

**Submission to**

**Parliament's Justice Committee**

**on the**

**Principles of the Treaty of Waitangi Bill**

**by**

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## Statement of position

I support the Bill.

My prime concern is that the current drive to divide the country into two races, Māori and non-Māori, in order to put the former into a superior position, is a recipe for creating a less civil and more racially divided community.

I fear increased racial violence in New Zealand unless the egalitarian principle that all citizens have the same rights is embraced.

I support the Bill because it has become obvious that dominant forces are succeeding in denying the general public the right to have a say about New Zealand's constitutional basis. The fiction of Treaty principles of a constitutional nature is being used to reinterpret the Treaty in maverick ways that have no credible historical basis and are potentially a disaster for any hopes of a peaceful and civil society looking forward.

The Bill provides a practicable way for the public to have a say in the revolution to New Zealand's constitution that is underway.

This submission does not reject what was agreed in 1840. Governments need to be doing a better job of allowing greater scope for local leadership for Māori and non-Māori alike. The Treaty is explicit about local autonomy for Māori, but that does not negate the like need for non-Māori regardless of their race, gender, religion or any other leadership purpose.

The author supports the call for central government to allow much greater autonomy for local decision-making in general. Those in local communities, Māori and non-Māori alike, could do a much better job of tailoring health, education and charitable welfare services to local needs and preferences; that is if central government was much less intrusive and prescriptive. Government could also help local decision-making by doing a much better job in better-defining and enforcing property rights and protecting the individuals in local communities from crime and coercion.<sup>1</sup> People cannot do much with their property if any busybody can tie them up in red tape and thereby thwart their land use decisions. Greater devolution of central government powers and accountability to competent local governments would also help.

But all this could and should be done in the absence of any invented Treaty principles. Just comply with what was signed and deal as best one can with past wrongs. I see the Bill as a response to the dire need to allow the public to have a say about the current

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<sup>1</sup> New Zealand's housing shortage is a symptom of poorly allocated property rights. Housing New Zealand's reluctance to evict tenants who are a menace to their neighbours undermines the personal autonomy of those neighbours.

largely unwitting drive to divide New Zealanders on racial lines and wreck New Zealand's democracy and egalitarian ethos. The stakes are now that high.

### **Acknowledgement of the hopes of those who oppose the Bill**

I appreciate that many well-meaning people think or hope that affirmative action is necessary and desirable because on average Māori fare poorly on most socio-economic indicators compared to the average non-Māori.

But this view commonly assumes what needs to be proven: 1) that affirmative action will usefully close the gaps and 2) fairer and more efficient ways of helping people overcome their problems do not exist.

My concern in respect of 1) is that the empirical basis for hoping for this outcome is weak. The current 'gaps' are unlikely to be closed by affirmative action policies. But considerable harm could result from the effort.

There is a real worry that affirmative action will help those at the top of the heap, for example, those that have achieved or could achieve a university education regardless, but not those whose prospects are well below average. Differences in IQ are material handicaps for all but a few. But home environment and attitudes to education, self-improvement and the work ethic matter too.

Many kids are seriously behind the average for communicating even before they reach kindergarten age. Nor are those so handicapped necessarily of one race or another. The government should be colour blind in its interventionist efforts to be the surrogate parent for such children. And while it continues with a centralised directive funding, it should be using the social investment approach rigorously to assess the effectiveness of its support programmes.

For those interested, Appendix 1 below provides a short bibliography of articles illustrating the problematic nature of race- or gender-based affirmative action policies. It is plausible that the quality of those policies matters, but the articles offer few insights as to which policies work and which do not work.

Wishful thinking and self-interested advocacy do not cut it. The following extract from one of those pieces illustrates why those who care deeply about those with the least prospects need to take the question of effectiveness very seriously

“The implicit assumption, tenaciously held, is that great statistical disparities in demographic “representation” could not occur without discrimination. This key assumption is seldom tested against data on group disparities in qualifications. For example, as of the year 2001, there were more than 16,000 Asian American students who scored above 700 on the mathematics SAT, while fewer than 700

black students scored that high—even though blacks outnumbered Asian Americans several times over.

Data such as these are simply passed over in utter silence—or are drowned out by strident assertions of “covert” discrimination as explanations of a dearth of blacks in institutions and occupations requiring a strong background in mathematics”. Thomas Sowell, Hoover Digest, 2004.

## **Other important reasons for supporting the Bill**

Related concerns that induce me to support the bill are democratic and constitutional.

### *The democratic case*

In a democracy, citizens are entitled to be heard on serious constitutional issues.

The main aim of the recent Hikoi appeared to be to stop the Crown and Parliament from being informed about the views of New Zealanders overall on what principles are important for civil society and the prosperity of New Zealanders looking forward.

The notion that the Crown should not inform itself by referendum about the views of non-Māori begs the question of whom the Crown represents.

The Crown, governing through a loyal Parliament, must govern on behalf of all New Zealanders. That means the Crown must ensure it is informed by the views of New Zealanders regardless of their mix of ethnicity, gender, age or religion etc.

The referendum mechanism in the Bill provides any New Zealander who wishes to express a formal view on the matter the opportunity to do so. This is consistent with democratic governance.

The fear that non-Māori will out-vote Māori does not do much credit to either side. I see no reason to doubt that non-Māori would prefer to see Māori on average less dependent on welfare, less populated in the prisons, better educated and more engaged in the work force. Nor have I seen any evidence that Māori overall want to be seen as needing preferential treatment over Asians or indeed every other ethnicity in New Zealand. New Zealanders are rather egalitarian. They likely resent privilege and claims of superiority.

I suspect that a substantial majority would prefer to see New Zealand taking a ‘fair go’ egalitarian approach that treats every citizen as having equal rights, regardless of ancestry, *along with* much better progress in improving health, education, and welfare outcomes for all New Zealanders who are most at risk of ending up at the bottom of the heap in those respects.

In this latter respect, I support the successful implementation of the government’s Social Investment Approach. New Zealand governments have been spending billions of

dollars to try to help those doing badly but failing to take evaluation of effectiveness seriously. This lets everyone down.

*The polarising issue of determining who is Māori – at the margin*

To decide who is not a Māori is obviously offensive at the margin in a country when healthy inter-marriage has long been the norm. Suppose a father has 1/32<sup>nd</sup> Māori blood and the mother none. Suppose also all the children are brought up as the mother was brought up, and indeed as is a typical New Zealand family. How can it be fair let alone moral to treat those children as having superior rights to their mother and to everyone else with respect to health care, education and much else? Why should their cousins be expected to pay if their cousins lack enough Māori blood to qualify as Māori? Such a discriminatory system must breed resentment.

*The Constitutional case*

Parliament is the right body to decide intensely political issues. The Courts bring themselves into disrepute when judges act as politicians. They are not competent to make political decisions, and any such decisions lack democratic legitimacy.

The Courts exist to apply the law, they are not competent to determine what it should be. They will bring themselves into disrepute if they use their interpretative function to reject the clear intent of statute law. Admittedly, Parliament is the culprit to some degree. It obliged the Courts to invent Treaty principles, having failed to identify them for itself.

The invention of a partnership<sup>2</sup> is now spiralling into the view that there was no agreement, one side was unequivocal that the Crown was to be sovereign, the radicals are now denying that sovereignty was conceded. What was not conceded is not now to be shared.

In short, the rapidly evolving “principles” of the Treaty are a modern-day political fiction. They appear to have no authentic historical or constitutional basis. I am not aware of any recorded statement in 1840 or 1841 of agreed Treaty principles. How many signatories were given a statement of such principles and how many signed that statement?

Nor is there any reason to think that there would be general agreement about any such principles at the time the treaty was signed. The signatories’ immediate pragmatic goals may have been to provide for law and order and a system of justice while retaining the mutual benefits of trade.

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<sup>2</sup> There is an informative and even-handed discussion of the partnership concept in relation to the Treaty in the Treasury’s “Government Management: Brief to the Incoming Government in 1987, Volume II, 1987, pp 323-326. Ewen McQueen’s distinctions between difference concepts of partnership is useful too. (See Appendix 2).

Nor does a treaty, contract or agreement create a partnership in itself. The notion of a partnership between the Crown and Māori is absurd on the face of it. Māori did not enter a partnership with Queen Victoria. KC Gary Judd's submission<sup>3</sup> has pointed out the contradiction between a treaty that made Māori her subjects conferring on them the rights and privileges of British citizens on the one hand and on the other hand interpreting it as giving the chiefs an equal footing in exercising her sovereign powers.

The lack of reasoned objective public debate on these issues is lamentable. It appears that the mainstream media will not permit this to occur. What is happening instead is that historians and others who provide critiques of the current orthodoxy in blogs and articles that the media will not publish are not being responded to in a similar academic or judicial manner. Appendix 2 provides a list of such articles. I have not seen reputable responses by opponents to these articles.

The important question looking forward is what principles offer New Zealanders overall, the best hope of a more civil and prosperous society. On this question I defer to Gary Judd's submission. Principles 1 and 2 in the Bill look essential if New Zealand is to have an egalitarian future. He suggests a rewording of principle 1 for greater clarity.

Nevertheless, The Bill's current principle 2 currently looks like a compromise between contending considerations. It looks to me like it would be worthy of greater public debate and scrutiny than Parliament has allowed time for.

### **Concluding comment**

The short time allowed for public submissions on this important matter does not inspire confidence in New Zealand's future stability and prosperity. People's views do matter, like them or not. Public debate is something that should be welcomed, not curtailed. A referendum gives time for public debate to occur. Since it is not going to proceed according to current party-political intentions, the remaining option was to provide the intended six months for public submissions. The late refusal to provide a meaningful amount of time to make submissions and learn from early submissions shows the strength of the resistance to allowing the public to have a say.

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<sup>3</sup> Gary Judd KC, Submission on the Treaty Principles Bill, 18 December 2024.  
<https://www.bassettbrashandhide.com/post/gary-judd-kc-submission-on-treaty-principles-bill>

## **Appendix 1: Some articles illustrating the international evidence and debate over the efficacy of affirmative action policies**

Anonymous Author, “Matters of Mismatch: The Debate Over Affirmative Action's Effectiveness”, Harvard Political Review May 29, 2015.

<https://harvardpolitics.com/matters-mismatch-debate-affirmative-actions-effectiveness/>

Harry Holzer David Neumark, “Assessing Affirmative Action”, Working Paper 7323, National Bureau of Economic Research, August 1999.

[https://www.nber.org/system/files/working\\_papers/w7323/w7323.pdf](https://www.nber.org/system/files/working_papers/w7323/w7323.pdf)

Harry J. Holzer, Georgetown Public Policy Institute Urban Institute, David Neumark, Public Policy Institute of California University of California at Irvine, “Affirmative Action: What Do We Know?” National Bureau of Economic Research, November 2005.

<https://www.urban.org/sites/default/files/publication/50186/1000862-Affirmative-Action.PDF>

Rachel M. Gisselquist, Simone Schotte and Min J. Kim, “Affirmative action around the world: insights from a new dataset”, WIDER Working Paper 2023/59, United Nations University, April 2023.

<https://www.wider.unu.edu/sites/default/files/Publications/Working-paper/PDF/wp2023-59-affirmative-action-around-world-new-dataset.pdf>

Richard Sander and Stuart Taylor, “Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It”, 2012. [Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It - Stuart Taylor, Jr.](#)

Thomas Sowell, “Affirmative Action around the World”, Hoover Digest, October 30, 2004. <https://www.hoover.org/research/affirmative-action-around-world>

Thomas Sowell, *Affirmative Action Around the World. An Empirical Study*, Yale University Press, 2004 (239 pages). [https://archive.org/details/affirmativeactio00sowe\\_y](https://archive.org/details/affirmativeactio00sowe_y)

## Appendix 2: Some reading material for those who only know the opposing side of the debate over the Treaty Principles Bill

First, John Stuart Mill on why we all need to do justice to opposing arguments:

*He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.*

Anthony Willy, “Dismantling the Constitution”, 16 July 2024.

<https://www.nzcpr.com/dismantling-the-constitution/#more-39656>

Anthony Willy, “Fairy Tales for the Gullible”, 1 June 2022. <https://www.nzcpr.com/fairy-tales-for-the-gullible/>

Anthony Willy, “Sovereignty and the Treaty of Waitangi”, August 2013.

<https://www.nzcpr.com/wp-content/uploads/2013/09/SovereigntyAndTheTreatyOfWaitangiByJudgeAnthonyWilly.pdf>

Anthony Willy, “Sovereignty in New Zealand”, 30 November 2024.

<https://www.nzcpr.com/sovereignty-in-new-zealand-2/>

Anthony Willy, “The State-Owned Enterprise Act and the Partnership Fiction”, 6 March 2024. <https://www.nzcpr.com/the-state-owned-enterprises-case-and-the-partnership-fiction/>

David Witherow, “Treaty Weather”, 25 November 2024. [Breaking Views: Dave Witherow: Treaty weather](#)

David Baragwanath, “The Treaty and essential fresh water: Part One”, *New Zealand Law Journal*, February 2024, pp 7-11.

David Baragwanath, “The Treaty and essential fresh water: Part Two”, *New Zealand Law Journal*, March 2024, pp 41-46 and 72.

David Round (chair of an Independent Constitutional Review Panel), “A House Divided”, 10 December 2013. [A House Divided | NZCPR Site](#)

David Round, A Treaty of Waitangi Constitution, 23 December 2024. [A Treaty of Waitangi Constitution | NZCPR Site](#)

Don Brash, “The Surrender is almost complete”, 29 November 2015.

<https://www.nzcpr.com/the-surrender-is-almost-complete/>

Don Brash, “Time to submit on the Treaty Principles Bill Fast Running Out”, 2 January 2025. <https://www.bassettbrashandhide.com/post/don-brash-1>

Ewen McQueen, *One Sun in the Sky*<sup>7</sup>: *The untold story of sovereignty and the Treaty of Waitangi*, 2020. <https://www.onesuninthesky.com/>

Gary Judd, “Ruling Out Race-Based Social Revolution”, 11 August 2022. [Ruling Out Race-based Social Revolution | NZCPR Site](#)

Gary Judd, “Tikanga is a collection of beliefs: it is not ‘law’”, 5 August 2023”. [Tikanga is not law | NZCPR Site](#)

Graham Adams, “Coastal court action flies under the radar Most of NZ’s coastline may end up under iwi control”, 5 April 2024. [Coastal court action flies under the radar | The Platform](#)

Hilary Calvert, “Battle over Tikanga is looming”, Otago Daily Times, 6 June 2024. [Battle over place of tikanga is looming | Otago Daily Times Online News](#)

Michael Bassett, “The Waitangi Industry”, 19 April 2008. <https://www.nzcpr.com/the-waitangi-industry/>

Muriel Newman, “ACT’s Principles Debate”, 23 November 2024. <https://www.nzcpr.com/treaty-principles-debate/>

Muriel Newman, “False Narratives”, 9 March 2023. <https://www.nzcpr.com/false-narratives/>

Sir Apirana Ngata, “The Treaty of Waitangi: An Explanation”, 1922. <https://www.nzcpr.com/treaty-of-waitangi/>

The Treasury, *Government Management: Brief to the Incoming Government in 1987*, Volume II, 1987, chapter 5: “implications of the Treaty of Waitangi”, pp 319-356.