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The Rest is Still Unwritten: Geoffrey Palmer's white paper A Bill of Rights for New Zealand 40 years on

I Introduction

On 2 April 1985, Deputy Prime Minister Geoffrey Palmer tabled the white paper *A Bill of Rights for New Zealand*, containing a draft version of what would become the New Zealand Bill of Rights Act 1990 (NZBORA).[1] The draft bill emboldened courts to strike down rights-inconsistent legislation, mandated a parliamentary supermajority (75%) to make amendments and—uniquely—incorporated the text of both the Treaty of Waitangi ("the Treaty") and Te Tiriti o Waitangi ("te Tiriti"). Widespread opposition led to the provisions being abandoned, but their motivations, like the need to comprehensively recognise te Tiriti and to restrain Executive power, remain.[2] This essay provides an overview of Palmer's model for a Bill of Rights (BOR) and analyses why it was so unpopular. Then, it will discuss the avenues our current BOR framework provides for litigating Māori rights claims. Finally, it attempts to map recent constitutional debates, considering whether Palmer's proposal retains any relevance.

II The Proposition

A Application

Palmer's draft bill would apply to acts by the legislative, executive, or judicial branches of the government, or those in the performance of public functions, powers, or legal duties – a provision survived by section 3 of the NZBORA.[3] The bill was 'supreme law', meaning any enactment inconsistent with it would have no effect[4] subject to reasonable limits (as in the NZBORA) prescribed by law as can be demonstrably justified in a free and democratic society.[5] Article 23 of the draft bill (equivalent to s6 NZBORA)[6] stated interpretations of

[1] Geoffrey Palmer, *A Bill of Rights for New Zealand A White Paper* (Government Printer, April 1985)
[2] Above, n 1, at 6.
[3] New Zealand Bill of Rights Act 1990, s 3.
[4] Above, n 1, art 1.
[5] Above, n 1, art 3.
[6] Above, n 3, s 6.

legislation, where rights-consistent, should be preferred by courts over a strict textual approach.[7]

B Incorporation of te Tiriti and the Treaty

The draft bill incorporated the Treaty and te Tiriti in a few brief sections. Clause 3 of the preamble reads:[8]

> The Maori people, as tangata whenua o Aotearoa, and the Crown entered in 1840 into a solemn compact, known as Te Tiriti o Waitangi or the Treaty of Waitangi, and it is desirable to recognise and affirm the Treaty as part of the supreme law of New Zealand.

The operative clause read:[9]

> 4 The Treaty of Waitangi
>
> (1) The rights of the Maori people under the Treaty of Waitangi are hereby recognised and affirmed.
>
> (2) The Treaty of Waitangi shall be regarded as always speaking and shall be applied to circumstances as they arise so that effect may be given to its spirit and true intent.
>
> (3) The Treaty of Waitangi means the Treaty as set out in English and Maori in the Schedule to this Bill of Rights.

Reading the above clauses, together with those governing the bill's application, meant if courts could not interpret legislation in line with the Treaty, te Tiriti, or other rights in the bill, that legislation could be overturned unless it constituted a justified limitation on those rights. Existing rights, such as customary rights, would not be affected by the BOR.[10] Where rights in the BOR were infringed or denied, section 25 enabled parties to bring the matter to court; judges would have discretion to award a remedy "appropriate and just in the circumstances".[11]

B Effect on Waitangi Tribunal

The draft bill preserved key functions of the Waitangi Tribunal. Palmer argued that incorporating te Tiriti and the Treaty in a BOR would enhance the Tribunal's role and status,[12] particularly given article 26 would have enabled any court to refer cases to the Tribunal for

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[7] Above n 1, art 23.
[8] Above, n 1, at 10.
[9] Above, n 1, at 11.
[10] Above, n 1, art 22.
[11] Above, n 1, art 25.
[12] Above, n 1, at 38.

advice.[13] A court would have to consider any advice it received in delivering judgements pursuant to the BOR.[14]

B Purpose

Palmer saw the bill as a 'safeguard' for fundamental values and freedoms in a system of government "…in need of improvement".[15] Introducing a BOR containing the Treaty and te Tiriti was a campaign policy for Labour in the 1984 election.[16] Palmer argued reforms would:[17]

- provide "appropriate recognition of the Maori [sic] as tangata whenua o Aotearoa"
- recognise the Treaty and te Tiriti as part of the supreme law of New Zealand (so they were 'legal' not 'moral rights' and could not be overridden by the ordinary process of legislation);
- redress previous Governments' failure to honour the Treaty and te Tiriti; and
- engender constructive constitutional debate among the New Zealand public "…in…accord with the sentiments of the Maori [sic]".

Palmer recognised elevating any rights instrument to a 'constitutional' status would need public buy-in. He figured the "debate about a Bill of Rights for New Zealand should concentrate on what New Zealanders have in common with each other, not on what divides them.".[18] However, he saw the onus as being on Māori "…to indicate if they want the Treaty of Waitangi to be dealt with in the Bill of Rights and in what way…"[19] However, ensuing 'debate' proved polarising; it is doubtful whether it was conducted with the benefit of "…full discussion with the Maori people" as intended.[20]

III The Reaction

Widespread opposition to the bill stunted its transformative ambitions. At the select committee stage, the paper attracted 431 submissions, of which 35 supported the BOR, 56 had qualified support, 12 were undecided, 243 opposed the bill, 84 opposed only the reference the right to

[13] Above, n 1, art 26.
[14] Above, n 11.
[15] Above, n 1, at 5.
[16] Geoffrey Palmer, *Reform a Memoir* (Victoria University Press, Wellington, 2013) at 400.
[17] Above, n 1, at 5-6, 35.
[18] Above, n 1, at 5-6.
[19] Above, n 1 at 35.
[20] Above n 1, at 35-36.

life, and 1 requested further information.[21] Very few gave unqualified support for the inclusion of the Treaty and te Tiriti in the BOR.[22] At the recommendation of the committee, Palmer opted to drop all references to Māori, the Treaty and te Tiriti from the bill, together with its 'supreme' quality. The remainder of this section will explore reasons why the bill was so unpopular.

A The Treaty and te Tiriti as sacrosanct

Many viewed the Treaty or te Tiriti as too constitutionally important to be relegated to a section in ordinary legislation. When Labour announced their treaty policy in early 1984, then minister for Māori affairs Manuera Benjamin Rīwai-Couch, cautioned of interfering with the Treaty, adding if meaning had to be ascertained, it should be determined by iwi and hapū.[23]

Palmer's proposition featured in kōrero at two national hui at Turangawaewae marae in 1984 and 1985. The resolution on the BOR from the 1984 hui sent the resolute message to the government: it was suspicious of the government's motives, and called for greater Māori representation in its development.[24] Many were unsure whether the bill was "an attempt to genuinely do something about an outstanding dilemma that successive Pakeha generations…ignored", "…an attempt to forestall assimilation…" or "…an appeasement of white middle-class New Zealand.".[25]

B Confused Ends

The purpose of Palmer's BOR was also a source of apprehension. Critics were unsure whether it was intended to be an expression of national identity or social and state policy, an apparatus for the protection of rights, or a declaration of unity.[26] Academic contemporaries noted, while the incorporation of te Tiriti and the Treaty entailed the recognition of Māori people collectively, communal, and economic, cultural, and social rights (ESCR) did not feature greatly in the bill.[27] Others felt a BOR was simply incapable of recognising self-determination

[21] New Zealand Bill of Rights Bill 1985 (246-F) (select committee interim report) at 8.
[22] Above, n 21, at 124.
[23] n.a. "Tribes must determine Treaty value" *Press* (New Zealand, 4 February 1984) at 8.
[24] n.a. *Waitangi Action Committee* (self-published, Otara, 1984) at 4.
[25] Ripeka Evans, "Is the Treaty of Waitangi a Bill of Rights" (presented to New Zealand Legal Research Foundation Seminar on A Bill of Rights for New Zealand, 1985) at 197.
[26] n.a. "Treaty ill-suits Bill of Rights" *Press* (New Zealand, 13 August 1986) at 20.
[27] Above, n 21, at 13.

as guaranteed by te Tiriti.[28] While a BOR supported existing distributions of power between Māori and Pākehā, te Tiriti urged Māori to strive for self-determination.[29]

C 'Incompatibility' of rights

Inside and outside the House, critics felt Treaty and Tiriti rights were fundamentally incompatible with others in the BOR. Many felt the incorporation of the treaty 'offended Māori concepts' and the 'compulsion under the bill of rights to combine…separate concepts alien to Māori culture and beliefs', transgressed the tapu of the Treaty.[30]

Others argued the inverse: that 'ordinary' New Zealanders did not value Treaty rights more than other rights such as the right to life, or right to vote.[31] The New Zealand Law Society, also questioned the remedy where rights conflicted, and the level of priority to be given to political, civil and equality rights and rights of Maoris [sic].[32]

D Limitations, applicability and discrimination

People were concerned that passing Palmer's BOR would have negative implications in relation to the Treaty and te Tiriti. One concern was that the force of the Treaty and te Tiriti could be limited by section 3; that there may be de facto amendments to the texts under the guise of 'reasonable' and justified limitations.[33] Others highlighted the problems caused by treating the English and te reo Māori documents as interchangeable when they had distinct meanings and implications for Māori rights.[34]

Some felt article 26 (the Waitangi Tribunal provision) went too far by placing the tiny tribunal beyond parliament acting with a normal majority,[35] while others thought it should go further, making the Tribunal's decisions binding, or encompassing a separate Māori vote on proposed amendments affecting Treaty rights.[36] Reference to 'separate' rights of Māori were viewed by

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[28] Shane Jones, "The Bill of Rights and Te Tiriti o Waitangi" (presented to New Zealand Legal Research Foundation Seminar on A Bill of Rights for New Zealand, 1985) at 213.
[29] Above, n 28, at 216.
[30] Above n 21, at 129.
[31] Above, n 21, at 131.
[32] Above, n 21 at 117.
[33] Above, n 21, at 33.
[34] Above, n 21, at 34-35.
[35] Above, n 21, at 35.
[36] Above, n 34.

many as discriminatory, while others were concerned it would mar legal certainty and give unfettered power to the judiciary.[37]

E Māori sovereignty

The bill also neglected the 'crux of the issue': tino rangatiratanga and mana Māori motuhake.[38] Despite the bill's reference to Māori as tangata whenua, it did not frame Indigeneity as a source of rights which proved problematic. As activist Ripeka Evans contended, "if we begin the argument about our sovereignty from 1840 and even 1835, we are confined to argue within the parameters of Pakeha history and its perverted sense of morality".[39]

The unworkability (and unacceptability) of Palmer's BOR 'fix' generated new insights from Māori constitutional thinkers. Minds like Professor Whatarangi Winiata mooted a separate body to ensure that legislation, government procedures, and practices were consistent with the Treaty.[40] Evans elaborated this body ought to be 50% Māori and nominated by Māori, suggesting 'a parallel Waitangi Tribunal' to 'deal specifically with Maori sovereign rights.'[41]

IV The Repercussions

Far from Palmer's original proposal, the NZBORA makes no reference to Māori, the Treaty or te Tiriti. The NZBORA can only be invoked for actions or omissions occurring after it came into effect on 25 September 1990. However, this has not prevented the use of the NZBORA as a vehicle for the recognition of Māori rights. Sections 19 (freedom from discrimination) and section 20 (rights of minorities to practice culture, religion, and language) are key mechanisms under the NZBORA for the affirmation of cultural rights and have been pleaded in various areas of the law. However, most of these claims have been unsuccessful; claimants seeking to rely on the NZBORA face obstacles that will now be examined.

The first issue is that ss19-20, as the NZBORA's primary provisions for cultural protections, are framed as 'negative' rights. Accordingly, a judge must be satisfied acts or omissions covered by the Act have completely 'denied' a person the right to freedom from discrimination

[37] Above n 21, at 19, 31.
[38] Above, n 25.
[39] Above, n 25, at 201.
[40] Above, n 25 at 203.
[41] Above n 40.

or to profess their culture.[42] These are high thresholds. Courts have, so far, been unwilling to interpret 'discrimination' for the purposes of the NZBORA as anything other than a 'personal' experience (i.e. there has been no finding of discrimination in cases where unequal treatment is seen as a function of systemic disparities disproportionately affecting Māori). NZBORA does not deem collectives holders of s 20 rights.

Arguably, there are more promising developments where NZBORA rights are framed positively. For example, the courts have found the right to freedom of thought, conscience, and religion (s13) engaged in respect of wāhi taonga,[43] provisions for search, arrest, and detention (ss21-23) engaged during the Tuhoe raids,[44] and rights of manifestation of religion and belief, assembly, association, and movement (ss15-18) engaged in treatment of 'Protect Pūtiki' kaitiaki.[45]

However, even where infringement of a NZBORA right is established, a court may find the limit "demonstrably justified in a free and democratic society".[46] NZBORA rights tend to give way to public, state, or economic interests. The court's failure to consider the Treaty and te Tiriti's context also limits the viability of the NZBORA as an avenue to litigate Māori rights. For example, in *Police v Taurua*, Moore J held the rights of minorities described in s 20 were not sufficiently clear to incorporate the Treaty, and that the section 27 right to justice preferred a criminal hearing take place in a courtroom rather than on the parties' marae.[47] His Honour, thus, articulated both the Treaty and the NZBORA as positive rights developments – while implying only the latter was justiciable *per se*:[48]

> "The Treaty was…an acceptance by Maori of the inevitability of having to rejoin the wider world, that things could not carry on as they had been before European contact or even over the intervening period….[BOR concepts] are not concepts which Pakeha has imposed upon Maori…[but]…developments which have since become widespread across the civilised world."

[42] Above n 3, s 3, ss 19-20.
[43] *Raikes v Hastings District Council* [2022] NZHC 3075.
[44] *Siemer v Spartan News Ltd* [2014] NZHC 3175.
[45] *Kennedy Point Boatharbour Ltd v Barton* [2022] NZHC 257, [2022] 2 NZLR 696
[46] Above, n 3, s 5-6.
[47] *Police v Taurua* [2002] DCR 306 at [24], [46]-[49], [65]-[66].
[48] Above, n 47, at [49].

In *Ngaronoa v Attorney-General*, the Court of Appeal refused to accept what it called the Treaty's 'parent document' He Whakaputanga o Niu Tireni as relevant to a claim pursuant to the NZBORA.[49] Equally, the court has not entertained arguments that the NZBORA is reinforced by the Treaty and other rights instruments.[50] However, the principles of the Treaty and te Tiriti increasingly feature in NZBORA arguments as 'interpretive aids'. For example, in *Kamo v Minister of Conservation*, the court noted while the s 20 right "is expressed in negative terms, the Crown is under an obligation to ensure that the existence and the exercise of [Māori rights under NZBORA] are protected against denial or violation".[51]

Finally, the remedies for rights breaches under NZBORA are limited. Damages may be possible in certain circumstances. Judicial review is an available remedy where administrative or judicial decisions impinge NZBORA rights. Courts may also declare legislation inconsistent with the NZBORA, though such declarations are not binding.[52] Recognition of the Treaty and te Tiriti and the potential for comprehensive remedies are two features of Palmer's BOR which are absent in the NZBORA. However, given Palmer's BOR contained an identical limitation provision it is unclear whether more claims would be successful under his model.

V The Future?

Since the introduction of the NZBORA there has been a series of constitutional reviews. One in 2004 following the abolition of legal appeals to the Privy Council, one in 2013 following the establishment of the Constitutional Advisory Panel in 2011, together with the 2016 He Whakaaro Here Whakaumu Mō Aotearoa - Report of Matike Mai Aotearoa - The Independent Working Group on Constitutional Transformation ("Matike Mai"), and Palmer's revised proposal for a written constitution *A Constitution for Aotearoa New Zealand*. I will briefly evaluate current suggestions for constitutional models.

The idea of a written constitution with an expanded NZBORA has circulated in recent years, though it has not gained widespread enthusiasm. Most concrete proposals would maintain existing institutions, with minor tweaks. For instance, Palmer's 2016 proposal would preserve

[49] *Ngaronoa v Attorney-General* [2017] 3 NZLR 643 at [53]-[61].
[50] *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General* [2018] NZAR 18 at [6].
[51] *Kamo v Minister of Conservation* [2018] NZAR 1334 at [83].
[52] New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022.

MMP voting and cabinet, with an elected head of state.[53] Te Tiriti would be given full legal status, and a panel charged with ascertaining its meaning and application; other ESCR would feature in a BOR.[54] Other proposals for a written constitution take a weaker stance, incorporating te reo Māori and tikanga Māori in limited ways, and declaring the Treaty a "fundamental document of Aotearoa" (without elevating its legal status).[55] However, while these models include Māori cultural norms and restrain the Executive, they do not challenge existing distributions of power which may lead some to question their relevance.

Matike Mai took an alternative approach, drafting a constitution centring tikanga, kawa, he Whakaputanga, te Tiriti, and indigenous human rights instruments. It features models for power-sharing between iwi/hapū, Māori delegates and representatives, and the Crown.[56] While the application of these models requires further Executive attention, they reflect the desire for a constitution which affords Māori self-determination and distinct constitutional standing. Matike Mai represents a shift to decolonial shift outside Eurocentric bounds of a BOR.

However, both models are challenged by public opinion; many do not consider constitutional change necessary or important. Constitutional debate has largely moved on from Palmer's BOR framework to favour models which are more transformative. Further, his proposal demonstrates New Zealander's distrust of wide-sweeping reforms and the likelihood we will continue 'pragmatic tinkering' with our constitutional arrangements.[57]

VI Conclusion

This essay has explored an important juncture in Aotearoa's constitutional development. By analysing the implementation, reaction, and repercussions of Palmer's constitutional experiment, it asks the question: does a strong BOR feature in New Zealand's constitutional future, and can it co-exist with rights guaranteed in the Treaty and te Tiriti? The author argues a BOR no longer holds the constitutional significance it once did, and current constitutional debate favours recognising te Tiriti and the Treaty in their own right. Despite persisting ideas

[53] Matthew Palmer and Dean Knight *The Constitution of New Zealand: A Contextual Analysis* (Bloomsbury Publishing, England, 2022) at 243.
[54] Above, n 53.
[55] Dean Knight and Julia Whaipooti "EmpowerNZ: Drafting a Constitution for the 21st Century" (2012) 10 NZJPIL 287 at 293 – 296.
[56] Above, n 53, at 247.
[57] Above, n 56.

recognition of te Tiriti and the Treaty would have adverse consequences; there remains a desire to have a constitutional framework which affirms Māori rights. Current structures have failed to deliver justice; Palmer's model may well have achieved the same result.