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SUBMISSION ON BEHALF OF THE CRIMINAL BAR ASSOCIATION OPPOSING THE PRINCIPLES OF THE TREATY OF WAITANGI BILL

1. These submissions are filed on behalf of the Criminal Bar Association ("CBA"). A representative from the CBA would welcome the opportunity to make oral submissions to the Select Committee, if that would be of assistance.

2. Because the CBA's remit focuses on the application of criminal law in New Zealand, these submissions will necessarily focus on how the Bill impacts the criminal law. Despite that narrow focus, the CBA wishes to make it clear that the organisation shares the broader constitutional concerns that have been raised by other legal organisations, including the Māori Law Society and members of the senior independent bar and legal profession.[1]

3. The CBA is particularly concerned that a common thread in the Bill is the degradation of tino rangatiratanga. Equal partnership is one of the central principles that underpins the Treaty. The CBA is concerned that the Bill, read in conjunction with the Act Party's press releases and other public statements, seeks to undermine this central plank of New Zealand's constitutional arrangements.

4. The Treaty Principles, as developed and defined by the Waitangi Tribunal and the Senior Courts, are specifically relevant to various aspects of the criminal justice system. Examples include:

    i. Rangatahi courts, which are specifically operated with Māori cultural values in mind to address youth offending. These courts have been successfully operating up and down the country for over 15 years.
    ii. The Te Ao Mārama initiative in the District Court. This is a judicially lead kaupapa that works with iwi and communities to ensure all participants (including victims, defendants, and families) can better understand the court process and increase the timely disposition of cases.
    iii. Te Pae Oranga Iwi Community Panels. This programme allows Police, in conjunction with their iwi partners, to deal with lower-level crimes and prevent

1 Refer to open letter to the Prime Minister and the Attorney-General from Kings Counsel dated 13 November 2024

further offending. Although this initiative has a strong Māori focus, it is available to people from all ethnic backgrounds.

iv. The Mana Ōrite agreement, which is a partnership between the Justice Sector Leadership Board and Ināia Tonu Nei[2]. This is designed to address Māori overrepresentation in the criminal justice system.

v. Recognition of background cultural factors at sentencing that can lead to meaningful discounts.[3] Although the current government has curtailed funding for cultural reports (under s27 of the Sentencing Act 2002), this background information remains highly relevant for many defendants at sentencing. There is now a well-established body of case law that confirms, where there is a causal connection between historic trauma and the index offending, a sentencing discount will be appropriate.

vi. Restorative justice meetings that take place after a defendant has pleaded guilty but before they are sentenced. A number of the programmes operated around the country adopt strong tikanga values and other Māori Kaupapa. This recognises that Māori are also disproportionately represented as victims of crime. It is important that these victims have a culturally sensitive forum to express their views and detail the impact that offending has had on them.

vii. Iwi liaison officers who work closely with the New Zealand Police throughout the country.

viii. Tikanga lead drug rehabilitation programmes. Several programmes around the country adopt a strong tikanga approach to rehabilitation, in combination with medical therapies, to help defendants with drug/alcohol issues.

5. All of the above are concrete examples of how the principles of the Treaty are woven into New Zealand's criminal justice system. The CBA is concerned that the Bill is an attempt to narrowly, and unjustifiable, define the Treaty Principles to align with the views of one minority political party.

6. The CBA remains very concerned that Māori remain overrepresented in most facets of the criminal justice system. There are many reasons for this overrepresentation but the negative impacts of colonisation, loss of land and mana, and other historic injustices are factors that cannot be ignored. The examples cited above all help to address the current imbalance. The CBA considers that these initiatives should be supported and

[2] Ināia Tonu Nei is a group established to increase the Māori voice in the criminal justice sector.
3 S27 of the Sentencing Act 2002

strengthened, as it is in everyone's best interests to reduce Māori overrepresentation in the criminal justice system.

7. The existing Treaty Principles have been developed and applied by the Waitangi Tribunal and Higher Courts for the last 50 years. Despite the Hon David Seymour's assertions to the contrary, the CBA considers that the Bill would have the effect of unilaterally changing the meaning of the Treaty and its effect in law. It would be fundamentally wrong if one party to the Treaty were permitted to amend the meaning without the agreement of Māori as a Treaty partner. The Waitangi Tribunal and the Courts remain best place to decide these issues.

8. Various press releases and public statements made by the Act Party opine that Māori receive special treatment or are somehow afforded more rights than non-Māori. The CBA wishes to emphasise that the criminal law applies equally to everyone in New Zealand, irrespective of race or background.[4]

9. The CBA welcomes open discussion and dialogue about the country's constitutional arrangements. However, the CBA considers that this Bill is ill-conceived and poorly drafted. The existing Treaty Principles remain an important part of the criminal justice system in New Zealand. This Bill seeks to unjustifiable reinterpret the Treaty Principles and the CBA urges Parliament to reject the Bill.

[4] The Higher Courts have routinely dismissed any claim to sovereignty advanced by criminal defendants.