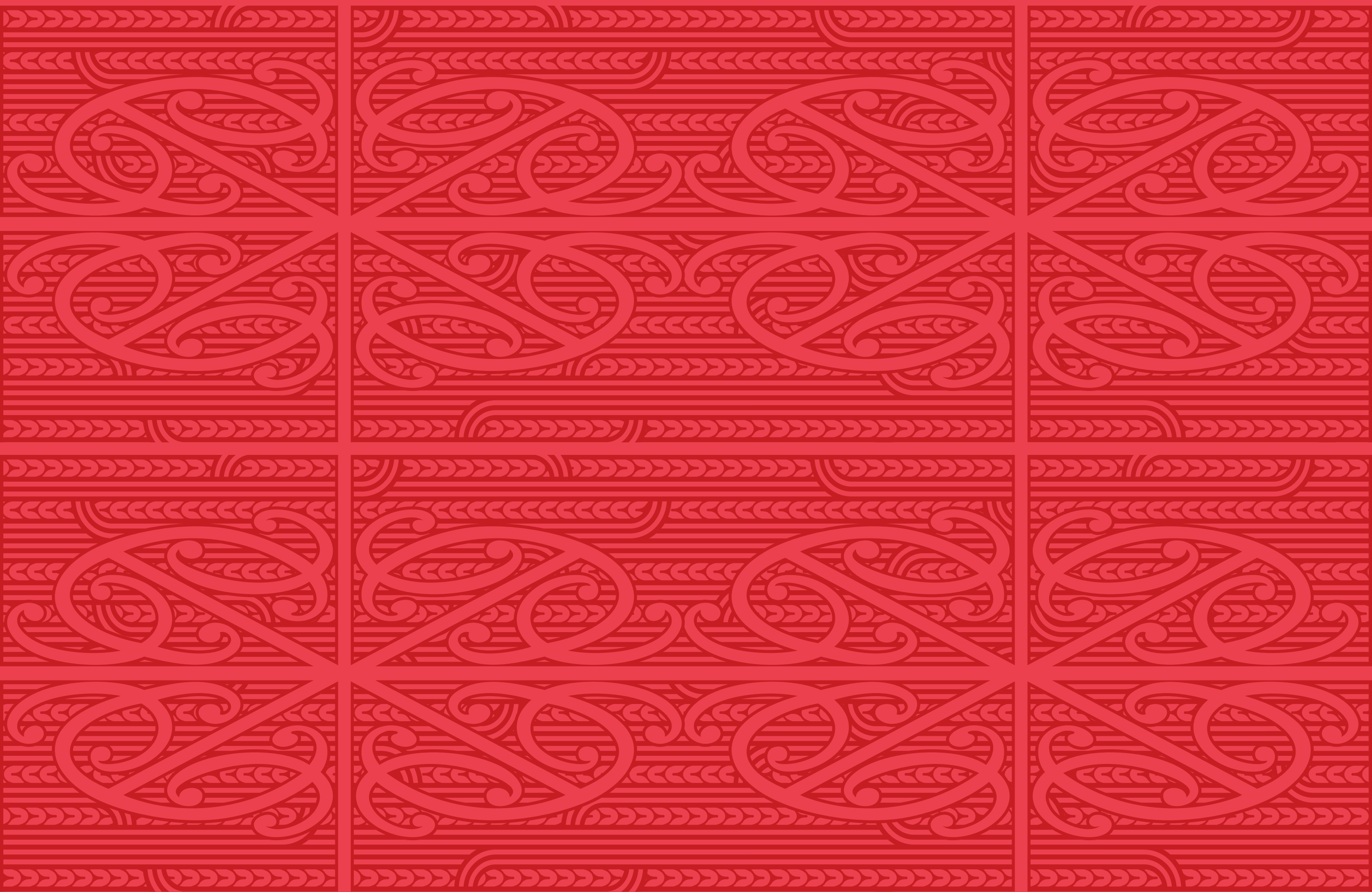
Submission on the Principles of the Treaty of Waitangi Bill

December 2024



NZCER
Rangahau Mātauranga o Aotearoa

To: The Honourable Members of the Justice Committee of the New Zealand Parliament Paremata Aotearoa

Re: Principles of the Treaty of Waitangi Bill

This submission is from the board and staff at Rangahau Mātauranga o Aotearoa / New Zealand Council for Educational Research (NZCER). Established in 1934, NZCER is Aotearoa New Zealand's independent research and development organisation, operating under its own legislation since 1945.

Te Tiriti o Waitangi (1840) (te Tiriti) guides our work. We work within the relational space of kāwanatanga (article 1) and tino rangatiratanga (article 2) in the domain of education.

We strongly oppose the Principles of the Treaty of Waitangi Bill (the Bill) both in its s2 commencement, and in its attempt to discard existing Treaty principles (Tiriti principles) and substitute for them several novel "Treaty principles" which are independent inventions.

This submission outlines our key concerns and stresses the importance of preserving the integrity of te Tiriti.

1. Te Tiriti is sacrosanct

Te Tiriti is fundamental to the relationship between the Crown and Māori. It is a sacred document that should not be misinterpreted. The Bill poses significant risks for our country.

2. Implications of redefining Tiriti principles

Redefining Tiriti principles could have devastating effects on Māori and all peoples in Aotearoa New Zealand. The current principles are clear in the text of te Tiriti. Their practical use has evolved over nearly half a century. They are strengthened by extensive negotiations between the Crown and Māori, and deep expertise held both by Māori and by Crown Tiriti partners. Furthermore, principles that guide the Crown have been identified by the Courts. A severe breach of te Tiriti will occur if the current accurate principles are replaced by the Bill's principles 1, 2, and 3. The Bill will undermine the efforts made both towards peace and good order ("rongo" and "ata noho"—Preamble), and towards reconciliation and partnership between Māori and non-Māori.

3. To whom does te Tiriti refer?

Te Tiriti is a solemn agreement between Māori and the Crown. The plain words of te Tiriti refer to two clearly distinct groups—the Queen's peoples, and Māori.

3.1 The Queen's undertaking to Māori rangatira and hapū

Te Tiriti holds Victoria, the Queen of England ("Ko Wikitoria te Kuini o Ingarangi"—Preamble) as undertaking to rangatira and hapū to preserve their "rangatiratanga" and "whenua" ("kia tohungia ki a ratou o ratou rangatiratanga me to ratou whenua"—Preamble).

3.2 The Queen's peoples

The Queen's people are clearly identified as: i) all her peoples who have settled at this land [in New Zealand], and who are coming here ("nga tangata katoa o tona Iwi Kua noho ki tenei wenua, a e haere mai nei"—Preamble); ii) Pākehā who have settled without law ("Pakeha e noho ture kore ana"—Preamble); and iii) the peoples of England ("nga tangata o Ingarangi"—article 3). Te Tiriti enables their occupation of particular domains.

3.3 Māori katoa

In clear contrast with these peoples of the Queen, all the leaders and the broad familial groupings (nga Rangatira me nga Hapu—Preamble), and the peoples of New Zealand ("nga Rangatira... nga hapu ... nga tangata katoa o Nu Tirani"—article 2) are Māori.

3.4 The Bill's forced misreading

Unfortunately, it seems as if the Bill is based on a serious misunderstanding, with its drafters plucking a particular phrase ("nga tangata katoa o Nu Tirani"—article 2) out of context and reading it as meaning "all New Zealanders". Such a cherry-picking interpretation is only possible if reading that phrase in isolation. In so doing the Bill is based on a forced misreading of te Tiriti, which results in the Bill's novel principles 1, 2, and 3.

4. The peoples of te Tiriti today

From 1840, and ongoing in present-day Aotearoa New Zealand, te Tiriti extends a welcome from Māori, on Māori terms, to all other citizens (i.e., tangata Tiriti—settlers, and their descendants, and all diverse citizens, whose governed presence in Aotearoa was made possible from 1840).

Te Tiriti is a solemn agreement between Māori and the Crown. The Crown now includes Māori and all other New Zealand citizens (Preamble and article 3). Stemming from te Tiriti the Crown may exercise kāwanatanga (article 1), yet those powers are limited by tino rangatiratanga (article 2). Kāwanatanga and tino rangatiratanga are relational.

5. Current principles are sufficient

Current principles provide ample, clear, and sufficient guidance on the meaning of these relational interests. These principles are derived from reading the full text of te Tiriti and as such they simply cannot be discarded by a literate society.

Current principles are well-known and are vital to rich educational contexts. They include: te tino rangatiratanga; te houruatanga—partnership; te matapopore moroki—active protection; ngā kōwhiringa—options; te mana taurite—equity; te rite tētahi ki tētahi—equal treatment; and kāwanatanga.

6. The Bill's principles

In contrast with the current clear and widely accepted principles, the Bill's principles breach te Tiriti as follows.

6.1 Principle 1 "Civil government" breaches te Tiriti

We submit that principle 1, "civil government", breaches te Tiriti and should be removed from the Bill for the following reasons.

- Te Tiriti (articles 1 and 2) establishes the relational interests and powers of kāwanatanga (article 1) and tino rangatiratanga (article 2). Each limits the other — and together they strengthen the people of Aotearoa New Zealand. The "Government of New Zealand" does not hold, and cannot independently declare, that it has "full power to govern". Rather, its power to exercise kāwanatanga, to govern, is limited by tino rangatiratanga.
- Te Tiriti does not give the maintenance of a "free and democratic society" (Bill summary of key features) automatic power to override the restrictions stemming from tino rangatiratanga.
- A complete reading of the full text of te Tiriti gives the inescapable conclusion that tino rangatiratanga is held and exercised by Māori only.

6.2 Principle 2: "Rights of hapū and iwi Māori" breaches te Tiriti

We submit that principle 2, "Rights of hapū and iwi", breaches te Tiriti and should be removed from the Bill for the following reasons.

- Te Tiriti is for past, present, and future, where: the wrongs of the past are redressed; the work of the present is shared by the Crown exercising the powers of kāwanatanga together with Māori exercising the powers of tino rangatiratanga; and our nation's future will be built by working together.
- Te Tiriti is not a time-bound transactional contract. Te Tiriti o Waitangi does not have a date of expiry. Nor does Te Tiriti specify the context as being applicable to a world "frozen at the time of signature".
- Nowhere in te Tiriti do the signatories agree to place a fixed time limit on the ongoing rights to exercise tino rangatiratanga, to develop, to bequeath, and to inherit.

- Māori rights that are acknowledged by te Tiriti indeed differ from "the rights of everyone" (6(2)) and stem from tino rangatiratanga, which is not able to be defined by kāwanatanga through the mechanism of an act of Parliament.
- Principle 2 (1) locks te Tiriti into 1840, and blocks the right to subsequent development. This is an anathema to education conceived of both as maintaining the transmission of knowledge, and as enabling the development of knowledge.
- Principle 2 does not account for the implications of applying an "as at February 1840" limitation to te Tiriti. It is a mystery how principle 2 declares the nation is founded on a rule of "rights as at 1840 for Māori, but not for the Crown". If principle 2 were to be applied consistently, it would disestablish all settler self-rule including the New Zealand Parliament. It would re-establish the roles of the Parliament of England, and the English Crown. We submit that would be a consequence of the Bill's drafters' naivety — and such an outcome will appeal strongly to some!

6.3 Principle 3 "right to equality" breaches te Tiriti

We submit that principle 3, "Right to equality", breaches te Tiriti and should be removed from the Bill for the following reasons.

- Article 3 affirms that Māori have the same rights as the peoples of England ("nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarangi"). Given that the peoples of England held and hold a variety of educational options and pathways, the same could reasonably be presumed to apply to Māori.
- Owing to the variety of options and pathways, article 3 can only affirm equity, not equality.
- Educational research confirms that better outcomes for all result from an emphasis on equity.
- If Article 3 were read as affirming equality, not equity, serious breaches of te Tiriti would need reparative remedies arising from the misapplication of resources, throughout almost the entire history of Aotearoa New Zealand, to support only one mode of Western education rather than a variety of options and pathways.
- Article 3 rights held by the peoples of England include the right to live within the law as oneself, along with one's family and community. These rights are held by the peoples of Aotearoa New Zealand. For Māori these rights encompass selfhood, whānau, hapū, iwi, and hāpori Māori, and include the right to te reo Māori.

6.4 Principles 1, 2, and 3 (Civil government; Rights of hapū and iwi Māori; Right to equality) breach te Tiriti

We submit that principles 1, 2, and 3 (Civil government; Rights of hapū and iwi Māori; Right to equality) breach te Tiriti and should be removed from the Bill for the following reasons.

- Kāwanatanga is created and exercised by the judicial, executive, and parliamentary arms of the Crown.
- Tino rangatiratanga is created and exercised by Māori.

- Te Tiriti acknowledges kāwanatanga (article 1) and tino rangatiratanga (Preamble, article 2) as separate powers.
- Te Tiriti does not transfer "the right to define tino rangatiratanga" to become part of the Crown's portfolio of kāwanatanga rights. Nor does te Tiriti, and nor can te Tiriti, give the Crown's kāwanatanga the power to instruct Māori rangatiratanga to limit and define itself in terms specified by the Crown's kāwanatanga-created legislation. Nor can the Crown's kāwanatanga impose its kāwanatanga-created limitations to bind Māori rangatiratanga (Preamble), including tino rangatiratanga (article 2) within the domains of whenua, kāinga, and ngā taonga katoa (article 2). Such a power is held by Māori only.

Clearly, an attempt by the Crown partner to use its own kāwanatanga-controlled instrument—a parliamentary Bill—to limit the rangatiratanga rights of the Māori partner is an act of shockingly bad faith.

7. Educational sector concerns

Te Tiriti is interwoven throughout the education sector, including in:

- Te Whāriki (2017)
- The New Zealand Curriculum (2008)
- The Education and Training Act (2020).

We are concerned that the Bill's principles are inconsistent with, and unsupported by, the text of te Tiriti. Further, the Bill's principles seriously breach te Tiriti with implications for the education sector.

The Bill's novel interpretations of Tiriti principles will deeply affect the interpretive possibilities available to all citizens of Aotearoa New Zealand, including to students, teachers, school leadership, and school boards of trustees.

For example, school boards (Education and Training Act 2020, s127(d)iii) would have to reconcile their statutory roles towards te Tiriti and equitable outcomes for Māori students with conflicting Bill principles 2 and 3. The result will be unproductive confusion and conflict.

Rather than a context of fairness, and working together, and honouring agreements, the Bill will officially introduce discordance, and promote division, dishonorable behaviour, and unproductive bullying behaviour.

7.1 Impact on education and Māori language

Having the opportunity to learn te reo Māori at school is an indigenous linguistic right for tamariki Māori (Bright et al, 2021, p 5, UNDRIP, CRC, ICCPR). The Education and Training Act 2020 enshrines the right to te reo Māori as a linguistic right for all Māori children. This Act also requires schools to honour Te Tiriti o Waitangi and supports Māori–Crown relationships. Any kāwanatanga act that endangers these provisions by introducing conflicting and novel Tiriti principles threatens the progress made in revitalising te reo Māori and promoting Māori culture in schools.

7.2 Impact on knowledge of Aotearoa New Zealand histories

Public engagement with the draft curriculum content for Aotearoa New Zealand's Histories and Te Takanga o te Wā showed overwhelming support for the inclusion of our own histories in schools and kura, which is necessary to help fulfil te Tiriti obligations. Many respondents also saw the proposed changes to the Aotearoa New Zealand histories curriculum as important, long overdue, and of benefit to all learners and to Aotearoa New Zealand (NZCER, 2021). Replacing the current Tiriti principles risks misrepresenting the original Tiriti, and white-washing our histories.

8. Commencement (s2) breaches te Tiriti

We submit that s2 Commencement breaches te Tiriti, and should be removed from the Bill for the following reasons.

- Crown expectations for school boards of trustees in relation to a school being a physically and emotionally safe space are set out in the Education and Training Act (2020) s127(1)b(i-iii). We work against bullying behaviour and towards equity within the New Zealand compulsory schooling sector. Research finds that contexts where the majority "gangs up on" and "picks on" the minority, using the power imbalance afforded by greater numbers, do not promote wellbeing for all.
- The Crown exercises kāwanatanga within a spectrum of rules that aspire to steer the Crown towards fairness, honour, and good faith. The Crown has also undertaken to actively protect Māori ("mahara atawai"—Preamble). However, making the enactment of this bill contingent on the results of a simple referendum is a threatened act of bad-faith bullying behaviour that will create lasting divisions and discord which will seriously affect New Zealand's wellbeing, now and in years to come.
- Current principles are clear and discoverable to all who read the Preamble and the three articles of te Tiriti. However, many potential referendum voters are limited by their inability to understand te reo Māori. Further, all potential referendum voters may not have developed an understanding of the connection between current accepted principles and te Tiriti. Yet they are being asked to discard clear and accepted principles in favour of novel principles that do not themselves have a foundation in te Tiriti.
- If the Bill's novel principles do seem to be an agreeable reading of te Tiriti, such a view is based on discourse which is not part of te Tiriti. The proposed referendum will not be relevant to the standing of the accepted principles of te Tiriti.
- Each currently accepted principle is clear in te Tiriti. To discard a current principle is to discard part of te Tiriti itself, which is not a possible right of citizenship. Te Tiriti itself establishes citizenship. Citizenship flows from te Tiriti. The alternative is to live without law ("noho ture kore ana" — Preamble). To discard te Tiriti is to discard legitimate citizenship.
- We submit that all voters need to understand what is proposed to be discarded, and why. Even if this were possible, options to achieve this understanding would likely be unpalatable to the Justice Select Committee.

Options: Examination, and dual referendums

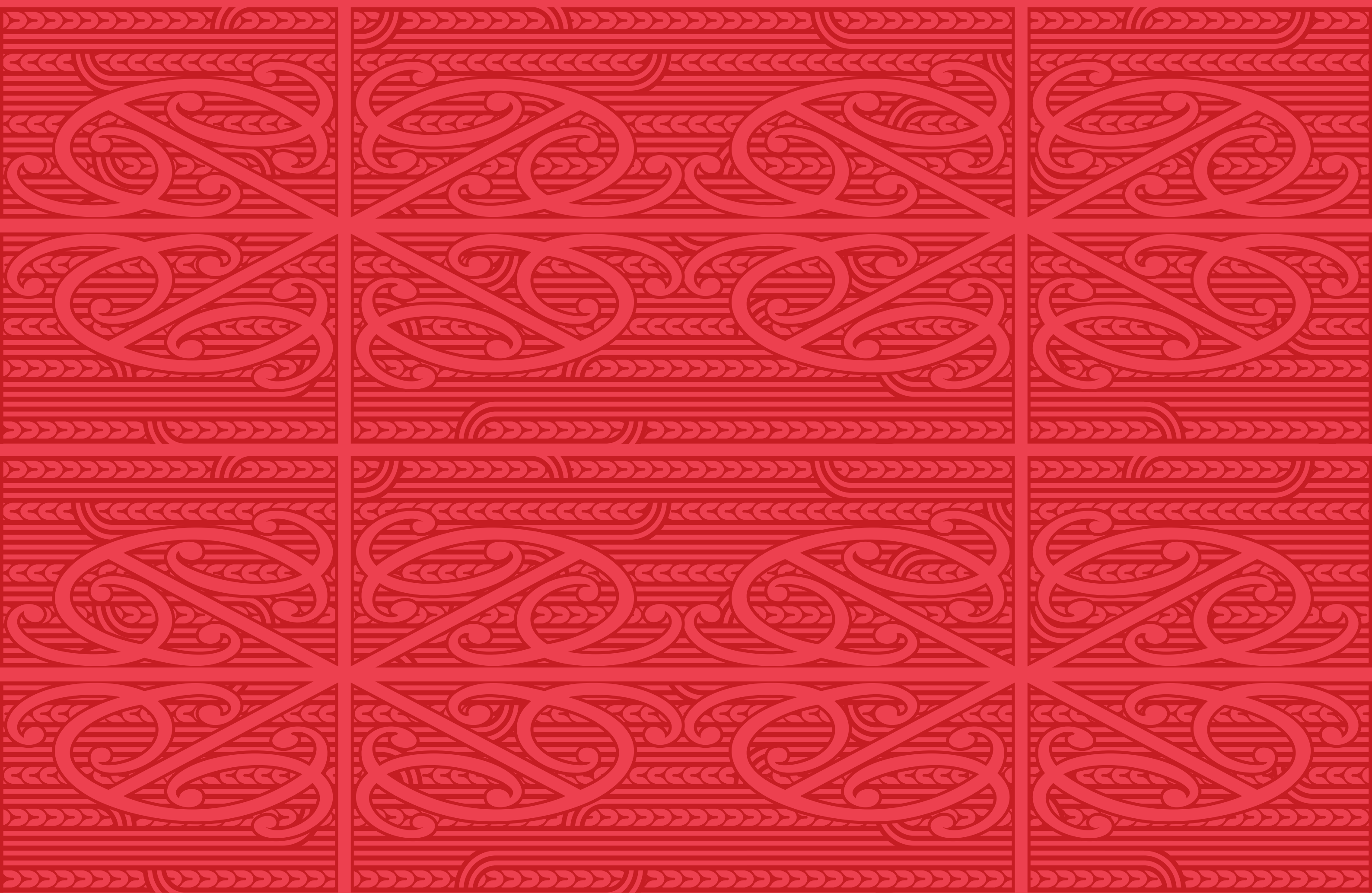
- To act in good faith and to fulfil the Crown undertaking actively to protect Māori, when establishing a referendum through the Crown powers of kāwanatanga the Crown would need to be confident that voters understand te Tiriti and its current principles. This confidence could be achieved by establishing a Tiriti curriculum, with the right to vote in the referendum contingent on success in a summative examination based on the Tiriti curriculum. Such a curriculum and examination, towards the sole aim of a fair referendum, is not a good use of this country's constrained resources. The resource implications for administering such national examinations to be sat by all electors would be staggering, and misapplied.
- The Māori Tiriti partner is a minority within a majoritarian democracy. The Crown will be aware that a simple "majority wins" referendum cannot be established honorably and in good faith by kāwanatanga.
- If such a referendum were to be established, within a Tiriti context two referendums would need to occur for those who achieved success in a summative examination based on a Tiriti curriculum. The first referendum would need to occur within the rangatiratanga sphere of te ao Māori, perhaps through the Māori roll. The second referendum would need to occur within the majoritarian democratically formed kāwanatanga sphere, perhaps based on the general roll. Both referenda would need to be passed by a majority vote in order for s2 commencement to occur.

9. Contra proferentem

This rule suggests that any ambiguity in a treaty should be interpreted in favour of the non-drafting party, and against the interpretation of the party that drafted it. It is a matter of deep concern that the Bill proposes interpretive change in relation to agreed principles in isolation to agreement with Māori (non-drafting) partners to te Tiriti.

10. Recommendation

In conclusion, we urge the Justice Select Committee to return the Bill to the House as quickly as possible with a recommendation that it is not workable and should not proceed.



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