

CHAPTER 8

CONCLUSIONS, FINDINGS, AND RECOMMENDATIONS

8.1 CONCLUSIONS ON OPERATIONAL CONFLICTS

8.1.1 Differences of opinion reflect deeper problems

In this claim, the simplest disagreements between the parties took on a greater significance, indicating as they did the underlying problems between them. Differences of opinion masked communication problems, which resulted from their different perceptions of the issues, which overlaid structural problems in the relationship between them. And just as the problems were symbolic of bigger issues, so were the potential solutions. The trust sought discussion and negotiation to resolve their differences, but it must have seemed from the agency's point of view that the very act of entering into debate about its funding policies and criteria could have been seen to validate the trust's claim to be a Treaty partner of the Crown, which the CFA disputed. Also, the CFA was not prepared to make ad hoc changes to its funding policies because that would threaten the consistency of its funding decisions and undermine the integrity and credibility of the agency's own stance. This may explain what appeared to the trust to be the siege mentality that developed in the CFA.

There was certainly no agreed mechanism for talking about their policy or operational differences, let alone Treaty issues. In fact the CFA seemed unable even to recognise the basis of the trust's stance. The only challenges the CFA was prepared to entertain concerned funding decisions, for which it had devised an appeal procedure just prior to the claim. Even though the outreach worker was not responsible for the policy matters which the trust was trying to discuss with the agency's management, the trust's challenges were repeatedly referred back down to him.

The agency took an unyielding prescriptive approach with the trust, asserting that the Crown's right to govern under article 1 of the Treaty was not qualified by article 2 in this case, while at the same time it developed protocols for consultation with 'iwi' (by which it meant traditional kin-based tribal groups) in recognition of their rangatiratanga and of the fact that a partnership with them was established by article 2. The trust was not an 'iwi' as the agency understood the term, and was thus not considered to be a Treaty partner of the Crown entitled to consultation as such; it was acknowledged only as having collective rights under the equal citizenship provisions of

article 3 of the Treaty which were the same as those of other interest groups, including, as a Maori group, the right to affirmative action to overcome disadvantage relative to non-Maori.

8.1.2 The department's policy relied on *Puao-te-Ata-tu*

The agency's view and its stance towards the trust were derived originally from its interpretation of *Puao-te-Ata-tu*. It was stated that the department's focus on and commitment to *Puao-te-Ata-tu* had been lost in the past but had been restored under the director-general at the time of the hearings. We heard from Mr Boag that there were three main themes of *Puao-te-Ata-tu* – the need for the DSW to become more bicultural in order to serve Maori clients better; the need for tribal structures to be strengthened through greater Maori involvement in policy development and service delivery and greater accountability by the department to Maori; and the need for the department to coordinate urgent Government action to address the social crisis that was developing in Auckland and other major cities.

In relation to the first theme, the department argued that implementation of a policy of biculturalism, which it was in the process of doing but had not completed at the time of the hearings, would fulfil its obligations to Te Whanau o Waipareira by ensuring that Maori were given equitable consideration in the operations of the department.

The second theme referred to the goal of strengthening tribal structures. The department's policy on recognition of 'iwi authorities' (later called 'iwi social services') which was enacted in section 396 of the Children, Young Persons, and Their Families Act 1989, and the planned devolution of many of the department's functions to recognised iwi authorities, were directed to achieve this end.

At the time section 396 was enacted, the thrust of the Government's Maori Affairs policy was the development of a Treaty-based partnership between the Crown and Maori people. This was to be done by devolution of responsibility for implementing and administering Government programs to 'iwi (tribal) or other appropriate organisations', or 'traditional iwi structure[s]'.¹ The short-lived Runanga Iwi Act was passed to facilitate and regularise this process.

Section 396 of the Children, Young Persons, and Their Families Act concerned sole guardianship of children, a matter critical to the rangatiratanga of a group. In line with its bicultural approach adopted in response to *Puao-te-Ata-tu*, the department consulted Maori people in developing its policy for approving iwi social services. The director-general said the advice the department received through its consultation was consistent with its conclusion that only kin-based iwi or hapu exercised the rangatiratanga guaranteed protection in article 2, and were thereby the Crown's Treaty partners entitled to special consideration. Undoubtedly, in line with its interpretation of *Puao-te-Ata-tu*, the department attached particular importance to the views of iwi over those of other groups, such as Te Whanau o Waipareira, who

1. *He Tirohanga Rangapu: Partnership Perspectives – A Discussion Paper*, Ministry of Maori Affairs, April 1988, pp 4, 13. This is a discussion booklet outlining the Government's plan for devolution.

expressed a dissenting view. In any event, Te Puni Kokiri endorsed that conclusion; and the department's legal advice also confirmed that, under section 396, only those social services which are established by kin-based iwi can be recognised as iwi social services.

Therefore, while the director-general said that rangatiratanga was 'the key principle that we are working to . . . I see it as empowering Maori to have control of their own destiny',² section 396 was seen to give priority to empowering tribal structures compared with 'pan-tribal' typically urban groupings like the Waipareira trust (although the department dealt with and funded both types of groups). The director-general added that even if the statute were to be changed, the department would still be guided by the preponderance of Maori opinion on whether or not non-kin based groups should be granted sole guardianship of Maori children, because a matter of such importance was for Maori to decide, and not for a Government department.

The director-general openly acknowledged that the department's interpretation of *Puao-te-Ata-tu*, and its consequent focus on the rangatiratanga of kin-based 'iwi' with all its implications for Treaty partnership, presented the department with a dilemma when placing children under the provisions of the Children, Young Persons, and Their Families Act. The Act requires that, where possible, Maori children should be placed with their whanau, hapu or iwi; but in many cases the iwi of such children was either not known or had no practical significance to them. Also, as was acknowledged at the hearings, at that time there were comparatively few Maori service providers, whether kin-based or otherwise, who were sufficiently established to provide the level of care and protection required by such placements. The department's response, she said, was to resolve the dilemma as best it could by recognising the sovereignty of iwi and at the same time dealing with pan-tribal organisations, while continuing to be guided by the preponderance of Maori opinion.

8.1.3 A broader interpretation of *Puao-te-Ata-tu*

The restrictive interpretation of *Puao-te-Ata-tu* was a key plank of the department's argument before us. We have already noted our conclusion that *Puao-te-Ata-tu* did not address directly the question at the heart of this claim, namely the status under the Treaty of non-tribal communities of Maori who live away from their traditional home territories. The Treaty remained in the background of *Puao-te-Ata-tu*.

Mr Boag acknowledged that iwi development was the Government's Maori Affairs policy at the time the report was written, and he said the committee's expectation was that in the long term, Maori would respond to the initiatives recommended in *Puao-te-Ata-tu* by strengthening their kin-based communities. But clearly the committee did not adopt a prescriptive approach, and members were not certain how Maori in Auckland might respond. In the interim, Mr Boag believed, a pragmatic approach was best in deciding who to consult and deal with. He denied that the Rangihau

2. Transcript 4.2, p 19

committee advocated that only kin-based groups be recognised as service providers in order to achieve the long-term goal of strengthening Maori communities: instead, the committee was concerned that the department should talk to the ‘right’ Maori people and develop a range of responses appropriate to their various situations. As a result, he agreed with the claimants that *Puao-te-Ata-tu* was capable of a broader and more generous interpretation than it was given by the department.

Such an approach might have avoided the department’s dilemma over placing children for care and protection with a tribal community that was foreign to them or that was insufficiently equipped to meet their needs. It might also have averted the department’s disputes with the Waipareira trust.

We consider that, having reached the view that only traditional kin-based iwi were its Treaty partners, the department denied itself the fullest opportunity to consult the advocates of different viewpoints. Instead, when challenged to justify its stance in terms of the Treaty, it relied on the strict terms of the separate articles, rather than the principles and the intent of the Treaty as a whole. In effect, the Crown construed the Treaty against ‘te pani me te rawakore’, Maori who are not organised in traditional tribal groupings, while at the same time acknowledging that such people have Treaty rights.

The third theme of *Puao-te-Ata-tu*, concerning coordination of Government action to avert the social crisis in Auckland and elsewhere, was overshadowed by the restructuring of the national economy and the State sector, a matter we return to later.

8.1.4 Communication problems

What made the parties’ differences of opinion intractable was the lack of good channels of communication between them. In chapter 7, we identified three possible avenues that were blocked – recognition of the trust as an Iwi Social Service under section 396 of the Children, Young Persons, and Their Families Act; direct dialogue with agency management over policy issues that was frustrated by the agency’s policy of devolution to outreach workers; and the lack of a consultation protocol for the agency’s dealings with Waipareira.

8.1.5 Section 396 of the Children, Young Persons, and Their Families Act 1989

We consider that the policy developed for recognition of iwi social services, by which the trust was bound not to qualify, was an enormous blow to Te Whanau o Waipareira’s aspirations. At the time Waipareira applied for recognition, the term in section 396 was ‘iwi authority’, and in the context of the Government’s Maori Affairs policy of devolution to iwi, ‘iwi authority’ had all the connotations of ‘Treaty partner’. The perceived importance of ‘iwi authorities’ no doubt stems from the idea that the Crown has a list of Treaty partners. In *He Tirohanga Rangapu*, the April 1988 discussion booklet outlining the Government’s plans for devolution, the role of iwi was described in this way:

Maori signatories to the Treaty of Waitangi represented a specific iwi or hapu. The strength of the traditional iwi structure is reflected in their continuing existence today. . . .

It is suggested that iwi organisations which meet eligibility criteria jointly established by the Government and iwi should become responsible for implementing and administering government programmes. . . .

The appropriate iwi-based organisations must be identified, and this can only be done by the iwi themselves. However, there must be some limitations to prevent an undue proliferation of iwi organisations – as looks like happening at present . . .

The Government proposes to establish criteria which would qualify an iwi to participate . . . Whatever arrangements might be devised they would need to reflect the responsibilities of the Government to Parliament and the taxpayer, and also the responsibilities of iwi to their members.³

The Runanga Iwi Act gave legislative effect to this policy.

Waipareira clearly believed that recognition under section 396 as an ‘iwi authority’ was one way to get on that list of Treaty partners and join the fast track to consultation and input to Government policy, Government funding, and control over service delivery. The director-general at the time of the hearings clearly shared that view, as did many Maori. This is no doubt why Maori insisted on a change from ‘iwi authority’ to ‘iwi social service’ in the wording of the section, to avoid any possible misunderstanding that they were conceding to the DSW the right to decide which organisations represented them in their wider dealings with the Crown.

Recognising the importance of the right to take sole guardianship of Maori children, a matter which was seen by the department and the Maori whom it consulted as central to the identity and future of Maori groups, the CFA eventually adopted narrow criteria for approval which clearly denied recognition to groups like Te Whanau o Waipareira. This had the effect of placing Waipareira outside the Treaty partnership as the department perceived it.

8.1.6 Devolution to outreach workers

The policy of devolution to outreach workers led to problems apparently because of communication breakdowns within the agency. Mr Takerei, the outreach worker who liaised with Waipareira, stated that he had tried to raise Waipareira’s policy concerns with his managers, but he received no response. Waipareira’s direct communications with agency management were referred to Mr Takerei apparently without a proper analysis of the issues raised. These exchanges occurred during the time when the agency was determined to establish in the minds of all service providers the new style of interaction, which discouraged direct approaches to senior management to overrule local funding decisions.

3. *He Tirohanga Rangapu*, p 13

8.1.7 Consultation protocol

It may be that many of the problems between the trust and the agency can be solved by a protocol for consultation between the parties. Clearly, there was no principle behind the agency's failure to develop one with Waipareira. We can only conclude that it was a casualty of the destructive relationship that developed, and we note with approval the agency's statement that it makes good sense to have one.

8.1.8 Services planning the crux

As we outlined in chapter 7, the lack of consultation and communication between the agency and the trust came to a head over the trust's lack of input to the agency's services planning process, which is the basis for its funding decisions. The trust argued that the underlying philosophy, the information base, and the agency's decision-making procedures were all flawed, and as a result, the agency's funding decisions were inequitable and the trust's community was prejudiced.

(1) Service development philosophy

The trust claimed that when the agency's philosophy of service development so completely replaced one of community development, the values, aims and aspirations of its community were lost sight of in welfare services, and the Treaty partnership broke down. In carrying out its task, the agency was pursuing only the Government's agenda – a fact which the agency freely acknowledged, and which it attributed to the requirements and the 'strictures' of the Public Finance Act 1989 and the State Sector Act 1988.

(2) Monitoring of services' effectiveness

Under the State Sector Act, the Government alone sets the social goals to be achieved by the department and the agency (by a process which was not known to the general manager of the CFA). Through its services planning, which provides for limited consultation with the community, the agency proposes the services that should be purchased to best achieve the predetermined goals. Once its budget is allocated, the agency decides who should provide those services; and at the end of the financial year, it reports to Government on the services which were provided.

The trust criticised the services planning process, and the agency's reporting to Government, for not being measured against the desired outcomes, the social goals set by the Government. Therefore no assessment was possible of the effectiveness of providers or the agency, only their efficiency in securing or supplying the proposed services within the budget allocated for that purpose. The agency pointed out that the Public Finance Act does not require it to assess the effectiveness of the services it purchases, although it acknowledged that such an assessment would be valuable, and it had begun developing methods of assessing social impact.

The trust argued that social impact assessment would show that the CFA's approach to achieving the desired social outcomes for the Waipareira community was deficient. This affected the style of service delivery to its clients. For example, the trust

contended that the appropriateness of services to clients could not reliably be determined by outsiders using objective criteria, but could be assured if service providers were fully accountable to their community and operated with a proper mandate. By this argument, the trust was not asserting that such a provider would be immune from more formal monitoring measures: it praised the tripartite system of monitoring kohanga reo, for example. Importantly, however, it saw it as the role of the trust, on behalf of the community, to ensure that funding to community groups was allocated only to those whom it judged effective. Providers had to present themselves and their programme to a meeting of the whanau which then decided whether or not to endorse them and grant them status as affiliates. Also, the trust acted as an umbrella group for the benefit of its affiliates. However the CFA's policy was to fund competing providers in order to achieve the CFA's own goal of funding a range of appropriate services to clients – an approach which the trust said was wasteful and ineffective.

For another example, the trust was convinced that integrated or holistic services were most effective, such as its alternative school which combined elements of education, social work and vocational training. However, the funding and reporting mechanisms of the Public Finance Act are specific to each programme within each Government agency, so there is no incentive for them to cooperate, no 'ownership' of the bonus that could be gained by integrating programmes, and no way to measure the increased benefit anyway.

(3) Equitable funding

Finally, the trust asserted that the funding allocated to West Auckland Maori, and to the trust in particular, was inequitable because the methods used by the agency to assess community needs and weigh them up against the needs of other communities failed to take into account all the relevant factors. Among those factors were a decline in funding for Maori programmes that followed the mainstreaming of the Department of Maori Affairs, and the relative disadvantage facing Maori community groups in comparison with established service providers in the mainstreamed environment. The CFA acknowledged that its needs index was being refined and it had not 'got it all right' at the outset.

8.2 FINDINGS ON JURISDICTION AND APPLICABLE PRINCIPLES

8.2.1 Jurisdiction

We find that the claim for Te Whanau o Waipareira is well founded. We consider the claim was honestly brought, not to obtain an advantage over others in competition for limited funds, but to seek to have their relationship with the Crown established on a proper Treaty basis, and to ensure that structural arrangements and policy directions can adequately achieve appropriate outcomes for their community.

There was no dispute that the policies and practices of the DSW as applied to Te Whanau o Waipareira, are policies and practices of the Crown. The central issue in

terms of our jurisdiction, was whether those policies and practices are inconsistent with the principles of the Treaty of Waitangi and prejudicial to the Waipareira claimants.

8.2.2 Applicable principles

As we outlined in chapter 1, the key Treaty principles in this claim are the principles of rangatiratanga and protection, and the partnership which arises from the Maori gift of the right of governance in exchange for the Crown's promise to protect Maori rangatiratanga.

8.2.3 Rangatiratanga principle

Rangatiratanga, as we explained in chapter 1, is not just Maori authority or control, as the Crown suggested. In Maori culture, it is the reciprocal relationship of trust between leaders and members of a Maori community, kin-based or non-kin based. It is the role of rangatira to protect and promote the interests of the community itself and all its members. A rangatira has a duty to protect, nurture and augment the human resource by maintaining a safe spiritual, social, and economic environment, one that maximises the benefits to and the contribution from all members, with the aim of enhancing the autonomy of the community, and their ability to determine their future direction and manage their affairs according to their own priorities. A rangatira secures the support and political allegiance of the people, the community from whom he or she gains the authority to articulate their will and advocate their interests.

Rangatiratanga is a dynamic relationship; popular support, freely given, can equally freely be withheld or transferred in order to better secure the interests of individual members or the community. However, the need to maintain the unity and integrity of Maori communities was a powerful social control. 'He totara wahi rua, he kai na te toki' – 'A split totara is vulnerable to the axe.' Individuals have their personal responsibilities to the community, including its past and future generations.

The political success of a rangatira may wax and wane, ebb and flow; yet rangatiratanga itself endures as a fundamental value in Maori culture, and the key customary principle in Maori social, political, and economic organisation. Kinship and descent provide ready-made networks of relationships among Maori, but it is rangatiratanga that determines which of those relationships have current significance.

It follows, therefore, that rangatiratanga is how a Maori community identifies itself – the acknowledgement and fulfilment of the reciprocal duties and obligations between members and leaders reflects the extent to which the people perceive themselves to be in a community. Usually rangatiratanga is manifest amongst members of a hapu, sometimes amongst a wider group of kin united under a paramount leader, and, in modern times especially, sometimes amongst a community of people who are not all connected by kinship. Conversely,

rangatiratanga also allows others to identify a Maori community, and, in the context of this claim, we have found that any community in which rangatiratanga is evident deserves special recognition in terms of the Treaty of Waitangi.

In chapter 1, we reiterated earlier findings of the Tribunal and the courts that Maori autonomy and authority can apply in a range of situations in the modern world, not merely, as the Crown contended in this case, in the management of lands, forests, fisheries and other properties. In article 3, the Crown imparted to the natives of New Zealand all the rights and privileges of British subjects. The Maori text and the oral promises made at the signing of the Treaty make clear that what was guaranteed is the right to speak their own language and live according to their own custom, for example, and is not the imposition of English language and the rule of English law. The Maori text says: ‘ka tukua ki a ratou nga tikanga katoa rite tahi ki ana mea ki nga tangata o Ingarani’ – ‘[The Queen of England] allows or grants to them [that is, to all Maori people] all customary values and practices, just like theirs [are allowed] to the people of England.’

This principle has some counterpart in current human rights standards that groups should be empowered, within reasonable or necessary State constraints, to be responsible for themselves, for the sake of their own dignity and to harness their capacity, so that their potential might be realised. It is a principle of common courtesy to respect others in that way, and common sense that cultural groups and communities know better than anyone else what they need or would aspire to, and how to achieve their own goals. The Treaty merely underlines the obligation to so provide for the indigenous people.

It was emphasised in this claim that Waipareira acknowledged the mana whenua claims of Ngati Whatua nui tonu and Tainui nui tonu; that Waipareira’s claim was at a different level, and that Waipareira placed particular importance on participation in social service delivery because they had no natural resources of their own to develop. The point is that the Crown’s duty is to protect rangatiratanga wherever it is manifest. In this case it does not extend to the natural resources or esoteric lore of the tangata whenua. The Crown guarantee, in the context of this claim, is to protect the Maori customary principle of social, political and economic organisation, or the right of any or all Maori to identify with the communities and support the leaders of their choice, in accordance with Maori custom; and an undertaking that its dealings with the Crown will, as far as is reasonable and practicable, enhance the autonomy of any such community and the authority of its leaders. A question the Tribunal had to consider was how the Crown might properly have given effect to its guarantee.

8.2.4 Protection principle

Another important question is whether the policies and practices at issue in this claim enhance the solidarity and integrity of Maori communities and empower the people, or whether they divide and rule them. In chapter 1, we reiterated that the Queen’s protection applies in a general way to all Maori people; in particular, we found that

article 3 assured Maori of recognition and protection as a people, in addition to rights of equal citizenship.

In this case the DSW, acting on advice from certain Maori, assumed responsibility for deciding that Maori who were organised into non-tribal communities would not be given special consideration. Furthermore, the CFA, by directly funding the trust's affiliates, hindered their banding together under the umbrella of the trust. This undermined the rangatiratanga of Maori living in West Auckland, their right to organise themselves as they preferred, and denied the Treaty's protection to some.

By contrast, the Maori expectation, based on their customs of rangatiratanga and the guarantees of the Treaty, was that the Queen would ensure that Maori as a people benefited from her kawanatanga and the European settlement and development that followed, just as the Queen had benefited from the Maori gift of the right to govern.

8.2.5 Partnership principle

This goes to the heart of the partnership implicit in the Treaty. In chapter 1, we found that the exchange of the Maori gift of kawanatanga for the Crown's guarantee of protection established the basis of an ongoing partnership between Maori and the Crown.

In the case of Waipareira, a partnership was not acknowledged by the Crown. The argument the Crown presented to us is that the principle of partnership as found by the Court of Appeal in 1987, and which was presented as underlying devolution policies, describes a partnership between the Crown and 'traditional iwi'. As a matter of law the argument is unsustainable on two grounds. As to the first we can find nothing in the decision of the Court of Appeal to determine that the partnership was with traditional iwi. On the contrary, the court speaks of a partnership between the Crown and Maori. That includes traditional iwi, of course, and in decisions of the Court of Appeal they are naturally spoken of, but we can find no judicial leaning to exclusivity.

The second ground has also been previously mentioned in chapter 1. The principle of partnership is not for the purpose of requiring particular contracts, though it is relevant to contract formation, but it defines the relationship between Maori and the Crown in all areas of endeavour. This relationship recognises their separate status, but with enduring obligations to each other, and it defines appropriate conduct in their dealings, to act towards each other with the utmost good faith for example.

The restrictive argument comes not from judicial opinion but the application of a narrow interpretation to a broad legal principle that should not be so constrained.

(1) Partnership through devolution

We must look to the origins and underlying purpose of a thing to divine its true intent and this applies not only to partnership but to empowerment by devolution generally. What is the principle behind devolution to Maori but that Maori communities should be empowered to take control of their own affairs? What is the customary Maori principle but survival of the group, and therefore that community autonomy is to be

maintained, ensuring the location of power at the basic level of the functioning community?

As the evidence in this case has amply shown, Te Whanau o Waipareira became the effective force that it is today partly because the policies of devolution, and the funding Waipareira subsequently received, enhanced the rangatiratanga that, since the 1950s, had been drawing Maori people in West Auckland together into a community. It enhanced the capacity of the trustees to meet the welfare needs of their community, and it broadened and strengthened the base of their support.

The restrictive approach, limiting devolution to tribes, came later, in policy documents of the Government already referred to. This was on the basis that there was a partnership between the Crown and not Maori, but exclusively tribes, and many Maori subscribed to it.

In this case we consider, for reasons given in chapter 1 and elaborated here, that the devolution policy is consistent with the principles of the Treaty but that the restriction of devolution to tribal authorities is not. The problem is not the policy of devolution as such, but the introduction of prescriptive rules that do not take account of all sections of the Maori community. This restrictive view impacted on Te Whanau o Waipareira probably more than anything else, and created a serious dilemma for the DSW, so we examine it in more detail.

(2) Partnership with communities

What then is the basis for restricting devolution to tribes? It appears to us that one is the Treaty partnership argument but, as we have found, that is flawed. The other relies on the importance of maintaining tribes as representing the customary units of Maori society.

Apart from one argument about the maintenance of kinship links, to which we shall later refer, this claim does not touch on the customary status of tribes in our view, save to the extent that the inclusion of urban groups in the distribution of limited resources may be seen to reduce that available for tribes. Special consideration of non-tribal groups does not diminish the right of tribes to special consideration as well.

The principle behind the process of empowerment by devolution to Maori is that Maori communities should be assisted to take control of their own affairs. To do that we must look to the communities as they are and not as they were or as we would have them be. Indeed to insist that Maori communities should all be of one kind is itself disempowering of those Maori communities that are not.

This is not to denigrate the tribes, or the tribal runanga or other authorities established to represent the tribes in a district and to manage their material and cultural resources. Tribal communities clearly exercise rangatiratanga, which must be actively protected. Kinship is a key criterion by which tribal members may gain access to their own traditional natural resources, tribal history, oral literature and traditions, tribal dialect, and other taonga which are only accessible through this channel, and only by the appropriate people. These are incentives which give kin-based groups a natural advantage over other types of organisation claiming the allegiance and

support of individual Maori. But it does not follow from this that genealogy is the only principle of Maori social and political organisation.⁴ Devolution is not about empowering a particular type of structure no matter how important it may be. It is really about empowering communities to achieve their aspirations having regard to their own perceptions. Our concern is that, in the absence of effective trusteeship exercised by the hapu, tribal prescriptiveness does not reach out to all Maori, and all Maori are entitled to the Treaty's benefit and on terms that are equal for all. An inclusive, not an exclusive approach is thus required in defining Maori communities if Maori communities are to be empowered under devolution principles.

(3) Custom accommodates various communities

We observe that this approach may be seen as consistent with custom. It is clear that far from being static, Maori communities have changed over time. No doubt they will continue to do so. They have changed throughout history with hapu growing, disappearing and emerging, their political alliances reshaping continuously, and sometimes with major migrations occurring, the migrants regularly gathering adherents from communities far and wide. It is thus apparent that, in 1840, Maori were not organised into the same communities as they were only 20 years before. There were major and pan-tribal movements in the interim, as the migrations to Wellington in the 1820s and 1830s well show. And those that exist today did not all exist in 1840. The concept of iwi authorities has grown, exercising corporate functions previously unheard of, and so too national bodies, each valid if they serve the needs of Maori in a new age. In addition new urban communities have grown as well, and these for many may now represent the communities of their choice.

The Treaty no more invalidates those things that happened after it than it did those things that happened before. It did not freeze Maori in time. It accommodates change for it is the customary values and the principles that remain the same. The fundamental principle of customary organisation is the survival of the community, requiring that its autonomy is to be protected, and ensuring the location of power and decision-making at the basic level of the functioning community. Here again to do that we must look to what constitutes the functioning community and not to some broader politic.

We thus caution against reinterpreting custom to bolster what is really a current Government policy desire. We can find no fundamental tenet of custom law that says that Maori can be serviced only through tribes. On the contrary, there is evidence that Maori were creative in adopting a range of institutions to meet their needs that were not based on kinship, but were Maori none the less.⁵ This creativity was consistent with a freedom of choice, and there is historical evidence that Maori valued their

4. Maori have consistently denied that identity is based solely on degree of 'blood'. For instance, in 1974 the definition of a Maori in the Maori Affairs Act 1953 was changed in response to Maori opinion. The old requirement was at least half Maori ancestry; that was broadened to any Maori ancestry, allowing ethnic and cultural identity to become the most important consideration.

5. For instance, there were non-tribal villages established at Parihaka to protest the confiscation of land in Taranaki and elsewhere in the 1870s and 1880s; and the church-based community at Ratana Pa established in the 1920s.

freedom. We have noted that rangatiratanga arises from the reciprocal relationship between members and leaders of a Maori community. The support and loyalty of the community is a vital ingredient of rangatiratanga, and that flows from the exercise of choice by individuals. Rangatiratanga cannot be imposed on the people – the people choose their own rangatira and create their own communities. This aspect of their rangatiratanga, by which Maori control their own group formation and representation, is also guaranteed protection by the Crown in terms of the Treaty.

(4) Maintaining kinship ties and other Maori values

However, there is one customary consideration that deserves attention and that is the very proper desire of many Maori to maintain the strength of their kinship ties, and to capitalise on kin networks to improve their social performance. We would not devalue that concern but see it as a separate issue. The question here is not whether kinship links should be maintained but how best to do it. Waipareira argued that for Maori individuals who are removed from traditional kin-based support networks, it was most important to bring them into a Maori cultural environment. There the community could best meet their immediate physical, emotional, and social needs, and teach them the rudiments of Maori cultural practices; in the process, inculcating in them basic Maori values, a sense of their obligations and rights as members of a Maori community. If and when appropriate, Waipareira tried to meet the individual's need for knowledge of and contact with kin and traditional culture by re-establishing contact between the individual and his or her tribal group(s).

On the facts presented in this claim it appears to us that Te Whanau o Waipareira is well equipped to do that, and that it indeed does so. It is they who operate in the urban areas where Maori most estranged from kinship ties are found. It is they who are best located to bring in 'te pani me te rawakore' and re-establish their connections to their kin.

In this regard, we heard that Waipareira's roopu kaumatua was set up initially to help young people trace their whakapapa back to their tribes. Equally relevant was the evidence of Pita Sharples that he knew of tribal spokespeople and kaikaranga who began to learn their skills through Waipareira and practice them on Hoani Waititi marae before returning to their tribal areas.

It is unfortunate then that only one way was put up for achieving a common goal when all help is needed, and a diversity of strategies is required. It is more unfortunate still that a focus on defining communities in terms of descent tends to set Waipareira up as a competitor with the tribes when it is not and when the two types of Maori community could collaborate in achieving a common objective. The recognition of Waipareira has been seen as being incompatible with Maori values, when in fact Waipareira serves to maintain them in a modern context.

There are then other Maori values to be brought into account. Respect for other Maori communities is one, a respect still played out in marae proceedings. A sense of inclusiveness is another, not an exclusive regime that provides for some but denies opportunities for others or which is unconcerned for different sections of the Maori people. It is the sense of generosity and concern for all the people that has been the

hallmark of the modern rangatira and which characterises our current rangatiratanga. We do not believe that prescriptive practice is a genuine reflection of Maori custom.

(5) Restriction to tribes a step backwards

The current policy of devolution only to tribes is especially unfortunate in view of the history between the peoples and the recent steps to redress the consequential imbalance. Maori have long suffered from official control in the management of their affairs, even of their land and their children. It robbed them of their dignity and sapped them of their once renowned initiative and energy. The record in that respect is abundantly clear.

Change came only late, from about 1978, but not too late for a resurgence to occur. Under the Tu Tangata philosophy of community empowerment, the transfer of decision-making through Kokiri units backed with resources, and a range of community based programmes under Maatua Whangai, Mana Enterprises and Maori Access schemes, a renaissance was evidenced in the unleashing of a creative energy that Maori had not witnessed for many years.

This new and dynamic power was especially evident in the operations of Te Whanau o Waipareira. Given the tools they were more than equal to the job. Their vigour and their vision had the potential to resolve Maori social problems in the district, and it appears as though nothing could have stopped them save a reversion to prescriptive controls by the Government.

Unintentionally or not, the elements of reversion are now emerging. Much progress was made by the Government in promoting the standing of the Maori people in the life of the nation, but now urban Maori are threatened with a step backwards.

(6) The source of the dilemma

The Director-General of Social Welfare freely acknowledged that the advice the department received from Maori, to restrict recognition under section 396 to kin-based tribal groups only, created a dilemma. On the one hand, the department's interpretation of the rangatiratanga principle bound it to act on advice from Maori in such matters; on the other hand, that advice created practical difficulties placing children in appropriate care. The department felt unable to resolve the dilemma on its own initiative, so it soldiered on, alert to any change of opinion among Maori.

In fact it was receiving contrary opinions, from Waipareira for one. But its earlier advice was that Waipareira's opinion did not carry much weight, because Waipareira was not an iwi.

Once the DSW moved away from the stance that 'all Maori' were entitled to special consideration, it found itself, a Government department, in the position of defining an iwi and selecting its Treaty partners. This was contrary to the rangatiratanga principle that Maori should decide how they want to organise themselves. Its departure from the Treaty's guidance also created a circular argument that trapped the department in its dilemma over how best to place children needing care and

protection. Having sought and received Maori opinion, the DSW found itself unable to give Waipareira the recognition which common sense indicated was appropriate.

8.2.6 The trust as a Treaty partner

In order to escape the consequences of the DSW's circular argument, the claimants sought a finding that they were a Treaty partner of the Crown. In our view, this reflects a misconception of the Treaty as explained in chapter 1. The Treaty was effected for and on behalf of all Maori. It was on behalf of all Maori that the right of governance was given, and it was for the benefit of all Maori that the Crown's solemn undertakings were made. If contracts are made in partnership mode, then that would be consistent with the Treaty. However, it would not be consistent with the Treaty if the effect is to exclude significant Maori communities, like Te Whanau o Waipareira, who exercise a rangatiratanga in fact. In light of the determination above no such conclusion is required, and in view of the earlier discussion, nor is such a finding desirable when the principles of partnership apply to all Maori and are for the purpose of prescribing appropriate conduct between Maori and the Crown.

8.2.7 Treaty principles not upheld

We come now to answer the question of whether the policies and practices of the DSW and the CFA are inconsistent with the principles of the Treaty and prejudicial to the Waipareira claimants. Taking a broad view of the relevant policies and practices, it is obvious to us that important principles of the Treaty were not maintained in this instance. The essence of our finding is that the relationship between the Crown and Waipareira was not properly defined. The CFA dealt with the trust as though it were nothing more than a Maori service provider; it did not deal with Te Whanau o Waipareira as a Maori community (through the trust as its representative body). The recognition given to Maori in the Treaty was not matched in performance in this case. In chapter 3, we made a finding that Te Whanau o Waipareira is clearly a community that exercises rangatiratanga in welfare matters, and is entitled to expect recognition as such by the Crown. The CFA acknowledged that Waipareira was a Maori group, but on the other hand said its rights were no more than those of any group of citizens. The effect of this was to deny Waipareira special recognition and protection. In the result, the principles of rangatiratanga, protection, and partnership were not maintained in respect of an important group which exercised a rangatiratanga in fact, and which was entitled to have that rangatiratanga protected through an ongoing partnership with the Crown.

We find that Te Whanau o Waipareira was prejudiced as a result. In broad terms, it is neither empowering of Maori communities nor enhancing of their rangatiratanga for others to decide what is best for them, what they need, or how those needs will be met. On the contrary, it denigrates their status and robs them of their dignity, and yet that is effectively what the policy prescribes. It is conceptually wrong that a people who are parties to a Treaty with the Crown should be limited to a role only as the

Crown's service providers, as Crown contractees or agents to do the Crown's bidding. This is most especially so when they have not only an independent status as a people, but a proven capacity to achieve goals the country wants, once freed and empowered to do so. And while it is reasonable for the Government to decide the quantum and to be satisfied as to the proper and effective use of public funds in the interest of both Maori and the wider public, there is no sharing of power with the people, or recognition of their status as a people, when there is no sharing of the essential decisions on the services required to improve their social performance.

8.3 BALANCING RANGATIRATANGA AND KAWANATANGA

The task is to get matters back on track. In the case of Waipareira and the Crown, that means striking a proper balance between the Crown's guarantees to protect Maori rangatiratanga, including Waipareira's, and the CFA's needs to exercise quality kawanatanga, not just for Waipareira but for all Maori and in the public interest. As we noted in chapter 1, in the partnership envisaged by the Treaty, the rights of each party are constrained by their duties to each other.

Striking a proper balance, we would suggest, means more than simply trading off clauses in the negotiation of a business contract. The Treaty is more like a marriage contract, in which broad and general vows express the desire and the intention of the parties to live together in mutual love and respect. The success of a marriage depends not on the ability of the parties to formulate or interpret vows advantageously to themselves, nor on their ability to enforce them in the case of dispute. Rather, it depends on their commitment to work through problems in a spirit of goodwill, trust, and generosity, actively seeking creative solutions, and taking opportunities to bolster each other. We observe that the very notion of the Treaty of Waitangi arose from Queen Victoria's 'mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani', 'Her Royal Favour' with which Queen Victoria regarded the 'Native Chiefs and Tribes of New Zealand'; and that 'atawhai', the showing of kindness and fostering of people regarded as belonging to one's community, is an expression of rangatiratanga. These are the personal and corporate attitudes that need to be brought to the resolution of this grievance by each and every agent and representative of the Crown, and by their Maori partners.

Under the circumstances revealed by the evidence, the Crown's response was inadequate. In making this observation, we do not intend to denigrate the clear commitment that exists within the present DSW to rangatiratanga – the empowering of Maori to have control of their own destiny – and to the principles of its 'key document' *Puao-te-Ata-tu*. In particular, we do not wish to demean the dedication and hard work of the agency's staff and management. On the contrary, we see all of these as critical elements of the solution.

The task of the Government is to provide a policy and operational context in which both parties can live side by side. Pursuing the analogy of a domestic relationship, this could be compared to building a family home. The trust's dislike of the decor is only

indicative of the real problem, which is that their needs have not been adequately considered in the design of the whole house. Maori custom and lifestyle have produced one architectural tradition – large, flexible, living spaces, open planning, rich symbolism – which does not fit well into the ordered, specialised, functional, and private spaces of the European style. Is there one design that can, with some compromise on both sides, accommodate both partners’ cultural preferences, while maintaining the structural integrity of the whole which is necessary for their security and protection?

Let us return to the recommendations of the Rangihau committee.

There are three main themes of its report, outlined at section 5.5, namely: that the department should become more bicultural in its approach; that it should strengthen Maori community networks through greater consultation and devolution of power and resources to Maori; and that it should lead the coordination of policy and programmes amongst Government departments to improve delivery of services to Maori.

Of those three themes, the first has been returned to the agenda by the current director-general after an absence of some years, during which time the department itself was restructured; the completion of this is seen by the Crown as fulfilling the department’s Treaty obligations to Maori.

We have already concluded in chapter 5 that biculturalism is a means to an end and not an end in itself – the goal is a partnership with Maori, a relationship that enhances the rangatiratanga of Maori and the kawanatanga of the Crown, and that is characterised by mutual respect and trust and the utmost good faith. Biculturalism is commendable, and it may be a necessary step for Crown agencies to try to see things from their partners’ perspectives, but biculturalism must lead to interaction with Maori and not simply to better-informed unilateral action by the Crown. Biculturalism is no substitute for a Treaty-based relationship.

Puao-te-Ata-tu’s strategy for strengthening Maori networks has two prongs – consultation with Maori and devolution of power and resources.

8.3.1 The DSW’s consultation with Maori

The department took a change of approach to consultation with Maori community groups. This was reflected in the abolition (prior to the advent of the CFA) of the district executive committees, which were established for a short time as a result of *Puao-te-Ata-tu*, and their substitution in effect by consultation procedures driven by the Social Policy Agency in Wellington; and also in the adoption by the CFA of a service development philosophy which strictly limited community input to key policy-making and decision-making.

(1) Poor communication

We have already referred to the importance of the Crown consulting organisations that articulate the views of Maori communities. The Tribunal sees consultation on welfare matters as primarily the department’s responsibility because of its extensive

presence ‘on the ground’ in the welfare arena. We believe this aspect of its work has been impeded by the way the CFA has applied its policy of devolution to outreach workers. Quite apart from the Crown’s special relationship with Maori, the agency emphasised that its role as a partial funder of services which are provided by, and are therefore also subsidised by, the not-for-profit sector arose out of a historic partnership between the State and the voluntary sector. We do not consider it to be conducive to that partnership to require all communication to pass through the lowest levels of the respective organisations. However smoothly the relationship is running, there are occasions when summit meetings are called for, if only to cement close ties. Although we understood the reasons for introducing a change of policy, the Tribunal had grave doubts about the wisdom of devolution of a kind that so isolated senior management from community feedback.

Among Government agencies, the CFA is in the best position to gather information about community viewpoints and translate them into ‘quality kawanatanga’. Consultation across cultural boundaries involves each party understanding the other’s cultural imperatives and priorities – hence the importance of a bicultural approach. It is doubly important in this case, since many Maori Affairs staff who worked in the community were lost from the Government service in the restructuring of that department. Te Puni Kokiri as a policy ministry is not capable of fulfilling the community liaison role that *Puao-te-Ata-tu* envisaged for the Department of Maori Affairs.

(2) *Lack of responsiveness*

Consultation involves not just listening, but also responding; and in Treaty partnership mode, responding so as to accommodate the other’s cultural values. Again, this has been impeded by the introduction of a service development approach to funding social services, which provides so little scope for community input. The CFA decides what needs are required to be met, what service is required to meet those needs, and who can best provide it; it also determines which factors will be weighed in the balance to assess competing claims from communities. It defended its decisions on the basis essentially that its process was bicultural, and its policy took into account criteria which ensured Maori received equitable treatment. We consider that this policy offered insufficient scope for community input. As we said earlier, not even informed unilateral action is any substitute for proper interaction between Treaty partners. The earlier style of community development represented a better balance of kawanatanga with rangatiratanga. We consider below whether the current statutory and policy framework disqualified the agency from taking this approach, as the agency claimed.

Responding to Waipareira may be relatively simple. First and most importantly the agency can recognise the rangatiratanga of Waipareira, by entering into open-ended discussion about what can be done to improve their relationship, and perhaps developing a joint strategy. For a start, the CFA could incorporate into its services planning some of the factors pointed out by the trust. As it stated at the hearings, the

agency does not claim to have got it all right, and is prepared to amend its criteria in the light of new information – an approach we strongly endorse.

8.3.2 Recognition of Maori in West Auckland

(1) Recognition of Waipareira

It will be recalled that a finding was sought that Te Whanau o Waipareira is representative of the West Auckland Maori community. We have found that this claim casts the net too wide, for there may be other Maori groups in West Auckland that operate independently. In any event, it is our view that Maori communities are not necessarily defined by land boundaries, rohe, or concepts of mana whenua, though the current trend is to do that. We find, however, that Te Whanau o Waipareira is representative of a significant Maori community based predominantly in West Auckland and that it makes itself fully accountable to West Auckland Maori.

Can the Tribunal accept, then, Waipareira's objection to the CFA's policy (now superseded) of funding a range of services, and its claim that, at the very least, it ought to be consulted about policies underlying the funding of other service providers in West Auckland? The answer is yes we can, and we do.

It was not explained why, in 1993–94, one of the Government's objectives was that the CFA should fund a range of appropriate service providers and services. Possibly, making explicit the contestability of funding was seen as an efficient mechanism to minimise the cost of any given service by creating commercial competition.

Whether or not the intent was to divide and rule, that is how it was perceived and that also could be its effect. From Waipareira's point of view, the affiliate structure of the trust was established to enable the diverse community, under the umbrella of the trust, to get the best value from the funding dollar by integrating and coordinating the services provided in West Auckland. Direct funding of service providers other than the trust, including trust affiliates, was seen to undermine the community's ability to organise its own affairs through the operation of the trust – in other words, Waipareira's rangatiratanga was undermined by a policy of funding a range of providers.

We find that it would be inconsistent with the principles of the Treaty to so deploy funding as to threaten the rangatiratanga of Te Whanau o Waipareira by compromising its unity. This is not to say there should be no funding of other bodies on some proper ground, but that care must be taken to ensure that the funding does not create unnecessary competition, does not fragment effort, does not compromise bodies with a proven track record, and does not threaten the unity necessary for the rangatiratanga of Waipareira, as evidenced in its comprehensive arrangement for accountability to the community. Accordingly, if the standard of conduct between Maori and the Crown, as required under the principle of partnership, is to be maintained, it appears that the agency should consult with Waipareira on services planning in the district.

(2) Recognition of tangata whenua

However, because of the dynamic interplay of rangatiratanga, several Maori communities may coexist in one area, and each is entitled to similar consideration. So, for example, Ngati Whatua as tangata whenua in West Auckland should also be consulted on services planning and funding priorities.

In Maori terms, the emergence of a powerful community within the mana whenua of another can easily create tensions, and it is to the credit of both Ngati Whatua and Waipareira that a delicate relationship remains good. We consider the qualities of rangatiratanga to be amply demonstrated by both Ngati Whatua, in particular in the submission of Mr Parore which we quoted at section 1.2.1(2), and by Te Whanau o Waipareira, in particular its recognition of the tangata whenua. We are concerned that this good relationship should be protected and maintained.

It is clear to the Tribunal that neither Ngati Whatua nor Waipareira is motivated by desire to deny the other's just rights and entitlements – rather, each is concerned to maintain opportunities to fulfil obligations to the other. Thus, Waipareira was concerned that direct funding of Te Roopu Mataihi denied it the chance to demonstrate its support for Ngati Whatua in south Kaipara – and we see Mr Parore's reservations about direct funding of Waipareira in the same way. We note that Ngati Whatua is represented as of right on the Waipareira trust board. We are confident that this good relationship can continue – provided mutual recognition of, and respect for, rangatiratanga remains its basis, and not a market model driven by competitive self-interest. We are also confident that tikanga Maori provides a better basis for two such groups to debate and resolve issues of concern than litigation over a Government policy.

We consider, furthermore, that the representation finding sought by Waipareira was not the basis of a claim for an exclusive territorial domain, but arose from concerns that the claimants' efforts were being fragmented by the funding of others. Therefore, we reiterate our finding in chapter 3 that Waipareira exercises rangatiratanga in matters of welfare, and it should be consulted by the Crown when its interests are affected.

(3) Recognition of all Maori providers

We are suggesting here that each Maori group in a district should be consulted about how delivery of and funding for social services might best promote the development of Maori communities in the district. What is crying out throughout this claim is the lack of a consultative forum, equivalent to the now-abolished district executive committees of the DSW. On committees such as these, all the Maori groups of the district could come together, acknowledge the rangatiratanga of each other in accordance with Maori custom and, on this basis, seek a consensus on how best to apply whatever funding is available for welfare services, so as to maximise their rangatiratanga. Here the Treaty partnership comes into play - Maori and the Crown debate with each other how best to balance the requirements of rangatiratanga with those of kawanatanga. By providing an opportunity for Maori communities to reach

consensus, which enhances their rangatiratanga, the Crown enhances the quality of its kawanatanga, and the Treaty partnership is greatly strengthened.

Since the district executive committees were disbanded, the community workers of Maori Affairs have disappeared from Government, and the kind of liaison with Maori communities envisaged in the devolution policy has all but been lost in the current drive towards mainstreaming.

We welcome the director-general's statement that she expected managers of the department to pro-actively create forums for consultation with Maori. We consider that this complements our conclusions below on the need for better interdepartmental coordination and collaboration. Other Crown agencies could attend the consultative forums, provided they did not overwhelm the Maori voices; otherwise, input from the community would certainly put the CFA and the DSW in the best possible position to take the lead amongst Government agencies, as envisaged by *Puao-te-Ata-tu*.

8.3.3 Identifying Maori as parties to the Treaty

Puao-te-Ata-tu also recommended strengthening Maori networks through devolution of power and resources. It appears to the Tribunal that devolution has been characterised by a preoccupation on the part of the Crown with the particular type of networks which Maori might decide to strengthen, in particular, an unnecessary focus on defining and prescribing the characteristics of an 'iwi'.

The evidence is clear that Te Whanau o Waipareira results from endeavours over many years to draw together and coordinate under one umbrella a host of Maori organisations in West Auckland. We also accept that Te Whanau o Waipareira has gained wide respect and recognition, from many years of work and some outstanding initiatives and success. This was an achievement in itself, but also emphasises the wide representativity that Te Whanau o Waipareira enjoys and the close contact the trust has with the community in delivering services.

The result, however, is a coupling of ironies. At a time when the Government is beset with problems over who represents tribes, for the purpose of settling claims, Waipareira is one of the few districts where representation for a very large community has been resolved, but its status for the purposes of Treaty obligations is unrecognised. And while the Government has difficulties in determining an appropriate Maori face to deal with for negotiations, here the roles are reversed. Waipareira has settled coordination problems but is prejudiced by a lack of coordination amongst the many Crown agencies. The Crown has many faces, but Waipareira cannot find a single Crown face to deal comprehensively with its concerns.

(1) *The department's approach*

The director-general clearly expressed her vision that devolution would promote the rangatiratanga of iwi whose social services were recognised in terms of section 396 of the Children, Young Persons, and Their Families Act 1989. In the present case, the

DSW and the CFA placed a limited interpretation on the term 'iwi' in section 396 by what we believe is circular reasoning.

We are not critical of the department in coming to the view that the Government policy of devolution to Maori should be restricted, so that some Maori communities should benefit but not others, to the extent that this restrictive approach was supported by both Maori opinion and advice from Te Puni Kokiri, to both of which the department had to be sensitive. In brief it was considered that in the predominant Maori view, devolution should be to tribes but not to non-tribal communities. The department relied upon its assessment of Maori views solicited in the process of policy development, and on the opinions of certain advisory kaumatua.

(2) An alternative approach

While Maori opinion is clearly important, the most important question is 'What does the Treaty say?' What protection does it give for non-tribal Maori communities which, while possibly a majority in terms of numbers, are a minority in terms of power? The opinion that Maori prefer to operate through tribes is not sufficient grounds to deny the rangatiratanga of others. Excluding sizeable non-tribal communities is not good kawanatanga and does not seem to accord with the human rights standards of today. We think it telling in this respect that, on the record of the Treaty debate, Maori sought that the Crown would settle disputes not only between Maori and Pakeha but between Maori themselves, having regard to the justice of the case. If there is a difference of opinion, it is not enough to inquire of the predominant Maori view but to inquire of what is right, bearing in mind the Crown's guarantees to protect rangatiratanga. Much the same must apply to the exercise of kawanatanga or governance. While governance requires a sensitivity to public opinion, good governance also requires doing that which is fair and right. It may be considered for example that the Treaty claims process for the alleviation of historical wrongs might not have got off the ground if public opinion were the sole test.

The department's concern to maintain rangatiratanga bound it to accept the views of Maori whom it consulted. However, a process of consulting Maori by seeking responses to discussion documents or draft policies from separate or scattered groups is not reliable. It does not provide proper opportunities for Maori themselves to gather together and weigh up a range of opinion, and to develop a consensus which represents the views, and enhances the rangatiratanga, of all Maori present.

The department's policy on iwi social services was developed without the benefit of such a consensus. In view of the department's dilemma, and this Tribunal's opinion, the department is entitled, indeed is obliged, in the interests of protecting rangatiratanga and enhancing kawanatanga, to refer this question back to Maori for reconsideration.

It is further to be observed that there are difficulties in determining a considered Maori view. There is no Maori parliament or other elected body truly representative of all Maori to determine Maori opinion or propose Maori policy. The nearest, perhaps, was the Hui Taumata of 1984, and that provided for non-tribal communities in the devolution scheme.

(3) Inclusive approach required

As we have explained in chapter 1, a defensive, restrictive construction of the Treaty with minimal recognition of Maori rights is quite the wrong approach for the Crown to take. Neither does it provide a stable basis for this nation's social contract. All Maori are entitled to protection. In all, we could find no proper grounds for the Crown to take a restrictive approach to devolution policies or sound reasons for differentiating between non-tribal communities and tribes as a matter of welfare policy.

Whether legally sound or not, the effects of the DSW's interpretation of 'iwi' must now be overcome in the CFA's ongoing relationship with the trust. The evidence we heard made clear that *Puao-te-Ata-tu* calls for the CFA, and the broader department, to wholeheartedly support Te Whanau o Waipareira in its efforts to deal with 'the Auckland crisis'. And, as we have found, the Treaty of Waitangi demands no less. Naturally this ought not to be done at the expense of traditional tribal groups.

The CFA said the approach that guided its earlier dealings with kin-based and other Maori groups was 'not either/or but as well as'. This needs to be taken much further than simply funding both tribal and non-tribal groups in accordance with current CFA policies and criteria. The CFA always ought to consult with and support to the fullest extent practicable a Maori group that is articulating its community's desire to look after its own, and in which members are bound by common imperative to nurture and care for others and the things that are important to their wellbeing. For its part, a group exercising such rangatiratanga is bound to respect the kawanatanga of the Crown and to assist it to achieve the appropriate balance between kawanatanga and rangatiratanga in the particular circumstances.

(4) Including Waipareira

We suggest that there is broad scope for Waipareira to carry out many of the functions of an iwi social service under its current status as a child and family support service, provided that its relationship with the DSW is healthy and constructive. The main difference in law between the two types of provider is that an iwi social service can, in appropriate cases, be awarded sole guardianship of a child, while a child and family support service can only have joint custody with either a parent or the Director-General of Social Welfare. If a better relationship could be developed, that difference may relatively quickly become less significant in the day-to-day dealings between the parties.

However, it may be that, despite proper consultation and greater devolution to Waipareira as a child and family support service, the lack of recognition as an iwi social service under section 396 continues to blight that relationship. For that reason we recommend below a legislative change, which we hope will be handled expeditiously.

So that the matter may be beyond doubt, however, we consider the status of Waipareira, in relation to the CFA on the matters covered by this claim, to be no less than that of a tribe – but hasten to add, in case another literal interpretation is given to a question of principle, that it does not follow that both should have an equal supply. That is something to be determined following proper consultation.

8.3.4 The Crown as a party to the Treaty

We come now to the third theme of *Puao-te-Ata-tu*, the coordination of Government policy and programmes in order to improve delivery to Maori. Waipareira said the disruption of Crown networks and the fragmentation of the Crown's social policy and funding precluded proper support being given for holistic services which worked for Maori. The problem was evident in Waipareira's failure to secure proper funding for its alternative school, which 'fell down the cracks' between the various Crown agencies responsible for supporting social services. The implication was that *Puao-te-Ata-tu*'s recommendation had been swamped in the wake of the restructuring of the national economy and the State sector.

(1) Fragmentation of the Crown

The effect of those economic and State sector reforms on the Crown's capacity to fulfil its Treaty obligations is not entirely clear-cut. The disruption of State sector networks appears to have prejudiced the claimants; on the other hand, it is an unfortunate side-effect of what, in the Crown's view, is a necessary exercise of *kawanatanga*. The agency sees the disruption as a regrettable but unavoidable problem which is already dissipating. *Puao-te-Ata-tu* placed prime responsibility on the DSW to coordinate Crown welfare policy and action. The department acknowledged its responsibility, and said it was doing what it could to rebuild effective networks. We consider that, if prejudice results from any failure of the department to act with the utmost good faith to overcome this problem, then the Crown would be in breach of the Treaty.

Secondly, while the agency acknowledged that 'holistic' service delivery makes good business sense, it said the 'strictures' of the State Sector Act 1988 and the Public Finance Act 1989 narrowed the focus of each separate agency, and fragmented the overall efforts of the Crown. In other words, the agency argued that it was operating within a restrictive statutory and fiscal policy framework which provided insufficient scope for it to meet Maori needs which it recognised as valid.

(2) Emphasis on kawanatanga

The reforms certainly changed the management and operational culture of the Crown. This was achieved through statutory requirements to report and account to Parliament for expenditure and policy outputs (but not policy outcomes), and through more precise specification of funding programmes. These changes, among others, had the effect of tightening Crown control over expenditure at the expense of community input, resolving the dual accountabilities of public servants to Maori and the Crown in favour of the Crown through employment contracts, and transforming the public service into the State sector. It was certainly our impression that the Public Finance Act and the State Sector Act, with their detailed and specific reporting requirements linked to performance assessment of managers, concentrated the attention of the CFA on serving the Government rather than the public and, in this case, at the expense of the Crown's Treaty obligations.

To the extent that these results were among the aims of the reforms, then they were inconsistent with the partnership principle of the Treaty. Our overall impression, based on the evidence we heard in this claim, is that in welfare and social policy, the relationship had become very one-sided.

However the Tribunal was not convinced that it was the statutes or the fiscal policy that were to blame. Rather, in this case, it was their rigid application, without a balancing of the requirements of statute with other principles, that is the real source of the Waipareira grievance. We consider that, within the statutory framework, appropriate recognition for Waipareira and steps to maintain their autonomy were practicable. What was required was a broad vision of the purpose of the statutes, and a recognition of how to apply them appropriately in a Treaty context.

8.3.5 Mutual accountabilities of Treaty partners

The purpose of the State Sector Act 1988 and the Public Finance Act 1989 is to establish a framework of authorities and accountabilities, and requirements for reporting. These enable the responsible authorities to monitor and assess output performance, and exert control, in order to discharge their responsibilities.

The Acts define the accountabilities of State employees to their Ministers, and specify how Crown agencies report, through their Ministers, to Parliament. Except for the requirement of section 56 of the State Sector Act, the Acts do not spell out the accountabilities of State employees to Maori – but those accountabilities come into play nevertheless through the partnership of the Treaty.⁶

It is fundamental to a partnership that there is some level of accountability to each other, as a prerequisite for shared control. It is self-evident, too, that if no consideration is given to a Maori community's values and aspirations in assessing the performance of Crown agencies, it cannot be said that the Crown and Maori are working together, nor that the principle of rangatiratanga is in fact being maintained.

(1) Rangatiratanga and kawanatanga not mutually exclusive

The agency's approach to social service funding policy was inadequate in that, having recognised the benefits, and even the necessity, of accommodating Maori values and aspirations, it was content to satisfy the reporting requirements of the statutes, which provide only for Crown control, and not the broader standard of the Treaty. For example, it was stated by the general manager (and the Auditor-General) that the CFA's services planning provided a robust framework for accountability which was consistent with other reporting requirements under the Public Finance Act. The clear impression was given that community development did not provide such a framework because, in any requirement to respond to community priorities, there was a loss of State control.

6. Since this claim was heard, there has been included in the performance contracts of chief executive officers a 'key result area' relating to their organisations' performance with regard to Maori. This may be, or could become, one way by which the Crown's Treaty obligations are given life through the State Sector Act 1988.

In our view, it is glaringly apparent that, in a society based on a partnership of two peoples, the achievement of social goals requires the active support and participation of both. Inevitably, then, the tighter the control that one party exerts over social policy, the less the other is able to contribute, and the less likely the goals are to be reached. It appears to us that Crown agencies cannot exclude the values and aspirations of communities unless they are totally incompatible with Crown goals. Nothing was said to that effect about the trust's aspirations.

(2) Kawanatanga exercised restrictively

In this case, conflict arose because the agency was required by the Acts to report only on the achievement of its policy outputs, which the trust had no hand in formulating, and not on the achievement of policy outcomes which both parties appeared to be agreed on. The policy framework enabled the Crown to take full control, and disenfranchised the Waipareira community.

We find this to be a valid and serious criticism of the way the Public Finance Act and the State Sector Act were applied. In a political and economic culture founded on the values of transparency and accountability, the lack of performance assessment against social outcomes renders hollow all the mechanics of measurement and reporting associated with output contracting. If the purpose of the Acts is to provide a framework for assessing the value of public expenditure, then the standards must be meaningful and substantial.

(3) Need to focus on outcomes

The Tribunal believes that work is urgently required to develop methodologies for social impact assessment of welfare policies, and that these must be applied to assess the performance of welfare funders and providers in the achievement of social goals. Such an assessment should also identify any problems caused by a lack of coordination between Government departments, especially in the aftermath of the Public Finance Act and the restructuring of the State sector. The department and the agency acknowledged at the hearings that they have an important coordinating role to improve social service planning. They must ensure that Maori are not prejudiced by the lack of coordination.

Perhaps most importantly, public reporting of information from such assessments would provide a basis for monitoring of Crown actions by Maori that would better reflect the cooperative, interactive nature of Treaty partnership.

(4) Range of strategies needed

The Crown argued that it is accountable to Maori through parliamentary processes, and that is sufficient; that it is not accountable to individual communities for the Government's appropriation of welfare funding or its allocation between communities, because these are article 1 functions of Government. The Tribunal considers that this assumes that Maori communities have no rights other than citizenship rights – and denies that the Treaty partnership established some level of Crown accountability to Maori communities.

It was made quite clear that Te Whanau o Waipareira Trust wanted significantly more freedom to follow its own pathway towards mutually acceptable social goals, because it believed it was a far more effective route for its people than the one mapped out by the CFA. The relaxation of Government control to allow them to do that, in other words a recognition of rangatiratanga and a balancing with the demands of kawanatanga, is the key to a successful policy framework.

The claimants themselves welcomed certain promised aspects of the reforms: greater transparency and consistency in decision-making; and the funder-provider split which allowed community groups to manage delivery of publicly funded services. In the words of one claimant witness, the Public Finance Act is not a straitjacket. There are various structures operating, in the health and education sectors in particular, which provide for the dual accountabilities of public servants – accountabilities to Parliament for the proper expenditure of public funds, and also to the community for the achievement of social goals.

A less prescriptive policy framework and appropriate devolution policies would have allowed the trust to design and manage programmes suitable for its community. There was no convincing evidence that appropriate recognition of Waipareira, and the creation of structures to enable their input to welfare policy and monitoring of the Crown's performance, would place other Crown responsibilities in jeopardy. The record itself is clear, that recognition was given to Waipareira in the past, in the developmental funding that was once provided. At the very least there was no proper basis to accord them a lesser standing of consideration than that which was in fact given to the tribes. In balancing governance with rangatiratanga, it is consistent with good governance that the rangatiratanga of Te Whanau o Waipareira should have been recognised as well.

(5) Immediate action possible

There is therefore action the agency could take to overcome or ameliorate some of the 'strictures' of the Public Finance Act 1989. The Act does not require reporting on the outcomes of social policy, but neither does it preclude it; and the Tribunal notes with approval the agency's intention to develop appropriate measures. Similarly, while the narrow specification of NDOCs does not encourage coordination and collaboration between Government agencies to tackle broader social issues or to deliver integrated services or funding to Maori, neither does it prohibit it, and there appears to be no reason in principle why the inter-departmental approach taken towards a crime prevention strategy could not be applied to social policy. In view of the recommendations of *Puao-te-Ata-tu* in 1986, and the subsequent mainstreaming of Maori affairs and restructuring of the State sector, such action is more important and more urgent than ever.

8.3.6 Findings on funding

In the Tribunal's opinion, the trust's arguments against services planning, outlined in chapter 7, raised serious doubts about the likelihood of equitable funding resulting

from the CFA's processes. As both parties agreed, measuring equity of funding is much more complicated than comparing the amounts granted to different providers. But equally importantly, equitable funding must not only be done, it must be seen to be done. The CFA tacitly acknowledged this in its spirited defence of the rigour of its processes, and its reluctance to make one-off exceptions to its formula assessments.

However, in a relationship between Maori and the Crown that is governed by the Treaty, a comparison between Maori and non-Maori is irrelevant. In the Treaty, the Crown undertook that it would exercise its *kawanatanga* so as to protect the *rangatiratanga* of Maori. On the evidence, the funding for the trust's social services declined between 1991–92 and 1993–94. The important point, though, is that the trust was not given adequate opportunity to clarify or question the situation or to negotiate funding criteria or levels with the CFA.

In conclusion, we return to the central notion in this claim – the proper balancing of the principles of *rangatiratanga* and *kawanatanga* in the Treaty partnership. The Privy Council put the position this way in its opinion on the Maori language and broadcasting case:

This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. 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 was buoyant. Again, if as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility.⁷

Thus, the balance is to be found not by an objective test but through consultation and negotiation between the parties, conducted in a spirit of partnership with the mutual goal of enhancing the status of the other party and the quality of the relationship.

8.4 RECOMMENDATIONS

This claim is unusual in the sense that it is not about a denial of kin group property rights. Rather, it is about a denial by the Crown of a reasonable opportunity for Te Whanau o Waipareira Trust to fulfil its self-imposed cultural obligations to provide

7. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC), per Lord Woolf

welfare services for the benefit of its community. It was claimed that the inadequate fulfilment of these obligations was the outcome of a lack of recognition by the Crown, in particular the Community Funding Agency, of the rangatiratanga exercised by the trustees on behalf of their whanau of beneficiaries.

There are two fundamental requirements underlined by this case: (a) all parts of the Treaty must be seen in their functional interrelationships with each other; and (b) any doubt about the meaning of the Treaty should be construed in favour of Maori, in accordance with internationally recognised legal principles.

We have found that the non-kin-based Te Whanau o Waipareira Trust did exercise a rangatiratanga in caring for, nurturing, and fostering those who had sought help from the social services provided by the trust. It is in that context that provider and beneficiary became Te Whanau o Waipareira, a community with its cultural centre at the Hoani Waititi Marae.

Given the Crown's guarantee under the Treaty of Waitangi actively to protect the rangatiratanga of all Maori, and our finding that the trust did exercise rangatiratanga in the delivery of social services, our task has been to consider how a proper equilibrium might be reached between the exercise of rangatiratanga in the social welfare field and kawanatanga; that is, how Crown and Maori can balance the Crown's guarantee to protect rangatiratanga against its obligation to exercise quality kawanatanga for the benefit of all New Zealanders.

We consider that this equilibrium can best be found through consultation between Maori and the Crown which meets the Treaty's standards of mutual cooperation, trust, and the utmost good faith. The proper application of Treaty principles to social policy is yet to be determined. Te Whanau o Waipareira has given both Maori and the Crown this valuable opportunity to reconsider the findings of *Puao-te-Ata-tu* and social policy directions to improve their future relationship. To further advance matters, the Crown should:

- (a) develop and publish evaluations of its current social service policies and programmes, based on their outcomes for Maori;
- (b) better coordinate its many agencies, each with its own policies and practices, in their relationships with Maori groups in order to represent its views as a whole on social service issues more effectively than it does at present;
- (c) ensure that any consultation with Maori about how the allocation of resources for social services might best promote community development in any given region includes both tangata whenua and non-tangata whenua in the region, irrespective of relative need and population size.

Therefore, we make recommendations concerning Te Whanau o Waipareira in particular, and social policy for Maori more generally, as follows:

- (a) We recommend that, in developing and applying policy for the delivery or funding of social services to Maori, the Department of Social Welfare and the Community Funding Agency deal with any Maori community which has demonstrated its capacity to exercise rangatiratanga in welfare matters, so that all interaction between Crown and community should enhance the exercise of that rangatiratanga. This necessitates appropriate changes to the

policies and practices of the department and its agencies as they apply to non-kin-based communities in particular. Such consultation with Te Whanau o Waipareira would demonstrate acceptance of Waipareira's rangatiratanga and do much to ensure the effectiveness of its welfare programmes in future.

- (b) There is more than sufficient evidence from the operations of Te Whanau o Waipareira to establish the point that Maori perform best when the principles of rangatiratanga are maintained; when a community is empowered to determine its own needs and resolve its problems in its own way. The practice of the Community Funding Agency of contracting for the services that it thinks are required, and from those whom it selects, has undermined the initiative of Te Whanau o Waipareira and its affiliates. It has been wasteful of public expenditure when social service contracts have been let in West Auckland which do not accord with Te Whanau o Waipareira's values, priorities, or standards, and its capacity to meet its community's needs through its own network and dedicated workforce.

We therefore recommend that the Community Funding Agency negotiate with Te Whanau o Waipareira with a view to devolving sufficient authority and resources to enable it to undertake a coordinated and holistic approach to community development within the whanau. We so recommend on the grounds of the Treaty requirement to protect Maori in the exercise of their rangatiratanga; on the grounds that those who deliver most effectively to Maori people are Maori communities which provide integrated services and utilise Maori holistic strategies; and on the grounds that the scale of the problem of Maori underdevelopment lends urgency to the need for a distinctive strategy to deal with it. For its part, the agency is entitled to assurance that whatever resources it provides for this purpose are used responsibly to meet those goals on which Te Whanau o Waipareira and the agency are agreed.

- (c) We are especially concerned that children needing care and protection should be placed with the communities where they are most comfortable and where the best care can be provided. That may well be with kin, but not necessarily, for it is always the welfare of the child that should be paramount. Although the difference between a child and family support service and an iwi social service may not appear to be great, in practice it is, especially as it creates unnecessary and undesirable distinctions between tribal and non-tribal communities which may affect the capacity of potential service providers to meet recognised needs, and may also prejudice the proper placement of children.

Therefore we recommend that section 396 of the Children, Young Persons, and Their Families Act 1989 be amended by substituting the term 'Maori social service' for the term 'iwi social service' (with consequential amendments to other relevant provisions), and that the department alters its policy and practice accordingly.

(d) We recommend that the Government, in its policies, practices, and protocols, should aim to apply the principles of the Treaty of Waitangi to protect the rangatiratanga of all Maori in contemporary situations, kin-based or non-kin-based, where the facts of any particular case reveal the exercise of rangatiratanga. The Waipareira claim has shown that Crown policy guidelines for non-kin-based groups are yet to be formulated. For the present, therefore, only free and open consultation between Maori and the Crown will minimise the risk of misconceptions about tikanga Maori, Crown policy, and the effects of each on the other.

(e) We recommend that social and welfare services to Maori communities stand as a separate output class designed to promote community development.

(i) In this context, we further recommend that the Crown should create appropriate opportunities, at either a national or a regional level depending on the circumstances, for all Maori, tangata whenua and non-tangata whenua, whose rangatiratanga is likely to be affected by policies on funding or delivery of social services to come together in a hui with the Crown to debate such policies. This would give each Maori community an opportunity to contribute to a consensus which enhances their rangatiratanga. The goal is to enhance, but not substitute for, the exercise of kawanatanga, and any failure on the part of Maori to reach a consensus does not relieve the Crown of its duty to exercise quality kawanatanga so as to protect Maori rangatiratanga.

(ii) Just as we consider that the rangatiratanga of all Maori is not enhanced by a piecemeal approach to consulting separate communities, we also consider that the quality of kawanatanga is not enhanced by a piecemeal application of the policies and practices of various Crown agencies. The current fragmented structure of the Crown dissipates the Treaty relationship and denies Maori communities proper support for holistic or integrated services such as the Trust's alternative school.

Therefore, we further recommend that the Government establish appropriate arrangements to coordinate the policies and practices of Crown agencies involved in social services; and that Crown agents consulting Maori on social service issues be able to represent the views of the Crown as a whole.

(f) We consider that the lack of public information on the effectiveness of Government policies and programmes in achieving social goals breaches the partnership principle of the Treaty in that it denies Maori communities any real opportunity to monitor the Crown's performance, and it denies the Government valuable information that would enable it to improve the quality of its kawanatanga.

We therefore recommend that Te Puni Kokiri ensure that comparable monitoring mechanisms are developed for all Government agencies concerned with the delivery of social services, and that those agencies be required to report to Parliament on the outcomes of their policies or funding for Maori communities.

