



THE TREATY OF WAITANGI AND RESEARCH



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Introduction.

In their book, *The Law of Research* (Editors: John Dawson and Nicola Peart; University of Otago Press, 2003), there is a section that is most relevant to the subject of this Symposium.

The piece, which comprises the book's Chapter 4, *The Treaty of Waitangi and Research*, is authored by Bevan Tipene-Matua and John Dawson. It beautifully covers the matter of respecting cultural and intellectual property rights of Indigenous people.

The current paper has, as its primary goal, a presentation summarising many of the issues raised by Tipene-Matua and Dawson's (2003) Chapter 4, but, the subject matter of that book cannot be treated in isolation.

We therefore also source a number of other writings, some of which address subjects only indirectly related to the topic which forms the title of our paper.

However, all of them deal with issues that impact upon it and are included with the intent of promoting thought and discussion.

Among these subjects are matters related to language and education policy in Australia, the home country of the two authors of the current paper, where the first steps have been taken towards the development of a similar Treaty (or Treaties) to that of *The Treaty of Waitangi*.

This approach provides the paper with the necessary depth that such a complex area warrants.

Background

Australia does not have, as yet, a Treaty (or Treaties) with its Indigenous peoples.

However, at least two State governments (those of Victoria and South Australia) have commenced moves towards such ends, and the paper presents some material related to the Victorian steps in this direction.

For a nice articulation of some of the related issues of a Treaty in an Australian context, one may refer to Mansell (2016).

Mansell's (2016) examination underlines how necessary it is for one to look at a Treaty in relation to many other related issues.

Among a number of strategies, Mansell (2016) proposes the possibility of creating an Australian (Aboriginal) State, a concept that may fit in with some of the approaches to be found in Richard Murray's (2012) work, "A new federation with a cities and regional approach".

Mansell (2016) also suggests the possibility of having an allocation of designated seats in Federal parliament for indigenous people (as is the case in New Zealand for Maori people) but acknowledges that, if members of political parties, Aboriginal members of parliament may feel conflicted as to whom they owe their allegiance.

Just recently, the Government of the Australian State of Victoria announced, with a view to advancing self-determination for Aboriginal Victorians, the establishment of the Treaty Interim Working Group (Aboriginal Victoria, 2016), which provides an opening for addressing the issue in Australia.

Prior to proceeding with our discussion on legal aspects of *The Treaty of Waitangi per se*, we shall refer to Chapter 3 of the 1989 publication, *Honouring the Treaty. An Introduction for Pakeha to The Treaty of Waitangi* (Editors: Helen Yensen, Kevin Hague and Tim McCreanor; Penguin Books, 1989) by Tim McCreanor.

McCreanor's (1989) Chapter 3, which draws attention to controversy which arises on account of differences between the English and Maori versions of *The Treaty of Waitangi* text, underlines how important it is to address the difficulty associated with accurately translating the expressions contained in one language into another one that is completely different.

Discussion

In respect to the incorporation of treaty principles into (New Zealand) research law, Tipene-Matua and Dawson (2003) write that "the Treaty's terms may be brought within New Zealand law in a manner making them legally enforceable and binding" (and that) "the principles of the Treaty have become an established and distinctive feature of New Zealand research law (with) ... many research agencies now lawfully insist(ing) on 'Treaty-consistency' in their internal structures or processes".

Important to this subject, and especially important to Australian Aboriginal and Torres Strait Islander peoples, is a recent analysis by Marnee Shay (Shay, 2016), *Seeking new paradigms in Aboriginal education research: methodological opportunities, challenges and aspirations*.

Shay (2016) notes that "it is only relatively recently that Aboriginal peoples in Australia are represented in the academe, creating knowledges that speak for, and not of, us".

Shay (2016) observes how "internationally renowned Maori scholar, Professor Linda Tuhiwai Smith was ground breaking in her use of critical discourses needed for Indigenous peoples globally to reclaim our knowledges and experiences through research".

Whilst the focus of the aforementioned work by Tipene-Matua and Dawson (2003) largely is on the situation in New Zealand, the concerns raised therein about the misappropriation of Indigenous people's traditional knowledge, and its commentary about how such concerns might be addressed - for example, via the adoption of codes of conduct "that ensure Maori consent when collecting and using Indigenous information" - have a much wider application.

After all, many authors around the globe (such as Lehman *et al.*, 2004) have raised "the importance of ethical issues, in the context that past scientific studies have often not sought permission from the original Indigenous owners for the use of cultural heritage".

Tipene-Matua and Dawson (2003) describe *The Treaty of Waitangi* as an agreement "between Maori and the British concerning the future of New Zealand as it entered the British Empire".

Specifically with regard to where *The Treaty of Waitangi* intersects Government policy related to research, Tipene-Matua and Dawson (2003) note that the Treaty's "general terms suggest that it is legitimate for laws to be enacted to regulate research in the national interest, but Maori should, in turn, participate fully in the allocation and use of research funds, the State should actively promote research by and for Maori, and Maori should control research within their communities and with their resources".

Tipene-Matua and Dawson (2003) then summarise "the numerous means by which Treaty principles are now incorporated into the legal framework for research" and this summary is, in part, reproduced below:

- Inclusion of Maori interests within the administrative structure;
- General legal obligations to consider or promote;
- Inclusion in legal criteria for making administrative directions;
- Express requirements of Maori consultation;
- Inclusion within secondary legislation or agency rules; and,
- Lawful Ministerial directives to public research agencies.

Specifically on the subject of "Good practice consultation" they write:

"Those involved should enter discussions with the capacity to change their proposal and with the objective of eliciting others' views and responding to them. If this is not the case, then consultation has not occurred; Maori are merely being informed about something that has already been decided upon".

They also address the issue of "voluntary adherence to Treaty principles", noting:

"In the absence of legislative guidance, the obligation to consult Maori may be more a moral than a legal one. But it is still often advisable for researchers to develop relations with Maori by consulting at the outset. As well as potentially benefiting the research, this will help to avoid problems later and cement long-term relationships".

The matter of "Indigenous people's cultural and intellectual property rights" is also considered, with areas needing to be addressed including:

- The inappropriate use of Indigenous knowledge by researchers;
- Lack of consultation about that use;
- Lack of benefits accruing to Maori therefrom; and,
- Loss of control over Indigenous knowledge.

However, whereas in New Zealand, notwithstanding difficulties arising from the Maori and English versions of their Treaty being somewhat different, one can only imagine how much more difficult a task do we face in Australia.

After all, Aboriginal people can recall the jailing of their older relatives for simply speaking their language (Grant, 2016). This policy has resulted in many Aboriginal languages being lost, a fact that amplifies any difficulties that may be faced in formulating the terms of a Treaty, especially given the intimate relationship between language and culture.

As pointed out in the cover-piece of Ilan Stavans 2008 publication, *Resurrecting Hebrew*: "The resurrection of (the) Hebrew (language) raises questions about the role language plays in Jewish survival".

Similarly, the (Australian) House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, in its findings from the inquiry, into language learning in Indigenous communities of September 2012, *Our Land Our Languages*, found that language is inseparable from culture, kinship, land and family and is the foundation upon which the capacity to learn, interact and to shape identity is built.

Key Recommendations

Tipene-Matua and Dawson (2003) provide a way forward and, to this end, make a number of suggestions as a guide to possible future directions, *all of which might be seen as being relevant to other jurisdictions*, including:

- Adopting codes of conduct that ensure Maori consent is obtained when collecting and using Indigenous information;
- Expanding the level of accountability to Maori;
- Inclusion of Maori in research proposals;
- Establishing mutually beneficial research relationships;
- Revising relevant legislation concerning the governance of universities;
- Public funding ring-fenced for Maori researchers; and,
- The development of recognised codes of ethics for research affecting Maori.

Link: <https://ams.confex.com/ams/97Annual/webprogram/Paper313878.html>