SUBMISSION OF TE PUNA RANGAHAU O TE WAI ARIKI | AOTEAROA CENTRE FOR INDIGENOUS PEOPLES AND THE LAW - THE CONSTITUTIONAL TRANSFORMATION RUTHERFORD PROJECT

**To:** the Justice Select Committee

**Re:** the Principles of the Treaty of Waitangi Bill (“**Bill**”)[[1]](#footnote-1)

# Summary of Position on the Bill

* 1. Te Puna Rangahau o te Wai Ariki | Aotearoa Centre for Indigenous Peoples and the Law, Law Faculty, University of Auckland (“**Te Wai Ariki**”) strongly opposes the Bill and recommends that it not proceed.
  2. The Bill furthers the extent to which Aotearoa New Zealand already falls behind the United States of America (“**USA**”) and Canada in compliance with treaties between Indigenous peoples and the USA and Canada. Further, the Bill is inconsistent with Aotearoa New Zealand’s commitments under the United Nations Declaration on the Rights of Indigenous Peoples (“**UNDRIP**”).

# Background of Te Wai Ariki

* 1. Te Wai Ariki has a particular focus on transformation of Aotearoa New Zealand’s Constitution to fully realise Māori rights and aspirations as expressed in He Whakaputanga, te Tiriti o Waitangi and UNDRIP.
  2. In this submission, Te Wai Ariki particularly speaks for the Constitutional Transformation Rutherford Project. This project examines constitutions in colonised countries to seek inspiration for concrete recommendations for constitutional transformation in Aotearoa New Zealand to better realise tino rangatiratanga. We have especial expertise in comparative constitutional law, especially of colonised countries.

# Global Context of Aotearoa New Zealand

* 1. The USA and Canada are comparable jurisdictions to Aotearoa New Zealand in that they are also liberal democratic settler states, where the establishment of those states was through violence against the Indigenous peoples living on their traditional territories. All three states have experience of engagement with Indigenous peoples through treaties.
  2. Aotearoa New Zealand falls behind the USA and Canada in how it legally protects treaties entered by the state with Indigenous peoples. While the USA and Canada have constitutionally upheld their relevant treaties, Aotearoa New Zealand provides no such constitutional protection for te Tiriti o Waitangi. The Bill would aggravate this comparative disparity by legislatively diluting te Tiriti into principles incongruous with its original text.[[2]](#footnote-2)

# Status of Indigenous Sovereignty in the USA

* 1. In the USA, treaties made between American Indians peoples and the state have the status of federal law and are protected by the Treaty clause in the Constitution. art II section 2, of 1788 Constitution. For example, when American Indians’ rights protected by a treaty have been challenged, the courts have found in favour of American Indian rights, including their inherent sovereignty.[[3]](#footnote-3) In particular, US courts have found that American Indian treaty rights “trump” rights of equal protection.[[4]](#footnote-4)
  2. Further, the USA has recognised the inherent sovereignty of almost 600 Indigenous nations. This sovereignty has included the power for Indigenous nations to regulate on their territories and over their own peoples. This Indigenous sovereignty has been affirmed and protected judicially. For example, US courts have found that nothing short of express legislative intent is required to disestablish treaties providing for Indigenous sovereignty over land and the criminal jurisdiction.[[5]](#footnote-5)

# Status of Indigenous Sovereignty in Canada

* 1. Canada has explicitly provided for constitutional affirmation of Indigenous peoples’ rights in s 35 of its Constitution Act, including their rights under treaties made between Canada and First Nations historically and today. These include rights to fishing, land and resources.[[6]](#footnote-6) These rights prevail over generic rights of non-discrimination.
  2. Many contemporary treaty settlements in Canada with Indigenous peoples attempt to recognise and provide for Indigenous peoples’ self-determination, including regulatory law-making jurisdiction, over their traditional territories.

# Comparison of USA and Canada to Aotearoa New Zealand

* 1. As outlined above, both the USA and Canada have protected Indigenous sovereignty and rights at a federal level. Indigenous rights affirmed in treaties are constitutionally protected.
  2. Aotearoa New Zealand has protected neither Indigenous sovereignty nor te Tiriti o Waitangi in a comparable manner, meaning that we fall behind other countries. Te Tiriti o Waitangi is made unduly vulnerable by this lack of legislative or constitutional protection. The Bill would exacerbate this by making the Indigenous rights affirmed in te Tiriti subject to Parliament’s majoritarian interpretation.

# UNDRIP

* 1. UNDRIP is the most comprehensive international instrument on the rights of Indigenous peoples. It establishes a universal framework of minimum standards for the survival, dignity and wellbeing of Indigenous peoples. UNDRIP articulates and elaborates on existing human rights as they apply specifically to Indigenous peoples.
  2. Aotearoa New Zealand, the USA and Canada each initially voted against UNDRIP when it was first adopted by the United Nations General Assembly in 2007. Each of these states has since reversed their position and expressed support for UNDRIP, with Aotearoa New Zealand doing so in 2010.
  3. The Bill’s unilateral redefining and removal of Indigenous rights breaches the UNDRIP.
  4. The Bill and its development are also inconsistent with the recommendation made to New Zealand in the Human Rights Council’s Universal Periodic Review of 2024 which included that New Zealand “Determine and implement, in consultation and agreement with the Māori, the appropriate constitutional processes to recognize, respect and give effect to the Treaty of Waitangi.”[[7]](#footnote-7) Rather than consultation and agreement on this foundational matter the Crown’s process to develop the Bill deliberately excluded any consultation with the Māori Treaty / te Tiriti partner.[[8]](#footnote-8)
  5. See also the submission from Te Tai Haruru, the Māori legal academics at the Law Faculty, Auckland University|Waipapa Taumata Rau on this specific kaupapa.

# Conclusion

* 1. Aotearoa New Zealand already falls behind the comparable jurisdictions of the USA and Canada in constitutionally protecting Indigenous peoples rights. The Bill would further this gap, and weaken Aotearoa New Zealand’s position and reputation in the international sphere. The Bill must not proceed.
  2. We wish to make an oral submission to the committee in support of our submission.

1. Principles of the Treaty of Waitangi Bill 2024 (94–1). [↑](#footnote-ref-1)
2. Waitangi Tribunal *Ngā Mātāpono/The Principles* (Wai 3300, 2024) at 110. [↑](#footnote-ref-2)
3. *United States v Washington* 384 F Supp 312 (WD Wash 1974), aff’d 520 F.2d 676 (9th Cir Wash 1975); *Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658 (US 1979). [↑](#footnote-ref-3)
4. See *United States v Washington* 384 F Supp 312 (WD Wash 1974) at 403. [↑](#footnote-ref-4)
5. *McGirt v Oklahoma* 140 SC 2452 (US 2020) at [10]. [↑](#footnote-ref-5)
6. *R v Sparrow* [1990] 1 SCR 1075; *Calder v British Columbia (AG)* [1973] SCR 313. [↑](#footnote-ref-6)
7. UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: New Zealand (29 April 2024) UN Doc A/HRC/57/4/Add.1 at [132.32]. [↑](#footnote-ref-7)
8. Waitangi Tribunal, *Ngā Mātāpono – The Principles: Part II of the Interim Report of the Tomokia Ngā Tatau o Matangireia – the Constitutional Kaupapa Inquiry Panel on the Crown’s Treaty Principles Bill and Treaty Clause Review Policies* (Wai 3300, 2024)at xiv. [↑](#footnote-ref-8)