8

INFLUENCE ON THE WAITANGI TRIBUNAL

Hon Judge Carrie Wainwright

The Waitangi Tribunal is a unique feature of New Zealand's polity. We are unique not only in New Zealand, but in the world. Such uniqueness could make an institution feel special and wonderful, or alternatively just strange. We are a bit of both, perching perilously between the judicial and political spheres of public life, inhabiting neither fully nor comfortably, but contributing in various ways to both.

As a Māori Land Court judge, I am an ex officio member of the Waitangi Tribunal. Since my appointment nearly seven years ago, I have worked on two district inquiries of the Tribunal, focusing mainly on Māori claims that historical acts and omissions of the Crown breached the principles of the Treaty. The interlocutory and hearing stages of district inquiries take place over a couple of years, and then it takes another couple to write the report. These historical claims are an area of work where the Tribunal's relationship with the government is fairly well worked out. This and previous governments have substantially signed up to the idea that they will accept most Tribunal findings about past breaches of the principles of the Treaty by the Crown. Remedying the breaches of the past is the work of the Office of Treaty Settlements, which operates a Treaty settlement process established by the National governments of the 1990s, and continued by the current Labour administration.

Contemporary claims are, however, another thing entirely. In fact, the Waitangi Tribunal was established in 1975 precisely to look into claims about the compliance of governments of the present day with

Treaty principles. Back then, the Tribunal had no power to look backwards and judge the historical actions of the Crown. Legislation in 1985[122] changed that, though, and since then the bulk of our work has concentrated on historical claims.

I think that people have lost sight of that original contemporary focus of the Tribunal. Now, it is not uncommon to find expression of the view that the past is the Tribunal's proper province.[123] Claimants do not accept this view, though. They regularly apply to the Tribunal for urgent inquiries into matters of current policy.

I have presided over five substantive urgent inquiries of the Tribunal since I was appointed,[124] and over many more interlocutory considerations of whether or not the Tribunal should inquire urgently into a contemporary claim. Most applications for urgency are declined. Apart from the Tribunal's 2004 inquiry into the Crown's foreshore and seabed policy, the urgent inquiries I have presided over have concerned the Crown's Treaty settlement policies. Typically, hearings for urgent inquiries last no longer than a week, and the Tribunal reports within a few months. Most recently, I led the Tribunal that inquired into the process the Crown followed to reach an agreement in principle to settle the Treaty claims of Ngāti Whātua o Ōrākei. We had a hearing in March, and the Tribunal reported earlier this month.

It is in inquiries of this kind that the intensely political nature of what we do is to the fore. We hear evidence from officials about policies and practices that are the subject of decisions by the government currently in office. We consider the evidence, and make findings about what we have heard in light of the principles of the Treaty. Then we make recommendations.

The Tribunal is not a court, and cannot make binding decisions.[125] If

---

[122] The Treaty of Waitangi Amendment Act 1985 allowed the Tribunal to look into acts and omissions of the Crown dating back to 1840.

[123] This view was perhaps most recently expressed by Dr David Williams in the New Zealand Herald on 20 June 2007, in relation to the Tribunal's *Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).

[124] Waitangi Tribunal, *The Ngāti Maniapoto/Ngāti Tama Settlement Cross-Claims Report* (Wai 788, Wai 800, 2001); Waitangi Tribunal, *The Ngāti Awa Settlement Cross-Claims Report* (Wai 958, 2002); Waitangi Tribunal,*The Ngāti Tūwharetoa kia Kawerau Settlement Cross-Claim Report* (Wai 996, 2003); Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004); Waitangi Tribunal, *The Tāmaki Makaurau Settlement Process Report* (Wai 1362, 2007).

[125] The Tribunal is empowered to make binding decisions to transfer to successful claimants Crown forest land and properties that were transferred from the Crown to state-owned enterprises, and have memorials on their certificates of title to this effect. See Treaty of Waitangi Act 1975, ss 8A-8I.

it considers a claim to be well-founded, it may recommend to the Crown what action it thinks should "be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in future".[126]

The *Tāmaki Makaurau Settlement Process Report* was the first in which the Tribunal recommended to the government that it call a halt to its proposed settlement. Naturally, a recommendation of this kind causes political reverberations, and is unlikely to be welcomed by a government whose officials conducted the negotiation, and whose Cabinet confirmed the offer.

What does a recommendatory body like the Waitangi Tribunal do in such a situation? It simply produces the best, most compelling report it can. It relies on the good sense of politicians to read what the report says, and to take heed. In each Tribunal report, we must identify in what ways the Crown's acts or omissions have breached the principles of the Treaty.[127] This involves setting out the relevant principles, and applying them to the facts of the case.

It was only last month that I was writing the "Ngā whakaaro mō te Tiriti/Treaty breach and prejudice" chapter of the *Tāmaki Makaurau Settlement Process Report*. Looking through the authorities, I was struck by one thing. The most compelling articulation of Treaty principles is still the *Lands* case.

In the report, I quoted Justice Richardson where he said:

> The responsibility of one Treaty partner to act in good faith and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant fact and law to be able to say it had proper regard to the impact of the principles of the Treaty.[128]

This was entirely apposite to the situation on which we were reporting, where we considered that the Crown had made an offer of settlement to Ngāti Whātua o Ōrākei without knowing enough about the claims and interests of the other Auckland tangata whenua groups. We characterised this as a failure on the Crown's part to fulfil its duty to act reasonably, honourably, and in good faith.

---

[126] Treaty of Waitangi Act 1975, s 6(3).

[127] Treaty of Waitangi Act 1975, s 6(1).

[128] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 682 (commonly refered to as the *Lands* case).

The Tribunal's inquiries into contemporary claims on the basis of urgency have much in common with judicial review proceedings. As in judicial review cases, the applicants' complaint is essentially that officialdom has treated them unfairly, and with adverse consequences. Judicial review is usually only available where somebody has exercised a statutory power, but Māori claimants can come to the Tribunal where officials have acted otherwise than pursuant to statute. Typically, officials' actions are part of an exercise of executive power. They are therefore not able to be judged ultra vires by a court, but they can be judged inconsistent with the principles of the Treaty of Waitangi by the Waitangi Tribunal.

The principles of the Treaty are the Tribunal's source of legal authority to assess Crown conduct. These are of course different in name from the principles of fairness and reasonableness that courts use to review administrative conduct. In practice, though, they are often not very different in effect. Why is it that the principles of the Treaty are invoked, rather than its terms or provisions? It is often assumed that the idea of the 'principles' was a means of going to the nub of the Treaty, bypassing debate about the meaning and effect of the textual differences between the Māori and English versions.

I think the necessity to distil principles arose from a more fundamental problem. The Treaty was a document of its time. It prefigured a colonisation process that was only just beginning. In the event, the activities mentioned in the Treaty did eventuate, but not in the way that was envisaged. Māori did not get to sell only the land they wanted to sell, and ultimately they had little land left. This meant that the guarantee of te tino rangatiratanga was more or less a dead letter. If the Treaty guaranteed the absolute authority of chiefs to be chiefs, but the landholdings over which they held sway had been substantially dissipated, what then was the substance of the guarantee?

Focusing on the principles was a way of distilling from the Treaty for the purposes of race relations in the twentieth century some fundamental notions about the rights of indigenous people. In the realpolitik of the twentieth century, the renewed focus on the Treaty was a response to Māori insistence that it not be relegated forever to obscurity – as, really, it had been for the century that spanned the years 1870-1970.

In effect, the principles act as a kind of estoppel. It would be available to the Crown to say, if the focus were on the terms of the Treaty, that as the activities that the Treaty was designed to control – the taking of sovereignty by the Crown, and the protection of the rights of chiefs in their own lands – are of the past, it has no contemporary

relevance. The concentration on the principles underlying the giving and taking of rights in Articles 1, 2 and 3 prevents the Crown from benefiting from its own misdeeds. It is a recognition that, in the critical years of the nineteenth century when governments supported the aspirations of settlers who wanted land on any terms, scant regard was paid to the protections of Māori interests inherent in the Treaty's terms. It would be wrong if, having obtained the landholdings over which the chiefs formerly held sway by disregarding the Treaty, the Crown were allowed to deny that the Treaty has anything to say in our current times. I think this is implicit in Justice Cooke's judgment in the *Lands* case.[129]

Making the Treaty meaningful again in the last decades of the twentieth century was of course primarily a political exercise rather than a legal one. Invoking the 'principles' in legislation was a neat way of achieving this – but ran the risk of lacking hard edges. Defining 'principles' in terms of the Treaty is susceptible of being seen to be at the woolly end of the continuum where the austerity of tabulated legalism sits at the other extreme.

One result of the intervention of the Court of Appeal in the *Lands* case was that it rescued Treaty jurisprudence from the possibility of the principles being seen as endlessly fluid and captive to a group of biased do-gooders like those of us on the Waitangi Tribunal.

Everyone knows that the Court of Appeal is inhabited by clever, hard-nosed lawyers (in those days all men). These are the foot soldiers – or perhaps more appropriately the generals – of legal orthodoxy, the rigour of whose scrutiny cannot be doubted. Their foray into defining the principles of the Treaty gave the whole "principles" endeavour the imprimatur of soundness and cogency. For this, those of us on the Waitangi Tribunal, trapped in that shadowy nether world between law and politics, are eternally grateful.

We might have hoped that, in the twenty years since the *Lands* case, things had moved on. But really they have not – or, at least, not in ways that are easily measured. Change of this kind is perhaps always slow. Or perhaps, being part of the process of change, we lose perspective on what has happened because it is still happening.

For me, the *Lands* case remains the high-water mark of insistence by the courts on an enduring place for the Treaty in New Zealand society.

---

[129] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641, especially at pages 653-654 and 655-656.