

Pemsel in the Pacific?¹

Justice Joe Williams

Tēnā tātou katoa. Tēnā koe e tama nāu te au mihi i tuku mai. Me ngā kai waiata anō hoki i waiata mai i te waiata whakamihi ki au. Tēnā koutou mihi mai, whakatau mai ki āu otirā ki ngā mate kei runga kei au e pīkauria nei. Rātou ki rātou, tātou ki tātou

When the speaker who welcomed me this morning commenced his formal remarks, he used a karakia or incantation often heard on marae and in pōhiri throughout the country. In fact, if you have studied Māori beyond basic and introductory, chances are someone has taught you a version of it. It is one of our most simple and beautiful.

Whakataka te hau ki te uru

Whakataka te hau ki te tonga

Kia mākinakina ki uta

Kia mātaratara ki tai

E hī ake ana te atakura

He tio, he huka, he hau hū

Turuturu o Whiti whakamaua kia tina!

Haumie, hui e, taiki e!

Whakataka te hau is also one of the oldest karakia that we have according to the late Pei Te Hurinui

Jones, who was from Ngāti Maniapoto, in the King Country. He was the great Tainui scholar of his

¹ The following is a lightly edited version of the oral comments delivered by Justice Joe Williams at the Future Prospects for Charities Law Accounting and Regulation Conference on 11th April 2019

generation. He was a close advisor to King Korokī, the grandfather of the current Māori King Tūheitia, and he was one of Āpirana Ngata's acolytes when a young man in the 1930s and 1940s. He died in the 1970s. He said that that karakia was composed 'fresh off the boat', so either by an arriver or by a child of an arriver on the Tainui canoe. So 800–900 years ago, depending on which archaeologist you talk to – 45 generations ago.

It's a fishing karakia. It was composed by a man – almost certainly a man – who was pushing his canoe out in the morning about to go fishing on Whaingaroa Harbour – I like to think he was pushing out into Whaingaroa Harbour, in the heart of Tainui country. We know it was first thing in the morning because it speaks of the dawn. So let me translate it for you. I'm sorry to go off piste but I love this story. The first three lines go like this:

<i>The west wind has changed</i>	<i>Whakataka te hau ki te uru</i>
<i>The south wind has fallen silent</i>	<i>Whakataka te hau ki te tonga</i>
<i>And the land bristles</i>	<i>Kia mākinakina ki uta</i>

The word that he uses for bristles is 'mākinakina'. You know what kina are. (Well if you're from New Zealand, and maybe even Australia, you know.) Kina are a spikey, bristled sea urchin, and so – kia mākinakina ki uta, the land bristles.

Next is '*Kia mātaratara ki tai*' – and the sea has goosebumps. *Mātaratara* or *hītaratara* are goosebumps. So, the land bristles and the sea has goosebumps.

'*E hī ake ana te atakura*' – the first rays of a red dawn pierce the night. That is such a beautiful phrase and can be said much more economically in Māori than English. A *hī* is a ray of light. *E hī ake* is a ray shooting up from the horizon as the sun begins to rise. *Ata* is the word for morning, and *kura* is that red morning glow.

Then he goes on to say, '*He huka, he tio, he hau hū*' revealing snow, ice and frost (from the mountains to the sea). Although this morning's karakia ended with '*Thei mauri ora!*' – a modern rendition denoting its use as an opening gambit in formal oratory – the old rendition says, '*Turuturu o Whiti whakamaua kia tina! Tina! Haumi e, hui e, tāiki e!*' Here, to close off his meditation, the fisherman says, I bind myself to this place: I grasp it, I hold myself to it "Haumi e! Hui e!"

The *haumi* is the join in a canoe. If you go out to the display area at Te Papa, you'll see the beautiful waka taua, the war canoe. At the front and the back of the hull you'll see joins like interlaced fingers. Canoes had to be shaped like bananas and, because we didn't have banana-shaped trees, they were made of a trunk cut into three pieces and shaped to create a lift at the front and back. Where these pieces join is the "*Haumi*" – interlaced fingers of wood, caulked together with resins and tied off. You know what a hui is – a meeting, a coming together. So when he says '*Haumi e! Hui e!*' he is saying, like the join in a canoe hull, I bind myself to this place.

My inference that this karakia was composed by someone who arrived on the Tainui canoe arises from its focus on climate. The wind from the west (always the strong wind in this country) has shifted. The wind from the south (always the cold wind in this country) is silent. The land is bristling, and there are goosebumps on the water. First light reveals snow, ice and frost. Only a person who belongs to a tropical culture would be so focussed on these environmental elements characteristic of a temperate maritime climate.

This tells you a little bit about tikanga Maori, I suppose. When I first learnt this as a young man, I was struck by this – the one thing the writer doesn't do is say, please God give me some fish. God, my family is hungry, please make it some big ones. Oh, and I'd rather not drown if you wouldn't mind. I'm sure this would be the Judaeo-Christian approach to praying about going fishing. But he doesn't

ask for anything. He just describes what he sees with awe and wonder. He says, I am one with this and that's enough. I do hope he got some fish.

At the end of the formal greeting offered to me, a group of people stood to sing a waiata in support of the oratory. They chose Te Aroha, a well-known waiata and a good place to start for my comments to you today. The word *charity* was translated in the Paipera Tapu (the Māori Bible) as *aroha*. (This translation endures across all Polynesia – if you are in Hawaii its *Aloha*, if you're in Samoa its *Alofa* and so on.) In his first letter to the Corinthians², Paul wrote that there were three great Christian virtues which remained imperishable and immortal: faith, hope and charity, and of them all, charity was the most important.³ Another very common waiata takes up Paul's list of virtues: Faith (whakapono), Hope (tumanako) and Charity (aroha) and the most important of them all is Aroha. These days, aroha is often translated as love – but it's not love in the narrow modern usage, it's love in the broader biblical sense. It's what we now call charity.

I want to comment on some history in the law of charities and then discuss some modern challenges while putting those challenges in context. You see, the functions that are performed by the non-profit and charitable sector in modern New Zealand are functions that were originally undertaken by the church – not by the state. The state made laws and wars and not much else in the old days. It was the church, the Catholic church to be precise, that did almost everything else that we might call state-like today. It gave out alms, cared for the sick and needy, it educated the youngsters – and it advanced religion, of course.

It wasn't until Henry VIII decided that he wanted a divorce, and the Catholic church should be outlawed, that these functions began to shift to the secular sphere. The Statute of Elizabeth⁴ follows, in which

² 1 Corinthians 13.

³ The letter to the Corinthians was in Greek (Paul's native language) and the term he used for charity was *agape*, which in Latin came to be translated *Caritas* and became *charity* in the King James version of the Bible.

⁴ Statute of Charitable Uses 1601 (sometimes known as the Statute of Elizabeth I).

Parliament set out all of these church functions at a time when the institutional church is receding before the Protestant wave. This was less about charity, and more about displacing the Catholic church and the vast tax-free estates it held as bare trustee for beneficial (Catholic) owners.

The Renaissance and arrival of rationalism, the discovery that the earth was actually round, and the sun was in the middle of the solar system, and maybe there wasn't a God after all – or maybe science was God signalled the church's steady decline. By the industrial revolution the church had begun to fade in its traditional social functions too – alms and education, and the state began its slow take over. The first increments were felt in the laissez faire economics of the 19th century, but then much more significantly as we head into the 20th century. And that's the point at which the *Pemsel* heads were dreamt up by the English Courts as a way of trying to make modern sense of Elizabeth's unfathomable Statute.⁵ In *Pemsel*, Lord MacNaughten said the purpose of charities is relief from poverty, spreading (Protestant) religion, education and everything else in a similar vein that is of benefit to the community.⁶ But all Lord MacNaughten was trying to do was say, this is what the churches did in the past, which is why the advancement of religion was included. For more than a thousand years, these functions were entirely the province of the church. The church advanced the cause of God, relieved poverty and provided education. So now anything that seems like something churches once did is exempt from income tax.

My point is that the concept and law of charity is, as the post-modernists might say, culturally freighted. Those heads of charity make sense in their historical and cultural context. When we look at the *Pemsel* heads, we are looking at post-Reformation post industrial revolution Christian culture. This context must be seen in order to understand the logical and conceptual distortions in the law that we, in the 21st century secular west, are happy to live with.

The welfare state rises in the 1930s following the Depression, and then becomes very very busy in all these areas following World War II. In fact, the state becomes the primary – and in many cases the only –

⁵ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 (HL).

⁶ At 28.

player. This was particularly true in Aotearoa, where we were effectively a quasi-socialist state for half of the 20th century. So, by the 1960s, the church was no longer the core player in charity work – the state had taken over. Then the neo-conservative counter-revolution of the 1980s produces a retro-shift in emphasis. The state becomes a contracting and outsourcing entity, inviting the charitable sector back into the game in partnership with the state, which retreats from primary provider to the role of the primary funder in some areas. It does not abandon the field but its role is reduced. This was occurring to a lesser extent previously, but once the 1980s came, the charities sector blooms as the state shrinks. You can see that the history of charities from the late 19th century on is just a shift in the tide between the role the state takes in community support and the role the private sector takes under the label of charity.

So, that made me think about these charitable purposes and how much sense they make in the 21st century. *Pemsel* says that to be charitable, there must be a benefit to the public somewhat analogous to the relief of poverty, the advancement of religion, and the education of the uneducated masses.⁷ Scores of cases have encrusted onto these three headings a whole series of purposes for which it's hard to see the connection with what the church was doing in the past. This is the common law once again choosing relevance over doctrine.

We have some good examples here in New Zealand. First of all, the *Latimer* case in which the Court of Appeal said truth and reconciliation processes in a post-colonial state are charitable.⁸ Huh? Well, you could call it analogous to the relief of poverty, but if we were applying a directness of connection test between Treaty settlements and Māori economic deprivation we might struggle with that conclusion. The deeper idea here is that in a post-colonial state like ours, truth and reconciliation with the original peoples is necessary for social cohesion. Meaning it's a really good idea. So, it's not surprising that in *Latimer* the Court of Appeal said funding Māori engagement with the Waitangi Tribunal process is a charitable purpose. Not surprising at all. But only if you understand that what you are talking about is

⁷ Above n 5.

⁸ *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA) at [38]-[41].

not remotely *Pemsel*. You're talking about a different kind of paradigm that's relevant in the late 20th century but would never have made any sense at all in Queen Elizabeth I's or Lord MacNaughten's time.

And then of course there's *Greenpeace* and political advocacy. Now, advocacy for the environment is widely accepted as a purpose that ought to be supported. Twenty years ago, it mightn't have been quite so much. Forty years ago, it would have been ridiculous. In *Greenpeace*, the Supreme Court talks about maintaining the infrastructure of civil society. Maintaining harmony is a good idea, the Court says.⁹ The law is developing towards the idea of effective contribution to the democratic ideal and social cohesion as values that might be charitable. And the 'analogous' fourth *Pemsel* head seems to have strayed a considerable distance from its three siblings. Indeed the evidence is it has moved out!

Family First really tests these ideas.¹⁰ The High Court considered the Charities Registration Board appeared to have the view that a purely political advocacy group can't be charitable and so declined their registration. Justice Collins on appeal directs the Board to look at *Greenpeace* and think again. The application then gets rejected a second time. It goes back up, and the Judge says, "A body created to advance the cause of the traditional family unit isn't providing a public benefit".¹¹ You can see why a Judge might think that if that's in, too many other dangerous things are in, but it's hard to see how that works in logic. Perhaps the fear was the importation of *Citizens United*,¹² and the super political action committees into New Zealand politics. Might this mean that the National Party and the Labour Party are charities? Are political donations tax-free? Does this mean we get effective privatisation of political influence? And so on, and so forth.

⁹ *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 at [59], [62]-[65] as per Elias CJ, McGrath and Glazebrook JJ.

¹⁰ *Re Family First New Zealand* [2015] NZHC 1493 at [102].

¹¹ *Family First New Zealand* [2018] NZHC 2273 at [65], [74].

¹² *Citizens United v Federal Election Commission* 08 US 205 (2009).

But when you're stuck with the *Pemsel* heads you can't reason that way. We say, well the common law is rather flexible. Its life is experience not logic. This is a way of allowing us, if you don't mind me saying, to kid ourselves about what we are really trying to do here.

Liberty Trust was a case that really struck me – an interest free mortgage scheme (funded by donations) is a way to teach the Bible's financial principles. The Judge, says "that's in".¹³

If that's in what else is in? And how? If *Liberty Trust* is in, what about a community that decides it wants to build houses for those who choose to live by Māori values? Does that mean the construction company is a charity? What about a company that makes clerical garb as part of its inventory? Is that a charity because it's advancing religion? You see how tortured the reasoning can get if we are stuck with the formalism of *Pemsel* and its analogies. In truth, that's not what we are talking about at all. The fact that the advancement of religion is charity but the advancement of secular humanism is not may be in breach of the *Human Rights Act*¹⁴ and the *Bill of Rights Act*.¹⁵ A system that privileges religious advancement in a secular society is probably problematic. And it arises only because it's an artefact of a different time and a different age.

If charitable purposes are really community cohesion purposes –community infrastructure, the maintenance of the community's sense of itself in our highly individualised complex large-scale modern communities, I rather think that's a good idea, and it would be good if we just came out and said it. If the point was that in our large-scale, highly urbanised and disconnected communities, the advancement of democratic values is a good idea we should just come out and say it. Within limits – and of course, as in all things, the limits are as important as the parent principle.

¹³ *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [79], [90], [101]-[102], [121]-[123].

¹⁴ Human Rights Act 1993; see s 21(1)(d).

¹⁵ New Zealand Bill of Rights Act 1990; see ss 13 and 19.

That's why I'm a little disappointed that these issues aren't on the table in the current reform process. In the 21st century, these are important matters to be resolved. I believe that the charities sector is going to grow and become more important. And if charity is about public benefit through the advancement of community cohesion in the 21st century – in the cyber age – we must rethink the idea of community. Online communities form, deform and reform constantly now, on an almost daily basis. And they are often as important to their members as physical communities. Are the platforms that assist these communities to form and flourish charities? Does that mean social media is a charity? Where do we draw the line? Is Tinder a charity? What about Facebook? These are interesting challenges.

There is another big area of the charity sector that I wanted to address. The rise of tribal entities created by Treaty settlements. Seventy-odd entities have been created or will be established over the next five years and will receive around 3 billion dollars in total settlements. Three entities that settled early (in the 1990s) are now each of them worth more than a billion dollars, one of them close to two billion. This is potentially quite a significant addition to the charity sector over the next few years, and if those *pūtea* (as Māori call it) are properly cared for, they will become quite a big chunk of the national economy. I think that's going to create some lumps in the system, because these entities aren't like other charities. They are going to run businesses. Lots of them – they have to – because the money they got, and I said some billions, was actually quite small when properly understood.

The former Chief Executive of Ngāi Tahu once said to me, \$170 million in 1996 was a flat screen TV per member of the tribe. That's about right – \$3,000 each. And most settlements are still around the \$3,000 per head mark. For losing the South Island. That means that if they do a good job, these entities are capable of earning around \$150 per year per head. Their chances of making a big difference in the lives of their people with that, after the costs of infrastructure are deducted, are close to zero. In fact their chances of being *relevant* to the lives of the bulk of their people are limited. So, they're going to have to accumulate and grow their funds. It's going to be a generation before there is any prospect of making a

transformative impact on their people. An anti-accumulation rule in the charitable sector would be problematic for iwi, because accumulation is what they must do.

Then there are the problems with the accountability rules of charitable entities. I can certainly see that might be a real issue in the mainstream, where the charity has no “owner”, but there isn’t any problem with the accountability of the tribal sector, I can tell you. There’s rather too much accountability. If the leaders don’t do what they’re told, they get removed and replaced. This isn’t a new thing. It has been ever thus – since that man composed his karakia on the Whaingaroa Harbour.

These tribes are increasingly going to seek to behave like governments. They have always seen themselves that way. Prior to the late 19th century, and for a number of them right up until the 1920s, they were. For example, Tūhoe doesn’t lose effective sovereignty until the 1920s. And probably around the same time in the King Country. In the rest of the country it’s the late 19th century early 20th century before the Chiefs aren’t the law anymore – so for most iwi, quite late. These new tribal administrations are going to revert to behaving like governments, and their people will be expect them to do so in our integrated, complex country. They will become a first cousin to local government. They will not be like the other charities. Our law must be able to cope with that reality.

The final point I want to make is this: if we are going to have a law of charities that is fit for purpose in 21st century Aotearoa, it would be really good if we infused tikanga principles into that law. I know it sounds scary, but this infusion is happening everywhere in the law now. It needs to happen here too. And why is that? Because community responsibility and cohesion is a fundamental aspect of Māori culture. The idea that you give for the purposes of your whānau or your hapū or your iwi is fundamental to being Māori. There are lots of principles in tikanga Māori that articulate these charitable ideas rather better than the English ones from the Reformation. Aroha for charity, whanaungatanga (for obligations to community), kaitiakitanga (for the responsibility to care and nurture), mana (individual dignity), tika (justice – social justice in particular). These are principles which, if they were infused into our charitable

law, would make it a better fit for the communities that we are serving. These are revolutionary ideas I know, at least they would have been a generation ago, but Aotearoa is now at the point where we need to start building more integrated structures, more integrated laws. Other sectors, including environmental regulation and family law, are well down this road.

When I arrived this morning at the conference, I got a mihi whakatau and you sang me a waiata. I suspect you had a pōhiri at the start of your conference. In this secular age, there was a karakia. This shows how infused kaupapa Māori is in the way we do things in Aotearoa. This is no longer happening because the Māori community needs it as a social justice gesture. Rather, it's happening because we are all coming to this way of doing things. Because it's increasingly a part of who we are and what we do in this small South Pacific nation. And once we get to that point, in my respectful view, we will be in the right spot. This possibility of infusion is what can make us an exceptional country, and as the community's response in the last few weeks to the terrible events in Christchurch demonstrates, we are inexorably walking in that direction.

Tēnā koutou katoa.

