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Komihana a te karauna mo nga ahuatanga-a-iwi

Treaty of Waitangi Phase.

Wananga Turua, Okawa Bay, Rotoiti, January 22, 1988

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Notes on the Discussions

A. STRATEGIES

Five main points emerged in the discussion of partnership and the status of the Treaty which could be useful in ensuring full Maori participation in social and political policies through power-sharing in accordance with the partnership provisions of the Treaty of Waitangi.

A.1. The provision of a Senate or Upper House in the legislature, which would have a composition based on equal representation of the Treaty partners. This may be consistent with the type of fundamental change called for in the RCSP Terms of Reference.

A.2. The need to incorporate the Treaty of Waitangi into all future legislation, similar to clause 9 of State Owned Enterprises Act. and the incorporation of a similar clause in the Acts Interpretation Act.

A.3. A permanent commission on the Treaty of Waitangi responsible for auditing all existing and proposed legislation and regulation to advise government on its consistency with the Treaty. This commission might also have an auditing function on government policies and their implementation. This might be an all-Maori or a fifty-fifty Maori-Pakeha commission.

A.4. The need to give power to tribal/iwi authorities at local and regional government level, in decision-making, resource allocation and policy formulation. The wananga stated that the various iwi authorities were the most appropriate Maori organisations to be represented. At national level, an appropriate tribal-based organisation would be necessary, whether that should be an existing Maori organisation or a modified or new one was not determined.

A.5. To give effect to the principle of power-sharing guaranteed in the Treaty of Waitangi, and to ensure that kin-based groups are encouraged to make responsible decisions for their members, an expansion of the range and functions of the Maori Land Court was discussed. Initially this expansion should include adoptions, custody, and child offending.

B. SUMMARY OF ISSUES DISCUSSED.

1. Principles of the Treaty

1.1 From a Ngatiawa perspective, our Ngatiawatanga preceded the Treaty of Waitangi, we have no arguement about that, what we seek are ways to ensure that others recognise that. At present, the emphasis placed on interpreting the principles of the Treaty restricts Ngatiawa ability to protect the sanctity of our mountains, rivers and lands.

2. Partnership and Power-sharing.

2.1 Whatever the Treaty may mean in a narrow Pakeha legal interpretation, there is agreement that the Treaty of Waitangi promised a partnership between Maori and the Crown. This has to be embodied in practices that ensure a Maori share of power. Maori should use the Treaty as a springboard for future development of the tribal estate, its lands, human and material resources.

2.2 The equal partnership embodied in the Treaty ought to ensure that Pakeha determine Pakeha things and Maori determin Maori things, where issues are common to both Maori and Pakeha, then a realistic sharing of power is called for; at present the Maori input into common issues is token, ignored or absent.

2.3 Power sharing should be used as a strategy, but there has been continuing difficulties with this through the reluctance of the Pakeha partner to keep their side of the bargain, and while Maori remain a small proportion of all resident New Zealanders, they cannot rely on numbers but on the integrity of their argument to hold sway.

3. Constitutional Enforcement.

3.1 A way ahead could be the establishment of a second house of parliament to augment the existing house of represent-atives, in the second house the Treaty partners would be equally represented, in the same way that the 50 united states have equal representation, no matter what their populations, in the U.S. Senate.

3.2 It was agreed that the government needs to put more resources into educating all New Zealanders, (but especially Pakeha), on the purpose, history and present-day importance of the Treaty of Waitangi.

3.3 It was generally agreed that the Maori people need a constitutional arrangement more permanent than exists at present, where the response of the government depends on their own willingness to incorporate a T of W. clause into Acts and regulations. The Treaty of Waitangi

guaranteed Maori rights in article 2 and 3. Any future written constitution should guarantee those rights as set out in the Treaty with the Crown, but ther needs to be some additional mechanism which will ensure that such rights and obligations of the two partners are maintained.

3.4 The wananga recommended that the RCSP point out that the Law Commission was established to promote the systematic review, reform and development of the law of NZ does not in its membership reflect the partnership of the Treaty of Waitangi. This body ought to be bicultural in its membership New Zealand law might then take into consideration both British law and Maori lore/law. If not it is another example of institutional racism. The wananga argued that we had a right and the Crown had an obligation to ensure that Maori be represented on such bodies as the Law Commission. Because of the central nature of their work such bodies require an appropriate Maori input.

4. RCSP and Other Bodies.

4.1 Besides the Law Commission, there were other such bodies, including the RCSP itself where the government has ignored the principle of partnership. The RCSP were urged to comment on the unfavourable way (to Maori) that the RCSP was set up, its terms of reference decided upon and the membership agreed to.

4.2 If rangatiratanga of Maori are not being allowed to be exercised because of Crown pre-emption, that is a violation of Maori rights. This was the basis of the Ngati Awa submissions to the Roper Committee on Violence.

5. The Treaty and All Legislation.

5.1 The Treaty of Waitangi should be addressable in all legislation. Because the Federation of Maori Authorities informed the government that the SOE Bill would be unconstitutional in respect of Maori rights, they agreed to insert the now famous Clause 9. Such a clause should be in all future legislation.

5.2 The power of the ruling group in our society inhibits others from questioning the assupmtions that underlie the rules. The evidence presented by the Maori Economic Development Commission on the extent to which negative funding occurs in NZ is incontravertable, but the assumption persists that the government is nonetheless right.

5.3 Maori people should stand their ground in solidarity and argue that only Maori can interpret the Maori terms of the Treaty, let the lawyers continue to argue the legal terms of the Treaty, the mana of the

Maori partner ought to ensure that they should likewise define and interpret the Maori side of the Treaty, it is the duty of the Crown, and an embodiment of the honour of the Crown, that it should keep its obligations to the Maori partner.

5.4 Maori people, the tribes and tribal authorities need a fair forum to which we can refer the Crown to its obligations, they cannot afford the cost of high court actions, apparently justice is more for the rich than for other NZers.

5.5 In respect of its unwillingness to recognise its obligations to the Treaty partnership the Crown was seen as not being honourable neither in its means nor in its ends.

6. The Status of the Partners - Who Are the Partners?

6.1 This wananga agreed with the general conclusions of the Wellington wananga that the non-Maori partner in the Treaty was confused by the 1852 Constitution Act (and the failure of the settler government to implement clause 71 Of that act) also the 1927 and 1947 Statute of Westminster where the liabilities of the British Crown were transfered to the New Zealand Parliament.

6.2 It appears to suit the New Zealand government to have NZers believe that the other partner comprises all Pakeha and even all Non-Maori, thereby shirking the Crown's responsibility by diffusion, engendering uncertainty, friction between Maori and Pakeha, unrest and a possible 'white backlash'. On the other hand, if the Crown is seen as the other partner rather than all Pakeha people it takes the responsibility for redress away from the Pakeha people those who benefit most from the Crown's reluctance to implement the partnership of the Treaty partners.

6.3 While the Crown is often refered to as the central government, the Crown must also include the delegated regional and local authorities that receive Crown financing or the authority to raise finance locally through legislation. The obligations or duties of the Crown ought also to rest on such bodies as Hospital Boards, Catchment Authorities and County Councils.

7. Devolution of Crown Obligations.

7.1 With the prospect of extensive privatisation of Crown functions and responsibilities, then if the partner is the Crown and the Crown divests itself of a wide range of responsibilities to the private sector, then the obligations of the Crown under the Treaty will cease to apply to privatised duties and functions. It was the view of participants that there is nothing in the Treaty of Waitangi that would permit the Crown to retreat from the guarantees that it entered into.

7.2 From whom would Maori seek legal and administrative redress after such actions of devolution or privatisation had occured? If the the weight of Maori and Pakeha opinion rests on a belief that the partners are the Maori tribes and the Crown (government of New Zealand) then that is also an arguement against privatisation.

7.3 The wananga agree that the reliance placed by the state on "the Principles of the Treaty" rather than on the words themselves, diminished the ritenga and tikanga Maori which are clearly embodied in the Treaty. Further, such reliance allows the monocultural judiciary to determine and interpret the principles, thereby diminishing the rights guaranteed to Maori by the Treaty

8. The Treaty as Supreme Constitutional Instrument.

8.1 While it was generally agreed that an amendment to the Acts Interpretation Act to ensure that all legislation complied with the Treaty of Waitangi would provide the constitutional safeguard that Maori seek, it was also recognised that such a simple course of action would not last long because of the widespread effect it would have on rendering inoperative much of the existing legislation.

8.2 According to the participants of this wananga, what was needed was for the Treaty of Waitangi to be recognised as the supreme constitutional instrument in New Zealand. That should be the long term aim of both partners to the Treaty, because without that recognition neither the guarantees nor the honour of the partners could ensue.

9. The Obligations of the Maori People under the Treaty.

9.1 There was some discussion on the extent to which protest by Maori against the Crown's lagging responsibility might be interpreted as failing to uphold the duty of loyalty to the Crown which is stated in Article 3. Is protest legitimate under the terms of the Treaty? It was generally agreed that loyalty was a mutual obligation, as most of our protest was against the Crown's disloyalty to Maori people.

9.2 There appears to be no real conflict between the terms of articles 1 and 2: while the former gives away governorship, the later preserves rangatiratanga. Rangatiratanga implies the in alienable right to make policy (either unilaterally in respect of their land, villages and treasures, or in partnership with the Crown in respect of other things, whereas, governorship implies

the right to impliment policy and the day to day running of national affairs, good order, etc. Any lessening of those rights can only occur with Maori consent, but if the other party changes Maori rights unilaterally then they are illegally usurping otherwise inalienable rights.

9.3 If descendants of the Maori Treaty partners wished to exercise all the individual rights of British subjects, then they should be able to do so, as guaranteed in Article 3, nonetheless this wananga argued that if people claim to be Maori, then the collective rights of the Maori must have precedence in their actions. If they want to exercise their individual citizenship rights then they must adopt tikanga Pakeha and must subordinatetheir group rights. This group argued that all things being equal, tikanga Maori should take precedence over tikanga Pakeha.

9.4 Further, in a response to a question about rights; does the emphasis on collective rights and responsibilities implied in tikanga Maori (itself guaranteed under the Treaty), mean for example that Maori would not receive individual payments for National super, but that they should be made to the Iwi authority who would then determine the allocation of such resources? The group were of the view that Maori are not required as individuals to relinquish all individual rights but that the Treaty re-emphasises the collective responsibility of Maori. According to some, Maori have extra responsibilities over and above the responsibilities of the Pakeha, because Maori have extra loyalties, while Maori may have extra rights, in respect of the guarantee of rangatiratanga, there is a clear understanding of the extension of such rights to extra responsibilities for the common good of whanaunga, hapu and iwi membership.

9.5 In the same way, the wananga argued that not all Pakeha rights are individual rights, they too have collective responsibilities, the difference between the two are that the Pakeha has the state to exercise most of their collective duties, and Maori do not. Under the environmental protective legislation for example there are ways that the Pakeha can implement restrictions on access or yields from sea of forest areas, but nothing that gives statutory recognition to the right of hapu or iwi to impose a rahui or tapu on land or coastal areas. The laws are structured as an expression of the Pakeha side, not as an expression of partnership and Maori rangatiratanga.

9.6 The Crown has demonstrated the Pakeha collective responsibility in many ways, the evidence of negative funding is one such way. It was observed that a collective responsibility without a collective commitment almost invariably turns out to have negative consequences.

10. Partnership and Good Faith:

10.1 It was agreed at the wananga that partnership and the principle of utmost good faith do not take precedence over the guarantees of Article 2 but are themselves the mechanisms or processes by which the guarantees should be kept, there is no question that the principle of partnership should not be used by either Treaty partner to diminish the guarantees of article 2. It was agreed that the more we sucome to analysis of the principles of the Treaty the more we are likely to play into the hands of the unwilling Pakeha partner. While the government has the initiative in introducing new terms and conditions, they effectively take the high-ground. If the Maori wish to gain greater control over Treaty issues they need to take further initiatives themselves.

11. Jurisdiction of the Maori Land Court.

11.1 The judicial system in NZ has failed the Maori people, it was set up under kaupapa Pakeha to protect Pakeha property rights (cf the differences between offenders legal aid and civil legal aid). Likewise the Maori Land Court was set up to alienate Maori land, only in recent years has the Maori Land Court been able to respond to Maori wishes, this is partly because half of the present judges are Maori, and they have been able to reorientate the thinking of their fellow judges. In the Children and Young Person's courts the emphasis has been on getting control of our Maori children, and taking that control from their parents. In the District Courts the emphasis has been to take responsibility and control away from the family and hapu and place it in the penal system. The existing judicial system exhibits outcomes that are far from favourable to Maori and the level of Maori input permitted is negligible.

11.2 Were the Maori Land Court to be expanded in jurisdiction to take responsibility for the future of our children, it would do so through whanau based concilliat-ion rather than judgement. This would return to the Maori Land Court and Maori people some of the powere which they used to exercise. In a conciliatory process rather than an adversary process, the MLC would not require judges to decide all cases but rather to act as advisors to the concilliation process, most of the work could be done by competent officers and the family members themselves.

11.3 While this process could not be achieved overnight, a step by step approach, with clear long-term goals would be a valid approach. If a hapu wanted to treat their children in the existing District court system they would have that right to chose, but the decision should be for the hapu to make, not the police or other arm of government. The extension of Maori Land Court jurisdiction proposed here would require

appropriate resourcing to be effective but it would be a considerable advance on the existing processes of matua whangai involving hapu members in domestic violence, incest and sexual abuse cases. Judge Hingston agreed to make a paper available on this topic to the RCSP.

12. Maori Political Representation:p

12.1 It was generally agreed that constitutional arrangements with an Upper House of 50-50 composition would be more likely to succeed than one which had soley Maori members. The latter could be ignored by the mainstream. With such an upper house, the lower house should as now be based on pro-rata representation of Maori and General electorates.

12.2 Maori representation on existing policy-making bodies is woefully inadequate despite the fact that the majority of the sacred and historical places and buildings registered with the historical places trust are Maori, there is but one Maori on the Trust, yet at least 70% of their work relates to Maori people. Until recently there was no provision for Maori to be represented as of right on the Auckland City Council, the Auckland Regional Authority or the various United Councils, In the Bay of Plenty United Coucil region, there are still extensive Maori land holdings but no representation on the Authority, such a system is unacceptable to the Maori view of partnership.

12.3 Many Maori argue that any changes that will affect them need to be subjected to the will of the people, while this process is not always feasible, absolutely no Maori input or part in policy making is even less acceptable. Maori representation must be fair, certainly not with Maori in a purely an advisory role with no ability to make final decisions.

12.4 Maori representation needs to be clear at all levels of government, both central regional and local, such authorities as Education Boards and Regional Health Boards should have appropriate Maori membership to demonstrate the principle of partnership, and a joint Maori-Pakeha commission could be established to ensure that Maori political and policy interests are accounted for. While the Waitangi Tribunal has the power to scutinise any legislation refered to it to see if it complies with the Treaty, in fact no legislation has been refered to it under this provision, and the tribunal does not have the human resources to be able to deal with such referrals promptly.

13. Waitangi Tribunal Proposal.

13.1 There is a suggestion being aired that the status of the Chairman of the Waitangi Tribunal should raised and that the chairman be a High Court Judge. There is a proposal being considered at present to increase the Tribunal membership to sixteen and the Tribunal to

operate in divisions, handling more than one claim at a time. Whatever happens to the status and composition of the Treaty of Waitangi Tribunal its greatest strength lies in its high ethical standards, the meticulous way in which it investigates and reports, and the use of Pakeha legal ethics which reduces the possibility of unwarrented criticism.

14. Devolution of Authority to Iwi.

14.1 The Department of Maori Affairs was originally set up to benefit the settlers, not the Maori. It did a good job of alienating Maori land and assimilating Maori people through pepper-pot housing and employment programmes. Now that Maori resources are so few, the control of the Department and its functions has been pased back to the Maori people. The wananga agreed that the quality of the services provided by DMA was woeful, Maori people are entitled to a service of quality and the present service falls far short of that. Some of the functions being diverted to Iwi authorities require consultation and mutual agreement before the act, but instead Iwi authorities are often faced with fait accompli. The DMA does not have the trained human resources or the financial resources to meet our needs as a people, most Iwi authorities expect that as devolution proceeds, the lack of resources to transfer to Iwi will be more evident and even more difficult to redress.

15. Treasury and Government Management.

15.1 The wananga agreed that the Treasury statement on Treaty of Waitangi issues needs to be read in its entirety, from the Maori perspective, exclusive rights to land, villages and taonga imply the resources to exercise those rights should not be withheld. Criticism of the Treasury statement was considerable, it was seen as a mataku (fear) response document, it was seen as being exclusively based on a Pakeha view of the Westernisation of the World and the supremacy of the capitalist mode of production. No Maori were involved in its writing, and it would appear to be in breach of the Treaty. The wananga asked the RCSP to refer the Treasury Statement on Government Management to the Bill of Rights Monitoring Group and to the Treaty of Waitangi Tribunal to see whether those bodies agree with its compliance with the provisions of the Treaty of Waitangi.

16. Privy Council.

16.1 If the right to appeal to the Privy Council were removed from the New Zealand judicial system that could be seen as a direct breech of the terms of the Treaty of Waitangi. At present a claimant has a right to apply to the Privy Council after the Maori Appelate Court, if this specific right were removed without consultation and agreement from Maori people it could constitute a breech of good faith.