

Where is New Zealand going with the Treaty of Waitangi?

Rt Hon Sir Geoffrey Palmer KC Speech to the 50th anniversary of the Waitangi Tribunal Thursday 9 October 2025

Introduction

E ngā mana, e ngā waka, e ngā reo, tēnā koutou, tēnā koutou, tēnā koutou

It gives me great pleasure to speak at this conference and to record my appreciation of the work of the Tribunal over the years. I wish to record my thanks to Sir Edward Durie for his initial chairmanship of the Tribunal when he was Chief Judge of the Māori Land Court.

When I held political office his work was very useful when the 4th Labour Government extended the jurisdiction of the Tribunal back to 1840. I note that the history of the Treaty in these islands has often fluctuated. Over the years I have written extensively about the Treaty and this speech reflects those views.

It is important that all New Zealanders support the Tribunal and the excellent work it has done over many years. . Te tiriti o Waitangi must continue to enjoy a prominent role in the somewhat fraught political atmosphere that surrounds it these days. We hope that those polarising days are over, but one can never be sure.

The Māori culture and language of our indigenous inhabitants are unique to New Zealand. They add to the Polynesian flavour of this country that should be encouraged and valued. Many strands of tikanga Māori have seeped into making us who we are as a nation. The importance of welcomes and hospitality – manaakitanga - are an attractive feature, greatly admired by visitors to this country. People who identify as Māori make up 17.8 per cent of the population and is growing.

We need to develop a sense of social cohesion around the Treaty issues in order to avoid the division and polarisation that can so easily creep into the Treaty debate. These issues go beyond the Tribunal although the Tribunal is an important part of the framework.

My own experience in public life and as a lawyer taught me there is an unpleasant underside to race relations in New Zealand. Disguised prejudice is sometimes not far from the surface when these issues are debated.

For these reasons we need to make progress on Treaty issues and arrive at a stable position that is bedded into the constitutional framework. It is not possible in a speech to cover the multitude of issues that the Treaty raises for public policy in New Zealand. My main message is we need to address them and make progress. Going backwards will solve nothing.

A short history

Members of the Tribunal will remember the Hon Mr Seymour's ill-starred Treaty Principles bill, which attracted more than 300,000 submissions to a select committee.

There was no commitment by the coalition government to pass the bill but only to support it to the committee. It is surprising that so much parliamentary time was wasted, and so many resources were devoted to what turned out to be a futile exercise.

It was said that the bill would not alter or amend the Treaty itself. Nevertheless, it would have had significant legal and other consequences.

The Tribunal itself released a report in August 2024 on the bill - finding that, if enacted, the bill would reduce the constitutional status of the treaty, remove its effect in law as currently recognised in treaty clauses, limit Māori rights and Crown obligations, hinder Māori

access to justice, impact treaty settlements and undermine social cohesion. I set out a portion of the summary:

On Friday 16 August 2024, the Waitangi Tribunal released *Ngā Mātāpono – The Principles: 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*.

With respect to the Treaty Principles Bill policy, the Tribunal found that the Crown had breached the Treaty principles of partnership and reciprocity, active protection, good government, equity, redress, and the article 2 guarantee of rangatiratanga. The Crown failed to engage with Māori, and the Bill:

- lacked a policy imperative justifying its development;
- was based on flawed policy rationales;
- was ‘novel’ in its Treaty interpretations;
- was fashioned on a disingenuous historical narrative; and
- distorted the text of te Tiriti o Waitangi.

If enacted, the Tribunal found, the Bill would reduce the constitutional status of the Treaty/ te Tiriti, remove its effect in law as currently recognised in Treaty clauses, limit Māori rights and Crown obligations, hinder Māori access to justice, impact Treaty settlements, and undermine social cohesion.

With respect to the Treaty Clause Review policy, the Tribunal found that the Crown breached the Treaty principles of partnership, active protection, equity, redress, good government, and the article 2 guarantee of rangatiratanga. It found that the policy was predetermined and would result in amendments to or repeals of Treaty clauses. This would reduce Treaty/te Tiriti protections for Māori, affecting the rights of Māori to access justice to have their Treaty/ the Tiriti rights realised. The Crown further failed to engage with Māori on this policy.

The report found that the bill itself would be a breach of the Treaty since it was calculated to weaken the Treaty’s effect on the interpretation of all the laws on the books that contain its principles

Attempting to disguise this fact, by saying the bill is not altering the Treaty was misleading. Clearly the purpose of the exercise was to render the Treaty less important with less influence over the government actions. Over time had the measure progressed it would have reduced the influence of Māori over a range of public policy issues.

Yet as the summary set out above shows these issues remain alive and the Treaty clauses review is being progressed. Government policy in its present settings clearly aims to reduce protections for Māori. The justification for these policies seems thin. Everything that has been done was done with by legislation , government decisions or approval. over a long period of time back to the days of the Hon Matt Rata and his legislation .

The political consequences and fallout from the Treaty Principles Bill spawned the biggest demonstration to Parliament in the history of New Zealand. What was designed to polarise people brought them together. There was a lot more support within the community at large for the Treaty, than was being stated by the proponents of the bill.

In a strong statement contained in the cabinet paper on the Bill, the Ministry of Justice warned against the proposal, saying that it ignored tino rangatiratanga, and relied only on the English language version of the Treaty. It reduced the Treaty indigenous rights to ordinary rights that could be exercised by anyone and reduced the collective rights of iwi and hapu with a significant risk of majority tyranny.

The bill would have created great legal confusion and cost. And it would have been the worst possible way of starting a national conversation about our constitutional arrangements which was one of the purposes of the policy. Act party policy suggests this would be the policy of a liberal democracy, but liberal democracies with

indigenous populations provide special protective policies for them and have done so for many years.

The approach taken ignored two vital factors – the historical context and experience with Treaty obligations since 1840, plus the contemporary relevance of the Treaty to government decision-making today

Professor Paul McHugh a distinguished New Zealand academic who taught at Cambridge University wrote a book about the place of the Treaty in New Zealand law entitled *The Māori Magna Carta* published by Oxford University Press in 1991. Complex constitutional law, the intricate statute law, case law and international law involved in these issues could not have been set-aside in the simplistic manner that was proposed.

New Zealand cannot change its history and neither can we ignore it. This is heavy history and important constitutional material and it needs to be engaged with properly, not superficially in an ad hoc way thinly cloaking an ideological agenda.

The policy was disingenuous. It aimed to produce division and polarization and achieved nothing. The notion that Māori in New Zealand constitute a privileged minority is risible. When one examines statistics relating to poverty, education, incomes, rates of imprisonment and health of Māori, it is clear they are under-privileged.

And this is not to mention the great historical injustices carried out by the settler governments of the 19th century that led to the New Zealand wars and land confiscations. What was promised to Māori under the Treaty was not delivered, although the settlements of the last 40 years have tried to redress the balance somewhat.

Statistics New Zealand shows the Māori population is growing and diversifying. As of the 2023 census, there were 887,493 people who

identified as Māori, representing 17.8% of the total population. Additionally, the number of people of Māori descent was 978,246, making up 19.6% of the total population. The Māori population is also younger on average than the rest of the population. .

The early history

The history of Aotearoa New Zealand has been well covered in many historical sources and scholarship. The brief recap here is by no means definitive. By the early 1830s, Māori were trading under a recognised Māori flag. The French also had aspirations to settle the country. In 1831, 13 Ngāpuhi chiefs wrote to King William IV of the United Kingdom to seek an alliance. To secure some order among unruly settlers, James Busby was sent as an official British Resident to Northland. On 28 October 1835 Busby called a hui at Waitangi. By the end of the day 34 Rangatira had signed He Whakaputanga o te Rangatiratanga o Nu Tireni (known in English as the Declaration of Independence of the United Tribes of New Zealand). It was later acknowledged by 18 other Rangatira, up until 1839.

The Declaration was recognised by the British Crown. But it was not a legally binding document at British law. It acknowledged Māori independence and “sovereignty” over New Zealand. Busby hoped he was forming a confederation, but it didn’t happen as iwi and hapū preferred to retain their autonomy.

The Treaty of Waitangi / Te Tiriti o Waitangi was signed in 1840. It was agreed between the British Crown and ultimately signed by 540 Māori Rangatira. They covered much of the country, although some refused to sign and some areas were not represented. The Treaty has been described by a great New Zealand judge, Lord Cooke as “simply the most important document in New Zealand history.” This is

because it was used to provide legitimacy for the British coming here in the first place. The Treaty was drafted mostly by the Crown officials, Captain William Hobson and Busby. Translation into a version in te reo was carried out by the Anglican missionary Henry Williams.

The British understanding of the Treaty was that it ceded sovereignty to the British, relying on the English text of the Treaty. However, it is now generally recognised that Te Tiriti in te reo did not convey what the British meant by the word “sovereignty”. The Māori text guaranteed tino rangatiratanga for Māori over their lands, homes, fisheries and other taonga. Hobson reinforced the Māori perception of this in oral discussions. And he told them they would “retain their perfect independence.” This reflected the instructions that he had received from the Colonial Office.

In England, however, it was assumed that New Zealand had now become a British colony and part of a massive imperial system safeguarded by the British Navy. After a number of false starts, the Parliament at Westminster passed the New Zealand Constitution Act in 1852. The Parliament in New Zealand set up by the Act first met in Auckland in 1853.

New Zealand’s current legal and governance systems are based on those set up during the first 20 years of government by the Crown. The 1852 New Zealand Constitution Act was followed by the granting of responsible government in 1857. At that point the government here was largely self-governing, except for defence and foreign affairs. However, tikanga Māori also had a place, and remains currently represented in our legal system.

Māori found themselves in conflict with the Crown, principally because the colonial government wanted to exercise authority over Māori and increasing number of settlers wanted land. These pressures

led to the New Zealand wars breaking out with battles between government forces and some iwi. The most serious conflicts occurred in the 1860s, and were finally at an end after Parihaka in 1881. Land confiscations to punish iwi that fought against the Crown left a legacy of grievance. These aspects of colonialism explain much about the inequities that afflict Māori to this day. As late as the second world war Māori soldiers who fought for New Zealand were treated differently from pakeha.

The Treaty is binding international law

Modern experts in international law are in broad agreement that the Treaty of Waitangi was a valid treaty under international law. Professor Ian Brownlee, a recognised authority on international law wrote in 1991:

There can be no doubt... that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane. As such, the Treaty created real rights and obligations at international law.

This means the rights and obligations the Crown took up in 1840 now belong to the Crown in right of New Zealand under international law. The Treaty is binding on New Zealand twice, first as the country that is subject to the Treaty, and second as the successor to the obligations of Great Britain for the Treaty.

New Zealand is now totally independent. London cannot make decisions for us now, so New Zealand is the successor to the obligations of the British government which was one party to the Treaty. It is also binding as a valid treaty at international law and it applies to this country. And to cap it all, the Treaty may be binding as a matter of contract law.

The Crown has obligations to honour its guarantees of tino rangatiratanga and equal rights under New Zealand's existing constitutional arrangements. These obligations cannot be recklessly dismissed.

Rights and obligations arising from treaties cannot be specifically invoked and enforced in the domestic courts unless they have been incorporated in domestic law by Acts of Parliament. Many domestic laws do refer to the Treaty as matters now stand. The courts have often used the Treaty as both a source of principle and as an aid to interpretation of both statute and common law.

Treaty developments, 1975 and beyond

The third Labour government, elected with a clear mandate in 1972, had a policy to "examine a practical means of legally acknowledging the principles set out in the Treaty of Waitangi." The policy was worked through thoroughly by a caucus committee and a statute was passed, the Treaty of Waitangi Act 1975. A key adviser on it was Professor Quentin-Baxter of Victoria University, an expert international lawyer.

It was then the formal 'principles' of the Treaty entered the constitutional dialogue. The Treaty of Waitangi Act 1975 was a most significant step to reversing the trend of trying to ignore the Treaty that had dominated in previous years. The preamble to the statute states the reasons for the approach.

The brief three articles in the original Treaty were written in two languages and were not compatible with what was agreed. It was thought by taking the issues gradually and examining each issue individually and thoroughly before the Tribunal that it would be possible to progress. And that proved to be correct.

The Tribunal under the chairmanship of Sir Edward Durie produced a number of important reports that developed recognition of the Treaty that convinced the Fourth Labour Government, in 1985, to extend the

jurisdiction of the Tribunal back to 1840. This produced many claims for the clear and palpable historic injustices that had been visited upon Māori and large awards of money, land and other assets have been handed over in recompense.

This produced many settlements. The historic claims now are almost at an end and the Tribunal has produced many important reports on contemporary issues. Contemporary breaches remain to be dealt with on a continuing basis as the law currently exists.

Treaty clauses in New Zealand statutes have been interpreted by the courts. For example, Section 9 of the State Owned Enterprises Act 1986 provided that “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.” This provision led to a most significant legal case, known as the Lands or SOEs Case, in which the Court of Appeal unanimously held that the Crown could not transfer assets to a state owned enterprise without establishing a system to consider whether such a transfer would be inconsistent with the principles of the Treaty of Waitangi, and therefore unlawful.

The result of this legal declaration was a negotiation with Māori followed by the passage of a statute that permitted transfers as long as titles to the lands in question made it clear they were subject to Treaty claims. This meant the rights of claimants were expressly protected. There were other cases as well.

Over the years, the courts have interpreted statutes and, in doing so, developed a series of Treaty principles that can be applied in other cases. These principles include that the Treaty was a partnership between the Crown and Māori in which both must act reasonably, honourably and in good faith. It includes active protection, as the Crown’s right to govern involved a corresponding obligation to actively protect Māori interests. It includes redress, putting wrongs right. The Tribunal has also identified other principles of reciprocity, mutual benefit, self-government and the right of Māori communities to manage themselves and their territories and resources.

So, the present situation is that the Treaty and its principles are part of statute law for some purposes and not for others, and the applications of the Treaty may be inconsistent from one statute to the next. Furthermore, under some circumstances the courts can consider the Treaty even when it is not specifically mentioned.

Conclusion

I have tried to summarise many of the modern developments concerning the Treaty.

In recent decades the Treaty came to form a more important element of government decision-making. Decision-making processes set out in the *Cabinet Manual 2023* require attention to the consequences of decisions that affect Māori interests. For example, it is necessary for ministers who seek Cabinet approval for bills to be introduced into Parliament to draw attention to any features of the bill that have te Tiriti implications. It is not clear that the present government is following the guidance in the Cabinet Manual. It is the definitive guide as to what ministers and public servants must consider in their decision-making.

There are clear signs that the direction of government policy at present on the Treaty is to travel backwards and undo some developments that have been beneficial. These pressures mean that vigilance must be exercised to arrest these backward steps.

Having the privilege of exercising the power of government in this country does not give the Government the right to do whatever it likes. With power comes responsibility. There are more responsible and constructive ways to fashion an enduring public policy platform for the role of the Treaty of Waitangi in the future. The Tribunal must be free to report on its historic mission.

We need to march forward and embed the Treaty more securely in our constitutional arrangements. But that is a speech for another day.

•