# *Quakers*

The Religious Society of Friends - Aotearoa/New Zealand
*Te Hāhi Tūhauwiri*

Yearly Meeting of Aotearoa/New Zealand

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Submissions
Secretariat, Constitutional Advisory Panel
c/o Ministry of Justice
DX SX10088
Wellington

*Peace requires justice. Justice requires law. Law requires government, not only within nations, but between nations.*
Paraphrased from William Penn, 1693 (Quaker founder of Pennsylvania)

**SUBMISSION: TREATY-BASED CONSTITUTIONAL ARRANGEMENTS**

**Summary**

This submission addresses the topic in the Constitutional Advisory Panel's terms of reference regarding Crown-Māori relationships.

Some initial comments are made about Quakers' experience with the current review of constitutional arrangements and we conclude that processes need to be developed to encourage ongoing citizen participation in the consideration of this critical aspect of the life of the nation.

The submission then outlines Quakers' views of;

- the values we consider need to underpin the constitutional arrangements of Aotearoa/New Zealand,
- the outcomes we consider need to be achieved by the constitutional arrangements and finally
- some examples of possible arrangements that might achieve those outcomes.

The last part of the submission answers the Panel's question as to why we hold these views and then concludes with some recommendations.

The fundamental issue in Crown-Māori relationships in our view is the need to build a constitutional relationship between hapū and iwi and the Crown based on the guarantee of the continuance of tino rangatiratanga and self-determination in Te Tiriti o Waitangi.

## Introduction

This submission has been prepared by the Treaty Relationships Group of the Religious Society of Friends (Quakers) Yearly Meeting of Aotearoa/New Zealand following structured discussions in our Society over the past 2 years since the Government announced the review of constitutional arrangements and published the terms of reference.

The Treaty Relationships Group, in conjunction with Peace Movement Aotearoa, developed a framework to give structure and purpose to those discussions. We sent a copy of that framework to the Constitutional Advisory Panel (the Panel) on 20 December 2011.

Whilst this submission focuses on Te Tiriti o Waitangi (Te Tiriti), the framework for discussion that we used in the Society led to consideration of many other aspects of our constitutional arrangements. Other Quaker groups will be making submissions on these other aspects.

This submission therefore addresses the topic in the Panel's terms of reference regarding Crown-Māori relationships. The submission does not however, address the questions posed by the Panel in its Submission Guide. The predominant focus of those questions, such as the ones on Māori representation, is how to encourage greater Māori participation in the existing Westminster-style political system and institutions. Our submission, in contrast, addresses the issue of the Crown-Māori relationships at a fundamental level and argues for a return to relationships based on Te Tiriti.

We make this submission as a predominantly Pākehā group concerned about our future as a nation if the indigenous peoples of the land continue to be marginalized. Our national body, the Yearly Meeting, has recorded over many years its commitment to constitutional change based on our concern about the injustices that the present arrangements impose on Māori.
The most recent public statement was in 2008 following the enactment of the Foreshore and Seabed Act 2004, the provisions of which breached Te Tiriti and the Bill of Rights Act. Yearly Meeting adopted the *Statement on Constitutional Change* which includes the following:

> For nearly 170 years Māori have attempted to address their concerns by using the legal systems and processes of the nation with tenacity and patience. Our observation is that the majority of these systems have failed to safeguard the basic rights of Māori as tangata whenua. Majority decision making has continued to oppress and control.
>
> We reaffirm our Statement on Bicultural Issues in 1989 and in particular our acknowledgement that honouring the Treaty of Waitangi would involve "…giving up by Pākehā of exclusive decision-making in the institutions of society." We are now clear that the way to achieve this is through constitutional provisions.

It is therefore our view, that Te Tiriti must be central to any consideration of our constitutional arrangements and that future constitutional provisions must be based on Te Tiriti, its spirit and its intent.

## The challenges posed by the review process

As Quakers considered how to contribute to the review of the constitution, we found the task difficult.

Unlike many other countries, our constitutional arrangements do not contain statements of values, or aspirations.

New Zealand's constitutional arrangements are to be found in numerous pieces of legislation, court decisions, legal instruments and conventions, and address legal and political institutions, structures, processes and procedures in a manner that makes them difficult for ordinary New Zealanders to understand. We think that this inaccessibility acts as a deterrent to citizen participation in considerations of our constitutional arrangements. It is easy to conclude that such matters are best left to legal and constitutional experts. This is of concern in a democracy, which by its nature, can only flourish when the citizens are informed and participate fully.

Quakers have a strong conviction that constitutions are too important to be left to technical experts. Broad citizen participation is critical in determining constitutional arrangements that reflect and enhance the unique cultural and social environment and contribute to an evolving sense of national identity. Broad participation is also likely to encourage a wider base of understanding and sense of common cause in the community.

Through our thinking about how to engage in the conversation we created a framework, in conjunction with Peace Movement Aotearoa, that helped us understand the relationship between the values we hold, the outcomes we aspire to, and particular constitutional arrangements. We set out an explanation of the thinking behind our framework in an earlier letter to the Panel. Subsequently the framework has been published in a modified form by Peace Movement Aotearoa as a resource to encourage community discussion.

We are concerned at the current paucity of civics education in New Zealand, despite recommendations by the Constitutional Arrangements Committee that reported in August 2005. Specifically, the Committee noted the need to foster public understanding of New Zealand's constitution, and recommended improving civics and citizenship education in schools. We think these recommendations continue to be relevant and that the framework we have developed would be a useful tool to facilitate ongoing discussion of our constitution.

## Results from our discussions

The framework we developed for Quakers, structured our discussions around three levels:

- Firstly, the core values on which constitutional arrangements should be based i.e. *why* are particular constitutional arrangements needed?
- Secondly, the outcomes, aspirations or vision i.e. *what* we want constitutional arrangements to achieve?
- Finally, the constitutional arrangements (legislation, structures, processes, institutions etc) i.e. *how* our aspirations could be achieved

*Values*
The core values that we believe should underpin the constitutional arrangements in regard to Te Tiriti are:

- Equality of all people.
- Respect for all people in their diversity.
- Integrity.
- Justice and fairness.
- Peace.

These values reflect our Quaker beliefs, which are briefly explained below. They are values that we consider will find wide support.

*Aspirations (outcomes)*
Given these core values, the outcomes in relation to Te Tiriti that we would want to see achieved by constitutional arrangements are:

- Right relationships between Tangata Whenua (Māori) and Tangata Tiriti (all others) as envisaged in Te Tiriti.
- Hapū and iwi self determination (rangatiratanga).
- Ongoing honouring of commitments made in Te Tiriti.
- Culturally rich and diverse communities.
- Peaceful resolution of differences and disputes.
- Inviolable protection of human rights.

*Constitutional arrangements*
We generated some suggestions for constitutional arrangements that might achieve the outcomes we identified. We are aware that some of our suggestions may have relatively minor effects and could be seen as steps toward the fundamental constitutional change we envisage is required.

These suggestions need to be properly analysed to identify which ones will most effectively achieve the desired outcomes. As we stated in our letter of 20 December:

> Expert analysis is critical at the level of the "how" of constitutional arrangements because it is our experience that when subjected to such expert analysis, apparent solutions at this level may have unintended consequences that may even subvert the intent of the lay proposer. The requirement for both creativity in expressing the vision and aspirations, and technical skill in crafting the arrangements, reinforces the need for involvement of both lay people and experts.

Furthermore it is critical that any constitutional arrangements that are designed to give effect to Te Tiriti are developed through a process of consultation and negotiation between Government and hapū and iwi.

With those caveats, we offer the following ideas for possible constitutional arrangements:

- A legislative framework based on Te Tiriti, for negotiated power-sharing agreements with hapū and iwi.
- Co-governance arrangements at local level.
- A bicameral Parliament with a Treaty-based upper house.
- An independent political body such as the Legislative Council of former years perhaps called the Legislative Review Council with Treaty-based representation and a brief to ensure that legislation complies with Te Tiriti and the UN Declaration on the Rights of Indigenous Peoples.

- A Bill of Rights Act that is supreme law.
- A Tiriti o Waitangi Commissioner.
- A place in our constitutional arrangements where the shared values and aspirations of New Zealanders are expressed.

The rest of this submission will provide the background to our conclusions as recorded above. We have published the substance of this background information as a pamphlet and also submitted similar information to the Constitutional Arrangements Committee of 2005. We conclude with our recommendations to the Panel.

**Why we hold these views**

A fundamental belief in Quakerism is that there is "that of God" in everyone or, expressed in another way, every person has within them the unique quality of humanness. This belief commits us to a deep and overriding respect for all people. Springing from this core belief are our social testimonies, which are the outward expressions of our faith and have defined us as a community over the centuries. These include testimonies to peace, equality and integrity.

*Peace*
Quakers have refused to take part in war or preparations for war and resisted the culture of military values and the social and economic distortions which militarism causes. The peace testimony includes action against unjust structures of society, racism, the denial of human rights, and other forms of oppression, which are themselves forms of violence. Positively, Quakers have acted to end slavery, to relieve the suffering caused by war and oppression, to mediate between parties in conflict, and to promote community and worldwide economic and cultural development on a basis of self-determination and dignity.

*Equality*
Quakers believe each person has value and dignity, and is precious. Equality does not mean sameness and indeed treating everyone the same is to fail to respect the dignity of the person. Quakers work for equality in all areas of social, cultural, legal, political and economic life, rejecting unequal treatment on the basis of race, social status and any other grounds.

*Integrity*
Quakers endeavour to be honest and straightforward in speech and in all our dealings. Our word is our bond and we expect the same from others. We refuse to swear oaths as we consider this implies we are honest only under oath.

**Why we consider constitutional arrangements should be based on Te Tiriti**

The formal legitimacy of government in Aotearoa/New Zealand depends on either Te Tiriti (as Sir Geoffrey Palmer has said) or on a "revolutionary seizure of power" beyond (but not cancelling out) the promises of Te Tiriti (Simon Upton and Doug Graham, following the reasoning of Prof F N Brookfield). Their argument is that such a seizure of power, maintained over a long time and not successfully opposed, leads to a de facto partial legitimacy. An early example was Governor Hobson's claim to sovereignty over all tribal districts including those where Te Tiriti had not been signed. Such unilateral extensions of power are sometimes justified by changing circumstances and sometimes not, but they are essentially "might is right" arguments and therefore open to being challenged by counter-

revolutions, whether peaceful or not. The recent history of Israel and Northern Ireland makes us always aware of the risks involved in such strategies.

From a Quaker perspective, formal legitimacy cannot be based on a 'might is right' argument. As a matter of justice, fair dealing and keeping one's word, formal legitimacy must be based on Te Tiriti.

The political legitimacy of government rests on the consent of the people. If that is taken as simple majoritarianism, then a minority which has distinctive rights, concerns and interests, lives effectively in a tyranny of the majority, and cannot be expected to uphold that position. When that minority is indigenous, numbers some 15% of the population and is proportionately increasing, the nation cannot afford to be complacent about its own long-term prospects. Many world conflicts have arisen and continue to arise from just this kind of situation.

*The original Treaty bargain*

Te Tiriti enabled British and other settlers to establish themselves in Aotearoa New Zealand and to live here in peace under the protection and control of the British government. The corollary was that Māori would have their rights and interests recognised and protected, both as individual citizens (Article 3) and as members of hapū and iwi (Preamble and Article 2).

The rangatira who agreed to the Treaty were agreeing to Te Tiriti o Waitangi (the rendering of Hobson's English draft into Māori by Henry Williams) and that is what was signed by Hobson on behalf of the Crown.

There is nothing to suggest a significant transfer of power from the hapū to the Crown in Te Tiriti. The logic of what was said by the Crown's agents and by the rangatira at the time, suggests not a total indivisible sovereignty vested in the Crown but a quite different pattern, essentially a federal state.

The expected pattern was that the Governor would rule over the settlers as their tribal leader within the areas of land that would be made available to the Queen. Hapū would continue to rule themselves (tino rangatiratanga), something that was so obvious that it was still embodied twelve years later in Section 71 of the New Zealand Constitution Act 1852.

The clear implication is that Crown authority (kāwanatanga) and hapū authority (rangatiratanga) were both to be recognised, and that neither could disregard the other. If we had inherited a pattern of federal government like most other such settler colonies of our kind (Canada, Australia, United States), we would have less difficulty in grappling with this, as it is a form of federalism.

The United Kingdom has been moving in the same direction for some time, with the Scottish Parliament and the Welsh Assembly to supplement Westminster. This makes New Zealand governments' insistence (to date) on maintaining the notion of 'indivisible sovereignty' somewhat anomalous.

Article 2 of Te Tiriti guarantees to the hapū their political authority and autonomy (tino rangatiratanga), their economic base (their lands), and all their taonga. With those guarantees in place, the Māori world should have been secure as a permanent part of the

evolving nation. Tamati Waka Nene summarised the same issues when at Waitangi he clarified his expectations of the kāwanatanga: “You must not allow us to become slaves; you must preserve our customs; and never permit our lands to be taken from us”.

*‘A revolutionary seizure of power’*

Settler numbers were rapidly increasing from the estimate of 2,000 in 1840 to 59,000 by 1858, overtaking those of Māori according to that year’s census. The result was that the governments elected under the New Zealand Constitution Act 1852 consisted overwhelmingly of settlers for whom Te Tiriti had already been history when they arrived, and an unwelcome history at that. The hapū now had to deal not with a Governor but with shifting and basically unsympathetic governments. The vast majority of Māori were excluded from the vote by the requirement that voters should be individual property-holders, and the Kāwana, from having been a central and impartial authority, was co-opted into settler society well out of Māori reach.

Section 71 of the Constitution Act 1852 , providing for self-governing Native Districts, was never put into effect by the settler governments, so Māori and their hapū were excluded from recognition in local as well as in central government.

What followed was the systematic expropriation of Māori land through warfare, confiscation, the operation of the Native Land Court created to individualise title to Māori land and facilitate (one might say “force”) its sale, and other government measures. On the cultural front, a variety of laws and regulations sought to enforce the assimilation of Māori into settler society, with the measures taken against the use of te reo Māori in schools, even in the playground, as one key issue. Assimilation was an article of faith in the settler world, and remained government policy until the 1970s. Even by the 1880s, the tsunami of settlement had made the Māori world invisible to most New Zealanders except as an occasional embellishment and tourist attraction.

*The present situation*
Recent governments led by both major parties have recognised these injustices, and through settlements and the accompanying apologies have to some extent made reparation, but have not yet seriously tackled the constitutional issue of the relationship between kāwanatanga and rangatiratanga.

We note that the Treaty settlement with Tūhoe includes clauses that provide some degree of “mana motuhake” and this may offer one model for the future but would observe that, as it is used in this settlement, it is a limited form of rangatiratanga compared with that guaranteed in Te Tiriti.

The massive changes over the years since Te Tiriti was signed have made it impossible to imagine that we can return in a simple way to the original expectations of Te Tiriti. The challenge is to find ways to embody the spirit and intent of Te Tiriti in our constitutional arrangements. One guide to how this can be done for example, is the United Nations Declaration on the Rights of Indigenous Peoples.

It seems certain that to insist on a simple majoritarianism, without protection for the rights of minorities, and in particular for the indigenous people whose rights are guaranteed not only in Te Tiriti but also recognised to some extent in common law, will perpetuate the injustices of the past and will ultimately lead to strife.

Other nations face similar issues. Rather than follow the examples of Northern Ireland or Israel, we might take note of the examples given by Alison Quentin-Baxter in her chapter "The International and Constitutional Law Contexts", in *Recognising the Rights of Indigenous Peoples*, Institute of Policy Studies, 1998:

> Many countries have recognised group political rights as a legitimate way of meeting the concerns of particular groups which fear that they would be neglected or swallowed up if all the decisions were made by majority governments. Examples include Switzerland, the Netherlands and Belgium… Wherever possible, the group has been given autonomy in matters that concern it. Where autonomy is not possible because the interests of other groups or the state as a whole also have to be met, the necessary arrangements are required to be the subject of agreement, backed by a veto power…. [These] 'consociational' arrangements have proved a valuable safety valve, reducing tensions among different communities.

## Conclusion

Quakers consider that the legitimacy of government in Aotearoa/New Zealand must be based on Te Tiriti o Waitangi. That Treaty provided guarantees that Māori would have their rights and interests recognised and protected as individual citizens and as members of hapū and iwi. Current constitutional arrangements do not fulfil those guarantees but instead, the form of majoritarian government that is at the core of current arrangements perpetuates the injustices of the past.

We recognise that the many changes over the years since Te Tiriti was signed make it unlikely that we can return in a simple way to the original expectations of Te Tiriti. However, we must start with Te Tiriti and negotiate ways of fulfilling its guarantees in the modern context and for the future.

There are numerous examples internationally of constitutional arrangements that better protect the rights of particular groups. Alison Quentin-Baxter cites the example of Switzerland, which has a number of constitutional provisions to protect the interests of indigenous groups that originate in its Germanic, Frankish and Italian tribal past. Other examples are based on some form of federalism such as is emerging in the United Kingdom and we have nothing to fear in New Zealand from exploring similar options to find what would best fit the unique historical, political and social features of this country.

The key outcome Quakers seek from New Zealand's constitutional arrangements is the creation of right relationships between Tangata Whenua (Māori) and Tangata Tiriti (all others) as envisaged and guaranteed in the Te Tiriti.

## Recommendations

We recommend to the Constitutional Panel that:

1. Constitutional arrangements in Aotearoa/New Zealand must be based on Te Tiriti o Waitangi.

2. Constitutional arrangements must protect the rights of Māori as guaranteed by Te Tiriti. Crown authority (kāwanatanga) and hapū authority (rangatiratanga) must both be recognised.

3. A process of consultation and negotiation between the Government and Māori is required to establish the most appropriate ways of embodying the relationships envisaged and guaranteed in Te Tiriti, in the constitutional arrangements of this country.

4. The outcomes that constitutional arrangements need to achieve are:
   - Right relationships between Tangata Whenua (Māori) and Tangata Tiriti (all others) as envisaged in Te Tiriti.
   - Hapū and iwi self determination (rangatiratanga).
   - Ongoing honouring of commitments made in Te Tiriti.
   - Culturally rich and diverse communities.
   - Peaceful resolution of differences and disputes.
   - Inviolable protection of human rights.

In Peace and Friendship

Elizabeth Duke and Elizabeth Thompson
Co-clerks