Hāhā-uri, hāhā-tea

Māori Involvement in State Care 1950-1999

Chapter 5: Te Tiriti o Waitangi

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# Contents

[Summary 3](#_Toc87027152)

[Introduction 5](#_Toc87027153)

[Current Context 7](#_Toc87027154)

[Historical Context 9](#_Toc87027155)

[A simple nullity 12](#_Toc87027156)

[Te Tiriti o Waitangi/The Treaty of Waitangi 1840 13](#_Toc87027157)

[Political upheaval – the Treaty of Waitangi Act 1975 14](#_Toc87027158)

[Waitangi Tribunal influence and recognition 17](#_Toc87027159)

[The Principles of te Tiriti/the Treaty 20](#_Toc87027160)

[Te Tiriti/the Treaty and social policy 22](#_Toc87027161)

[References 28](#_Toc87027162)

# Chapter FiveTe Tiriti o Waitangi

Tapahia tō arero pēnei me tō te kōkō.

Cut your tongue like that of the tūī.[[1]](#footnote-2)

## Summary

State agencies’ interactions with Māori have been primarily punitive and paternalistic, whether this be in relation to their lands and resources (acquisition and/or management), health, education, justice, or child welfare. There has been an ‘absence of te Tiriti/the Treaty’ within governments’ economic and social policies, an indifference or more pertinently, an explicit resistance to its application (p. 215).

Following a contentious court decision in 1877 where te Tiriti/the Treaty was defined as a simple nullity, it was rarely mentioned or considered by the state or society in general. It was largely viewed as a historic document with no applicable relevance in the development and emergence of a new society (p. 219).

Māori utilised multiple settings to keep te Tiriti/ the Treaty discourse in the public arena. This has included taking grievances through the courts, on marae, in community development, in social and academic dialogue, in political forums, and from within national and international human rights, and indigenous rights forums (p. 221).

Māori protest activism was eventually the most successful factor in achieving the desired recognition of te Tiriti/the Treaty. However, recognition and application of te Tiriti/the Treaty in Aotearoa New Zealand was dependant on it being incorporated into law which did not eventuate, aside from the second

Article’s right of pre-emption that is contained within the Lands Claim Ordinance 1841, and the Constitution Act 1852, until the introduction of the Treaty of Waitangi Act 1975 (p. 220).

The adoption of the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal changed the political landscape of New Zealand specifically, the Māori and Crown relationship, but did not necessarily change historically deficit attitudes embedded in state agencies’ practices (p. 222).

Numerous commentators have criticised the Act 1975 as it ‘gave power to take grievances to the Tribunal but not have the Treaty litigated in the courts.’ In other words, the tribunal can make recommendations to the courts, but does not have the power to enforce them (p. 223).

Debates in the social policy arena during the 1980s appear to be mainly related to the interpretation and application of the second article in which Māori are guaranteed the ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’ (p. 222).

The Tribunal’s conclusions in the Motunui-Waitara report 1983, and Māori Language Claim report 1986, are relevant to the state’s formulation of social policy (p. 223). The tribunal contends that Article two extends beyond literal interpretations of tangible assets. This is a significant outcome for Māori in respect to te Tiriti/the Treaty (p. 224).

A key factor of these reports is fact that the principles were not fixed, but to be viewed and applied appropriate to the circumstances. The State-Owned Enterprises Act 1986 first used the phrase ‘treaty principles’, viewing te Tiriti/the Treaty as a ‘living document capable of adapting to new circumstances and [ensuring]… that the principles underlying the Treaty were of greater importance than its actual words’ (p. 224).

The Waitangi Tribunal reports offer valuable insights of relevance to the evolving significance of te Tiriti/the Treaty in New Zealand statute, and its application in policy. The initial decades following the establishment of the tribunal focussed mainly on recognition and redress for land and resource breaches. However, the tribunal has also provided a platform for constructive legal, social, and political debate regarding citizenship rights and obligations, the role of the state, and its social policies and associated issues of implementation, access, and equitable re-distribution (p. 224).

 The developments in the 1970s and 1980s did not occur without resistance or backlash. The government’s activities in the period between 1984 to 1999, were to pacify and depoliticise what were perceived as increasing Māori demands during a period of significant neo-liberal reforms (p. 226).

Māori contend government agencies have consistently failed to take responsibility for their role in perpetuating Māori inequalities, and that incorporating te Tiriti/the Treaty will provide a more balanced and holistic approach to social policy and practice (p. 228).

More recently debate has been in respect to needs-based policies versus rights-based policies, and for Māori, the relevance of te Tiriti/the Treaty in determining when, where, how and for whom policies should be enacted (p. 228).

What is apparent in the literature reviewed, is an entrenched resistance to the partnership implied in te Tiriti/the Treaty, especially regarding its relevance to social policy (p. 229).

## Introduction

This review draws attention to numerous legislative, policy, and research documents regarding the Māori and Crown relationship, particularly Te Tiriti o Waitangi. The previous chapters speak of the differential treatment of Māori versus non-Māori carried out by various government agencies. They also provide statistical data and information that illustrate the cumulative impacts of policies and practices across multiple settings that have intruded into all aspects of whānau and community life. Intrusions that Māori assert, collectively entrenched economic, health and social disparities, including the disproportionate representation of tamariki Māori and vulnerable adults, placed in State Care and government institutions.

A scan of successive governments’ policies and reports, alongside academic research and social policy literature, presents an account of agencies’ interactions with Māori that are primarily punitive and paternalistic – whether this be in relation to their lands and resources (acquisition and/ or management), health, education, justice, or child welfare. The literature draws attention to an ‘absence of te Tiriti/the Treaty’ within governments’ economic and social policies, an indifference or more pertinently, an explicit resistance to its application. This is acknowledged by Sir Geoffrey Palmer, that if the,

‘… remedying of injustice under the Treaty could only be done by Parliament under [the] existing constitutional structure, then the big obstacle was [what was called] majority tyranny. If the legislation addressed the grievances, then majority tyranny would kick in and the likelihood of the issues being addressed in a principled fashion would be reduced’ (Palmer, 2013, the Treaty section, para. 7).

Events and developments in the 1970s and 1980s, included the adoption of the Treaty of Waitangi Act 1975 and the establishment of the Waitangi Tribunal. Developments that changed the political landscape of Aotearoa New Zealand specifically, the Māori and Crown relationship, but did not necessarily change historically deficit attitudes embedded in state agencies’ practices. Attitudes many commentators argue were ingrained in government policy from the outset of the crown’s governance in Aotearoa New Zealand. Commentators assert that agencies’ interactions with Māori have consistently been underscored by fundamentally racist and deficit assumptions, to address what was largely viewed as ‘the Māori problem’ (Orange, 1987; Morris, 2004; Dalley, 1998; Parata, 1994; Kaiwai, et al., 2020). A prevailing view that failed to acknowledge the role the state played in contributing to increasingly disparate social, health and economic inequities between Māori and non-Māori (Parata, 1994; Workman, 2017; O’Regan & Mahuika, 1993). This role has been examined and debated in academic and social justice arenas and ‘brought to bear’ in te Tiriti/the Treaty discourse.

It is not the intent of this section to revisit the impacts of agencies’ activities, but whether and to what extent (if any), agencies considered and applied te Tiriti/the Treaty in their relations with Māori; and to what extent this contributed to the removal of tamariki Māori, and vulnerable adults, from their whānau and communities. What is apparent in the literature reviewed, is an entrenched resistance to the partnership implied in te Tiriti/the Treaty, especially regarding its relevance to social policy (Barrett & Connolly-Stone, 1998; Culpitt, 1994). Additionally, the ramifications of racial intolerance, discrimination, and public pressure on the state’s policies and practices in respect to the welfare of whānau Māori (Dalley, 1998; Kaiwai, et al., 2020; O’Regan & Mahuika, 1993).

## Current Context

It would be remiss to not reference the timing of this Historic Abuse inquiry alongside the recent Māori- led inquiry into Oranga Tamariki; the Office of the Children’s Commissioner review of Oranga Tamariki policies and practices; and the Waitangi Tribunal’s Urgent Inquiry into Oranga Tamariki.

“Its (child protection) a Treaty of Waitangi responsibility to Māori, especially the active protection, because the goal of stemming the flow of children into institutions ... let's be really clear about that ... that is a breach of active protection...”

– Māori social worker

The subsequent reports of these inquiries, ‘Ko Te Wā Whakawhiti: It’s Time for Change 2020’, ‘Te Kuku O Te Manawa 2020, Reports 1 and 2’, and ‘He Pa Harakeke, He Rito Whakakīkinga Whakaruarua 2021’, draw attention to deeply ingrained structural issues. Issues that the literature asserts are rooted in discriminatory assumptions, attitudes, and practices that have contributed to the entrenched disparities we see today. The tribunal’s report (2021) specifically notes breaches underscored by more than ‘just a failure to honour or uphold, [te Tiriti/the Treaty, but more pertinently] ...a breach born of hostility to the promise itself’ (Judge Michael Doogan, 2021, p. xiii). Furthermore, ‘the need for change and the process of transformation … has nothing to do with separatism and everything to do with realising the Treaty promise, that two peoples may coexist harmoniously’ (Judge Michael Doogan, 2021 p. xv). Grainne Moss, Chief Executive of Oranga Tamariki (at the time of these inquiries) conceded on behalf of the Crown, the presence of entrenched structural issues, and the enduring consequences and ongoing impacts to whānau Māori despite previous advice provided in Puao-te-Ata-Tū 1986 (outlined in Chapter 6):

‘The Crown has failed to fully implement the recommendations of Puao-te-Ata-Tū in a comprehensive and sustained manner. This implementation failure has impacted outcomes for tamariki Māori, whānau, hapū and iwi. Further than this, it has undermined Māori trust and confidence in the Crown, as well the belief in the Crown’s willingness and ability to address disparities. Structural racism is a feature of the care and protection system which has adverse effects for tamariki Māori, whānau, hapū and iwi. This structural racism has resulted from a series of legislative, policy and systems settings over time and has degraded the relationship between Māori and the Crown (Moss, 2020 as cited in Waitangi Tribunal, 2021, p. 5).

These concessions are a step forward but do little to alleviate the ongoing effects and impacts on generations of whānau or instil confidence that a relationship based on reciprocity and trust, as implied in te Tiriti/the Treaty, is within reach. This is emphasised further by the Māori-led inquiry that there ‘has been a consistent belief expressed by Māori over most of the last century that participation in the state system of child welfare has the potential to cause more harm than good for Māori children and whānau’ (Kaiwai et al., 2020, p. 22).

## Historical Context

The ‘hostility’ asserted by the tribunal is unmistakeably candid in the initial decades after the signing of te Tiriti/the Treaty; a history that is wrought with conflict between Māori, early settler communities and the Crown, as Māori resisted the wholesale loss of their lands and resources. The introduction of the Native Lands Act 1862, and its amendment in 1865, the New Zealand Settlements Act 1863, the Native Schools Act 1867, and the Tohunga Suppression Act 1907 combined, entrenched significant inequalities across all social determinants of Māori health and wellbeing. State sanctioned policies and practices that enforced these Acts, not only dispossessed Māori from their lands and resources, but intruded into all aspects of their lives, and demanded from them a ‘conformity in dress and behaviour, language and personal spiritual beliefs, [that were] explicit and unremitting’ (Parata, 1994, The Fundamental Policy Flaw section, para. 3).

Furthermore the Māori-led inquiry draws attention to:

The Neglected and Criminal Children Act 1867, which created State industrial schools where courts could place children, [as] an early recognition that the colonial State needed to take responsibility for some children. The industrial school system dominated child welfare provision until the early twentieth century (Kaiwai et al., 2020, p. 22).

Dalley’s (1998) examination of child welfare policies 1925 – 1972 highlights burgeoning numbers of tamariki Māori coming to the attention of welfare and justice authorities and institutions in the 1960s and 1970s based on assumptions of perceived neglect, abuse, and/or delinquency. This suggests that resource was directed to control and/or incarcerate children, with little to no resource dedicated towards addressing the contributing stressors. Although there was an ‘absence of te Tiriti/te Treaty’ in social policy there was a ‘particular mid-century focus on Māori welfare [as] illustrated in a series of reports on Māori education, social and economic conditions’ (p. 192), a focus that was grounded in deficit and paternalistic assumptions. This focus was a deviation from child welfare policy that considered the child’s home life as ‘the most precious heritage of every child, and [that] no effort should be spared to keep the home together’ (Superintendent John Beck, 1927, as cited in Dalley, 1998, p. 192). A deviation emphasised further by the Māori-led inquiry that ‘colonial attitudes towards the role of the family and the place of children within it, attitudes towards the care of Māori children and whānau were deeply entwined with colonial criticisms of Māori socio- economic structures’ (Kaiwai et al., 2020, p. 23).

Chapters two to four of this review, links racial intolerance, public pressure, and targeted policing, to the incarceration of tamariki Māori within the state’s youth justice and psychiatric institutions. The historic and intergenerational harm perpetuated by the state’s agencies and institutions was also highlighted by the Safe and Effective Justice Advisory Group (2019) who were told of the harm done to Māori children, families and whānau by the criminal justice system (Te Uepu i te Ora Safe and Effective Justice Advisory Group, 2019, p. 25).

‘…that institutional, structural, and personal racism contributed to Māori over-representation in the system, tearing apart Māori families and whānau, and creating damaging stereotypes of Māori as offenders; and that the justice and child welfare agencies [combined] excluded families and whānau from decision-making, denying them opportunities to address harm and ensure accountability within their communities’ (Te Uepu i te Ora Safe and Effective Justice Advisory Group, 2019, p. 25).

The impact of racial intolerance and deficit assumptions of staff attitudes and practices in these contexts cannot be underestimated. The use of terms such as maladjusted family circumstances and juvenile delinquency; ‘a vague and ill-defined term which encompassed youthful behaviours and lifestyles ranging from criminal conduct to ‘misbehaviour’ and being ‘uncontrollable’’ (Dalley, 1998, p. 194), became more entrenched in child welfare policy in the 1940’s. Narratives of child welfare officers during this period are quite telling. For example, Uttley (1964) wrote:

I don’t doubt that many of the children will … become reasonable citizens if left alone, [but] it is worse than useless trying to explain this to an eager beaver social worker, an irate headmaster or a policeman who wants peace at any price in his area. Our policy of leaving children in their homes … is regarded as laziness and weakness. (Uttley, 1964, as cited in Dalley, 1998, p. 199).

Although inconsistent in application, the ability of child welfare officers to enact ‘family and community-based’ policies, and to maintain kinship ties, without dedicated resource, was at times, in the face of significant public criticism and pressure.

“I don't really believe there's been the power sharing (State Care organisations and whānau) that there could have been and should have been.”

- Don Sorrenson, Māori social worker

## A simple nullity

Māori increasingly expressed discontent with state’s policies aimed at assimilating Māori into mainstream society (Parata, 1994; Poata-Smith, 2008; Tauri & Webb, 2011). ‘…Māori have long contested the ways in which the Crown and the New Zealand Government have developed policies that directly impact on them and their communities, particularly in relation to land confiscation and breaches …’ (Tauri & Webb, 2011, p. 23). Māori utilised multiple settings to keep te Tiriti/the Treaty discourse in the public arena. This has included taking grievances through the courts, on marae, in community development, in social and academic dialogue, in political forums, and from within national and international human rights, and indigenous rights forums (Orange, 1987; Palmer, 2013; Tauri & Webb, 2011; Workman, 2017). Overall, the efforts for redress via the courts were repudiated. Recognition and application of te Tiriti/the Treaty in Aotearoa New Zealand was dependant on it being incorporated into law which did not eventuate, aside from the second Article’s right of pre-emption that is contained within the Lands Claim Ordinance 1841, and the Constitution Act 1852, until the introduction of the Treaty of Waitangi Act 1975.

This is most apparent in the ruling of Chief Justice Prendergast (1877) in the case of Wi Parata v Bishop of Wellington that the ‘instrument purported to cede the sovereignty … must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist’ (1877, p.78). A highly contentious ruling with far reaching consequences that set a precedent for future cases that held Māori claims outside of court jurisdiction and decreed the Crown, as Prendergast stated, the ‘sole arbiter of its own justice’ on these matters (Morris, 2004; Palmer, 2013).

In the decades that followed, te Tiriti/the Treaty was rarely mentioned or considered by the state or society in general. It was largely viewed as a historic document with no applicable relevance in the development and emergence of a new society.

‘Government statements seldom praised the treaty; they disparaged it; or insisted that the contract bound Maori to obey the law. For the Maori people, … the treaty became more relevant than ever… Maori grievances, diverse and sometimes confused, found kotahitanga (unity) in the treaty’ (Orange, 1987, p. 185).

“[the treaty] wasn’t talked about. Don’t forget, we didn’t yet have Matiu Rata as Minister of Māori Affairs. We had Pākehā Ministers of Māori Affairs.”

- Oliver Sutherland, advocate for Māori

## Te Tiriti o Waitangi/The Treaty of Waitangi 1840

A summary overview of te Tiriti/the Treaty is necessary to understand the context and evolving status of te Tiriti/the Treaty in Aotearoa New Zealand statute, and its relationship to agencies’ economic and social policies. Signed by the Crown’s representative, William Hobson, and northern chiefs in Waitangi on 6th of February 1840, it sets out mutually agreed obligations and expectations between Māori and the Crown. It was then signed in multiple locations across Aotearoa New Zealand with the final recorded Māori signatory in Kāwhia in September of the same year (Boyle, 2014). There are two versions ‘Māori and English’ of te Tiriti/the Treaty with fundamental differences in meaning and interpretation between the two. An incongruity that is the basis of much controversy and dispute in Aotearoa New Zealand’s political arena (Jackson, 2013; Waitangi Tribunal, 1983). More than 500 chiefs signed the Māori version, and 39 chiefs signed the English version – an important detail that had bearing in future te Tiriti/the Treaty debates.

For the Crown, the Treaty confirmed Māori cessation of sovereignty in Aotearoa New Zealand, established Crown governance, and provided exclusive right of pre-emption to purchase lands as agreed with Māori. Activities that further supported the migration and settlement of British subjects in the establishment of a new Commonwealth colony. For Māori, te Tiriti embodies an enduring and implicit expectation of reciprocity and partnership – an exchange of the right to govern whilst retaining their sovereignty (tino rangatiratanga) over their lands, resources, and treasures (taonga), including rights as equal citizens, that would be upheld and protected. Te Tiriti/the Treaty articles provided by Parata (1994) in Mainstreaming: A Māori Affairs Policy, are attached as an appendage to this chapter for reference.

## Political upheaval – the Treaty of Waitangi Act 1975

Developments in the 1970s and 1980s are the result of a groundswell of collective action and Māori activism in what Workman (2017) describes ‘as a period of considerable political upheaval in the mid-1970s’, including resistance and ‘protest at the relentless alienation of Māori land and to maintain control of the [remaining] 1.2 million hectares still in Māori control’ (p. 165). Protest that culminated into the ‘hīkoi’ (1975) that began in the Far North with 50 people and climaxed at parliament in Wellington with approximately 5000 people. Upheaval and activism during that period also included the occupation of Bastion Point and the Raglan golf course alongside other major causes including protest of the Vietnam War, and the women’s rights and anti-apartheid movements (Workman, 2017; Tauri & Webb, 2011). Prominent Māori leadership at that time, were also instrumental in mobilising Māori and (increasingly supportive) Pākehā communities, towards discussion and debate regarding the constitutional status of te Tiriti/the Treaty; the interpretation of tino rangatiratanga outlined in the Māori version; ongoing breaches, citizenship rights, and a promise that implied reciprocity and partnership (Walker, 1990; Tauri & Webb, 2011; Workman, 2017; Jackson, 2013).

The policy assimilation that characterised New Zealand politics and society acted as a constraint to the definition of Māori socio-economic problems as connected to Crown injustices committed under the Treaty… [therefore]… the New Zealand politico-institutional context… conditioned the way in which Māori sought to draw attention to their problems – protest activism – that was eventually the most successful factor in achieving the desired recognition (Catalanic, 2004, as cited in Tauri & Webb, 2011, p. 24).

These activities informed the formulation and adoption of The Treaty of Waitangi Act 1975, a ground-breaking development in Aotearoa New Zealand’s political and public arena. It was the first recognition of te Tiriti/the Treaty in law; it introduced the principles of te Tiriti/the Treaty (that will be discussed further in this chapter); and established the Waitangi Tribunal to investigate Tiriti/Treaty breaches of the Crown and/or state agencies that occurred after 1975. An amendment to the Act 1985, following further debate in the political arena, extended the tribunal’s ability to investigate claims dating back to 1840 (Palmer, 2013). Following a precedent set almost 100-years prior, that te Tiriti/ the Treaty was a simple nullity, the Act 1975 signalled to Māori – a tacit recognition of the constitutional nature of te Tiriti/the Treaty in statute.

It is pertinent to note, that the parameters given to the Waitangi Tribunal are not binding. In other words, the tribunal can make recommendations to the courts, but do not have the power to enforce them. This has attracted criticism from numerous commentators in that the Act 1975, ‘gave power to take grievances to the Tribunal but not have the Treaty litigated in the courts’ (Palmer, 2013; Tauri & Webb, 2011). A criticism also asserted by the United Nations (UN) Committee on Social, Cultural and Economic Rights in 2018 (4th periodic report).

More than 40 years following the adoption of the Act 1975, te Tiriti/the Treaty ‘is still not legally enforceable nor referred to in the Constitution Act, …and the Waitangi Tribunal’s findings are frequently ignored by the New Zealand government’ (United Nations, 2018, p. 2). UN recommendations to the New Zealand government included taking ‘immediate steps, in partnership with Māori representative institutions, to implement the recommendations of the Constitutional Advisory Panel regarding the role of the Treaty of Waitangi within its constitutional arrangements…’ (United Nations, 2018, p. 2).

Tauri and Webb (2011) contend that the parameters of the Waitangi Tribunal are intentionally ‘informal’ in which the implicit intent was to ‘encourage the incorporation of Māori political and social activism into a controlled government forum’ (p. 21). A position that ‘can be understood as a state-centred informal justice forum that assisted the state in regulating the potential hegemonic impact of Māori Treaty activism’ (Tauri & Webb, 2011, p. 22). This is consistent with Ramsden's assertion that it is ‘not normal for any group in control to relinquish power and resources to the less powerful simply on the grounds of good will’ (Ramsden, 1994, para. 30). Irrespective of potentially conflicting intentions, the Treaty of Waitangi Act 1975 was a game changer in te Tiriti/the Treaty discourse. Tauri and Webb’s (2011) contention has merit that does not detract from the fact this was a pivotal development in Aotearoa New Zealand politics. Rather, it distinguishes further, the substantial commitment and resulting gains of those leading and contributing to recognition of te Tiriti/ the Treaty rights.

What is not disputed today, is the constitutional significance of te Tiriti/the Treaty to Aotearoa New Zealand. Te Tiriti/the Treaty

‘has taken on in fact a vitality and potency of its own. For Māori, its mana has always been high… Some [Pākehā] see it as a threat, and political capital is made out of that point of view; but in truth theirs is a tacit tribute to the Treaty, a reluctant recognition that has become part of the essence of national life. Even its critics have to accept that it is a foundation document’ (Cooke, 1990, as cited in Culpitt,1994, p. 48).

## Waitangi Tribunal influence and recognition

The Waitangi Tribunal has established a significant body of historic and contemporary research literature, and influence, in respect to both the recognition and application of te Tiriti/the Treaty. Their reports offer valuable insights of relevance to the evolving significance of te Tiriti/the Treaty in Aotearoa New Zealand statute, and its application in policy. The initial decades following the establishment of the tribunal focussed mainly on recognition and redress for land and resource breaches. The tribunal has also provided a platform for constructive legal, social, and political debate regarding citizenship rights and obligations, the role of the state, and its social policies and associated issues of implementation, access, and equitable re-distribution (Palmer, 2013; Workman, 2017; Jackson, 2013; O’Regan & Mahuika, 1993).

For example, the tribunal’s deliberations in the Wānanga Capital Establishment report (Waitangi Tribunal, 1999) examined how ‘past legislative action played a significant role in disadvantaging Māori within the state’s education system, leading to their under-representation in the statistics by which educational success is usually measured’ (Waitangi Tribunal, 1999, p. 5). Dr Simon's submission to the tribunal drew attention to an explicit intent ingrained within educational policy to assimilate Māori; to ‘restrict Māori to working-class employment'. Simon highlighted Māori objections to a technical curriculum with the claim [Hogben, Inspector- General of Education] that it was necessary 'to make Māori recognise the dignity of manual labour' and quoted the Inspector of Native Schools [W Bird], '... that the purpose of Māori education was to prepare Māori for life amongst Māori, not to encourage them to mingle with Europeans in trade and commerce'. (Simon, undated, Waitangi Tribunal, 1999, p. 7). These types of attitudes persisted for decades, and it is contended that they are so deeply ingrained that they have continued to influence the quality of education of tamariki Māori in which ‘educational aspirations have been lowered [and] … teacher expectations of Māori achievement have been lowered’ (Waitangi Tribunal, 1999, p. 9).

Debates in the social policy arena during the 1980s appear to be mainly related to the interpretation and application of the second article in which Māori are guaranteed the ‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’ (Treaty of Waitangi, as cited in Jackson, 2013, p. 4). In the Māori version the second article reads ‘te tino rangatiratanga o ō rātou wenua ō rātou kāinga me ō rātou taonga katoa’ (Te Tiriti o Waitangi, 1840 as cited in Jackson 2013, p. 5), of which the meaning or meanings, are a source of ongoing discussion. For example, Parata (1994) cites the Waitangi Project’s interpretation ‘the full chieftainship (rangatiratanga) of their lands, their villages and all their possessions (taonga: everything that is held precious) (see appendix to this chapter). Similarly, Kawharu (1989) translates the second article as ‘the unqualified exercise of the chieftainship over their lands, villages and all their treasures’ (as cited in Jackson 2013, p. 5), and Mutu (2010) translates the second article as ‘their paramount and ultimate power and authority over their lands, their villages and all their treasured possessions’ (as cited in Jackson 2013, p. 5).

A notable development in respect to these debates are the tribunal’s deliberations and conclusions in Motunui-Waitara report (1983).

‘The Te Atiawa people of Taranaki [submitted a grievance that they were] prejudicially affected by the discharge of sewage and industrial waste onto or near certain traditional fishing grounds and reefs and that the pollution of the fishing grounds is inconsistent with the principles of the Treaty of Waitangi’ (Waitangi Tribunal, 1983, p. 1).

As set out by the Treaty of Waitangi Act 1975, the expectation is for the tribunal to ‘have regard to the two texts of the Treaty set out in the First Schedule (to the Treaty of Waitangi Act) but the text in Māori as printed in the First Schedule contains in Article the Second glaring errors and omissions’ (p. 47). To examine the claim, the tribunal needed to firstly examine and reconcile the different interpretations in each of te Tiriti/the Treaty texts. In examining the application of treaties in international jurisdictions (United Kingdom and the United States) the tribunal concluded that

‘no argument has been adduced to question the existence of the Treaty or to deny the moral obligations it imposed. Nonetheless the approach of the New Zealand Courts, and of successive Governments, [did not] compare favourably with that taken by other Courts and Governments in their consideration of indigenous minorities’ (p. 46).

A salient point in their deliberations is that from a Māori perspective the ‘spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place’ (p. 47). The tribunal also noted that ‘there are several similarities between the Māori approach to the meaning of things, and the ‘European’ legal approach to the interpretation of treaties’ (p. 48).

The Tribunal cited the Department of Māori Affairs submission in respect to the Vienna Convention on the Law of Treaties 1969 (of which New Zealand became a party in 1971), that the rule of contra proferentem in contract law applies, ‘in the event of ambiguity a provision should be construed against the party which drafted or proposed that provision’ (p. 49). The Tribunal concluded that,

‘should any question arise of which text should prevail the Māori text should be treated as the prime reference. This view is also based on the predominant role the Māori text played in securing the signatures of the various Chiefs’ (p. 49).

The tribunal contends that Article two extends beyond literal interpretations of tangible assets. This is a significant outcome for Māori in respect to te Tiriti/the Treaty.

‘For years Maori have struggled to secure public recognition of rights based on their understanding of the treaty – rights to land, fisheries, and taonga or prized possessions – as well as a degree of genuine autonomy within the mainstream of New Zealand life’ (Orange, 1987, p. 2).

The Māori Language Claim’s report (1986) brought the relevance of this conclusion and therefore, applicability of the Māori version to the fore. In its deliberations, the tribunal confirmed the role of native schools and ensuing education settings in undermining Māori language and culture; drawing attention to a system that perpetuated, in the words of Ramsden (1994), a ‘reconstructed version of history utterly deprived of the vigorous truth of colonial and subsequent Māori, Pākehā, and Crown interaction’ (para. 11). An issue that is being remedied by the current government via the national education curriculum to ensure Aotearoa New Zealand history will be taught in all schools by 2022. Te reo Māori was recognised by the tribunal as a taonga (treasure, or valued possession) under the second article of te Tiriti/the Treaty, and its recommendations influenced the adoption of the Māori Language Act 1987, which elevated te reo Māori as an official language in Aotearoa New Zealand and established the Māori Language Commission.

## The Principles of te Tiriti/the Treaty

The relationship between the state’s economic and social agendas, the alienation of Māori from their land and resources, alongside the imposition of a dominant culture, language, and authority, is well- established (Dalley, 1998; Jackson, 2013; Orange, 1987; Walker, 1990). Such agendas, Māori contend, are direct breaches of their fundamental human rights and te Tiriti/Treaty rights, and so, the source of multiple historic and contemporary inquiries heard by the Tribunal since its inception in 1975. It is in this discourse that the Tribunal’s conclusions in the Motunui-Waitara report 1983, and Māori Language Claim report 1986, are relevant to the state’s formulation of social policy.

The ‘State-Owned Enterprises Act 1986 produced the most dramatic case on Māori issues decided by a New Zealand court up to that time’ (Palmer, 2013, in [the] courts thunder into the Treaty section, para. 1: the case of the New Zealand Māori Council v Attorney-General 1987). The fourth Labour government had commenced significant social and economic reforms that would include the privatisation and therefore, sale and transfer of state-owned assets. The Māori Council was concerned the Crown would transfer Crown land without establishing whether claims or potential claims to the Waitangi Tribunal would be unlawful and inconsistent with the principles of te Tiriti/the Treaty. The court ruled in favour of the Māori Council in which the Crown was required to safeguard Māori interests to avoid prejudice to Māori claims - to not do so would be considered unlawful under provisions of the Act 1986. The decision is viewed as:

‘one of the crucial measures that helped facilitate Māori development and identity through propelling extensive social and political change in New Zealand. [The decision gave] the Treaty of Waitangi an explicit place in New Zealand jurisprudence for the first time’ (Glazebrook, 2010, p. 343).

Developments that flowed from the court’s ruling included the Treaty of Waitangi (State Enterprises) Act 1988; a commitment from Cabinet to review all future legislation against potential te Tiriti/ Treaty implications; the ability of the Tribunal to make binding decisions in this context; and the development of the Treaty of Waitangi – Principles for Crown Action, adopted by Cabinet 1989 (Palmer, 2013; Glazebrook, 2010; Jackson, 2013). References to the principles can be sourced in multiple documents including the tribunal and courts’ reports and social policy literature.

A key factor in the courts deliberations was that the principles are not fixed, but to be viewed and applied appropriate to the circumstances. For example, they noted the use of the phrase ‘treaty principles’ in the State-Owned Enterprises Act 1986, rather than terms of the Treaty. In essence, treating te Tiriti/the Treaty as a ‘living document capable of adapting to new circumstances and [ensuring] … that the principles underlying the Treaty were of greater importance than its actual words’ (Barrett & Connolly-Stone, 1998, [the] status of the Treaty in law section, para. 6). There are key themes encapsulated in The Principles for Crown Action that generally apply. Namely, ‘the principle of government or kāwanatanga; the principle of self-management or rangatiratanga; the principle of equality; the principles of reasonable co-operation; and the principle of redress’ (Palmer, 1989 as cited in Jackson, 2013, p. 6).

“The period in '83 or '84 onward, there was legislative change, I think in '84. There were two things that happened, as I recall. One was that the Waitangi Tribunal got additional powers to look at historical breaches and expanded their role quite heavily. The second thing that happened was that government agencies had to apply treaty analysis to any of their policies. They were expected, when they reported on issues and legislation, to do an analysis around what is the impact on Māori. That was quite powerful.”

– Tā Kim Workman, Māori senior public servant

## Te Tiriti/the Treaty and social policy

The developments in the 1970s and 1980s did not occur without resistance or backlash. Sir Geoffrey Palmer acknowledges that at the outset of these activities it was difficult to rally support from within the public sector. Although ministers in government considered te Tiriti/the Treaty as important to Aotearoa New Zealand’s legislative and policy activities ‘the bureaucracy on the whole did not. They gave little weight to it… [and] there was no source of good advice within the public service about it’ (Palmer, 2013, [the] Treaty within the Executive section, para. 1). It was difficult gaining buy-in from the state’s agencies. As the Tribunal progressed claims that appeared to favour Māori claimants, dis-ease was increasing in mainstream Aotearoa New Zealand culminating into what Sir Geoffrey Palmer referred to as ‘a white backlash of substantial proportions [that included calls] for the Treaty to be scrapped and another agreement made’ (Palmer, 2013, [the] Treaty within the Executive section, para. 1). This backlash initiated the establishment and development of the Treaty of Waitangi Policy Unit within the Ministry of Justice (1988), enabling the Crown to bypass the Tribunal in respect to receiving policy advice regarding Māori claims (Palmer, 1987). A development that reinforces Poata-Smith’s contention that the government’s activities in the period between 1984 to 1999, were to pacify and depoliticise what were perceived as increasing Māori demands during a period of significant neo-liberal reforms ‘without disrupting the economic, social, and political conditions most conducive to profitable capital accumulation’ (Poata- Smith, 2008, p. 102).

‘[From 1975 to 1998] 41 statutes [were enacted incorporating] references to the Treaty and its principles, and many others refer to Māori interests. Among these, only the Māori Language Act, the Education Act, the Children, Young Persons and their Families Act, and the Health and Disability Services Act could be characterised as social policy legislation.’ (Barrett & Connolly-Stone, 1998, para. 1).

 In a context where Māori disproportionately feature in the deficit across all social determinants, the discussions are primarily concerned with equity, and access, and re-distribution of resources and opportunities. Agencies have focussed primarily on the relationship between ethnic and social disparities with an explicit focus on ‘the Māori problem’ and resulting inequalities. A focal point of ‘controversial public debates about strategies implemented to address these inequalities’ (Poata-Smith, 2008, p. 101).

An emergent debate has been in respect to needs- based policies versus rights-based policies, and for Māori, the relevance of te Tiriti/the Treaty in determining when, where, how and for whom policies should be enacted (Parata, 1994; O’Regan & Mahuika, 1993; Barrett & Connolly-Stone, 1998). Article three guarantees equal citizenship rights implying Māori would have unhindered access to the same opportunities and outcomes as Pākehā. On the other hand, it is asserted by Māori that ‘the emphasis on the rights of equal citizenship under the auspices of article three of the treaty has effectively deflected the more politicised themes of tino rangatiratanga under article two’ (Poata-Smith, 2008, p. 103).

The argument about the role of the state as a determinant to individual and collective wellbeing or ‘dis-ease’ (specifically Māori), has increased, and is compelling. For example, the Royal Commission on Social Policy (1988) contended that wellbeing should be:

‘concerned not so much with the treatment of problems or problem people, as with identifying their causes in institutions and social structures, and with attacking the problems at their presumed source: [asserting the view that this] is associated with both social planning and community action’ (Richardson et al., 1988, p. 7).

This is reinforced further by the Commission on the Social Determinants of Health (CSDH) that ‘poor and unequal living conditions are the consequence of poor social policies and programmes, unfair economic arrangements, and bad politics’ (CSDH, 2008, p. 1). Alongside these debates, a new discourse has emerged ‘that supports the rights of indigenous people to be protected from overt intervention by professional and sometimes paternalistic groups’ (Culpitt, 1994, para. 4).

“The things (barriers in State Care) that got in the way, was the ability to be able to go to the table and say, well actually the resources that you're providing need to be consistent, and need to be targeted in this area, and we decide where, how that's best to be dispersed, and we decide on the amount. We want to challenge (them) and put some of our things that we've been telling you all these years … the articles one, two and three of our founding documents. I think the barrier (was) that they still were not acknowledging the relationship, the partnership.”

– Daniel Mataki, Māori family home parent

Debates in respect to incorporating te Tiriti/the Treaty into social policy legislation became more frequent in the 1980s and 1990s (Parata, 1994; O’Regan & Mahuika, 1993; Barrett & Connolly- Stone, 1998). Māori contend government agencies have consistently failed to take responsibility for their role in perpetuating Māori inequalities, and that incorporating te Tiriti/the Treaty will provide a more balanced and holistic approach to social policy and practice. This approach begins with recognition of the real causes in the first instance, and then ensuring Māori have a mechanism to hold the public sector accountable (Parata, 1994; O’Regan & Mahuika, 1993). Further promoting a Māori perspective that considers ‘the definition of good government referred to in Article [one] of the Treaty requires a sensible balance between Articles [two and three], rather than an undue emphasis on one or the other’ (Parata, 1994, Introduction, para. 2). Furthermore, Parata contends that a rights-driven policy would require the State to recognise, in concert with its international commitments, the status of indigenous people, plus domestic obligations…’ (Parata,1994, para. 5).

Māori commentators also contend that agencies’ overt focus on the formulation of needs-driven policies that primarily deal with income distribution are ineffective. They maintain the economic challenges Māori experience will not be ‘eliminated (although [they] may be alleviated) simply by addressing income issues’ (Parata, 1994, Policy Basis section, para. 6), because the public sector does not operate in a value-free marketplace. In other words, the formulation of economic and social policies and decisions are informed by a predominantly prejudiced perspective. This is emphasised more strongly by O’Regan and Mahuika, (1993) that ‘the device used to deny Māori property rights is distributive equity … [in that the] economy has been built on taking and dispossessing of Māori assets, and after dispossession you are telling what the problem of the dispossessed is’ (O’Regan & Mahuika, 1993, para. 13).

In the late 1990s government did not recognise and had not 'accepted the Article 2 to social policy and Māori demands for self-determination [had] been rejected’ (Barrett & Connolly-Stone, 1998, Application of the Treaty in Social Policy section, para. 2). Therefore, social policy legislation introduced in the 1980s and 1990s often expresses a commitment to consult and involve Māori in decisions that impact them alongside other minority communities, and/ or makes references Māori interests. For example, within Whaia Te Ora Mo Te Iwi 1992: Government’s key statement on te Tiriti/the Treaty in Health policy it the Crown contends that:

‘The claim that the protection of the health of Maori has (through Article 2) a special claim on New Zealanders as a whole, over and above the responsibility of the Crown to secure the health of all citizens is, however, not one the Government accepts’ (cited by Barrett & Connolly-Stone, 1998, Health Sector section, para. 3).

“We are over-represented because of the Treaty, because of all the stuff that was taken away from us.”

- Raewyn Nordstrom, Māori social worker

The literature reviewed suggests this rebuttal is not so much about ensuring there is emphasis on Māori within social policy but in determining what a right-based relationship with Māori entails in social policy and incorporating a positive emphasis on Māori - as it draws attention to an explicitly antagonistic emphasis on Māori within successive governments’ social policies. An emphasis that has significantly informed agencies’ policies, procedures, and workforce practices, with detrimental impact on generations of Māori. For example, the Children, Young Persons and their Families Act 1989, provides a strong provides a strong example of how the legislation required agencies to work with families and whānau, hapū and iwi and family groups, in deciding the best ways to address care and protection needs - it did not translate positively in application or practice. That in ‘respect of Māori, the Public Service and its managers are responsible and accountable for long-term professional negligence. So far, responsiveness to the needs of Māori has been largely a myth’ (Parata, 1994, Professional performance section, p. 7).

‘Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements’ (Article 37: United Nations General Assembly, 2007).

“I did some research for, I think the police, in 1998, which actually had a pretty good crack at defining what it was that the police had to do, in terms of (treaty/cultural) responsiveness … I mused, when I started the process, that I was wasting my time. I could see that most of those organisations had leaders that were champions for change, but the second tier was just hopeless. They were full of people that were resisting change.”.

- Tā Kim Workman, Māori senior public servant

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