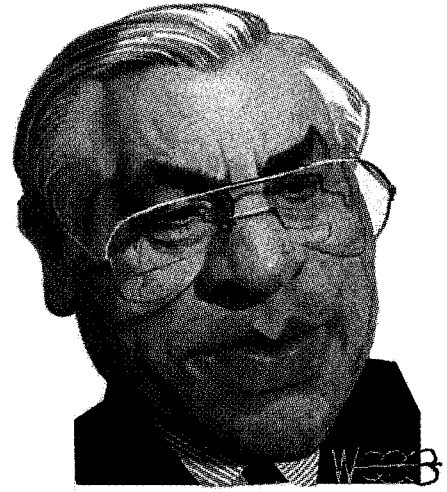
Otago Daily Times 1 September 2000

Treaty of Waitangi is 'irrelevant'

Wrongs done in the past do not justify unbalanced decisions now, writes SIR DOUGLAS GRAHAM, the former attorney-general and minister of treaty negotiations. The proposed treaty recognition clause in social legislation should not proceed.



Sir Douglas Graham

THE fact that the Labour Maori caucus seems to have persuaded the Government to reject the advice of officials and to insert a treaty clause in upcoming health legislation should come as no surprise.

For 150 years, Maori tried to enforce the treaty in the courts but were told the courts had no power to hear treaty claims. This was because the treaty, an international agreement between nations, had not been adopted into our domestic law which is done by making specific reference to the treaty in parliamentary statutes. So Maori were left high and dry.

It was not until the late 1980s that Parliament began to insert treaty clauses into statutes and there are now over 30 various examples sprinkled throughout the statute book. Now the courts had the ability to interpret and apply the treaty in that particular category of the law.

The treaty clauses usually require those carrying out that particular law, for example Department of Conservation staff, to have regard to the "principles of the treaty" when making decisions. If they don't, the courts can grant an injunction until they do. For Maori, therefore, the more references there are in the statute book the better it is, because where it exists they can try to persuade the courts that the Crown has a treaty duty which has been ignored.

So a treaty clause for Maori certainly does no harm and, in the event the courts finds in their favour, might well do a lot of good. One consequence of all of this is that the courts are much more involved now than ever before and, conversely, the power of the politicians has been reduced.

Given our history of procrastination in addressing valid grievances, it is hard to argue that the courts should not be able to decide what the principles of the treaty are, and when and how and to whom they are to apply. But there is a serious risk here nonetheless, which may not have been appreciated. It arises from the ability of Parliament to make law and the duty of the courts to interpret and apply it.

Now there is little doubt the treaty tried to protect the customary ways of Maori. Their lands, fisheries and forests were guaranteed to them and the clear intention was that they had the right to follow customary practices.

That right, recognised under the English common law, survived the transfer of sovereignty. And so any interference with their rights to tribal land, food gathering, and other traditional activities which could be established may well have, and indeed did, breach the treaty guarantee. To be denied access to the courts was simply outrageous.

Today, to the extent those matters are still relevant, access should be automatic, and accordingly a treaty clause in conservation law, resource management, minerals, heritage etc seems appropriate and necessary. If, for example, a proposed law could possibly result in the destruction of historically important sacred sites such as burial grounds, then the law should unquestionably require prior notification to the local iwi and full and open consultation. That respects the treaty promises.

But in other areas it is far less obvious. In health, education, welfare, housing and the social services generally the question is whether the treaty is relevant at all. Did the signatories really consider Maori were to have any different rights in these areas than any other New Zealander? Did the treaty really guarantee all Maori would enjoy good health, with compensation if they did not? Could the Maori chiefs, many of whom were probably smoking as they signed the treaty, have in their wildest dreams contemplated that a century and a half later it would be claimed the Government was in breach of the treaty because some Maori suffered poor health through smoking?

And was it really the intention that Maori would have some priority when it came to the provision of services — not due to exceptional need — but on

PANZ COMMENTARY

Our research (see Monograph No. 6) leads us to believe that Sir Douglas is correct in observing that Maori entitlement to health, etc., is not drawn from the treaty but from citizenship. We also concur that there is not a 'partnership' derived from the treaty. However we believe that his unqualified statement that "their [Maori] lands, fisheries and forests were guaranteed to them" makes an error of selectivity, being a misrepresentation of the treaty. The rest of Article 2 continues... "so long as it is their wish to and desire to retain [them] in their possession...but on the other hand the Chiefs will sell land to the Crown".

Therefore the large tracts of land, and appurtenant natural resources, that were sold (or gifted) to the Crown should not be subject to residual Maori control at the expense of other citizens.

Sir Douglas' tenure in Government has left a legacy of alienation of public say and control over lands lawfully held by the Crown on their behalf. This is a consequence of political agendas that depend on selective rendering of the treaty, as instanced above.

in many areas

the grounds of race? Did the treaty really guarantee that Maori would not be allowed to fail?

Surely it is more likely that, looking ahead, both parties wanted Maori property and customary rights to be respected and some redress made available when they were not, but in other areas everyone would be on the same footing with the same entitlements. If this is so, then a treaty clause has no place in statutes dealing with social issues because it is not relevant.

Entitlements to health, education, welfare, housing and such like are not drawn from the treaty at all but through citizenship. To insert such a clause to pacify the Maori caucus is extremely unwise. If the Government believes there are treaty rights in these social entitlements, it should say so. If it doesn't believe that, then it must be secretly hoping the courts will reject any legal action by Maori and nobody will have to worry.

But here's the rub on that score. When Maori inevitably go to court to see how far the treaty extends, the courts will look at the statute to try to interpret the will of Parliament. The judges will conclude that Parliament must have intended the treaty to have relevance and that Crown duties exist, because Parliament had put a treaty clause in the legislation.

The Government should think again and withdraw the treaty clause from the health Bill. Maori can still be consulted and can still be contracted to provide health services, as should other ethnic groups. But to appease the Maori caucus as pay-back for political support in this way, and decline to make the difficult decisions, is unacceptable.

And the Maori caucus should remember too that MPs are there to further the interests of all New Zealanders and not just one sector. Wrongs done in the past do not justify unbalanced decisions now. At a time when a great deal of effort is going into addressing real grievances which clearly did arise under the treaty, such as unfair land confiscation, it is foolhardy in the extreme to push the boundaries and raise the ire of the non-Maori public.

The Minister of Health for her part says the treaty clause will further what she calls the "partnership" between Maori and the Crown. This so-called "partnership" concept came into common parlance after a Court of Appeal case in the 1980s. The judges were attempting to describe the duties the parties to the treaty owed each other.

While the ongoing relationship is undoubtedly special and very important, it is not a "partnership" as that is commonly understood. There are rights that both parties have under the treaty that must be respected. But there are many areas where the treaty is simply irrelevant. The provision of health services is one of them.