PERSPECTIVES ON THE TREATY OF WAITANGI AND SOCIAL POLICY DEVELOPMENT

SONIA HAWEA

LAWS 539

LAW AND SOCIAL POLICY

1 DECEMBER 1996

HE MIHI

Tēnā koutou katoa. Tuatahi, tēnei te mihi atu ki aku hoa mahi, nā rātou ahau I āwhina mai ki te whakatutuki I te kaupapa nei. Tēnei anō hoki te mihi atu ki taku hoa tata, nānā ahau I tautoko I akiaki, I āwhina mai hoki ki te whakaoti pai I tēnei tuhinga.

TABLE OF CONTENTS

INTRODUCTION

In 1988, Professor Mason Durie noted that:

> Most debate about the treaty has centred on its application to property rights and its relevance to past grievances. But the treaty's other dimensions have been progressively identified including its implications for contemporary issues and the maintenance of Māori well-being.[1]

Professor Durie's statement accurately reflects the public policy arena, however debate about the Treaty of Waitangi's relevance to social policy issues is certainly gaining momentum, both inside and outside the public sector. Despite this, to date, a consistent, and appropriate Government rationale for the development of social policy based on the Treaty remains to be established.[2]

A number of forces, or 'policy drivers', are steering the Government towards a rigorous analysis of the Treaty's place in social policy development. Among these are:

- persistent, and in many cases, widening, socio-economic disparities between Māori and non-Māori[3];
- the effectiveness, or otherwise, of existing policy frameworks such as mainstreaming, in delivering adequate services to Māori;
- requirements to review Government legislation, policies and practices against the provisions of the Human Rights Act 1993;
- growing numbers of claims to the Waitangi Tribunal based on social policy matters[4];

---

[1] Durie (1989) p 283.

[2] Some say that the Government urgently requires a comprehensive policy covering *all* aspects of the Treaty, and the relationship it encapsulates. See, for example, comments by the Hon Winston Peters in **Treaty Settlements: The Unfinished Business**, edited by Geoff McLay, New Zealand Institute of Advanced Legal Studies, 1995, pp 29-31.

[3] The reference to 'non-Māori' accords with the approach taken in policy circles when discussing the position of Māori relative to the general population in New Zealand.

- the advancement, at an international level, of the human rights of indigenous peoples, for example, by the Draft Declaration on the Rights of Indigenous Peoples; and
- court rulings relating to issues of representation and the allocation of benefits to iwi and Māori.

This final distinction between iwi and Māori acknowledges the bases on which Māori have a relationship with the Crown under the Treaty. The Treaty recognises the rights, and obligations of Māori, both as individuals and as members of hapū and iwi. Historical processes, combined with changing demographic patterns, have affected Māori social organisation, such that the suitability of 'traditional' structures for achieving social policy objectives is more often being challenged. As a result, the distinction under the Treaty is drawing increased scrutiny.

Consequently, to shape such an analysis it is necessary to first understand, and then develop further upon, these drivers. This paper considers several of these drivers in more detail to see what direction they may steer a future Government.

These policy drivers can also be seen as indicators of varying perspectives on the application of the Treaty in a social policy context. This paper focuses on two of these: Māori and Government perspectives. In support of this approach, Sir Ivor Richardson, back in 1987, identified the different interpretations taken by the Government and Māori to Article III:

---

[4]As part of the Harkness Henry Lecture given at Waikato University in 1994, the then President of the Court of Appeal, the Right Honourable Sir Robin Cooke supported the significance of the Waitangi Tribunal's deliberations and reports. Sir Robin noted that (in Te Rūnanga o Muriwhenua Inc v Attorney-General [1990] 2 NZLR 641) the Court of Appeal affirmed the right of the courts to make evidential use of the Tribunal's reports as they fall within section 42 of the Evidence Act 1908, as books of authority in matters of public history and social science. Sir Robin also concluded his lecture by referring to the Waitangi Tribunal process as one of three distinct, but complementary, forces necessary to achieving progress in the area of Treaty of Waitangi jurisprudence. The other two were, notably, enlightened leadership on both the Crown and Māori sides, and an increased willingness by the traditional courts to take into account the Treaty of Waitangi and the fiduciary concept: Rt Hon Sir Robin Cooke, "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato Law Review 1, 8-9,11.

> on the one hand [Article III] reflected in British eyes the goal of assimilation and eventual submergence of Māori custom in a superior British civilisation and on the other hand it was seen as providing protection of the right of the Māori people to retain their own culture and heritage just as the British maintained theirs.[5]

Added to that, underlying any attempt by the Government to develop social policies based on the Treaty will doubtless be concerns about efficiency, entitlement, effectiveness, consistency, and durability, among others. While Māori will assess the appropriateness of social policies using similar criteria, added to these will doubtless be concerns based explicitly on guarantees they perceive to be in the Treaty.

This paper draws principally upon instances from the Waitangi Tribunal process to illustrate Māori[6] perspectives. Government's perspective is gleaned from current policy statements and recent court decisions. Also informing Government's perspective is the review of legislation, regulations, policies and administrative practices under the Human Rights Act 1993[7], which combines a legal exercise with policy development processes.

---

[5] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, 674.

[6] The author acknowledges that the Waitangi Tribunal is a publicly funded agency, and therefore may in one respect, be seen as imparting a Government perspective. However, as the Tribunal draws heavily upon evidence from Māori themselves, and adopts operational practices that reflect Māori culture, its process can be seen to reflect views on the Treaty that are essentially Māori. Jane Kelsey has commented on the changes in approach by the Tribunal. Kelsey notes that from 1975 to 1982 the Tribunal maintained a narrow legalistic approach. However, from the Motunui decision in 1982 onwards, the Tribunal began, cautiously but firmly 'developing the guiding 'principles' of the Treaty by interpreting the text of the Treaty in a manner consistent with the Māori understandings of the Māori text and circumstances which surrounded the signing.': in Jane Kelsey, "Free Market "Rogernomics" and Māori Rights under the Treaty of Waitangi - An Irresolvable Contradiction?", (circa 1990), available from the author, pp 3-4.

[7] The Human Rights Act 1993, s 5(1)(i)-(k).

PART 1: MĀORI PERSPECTIVES

The Waitangi Tribunal

Since its establishment, the Waitangi Tribunal (the 'Tribunal') has acted as a gauge of Māori perceptions of the nature and extent of rights guaranteed by the Treaty of Waitangi.[8] During the last decade of the Tribunal's existence, Māori have been seen claiming certain rights distinct from, but related to, those rights pertaining to iwi development and asset management.

In 1988, Professor Durie predicted the emergence of a new class of claims to the Waitangi Tribunal when he wrote:[9]

> Statistical disparities between Māori and non-Māori are sufficiently serious to introduce the possibility that inferior standards of health might merit examination by the Waitangi Tribunal in a similar manner to land grievances or the loss of Māori language.

There are presently 634 claims entered in the Tribunal's register of claims. Of those, the Tribunal has reported on less than 60. The Tribunal is yet to produce a report dealing exclusively with social policy issues. In a review of 40 reports, Walghan Partners found that eight made reference to social policy issues, with five of the eight containing specific social policy components.[10] A list of the reports reviewed by Walghan Partners is attached at the end of this paper as Appendix A. In this section the social policy commentary from a selection of these reports is reviewed.

Based upon the information in the Tribunal's register, about 25 of the 634 claims could be said to directly relate to social policy issues. A list of those claims identified

---

[8] This does not deny the significance of other key forums for Māori opinion, including hui, Parliament, the courts and the international arena.

[9] Durie (1989) p 285.

[10] Walghan Partners, *The Treaty of Waitangi and Social Policy Project*, a report prepared for Te Puni Kōkiri, June 1996, Vol III, pp 24-25.

from the register is included at the end of this paper as Appendix B. (This, of course, excludes claims to land and natural resources that indirectly raise social policy matters.) Also in this section, a selection of those statements of claim is reviewed for an indication of the nature of the social policy issues brought to the Tribunal by Māori, pursuant to the Treaty.

Tribunal Reports

These reports provide no guidance as to how Treaty principles apply or relate to the development and provision of social policy services to Māori, or what obligations the Government has under the Treaty to deal with social policy issues for Māori. However, the following reports contain elements which could be relevant to broader social policy development:

- WAI 413 Māori Electoral Option
- WAI 350 Māori Development Corporation
- WAI 9 Orakei
- WAI 11 Te Reo Māori
- WAI 26/150 Broadcasting/Radio Frequencies

WAI 413 Māori Electoral Option

This claim arose out of the proposal for the introduction of the Mixed Member Proportional ('MMP') system. As a consequence, the Māori Option Notice 1993 was made by the Minister of Justice on 17 December 1993 and published in the *Gazette* dated 22 December 1993. The Notice, made pursuant to sections 77(2) and 269(2) of the Electoral Act 1993, declared that the two month period required under section 76(1) of the Electoral Act 1993, in which Māori may elect whether to register on the Māori roll or the General roll, would begin on 15 February 1994 and close on 14 April 1994.

As a result of a hui at Turangawaewae on 14 January 1994, the claim was brought by Hare Wakakaraka Puke on behalf of himself and those iwi and Māori authorities who

attended the hui. The claimants asserted that Article III granted full citizenship rights to Māori, including those of full political representation, and therefore the Crown had an obligation under the Treaty of Waitangi to protect the right of Māori to be represented in Parliament. In addition, the Crown had further obligations to promote Māori enrolment and education on the option. The claimants said that the funding provided by the Government to assist with these matters was inadequate and insufficient to properly inform Māori of their democratic entitlement and responsibilities.[11]

Regarding specific rights under Article III, the Tribunal noted:

> ...the extension to Māori ... of all the rights and privileges of British subjects must necessarily include the rights of political representation....*It is difficult to imagine a more important or fundamental right of a citizen in a democratic state than that of political representation.*[12] (emphasis added)

The Tribunal also reflected upon the Treaty principles important to any interpretation of Treaty rights, including those under Article III. In particular, the Tribunal noted the following statement from the Privy Council in the 1993 New Zealand Māori Council (Broadcasting Assets) case:[13]

> Foremost among those "principles" are the obligations which the Crown undertook of protecting and preserving Māori property...in return for being recognised as the legitimate government of the whole nation by Māori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. *It does not however mean that the obligation is absolute and unqualified.* This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Māori and the Crown. *This relationship the Treaty envisages should be founded on*

---

[11] WAI 413 Māori Electoral Option Report, Waitangi Tribunal Report, 10 February 1994, p1.

[12] WAI 413 Māori Electoral Option Report, Waitangi Tribunal Report, 10 February 1994, p 12.

[13] New Zealand Māori Council v Attorney-General (Broadcasting Assets) (unreported PC 14/93, 13 December 1993), p 33.

> *reasonableness, mutual co-operation and trust....While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.* For example, in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy is buoyant.[14] (emphasis added)

The Tribunal did not refer to rights arising from Article III, other than the 'fundamental' right to political representation. Falling within the civil and political category of citizenship rights, political representation is distinct from rights to social policy outcomes, such as certain levels of health status, or educational participation and achievement. Having said that, however, the Tribunal interpreted the Privy Council's statement as applying equally to Articles II and III.[15] Consequently, when the Tribunal reports upon a recent claim based on social and/or economic rights under Article III (such as access to social service funding) the Crown's duty in respect of those rights may be subject to interpretation based on the Privy Council's statement. This would obviously provoke interesting debate on, among other things, the definition of a 'buoyant economy', or one that is in 'recession'.

WAI 350 Māori Development Corporation

On 1 July 1987, the Ministers of Finance and Māori Affairs announced the launch of the new Māori Development Corporation (the 'MDC') with a trust fund of $10 million, and the Poutama Trust, to work in parallel with the MDC. The aim of the MDC and the rationale for the government's participation in it was to further the development of profitable commercial Māori business enterprises. In March 1993,

---

[14] WAI 413 Māori Electoral Option Report, Waitangi Tribunal Report, 10 February 1994, p 13.

[15] Other statements by the Tribunal on the Crown's duty of active protection can be found in the Orakei Report (1987) 191; Te Reo Māori Report (1986) 21; Ngai Tahu Report (1991) vol 2 240. See for example, the Manukau Report (1985) p 70: "The Treaty of Waitangi obliges the Crown not only to recognise the Māori interests specified in the Treaty but to actively protect them....It follows that the omission to provide that protection is as much a breach of the Treaty as a positive act that removes those rights."

Cabinet agreed to offer the Crown's majority shareholding in the MDC for sale in an open and competitive manner.[16]

The claimants in this case asserted that the establishment of the MDC reflected the Crown's acceptance of its obligation to reduce economic disparity between Māori and Pakeha, and, further, that the Treaty of Waitangi obliges the Crown to actively promote Māori economic development. Among their remedies, the claimants sought support from the Tribunal for the need for a Treaty-based market mechanism delivering development finance to Māori.

Notably, the Crown submitted that while some of its actions were motivated by 'social' considerations, its investment in the MDC was on a purely commercial basis, and, consequently, that Treaty principles were now irrelevant to a decision to devolve itself of that investment. The Tribunal firmly rejected these suggestions, saying that although the government of the day did not expressly identify the MDC (and other initiatives) as flowing from the Treaty:

> that is unsurprising for Treaty jurisprudence in this country was nascent at the time.[17]

With the nature of Treaty debate today, taking into account legal decisions, current social and economic policies, as well as international developments, it would be interesting to see the results of a similar set of circumstances. The Tribunal appeared to be thinking along similar lines when it went on to observe that the MDC did indeed represent a commitment by the Crown to responding to a specific need of Māori, by providing positive economic assistance in the form of development banking services. More importantly, the Tribunal expressed the belief that, at the time of writing the

---

[16] WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993, p 23.

[17] WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993, p 36.

report, the relationship between Māori need and the Crown's commitment to supplying it, would be expressed 'unequivocally' in Treaty terms.[18]

The Tribunal analysed the situation thus:

> It appears likely to us from our knowledge of the various Crown actions leading to tribal losses and the recorded outcome of the extent of lands remaining in tribal ownership, that there is not a tribe in the country without some legitimate claim to economic restoration. It follows then that the disparity between the rate of economic progress of Māori compared with other New Zealanders can clearly be attributed in some measure to breaches of the Treaty.[19]

In addition, the Tribunal noted, as principle, that the Treaty both assured Māori survival and envisaged their advance. Referring to the Privy Council decision in 1987 New Zealand Māori Council case[20], the Tribunal acknowledged that:

> The application of this principle at any particular past or future point, must depend upon the conditions then applying, the extent to which Māori have subsequently chosen to benefit in Western terms and the degree to which the tribal base remains preferred.[21]

In that case Richardson J, in commenting on Article III, observed:

> The essential problem lies in balancing or blending the competing philosophies or protecting Māori as equal citizens, or upholding their distinctive heritage.[22]

---

[18] WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993, p 36.

[19] WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993, p 36.

[20] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641.

[21] WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993, p 194

[22] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, 674.

Reflecting upon this claim, the Tribunal may also be tempted to consider obvious socio-economic disparities between Māori and non-Māori as, to paraphrase the report, clearly attributable in some measure to breaches of the Treaty. However, this may also rely upon the Government expressing its commitment to address those disparities 'unequivocally' in Treaty terms. If, as is arguably the case, the Government continues to steer away from clearly expressing a Treaty obligation to address areas of Māori social and economic need, it will be interesting to monitor the Tribunal's response.

Noting the finding of principle, where the Tribunal considers the appropriate degree to which Māori may be seen to have chosen to benefit from Western conditions, it is equally relevant that institutional and systemic barriers may have prevented Māori from truly benefiting from such conditions. Measures of disparity across social and economic indicators offer evidence that such benefits as might be expected to accrue to Māori and non-Māori, as a result of the Treaty relationship, may not in fact have been shared equally.

WAI 9 Orakei

This claim was brought by members of Ngāti Whātua, against the policies and practices of the Crown, which left Ngāti Whātua stripped of their land base and their marae and papakāinga largely destroyed. The grievances expressed in this claim contributed to the activities at Bastion Point in the late 1970s.

An aspect of the claim focused on the Crown's state housing policy. The purchase by State tenants of their homes was first introduced in 1950, and the policy has operated in an 'on again', 'off again' fashion depending on the government of the day. Between 1952 and 1973, several Ngāti Whātua tenants applied to purchase their respective homes. The claimants complained of:

> policies and practices of the Crown requiring those of us provided with housing in Orakei to live as State tenants and not enabling us to obtain freehold titles (though permitting other State tenants in Orakei to do so).[23]

The claimants appeared to refer to something more than an *opportunity* to purchase freehold titles. Instead, they seemed to suggest that the Crown should have ensured, for example by allowing their rents to be applied to mortgage instalments[24], that they were able to purchase the titles, referring more to an actual outcome rather than a mere opportunity.

This distinction has, in recent times, drawn much debate.[25] In Treaty terms, the equality principle can be conceptualised in two ways. The first is that of *legal equality*, represented by the right to equal treatment under the law, freedom of speech, religion and peaceful assembly, for example. The second aspect concerns the actual enjoyment of social benefits, or *equality of outcome*.

The Tribunal found that offers to sell the houses were made by the Housing Corporation in most cases, but that in others, no sales were concluded for reasons such as offers not being accepted, or lapsing, or the purchasers not being able to afford the sale price. Consequently, the Tribunal found that Māori at the time did not obtain freehold titles to State houses probably because they were not able to afford it, unlike other state housing tenants. The Tribunal said:

> in no case was a sale declined because the houses in question were being dealt with on a basis different from state houses occupied by other tenants....
>
> [I]t was because the outgoings including the need to meet rates and repairs, were beyond the financial resources of the prospective purchasers.[26]

---

[23] WAI 9 Orakei Report, Waitangi Tribunal Report, 4 November 1987, p 284.

[24] WAI 9 Orakei Report, Waitangi Tribunal Report, 4 November 1997, p 147.

[25] See, for example, Vaithianathan R Equality: *Outcomes or Opportunities? A Review of the literature*, prepared for the Department of Labour, August 1995.

[26] WAI 9 Orakei Report, Waitangi Tribunal Report, 4 November 1987, p 242.

Consequently, in light of the equality debate, the Tribunal's findings in this claim suggest that the Crown, by virtue of its policies and practices, are required to ensure that Māori and non-Māori enjoy legal equality. While it would be difficult to draw out any further Treaty-based interpretations of equality from this particular claim, it might be suggested that it does, at least, support legal equality as a minimum standard.[27]

WAI 11 Te Reo Māori

Although the nature of this claim was simple, the Tribunal noted that its ramifications - politically, socially, financially and otherwise - were perhaps the most difficult that it had had to consider. In this case, the claimants spoke of the need for the Crown to actively protect the language.[28] In addition, they sought recognition of te reo Māori as an official language of New Zealand.

---

[27] Julian Le Grand provides an economic analysis of equality, describing five different models:

a. *equality of public expenditure* - public expenditure on the provision of a particular social service should be allocated equally between all relevant individuals;

b. *equality of final income* - public expenditure on the social services should be allocated in such a way as to favour the poor, so that their 'final incomes' (private money income plus the value of any public subsidy received in cash or in kind) are brought more into line with those of the rich;

c. *equality of use* - public expenditure on a social service should be allocated so that the amounts of the service used by all relevant individuals are the same;

d. *equality of cost* - public expenditure should be allocated in such a way that all relevant individuals face the same private cost 'per unit' of the service used; and

e. *equality of outcome* - public expenditure should be allocated so as to promote the equality in the 'outcome' associate with a particular service. Precisely what is meant by 'outcome' will vary from service to service.

See J Le Grand **The Strategy of Equality**, Allen and Unwin, London (1982) pp 14-16.

[28] The claimants stated that numerous Acts (including the Māori Affairs Act 1953, the Broadcasting Act 1976, the Education Act 1964, the Health Act 1956, the Hospitals Act 1957) were inconsistent with the Treaty in that they denied Māori the right to have their language spoken, heard, taught, learnt, broadcast or otherwise used for all purposes and in particular in Parliament, the courts, Government departments and local bodies and in all other spheres of New Zealand society including hospitals; WAI 11 Te Reo Māori Report, Waitangi Tribunal Report, 29 April 1986, p 19.

A crucial finding of the Tribunal in this claim was that the language was an essential part of Māori culture, and it must therefore be regarded as a valued possession or taonga, protected under Article II of the Treaty.[29] The Tribunal stated:

> Taking into account all the circumstances as they existed when the [Treaty] was made we think that it is unlikely that many Māori signatures would have been obtained if it had been said by Captain Hobson that the Royal guarantee of protection would not include the right to use Māori in any public proceedings involving a Māori.[30]

As proof of prejudice, the Tribunal chose to focus on the use of te reo Māori in the country's courts. In light of its earlier finding that the language is a 'taonga' for Māoridom, protected by Article II, the Tribunal determined that the Crown had an active obligation to protect the language.

It was clearly not easy for the Tribunal to make recommendations in this claim. There was a need to balance the political consequences with social factors, including the high costs to the Government, if the decision was to support the claim. Nonetheless, the Tribunal recommended that the language be restored to its proper place by making it an official language of New Zealand, with rights to use it on any public occasion, in the Courts, in dealing with Government Departments, with local authorities and with all public bodies. In addition, the Tribunal recommended that the Ministers of Education, Broadcasting, and State Services seriously consider the implications of this claim for their respective sectors of responsibility, in relation to the Crown's Treaty guarantees to protect the language.[31]

---

[29] The Tribunal considered the two versions and applied international law principles of interpretation to assist it to make this finding, WAI 11 Te Reo Māori Report, Waitangi Tribunal Report, 29 April 1985, p 20.

[30] WAI 11 Te Reo Māori Report, Waitangi Tribunal Report, 29 April 1986, p 25.

[31] Te Taura Whiri (The Māori Language Commission) was also established as a result of the Tribunal's recommendations in this claim.

Since this claim, commentators have sought to extend the Tribunal's findings concerning Article II 'taonga' into other areas such as health, or onto other things, such as children. For example, in Re M (Adoption)[32] the Family Court accepted the argument that 'taonga' may also include children. Furthermore, the Royal Commission on Social Policy (the 'Commission) noted that 'taonga' was a very broad term which includes material and non-material kinds of treasures. Among those treasures, the Commission noted the importance of children and the elderly. Kaumātua (the elderly) maintain Māori identity with the past and with ancestors, and mokopuna (grandchildren) are guardians of life and identity for the future.[33]

Within this context, the concept of 'wellbeing' has also been widely discussed. Wellbeing can arguably encompass all aspects of life. The Commission referred to the place of cultural and social values in the Treaty and their implications for the wellbeing of Māori. The Commission stated that:

> Within the Treaty, economic, social, constitutional, cultural and spiritual dimensions are intended.[34]

Furthermore, the Commission maintained that Article II must also be concerned with economic and social issues (and with the many factors that contribute to wellbeing), given the relationship of people to resources such as land, forests, fisheries and villages.[35]

Professor Mason Durie also finds support in the preamble to the Treaty, which he argues, both in tone and wording (the Queen offers protection of 'just Rights and Property and to secure to them the enjoyment of Peace and Good Order'), clearly advocates that Māori wellbeing was an important objective of the Treaty. Professor

---

[32] Re M (Adoption) [1994] 2 NZLR 237.

[33] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 41, and Volume III, Part One, *Future Directions*, pp 151-152.

[34] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 41.

[35] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 41.

Durie also points to the element of wellbeing, separate to material wealth, confirmed in the expression of citizenship rights in Article III.[36]

Finally, a statement, often referred to as the 'Fourth Article', read just prior to the signing of the Treaty at Waitangi, expressed a concern for spiritual and cultural aspects of wellbeing. It said:

> The Governor says the several faiths of England, of the Wesleyans, of Rome, and also the Māori custom, shall be alike protected by him.[37]

WAI 26/150 Broadcasting/Radio Frequencies

These claims concerned aspects of the Tribunal's decision in the *Te Reo Māori Report*, as well as the Crown's proposed sale of radio spectrum frequencies. This second aspect resulted in litigation in the High Court and Court of Appeal, as well as a further hearing in the Tribunal.

The claimants asserted that the radio spectrum was a taonga protected by the Article II guarantee of 'tino rangatiratanga'. The claimants also argued that the principles of the Treaty imposed an obligation on the Crown to ensure that Māori had sufficient access to the spectrum to maintain cultural integrity and security. The Crown rejected the claimants assertion based on interpretations of 'taonga' in Article II, saying instead that by virtue of Article III Māori had the same rights to enjoy the scientific and technological advances since the Treaty.[38]

The Tribunal noted that the radio spectrum is different from other taonga such as those handed down from the ancestors (taonga tuku iho o ngā tupuna). As a natural resource, the spectrum could not be possessed by one person or group, and therefore

---

[36] Durie (1989) p 282.

[37] Durie (1989) p 282. See also the Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 42.

[38] WAI 26/150 Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies, 27 November 1990, p 40.

the only available right was a right of access shared with all other humans. As a result, the Tribunal concluded that this was an 'in between' situation, where the use of the radio spectrum was intimately connected to the use, protection and development of Māori language and culture. Consequently, Māori were deemed to be entitled to fair and equitable access to radio frequencies, and in any scheme of spectrum management Māori had greater rights than the general public, especially when it is being used for the protection of language and culture.[39]

One further point from this claim, arose in the Tribunal's discussion about the Crown's obligation to consult with Māori. The Tribunal noted that Māori are not a homogenous group, that the Treaty talks of tribes rather than an amorphous body now called 'dom'.[40]

The Crown's arguments in this claim indicate that in relation to this special type of resource, Māori have no additional citizenship rights to those enjoyed by all New Zealanders. The Tribunal disagreed only in so far as greater rights may be necessary to ensure adequate protection of Māori language (a taonga protected by the Treaty) and culture.

Summary

Based on the Tribunal reports reviewed above, several threads can be drawn. Noted below, they may prove to be relevant in the resolution of future, more directly social policy-related claims to the Tribunal:

- the Treaty both assured Māori survival and envisaged their advance;
- the Treaty contains guarantees but these are not absolute and unqualified. While these guarantees are constant, the Crown's obligations to actively meet them are subject to the circumstances, including the economic, political and social conditions, prevailing at any particular time;

---

[39] WAI 26/150 Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies, 27 November 1990, p 42.

- the extent to which Māori have participated and benefited from Western culture are important to an analysis of the extent of the Crown's obligation to allow for Māori to advance;
- the disparity between the rate of economic progress of Māori compared with other New Zealanders can clearly be attributed in some measure to breaches of the Treaty;
- where Māori experience certain conditions of need, the relationship between that need and the Crown's commitment to supplying it may clearly be expressed in Treaty terms;
- there are fundamental rights of citizenship, including that of political representation;
- the Crown, by virtue of its policies and practices, is required to ensure that Māori and non-Māori enjoy, at least, legal equality;
- interpretations of 'taonga' may extend into other areas such as health, or onto other things, such as children;
- where a resource, or taonga, which is subject to an Article II guarantee, is in question, Māori may have greater rights of access than the general public;
- it is necessary to look at all the circumstances as they existed when the Treaty was made to consider whether Māori would have signed if they thought that the Crown's guarantees excluded certain social conditions;
- Māori wellbeing was an important objective of the Treaty, and was confirmed in the expression of citizenship rights in Article III; and
- Māori are not a homogenous group - the Treaty spoke of tribes rather than an amorphous body called 'dom'.

[40] WAI 26/150 Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies, 27 November 1990, p 43.

Recent Claims

As noted above, more recent claims to the Tribunal have a distinct social policy flavour. Although the Tribunal is yet to report their decisions in these cases, the arguments contained in the selection of statements of claim reviewed provide a useful indication of Māori interpretations of Treaty, and more particularly, of Article III, guarantees.

The earliest of these claims was registered in 1987, however almost half were received by the Tribunal during the past two years. While clearly a minority, at less than four % of the total claims registered, this category of claims is certainly growing in number, with four being received by the Tribunal in this year alone. The following claims are reviewed:

- WAI 414 Te Whānau o Waipareira Trust Claim
- WAI 286 Adoption of Children Claim
- WAI 381 Māori Women's Claim
- WAI 578 New Zealand Qualifications Authority: Māori University Bursary Examination Claim
- WAI 582 Scaling of "raw scores" in the 1995 University Bursary Examination Claim

WAI 414 Te Whānau o Waipareira Trust Claim

On 20 December 1993, Haki Wihongi, on behalf of himself and Te Whānau o Waipareira Trust, claimed that, under the Treaty, urban Māori authorities are entitled to receive an equitable share of social service funding from the Government.[41] The claim relates to the statutory provision for Iwi Social Services pursuant to the Children, Young Persons and their Families Act 1989 (the '1989 Act').[42]

---

[41] WAI 414 Second Amended Statement of Claim, Monday 22 August 1994, pp 8-9.

[42] Children, Young Persons and their Families Act 1989, ss 396-402, inter alia, provide for the Director General of Social Welfare to:

> approve any incorporated body (being a body established by an iwi) as an Iwi Social Service for the purposes of this Act.

The claimants included among the Crown's alleged Treaty breaches, that:

- the provision of money for social development funding to Māori is an obligation of the Crown arising from the Treaty and amounts to an action consistent with the Crown's obligations to protect and restore their rangatiratanga; and
- the Crown's failure to protect Māori interests in the delivery of Social Care breaches Articles I, II and III of the Treaty, and the fiduciary duty of the Crown to the claimants is as a consequence in breach.[43]

Consequently, the claimants asked the Tribunal to recommend, inter alia, that organisations servicing predominantly the Māori population be acknowledged in terms of their representational capacity, performance and systems available to place Government programmes out to their communities.

In their second amended statement of claim, the claimants went further. To establish a Treaty-based right to government funding, the claimant argued that, as an urban Māori organisation which provides 'cultural continuity' for Māori in an urban setting, and because *all* Māori are members of iwi, Te Whānau o Te Waipareira Trust is a Treaty partner and enjoys rights deriving from Treaty guarantees.[44]

The 1991 Census indicated that between 70 and 80 % of Māori live in urban areas. Māori experience, whether in urban or rural areas, spans the spectrum from strong affiliation with traditional iwi and hapū structures (including marae) based on common ancestry, to association with contemporary organisations, based on common experience and common needs. Chief Judge Eddie Durie has emphasised the need to consider equity as between traditional and urban groups.[45] By virtue of Article III,

---

The development of this particular policy was based upon the combination of a recognition of the constitutional position of iwi, as well as the Department of Social Welfare's concern to deliver effective services to Māori.

[43] WAI 414 Statement of Claim, 16 December 1993, p 2.

[44] WAI 414 Second Amended Statement of Claim, Monday 22 August 1994, pp 4-5.

[45] E Durie in McLay (ed) (1995), p 6. See also Roger CA Maaka "The New Tribe: Conflicts and Continuities in the Social Organization of Urban Māori", The Contemporary Pacific, Volume 6, Number 2, Fall 1994 p 311-336.

wherever Māori reside, they are entitled to the share in the benefits that accrue to citizens in this country. The next question then becomes the most appropriate means of delivering those benefits.

Pursuant to Article II, the relationship established by the Treaty is usually referred to as one between the Crown and iwi/hapū.[46] However, urban Māori authorities, such as Te Whānau o Waipareira Trust and the Manukau Urban Māori Authority are currently contesting that view both in the Tribunal and the Privy Council. (This paper does not advocate for one position before another. In the author's view, both arguments rest on valid interpretations of the Treaty and of the Treaty relationship, however this paper will not discuss in detail the rights of urban Māori authorities to share in the proceeds of historical settlements, or to shares in the fishing quota.)

Arguments such as those advanced by the urban Māori authorities in the above actions, seem to have some currency. Chairman of the Waitangi Tribunal, Chief Judge ET Durie has stated that:

> Māori currently present the iwi as the main governing unit - the iwi being a confederation of peoples, claiming authority over a prescribed area and possessed of corporate functions exercised through a central organ....*It appears, however, that the modern iwi arrangement represents the latest stage in a history of tribal restructuring. I doubt it should be seen, or represented, as having always existed....*
>
> ...in the latter part of the last century, and increasingly in this, iwi groups emerged as regular confederations of the related hapū of a region and new

[46] See, for example, Hekia Parata, "The Treaty of Waitangi: A Public Policy Framework", paper prepared for Te Puni Kōkiri, 24 May 1996; and also Durie M "The Treaty of Waitangi: Perspectives on Social Policy" in **Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi**, H Kawharu (ed) Oxford University Press, Auckland, 1989. For an alternative view, based on the experiences of Kahungunu Māori living in urban Canterbury, see Roger CA Maaka "The New Tribe: Conflicts and Continuities in the Social Organization of Urban Māori", The Contemporary Pacific, Volume 6, Number 2, Fall 1994, 311-336.

> leadership were seen to exist at local and regional levels. *'Iwi' meant simply, 'the people'*.[47] (emphasis added)

Lord Cooke of Thorndon proceeded along a similar approach in the recent judgement of Te Rūnanga o Muriwhenua and others v Te Rūnanga o te Upoko o Te Ika Association Inc and Others CA 155/95 30 April 1996 where the Court concluded that 'iwi' means the peoples of tribes, whether their specific affiliation is established, or not.[48]

While expressly limited, in this instance, to the pan-Māori settlement of fisheries assets, the Court made pertinent statements concerning the nature of traditional structures. In doing so the Court appeared to consider the present day 'realities' of Māori social organisation. In respect of consultation with urban Māori in this case, Lord Cooke said:

> This is required by the Treaty of Waitangi and its principles, applied as a living instrument in the light of the developing national circumstances.[49]

The present day 'realities' of Māori are a relevant consideration in the development of social policies affecting Māori. Frequent descriptions of the Treaty as a 'forward-looking' and 'living' document, support such an approach.[50] Consequently, the Government and its social service agencies should avoid pre-determining the best delivery mechanisms for Māori. The provisions for the Iwi Social Services under the 1989 Act were developed following consultation with Māori. In addition, the Department of Social Welfare (the 'Department') considered the significance of the Treaty, and the fact that 50 % of its clientele is Māori.[51] While these provisions were

---

[47] Chief Judge ET Durie, "Custom Law: Address to the New Zealand Society for Legal and Social Philosophy" [1994] 24 VUWLR 325, 327-328, cited in C Wickliffe and Walghan Partners, *The Treaty and Social Policy Project*, Volume II, report prepared for Te Puni Kōkiri, June 1996, 5:47-48.

[48] CA 155/95, 30 April 1996, p 29. The Court referred to the different versions of the Treaty, and also to HW Williams' **Dictionary of the Māori Language**, 7th ed revised 1985, which defines 'iwi' as 'nation, people'.

[49] CA155/95, 30 April 1996, p 29.

[50] See A Sharp, **Justice and the Māori: Māori Claims in New Zealand Political Argument in the 1980s**, Auckland, Oxford University Press, 1990.

[51] Personal communication, Social Policy Agency Policy Analyst.

perhaps developed in good faith, their associated requirements (such as the need for an established mandate) suggest that the present day realities of Māori, including their needs, were not fully considered.[52] The current claim also suggests that the degree of commitment by the Government to involving Māori via these mechanisms, is not met with a corresponding financial commitment to supporting their development and success.

In their opening submissions to the Tribunal, counsel for the claimants argued that Article III speaks of an obligation on the Crown to produce substantive equality of outcomes on terms acceptable to Māori.[53] This, arguably, provides a significant Treaty basis on which Te Whānau o Waipareira Trust could bid for resources without the need to assert iwi status. If it could be shown that a group such as Te Whānau o Te Waipareira contributes to a reduction in social and economic disparities between Māori and non-Māori, then there is a strong Article III-based presumption that they should be given the opportunity to do so.

Based on this view, Article III authorises the development of social policies, practices or programmes favouring Māori that may result in the different treatment of different sections of the community. In this context, 'community' refers to New Zealand society as a whole. This leads to the suggestion that, in light of the current social inequalities that persist (and appear to be growing) between Māori and non-Māori, Article III supports 'vertical equity', or unequal outcomes, as opposed to 'horizontal equity' or similar outcomes.

---

[52] Materoa Dodd noted the debate and scepticism over the real intention of the Government in establishing Iwi Social Services in a paper entitled "Iwi Social Services, A Partnership or Fiscal Saving?", presented to the Asia-Pacific Regional Social Services Conference, held at Canterbury University, 20-23 November 1995. Dodd noted that for iwi, Iwi Social Services encompasses an holistic social service delivery, but for the Department of Social Welfare, it is premised on need. Dodd added that resources and funding are critical concerns, some critics maintaining that Iwi Social Services constitutes a ploy of the Government to rid itself of its social responsibilities; p 2.

[53] Opening Submissions of Counsel for the Claimants before the Waitangi Tribunal, WAI 414, p 12; noted in C Wickliffe and Walghan Partners, *The Treaty and Social Policy Project*, Volume II, report prepared for Te Puni Kōkiri, June 1996, 5:23.

For example, the Māori labour force participation rate is 59.8 % compared with 65.9% for non-Māori, and unemployment amongst Māori stands at 18.1% compared with only 5.4% for non-Māori. Employment assistance programmes that 'target' Māori men, or Māori youth, aim specifically to increase their participation in the labour market. Similarly, university 'quotas' have the specific objective of increasing the number of Māori receiving tertiary education. Such programmes are not available to non-Māori. Therefore, while these programmes seek to achieve unequal outcomes (vertical equity), the overall aim is to bring Māori and non-Māori experience relatively closer together.

This discussion raises the distinction between arguments for the unequal treatment of Māori based on 'needs' on one hand, and 'rights', on the other. These arguments are relevant to an analysis of social policy based on the Treaty. A needs-based rationale relies on statistics showing that Māori are performing worse than non-Māori. Currently, there is no difficulty finding such statistics. Targeting services to Māori based on rights relates to their distinct position under the Treaty. Other groups, such as Pacific Island, or Asian, people do not enjoy such a position, and therefore, although they may experience similar disadvantage to Māori, they cannot advocate a similar right. Social policies based on need clearly have currency in government policy. This argument is further discussed below in relation to the Human Rights Act 1993.

Progress in relation to activating the Iwi Social Service provisions of 1989 Act stalled in anticipation of the Tribunal's ruling in this claim. However, the Department has continued to progress discussions with groups seeking authorisation, to the point where several applications are poised for approval.[54] As far as the claim, the Department has a continuing interest in whether urban Māori authorities, such as Te Whānau o te Waipareira Trust, or the Manukau Urban Māori Authority, are 'iwi' for the purposes of the 1989 Act. The Waitangi Tribunal's ruling on this claim is awaited with interest, both in policy and legal circles.

---

[54] In doing so, the Department appears to be treating issues of mandate on a case by case basis.

WAI 286 Adoption of Children Claim

This claim was registered on 27 March 1992 by Daphne EB Tait-Jones, of Tuhoe descent. The claimant states that she has been deprived of her grandchild pursuant to government policies and practices, and that consequently, she has been prejudicially affected by the provisions of the Adoption Act 1955 and the Guardianship Act 1968; by the failure of the Crown to adequately provide for the tikanga and social structures of Tuhoe within the provisions of that legislation; and by the policies and practices of the Crown via the Department of Social Welfare. The claimant states that these Acts, policies and omissions are inconsistent with the principles of the TOW.

The claimant understands Article III to mean that:

> "Māori would not be disadvantaged by our status as British subjects and also that we would not be forced to adopt British practices at the cost of our own culture especially in respect of our taonga."[55]

In her view, the current legal regime governing adoption and guardianship does not adequately accommodate Māori culture as it relates to Māori children, and consequently breaches Articles II and III.

Sections 18 and 19 of the Adoption Act 1955 deal specifically with Māori adoptions:

> **18. Application of Act to Māoris** - An adoption order may be made under this Act on the application of any person whether Māori or not, in respect of any child, whether Māori or not.
>
> **19. Adoptions according to Māori custom not operative** -
>
> (1) No person shall hereafter be capable or be deemed at any time since the commencement of the Native Land Act 1909 to have been capable of adopting any child in accordance with Māori custom, and, except as provided in subsection (2) of this section, no adoption in accordance with Māori custom

[55] WAI 286 Statement of Claim, 27 March 1992, p 4.

> shall be of any force or effect, whether in respect of intestate succession to Māori land or otherwise.
>
> (2) Any adoption in accordance with Māori custom that was made and registered in the Māori Land Court before the 31st day of March 1910 (being the date of the commencement of the Native Land Act 1909), shall during its subsistence be deemed to have and to have had the same force and effect as if it had been lawfully made by an adoption order under Part IX of the Native Land Act 1909.

By virtue of these provisions, the claimant states that the 1955 Act vests the power of consent to an adoption in the natural parents only, and in certain circumstances only one parent, contrary to tikanga Māori and Article II and III guarantees.

With respect to the Guardianship Act 1968, the claimant states that:

> Article III of the Treaty of Waitangi guaranteed a place for both cultures in New Zealand. Māori culture is unaccommodated and unrecognised within the provisions of the Guardianship Act. This is contrary to the Treaty.[56]

The claimant also suggests policies and practices that the Department of Social Welfare employ to provide culturally appropriate services for Māori, and to enable it to act consistently with the Treaty. These include employing Māori social workers, availability of information to whānau, hapū and iwi, and a role for whānau, hapū and iwi in decision-making with respect to their taonga.[57]

---

[56] Furthermore, the claimant noted that the Guardianship Act breached the Treaty of Waitangi in several ways, including that section 16 denies kaumātua the right of access to their mokopuna, unless they fit within the narrow definition or class of people given standing to have an access order made in their favour; section 16 does not accommodate the cultural norm of Māori, that is a child or children are raised by members of their whānau, hapū or iwi as well as their natural parents; section 6 ... vests guardianship in the natural parent and the rights ancillary to guardianship...[whereas G]uardianship should be able to be vested in a group rather than one or two people; and section 11 states that custody can only be made in favour of a narrow class of people. In addition, the claimant states that the Act is based on underlying policy assumptions that are contrary to the Treaty of Waitangi, WAI 286 Statement of Claim, 27 March 1992, pp 6-7.

[57] WAI 286 Statement of Claim, 27 March 1992, p 8.

A significant aspect to this claim is the focus on *Tuhoe*, as a distinct group within Māori generally. The claimant describes the environment and relationships necessary for *Tuhoe* children to grow up knowing who they are and where they come from. Regarding the Adoption Act 1995, the claimant said that:

> [The Act] breaches the spirit and principles both (sic) Article II and III in that it does not accommodate *Tuhoe tanga and practise as it relates to adoption.*[58] (emphasis added)

Iwi and hapū identity, autonomy and/or rangatiratanga, are more often discussed with respect to claims to land and natural resources, that is Article II-issues. Consequently, a claim to specific modes of adoption policy design and implementation (via legislation and service delivery) for a specific iwi, namely *Tuhoe*, appears to place a gloss on Article III guarantees to *Māori.*[59]

Pending the Tribunal's recommendation on this particular aspect, one result may be that Parliament in designing social policy legislation, and Government departments in implementing that legislation (for example through service delivery contracts with provider agencies), will be actively discouraged from considering New Zealand society in general as a homogenous group, but also Māori as a homogenous group.[60]

WAI 381 Māori Women's Claim

This claim was registered on 27 August 1993, by Areta Koopu and a number of Māori women, on behalf of themselves and their respective iwi, and all Māori women. In the preamble to the particulars of their claim, the claimants refer to the rights of Māori women guaranteed in Article II and III, and state that the Crown's actions and policies have been inconsistent with its obligations under the Treaty of Waitangi, and that these actions and policies have resulted in:

---

[58] WAI 286 Statement of Claim, 27 March 1992, p 4.

[59] On the basis that the Crown sought signature to the Treaty from rangatira (or chiefs) from iwi and/or hapū, and when considering the Treaty in totality (rather than as the sum of distinct component parts) this assertion appears to hold merit. For a background discussion on the context to the Treaty's signing see Orange C, **The Treaty of Waitangi**, Allen and Unwin, New Zealand, 1987, pp 6-91.

[60] See also Durie (1989) p 292; T v S (No 1) [1990] NZFLR 411, and T v S (No 20 [1990] NZFLR 429.

> an undermining of Māori women so that their status as rangatira has been expropriated due to the Crown's failure to accord Māori women status and power within the political, cultural, social and economic structures it has created;...[61]

According to the claimants, the Crown's policies and practices in relation to its appointment procedures to various Crown agencies[62] established for the benefit of Māori represent a failure to protect and promote the value, status and position of Māori women. In effect, they say this has denied Māori women access to key processes of iwi self-government, management of Māori-owned assets, and contribution to whānau, hapū and tribal leadership, across areas of significant concern for all Māori. Consequently, the claimants seek recommendations from the Tribunal on three issues, including:

> (a) Does the Treaty of Waitangi guarantee to Māori women rangatiratanga?
>
> (b) Does the rangatiratanga guaranteed by the Treaty include *the exercise of political, economic and social power by Māori women? If so, does the Treaty encompass a development right in this context?*
>
> (c) Are the processes for appointments that are being made by the Crown to organisations in accordance with the guarantees in the Treaty?[63] (emphasis added)

The claimants seek remedies that focus predominantly on appointment and consultation processes.[64] According to the Court's interpretation of the principles of the Treaty, 'policy and resource decisions on social policy, ..., need not be the subject of consultation, so long as the Government acts in good faith'.[65] However, under this reasoning social policy decisions will continue to be fragmented into specific categories such as mental health, education, employment and environment.

---

[61] WAI 381 Statement of Claim, 26 July 1993, p 3.

[62] The amended statement of claim focused specifically on the Māori Education Foundation Trust Board, the Fishing Industry Board, Te Waka Toi (the Māori Arts Council) and Te Reo Whakapuaki Irirangi (now Te Māngai Paho), but the remedies also included organisations such as Regional Health Authorities, Crown Health Enterprises and the Treaty of Waitangi Fisheries Commission; WAI 381 Amended Statement of Claim, 9 August 1993, p 2.

[63] WAI 381 Amended Statement of Claim, 9 August 1993, p 1.

[64] WAI 381 Statement of Claim, 26 July 1993, p 9.

[65] New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, 653 (Richardson J).

Furthermore, any consultation will be ad hoc, and broader questions such as control over political power will not be on the agenda.[66]

WAI 578 New Zealand Qualifications Authority: Māori University Bursary Examination Claim

WAI 582 Scaling of "raw scores" in the 1995 University Bursary Examination Claim[67]

Both these claims concern the scaling formula for 'raw scores' used by the New Zealand Qualifications Authority (the 'NZQA') following the 1995 University Bursary Māori examination.[68] In WAI 578 the tumuaki (or principal) of a kura kaupapa, and the kura kaupapa itself claim on behalf of their pupils, and in WAI 582 a mother claims on behalf of her son.

In WAI 578 the claimants state that they were prejudicially affected by the NZQA's conduct of the 1995 University Bursary Māori examination in that:

> ...the manner of scaling of the "raw scores" resulted in Māori candidates being treated differently, and in a manner that significantly disadvantaged them in relation to Non-Māori candidates.[69]

The claimants go on to say that:

> Actions of the Crown that disadvantage Māori examination candidates in relation to Non-Māori examination candidates are inconsistent with Article 3 of the Treaty of Waitangi.[70]

---

[66] J Kelsey, "Bi-culturalism, Access to Justice and the Mental Health Act", in Community Health in New Zealand, vol 4, no. 1, June 1988 p 32.

[67] Because they relate to similar concerns, for inquiry, the Tribunal has grouped these claims together, and therefore they will also be considered together in this paper.

[68] The NZQA uses a formula to award final marks which recognises the general performance level of the group of students taking the subject. The claimant in WAI 582 was told by NZQA staff that "the process is used to make the marks in Māori comparable with English results [because] marks in Māori were too high and the written examination too easy in comparison to English"; WAI 582 Statement of Claim, 1 March 1996.

[69] WAI 578 Statement of Claim, 28 February 1996, p 2.

[70] WAI 578 Statement of Claim, 28 February 1996, p 2.

The claimants describe the experiences of the pupils who had scripts returned with raw scores that had been scaled down by as much as 20 %, and claim that this type of scaling exacerbates the poor position of Māori in education.

The son of the claimant in WAI 582 had had his mark scaled down by 22 %. This situation, states the claimant, "breaches the Treaty of Waitangi provisions" and "undermines one of the Treaty partners".[71]

In the *Te Reo Māori Report*, the Tribunal heard similar evidence relating to the practice of scaling School Certificate marks. Evidence was brought showing that the practice unfairly discriminated against Māori students, particularly in the Māori language examination. The Tribunal did not make any specific findings on this aspect of the evidence, noting that:

> Steps have been recently taken to remedy the position on this particular point but the damage has been done - and for many years.[72]

However, these recent claims suggest that this position has not been remedied at all.

The claimants in WAI 578 seek recommendations from the Tribunal that would change the marks awarded the 1995 University Bursary Māori examination candidates so that they are not prejudiced in relation to candidates who sat other examinations; see the scaling formula used by the NZQA removed; and prohibit any future action by the NZQA that is inconsistent with the Treaty of Waitangi.

These claims raise issues concerning the extent of the NZQA's Treaty obligations as a Crown entity under the Education Act 1989, and the outcome of the application by the NZQA of its scaling formula being a disparity in achievement between Māori and non-Māori examination candidates.

---

[71] WAI 582 Statement of Claim, 1 March 1996.

[72] WAI 11 Te Reo Māori Report, Report of the Waitangi Tribunal, 29 April 1986, p 29.

Summary

This paper cannot predict the outcomes of future social policy-based claims to the Tribunal. However, there is benefit in tracing trends in Māori claims to the Tribunal, as these indicate Māori perceptions of their rights under the Treaty. This all adds to a more informed Treaty debate with regard to social policy issues. Based upon the material reviewed, the existence of this category of claims highlights perceptions among Māori that:

- the Treaty, literally and in principle, affirms obligations in relation to the social and economic well-being of Māori;
- those obligations in relation to the social and economic well-being of Māori accrue to the Crown and its various agencies, by virtue of the Treaty relationship;
- the social and economic disadvantage experienced by Māori relates to their access, participation, and achievement across social policy sectors;
- as with historical claims to land, the Tribunal has a crucial role to play in developing Treaty principles related to guarantees concerning Māori social and economic well-being;
- Article III guarantees to all Māori, wherever they reside, an entitlement to share in the benefits that accrue to citizens in this country. The Government, in consultation with Māori, must then determine the most appropriate means of delivering those benefits;
- as urban Māori organisations provide 'cultural continuity' for Māori in an urban setting, and because *all* Māori are members of iwi, such organisations are Treaty partners and enjoy rights deriving from Treaty guarantees;
- the present day 'realities' of Māori are a relevant consideration in the development of social policies affecting Māori;
- Government, and its agencies, should be actively discouraged from considering New Zealand society in general as a homogenous group, and also Māori as a homogenous group. Treaty guarantees extend to Māori as individuals, and therefore service responsiveness may also be evaluated along these lines;

- future policy development affecting different Māori groups, such as women, young people, the elderly, should occur following consultation with, and participation in decision making by, those affected groups;
- the guarantees under the Treaty are inter-connected[73], and should build upon the Crown's practices in relation to other, more developed areas, of Treaty policy;
- Article III may authorise the development of social policies, practices or programmes favouring Māori that result in the different treatment of different sections of the community. This is an outcome-based interpretation of equality[74];
- Government departments should consider employing policies and practices to provide culturally appropriate services for Māori, and to enable them to act consistently with the Treaty; and
- Māori should not be unfairly discriminated against by virtue of Government policies.

Many commentators argue that socio-economic disparities between Māori and non-Māori are due to the failure of the Crown to exercise its obligations under Articles I and II.[75] As noted above, several Tribunal reports conclude that loss of land and control over physical assets resulted in great damage to Māori social and economic well-being.

Underlying these social policy claims, in the authors view, is the assertion that, in developing social policy for Māori, the Government must go beyond Article III, and take account of Articles I and II, which relate to issues of governance and the possession of resources. As one claimant stated:

---

[73] Durie emphasises the importance of considering the Treaty as a whole, 'recognizing not only the meaning of each Article, but the way in which the three relate to each other and the ground that lies between them'; Durie (1989) p 292.

[74] The author acknowledges the difficulties associated with choosing equality of outcome as a policy objective, including, in particular, the difficulty in measuring achievement. At footnote 27, Le Grand expresses this as an uncertainty regarding the definition of 'outcome' across different services.

[75] See, for example, The Royal Commission on Social Policy (1988), *Towards a Fair and Just Society*; Durie M in H Kawharu (ed) (1989) p 285; McLay G (ed) (1995); and Filipo SL, *Whakamanatia Te Tiriti: Implementation in Four Catholic Schools of Policy relating to the Treaty of Waitangi*, MA Thesis, Auckland, 1993.

> It is no good having Māori owned land and Māori owned resources if Māori, as a distinct people with a unique culture disappear.[76]

The Treaty is not only about subsistence and the past, it is also about the right to development in areas and directions chosen by Māori. Therefore, debate about the Treaty must follow that trend. Treaty jurisprudence ~~has to~~ has proven itself to be a living, and not a static, thing. The ability to develop and adapt ideas suitable to a changing environment is essential at all times, but particularly when considering social policy issues.

Conclusion to Part 1

Just as the Tribunal has taken over 20 years since its establishment to achieve the current level of sophistication in the way it deals with claims pertaining to land and natural resources, the author predicts that there will be a period during which the Tribunal develops its position on social policy matters. Having said that, the Tribunal does have at its disposal, a wealth of information to draw upon, including existing Treaty jurisprudence, Government policies and international experience.

It is likely that the Tribunal will continue to draw upon the expertise of the courts. The role of the courts is discussed further below, however two points are relevant here. The positives and negatives of court action have become increasingly apparent. The costs of asserting rights have been high, and the outcomes uncertain. Kaye Turner advocates a role for the legal system along these lines:

> the legal system does not have the capacity to integrate and resolve the complexity and conflicts in society....the most suitable strategy for law as an integrative social force is to nurture the growth of institutions which regulate the methods of conflict resolution rather than stipulate their outcomes. Law, on this analysis, provides institutions and procedures within which conflicts can be resolved, rather than comprehensive and detailed regulation.[77]

---

[76] WAI 372 Statement of Claim, 27 July 1993, p 2.

[77] Turner (1995), pp 87-88. For a similar interpretation of the role of the legal system in contributing to the Crown's formulation of its Treaty obligation see also Jane Kelsey, "Free Market "Rogernomics"

Secondly, it is becoming increasingly urgent that Māori and the Government resolve the constitutional status of the Treaty, both as a means to a more positive relationship in future, and to reduce the uneven burden of cost that Māori currently bear, both in the Tribunal and the courts, through maintaining and advocating rights based on the Treaty.[78]

Although the Tribunal will probably avoid generalisations, and will continue with a case by case approach, current Treaty principles are likely to be further refined, or new principles developed to suit current social and economic realities. In any event, Māori will continue to look to the Treaty as providing the justification and the means for their access to improved social and economic outcomes, and the Tribunal will continue (as long as it exists) to be a forum for Māori to seek those outcomes.

---

and Māori Rights under the Treaty of Waitangi - An Irresolvable Contradiction?", available from the author, pp 6-7, 17-18.

[78] See Palmer in McLay (ed) (1995) p 154: "Indeed in my view the constitutional change that is most likely to be beneficial and acceptable is to make the Treaty part of a basic constitutional document in NZ which is part of our higher law. That way more arguments about its range and quality will be capable of being dealt with by established institutions, particularly the courts."

PART 2: GOVERNMENT PERSPECTIVES

Among the factors it considers when developing policy, government considers certain 'risks', including the fiscal, the political, and the legal risks, of supporting such a policy. In this balancing exercise, government is guided by a complex variety of policy drivers; among these expert advice, court decisions, and obviously, public opinion. Despite the undeniable incentives to factor the Treaty into its decision-making processes in some way, under current constitutional arrangements the Government has only a moral obligation to consider the Treaty.[79] Consequently, the status of the Treaty, constitutionally and in policy circles, is clearly inconsistent.

Despite the current environment where perhaps it is more appropriate to speak of 'caretaker Government' perspectives, several drivers are identified, that in the author's view, will be relevant to future government social policy development based in any way on the Treaty:

- existing policy statements;
- court decisions; and
- the review of government legislation, regulations, policies and administrative practices under the Human Rights Act 1993 (the 'Act').[80]

Existing Policy Statements

The Cabinet Office Manual (the 'Manual') is the authoritative guide to central government decision-making, for those working within government. According to Marie Shroff, Secretary of the Cabinet, the Manual is also a primary source of information on constitutional and procedural matters for those outside government. In his introduction to the Manual, Sir Kenneth Keith states that:

---

[79] For more on current constitutional arrangements, see FM Brookfield, "The New Zealand Constitution: the search for legitimacy", pp 1-24; and PG McHugh, "Constitutional Theory and Māori Claims" pp 25-63, both in Kawharu (ed) (1989). See also Sir K Keith, "The Roles of the Tribunal, the Courts and the Legislature", in McLay (ed) (1995) pp 41-49.

[80] The Human Rights Act 1993, s 5(1)(i)-(k).

> The New Zealand constitution reflects and establishes that New Zealand is a monarchy, that it has a parliamentary system of government, and that it is a democracy. *It increasingly reflects that the Treaty of Waitangi is regarded as a founding document of New Zealand.*[81] (emphasis added)

Later Sir Kenneth acknowledges that the Treaty places limits on majority decision making.[82]

It was in that context that Cabinet in 1986:

1. agreed that all future legislation referred to Cabinet at the policy approval stage should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;
2. agreed that departments should consult with appropriate Māori people on all significant matters affecting the application of the Treaty, the Minister of Māori Affairs to provide assistance in identifying such people if necessary; and
3. noted that the financial and resource implications of recognising the Treaty could be considerable and should be assessed wherever possible in future reports.[83]

The 1987 Treasury brief to the incoming Labour Government expressed one perspective on the Treaty's application to social policy matters:

> the Treaty involves a special and unique partnership but only in respect of areas actually covered by the Treaty. Where the Treaty is silent, as in respect of employment, incomes and economic development, there would be no special claim to partnership or power sharing other than as provided under Article III.[84]

---

[81] Cabinet Office Manual, Cabinet Office, Department of the Prime Minister and Cabinet, Parliament Buildings, Wellington, August 1996 p 3.

[82] Cabinet Office Manual (August 1996) p 7.

[83] Keith in McLay (ed) pp 41-42.

[84] Treasury, "Government Management. Brief to the Incoming Government", Vol I (1987), p 348.

This statement reflected a very restrictive interpretation of the Treaty, which sought to treat the rights and obligations envisaged by the Treaty on a piecemeal basis.[85] In 1988 the Royal Commission on Social Policy had no trouble rejecting this approach, noting that:

> The Commission is not convinced that "areas of silence" can be so clearly identified. Within the Treaty, economic, social, constitutional, cultural and spiritual dimensions are intended.[86]

The Royal Commission went on to describe the Treaty as a kind of 'tie that binds'; as the thread which 'can draw together the loosely woven fabric of social values and practices.'[87] This description of the Treaty suggests that the Royal Commission was anxious to restore a sense of dynamism to the Treaty partnership.

Kaye Turner notes that a key contribution by the Royal Commission was that it introduced the idea of the Treaty relationship as one that could be projected into the future and encompass all areas of social and economic life into the official discourse.[88] For example, the Royal Commission stated that:[89]

> Serious consideration needs to be given to the spirit of anticipation so evident when the Treaty was signed in 1840; then it was a prescriptive document, a guideline for future relationships, and the development of new social and economic patterns.

The Royal Commission identified a real danger that the proactive provisions of the Treaty would not be sufficiently recognised unless other measures were put in place to complement existing mechanisms, such as the Waitangi Tribunal.[90]

---

[85] See also Wickliffe C and Walghan (1995).

[86] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 41.

[87] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 49.

[88] Turner (1995) p 86.

[89] Report of the Royal Commission on Social Policy, The April Report, Volume II, *Future Directions*, p 62.

[90] Among those 'measures', the Royal Commission recommended the establishment of a Treaty of Waitangi Commission to give emphasis to the application of the Treaty to New Zealand's current and future development. Although most of the Royal Commissions recommendations went largely ignored

While acknowledging the positive contributions by the Royal Commission, Turner is critical of the fact that the symbolism of the Treaty as a potentially unifying social force was emphasised, rather than the Royal Commission focusing on concrete changes in political institutions and processes to give expression to the Treaty's partnership potential. Such an opportunity presented itself recently in the form of a review of the Standing Orders of the House of Representatives. Turner says:

> It is not an insignificant contribution to public discourse to affirm the Treaty as a kind of code of conduct for everyday social interaction between Māori and Pakeha. *It would, however, have been more significant still to have focused more particularly on the public dimensions of the relationship, that is, the ways in which public, political processes might express the relational code embedded in the Treaty.*[91] (emphasis added)

Obviously one key extension to the public debate would have been to advocate the need for an explicit rather than an implicit constitutional framework for New Zealand. Such an extension is still relevant. New Zealand needs a written constitution to provide a clear statement of the Treaty's status in law. As Turner notes, were such developments to occur, further work would definitely be required to configure the detailed forms of law appropriate for expressing the meaning and purpose of a diverse Treaty partnership.[92]

The *Crown's Settlement Proposals* are also relevant here in so far as they reflect, at least in part, the Government's position on the Treaty. This paper does not comment on the legitimacy or otherwise of the settlement policies contained in the proposals.[93]

---

by the Government, including this one, the findings of the Royal Commission are widely referenced in recognition of the high level of expertise and consultation that contributed to the compilation of the reports.

[91] Turner (1995) pp 84-85.

[92] Turner (1995) p 87.

[93] For comment on the proposals see Durie in McLay (ed) (1995) pp 21-26.

In the Foreword to the Settlement Proposals, Doug Graham, Minister in Charge of Treaty Negotiations, states that the Treaty of Waitangi is the foundation document of New Zealand. As such, the Treaty acknowledged the Crown's right to govern in the interests of all our citizens, it protected Māori interests, and it made us all New Zealanders.[94]

The Minister also recognised that the Treaty is as applicable today as it was in 1840, and that settlements will not restrict the ability of any Māori to enjoy the rights held by every other New Zealander, for example, to health services, educational and welfare entitlements.[95] Furthermore, nothing in the settlements will remove, restrict or replace Māori rights under Article III of the Treaty.[96]

Surprisingly, in view of the aims of the Proposals, neither the Treaty, nor even its principles, are included among the Settlement Principles. The Proposals illustrate that rather than first formulating a Treaty policy which is acceptable to both partners, the Government has opted instead to tackle one aspect of the Treaty (historical claims settlement), but in isolation from established Treaty principles, and the other Articles. In doing so, the Government's Proposals foster the impression that Treaty matters are an aggravation and that a piecemeal approach to issues under each Article will see the Treaty eventually done away with altogether.

---

[94] Crown Proposals for the Settlement of Treaty of Waitangi Claims, Summary Booklet, 1995, p 5.

[95] Crown Proposals for the Settlement of Treaty of Waitangi Claims, Summary Booklet, 1995, p 5.

[96] Crown Proposals for the Settlement of Treaty of Waitangi Claims, Summary Booklet, 1995, p 6.

Statements from the Health Sector

The health sector provides a useful illustration of the significance of the Treaty for policy development, and indeed, implementation.

The Crown's recognition of its Treaty of Waitangi obligations in the health sector was confirmed in the former Department of Health document entitled *Whāia te Ora mo te Iwi.*[97] Whāia te Ora states that:

> Any discussion on Māori issues in the health sector must begin with an acknowledgement of the relationship between the Crown, this legislation [the Health and Disability Services Bill] and the Treaty of Waitangi. The Government regards the Treaty of Waitangi as the founding document of New Zealand.[98]

Whāia te Ora was reaffirmed in the 1996/97 Policy Guidelines to the Regional Health Authorities (the 'RHAs').

He Matariki: A Strategic Plan for Māori Public Health[99] was produced by the Public Health Commission (the 'PHC') as its advice to the Minister of Health for 1994-95. It provides an overall framework for advancing Māori public health by addressing particular issues of relevance to Māori. That document confirms the PHC's understanding of the Treaty of Waitangi as the founding document of New Zealand.[100] Following the reconfiguration of the PHC in 1995, this document continues to provide the strategic framework for the development of Māori public health policy and has been reaffirmed in the Government's Guidelines to RHAs for 1996/97.

The Ministry of Health has identified Māori health as a 'health gain priority', and has stressed the urgent need for improvements in Māori health status. In the Policy

---

[97] *Whāia te Ora mo te Iwi: Strive for the Good Health of the People* - Government's response to Māori Issues in the health sector - Health and Disability Services Bill, Department of Health, 1992.

[98] *Whāia te Ora* (1992) p 22.

[99] The Public Health Commission's Advice to the Minister of Health, Public Health Commission, 1995.

[100] *He Matariki* (1995) p 7.

Guidelines for RHAs 1995 through 1997[101] the Ministry reaffirms the Treaty as the founding document of New Zealand, and states that the Treaty requires that Māori be given the opportunity to enjoy the same level of health as non-Māori. In the 1996/97 Guidelines the Minister and the Ministry of Health express a desire to 'demonstrate the Crown's partnership responsibility to tāngata whenua'.[102]

The 1994/95 Policy Guidelines also requested that all RHAs develop a three year strategy to improve Māori health. That request is confirmed in the 1996/97 Guidelines. In its *Māori Health Plan 1995 - 1997*[103] North Health notes the Treaty is the cornerstone of quality and culturally appropriate health care services for Māori.

Several frameworks for the delivery of health services to Māori have been developed by the Government, which focus on health service effectiveness from a Māori consumer perspective, and which aim to give practical significance to the Treaty. Among these *He Taura Tīeke*[104] was developed by the Ministry of Health based on research into health service priorities for Māori consumers.[105] *He Taura Tīeke* identifies the key attributes of effective health services for Māori consumers and is intended as a tool for use primarily by service providers.

According to *He Taura Tīeke*, the Treaty provides a philosophical base or framework from which a health service is structured and delivered, which is consistent with and supports, Māori consumers' views of health. In addition, the Treaty is included among the service implications and measurable indicators for the effective delivery of health services to Māori. [106]

---

[101] Ministry of Health, 1994 and 1995.

[102] *Policy Guidelines for RHAs 1996/97* p 13.

[103] Māori Health Development Division, North Health, 1995.

[104] Traditionally, a taura tīeke was a measuring line used in the building of a house. It was designed to check the symmetry of the diagonals, so that the walls would be even and the house would be strong. *He Taura Tīeke: Measuring Effective Health Services for Māori*, Ministry of Health, 1995.

[105] See *Health Service Priorities for Māori Consumers,* Harris, A, Ministry of Health, 1994 and *Measuring the Effectiveness of Health Services for Māori Consumers*, Harris, A, Ministry of Health, 1994.

[106] *He Taura Tīeke* (1995) p 14.

In contrast, the Health and Disability Services Act 1993 and Code of Health and Disability Services Consumers' Rights are examples of an explicit decision by the Government not to incorporate any references to the Treaty of Waitangi into policy documents and governing legislation, despite repeated calls by Māori to do so.

Professor Mason Durie suggests that the Articles of the Treaty have direct implications for service delivery, when he says:

> In so far as the intent of article 2 was to maintain social and economic systems, and to ensure continued Māori wellbeing, the spirit of the Treaty has not been observed.[107]

Professor Durie goes on to suggest practical steps that policy makers and practitioners can take to ensure that the Treaty is given effect for Māori health consumers. However, in doing so he acknowledges that the Treaty is not a blueprint for good health 'nor a prescription for all ills.' Nonetheless, Professor Durie strongly advocates that good health is clearly an objective of the Treaty.[108]

The above summary indicates that at various points in the health sector the Treaty has relevance, however government policies and strategies are by no means consistent in this regard. For example, the Ministry of Education is committed to a bicultural strategy which incorporates a ten point plan for Māori education, but does not mention the Treaty. The lack of a coherent statement of the Government's position on the Treaty, generally speaking, but particularly in relation to social policy matters, has resulted in disjointed, albeit well-meaning, policy development across government agencies. Surely, consistency and transparency, as well as other interests relevant to 'good government', demand a improvement to the current situation.

---

[107] Durie (1988) p 284.

[108] Durie (1988) p 285.

Representation and Mandate

A full discussion on these issues would fill a research paper on its own. However due to the significance these matters currently have for the Government, a brief mention seems necessary. Sufficient to say in this context that there are two relevant issues. The first is who may represent Māori in discussions with the Crown. This is so whether the discussions are over land and other natural resources, frequencies, fish quota, or the delivery of social services to iwi. While agencies have their particular areas of focus, a consistent rationale which promotes transparent process and clear objective criteria, will be in the interests of both sides of the partnership. The second concerns which group, urban or tribal, Māori as individuals, will affiliate to, to receive the benefits of any settlements or resources allocated to them. Criteria such as commitment, association, and domiciliary location, as opposed to descent alone, may then be relevant.[109]

[109] Maaka (1994) p 329.

The Courts

The role of the legal system in contributing to the current status of the Treaty could similarly occupy a paper on its own. The courts have played a central role in the development of Treaty jurisprudence. While a full consideration of the various issues raised by the courts' contribution is beyond the scope of this paper, the following brief points are noteworthy.

The recent judgement of the Court of Appeal in Te Rūnanga o Muriwhenua and Others v Te Runanganui o Te Upoko o Te Ika Association Inc and Others CA 155/95 30 April 1996, was significant for its contribution to the development of Treaty of Waitangi jurisprudence. It is also noteworthy as the final judgement delivered by Lord Cooke of Thorndon in the Court of Appeal.

The key to the judgement is the requirement that any scheme or legislation proposed by the Treaty of Waitangi Fisheries Commission (the 'Fisheries Commission') to distribute the assets of the settlement 'includes equitable and separately administered provision for urban Māori.' In doing so, the Court appears to have defined a new constituency called 'urban Māori', contrary to the Fisheries Commission's wish to deal with all Māori first and foremost as 'iwi Māori'.[110] The Court directed the Fisheries Commission to include Māori without specific tribal affiliations *within* the definition of 'iwi'. The Court opined that such an interpretation was justified because the settlement assets were stated as being for 'all Māori', and also because the term connotes 'the people of tribes' regardless of tribal affiliation or leadership.[111]

In a case note, A Kawharu comments on the Court's findings. Kawharu notes that the Treaty certainly provides for urban groups and individuals, regardless of affiliation. In addition, Kawharu acknowledges that the groups represented by the Urban Māori Authorities are inherently capable of exercising rangatiratanga, thereby qualifying

---

[110] The Maori Law Review, May 1996.

[111] Te Rūnanga o Muriwhenua and Others v Te Runanganui o Te Upoko o Te Ika Association Inc and Others CA 155/95 30 April 1996, p 29.

them for the protection afforded by the Treaty.[112] However, Kawharu respectfully takes issue with the Court expressing its views on matters which fall within tikanga and tradition. In particular Kawharu expresses a concern that Māori culture not lose its distinguishing qualities, and that its identity remain intact. Therefore, Kawharu suggests that an approach more consistent with tradition may have been preferred by the Court.[113] Api Mahuika, Ngāti Porou Leader, saw the ruling as an extremely dangerous precedent for Māori, saying that the courts are now 're-writing how Māori rights should be determined.'[114]

In closing, Kawharu seems to reflect the views of many in the observation that it would have been more desirable for the parties to these proceedings to have resolved the issues - either between themselves or at a political level, between the Treaty 'partners' - without recourse to litigation. Kawharu says:[115]

> If any measure of control over the shape of Māori tikanga in law is to be had, litigation of this sort should be the last resort.

The parties to the litigation obviously still see some benefit in allowing the courts to adjudicate on such matters, as the Privy Council is currently hearing the appeal against the Court of Appeal decision.

The final point in relation to the court's contribution was noted in the conclusion to Part 1 of this paper. The financial costs to Māori of pursuing Government's conformity with the Treaty via the courts have been immense. The contribution to Treaty jurisprudence by judgements such as that of the Court of Appeal in New Council v Attorney-General [1987] 1 NZLR 641, (CA) 667 is heralded by many, including the Waitangi Tribunal. Jane Kelsey has taken an alternative view of such decisions.

---

[112] Kawharu (1996) p 210.

[113] Kawharu (1996) p 211.

[114] Newstel News: RNZ "Mana News", Wednesday 1 May 1996 (A).

[115] Kawharu (1996) p 211.

After acknowledging that the 1987 New Zealand Council (SOE) decision marked a significant shift in judicial attitudes to the Treaty, Kelsey centres on the Court's focus on the 'principles' of the Treaty, including partnership, reasonableness and good faith. Kelsey states that:[116]

> the concept of 'principles had thus become a device to rewrite the Treaty and avoid conflict between Crown sovereignty and te tino rangatiratanga.

In policy terms, Kelsey claims that since 1987, government departments and politicians have drawn extensively on the Court's decision in the SOE case to support restrictive interpretations of the Treaty. Kelsey cites as an example, the Government's devolution policy in 1988, which began with the dismantling of the Department of Affairs.[117]

Kelsey concludes, however, by saying that the courts have, to their credit, rejected the Government's narrow interpretation of the Crown's Treaty obligations, and the judiciary has actively facilitated political resolution of Treaty disputes by ordering the Government to negotiate when it had refused to so, and by retaining the right to scrutinise the outcome.[118]

---

[116] Kelsey (circa 1990) p 8.

[117] Kelsey (circa 1990) p 13.

[118] Kelsey (circa 1990) p 17.

The Human Rights Act Review

The aim of the Human Rights Act 1993 (the 'Act') is to prohibit discriminatory acts by private and public actors, in specific contexts. This section is not an exhaustive review of the history of anti-discrimination law in New Zealand. Instead, this section raises suggestions as to how, and why, the Treaty may be relevant, first, to interpretation of the Act, and second, in relation to the review procedure set out in s 5(1)(i)-(k). Also, this section considers possible options available to the Government for reconciling the Act with the Treaty.

The Act

The Long Title to the Act notes that it provides better protection of human rights in 'general accordance' with United Nations Covenants or Conventions on Human Rights.[119] The 'Covenants or Conventions', will, at least, include those to which New Zealand has become a party. This includes the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Racial, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic Social and Cultural Rights.

This international legal background forms the context against which section 73 of the Act must be interpreted, and, also against which a relationship may be established between the Treaty and the Act. Such an argument is convincingly mounted by AB Blades in relation to the Article 27 of the ICCPR and the Bill of Rights Act 1990 (the 'BORA').[120]

Although the BORA does not specifically refer to the Treaty, section 20 provides for the rights of minorities. Blades focuses on the similarity between section 20 of the BORA and Article 27 of the ICCPR. He refers to comments by the Human Rights

---

[119] The complete Long Title reads:

> An Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

Committee (the 'Committee') and New Zealand's periodic reports to the Committee as a State Party to the ICCPR, to support his proposition that an integral aspect of New Zealand's obligations under Article 27 is to implement the Treaty. Thus, Blades' thesis is that section 20 of the BORA imposes an identical obligation on the New Zealand Government since it was designed to implement Article 27 of the ICCPR.[121]

Apart from a brief reference to the Treaty of Waitangi Act 1975, New Zealand's first report to the Committee, in 1982, contained no mention of the Treaty. Committee member, Sir Vincent Evans, reflected upon the problems experienced by indigenous peoples in other countries and asked the New Zealand representatives whether:

> there had been any such problems in New Zealand and, if so, how they were being settled, having regard, in particular, to the Treaty of Waitangi.[122]

Clearly, one Committee member saw a connection between New Zealand's obligations under the ICCPR and those under the Treaty.

The Treaty has seen an increasing emphasis within the context of New Zealand's human rights reports since 1982. In 1988, Blades noted a 'remarkable change in approach', illustrated by this comment:[123]

> In recent years, a positive and dynamic view of the Treaty has emerged whereby it is seen as a living contract and the corner-stone of a positive bicultural relationship between the Māori people and other New Zealanders. Accordingly, the Treaty has been given an enhanced status which in turn led, amongst other things, to a greater awareness of Māori cultural values.

In addition, the relationship between the Treaty and Article 27 was further emphasised by the New Zealand representative's reference to 'a number of important developments...in the field of human rights' which included the extension of the Waitangi Tribunal's jurisdiction, and the passage of the Māori Language Act 1987.

---

[120] Blades AB, "Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand", [1994] 1 Canadian Native Law Review 1-39.

[121] See the Preamble to the Bill of Rights Act 1990.

[122] Blades [1994] p 28.

According to Blades, these remarks 'clearly linked the implementation of the Treaty with New Zealand's implementation of the Covenant'.[124]

New Zealand's third report, submitted in 1995, is the most explicit recognition so far that Article 27 requires positive implementation of the Treaty. The report states:[125]

> ...there has in recent times been a greatly increased awareness of the fundamental significance of the Treaty of Waitangi, entered into between representatives of the British Crown and Māori Chiefs and Tribes in 1840, as a founding document for the modern state of New Zealand. *The Treaty is specifically referred to in a manner cognizable by Courts in a number of statutes, while others make reference to the aims and aspirations of Māori.* (emphasis added)

Although it welcomed improvements since the previous report, the Committee stated that:[126]

> despite improvements, *Māori still experience disadvantage in access to health, education and employment.* The Committee is also concerned that the proportion of Māori in Parliament and other high public offices, liberal professions and in the senior rank of civil service remains low. (emphasis added)

This statement implies that 'positive measures' are required to satisfy Article 27 of the ICCPR. An analysis of the interpretation of 'positive measures' is beyond the scope of this paper.[127] In relation to , one of the positive measures required under Article 27 is

---

[123] Blades [1994] pp 25-26.

[124] Blades AB [1994] p 26. See also p 27 for comments from Mr Ando, a Committee Member, regarding the legal status of the Treaty.

[125] Human Rights in New Zealand, Report to the United Nations Human Rights Committee under the International Convention on Civil and Political Rights, Information Bulletin No 54, June 1995, Ministry of Foreign Affairs and Trade, Wellington, New Zealand, para 132, p 29.

[126] Comments of the Human Rights Committee, Human Rights in New Zealand, Report to the United Nations Human Rights Committee under the International Convention on Civil and Political Rights, Information Bulletin No 54, June 1995, Ministry of Foreign Affairs and Trade, Wellington, New Zealand, para 17, p 70.

[127] For discussion on the extent of 'positive measures' see P Thornberry, International Law and the Rights of Minorities, Oxford University Press, 1990; P Thornberry "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 ICLQ 867, 881; and R Cholewinski "State Duty towards ethnic minorities: Positive or Negative" (1988) 10 Human Rights Quarterly 34.

arguably implementation of the Treaty. Acknowledgement of the Treaty in New Zealand's reports to the Committee, and the Committee's statements in response support such an argument.

Consequently the above analysis supports the following propositions:

- section 20 of the BORA requires that the Government adopt specific targeted programmes and policies for Māori;
- in light of the Committee's comments about Article 27 of the ICCPR, section 20 of the BORA requires that the Government implement the Treaty of Waitangi, as well as measures designed to enhance the social and economic status of Māori; and
- section 73 of the Act not only exempts, but *requires* that the Crown implement specific, targeted policies and programmes for Māori.

It is also important to bear in mind other relevant developments. The Draft Declaration of the Rights of Indigenous Peoples (the 'DDRIP') explicitly acknowledges the need for special measures to protect indigenous peoples, and is therefore an important document for Māori, particularly on self-determination issues.[128] Whilst the DDRIP is still only in draft form, it reflects the emergence of an international customary law norm relating to indigenous minorities.

---

[128] See, in particular, Part 1 Clause 3 of the DDRIP, which states:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The Review

Pursuant to the Act, the Human Rights Commission (the 'Commission') must report to the Minister of Justice by the end of 1998 on its determination of whether all public legislation, regulations, policies and administrative practices:

(a) conflict with the provisions of the Act, in particular Part 2; or

(b) infringe the spirit or intention of the Act.[129]

This includes all current and developing legislation, regulations, policies and practices. The Act obliges departments to report on the full range of practices including the minutiae of internal processes.

Under the review, the Commission's role is to determine breaches of the Act. Matters of justification, exemption or permanent exception are policy issues that are the responsibility of government agencies, as part of the normal policy cycle, subject to direction from their respective Ministers and/or Cabinet. At this point, what is prima facie a legal process, at least with respect to legislation and regulations, encounters immediate difficulties due to the requirement to review 'policies and practices'. As indicated above, numerous factors contribute to the design and implementation of government policies and practices. One of these factors is undeniably the Treaty of Waitangi.

The Act recognises the need for Government to make policies which target certain groups on the basis of their need for advancement. Section 73, provides an exemption from a breach of Part 2 of the Act, and states:

> **73. Measures to ensure equality -**
>
> (1) Anything done or omitted which would otherwise constitute a breach of any of the provisions of this Part of this Act shall not constitute a breach if -
>
> (a) It is done or omitted in good faith for the purpose of assisting or advancing persons or groups of persons, being in each case persons against whom discrimination is unlawful by virtue of this Part of this Act; and

(b) Those persons or groups need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community.

As noted above, the Government often supports policies and practices, and less often legislation, designed and implemented specifically to address the socio-economic disadvantage of Māori. At times there is a Treaty reference in these policies and practices. In addition, often the rights of Māori and Iwi groups to deliver their own social services is explicitly, at least in policy terms, related to Treaty guarantees.

One example is the provision for Iwi Social Services discussed above in relation to the Waipareira Claim to the Waitangi Tribunal. It is possible that a person who is not could claim that those provisions in the Children, Young Persons and Their Families Act 1989, constitute a breach of Part 2 of the Act on the ground of race[130] because the policy is only available to Māori. If that policy cannot subsequently be exempted under other sections of the Act, a possible outcome is that those provisions are repealed. While this might be reasonable applying a strictly legal analysis, as discussed above, the Treaty has definite (although unspecified) relevance to public policy decision-making. Consequently, this raises a question concerning the relationship between the Act and the Treaty.

Measures to Ensure Equality

The only decision relating to the effect of section 73 is Amaltal Fishing Company Limited v Nelson Polytechnic Decision of the Complaints Review Tribunal, 29 January 1996 (Unreported). When the decision was released in February 1996, the Chief Executive Officer of Manukau Polytechnic in South Auckland, Bob Williams was reported as saying:

---

[129] Human Rights Act 1993, s 5(1)(i)-(k).

[130] Human Rights Act 1993, s 21(1)(f).

> Positive discrimination had been discarded in the United States and it was only a matter of time before the policy was abandoned in New Zealand.[131]

Whether or not Mr Williams' comment proves to have some substance, it is necessary to consider the implications of the decision for policies and programmes designed to reduce disadvantage.

These proceedings were brought by the Amaltal Fishing Company Limited, which operated a deep sea fishing company. The action related to two courses run by the Nelson Polytechnic. The first 26 week course was a fishing cadet course involving places for 14 students. Four of those places were set aside for Māori and Pacific Islands students (the target group). The second course was also a fishing course and 14 (out of 14) places were set aside for the target group. The courses were provided subject to an agreement between the Polytechnic and the Education and Training Support Agency ('ETSA'). Amaltal became aware of the agreement when one of its employees applied for the fishing cadet course, and was subsequently rejected because he was not of Māori or Pacific Islands descent. Amaltal consequently alleged breaches by the Polytechnic under the Race Relations Act 1971, the Human Rights Commission Act 1977 and the Human Rights Act 1993.[132] Nelson Polytechnic elected to conduct its defence through a letter sent to the Tribunal.

The Tribunal found that the Polytechnic's decision to admit individuals to its courses on the basis of race constituted a prima facie breach of all three Acts. The Tribunal went on to say that the Polytechnic may be excused from its breaches if it could establish that:[133]

1. the thing done (that is, the reservation of three places in the first course or all places in the second course for persons within the target group) was done in good faith;
2. the thing done was for the purpose of assisting or advancing persons or

---

[131] *NZ Herald*, 1 February 1996, p 2.

[132] The two earlier Acts were relevant because some of the alleged breaches predated the Human Rights Act 1993.

[133] Amaltal (29 January 1996) 26.

groups of persons of a particular race (that is, Māori or New Zealand resident Pacific Islanders); and

3. those persons or groups of persons need, or may reasonably be supposed to need assistance or advancement in order to achieve an equal place in the community.

Although the Tribunal satisfied itself that Nelson Polytechnic could probably have established the first two elements of the defence, it refused to find that, on the balance of probabilities, the Polytechnic had satisfied the third element. In doing so, the Tribunal rejected the Polytechnic's argument, via the letter, that so long as it was Government policy that favoured the view that Māori and Pacific Islands students were eligible for special funding, then the Polytechnic was entitled to believe that such groups were in need of assistance. Consequently, the primary reason for the Tribunal's finding was the failure of Nelson Polytechnic to call any independent evidence of the need by and Pacific Islands people for special assistance, and that the Tribunal was bound to decide cases on the basis of evidence presented.

The Tribunal framed its orders in such a way as to make the basis for its finding clear. It said that its intent was that the orders:[134]

> ...restrained the Defendant from repeating the conduct while leaving it open for the Defendant to reserve places for members of the target group in any course which it runs in the future, *providing that it complies with the requirements of s 73 of the Human Rights Act 1993*. (emphasis added)

The following is a summary of the key points from the case:

- an organisation seeking to establish a defence under section 73 of the Act must bring independent evidence of the need by the particular group or groups for special measures; and
- organisations cannot rely on Government policy to justify the special measures, even if the measures are being funded by the Government.

The requirement to bring evidence of the need for special measures, should not, in most situations involving Māori, prove difficult. This is particularly so in relation to the need for special measures in the social policy areas of health, education, employment, housing, and crime.

Two other judgements require a brief mention as they provide indirect assistance in the interpretation of section 73. The first case, Coburn v Human Rights Commission [1994] 3 NZLR 323, concerned a superannuation scheme run by BHP Steel, which paid primary pensions upon retirement, and spousal pensions if an employee died leaving a spouse. A complaint was made that the provision of spousal pensions under the scheme discriminated, under the Act, against single employees because although all employees paid the same amount in contributions, single employees received only the primary pension. Thorp J agreed that the marital status provisions of the scheme breached the Act, and held that section 73 did not apply. Thorp J did, however, make the following comment with regard to section 73:[135]

> In my view, the main purpose of section 73 is to allow, and *indeed encourage, the formulation of programmes to alleviate particular inequalities* until these have been rectified by the operation of the Act's general and broader policies. (emphasis added)

In the second case, Gerhardy v Brown (1985) 57 ALR 472, Brennan J concluded that separate measures for different racial groups should not be maintained forever, but only for as long as it takes to achieve the objectives of the special measures. This case suggests that once Māori have achieved a certain status, this indicates that there is no longer a need, and therefore there can be no further justification for policies or programmes favouring Māori.

According to the relevant decisions, section 73 provides a needs-based justification

---

[134] Amaltal (29 January 1996) 29-30.

[135] Coburn v Human Rights Commission [1994] 3 NZLR 323, 341.

for policies and programmes specifically aimed at reducing Māori disadvantage. However, an approach based on the Treaty favours a rights-based justification for such policies and programmes. Arguably, a rights-based approach is more consistent with the Government's obligations under the Treaty, and with the ongoing relationship between Māori and the Crown envisaged by the Treaty. Also, a rights-based approach would provide a possible exemption from application of the Act, and unlike the needs-based analysis, it would not be dependent on an objective assessment of whether Māori have achieved an appropriate status, after which the measure can be discontinued. Therefore, a rights-based approach states that Māori are entitled to be treated differently to other sections of New Zealand society due to their unique status under the Treaty.

However, as noted in Part 1, the Government explicitly favours needs-based policy. Consequently, in considering how to reconcile the Treaty with the Act, the Government will first need to consider its position on the Treaty, as far as it impacts upon social policy development. This adds further urgency to the call that the Government declare its position on the Treaty, particularly in relation to social policy matters.

Once the Government has done this several options for reconciling the Act with the Treaty are possible. For instance, Parliament could expressly override anti-discrimination provisions in relation to policies and programmes favouring , via a special enactment. Also expressly incorporating the Treaty into an entrenched statute would be a clear signal that all legislation, including anti-discrimination provisions, should be interpreted consistently with the Treaty.

Conclusion to Part 2

This Part has sought to provide an indication of aspects of Government's perspective on the Treaty, as well as the drivers that stimulate the development of that perspective.

The examples of current policy statements that were reviewed in this Part showed little advance from the assertion that the Treaty is the founding document of this country. The Crown Settlement Proposals indicated a preference by the Government for a fragmented approach to the Treaty, which compartmentalises the rights and obligations contained in each respective Article. A review of health sector policy documents revealed that the Treaty has had varying fortunes, both within, and across, social policy sectors.

As they have in the past, the courts continue to be key contributors to Treaty jurisprudence. It is expected that future Government's will continue to rely upon the courts to scope the boundaries of its Treaty obligations. In relation to recent decisions, however, Māori commentary suggests that the courts may be encroaching into areas that are outside their sphere of professional expertise.

As legislation, regulations, policies and practices are scrutinised against the provisions of the Human Rights Act 1993, the Government will come under increasing pressure to extend its discourse on the Treaty into areas of social policy concern. Thus, the review procedure provides a real opportunity for the Government to actively build a unified and rational Treaty position. In doing so, Government will halt the development of fragmented Treaty policies across individual departments. Consequently, a limited review of current government perspectives on the Treaty reveals that a clear statement on the Treaty's position within New Zealand's constitutional framework, with particular attention to social policy matters, is urgently required.

In the current environment, one other set of factors is also relevant, and can be commented upon briefly. Policies for Māori, and perhaps the Treaty, will almost

certainly be significant elements in any deal struck between political parties engaged in coalition negotiations. New Zealand First, a key player whatever the outcome, recognises that for the Treaty to be given life, 'real equality' must be the long term objective.[136]

The earlier analysis shows that the current National Government has steered away from proffering a clear statement on the Treaty, and its recent manifesto promises little advancement on that position, stating at one point that the Treaty 'imposes certain obligations on the Crown with regards to Māori and guarantees equal citizenship to all New Zealanders.'[137] Similarly of questionable substance is the Labour Party recognition of the Treaty as the basis of constitutional government in this country.[138] Only the Alliance promises substantial reform which would see the Treaty legislated into New Zealand's constitution, as a framework for positive Māori policy initiatives in health, education, employment, housing and imprisonment rehabilitation.[139]

---

[136] New Zealand First Party, "Te Maramatanga: NZ First's Maori Policy", 1996, p 2.

[137] National Government, Manifesto, 1996, p5.

[138] Labour Party, "He Putahitanga: A True Partnership", 1996, preface.

[139] Alliance Party, "Treaty of Waitangi Policy: A Nation in Partnership", July 1996, pp 3-4.

CONCLUSION

It is likely that the parties to the Treaty had some fairly basic human interests: security, economic well-being, a sense of belonging, progress, recognition and control over one's life. For any future Government, when considering what the Treaty might have to say in relation to such matters the aim should not be a 'fiscal envelope' for social policy. In fact, to the contrary. The Treaty sign-posted the development of an ongoing relationship and set in place some of the significant parameters of that relationship. Consequently, if the Treaty is accepted as a policy tool guiding the implementation of social policies and programmes for the benefit of Māori, then the parameters of the Treaty relationship need to be clarified and accepted.[140]

The purpose of discussing a public policy framework based on the Treaty is not to bind us into a straight jacket which limits the country to 1840 conditions. Rather it is to remind ourselves, politicians, judges, policy analysts, and citizens alike of the relationship formed under the Treaty. According to one view, the Treaty provides a framework that identifies who the parties are and their relationship with each other; it sets out the expectations, rights and obligations of these parties; and it outlines some of the key interests of the parties both those held in common and those that were separate.[141] To others, the Treaty is a blueprint for future development and the foundation of obligations and rights recognisable in a working legal system.[142] Elsewhere along the spectrum of views, sit Māori perspectives, as well as current Government perspectives.

This paper supports the proposition that different perspectives can co-exist within a single relationship. Furthermore, to prevent that relationship further stagnating, it is

---

[140] The Auditor-General in his most recent report to Parliament concluded that there was a need for the Crown to develop a coherent policy framework and an integrated budget for the settlement of Treaty claims. The Auditor-General also reflect upon the considerable costs to Māori claimants in pursuing resolution of their grievances; Mikaere [1996] p 169.

[141] Parata (1996) p 4.

[142] Elias (1995) p 212.

necessary for both partners to reaffirm their commitment to it. In this regard, the onus is on the future Government, if not to declare a position on the Treaty's status at this stage, at least to declare an intent to work proactively towards establishing such a position.

Commentators have noted the need for the right climate for change to occur.[143] The Treaty has become an icon for disadvantage. That is, wherever Māori disadvantage, disparity or grievance is at issue, Māori will look to the Treaty as the basis of their call for Government action. Recent claims to the Waitangi Tribunal confirm that for Māori, the Treaty encompasses all aspects of their existence, both as tangata whenua, and as citizens. The Government cannot continue to deny Māori a response, particularly in an active judicial and policy environment. It would seem that if ever there was a time, and an opportunity, to clarify the status of the Treaty, both in constitutional and policy terms, that time is now.

[143] See Turner (1995).

BIBLIOGRAPHY

Books

Kawharu H (ed), **Waitangi: Māori and Pakeha Perspectives of the Treaty of Waitangi**, Oxford University Press, Auckland 1989;

Kelsey J, **A Question of Honour? Labour and the Treaty 1984 - 1989**, Allen and Unwin Inc, Auckland, 1990 chapters 3-5 pp 78-161;

Le Grand J, **The Strategy of Equality**, Allen and Unwin, London (1982);

McLay G (ed), **Treaty Settlements: The Unfinished Business**, New Zealand Institute of Advanced Legal Studies, VUWLR, 1995 (papers presented at the NZ Institute of Advanced Legal Studies conference "Treaty Claim - The Unfinished Business", held in Wellington on Feb 9-10, 1995);

Orange C, **The Treaty of Waitangi**, Allen and Unwin, New Zealand, 1987;

Sharp S, **Justice and the Māori: Māori Claims in New Zealand Political Argument in the 1980s**, Oxford University Press, Auckland, 1990;

Thornberry P, **International Law and the Rights of Minorities**, Oxford University Press, 1990;

Reports

Harris A, *Health Service Priorities for Māori Consumers,* Ministry of Health, 1994;

Harris A, *Measuring the Effectiveness of Health Services for Māori Consumers*, Ministry of Health, 1994;

He Matariki: A Strategic Plan for Māori Public Health, Public Health Commission, Wellington,

He Taura Tīeke: Measuring Effective Health Services for Māori, Ministry of Health, 1995;

"Human Rights in New Zealand", Report to the United Nations Human Rights Committee under the International Convention on Civil and Political Rights, Information Bulletin No 54, June 1995, Ministry of Foreign Affairs and Trade, Wellington, New Zealand;

Māori Health Plan 1995 - 1997, Māori Health Development Division, North Health, 1995;

Policy Guidelines for RHAs 1996/97, Ministry of Health, Wellington, 1996;

Reports of the Royal Commission on Social Policy, The April Report, Volumes I-IV, April 1988;

Royal Commission on Social Policy *Towards a Fair and Just Society* 1988;

The Treasury, "Government Management. Brief to the Incoming Government", Vol I (1987);

Vaithianathan R, *Equality: Outcomes or Opportunities? A Review of the literature*, prepared for the Department of Labour, August 1995;

WAI 6 Motunui - Waitara Report, Waitangi Tribunal Report, March 1983;

WAI 9 Orakei Report, Waitangi Tribunal Report, 4 November 1987;

WAI 11 Te Reo Māori Report, Waitangi Tribunal Report, 29 April 1986;

WAI 22 Muriwhenua Fishing Report, Waitangi Tribunal Report, 31 May 1988;

WAI 26/150 Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies, 27 November 1990;

WAI 286 Statement of Claim, 27 March 1992;

WAI 350 Māori Development Corporation Report, Waitangi Tribunal Report, 13 October 1993;

WAI 372 Statement of Claim, 27 July 1993;

WAI 381 Statement of Claim, 26 July 1993;

WAI 381 Amended Statement of Claim, 9 August 1993;

WAI 413 Māori Electoral Option Report, Waitangi Tribunal Report, 10 February 1994;

WAI 414 Statement of Claim, 16 December 1993;

WAI 414 Second Amended Statement of Claim, Monday 22 August 1994;

WAI 578 Statement of Claim, 28 February 1996;

WAI 582 Statement of Claim, 1 March 1996;

Whāia te Ora mo te Iwi: Strive for the Good Health of the People - Government's response to Māori Issues in the health sector - Health and Disability Services Bill, Department of Health, 1992;

Wickliffe C and Walghan Partners, *The Treaty of Waitangi and Social Policy Project*, a report prepared for Te Puni Kōkiri, Volumes I- III, June 1996;

Articles

Bennion T, Urban Māori and the Fisheries Settlement, The Māori Law Review, May 1996;

Blades A, "Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand" [1994] 1 Canadian Native Law Review 1-39;

Cholewinski R, "State Duty towards ethnic minorities: Positive or Negative" (1988) 10 Human Rights Quarterly 344-371;

Cooke Rt Hon Sir Robin, "The Challenge of Treaty of Waitangi Jurisprudence" (1994) 2 Waikato Law Review 1;

Dalziel P 1990 "Explaining Ethnic Differences in Economic Attainment: A Survey", paper presented to the Sesquicentennial NZAE Conference, reprinted in J Whitwell and MA Thompson (eds) Society and Culture: Economic Perspectives, Wellington, NZAE 1991;

Dodd M, "Iwi Social Services, A Partnership or Fiscal Saving?", paper presented to the Asia-Pacific Regional Social Services Conference, held at Canterbury University, 20-23 November 1995;

Durie M, "The Treaty of Waitangi and health care", NZ Medical Journal, 14 June 1989, 283-285, paper presented to the Royal Australasian College of Physicians annual scientific meeting, Wellington, 25 November 1988;

Elias S, "The Treaty of Waitangi and Separation of Powers in New Zealand", in **Courts and Policy: Checking the Balance**, Brookers, Wellington, 1995;

Iorns CJ, "Indigenous Peoples and Self Determination: Challenging State Sovereignty" (1992) 24 Journal of International Law, 199-348;

Joychild F, "Affirmative Action - Measures to Ensure Equality", (1996) 1 Human Rights Law and Practice, 218;

Kawharu A, "Urban Iwi: The New Tribes of Māoridom?" [1996] 8(1) AULR, 209-211;

Kelsey J, "Bi-culturalism, Access to Justice and the Mental Health Act", in Community Health in New Zealand, vol 4, no. 1, June 1988;

Kelsey J, "Free Market 'Rogernomics' and Māori Rights under the Treaty of Waitangi - An Irresolvable Contradiction?", circa 1990 (available from the author);

Maaka RCA, "The New Tribe: Conflicts and Continuities in the Social Organization of Urban Māori", The Contemporary Pacific, Volume 6, Number 2, Fall 1994, 311-336;

Mikaere AL, "Māori Issues" [1996] NZLR, 162-186;

Nikora LW and Thomas DR, "From Assimilation to Biculturalism: Changing Patterns in Māori-Pakeha Relationships", Psychology and Social Change, pp 278-296 (available from the author);

Parata H, "The Treaty of Waitangi: A Public Policy Framework", paper prepared for Te Puni Kōkiri, 24 May 1996;

Shirley Professor Ian, "Partnerships in Pursuit of a New Social Order", paper presented to the Asia-Pacific Regional Social Services Conference, held at Canterbury University, 20-23 November 1995;

Thornberry P, "Self-Determination, Minorities, Human Rights: A Review of International Instruments" (1989) 38 ICLQ 867, 881;

Turner K, "The *April Report* of the Royal Commission on Social Policy: Treaty Partnership as a Framework for a Politics of Difference?", in Wilson M and Yeatman A (eds) **Justice and Identity: Antipodean Practices**, Bridget Williams Books, Williams, 1995;

Wickliffe C, "The Sealord's Deal: Te Rūnanga o Muriwhenua and Others v Te Rūnanga o Te Upoko o Te Ika Inc, New Zealand Court of Appeal Unreported, 30 April 1996, CA 155/95, Aboriginal Law Bulletin, Vol 3, No 82, July 1996, p 11;

Cases

Gerhardy v Brown (1985) 57 ALR 472

Huakina Development Trust v Waikato Valley Authority [1987] 2 NZLR, 188

New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641 (the State-owned Enterprises case)

Re M (Adoption) [1994] 2 NZLR 237

Coburn v Human Rights Commission [1994] 3 NZLR 323

Amaltal Fishing Company Limited v Nelson Polytechnic Decision of the Complaints Review Tribunal, 29 January 1996 (Unreported)

Te Rūnanga o Muriwhenua and Others v Te Runanganui o Te Upoko o Te Ika Association Inc and Others CA 155/95 30 April 1996

Legislation

Adoption Act 1955

Children, Young Persons and their Families Act 1989

Human Rights Act 1993

Other Publications

Act NZ Party, "Values. Not Politics", September 1996 (Act NZ Campaign Manifesto, General Election 1996);

Alliance Party, "Treaty of Waitangi Policy: A Nation in Partnership", July 1996;

Cabinet Office Manual, Cabinet Office, Department of the Prime Minister and Cabinet, Parliament Buildings, Wellington, August 1996;

Crown Proposals for the Settlement of Treaty of Waitangi Claims, Summary Booklet, Office of Treaty Settlements, Department of Justice, Wellington 1995;

Durie E Chief Judge, speech presented on Waitangi Day 6 February 1996 (available from the author);

Filipo, SL, *Whakamanatia Te Tiriti: Implementation in Four Catholic Schools of Policy relating to the Treaty of Waitangi*, MA Thesis, Auckland 1993;

Labour Party, "He Putahitanga: A True Partnership", 1996;

National Government, Manifesto, 1996;

Newstel News: RNZ "Mana News", Wednesday 1 May 1996 (A);

New Zealand First Party, "Te Maramatanga: NZ First's Maori Policy", 1996;

The Māori Law Review, May 1996.

APPENDIX A

List of Waitangi Tribunal Reports Reviewed by Walghan Partners

***indicates reports with a social policy component**

WAI Number	Name of Report	Date Report Produced
1	Fishing Rights (Hawke)	22 March 1978
2	Waiau Pa Power Station	27 February 1978
3	Welcome Bay Sewerage Scheme	20 February 1990
4	Kaituna River	30 November 1984
5	Land Tax	20 February 1990
6	Motunui-Waitara	17 March 1983
8	Manukau	19 July 1985
9	Orakei	4 November 1987*
10	Waiheke Island	2 June 1987
11	Te Reo Māori	29 April 1986*
12	Motiti Island	21 May 1985
13	Northland Fishing Regulations	20 February 1990
14	Tokaanu Building Sections	20 February 1990
15	Fishing Rights (Te Weehi)	6 May 1987
17	Mangonui Sewerage	16 August 1988
18	Fishing Rights (Lake Taupo)	15 October 1986
19	Māori 'Privilege'	21 May 1985
22	Muriwhenua Fishing	31 May 1988
25	Māori Representation (ARA)	8 April 1987
26/150	Broadcasting/Radio Frequencies	27 November 1990*
27	Ngai Tahu Fisheries/Ngai Tahu Ancillary Claims	1991/1992/1995*
32	Ngāti Rangiteaorere	18 December 1990
33	Pouakani	26 February 1993
34	Kakanui Sewerage Scheme	20 February 1990
38	Te Roroa	3 April 1992*
45	Kaimaumau-Muriwhenua Land	30 October 1991
55	Te Whanganui-A-Orutu	13 June 1995
67	Oriwa 1B3	8 June 1992

83	Waikawa Block	27 June 1989
103	Wairoa Land	19 December 1990
119	Mohaka River	5 November 1992
153	Te Arawa Geothermal Reserve	25 June 1993
167	Whanganui River	19 November 1993
176	The Broadcasting Claim	22 July 1994
202	Tamaki Māori Development Authority	1992
212	Te Ika Whenua - Energy Assets	20 May 1993
261	Auckland Hospital Endowments	6 December 1991*
264	Disposal of Railway Lands	1992/1993
273	Tapuwae 1B & 4 Incorporation	8 March 1993
276/272	Sylvia Park & Auckland Crown Assets Disposal	22 April 1992
304	Ngawha Geothermal Resource	16 June 1993
307	Fisheries Settlement	4 November 1992
315	Te Maunga Railway Lands	September 1994
321	Appointments to the Treaty of Waitangi Fisheries Commission	21 December 1992
322	Tuhuru	28 February 1993
350	Māori Development Corporation	13 October 1993*
413	Māori Electoral Option	10 February 1994*
449	Kiwifruit Marketing	November 1995

APPENDIX B

Possible Social Policy Claims from the Waitangi Tribunal Register of Claims

1	**WAI number:**	160
	Claimant:	TC Reihana
	Concerning:	The Guardianship Act
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	20 October 1989
	Action:	Inquiry deferred pending court proceedings (150695)
	Note:	Awaiting response from claimant
2	**WAI number:**	169
	Claimant:	JR Heremia
	Concerning:	Labour Relations Act
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	17 August 1990
	Action:	Adjourned sine die 24 November 1992
	Note:	No further inquiry - completed
3	**WAI number:**	179
	Claimant:	C Malcolm
	Concerning:	Māori Affairs and Burials Legislation
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	29 October 1990
	Action:	No further inquiry 1992
	Note:	Completed
4	**WAI number:**	223
	Claimant:	Reverend Potaka-Dewes
	Concerning:	Immigration Act
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	2 July 1991
	Action:	Exploratory Tribunal research report completed
	Note:	

5	**WAI number:**	241
	Claimant:	W Henare and others
	Concerning:	Family Court
	Locality:	Auckland
	District:	Auckland
	Received:	28 April 1987
	Action:	No further inquiry unless revived by claimants (8 Nov 1991)
	Note:	Completed
6	**WAI number:**	286
	Claimant:	D Tait-Jones
	Concerning:	Adoption of Children Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	27 March 1992
	Action:	Unclear claimant research
	Note:	
7	**WAI number:**	287
	Claimant:	AL Delamere for Te Whānau a Apanui
	Concerning:	School History Syllabus Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	23 April 1992
	Action:	MOE to reply on certain factual matters. Inquiry deferred.
	Note:	
8	**WAI number:**	372
	Claimant:	John Delamere and others
	Concerning:	Education Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	4 August 1993
	Action:	Research proposal needed
	Note:	

9	**WAI number:**	381
	Claimant:	Areta Koopu and others
	Concerning:	Māori Women's Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	27 August 1993
	Action:	Research proposal needs to be redrafted
	Note:	
10	**WAI number:**	387
	Claimant:	W Kuiti
	Concerning:	Childcare Subsidies Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	3 September 1993
	Action:	Research proposal needed
	Note:	
11	**WAI number:**	395, 412, 413
	Claimant:	various
	Concerning:	Electoral Act issues, including the Māori option
	Locality:	Aotearoa
	District:	
	Received:	
	Action:	
	Note:	
12	**WAI number:**	414
	Claimant:	Haki Wihongi
	Concerning:	Te Whānau o Waipareira
	Locality:	Auckland
	District:	Auckland
	Received:	11 January 1993
	Action:	In report writing
	Note:	

13	**WAI number:**	431
	Claimant:	WM Kaa and P Adds
	Concerning:	Government funding of tertiary education
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	6 May 1994
	Action:	Tribunal memo issued declining request for urgency 5 April 1995
	Note:	
14	**WAI number:**	439
	Claimant:	Hohepa Waiti
	Concerning:	Civil Legal Aid Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	19 August 1994
	Action:	Research proposal needed
	Note:	
15	**WAI number:**	473
	Claimant:	Tom Hemopo
	Concerning:	Provision of Health Services Claim
	Locality:	Napier-Hastings
	District:	Hawkes Bay/Wairarapa
	Received:	28 October 1994
	Action:	Claimant requested to provide further particulars
	Note:	
16	**WAI number:**	539
	Claimant:	Emari Emily Nikora and Ngā Kohanga Reo Raukawa
	Concerning:	Establishment of a kura kaupapa at Matarewa Primary School - Tokoroa
	Locality:	Waikato/Tokoroa
	District:	8 August 1995
	Received:	
	Action:	
	Note:	

17	**WAI number:**	545
	Claimant:	Jessica Hutchings and others
	Concerning:	Restructuring of the National Archives and the Archives Act 1957
	Locality:	N/A
	District:	7 September 1995
	Received:	
	Action:	
	Note:	
18	**WAI number:**	568
	Claimant:	Jane Helen Hotere
	Concerning:	Housing Corporation of New Zealand
	Locality:	NZ/Auckland
	District:	
	Received:	21 November 1995; 28 November 1995; 5 December 1995
	Action:	
	Note:	
19	**WAI number:**	572
	Claimant:	Pateriki Nikorahi
	Concerning:	Privy Council
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	22 February 1996
	Action:	
	Note:	
20	**WAI number:**	578
	Claimant:	John Rangiteremauri Heremia and another
	Concerning:	New Zealand Qualifications Authority: Māori University Bursary Examination
	Locality:	Aotearoa
	District:	28 February 1996
	Received:	
	Action:	
	Note:	

21	**WAI number:**	582
	Claimant:	Teresa Bowkett
	Concerning:	Scaling of "raw scores" in the 1995 University Bursary Examination
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	1 March 1996
	Action:	Grouped with 578 for inquiry
	Note:	
22	**WAI number:**	585
	Claimant:	Whititera Kaihau on behalf of himself and members of Ngāti Te Ata
	Concerning:	Privy Council (Ngāti Te Ata) Claim
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	19 April 1996
	Action:	Grouped with 572 for inquiry
	Note:	
23	**WAI number:**	589
	Claimant:	Tata Winara Parata
	Concerning:	Representation of urban Māori on TOW Fisheries Commission
	Locality:	Aotearoa
	District:	Aotearoa
	Received:	8 May 1995
	Action:	
	Note:	