Constitutional Conversation, Dr Susan Healy contribution

To Members of the Constitutional Review Panel

Tēnā koutou.

Thank you for the opportunity to enter this constitutional conversation. My particular interest is the place of and meaning of Te Tiriti o Waitangi in our constitution.

I am a Pākehā New Zealander who is passionate about our country. I believe that our relationships with one another and the land need to be based on what is truthful and right. My concern is that our country faces up to its constitutional history, because knowledge of this history is vital to informed conversation about the constitution. In particular, we must recognise the constitutional arrangements of hapū and iwi prior to the imposition of Crown sovereignty, acknowledge the falsity of the premise that Māori ceded their sovereignty to the Crown, and officially recognise the one authentic treaty, Te Tiriti o Waitangi.

My comments are based on research into the Crown's relationship with Iwi Māori and consideration of the evidence from the hearing of the Ngāpuhi Nui Tonu initial claim to the Waitangi Tribunal, which focused on He Wakaputanga o te Rangatiratanga o Nu Tireni (Declaration of Independence 1835) and Te Tiriti o Waitangi (1840). Since this is a conversation, I will not reference my comments as in an academic piece of work. I am happy to provide fuller references if requested. In general, I will use "Māori" as shorthand for hapū and iwi, as well as for Māori people as a whole.

The starting point for my observations is the background you provided in "The Conversation So Far", which is probably a fair resumé of current liberal thinking about the constitution. I will refer to this as the "Backgrounder".

Points are made are under the following headings.

1. The need to appreciate the historical sources of the right to govern
2. Te Tiriti o Waitangi is the one authentic treaty
3. "Single, undivided sovereignty" fatally undermines "Treaty partnership"
4. Exclusion and racism in our constitution
5. Shared power and government

Each section opens with a general observation, followed by a number of points, and ends with recommendations as to what needs to happen. Summary reflections are italicised.

1. The need to appreciate the historical sources of the right to govern

General Observation
The Backgrounder lacks an outline of the history of New Zealand's constitutional arrangements and, in particular, fails to pinpoint clearly the historical sources of the present Government's right

to govern. Knowledge of the country's constitutional history is vital to informed discussion about our constitution.

Point 1.1
The Backgrounder is written for the general public. The section on "Our Constitution" (pp. 7ff.) does not show the historical basis for our present constitution. The New Zealand Constitution Act 1852 is not even mentioned. The fact that this Act was put in place by the British (Imperial) Government and was modeled on the British governing system is not stated. Nor the fact that Section 71 of this Act did at least allow for Māori self-governing areas.

Constitutions have histories. Knowledge of the history of a constitution is essential to informed constitutional conversation.

Point 1.2
The Backgrounder completely ignores the constitutional arrangements of the Māori world: history, philosophy and practice. Yet, these are the indigenous constitutional arrangements of our country, long preceding any systems introduced by the British. Information about these arrangements can be found in the writing of Moana Jackson, some writing by Sir Edward Durie, evidence given to the Waitangi Tribunal, and in *Ngāpuhi Speaks*.

A constitutional conversation becomes enormously enriched when there is real dialogue between peoples coming from different constitutional traditions. What is more, there is enormous ignorance and prejudice in much of the Pākehā world about the traditional systems of Māori government. These systems are based in local participation, consensus decision-making and the face-to-face accountability of leaders to their people: many things people in our contemporary world are asking for. Too often we hear uninformed but vocal people writing off the Māori systems of government as "undemocratic".

Point 1.3
The Backgrounder does not mention He Wakaputanga o te Rangatiratanga o Nu Tireni (the Declaration of Independence). It was through He Wakaputanga that New Zealand gained international recognition as a sovereign nation. Although the mana (sovereignty) of hapū and iwi existed without the declaration, He Wakaminenga (the United Assembly of Hapū) made the written Declaration in order to advance the developing international interests of the hapū.

He Wakaputanga clearly shows the thinking and intentions of the rangatira (Māori leaders) leading up to the signing of Te Tiriti (*Ngāpuhi Speaks*, 4.3). It provides an essential context for understanding Te Tiriti; without this context the articles of Te Tiriti can be and have been misunderstood.

Through He Wakaputanga (the Declaration) New Zealand was internationally recognised as an independent Māori nation. This declaration set a crucial political and ethical basis for the accommodation of foreign (that is, non-Māori) authority. Failure to acknowledge He Wakaputanga and its constitutional significance is undermining to the mana of Māori, and does a disservice to us all by suppressing an important part of our country's history. An understanding of the terms of He Wakaputanga is essential to a correct appreciation of terms used in Te Tiriti o Waitangi.

Point 1.4
The Backgrounder says: "The New Zealand constitution increasingly reflects the fact that the Treaty of Waitangi is "regarded as" a founding document of government in New Zealand".

I am wondering why the words "regarded as" are used? This seems to diminish the fact that the Treaty *is* a founding document of government in New Zealand. The awareness of that fact is not anything recent. Lord Normanby, Captain Hobson and other British officials in 1839 knew that Māori assent was needed for the British Crown to have legitimate authority in New Zealand (*Ngāpuhi Speaks*, 5.2, citing Dr Paul McHugh and others). That was why the Crown negotiated a treaty with Māori.

It is true that Hobson chose to interpret Māori assent to the Treaty as a "cession of sovereignty". His interpretation was a myth of convenience, tailored to suit British imperial interests. The early Governors and Parliaments reinforced the notion of "cession of sovereignty" to justify their authority.

There is one positive thing about the colonisers' "cession of sovereignty" claim: it contains an acknowledgement that their right to govern came from Māori assent.

Recommendation
That a panel of Māori and non-Māori experts is commissioned to draw up a text outlining the history of the constitutional arrangements of this country. And that this text:

- explains the values and cultural histories that inform the differing Māori and British-heritage constitutional arrangements;
- includes an authentic account of He Wakaputanga o te Rangatiratanga o Nu Tireni (1835 Declaration of Independence), that is, one based on reliable Māori sources;
- highlights the foundational basis of He Wakaputanga in allowing for non-Māori participation in government;
- is unambiguous about the place of Te Tiriti o Waitangi as a founding document of national government in New Zealand;
- becomes a basis for wide-ranging education about government in New Zealand and its constitutional history.

2. Te Tiriti o Waitangi is the one authentic treaty

General Observation
The time has come for accuracy about the treaty agreement assented to by Māori. This is Te Tiriti o Waitangi.

Point 2.1
The Backgrounder slides round the issue of the treaty text, merely noting (p. 36) "Because of the difference between the two texts of the Treaty [principles have been distilled]". This could be interpreted as accepting that the "English text" is as valid as the "Māori text", which is not correct. The evidence given to the Waitangi Tribunal in the hearing of the Ngāpuhi Nui Tonu initial claim

made it very clear that the rangatira who assented to the treaty were agreeing to Te Tiriti o Waitangi (*Ngāpuhi Speaks*, 4.3, 4.4). Moreover, the document signed at Waitangi by the rangatira and Hobson was Te Tiriti o Waitangi. Hobson always held to the fact that this was the most significant signing. British official sources referred to Te Tiriti as "The Treaty" and the English version as "Translation".

Māori assent is fundamental to the legitimacy of the right of the Crown to govern. Māori who signed the treaty assented to Te Tiriti o Waitangi.
At the Ngāpuhi Nui Tonu hearing, evidence from Māori and Pākehā sources showed that there is one authentic treaty, that is, Te Tiriti o Waitangi (Ngāpuhi Speaks, 4.3).

Point 2.2
Te Tiriti o Waitangi and the Crown's English-language version are irreconcilable on how the powers of government were to be held after the signing of the treaty (*Ngāpuhi Speaks*, 4.3.5). In Te Tiriti, the paramount authority (te tino rangatiratanga) of the rangatira and hapū is affirmed and protected. The Queen's governor is granted the right to exercise a limited authority over British subjects. Contrary to this, the English-language version states that Māori cede their sovereignty to the Queen.

It is intellectually dishonest to pretend that the Crown's English-language version of the Treaty is equivalent to, or reconcilable with, Te Tiriti o Waitangi. And yet this is what has been happening in official circles since at least the 1970s. The effect is to obscure the issues around Crown authority vis-à-vis the authority of hapū and iwi and Māori as a whole.

In its brief to inquire into breaches by the Crown of the Treaty promises, the Waitangi Tribunal is required to work from the Māori and English texts of the treaty. The inherent contradiction in the texts has meant that the Tribunal has been constrained in its efforts to pronounce on issues of authority, rights to govern and rights to manage resources. This has meant the Tribunal has been unable to address some of the underlying causes of injustice to Māori and, thus, hampered in fulfilling its mandate.

Te Tiriti o Waitangi needs to be officially recognised as the one authentic treaty.

Point 2.3
Experts presenting evidence at the hearing of the Ngāpuhi Nui Tonu initial claim were consistent in their view that it was philosophically, legally and culturally impossible for rangatira to cede their mana (sovereignty) and that of their hapū (see quotes below from *Ngāpuhi Speaks*, 4.1, and further explanation in 4.2.4):

> For the Crown to say that this mana was given to the Crown by the signing of Te Tiriti is a fundamental misunderstanding of mana itself. You cannot separate yourself from your mana tuku iho [mana held from time immemorial]. This would be to extinguish your whakapapa, your connection to your tupuna, your whenua and your identity.
>
> *Buck Korewha, Ngāti Kaharau, Ngāti Hau ki Omanaia*

> It would have been impossible for the Rangatira to knowingly sign away their mana within one day. Their mana is intrinsically bound into their entire world view and into the entire Maori social structure. How could they have signed it over to somebody else? How could they have decided to do this within a matter of a few hours?
>
> *Rima Edwards, Ngāpuhi Nui Tonu*

> I take the view that the very nature of mana and the nature of a rangatira was such that they would not agree en masse to give away all their chiefly powers and authority—in essence their mana rangatira—to the Queen of England.
>
> *Manuka Henare, Māori historian*

The British claim that Māori ceded their sovereignty through the Treaty of Waitangi was based in profound ignorance of the Māori world, and racist notions of the superiority of British and European institutions vis-à-vis "native" institutions (*Ngāpuhi Speaks*, 2.2, 5.2).

Point 2.4

The Backgrounder says (p. 8): "The Treaty records an agreement that enabled the British to establish a government in New Zealand".

It is not accurate to say that the treaty agreement enabled the British to establish a government in New Zealand. In Te Tiriti o Waitangi—the treaty signed by Hobson and the rangatira at Waitangi—the agreement was that the Queen's Governor would be allowed to exercise authority over the Queen's people. This is the authority that Hobson requested from the rangatira when he addressed them at the beginning of the treaty discussions at Waitangi on 5 February 1840. Moreover, "Colenso's record of the treaty discussions shows that what was proposed and discussed was the presence of a governor, not the institution of a British-style government with its encompassing legislative and judicial capacities" (*Ngāpuhi Speaks*, p. 221, citing M. Belgrave, *Historical Frictions*, pp. 59–60).

For too long, the Pākehā sense of national identity and the Crown's justification for its authority in New Zealand have been built on an untruth: that by signing the treaty Māori ceded their sovereignty to the British Crown and thereby agreed to British government.
There is a younger generation of New Zealanders who are learning a more accurate history and are talking about building our constitution on recognition of Te Tiriti o Waitangi. No favours are done to them or race relations in the future by continuing to collude in the false notion that Māori ceded their sovereignty to the Crown.

Recommendations

(*These align closely with Recommendations 2–4 in Ngāpuhi Speaks.*)

That the Crown formally acknowledges that Te Tiriti o Waitangi is the one authentic treaty.

That the Crown acknowledges that its English-language rendition of the treaty—the version promulgated by the British and New Zealand Governments as the official treaty—is an incorrect interpretation of Te Tiriti o Waitangi and wrongly conveys that Māori agreed to cede their sovereignty to the British Queen.

That there is an amendment to the Treaty of Waitangi Act stating that Te Tiriti o Waitangi is the authoritative text of the treaty agreement.

3. "Single, undivided sovereignty" fatally undermines "Treaty partnership"

General Observation
The Backgrounder (p. 37) cites the 1987 Court of Appeal judgment in which the judges: "Commented on the differences between the English and Māori versions of the Treaty affirming the right of the Crown to govern, subject to the balancing of duties of good faith and partnership". It is significant that the judges put the Crown's right to govern as contingent on good faith and partnership. However, the judges failed to recognise that the Crown has constituted itself with an absolute sovereignty, rendering itself incapable of true partnership with Māori. Partners have between them a power balance, meaning that decisions about matters in common are reached by negotiation.

Point 3.1
The doctrine informing the constitution of Crown power in New Zealand has been succinctly described by Dr Paul McHugh (1996, p. 302):

> The Crown's sovereignty is regarded as absolute, unitary and unaccountable, the ultimate expression of this supreme power being the enactment of legislation (the Crown in parliament). Being absolute, this sovereignty is viewed as undivided and indivisible—it can never be shared with any other sovereign entity. It is also unaccountable. The Courts will recognise no law-giving power other than the Crown and will not call the sovereign to account for the exercise of its legislative power.

The implications of this in relation to the Treaty were touched on by the late Professor Jock Brookfield (Valedictory Lecture, 1993) when he said:

> But whatever the chiefs individually intended, it is impossible to believe that any of them consented to the claims of absolute and unlimited power, even over the Treaty itself, which, under the doctrine of parliamentary sovereignty, were made by Queen Victoria's Parliament and are made today by the New Zealand Parliament as its successor.

Brookfield's point about the Crown's "absolute and unlimited power, even over the Treaty itself" is a telling one. It explains why the Crown's efforts at "partnership" are less than satisfactory.

Point 3.2
The Crown's exercise of power over the Treaty itself is manifest in the processes for the settlement of Treaty grievances, which are based on "terms of engagement" determined by the Crown. They are not processes developed through a partnership arrangement. This issue of terms of engagement and how they are developed is critical, and was brought to the fore at the Ngāpuhi Nui Tonu hearing by the kaumatua and scholar, Nuki Aldridge (*Ngāpuhi Speaks*, Appendix 9). A partnership is fatally undermined where only one party sets the rules for how agreement is to be reached.

If we are to move towards a form of government that is truly and rightly based on partnership between tangata whenua and the Crown, and the upholding of te tino rangatiratanga of hapū and Māori as a whole, then terms of engagement for mapping a way forward will have to be developed and agreed by Māori and the Crown, and not by the Crown acting alone.

Recommendations

That there is official recognition that the absolute and unitary authority that the Crown has taken to itself is a breach of the intent and promises contained in Te Tiriti o Waitangi.

That the Crown work with hapū representatives from across the country to develop rules of engagement between Crown and Māori based on true bilateral arrangements, the rules to apply in the advancing and resolution of treaty-related issues and all matters affecting the well being of Māori (see *Recommendation 10 in Ngāpuhi Speaks*).

4. Exclusion and racism in our constitution

General Observation

New Zealand's constitution has been established on an exclusive and racist base. The rationales used to justify this order are built on notions that are detrimental to Māori; they are also undermining to healthy race relations.

Point 4.1

The evidence given by Ngāpuhi Nui Tonu at their hearing showed that the rangatira who signed Te Tiriti o Waitangi had an *inclusive* vision (see *Ngāpuhi Speaks*, 4.1, 4.4). They agreed to the Queen's people having their own recognised leader, who would sit as one with them in making decisions on matters of common concern. For them, Te Tiriti established "a framework of understanding, which outlined respective responsibilities and duties to ensure good order into the future" (*Ngāpuhi Speaks*, p. 241). In He Wakaminenga (the United Assembly of Hapū) there was an established model of confederated government, one based solidly on the maintenance of hapū autonomy. Embracing the governor and the Queen's people within this established order was the hapū's and their rangatira's intention; they had no intention of ceding their authority to the governor or the Crown he represented.

Point 4.2

It was the imposition of the British model of government that allowed for privileged and *exclusive* holding of power in this country. The legislative powers given by the British Crown to the Governors from 1840 and to the New Zealand Parliament from 1852 excluded hapū and their leaders from decision making at the provincial and national levels. The Crown claimed the right to do this on the basis that Māori had ceded their sovereignty, a false premise. This premise was based on ignorance of Māori, their language, philosophy, culture and government; an ignorance deriving from profoundly racist notions of the superiority of the British social order. At the Ngāpuhi Nui Tonu hearing, Ngāpuhi, Tribunal and Crown witnesses gave evidence that showed the racist notions that informed the reasoning of the British Crown and its agents in the nineteenth century (*Ngapuhi Speaks*, 2.2, 5.2).

Point 4.3

The English version of the Treaty articulates the notion that Māori ceded their sovereignty to the Crown. This notion is not only false; it is also denigratory of Māori mana. Of particular concern is its harm to young Māori people, because it promulgates the idea that their ancestors gave away their mana—their authority in the land—to a foreign people. It is also harmful to all other young people in our country because it reinforces the notion of European superiority and thus, on a subtle level, undermines their potential for engaging with tangata whenua on the basis of true respect and mutuality.

Recommendation

That the Government funds the collation and development of teaching resources, with the oversight of hapū and iwi experts: on mana Māori and the basis on which hapū and iwi came to the Treaty agreement, and other agreements with the Crown.

5. Shared power and government

General Observation

The intention of the rangatira who assented to Te Tiriti o Waitangi was shared power and government, according to tikanga (*Ngāpuhi Speaks*, 4.3, 4.4). Contrary to this, the British Crown imposed a constitutional order that established the Crown as the single, supreme governing authority. The Crown thus overrode the will and intent of those from whom it sought a right to govern in the first place. Our efforts as a country to address a history of grave injustice to Māori have not, to this point, dealt with the wrongs to hapū and iwi authority that are contained in the present constitution of state power.

Point 5.1

It is significant that the Government's 2005 select committee recognised "it is difficult to identify significant constitutional questions that do not touch on the Treaty to a material extent" (cited in Backgrounder, p. 39). I doubt that a randomly-selected group of the general public would reach this conclusion; and I think this reflects the fact that the history behind the constitutional arrangements in this country have not been taught, or where taught, the history has been fudged. It is time to face up to the truth of our history.

Point 5.2

The 2005 select committee went on to indicate that a move towards constitutional arrangements that were truly in line with the Treaty "would require deliberate effort to engage with hapū and iwi as part of the process of public debate". The committee decided that this would be too difficult because there was not enough "consensus on what is wrong". This seems a pretty weak-kneed conclusion. I am quite sure hapū and iwi would have a good deal of consensus on what is wrong, and important insight on how to move towards a more just sharing of power. In any situation of injustice or abuse, it is the abusing partner who has difficulty in seeing what is wrong. It is through listening to and conversing with tangata whenua that our country has come to some measure of appreciation of the injustices they have suffered at the hands of the Crown. Moreover, in the end the rectification of injustice is of benefit to all.

Recommendations

(*The first two align with Recommendation 9 in Ngāpuhi Speaks.*)

That the Crown work with hapū representatives from across the country towards a constitutional framework for Aotearoa based on He Wakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi.

That the work currently being undertaken by the iwi and hapū-mandated Independent Working Group on Constitutional Transformation (Matike Mai Aotearoa) is recognised, and that its findings (to be published in late 2013) are accepted as an essential framework for constitutional reform.

(*This last recommendation is specifically addressed to you as the Constitutional Review Panel*.)
That in making your report you advise the necessity for a next and essential stage of Constitutional Review in which there is official engagement with hapū and iwi about how to establish a just order in our constitutional arrangements.

Thanking you once again.
Ngā mihi ki a koutou.
Susan Healy, PhD in Māori Studies, University of Auckland

My thanks to Margaret Haworth who read this submission in its draft form and provided helpful comment.

In the list below I include documents referred to in this contribution and relevant work from my research.

References and Relevant Research

Aldridge, N. (2010). *Rules of engagement*: *Introductory remarks of Nuki Aldridge in support of affidavit Wai 1040, Doc#B10, 14 June 2010*. Wellington: New Zealand Waitangi Tribunal.

Brookfield, J. (1993). *Professor Jock Brookfield valedictory lecture*. Auckland: Faculty of Law, The University of Auckland. Cited in M. Palmer. (2008). *The Treaty of Waitangi in New Zealand's Law and Constitution*. Wellington: Victoria University Press.

Durie, E. T. (1996). *F W Guest memorial lecture 1996: Will the settlers settle? Cultural conciliation and law*. Otago: Faculty of Law, University of Otago.

Healy, S., Huygens, I., & Murphy, T. (2012). *Ngāpuhi speaks: He Wakaputanga and Te Tiriti o Waitangi: Independent report on Ngāpuhi Nui Tonu claim*. Whangārei: Te Kawariki & Network Waitangi Whangarei.

Healy, S. (2009). Tuku whenua as customary land allocation: Contemporary fabrication or historical fact. *Journal of the Polynesian Society, 118*(2), 111–134.

(2009). *A modern state in its relationship with a tribally-based people: Democracy belied in Aotearoa/New Zealand*. Germany: VDM Verlag.

(2007). *The nature of the relationship of the Crown in New Zealand with Iwi Māori*. Unpublished doctoral thesis, The University of Auckland, Auckland, New Zealand.

Jackson, M. (2010). *Brief of evidence of Moana Jackson*. Wai 1040, Doc#D2. Wellington: New Zealand Waitangi Tribunal.

(1998). Self-determination: the principle and the process. *Indigenous Affairs, 3*, 57–61, 1998.

McHugh, P. (1996). The legal and constitutional position of the Crown in resource management. In R. Howitt, J. Connell & P. Hirsch (Eds.). *Resources, nations and indigenous peoples*. Melbourne: Oxford University Press.