Treaty of Waitangi Principles Bill
Submission by Hon Ruth Richardson
December 2024

This is a Bill of consequence.

I regard it as in the same league as the Reserve Bank Act 1989 and the Fiscal Responsibility Act 1994 which together established the macro-economic architecture that has served NZ so well since.

The Treaty of Waitangi Principles Bill seeks to establish a constitutional architecture derived from our founding document.

The Fiscal Responsibility Act and this Bill share the same lineage in the sense that they both articulate a set of principles that will guide the conduct of policy and practice.

I want to break my submission down into five succinct parts:

The status of the Treaty of Waitangi

The Treaty in practice

The evolution and ultimate arbiter of the principles of the Treaty

The counterfactual

Governing by consent

1.The Status of the Treaty then and now:
The signing of the Treaty of Waitangi was not and never intended to be tantamount to the creation of a written constitution.

The Treaty was more a pact between the Crown and the Māori signatories.

The three articles were something of a tripod anchoring the broad tent of NZ and constituted the basis on which modern NZ was founded.

My working understanding of the essence of the articles is as follows:

Article 1 ceded sovereignty to the Crown

Article 2 secured property rights for Māori

Article 3 conferred citizenship on all.

There have been many what I see as ‘codicils to the will’ since the signing of the Treaty.

*The courts have introduced the notion of the Treaty as a partnership (the word is nowhere to be found in the Treaty) and more recently introduced the concept of tikanga as an integral part of our jurisprudence in addition to statute law and common law.

*The Waitangi Tribunal has advanced many variations on that theme and taken more latterly to pronouncing on matters well beyond its brief.

*There are numerous statutes that in a generic way stipulate that regard must be had to the Treaty.

Absent has been legislation that stipulates what those principles are, hence, the genesis of this Bill.

It is axiomatic in our constitutional arrangements that Parliament is the sovereign body to set the law of the land hence the invitation with the introduction of this Bill to commence this process.

Parliament and Parliamentarians have routinely shouldered the responsibility to legislate on matters both complex and straightforward. I fundamentally disagree those who say Parliament is not up to this task and that the Treaty jurisprudence should be left to evolve in what supposedly is a 'superior' forum like the Courts.

The Select Committee process is the perfect platform for both debate and distillation of submissions that will advance opinions sincerely held, while very different, in the advocacy of what should transpire.

It is the job of the Select Committee to deliberate and recommend in what form the Bill should proceed. Irrespective of the fate of this Bill once it is reported back to the House, there will be accountability for the decision to advance or not and in what form.

2. The practice:
In practice the Treaty has played out in a fashion best characterized as the good, the bad and the ugly.

The good: a Government for all of NZ was instituted which set about discharging the responsibilities that sovereign governance involves.

There was no parallel system of government nor was that the intent.

Absent was a USA style approach of creating reservations where the indigenous population had self-governing rights on all matters other than those that would be regarded as federal responsibilities; eg Defence and Foreign Affairs.

The bad: there were systematic and egregious breaches of Treaty and contractual undertakings for which compensation was belatedly paid by way of Treaty Settlements over a century later.

The ugly: land wars, slaughter and what we now call the cancel culture.

The debate about what the Treaty means in modern times some 184 years after the event is long overdue.

The historic record will show that there have been multiple ways in which NZ and its institutions have sought to honour the Treaty over those 184 years, with heightened awareness and action particularly over the last generation.

The Treaty Settlement process has been arduous but undertaken in good faith, compensating in some part for past breaches.

There has been a revival of Te Reo - my children and grandchildren are much more at home in the language than I am. The establishment of Kura Kuapapa Māori immersion schools is now yielding a generation of Rangitahi who are assertive and increasingly influential.

There is no more emblematic acknowledgment of the cultural shift than the singing of the National Anthem in Te Reo at All Black Tests, a practice unheard of and probably frowned on a generation ago.

The Māori economy has been boosted by Treaty Settlements and now blooms. Most significant businesses and banks have imbedded Māori voices and expertise.

In short, much of the Treaty shame has been transformed into Treaty success.

This pleasing progress in no way sugar coats a more ugly reality. It is a stain on NZ that we have disparate education, health and economic outcomes as between Māori and non-Māori. The scars of crime disproportionately feature Māori with horrendous domestic violence and murder of women and defenceless children so often fueled by addiction and gangs.

We all acknowledge there is much to do to overcome these dreadful statistics and this calls for action on a much broader front than just the passage of this Bill, important as it is.

3. The evolution of the principles - by accident or by design?

The concept of 'the principles of the treaty' first saw light with the establishment of the Waitangi Tribunal in 1975 under a legislative framework that governed the work of the Tribunal.

The legislation was explicit that the Tribunal did not have power to make binding decisions. That power was properly reserved to Parliament as the ultimate sovereign authority.

Subsequent decades have seen a plethora of dictums and interpretations of what those principles might be, or mean, initially starting with declarations by the Tribunal.

The Judiciary too has had a field day with fresh bouts of judicial activism rendering still more versions of 'the principles' ranging from introducing the concept of partnership to the weaving of tikanga into our jurisprudence.

Judicial activism has known no bounds when it comes to the Treaty with the overt and implicit assumption that the judges are the repository of all treaty wisdom and better placed to be the arbiter of what the treaty must mean in a modern context.

This strikes me as the arrogance of unaccountable elites who have "no mandate to become agents of societal change" as Jack Hodder KC charged in his seminal paper marking the 20th anniversary of the founding of the Supreme Court.

The judicial overreach has even extended to ignoring the explicit language of Parliament with the current example being to effectively sanction the universal exercise by Māori of customary marine title in the face of specific legislation to the contrary. The Government has been forced to introduce corrective legislation to override the errant court and wind back this interpretation to its original and much narrower scope.

Since I began the drafting of this submission the Supreme Court with unprecedented speed has overturned aspects of the Court of Appeal decision. It's a case of too little, too late!

Parliament too has been culpable by enacting in a piecemeal fashion legislation with all manner of renditions of ‘the principles’ without defining precisely what those principles are or mean.

Not to be left out, officialdom has weighed in with multiple edicts as to how the treaty principles must play out in the correct conduct of business or the correct use of language and names.

The bottom line is that scope and meaning of ‘the principles of the treaty’ have evolved by accident rather than by design.

I will point the finger and say that it is Parliament that has abrogated its responsibility to legislate for the meaning of the principles and no wonder that all manner of interpretations from all quarters have filled the void.

Cometh the hour, cometh the Bill.

The Bill is introduced in the context of what most regard as two immutable elements:

*the Treaty remains untouched in word

*there is an imperative to honour the Treaty in spirit.

While there is no quarrel with the adoption of these Treaty ‘missions’, there is much more contest and contention about the methods chosen to advance these imperatives.

I reject the notion that we should continue with the organic evolution of the Principles of the Treaty which in essence will see them defined by ‘accident’.

In my submission the correct method is to have the sovereign authority legislate for what those principles mean by ‘design’ rather than abrogate that responsibility to unaccountable institutions like the Courts, the Waitangi Tribunal or officialdom.

The current government already has a commitment (which I support) to identify and address the many and varied statutory references to the principles of the treaty.

In my view that is necessary but not sufficient.

Rather than a case by case approach the proper way is to legislate for a universal definition of those principles and the Parliament is the proper place for this to happen.

As to the precise formulation of those principles that is now a matter for this Select Committee (a process I applaud), the House, and in my submission given the constitutional significance of the measure, ultimately a referendum.

If we can put the design of our flag to a referendum then it follows that a matter of much greater import, treaty principles, should likewise be submitted to the people.

4. The Counterfactual

He Puapua asserted, as some do, that sovereignty was never ceded to the Crown under Article 1, the logical consequence being that a separate or parallel governance regime should exist.

Presumably such a regime would develop and apply policies and practices for just one segment of the population defined by ancestry.

Quite how that regime might be funded is another matter, but then I would pose that inconvenient question.

There are precedents for such an approach and I want to reference four:
*Apartheid in South Africa
*Bumiputra preference in Malaysia
*It doesn't pay to be a Chechen in Russia
* Neither does it pay to be a Uyghur in China.

Not only are these approaches morally wrong and abhorrent affronts to human rights, but they are bound to end in tears.

The proponents of a 'no sovereignty was ceded under the Treaty of Waitangi' must answer these three fundamental questions:

1.Why in practice was a Māori Parliament or separate governance regime not constituted in the wake of the signing of the Treaty?

2.How would such a separatist regime be funded and what would be the scope of its jurisdiction?

3.Would a separate judicial regime be established to interpret and enforce Māori custom and law in the face of disputes, and would ancestry determine the scope of its jurisdiction?

There has been latter day advocacy of separatism with the cry of Mana Motuhake; 'self determination, independence, sovereignty, authority' to give the four common translations of that term.

I have no truck with that position; rather I adopt the settled and serious view that sovereignty was ceded under Article I.

5.Governing by consent

My long held view has been that irrespective of a particular electoral outcome at the time, ultimately there must be government by consent. This concept has come to be known as the social licence to operate.

Accordingly I want to finish by looking beyond the emphasis I have placed in this submission on constitutional issues and the imperative to assert and affirm the supremacy of Parliament.

The dynamic or vibe (to use a more contemporary term) of NZ society matters to us all.

We all aspire to social harmony and unity, but the routes we might individually (Hon David Seymour) or collectively (hikoi marchers) choose to achieve such noble outcomes are many and varied.

That's actually the point. Diversity in the NZ population abounds.

Dame Kiri Te Kanawa is Māori by birth and a world class opera singer.
Dame Fran Wilde is a Pakeha by birth and a homosexual law reform pioneer.
Portia Woodman is a Māori by birth, gay and a world class rugby player.
Mai Chen is Taiwanese by birth and a leading public law practitioner.
David Seymour like many of our current Parliamentarians has Māori ancestry and is NZ's leading reformer.

Each of these individuals is bound to have a different view on the merits of many policies including this Bill.

NZ celebrates Matariki, Diwali, the Chinese New Year and Christmas.

I think of this as a rich social tapestry.

Those motivated to march recently made their way to Parliament through settlements and suburbs full of other folk who have equal and opposite views about the significance of the Treaty and how it should feature in our lives and our laws.

NZ is a proud and distinctive country with citizens who have ties old and new to our nation.

The NZ ideal for me is achieved by weaving together the many strands of our people into one rope.

I support this Bill and irrespective of whether its passage is ensured beyond this Select Committee phase, it has served to properly put matters of constitutional and societal significance on the political map.

During the last 184 years New Zealanders have evolved our thinking and more recently made proper acknowledgements and investments in the cause of honouring the Treaty
.
Expectations of future progress have been elevated as they should.

This bill has four declared objectives, the last of which is to foster consensus about the Treaty and promote social cohesion.

The idea of dividing us up as people of the treaty and people not of the treaty is not just at odds with fundamental human rights but is a flawed formula on which to advance our future as a nation.

My basic premise is that we are a one, not a two tier society.

He iwi Kotahi tatou

I would like to speak to this submission but know that the decision of who to hear in person must lie in the hands of the Select Committee.

Ruth Richardson 17 December 2024