

## **Speech at Te Tii Marae, Waitangi, 6 February 2006**

My name is Jane Kelsey. I first came to Waitangi in February 1980 in the days when so-called 'young Maori radicals' at Waitangi and elsewhere, were joined by small groups of Pakeha activists. I haven't felt so drawn to Waitangi for the last 10 years. This year feels different. I am honoured to be here and to be invited to contribute to today's debate.

I am here as a Pakeha woman whose ancestors date back to 1842, when my mother's forebears came from Ireland to Auckland. They moved to Taranaki in the 1860s where they married into a Swiss family who 'settled' on a farm called Sentry Hill. My father's French grandfather jumped ship in Akaroa in the 1880s and found his way to the Hokianga where he met up with some bigoted English Methodists in the 1890s. They built boats in Motukaraka. Their stories, woven together - their achievements and their outrages - have shaped my place in this land. When I call myself a nationalist, an understanding of that past shapes my actions in the present and my vision for the future.

There are many different ways that Tauwiwi contribute to this land and seek rewards. In my case it is largely as an academic. My job is to educate young law students, to research and write about the realities of law, and to foster informed and critical debate. My identity as a Pakeha in Aotearoa and my role as an academic are inseparable.

A huge amount has changed since I was first here in 1980. This is not because those with power suddenly saw the light. It is largely because people, mainly Maori, took risks and pushed the boundaries in many different ways. The policy shift on the Treaty that happened in 1984 was built on the occupations at Takaparawha, Raglan, Awhita and elsewhere; the persistence of Nganeko Minhinnick in asserting kaitiakitanga before the Planning Tribunal; the Waitangi Action Committee's activism here and elsewhere, and much more. Today Maori self-empowerment is evident everywhere - in the revival of te reo, the growth of many wananga, the birth of Maori television, the vibrancy of kapa haka, even the birth of the Maori Party.

One of the most positive developments, from my perspective, is the deeper understanding that we as Tauwiwi have available to us about our history, and how the mana of te Tiriti cements its place forever as the foundation stone on which any claim to nationhood must stand. Despite attempts by opportunist Pakeha politicians to turn the clock back, we can't un-know what we now know.

While much has changed, too much has stayed the same. Inequality and racism that were disguised by the welfare state are much more visible. Unchanged, too, is the insistence that the Crown enjoys unfettered sovereignty. Despite the appearance of victories by Maori claimants in the courts, they have consistently insisted that the sovereignty of the Crown is absolute and is represented by a parliament that is controlled through a Pakeha majority electorate.

This assertion of sovereignty allows political parties to turn the clock back on advances of the past 20 years overnight, as they compete with each other for the redneck vote. They have a vested interest in ensuring that the majority of New Zealanders, whether fifth generation Pakeha or recent arrivals of diverse backgrounds, don't understand our history and te Tiriti. Ensuring that does not happen is one of our most urgent challenges as Pakeha.

Some things have actually got worse in recent years. The so-called free market has condemned almost one third of our next generation to begin their lives in poverty and then blames them for failing to achieve. It has also transferred economic power beyond our shores. A lot of people talk today of an entering 'post-grievance' era where hapu can resume control of their taonga. Yet, when we look around us we see that control over those resources is securely held in corporate, usually foreign hands. What better illustration than the Seabed and Foreshore legislation? The rights of Maori to reclaim the foreshore and seabed were confiscated in the name of protecting 'public access'. The private property rights of wealthy, often foreign owners in coastal

resorts, flash marinas, mussel farms and licences to plunder the sands and seabed were considered sacrosanct.

Every year, New Zealand governments sign more international treaties that guarantee foreign companies the right to control the resources that Maori have struggled to regain. These new treaties run roughshod over tino rangatiratanga. While governments insist that te Tiriti is only morally binding, they insist that these economic treaties are legally binding and enforceable. Few people, especially Maori, even know this is happening.

Some believe the solution lies in a Tiriti-based constitution. That is a great aspiration. There is no other legitimate constitutional basis for this country and debates about the constitution can provide important opportunities to focus our minds. They also present stark challenges to Pakeha power brokers – as the Hirangi Hui did in response to the outrage of the fiscal envelope.

But I don't believe a formal written constitution is (a) necessary; (b) feasible; (c) would be allowed genuinely to reflect te Tiriti; and (d) is a priority.

First, a formal Tiriti-based constitution is not necessary. Te Tiriti exists. Its mana endures. To say that te Tiriti is a living document is a truism. Its future is not threatened. If anything is clear from the past 166 years, it is that Maori will defend its mana. It doesn't require 'validation'.

Second, creating a formal Tiriti-based constitution is not feasible. Generating *any* written constitution in New Zealand today would not be feasible. People would have to agree on a new structure for exercising power and what are the most important rights and interests to be protected.

In Australia, there is already a written constitution that was agreed to by settlers in 1900 and strong republican sentiments. Yet a recent referendum for a new constitution failed largely because its supporters couldn't agree whether the President should be appointed or elected. Imagine if the sovereignty of indigenous Australians has been on the agenda!

Come back home and imagine the kinds of vested interests that would paralyse a debate about republicanism here, even within the existing colonial constitutional structure. Then add te Tiriti and tino rangatiratanga into the mix. Those who have power will not simply give it away. Agreement on a formal written constitution, especially one based on te Tiriti, is simply not going to happen within our lifetimes.

Indeed, that prospect seems more remote than it was five years ago when a rather bizarre invitation-only meeting of the elite was called at Parliament to discuss the issue. On one side of the hall were prominent Pakeha lawyers, MPs from almost all political parties, Pakeha academics and commentators, and business leaders. Their vision was firmly embedded in the current constitutional arrangements. Some saw no place for te Tiriti at all. Others argued that it should be accommodated within a republican version of the current framework.

On the other side (actually, at the back) were almost all the Maori present and a few fellow travellers. They insisted that tino rangatiratanga, understood as perpetual authority of hapu that was affirmed in the Declaration of Independence and again in te Tiriti o Waitangi, is the only legitimate foundation for a future constitution. Each talked past each other because there was no conceptual meeting ground.

That hui was before the major political parties began their competition for who could pander best to the lowest denominator of racism and anti-Treaty sentiment within their Pakeha constituencies.

But let's set that reality aside and assume there is agreement that te Tiriti should be the foundation for a new constitution that would become the supreme law of the land. My third problem is what meaning would be given to te Tiriti.

The problem is not te Tiriti itself. As Paul Moon said during a discussion on Morning Report last week, it is nonsense to say its meaning is not clear. A wealth of knowledge about te Tiriti and what the rangatira understood they were doing has emerged during the past 30 years. This is accessible to every person in Aotearoa. Those who claim it is impossible to know what the Treaty really means simply expose their own laziness or willful ignorance. That is a problem of political expediency and racism, which won't be fixed by a written constitution.

My concern is how the meaning of te Tiriti would be manipulated.

Some will remember Waitangi Day in 1984, when Geoffrey Palmer announced that a future Labour government would include the Treaty in a Bill of Rights. This was in the hey-day of Treaty politics, as the hikoi of kaumatua and 'young radicals' descended on Waitangi. The policy makers who set about preparing Palmer's White Paper were concerned about how to 'fit the Treaty' into a broader Bill of Rights. The final version 'recognised and affirmed' the rights of Maori under both texts of the Treaty. These rights would then be subordinated to 'limitations that could be demonstrably justified in a free and democratic society'.

The court system that would decide the meaning of the Treaty provision and the limitation has always been an instrument of colonial power. Even when the courts made their most Treaty-friendly judgements, they have steadfastly maintained Crown sovereignty.

The classic example is their interpretation of references in legislation to the 'principles of the Treaty'. The courts have manipulated this to reflect the English text: the Crown has supreme sovereignty; Maori are to be consulted where appropriate; Parliament has the ultimate right to ignore those views. The duty of Maori in this unequal partnership is to be reasonable and loyal to the Crown. The Waitangi Tribunal, which in its early reports questioned whether there was a cession of sovereignty, fell into line.

In 1989 when the Labour government produced 'Crown Principles for Action on the Treaty' that rewrote the Treaty it relied on the court and tribunal for legitimation. As Bishop Whakahuihui Vercoe said in his speech at Waitangi during the 1990 Tiriti commemoration 'we don't need your principles, we have the Treaty'. Yet that distorted set of principles continues to underpin Treaty settlement policy and judicial decisions today.

Even the Court of Appeal's decision in the *Ngai Apa* case on the seabed and foreshore made it clear that the Crown, meaning Parliament, was sovereign and could override tikanga Maori and any guarantees in te Tiriti.

Annie Mikaere has argued that tikanga Maori, with its ethical foundations in whanaungatanga, manaakitanga and kaitiakitanga, should provide the basis for law in this land. That makes perfect sense. Yet colonial law, based on private property, individualism and self-interest, is deeply embedded. Maori can and should continue to exercise tikanga Maori themselves and do so more insistently; but changing formal legal system would require a revolution, not simply a written constitution.

All of which leads me to argue that campaigning for a formal Tiriti-based constitution is not a priority. Indeed, it is a diversion of energy and resources that are needed first, to prevent the further erosion of tino rangatiratanga and second, to create the conditions where a vision of a Tiriti-based Aotearoa becomes a real possibility.

I mentioned earlier the threat that is posed by international treaties that guarantee rights to foreign corporations and their patron governments, such as the US, Europe, China, Japan or Australia. Every one of these treaties involves giving up some of New Zealand's sovereignty to foreign interests, who can enforce them by imposing economic sanctions. Both major political parties are intent on signing as many of these treaties as they can. They are negotiated in secret by the Cabinet; Parliament doesn't even get to vote on them.

Just this week I gave a submission to a parliamentary select committee on a new economic treaty with Chile, Singapore, and Brunei. Tim Groser, who was New Zealand's ambassador to the World Trade Organisation in Geneva and is now a National MP, said quite bluntly that the choice is about whether New Zealand should give up more of its sovereignty. He thinks that's a good thing and we should sign many more of these agreements.

Georgina te HeuHeu then asked me to explain what this agreement means for foreign investment. That is very simple. It guarantees that foreign investors operating from these countries will never have to get permission for investments valued at less than \$100 million, except in the small number of situations where they do now. If the government lifts that threshold even higher, or takes it away altogether, that is automatically locked in for investors from these countries. There is no going back. For the limited range of investments that are still vetted, the government has promised never to add new considerations – such as whether the investment involves unresolved Tiriti claims or requirements to create jobs for local hapu and reinvest some profits in the local community.

Just think how much of Aotearoa is already controlled foreign companies in tourism, forestry, mining, hydro dams and geothermal, mining, corporate farms, golf courses, marinas, a half share of Sealord ... Unless governments stop signing new treaties and withdraw from existing treaties there will be no resources to exercise tino rangatiranga over.

In my view, stopping that rapid transfer of sovereignty offshore is one of the most immediate challenges we all face. The Maori Party, the Greens and even New Zealand First have a vital role to play in doing that. But we all have to make it clear that we will not be bound by decisions which are made in our name but which fundamentally violate te Tiriti o Waitangi.

This is just one of many urgent challenges. As we move forward with a vision of Tiriti-based nationalism, the lead will come from Maori, as it always has. Creative strategies - use of international forums, the exercise tino

rangatiratanga without 'permission' to do so, harness resources to promote people-centred development, tactical use of opportunities such the Maori Party in Parliament - all offer exciting options for pushing the boundaries.

As Pakeha, we need to take responsibility for tilling that ground in our families, communities and institutions where we have power. As the make up of Tuaiwi changes we also need to come to grips with what it will mean for Pakeha to become a minority and reach out to newer arrivals. Organisations, such as the churches, that have retreated from the Tiriti-based vision of social justice that they vigorously advocated in the 1980s need to find their voice again. Despite the Maori-baiting of the major political parties, there is an enormous amount of goodwill and a shared commitment to building a Tiriti-based future in this land. That is the kind of nationalism that I want to fight for.

I look forward to the discussion on this today and beyond.