Submission on the Principles of the Treaty of Waitangi Bill

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Introduction

1. My name is Dr Paul Dalziel. I was Professor of Economics at Lincoln University for 23 years between 2002 and 2024. I am now Director of Wellbeing Economics (a private consultancy) and part-time Research Economist at the Wellbeing Economy Alliance Aotearoa. For the last two years, I have worked on a research project entitled *The Crown's Annual Budget Process and the Principles of te Tiriti o Waitangi*.

2. The project published an Issues Paper in April 2024 and is currently finalising a 110-page research paper entitled ***Principles of Te Tiriti o Waitangi: An economics perspective***. Funded by Partners for a New Economy, the work was supported by the Wellbeing Economy Alliance Aotearoa and by the Agribusiness and Economics Research Unit at Lincoln University. The Ngāi Tahu Research Centre hosted the project at the University of Canterbury.

3. In my research, I made a thorough study of Waitangi Tribunal reports, as well as relevant court decisions, public policy documents, and publications by other researchers who have examined treaty principles. As a result of this study, I have specialist expertise and knowledge concerning the Principles of the Treaty articulated by the Waitangi Tribunal under the Treaty of Waitangi Act 1975.

4. Drawing on that expertise and knowledge, I submit to the Justice Committee that the Principles of the Treaty of Waitangi Bill contains **fundamental errors and omissions** that mean it should not be proceed into law. In this submission, I emphasise that *the Bill excludes without any justification the fundamental treaty principle of exchange*.

Principles articulated by the Waitangi Tribunal

5. Section 5(2) of the Treaty of Waitangi Act 1975 gives the Waitangi Tribunal exclusive authority to determine the meaning and effect of the treaty. My research confirms the Tribunal has fulfilled this duty with **intelligence and integrity** to develop a cohesive set of treaty principles carefully founded on the Māori and English texts.

6. Further, because the Tribunal determines principles as part of its Inquiries, the process is **strong and transparent**. Hearings are public. The Crown and claimants have legal representation. Each Inquiry includes expert research that is fully recorded and available to the public. Tribunal reports provide detailed explanations of all their conclusions and recommendations, which anyone is free to read and critique.

7. In short, Parliament and all New Zealanders can have **complete confidence** in the work of the Tribunal, including the principles it has articulated over several decades. This is evidenced by the endorsements given by the Courts to relevant principles in important cases, as well as the successful application of the principles to help settle historical Treaty claims. I am pleased this last point is respected in section 8 of the Bill.

8. My study identified **16 principles** articulated by the Waitangi Tribunal, which I list here: *exchange*, *partnership*, *good faith*, *mutual benefit*, *kāwanatanga*, *reciprocity*, *redress*, *informed decisions*, *tino rangatiratanga*, *active protection*, *right to development*, *full participation*, *mana motuhake* (*autonomy*), *options*, *equal treatment* and *equity*.

9. I do not have space to expand on these principles, but my research confirms two features. First, each principle is carefully drawn from the two texts of the treaty. Second, none of the principles should cause any anxiety for New Zealanders. To the contrary, these principles reflect values and norms that are widely held.

10. Given the quality of the Waitangi Tribunal's exercise of its authority to determine the meaning and effect of the treaty, it is **arbitrary and wrong** for Parliament to propose that some of these principles "must not be used to interpret an enactment" without a detailed explanation of the objections held by the Crown to the excluded principles.

11. Further, as in any agreement founded on good faith and mutual benefit, a proposal for a change must involve meaningful discussions with other parties to the agreement.

Clause 7(2) of the Bill

12. Clause 7(2) of the Bill states: "**Principles of the Treaty of Waitangi other than those set out in section 6 must not be used to interpret an enactment**." I can give detailed advice on this clause, based on my expertise and knowledge of the treaty principles articulated by the Waitangi Tribunal.

13. Contrary to the first purpose of the Bill described in its explanatory note, Clause 7(2) creates **uncertainty and confusion** to the meaning of the principles in legislation. This is because it does not define, yet alone list, what qualifies as a principle of the Treaty that must not be used for interpreting enactments.

14. Alongside this absence of a general definition or list of excluded principles in the Bill, the explanatory note does not indicate how the three principles in section 6 were selected from the wider set of available principles. Consequently, this aspect of the Bill is **arbitrary**, which is a serious weakness in any proposed legislation.

15. To illustrate, in his Cabinet paper to obtain policy approvals for progressing a Treaty Principles Bill, the Associate Minister of Justice named three key principles as articulated by the Courts and the Tribunal (section 10): *partnership*, *active protection* and *redress*. Only a weak version of *active protection* appears in section 6 and there is no explanation of why *partnership* and *redress* were excluded. **This is arbitrary lawmaking.**

The principle of exchange

16. The principle of exchange is the first principle in paragraph 8 above. This is deliberate. In its Ngāi Tahu report in 1991, the Tribunal described exchange as "**fundamental** to the compact or accord embodied in the Treaty", which involved "the exchange of the right to govern for the right of Māori to retain their full tribal authority and control over their lands and all other valued possessions" (p. 236).

17. The principle of exchange appears repeatedly in Tribunal reports. In its report on this Bill, for example, the Waitangi Tribunal again gave **priority** to the principle of exchange, saying the principles it had used to consider the Bill "are relevant to the exchange of kāwanatanga for the guarantee of rangatiratanga" (p. 69).

18. The reason why the principle of exchange is fundamental to determining the meaning and effect of the treaty is clear: **Without the desire to make an exchange in 1840 there was no need for a treaty.** Te Tiriti was not a treaty made after a war, for example.

19. To the contrary, the British Crown recognised Māori sovereignty in He Whakaputanga in 1835 and there was no armed conflict between the British Crown and Māori iwi and hapū in 1840. Thus, Te Tiriti is **a peacetime treaty** in which both sides of the agreement, for their own reasons, agreed to make an exchange.

20. **The Bill's proposed exclusion of the principle of exchange from the interpretation of relevant enactments excludes the very reason for the treaty.**

21. The principle of exchange is **fundamental in economics** more generally. As Adam Smith famously expressed in *The Wealth of Nations* that launched the modern discipline in 1776, "the propensity to truck, barter and exchange one thing for another" is a unique characteristic of the human species "from which so many advantages are derived".

22. Thus, there is no reason I can think of to exclude the fundamental principle of exchange from interpretations of relevant enactments. Further, the omission of the principle of exchange has led the text of the Bill to make **two serious errors**.

23. The first error is in its definition of Principle 1, which says the Executive Government of New Zealand has full power to govern, and the Parliament of New Zealand has full power to make laws. The power to govern and the power to make laws derived from te Tiriti are not *full*; these powers are *constrained* by the promise made by the Crown to protect tino rangatiratanga in exchange for its authority to govern.

24. The second error is in the definition of Principle 2, which says the Crown's protection of the rights of hapū and iwi Māori does not apply if those rights differ from the rights of everyone. There is no hint of any such restriction in the exchange agreed in 1840. To the contrary, Her Majesty the Queen of England in Article 2 of the English text confirmed *without any qualification* the rights held by Māori. By definition, Māori held property rights of first possession that were unavailable to British settlers.

The problem of time inconsistency

25. After any agreement for an exchange, one of the parties may face future incentives not to keep its side of the bargain. Economists call this the problem of time inconsistency. Throughout New Zealand's colonial history, the Crown used Parliamentary sovereignty to pass laws that attacked the exercise of tino rangatiratanga by Māori. This led to some of the most shameful violence in our country's history.

26. The decision by Parliament to establish the Waitangi Tribunal as a standing commission of inquiry was an important step to mitigate the problem of time inconsistency and to honour the exchange made in 1840. An essential element in that step was giving the Waitangi Tribunal *exclusive authority* to determine the meaning and effect of the treaty. This was a deliberate **strength**, not a weakness, of the Treaty of Waitangi Act 1975.

27. The Principles of the Treaty of Waitangi Bill attacks the Tribunal's exclusive authority by seeking to impose an interpretation that is of the Crown's own making. Further, this interpretation has been introduced without any prior and meaningful discussion with the Crown's Tiriti partners. **This diminishes the honour of the Crown**.

28. Indeed, it is a return to the pre-1975 pattern of the Crown using the powers of Parliamentary sovereignty to advance its own self-interest by ignoring the exchanged promises and guarantees it had offered in the treaty. The exclusion of the principle of redress is a shameful illustration of this self-serving behaviour by the Crown.

Recommendations

29. I recommend that the Select Committee report back to Parliament that this Bill should not proceed.

30. I recommend that Parliament create a series of events in 2025 around the country to honour the 50th anniversary of the Treaty of Waitangi Act 1975, including celebrations of the principles of te Tiriti produced by the Waitangi Tribunal under that Act.

31. I recommend that Parliament continue to reflect on the principle of exchange, including the responsibilities that principle imposes on the Crown to honour the promises made on its side of the exchange recorded in te Tiriti o Waitangi.

Conclusion

32. I thank the Justice Committee for the opportunity to submit on this Bill and advise that I wish to be heard in support of my submission.

Dr Paul Dalziel
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