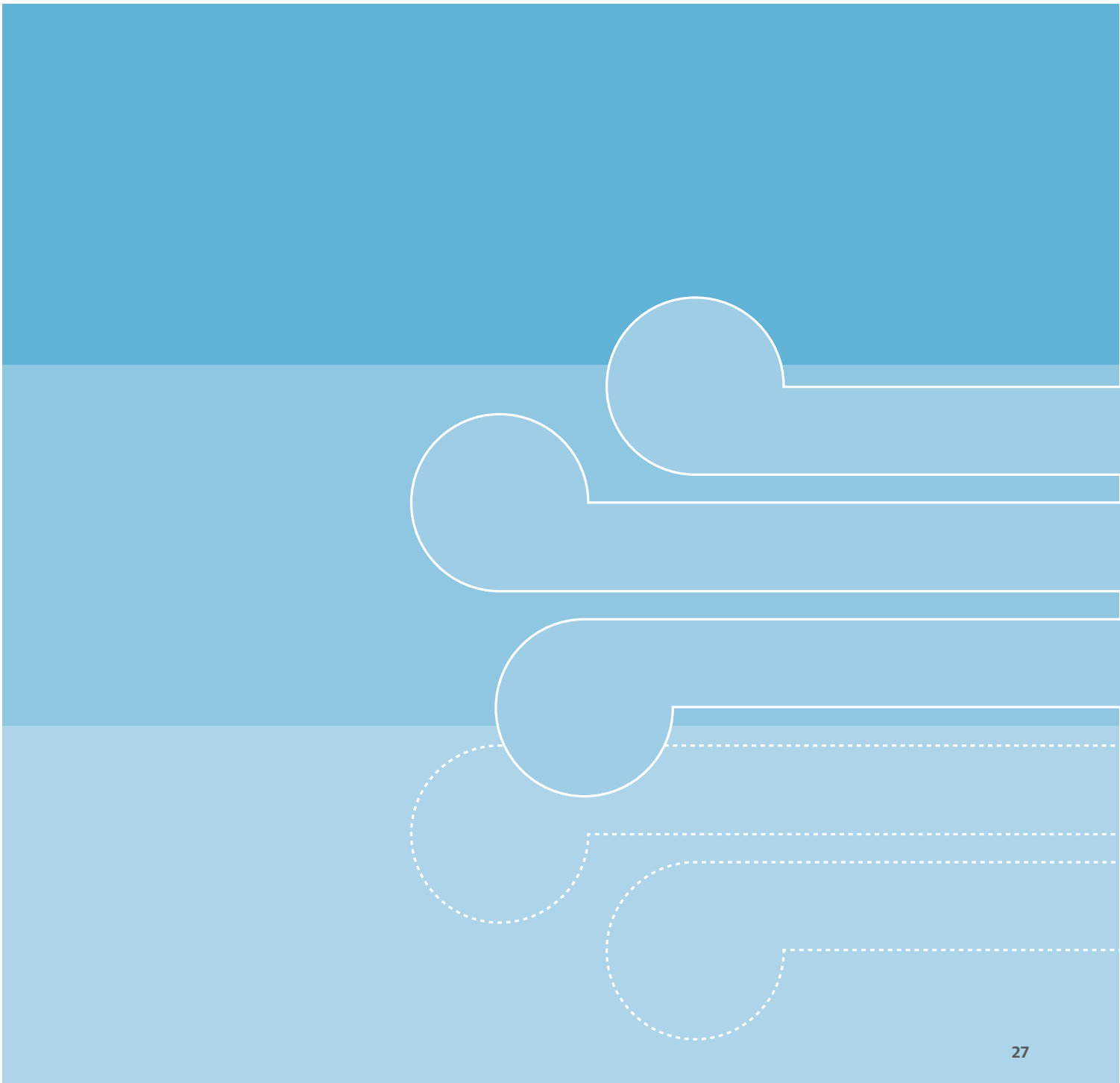


Te Tiriti o Waitangi, The Treaty of Waitangi



Recommendations

The Panel recommends the Government:

- continues to affirm the importance of the Treaty as a foundational document
- ensures a Treaty education strategy is developed that includes the current role and status of the Treaty and the Treaty settlement process so people can inform themselves about the rights and obligations under the Treaty
- supports the continued development of the role and status of the Treaty under the current arrangements as has occurred over the past decades
- sets up a process to develop a range of options for the future role of Treaty, including options within existing constitutional arrangements and arrangements in which the Treaty is the foundation
- invites and supports the people of Aotearoa New Zealand to continue the conversation about the place of the Treaty in our constitution



Māori-Crown relationships

The history of Māori-Crown relationships is an important context for any future conversations about how this country is governed. In relation to Māori parliamentary representation the Royal Commission on the Electoral System¹⁷ noted it is:

...essential to have a full understanding of the history of Māori representation. [...] Unless decisions concerning Māori representation are made in the context of our history, and with the knowledge of the aspirations of Māori people, past misunderstandings are likely to continue.

The Treaty of Waitangi is the foundation of this Māori-Crown partnership.¹⁸ The text reflects an understanding of the fundamental elements of the relationship and about how iwi and hapū would work with the Crown in developing the country's future.

As the Treaty was prepared in both English and in te reo Māori the wording of the two texts differs in places.¹⁹ About 40 chiefs signed the Treaty of Waitangi on 6 February 1840. By the end of the year about 500 other Māori, including 13 women, had put their names or moko to the document. All but 39 signed the Māori text.²⁰

The Māori text of the Treaty, while giving kawanatanga (governance) to the Queen of England, also protected Māori rangatiratanga. Te Tiriti guaranteed Māori 'tino rangatiratanga o o ratou wenua o ratou kainga me o o ratou taonga katoa' or 'absolute authority for chiefs (rangatira) to be chiefs and hold sway in their territories.'²¹ The English text is not an exact translation of the Māori text.

Despite the differences between the two texts 'both represent an agreement in which Māori gave the Crown rights to govern and to develop British settlement, while the Crown guaranteed Māori full protection of their interests and status, and full citizenship rights.'²²

Prior to the signing of the Treaty of Waitangi, Māori were asserting their rangatiratanga with the Crown and organising their own political systems. In 1835, the Northern chiefs as the 'United Tribes' signed the Declaration of Independence.²³

Māori have advocated for an established political voice in decision-making processes through the development of their own politically autonomous structures and through general institutions. The authority of such structures developed from within a Māori context, for example the Kīngitanga movement²⁴ and Te Kotahitanga (Māori Parliament)²⁵, was not recognised by the Crown. Instead, the Crown recognised only the authority of the structures established within the existing arrangements, for example the Māori seats in Parliament and the Māori Council. Many Māori do not see these structures as fulfilling the Treaty's commitments.

¹⁷ Royal Commission on the Electoral System, 'The Report of the Royal Commission on the Electoral System: Towards a Better Democracy' (1986), AJHR H.3, p. 4 (available from www.elections.org.nz)

¹⁸ See Appendix E, Treaty of Waitangi.

¹⁹ Both texts have been recognised by the New Zealand Parliament by appending them in a schedule to the Treaty of Waitangi Act 1975.

²⁰ Ministry of Culture & Heritage, 'Signing the Treaty', New Zealand History Online (www.nzhistory.net.nz)

²¹ The Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wellington, New Zealand: Legislation Direct, 2007), p. 6.

²² The Waitangi Tribunal, 'The Meaning of the Treaty' (www.waitangi-tribunal.govt.nz)

²³ See Appendix E, Declaration of Independence (1835).

²⁴ See Appendix E, Kingitanga and the first Māori King (1858).

²⁵ See Appendix E, Opening of the Kotahitanga Parliament (1892)

Successive governments have now acknowledged Crown breaches of the Treaty caused Māori to suffer social, cultural and economic losses. In particular, the alienation and confiscation of large areas of land hampered Māori economic development and fractured social and cultural structures.

These losses are being addressed through the Waitangi Tribunal's jurisdiction to recommend remedies for breaches of the Treaty and the Treaty settlements process. Treaty settlement legislation affirms relationships between iwi and the Crown.

In recent decades the Treaty has had a significant and increasing influence on New Zealand law. The Treaty may be taken into account in public decision-making, but is only required to be taken into account if referred to in legislation. The Treaty's legal enforceability therefore relies on Parliament, in which Māori are a minority, referring to the Treaty or the Treaty principles in legislation.

Partly because of the differences between the texts, and also because of the need to apply the text to modern circumstances, reference is often made to the 'principles' of the Treaty. The President of the Court of Appeal observed in a unanimous decision that the Treaty signified a 'relationship akin to partnership between the Crown and Māori people, and of its obligation on each side to act in good faith.'²⁶

About 30 Acts of Parliament require decision-makers to have regard to, or take account of, the Treaty or its principles when exercising powers under the Act. Other legislation recognises the rights of Māori in matters such as education, broadcasting and language, and also recognises rights to be consulted or to participate through advisory boards. Cabinet guidelines for many years have required that Treaty implications be considered when preparing legislation. Since July 2013 proposed legislation is accompanied by a disclosure statement which sets out, amongst other matters, the steps that have been taken to determine whether the policy to be given effect is consistent with the principles of the Treaty.²⁷

The Waitangi Tribunal, established in 1975, has played a key role in developing the understanding of the Treaty and its principles in the contemporary context.²⁸ It can determine the practical application of the principles of the Treaty and whether Crown actions or omissions are inconsistent with those principles. The Tribunal can examine historic and contemporary legislation and government policies and practices for consistency with the Treaty and its principles, and reports its findings and any recommendations to the Crown.

²⁶ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 p 705, See Appendix E

²⁷ 'Disclosure Statements for Government Legislation: Technical Guide for Departments' (www.treasury.govt.nz)

²⁸ See Appendix E, Treaty of Waitangi Act 1975, and Treaty of Waitangi Amendment Act 1985

All Treaty settlements are implemented through legislation and therefore many Acts of Parliament now give effect to Treaty settlements. They contain the Crown's acknowledgements of, and apology for, breaching the Treaty of Waitangi. The form of the wording differs from settlement to settlement, though most also contain commitments to work with iwi to build a relationship of mutual trust and co-operation. More recent settlements also expressly state that this relationship will be based on the Treaty of Waitangi and its principles.

Successive governments have also made statements in international forums about the status of the Treaty and indigenous rights. For example, in 2010 the New Zealand Government made a Statement of Support for the United Nations Declaration on the Rights of Indigenous Peoples:²⁹

- acknowledging that Māori hold a distinct and special status as the indigenous people of New Zealand, reaffirming the importance of the Treaty of Waitangi as a unique feature of indigenous rights in New Zealand
- affirming New Zealand's commitment to the common objectives of the Declaration and the Treaty of Waitangi, including operating in the spirit of partnership and mutual respect.

The role of te Tiriti o Waitangi, the Treaty of Waitangi

For many people the Treaty was the focus of the Conversation. The Panel invited people to think about the future when considering the role of the Treaty in our constitution. Participants responded to the guiding questions by expressing values of social justice, fairness, equity, tikanga, manaakitanga, rangatiratanga and mana. The questions also prompted discussions about minority representation, biculturalism and multiculturalism.

Perspectives

Perspectives on the current and future role of the Treaty in our constitutional arrangements fall into three broad groupings:

- the Treaty is fundamental to how this country is governed
- a Treaty-based multicultural future
- the Treaty has no role in how the country is governed.

The current flexibility of the Treaty's application – it being a 'living document' or its principles being referred to in various Acts of Parliament – is for some a source of concern. There was also uncertainty about what the Treaty's principles are, who should apply them and what the outcomes might be. This perceived uncertainty has made some people apprehensive about the Treaty. Alternatively, for some, the current flexibility allows the Māori-Crown relationship to continue to develop and address issues as they arise.

²⁹ See Appendix E, New Zealand endorses Declaration on the Rights of Indigenous Peoples (2010)

The Treaty is fundamental to how this country is governed

This grouping sees the Treaty as the founding document of New Zealand's constitution and a fundamental and inseparable part of our constitution, values, history and culture. For this group of people the Treaty is an agreement to share authority, but this vision of shared authority is yet to be realised. The Panel's conversations suggest a majority of Māori are within this grouping, along with a significant number of communities, organisations and individuals with different ethnic backgrounds.

This view regards the Treaty as a binding agreement to a relationship that brought together two sovereign peoples. The aspiration of this grouping is of a genuine and constructive relationship between tangata whenua and the state, working together in partnership and good faith. This relationship would be an ongoing feature of this country, and would adapt to circumstances as they arise, providing for a unique and distinctive national identity.

Participants saw the Crown's duty of active protection as extending beyond references in legislation, seeing potential in developing existing constitutional institutions to make better provision for tangata whenua in decisions that affect them.

A Treaty-based multicultural future

This grouping supports the Treaty as both the foundation for the bicultural partnership and the basis for multiculturalism for all New Zealand citizens. The future role of the Treaty is seen as being more about relationships, not just between Māori and the Crown, but also between Māori and all other New Zealand citizens: 'All citizens must feel legitimised in voicing their aspirations for the country's constitutional future.'³⁰ This grouping also reflects some of the views heard in conversations with New Zealanders of diverse ethnicities, including Pasifika, whether newly immigrated or of long standing in Aotearoa New Zealand.

The Treaty has no role in how this country is governed

This grouping rejects the very basis of the Māori-Crown relationship and its history, and aspires to a system which pays no heed to a Treaty relationship or to indigenous rights. The suggestion is that the Crown's right to govern the country was established by means other than the Treaty so no enforceable guarantees were made to iwi or Māori. Under this view the Treaty would be nullified, and all references to it in legislation removed. Some suggest that the multicultural nature of New Zealand means the Treaty is no longer relevant and that we are now (or should be) one people. Some say giving the Treaty greater force would lead to an undesirably 'race-based' constitution.

This grouping also includes the view that even if the Treaty was the founding document of government in this country, it can no longer be applied in the complexities of modern New Zealand without undermining social cohesion and creating inequality of access to resources and opportunities. So once the Treaty settlement process has addressed historic breaches of the Treaty, the Treaty should be considered to be only of historic interest.

Participants in this conversation also saw New Zealand's multicultural future as not requiring the bicultural platform the Treaty established, but a fresh start with a multicultural base.

³⁰ Fiona Barker, 'We, the People: Debating Constitutional Change in New Zealand's Diverse Population', (www.posttreatysettlements.org.nz)

Options and reflections

It is clear from the conversations that the Treaty is an important document to iwi, hapū and Māori, along with a significant number of New Zealand individuals and organisations. Although ideas about fitting the Treaty within the existing arrangements are relatively well traversed (although by no means at a point where decisions might be made), options starting with the Treaty of Waitangi are only beginning to be developed.

One of the Panel's tasks is to provide advice where further work is required and the Treaty is one such area. While the Panel supports the current fluid development of the Treaty within the constitution, more consideration should be given to Treaty-based options that do not seek to include the Treaty within the current Westminster system. If the country is to have constructive conversations about the constitution, a range of options for its future should be on the table.

A key consideration for the Panel is that Māori are tangata whenua: Māori culture, history and language have no other home. In light of this status, Māori culture, history, and language needs to be used and to be able to develop, regardless of the standing of the Treaty within our constitutional arrangements. All the people of Aotearoa New Zealand have a role in supporting these outcomes.

A broad consensus supports the Government taking active steps to continue the conversation about the Treaty in our constitutional arrangements. A vital step is making available more accessible information about the current arrangements, including commitments made in Treaty settlements between iwi and the Crown and what they mean for the nation. Many submissions appeared to demonstrate a lack of awareness of the significant and good faith efforts by iwi and the Crown to settle their differences through the well-documented Treaty settlement process.

It is timely as historic Treaty settlements draw to a close to look to our history to inform our future. We have an opportunity to go back, examine our history, explore missed opportunities and forge a unique future.

While the various visions for the Treaty were passionately expressed, participants generally offered little in the way of detail about how their vision might be achieved. This uncertainty about what the future might hold appears to lead to a level of apprehension in each of the groupings: some fear the potential undermining or negation of Treaty rights, others fear their implementation.

Further work is therefore required to explore plausible models for the Treaty in our constitutional arrangements. This section sets out the three high-level options that appeared to be forming across the Conversation, and offers advice about which option to pursue. Any of the options would require more discussion before any decisions could be made. The Crown can support this work, although iwi must also have time and space to develop options that reflect tikanga Māori.

The Panel had many conversations about the place of the Treaty within New Zealand's increasingly diverse population, and recommends further consideration of and conversations about a Treaty-based multicultural future. This would include an inclusive conversation to clarify and recognise constitutional relationships and obligations. To this end, information and resources about the Treaty, te Tiriti would be an important element of the education strategy recommended earlier.

This would be a conversation about developing a unique solution to our unique circumstances. The outcome of this conversation cannot be predicted – it could result in support for a transformed constitution or an endorsement of the current arrangements. Matike Mai Aotearoa, on behalf of the Iwi Leaders' Forum, has been working with iwi, hapū and Māori to develop an inclusive constitutional model based on tikanga and kawa, He Whakaputanga, te Tiriti and indigenous human rights. This work will no doubt contribute to the development of the conversation.

A high level description of the topics the conversation is likely to cover is set out below. Other approaches will emerge and develop as it continues, with these offered as a starting point for further discussion.

A Treaty-based constitution

One option discussed in the Conversation was to discuss placing the Treaty and Treaty relationships at the centre of our constitutional arrangements, rather than attempting to graft them onto existing Westminster arrangements. Models could be drawn from previous attempts by Māori to establish autonomous structures and from a range of international examples including Canada, Bolivia, Norway and the United Kingdom.

Maintain development of existing arrangements to accommodate Treaty rights and obligations

This option would preserve the current institutions and mechanisms of government. Most Treaty matters would be settled by negotiation between the Government and iwi as the need arises, with the ability to refer specified issues to the courts for resolution if necessary.

This option may be supported by people who see the principles and text of the Treaty as important elements of the constitution but do not consider the Treaty discourse is fully developed enough to include it in a written constitution. In the conversations, some Māori supported this view on the basis that the Treaty is sacrosanct and should be left alone. It would sit outside the legal system in much the same way as does the American Declaration of Independence in relation to the American Constitution, yet its principles inform the development of the law and the nation's constitutional values.

Take active steps to accommodate Treaty rights and obligations

A range of different options to more proactively recognise the Treaty within the existing constitutional arrangements were raised during the Conversation, including:

- confirming the Treaty as a tool for interpretation, rather than having legal or constitutional force. For example, the Treaty might be added to or referred to in a preamble to the Constitution Act 1986
- making the Treaty one of the standards for good process – the courts could test process rather than outcomes against the Treaty
- making consistency with the Treaty a required consideration in all legislation and government action, for example by making the Treaty supreme law, perhaps along with the rights in the Bill of Rights Act 1990. The requirements could be given force by:
 - establishing a dedicated Treaty court, or increasing the jurisdiction of the Waitangi Tribunal or the general courts, with powers to assess whether legislation is consistent with Treaty principles
 - creating an upper 'Treaty' house in Parliament with 50% Māori membership
- entrenching Treaty rights to reduce their vulnerability to change.³¹

³¹ Craig Linkhorn explores some of these options in 'The Treaty in the Constitution Conversation' Māori Law Review, June 2013 (www.Maorilawreview.co.nz)

A constitution without the Treaty

The Panel acknowledges that many New Zealanders remain sceptical that the Treaty can be a constructive element of our constitution and so may be reluctant to participate in a conversation about its future. Based on the Conversation, however, the Panel believes it is not viable to wind back the clock. The Treaty is already a fundamental element of our constitutional arrangements. It would be unfair, unjust and unrealistic to go back on the commitments made to iwi and hapū by successive governments. Nor do the arguments of equality put forward by some proponents of this view sufficiently acknowledge the diversity of this country's people.

The Treaty is not inherently divisive – its purpose was to establish a relationship between two peoples in one nation. Any divisions arise from a failure to meet those obligations, not from meeting them. The question is not just whether the Treaty is part of the constitution, but how it is best reflected and what we want to achieve by reflecting it.

The Crown cannot turn back on the commitments made in the Treaty and subsequently without the risk of social and political tensions. Any decisions made in such a crisis situation are unlikely to be enduring.

