'heat than light'. By fear-mongering over a range of issues relating to Māori participation and visibility in public life, the Government parties have created a hostile environment in which it is virtually impossible to have a good faith conversation about Te Tiriti. This is exacerbated by the misinformation that the ACT Party continues to spread. A referendum based on misinformation would not just be unhelpful, but divisive.

What is more, it is an act of extreme bad faith for one party to a treaty to try to change the terms of that treaty without seeking the agreement from the other parties. While the Treaty Principles Bill cannot change the words of Te Tiriti, redefining Treaty principles in the way proposed would fundamentally alter the recognition of Māori rights that are guaranteed in Te Tiriti. In fact, it would effectively remove those rights.

If the Government parties genuinely wanted a good faith public discussion of Te Tiriti and its application, the first step would have been to engage with Māori to develop an effective and constructive process for that conversation. Many Māori groups, and others, have been working to promote a better understanding of Te Tiriti and its constitutional role for many years and have plenty of ideas about how to support those discussions with good information and facilitate conversations that build strong relationships within and across our communities. The proposed referendum is already supporting the circulation of misinformation and damaging social relationships.