

A TREATY AGENDUM FOR LOCAL GOVERNMENT

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There is a vast literature on the Treaty of Waitangi. However, a large number of constitutional issues such as who owes Treaty obligations and the nature and extent of these obligations are not clear.¹ Instead, such issues are often obscured by the media sensationalising Treaty-settlement processes, Māori fisheries, and Pākehā political assumptions about what Māori want.² Amidst talk of fish, cash settlements and development, little Treaty jurisprudential thinking addresses the complex legal, cultural and economic issues surrounding local government and Māori. It is the purpose of this paper to expand Treaty jurisprudential thinking in the area of local government,³ and to advocate a direction for local government Treaty obligations.

I INTRODUCTION

Two centuries ago Māori were the undisputed managers and administrators of natural resources in Aotearoa. Māori self-government occurred at iwi, hapú, whánau and individual levels.⁴ Tikanga Māori evolved from the resource base itself, and dictated

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1 The Treaty is used to represent Te Tiriti o Waitangi 1840 (Māori text) and the Treaty of Waitangi 1840 (English text). The First Schedule of the Treaty of Waitangi Act 1975 contains the texts of the Treaty.

2 See "Māori call for republic debate" *Sunday Star Times*, Auckland, 2 August 1998, A2. Prime Minister Shipley contends that Māori are more interested in settling grievances than republicanism and wider constitutional issues. See also "Let fisheries assets flow, Henare urges Māoridom" *The Dominion*, Wellington, 5 August 1998, 1.

3 Local government is used to represent all types of sub-national bodies including territorial authorities and regional authorities and special provider boards. No distinction is made between Local Authority Trading Enterprises, Community Boards, Community Trusts, regional authorities and territorial authorities.

4 See A Ballara *Iwi: The Dynamics of Māori Tribal Organisation from c1769 to c1945* (Victoria University Press, Wellington, 1998) for a Pākehā analysis of Māori self-governance structures ["Iwi"]. See Waitangi Tribunal *Muriwhenua Fishing Report - Wai 22* (Department of Justice, Wellington,

governance and management. Strategic planning was determined by the foreseeable needs of future generations and the immediate needs of resource use.⁵ Representation of the collective social structures demanded responsibility and was subject to regular assessment by the collectives.

Today, Pákehá local government and central government dictate the operation of Māori self-government. Clarity in the relationship between Pákehá local government and Māori is particularly important considering that Māori development and cultural survival occurs primarily at the local levels.⁶ Central government's role in guiding this relationship is paramount given the powers it has in negotiating Treaty settlements, and dictating local government behaviour through legislation.

This paper considers local government Treaty obligations and responsibilities.⁷ Part II outlines the recent reform of local government. Part III assesses whether it is appropriate to conceptualise local government as the Crown, and whether local government has Treaty obligations independent of the Crown label. Part IV comments on recent local government initiatives with Māori in areas of planning and representation. Part V identifies the advantages and disadvantages of local government having Treaty obligations. Part VI concludes by suggesting possible improvements to the present constitutional framework.

1988) 187 ["*Muriwhenua Fishing Report*"]. According to the Waitangi Tribunal, self-government (tino rangatiratanga) was conceptually similar to the notion of local government. It is submitted that this comparison is based on an incorrect assertion, popularised in the Court of Appeal decision of *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands case*] that Māori intentionally ceded sovereignty under the Treaty. Contrast the *Manukau Report - Wai 8* (2ed, Government Printer, Wellington, 1989) 67 ["*Manukau Report*"]. Prior to the *Lands case* the Waitangi Tribunal was more liberal in describing self-government (tino rangatiratanga), comparing it to sovereignty. Pakeha local government is continually subject to control by a more authoritative body (such as the Crown/central government). Māori self-government at an iwi level was not controlled by a more authoritative temporal body. This suggests that the *Manukau Report* analysis more appropriately illustrated Māori self-governance structures. Māori self-government could be in the nature of sovereignty, hence of greater consequence than local government.

5 See P Nuttall and J Ritchie *Māori Participation in the Resource Management Act* (University of Waikato Occasional Paper No 37, Hamilton, 1995) 1.

6 See "B Mahuta" in H Melbourne *Māori Sovereignty: The Māori Perspective* (Hodder Moa Beckett, Wellington, 1995) 143-152.

7 It is considered that there are three basic Treaty-constitutional relations that need clarifying. These are relations between the Crown and Māori, relations between Māori and Māori (for example between iwi and hapú, and iwi and iwi), and relations between non-Crown bodies and Māori. This paper focuses on Crown-Māori relations, and non-Crown bodies-Māori relations.

One major theme underlies this essay. Treaty obligations follow the exercise of powers of Káwanatanga. Treaty obligations attach to the body exercising powers of Káwanatanga, and are not dependent on labels such as 'the Crown'.⁸ The recent Crown devolution of responsibilities to local government has meant that local government exercises powers of Káwanatanga. This demands Treaty responsiveness from local government. In simple terms, when local government exercises powers of Káwanatanga, it has Treaty obligations.

It is submitted that the central government monitors local government by encouraging a 'relational' approach between local government and Māori.⁹ This approach needs to focus on building better relations between local government and Māori, and requires central government to formulate legislation to enforce the Treaty in all local government operations. Further, local government consultation with Māori over environmental issues is only an interim measure in this relationship building.¹⁰ Māori are entitled, and desire, to

8 Ko te tuatahi (Article 1) of the Treaty (Māori text) states: "Ko nga Rangatira o te wakaminenga me nga Rangatira katoa hoki i uru ki taua wakaminenga ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua". This translates to mean that the Māori signatories ceded Káwanatanga to the Crown. There are different perspectives on the proper meaning of Káwanatanga. See IH Kawharu *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989). The English text of the Treaty uses 'sovereignty' to translate Káwanatanga. It is contended that this English term is an inadequate representation of what Káwanatanga entails. It is suggested that Káwanatanga was initially intended by Māori signatories to represent governance over non-Māori (in relations with non-Māori), and to facilitate relations between non-Māori and Māori. However, it has been assumed to mean governance over Māori (in relations with Māori and non-Māori) and non-Māori (in relations with Māori and non-Māori). For the purposes of this essay Káwanatanga means any governance that affects Māori, that is not exercised by Māori.

9 See generally P McHugh "Aboriginal Identity and Relations - Models of State Practice and Law in North America and Australasia" (1997). McHugh suggests that there should be a shift in state-indigenous affairs from claims-centred ideology to placing greater emphasis on the relationships between the parties.

10 See M Durie "Mana Māori Motuhake: The State of the Māori Nation" in R Miller (ed) *New Zealand Politics in Transition* (Oxford University Press, Auckland, 1997) 372-385, 383. Durie comments that even at a national level advisory positions are only interim measures to achieve Māori self-determination (self-government/tino rangatiratanga).

share power in local governance.¹¹ Guaranteed Māori participation and representation in local government affairs, and more local government support of local Māori affairs, are advocated.

II REFORM OF LOCAL GOVERNMENT

Local government in New Zealand is based on the English model of local government. Control of local government in England was historically exercised by the Crown.¹² By the nineteenth century central government policies expressed in legislation dictated its operation.¹³ These policies helped to create the first local government structures in Aotearoa.¹⁴ These local government structures in Aotearoa were transformed in the late nineteenth century, and the later structures remained in substantially the same form until the 1984-1990 reform period.¹⁵ Prior to the reform local government in Aotearoa was broadly divided into territorial authorities and special purpose authorities. By 1988, there

11 Self-government and sharing power in local government accord more with the Treaty guarantees and rights of indigenous peoples as asserted by The Draft Declaration on the Rights of Indigenous Peoples ('the Draft Declaration'). The rights in the Draft Declaration include:

Article 19: Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 20: Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

See Te Puni Kōkiri *Mana Tangata: Draft Declaration on the Rights of Indigenous Peoples: background and discussion on key issues* (Te Puni Kōkiri, Wellington, 1993) for more information on the Draft Declaration. See also ETJ Durie "The Treaty in Māori History" in W Renwick (ed) *Sovereignty and Indigenous Rights* (Victoria University Press, Wellington, 1990) 156, 158 ("*Sovereignty and Indigenous Rights*"). Durie comments that the Treaty was the harbinger of some of the rights enunciated in the Draft Declaration.

12 W Holdsworth *A History of the English Law Vol 4* (3ed, Methuen, London, 1966) 164.

13 W Holdsworth *A History of the English Law Vol 2* (3ed, Methuen, London, 1966) 405. See HWR Wade and CF Forsyth *Administrative Law* (7ed, Clarendon Press, New York, 1994) 110 ["*Administrative Law*"].

14 The Municipal Corporations Ordinance 1842 (5 Vict No 6) established provisions for boroughs in Aotearoa. It was based on the Municipal Corporations Act 1835 (UK). Other early legislation affecting the first Pakeha local governments in Aotearoa included the Public Roads and Works Ordinance 1845 (8 Vict No 6) and the Constitution Act 1846 (9 & 10 Vict c 103 UK).

15 Counties Act 1876, Municipal Corporations Act 1876 and the Town Districts Act 1881 (No 35).

were over 800 such authorities in Aotearoa. Finance was obtained through rates levied on real property, and from central government assistance.

Between 1984-1990 the Fourth Labour government initiated local government reform founded on increased autonomy and improved accountability of decision-makers to the public.¹⁶ This reform followed changes made to local government in Britain. Devolution of resources and responsibilities to territorial authorities and regional councils was driven primarily by efficiency motives.¹⁷ Reform emphasised environmental management and corporatisation of trading activities. The legislative outcomes from this reform were massive. The number of local government authorities was reduced to fewer than 90. The Local Government Act 1974 ('the LGA') was substantially amended between 1988-1989 (especially giving increased financial independence for local government),¹⁸ and a new environmental management statutory framework based on the Resource Management Act 1991 ('the RMA') emerged.¹⁹ Functions formerly performed exclusively by the Crown, and the responsibilities for those functions, were thus transferred to local government.

Māori consensus had demanded a Treaty-driven system of local government throughout the process of reform.²⁰ Before the reform, local government had minimal legislative or practical Treaty responsiveness. However, aside from environmental management, reform did not improve Treaty outcomes at a local level. The LGA and its 1988-1989 amendments were not used to bring the Treaty into local government despite

16 (22 March 1988) 487 NZPD 2883. See also G Bush "The Historic Reorganisation of Local Government" in J Boston and M Holland (ed) *The Fourth Labour Government: Politics and Policies in New Zealand* (2ed, Oxford University Press, Auckland, 1990) 233. See also D Ponter "Accountability of Regional Councils: an analysis of the accountability of Regional Councils" (Research Paper for the Degree of Master of Public Policy, Victoria University of Wellington, 1995) 31.

17 (28 June 1988) 489 NZPD 4739. See also J Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Allen & Urwin, Wellington, 1990) 162-186 ["A Question of Honour"].

18 The Local Government Amendment Act (No 3) 1988 and the Local Government Amendment Act (No 2) 1989 provided the major reforming provisions. Local government is involved in the administration of several other statutes including the Reserves Act 1977 and the Biosecurity Act 1993.

19 This paper does not include detailed discussion of the impact of the Resource Management Act 1991 on local government-Māori relationships. See Office of the Parliamentary Commissioner for the Environment *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* (Office of the Parliamentary Commissioner for the Environment, Wellington, 1992) for a simple analysis of local government's environmental management Treaty obligations under the Resource Management Act 1991.

20 "Report of the Hui on Māori Participation in Local Government" (1-3 March 1989). See *A Question of Honour?* above n 17, 186. See also J Hayward *In Search of a Treaty Partner: who, or what is, the Crown?* (PhD thesis, Victoria University of Wellington, 1995) 202 ["In Search of"].

attempts by some officials to do so.²¹ Parliament had conferred substantial powers of Káwanatanga on the new local government structure with no obligation to comply with the Treaty.²² Māori as tangata whenua, were effectively excluded from this structure and treated as another interest group. This is of major cultural and economic significance. Local government presently constitutes a major sector of the economy with an annual operating income of \$3 billion, infrastructure assets worth about \$22 billion and a ratepayer equity of \$27.5 billion. It contributes around 3.5% of the Gross Domestic Product of New Zealand.²³

III DOES LOCAL GOVERNMENT HAVE TREATY OBLIGATIONS?

A Introduction

It is clear that the Crown is a Treaty partner and has Treaty obligations, but what the Crown constitutes for Treaty purposes remains elusive.²⁴ The Crown was identified in the Treaty of Waitangi as 'Her Majesty the Queen of England'.²⁵ However, New Zealand's constitutional development transferred authority for Káwanatanga from the English Monarch to the settler government.²⁶ The evolutionary nature of the Crown has meant societal groups have defined it differently.²⁷ This is especially problematic for groups that

21 Māori Local Government Reform Consultative Group (MCG) "Minutes of the Second Meeting of the MCG" (State Insurance Building, Wellington, 9 June 1988) 4. The MCG recommended that the Treaty principles be incorporated in the local government reform legislation.

22 See *A Question of Honour?* above n 17, 178. See also *In Search of* above n 20, 202.

23 Local Government New Zealand *Local Government Says* (Local Government New Zealand, Wellington, 1996) 2 ["*Local Government Says*"].

24 See *Halsbury's Laws of England* (4ed, Butterworths, London, 1996) vol 8(2), "Constitutional Law", para 353, 229. The term 'Crown' is considered to have a number of meanings. Compare New Zealand Law Commission *Crown Liability and Immunity: A Response to Baigent's case and Harvey v Derrick* (New Zealand Law Commission Report No 37, Wellington, 1997) 3 ["*Crown Liability*"]. The New Zealand Law Commission states that it is sometimes difficult to identify the Crown for the purposes of the New Zealand Bill of Rights Act 1990. It is arguable that the Treaty was an act of the state in all its manifestations. This argument suggests that it does not matter what form the state takes, Treaty obligations will attach to that form (local government for example).

25 See the Preamble of both the English and Māori texts. Both texts start with reference to Queen Victoria. Each Treaty article (in both texts) acknowledges Queen Victoria. The Privy Council has expressly affirmed that those obligations are now possessed by the Crown in right of New Zealand. See *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 517 (PC).

26 See P Joseph *Constitutional and Administrative Law in New Zealand* (The Law Book Company, Sydney, 1993) 82 ["*Constitutional and Administrative Law*"]. Joseph provides a succinct discussion on the early Pakeha governmental system in New Zealand.

27 See *Town Investments v Department of Environment* [1978] AC 359, 393. See also *Constitutional and Administrative Law* above n 26, 490.

have tried to isolate the Crown for Treaty purposes.²⁸ Māori have been particularly disadvantaged through exclusion, as a Treaty partner, from the process of redefinition of Kāwanatanga structures. This Part addresses the appropriateness of conceptualising local government as the Crown or a Crown agent, and whether it really matters for Treaty discourse.

B IS LOCAL GOVERNMENT THE CROWN?

1 Redefinition

Conceptualising local government as the Crown, thereby acquiring Crown immunities and Treaty obligations, involves redefinition of Treaty relationships. Redefinition of Treaty relationships is not abhorrent to Treaty jurisprudence.²⁹ Māori self-government structures have changed since the Treaty and so far have not been subject to serious mainstream constitutional discourse.³⁰ This is in contradistinction to the attention given to the changes in the definition of the Crown and the authorities exercising Kāwanatanga. While the Crown is the symbolic Treaty partner, the central government (despite initial opposition from Māori) has powers of Kāwanatanga and the Crown's Treaty obligations.³¹ Local government theoretically could take on a similar role.

28 *In Search of* above n 20, 202.

29 It is submitted that the most graphic example of redefinition in recent times is the use of 'Treaty principles' to depict Treaty relationships rather than the actual words of the documents. This has emerged from the inclusion of the phrase 'Treaty principles' in statutes such as the Treaty of Waitangi Act 1975 and the State-Owned Enterprises Act 1986, and subsequent interpretation by the Waitangi Tribunal and the Court of Appeal. *Lands case* above n 3, 663 and 673.

30 Māori development has taken on a greater iwi and pan-Māori image. This contrasts with the hapu paradigm in which Māori lived before the Treaty was signed. *Iwi* above n 2. See also J Belich *Making Peoples: a history of the New Zealanders from Polynesian settlement to the end of the nineteenth century* (Allen Lane/Penguin, Auckland, 1996). Perhaps the central government should consider having open discussion with Māori on who each party considers the Treaty partners-parties are, especially considering the Māori fisheries debates which have resulted in prolonged intra-Māori litigation over what constitutes an 'iwi'. See *Te Rūnanganui o Te Upoko o te Ika Association (Inc) and ors v The Treaty of Waitangi Fisheries Commission and ors* (4 August 1998) unreported, High Court, Auckland, CP 122/95 for the most recent decision in this litigation.

31 See C Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington, 1987) 141. Orange identifies occasions in the nineteenth century when Māori appealed directly to Queen Victoria over government activities purporting to have the authority of the Crown. *In Search of* above n 20, 283. Hayward makes the pertinent comment that central government has the ability one moment to assert its powers as the Crown, and the next moment to distance itself from Treaty responsibilities as the government. It is submitted that despite ambiguities in self-definition, central government exercises powers of Kāwanatanga and therefore has Treaty obligations.

2 *Local Government Act 1974*

The authority of local government is not sourced in any constitutional document, but is referable to ordinary statutes.³² The nature of local government is therefore dictated by the relationship it has with the Crown, as expressed in legislation. The LGA defines the current relationship between the Crown and local government. The statute distinguishes local government from the Crown.³³ Section 37K of the LGA outlines the purposes of local government:

The purposes of local government in New Zealand are to provide, at the appropriate levels of local government,

- (a) Recognition of the existence of different communities in New Zealand;
- (b) Recognition of the identities and values of those communities;
- (c) Definition and enforcement of appropriate rights within those communities;
- (d) Scope for communities to make choices between different kinds of local public facilities and services;
- (e) For the operation of trading undertakings of local authorities on a competitively neutral basis;
- (f) For the delivery of appropriate facilities and services on behalf of central government;
- (g) Recognition of communities of interest;
- (h) For the efficient and effective exercise of the functions, duties, and powers of the components of local government; and
- (i) For the effective participation of local persons in local government.

There are several minor references to Maori in the LGA.³⁴ However, the LGA does not impose statutory Treaty obligations.³⁵ The recent devolution of responsibilities and powers of *Kāwanatanga* is not mirrored by devolution of Treaty obligations.

³² See *Halsbury's Laws of England* (4ed, Butterworths, London, 1980) vol 28, Local Government, para 1001, 424. See also KA Palmer *Local Government in New Zealand* (2ed, Law Book Company, Sydney, 1993) 23 ["*Local Government*"].

³³ Local Government Act 1974, s 37K(f). Local government may act as a contractual agent for the Crown.

³⁴ Local Government Act 1974, s 119F(2). Local Government Act 1974, s 37zo.

³⁵ *Local Government* above n 32, 29.

The absence of Treaty references in the LGA contrasts with other Labour reforms between 1984-1990.³⁶ Environmental management reform in the RMA requires local government to *have particular regard to* or to *take into account* some *tíkanga Māori* when operating pursuant to that legislation.³⁷ Corporatisation reform in the State-Owned Enterprises Act 1986 includes: "Nothing in this Act permits the Crown to *act in a manner that is inconsistent* with the principles of the Treaty of Waitangi".³⁸ Education reform also resulted in greater Treaty responsiveness. The Education Act 1989 requires schools, when proposing a charter, to *consider* the views of Māori.³⁹ University Councils are required to *acknowledge* the Treaty principles in exercising their statutory duties.⁴⁰ These reforms indicate that the Labour government attempted to create greater Treaty responsiveness within the state. However, this responsiveness is not reflected in the local government legislation.

3 Statute

No statute identifies local government as the Crown or part of the Crown. The Constitution Act 1986 offers no definition of the Crown. The Crown Proceedings Act 1950 ('the CPA') defines the Crown as 'Her Majesty in right of Her Government in New Zealand'. The Public Finance Act 1989 ('the PFA') definition of the Crown is more expansive than the CPA definition, but the PFA definition does not include local government either.⁴¹ The PFA gives a separate definition for 'local authority', suggesting that local government is not the Crown.

36 In this paragraph emphasis is added to words used in provisions requiring Treaty responsiveness.

37 The Resource Management Act 1991 requires local government to *recognise and provide* for the ancestral relationship of Māori and our culture with natural resources and other taonga (s 6(e)), to *have particular regard to kaitiakitanga* (s 7(a)), and to *take into account* the Treaty principles (s 8) [emphasis added]. There are many uncertainties surrounding the operation of these provisions, especially in regards to how and when consultation with Māori should occur. It is contended that these provisions redefine Treaty relationships between local government and Māori.

38 State-Owned Enterprises Act 1986, s 9. This section was the major issue of interpretation in the *Lands case* above n 3.

39 Education Act 1989, s 62.

40 Education Act 1989, s 181(b).

41 Section 2 of the Public Finance Act 1989 defines the Crown as:

- (a) Her Majesty the Queen in right of New Zealand;
- (b) Including all Ministers of the Crown and all Departments;
- (c) Does not include:
 - An office of Parliament;

The Treaty of Waitangi Act 1975 ('the TOWA') suggests that local government could be the Crown.⁴² This suggestion arises from analysis of the definition of private land. Section 2 of the TOWA defines private land as:

Private land means any land, or interest in land held by a person other than-

- (a) The Crown; or
- (b) A Crown entity within the meaning of the Public Finance Act 1989.

It is arguable on grounds of statutory interpretation that for the purposes of the TOWA local government could be conceptualised as the Crown. The lack of reference to the PFA in section 2 (a) of the TOWA suggests that the definition of the Crown for the purposes of the TOWA is not limited to the PFA definition of the Crown (unlike Crown entity), hence could include local government. However, two extrinsic aids counter this argument. Parliamentary debates which led to the inclusion of this definition specifically refer to local government land as constituting private land, hence being excluded from recommendation by the Waitangi Tribunal.⁴³ This contrasts with Crown lands which are open to recommendation. Second, and more importantly, the Waitangi Tribunal has stated that the Crown for the purposes of the TOWA has the same meaning as the Crown for the purposes of the Crown Proceedings Act 1950.⁴⁴ The meaning of the Crown is not extended to include bodies which have Crown-delegated responsibilities.

It is helpful to consider statutes that focus on the relations between the exercise of executive power and citizens. This may point to local government being perceived as part of the Crown, or at least exercising powers of Káwanatanga. Aotearoa has a statutory framework designed to encourage principles of open government. The Ombudsmen Act 1975, the Official Information Act 1982, the Local Government Official

-A Crown entity; or

-A State Enterprise in Schedule I of the State-Owned Enterprise Act 1986.

42 The Treaty of Waitangi Act 1975 established the Waitangi Tribunal. Treaty of Waitangi Act 1975, s 6 empowers the Waitangi Tribunal to investigate claims made by Māori that Treaty principles have been breached.

43 (23 June 1993) 536 NZPD 16167. Section 6(4)A of the Treaty of Waitangi Act 1975 states:

Subject to sections 8A-8I the Tribunal shall not recommend under subsection (3) of section 6:

- (a) The return to Maori ownership of any private land; or
- (b) The acquisition by the Crown of any private land.

44 *Manukau Report* above n 3, 73. See also *Orákei Report - Wai 9* (Department of Justice, Wellington, 1987) 136.

Information and Meetings Act 1987 and the Privacy Act 1993 indicate the emphasis now placed on the accountability of executive power. These statutes do not treat local government as part of the Crown. However, the Ombudsmen Act 1975, the Local Government Official Information and Meetings Act 1987 and the Privacy Act 1993 do apply to local government,⁴⁵ and these statutes treat local government similarly to central government and the Crown. This suggests that local government exercises powers of Káwanatanga.

4 *Case law*

a *Treatment of Local Government as the Crown*

Judicial treatment of the idea of local government being conceptualised as the Crown for Treaty purposes is sparse. In *Hanton v Auckland City Council*⁴⁶ ('*Hanton*') the Planning Tribunal (now known as the Environment Court) addressed the issue of whether the Auckland City Council operating as a consent authority pursuant to the RMA, possessed the Treaty obligations of the Crown. The Tribunal stated:⁴⁷

But where the consent authority is not a Minister of the Crown, but is a local authority or some other person, we do not find authority in s 8 (RMA) for the proposition that by exercising functions and powers under the Act it is subject to the obligations of the Crown under the Treaty. Rather the consent authority is to take those principles into account in reaching its decision.

Section 8 of the RMA states: "In achieving the purpose of this Act, all persons exercising functions and powers under...[the Act]...shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)." *Hanton* states that local government is not the Crown for Treaty purposes, although the RMA requires local government to take into account the Treaty principles. On this basis it is difficult to contend that local government is the Crown for Treaty purposes in the absence of statutory provisions explicitly stating that. The judicial view expressed in *Hanton* has been criticised from a constitutional law perspective.⁴⁸

The Káwanatanga ceded in the Māori version of article 1 of the Treaty...is exercised not only by the Crown and its Ministers and officers but by all authorities, officers and other persons

45 Ombudsmen Act 1975, s 13. Privacy Act 1993, s 2. The Local Government Official Information And Meetings Act 1987 provides a statutory framework (separate from the Official Information Act 1982) for official information held by local government.

46 *Hanton v Auckland City Council* [1994] NZRMA 289 (*Hanton*). But see *Greensill v Waikato Regional Council* (6 March 1995) unreported, Planning Tribunal, Treadwell J, WO 17/95.

47 *Hanton* above n 46, 301.

48 F Brookfield "Constitutional Issues" [1994] NZ Recent Law Review 376, 379 ["Constitutional Issues"].

exercising statutory powers or functions that depend ultimately on what was ceded or taken in 1840. If the powers of Káwanatanga are qualified by obligations, even if faintly through the concept of Treaty "principles" to be "taken into account" there is...no basis for the distinction suggested...between Ministers of the Crown and other consent authorities (local government).

Brookfield considers that treatment of the Treaty in *Hanton* is wrong. Brookfield's approach concentrates on the exercise of powers of Káwanatanga as having obligations. Local government is considered to be exercising powers of Káwanatanga that have been qualified by statutory Treaty obligations. The label, "local government", that is now attached to the body which exercises those powers is unimportant. This suggests that anything once in the purview of the Crown as a result of what was ceded in 1840, is qualified by Treaty obligations if there is a statutory basis for that qualification.

b Treatment of the Treaty

Although the judiciary has been unwilling to conceptualise local government as the Crown for Treaty purposes, judicial treatment of the Treaty suggests local government may need to act pursuant to the Treaty or to its principles. Judicial treatment of the legal status of the Treaty is unclear.⁴⁹ The Privy Council case of *Hoani Te Heuheu Tukino v Aotea District Māori Land Board*⁵⁰ ('*Te Heuheu*') enunciated the orthodox legal position regarding use of the Treaty as a means to seek redress. The Privy Council stated that the Treaty is part of New Zealand law only to the extent that it is expressly recognised by statute.⁵¹

However, recent cases have suggested that the *Te Heuheu* rule is outdated. The Treaty can be used as an extrinsic aid when interpreting legislation.⁵² In the absence of clear statutory provisions to the contrary, the Crown/central government will have ascribed to it a fiduciary duty to give due weight to Treaty principles when decision-making.⁵³ Therefore, the Treaty will have relevance in the interpretation of statutes

49 This reflects the unclear constitutional position of the Treaty.

50 *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308.

51 *Lands case* above n 3, 655 and 691; *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 515 (PC); *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140, 168 (CA). New Zealand courts maintain formal acceptance of the *Te Heuheu* rule.

52 Consider *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188. Justice Chilwell considered the Treaty part of the fabric of New Zealand society. Māori concerns were a relevant consideration in interpreting the Water and Soil Conservation Act 1967, even though that legislation made no reference to the Treaty.

53 *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129, 135; *Te Rūnanga o Wharekauri Rēkohu Inc v Attorney-General* [1993] 2 NZLR 301, 305; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 561.

whether or not there is a reference to the Treaty in the statute.⁵⁴ These judicial statements have recently been strengthened by the High Court stating that the Treaty impacts on the interpretation of law even if it is not incorporated in statute; the very antithesis of the *Te Heuheu* rule.⁵⁵

This affects local government decision-making. The LGA and other statutes which empower local government can be interpreted in light of Treaty principles. Māori may base an action in public law against the authority if a local government authority breaches Treaty principles while acting pursuant to those statutes.⁵⁶

5 *Select Committees*

Two Parliamentary select committees have investigated local government.⁵⁷ These committees were convened before the reform period and can only be taken as giving a historic view of local government. Both select committees treated local government as part of a unitary governing structure 'for which Parliament alone is responsible'.⁵⁸ Whilst not asserting that local government is the Crown (for Treaty purposes or otherwise), these comments suggest that the select committees considered local government, at the very least, to be exercising powers of Kāwanatanga. Neither report mentions Māori or the Treaty.

6 *Agency*

Whether local government is a Crown agent (as opposed to the Crown) is unclear.⁵⁹ The High Court has adopted a 'control' test in determining Crown agency.⁶⁰ If the entity

54 *Barton v Director-General of Social Welfare* [1997] 3 NZLR 179. The court refused to follow *R v R* (1990) 6 FRNZ 232 which suggested acceptance of the *Te Heuheu* rule. See also *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, 692.

55 Academic debate on the *Te Heuheu* rule has occurred. Some commentators assert that the orthodox legal position has been maintained by recent litigation - See A Mikaere "Māori Issues" [1994] NZ Recent Law Review 265, 279. Others maintain that the litigation challenges the orthodoxy. "Constitutional Issues" above n 48, 377. See also D Kalderimis "Revolution by Stealth: The Implied Reversal of the Rule in *Te Heuheu Tūkino*" (Unpublished LLB (Hons) paper, Victoria University of Wellington, 2 October 1997).

56 This potentially gives rise to public law damages under the Treaty of Waitangi comparable to public law damages under the New Zealand Bill of Rights Act 1990 based on *Simpson v Attorney-General* [1994] 3 NZLR 667 [*Baigent's case*].

57 Report of Local Government Committee [1945], 115 ["*Select Committee 1945*"]. Report of Local Bills Committee *Inquiry into the Structure of Local Government* [1960], 118 ["*Select Committee 1960*"].

58 *Select Committee 1945* above n 57, 1. *Select Committee 1960* above n 57, 7.

59 See D Crengle *Taking Into Account the Principles of the Treaty of Waitangi: Ideas for Implementation of Section 8 of the Resource Management Act 1991* (Ministry for the Environment, Wellington, 1993)

is substantively controlled by central government then it constitutes a Crown agent.⁶¹ Central government has little control over the functions management of local government.⁶² This suggests that local governments are not Crown agents and therefore have no Treaty responsibilities, unless specified in statute.

Some commentators suggest that a 'functional' test is more appropriate.⁶³ If the body is exercising what is traditionally perceived as part of the general executive authority of government, then it is a Crown agent.⁶⁴ This reinforces the theme of this paper that the nature of the body exercising powers of Káwanatanga is irrelevant. It is the fact that the body is exercising Káwanatanga that is important. If Káwanatanga is involved, then Treaty obligations are imposed.⁶⁵ Local government authorities in Aotearoa perform

10. See Local Government New Zealand *Liaison and Consultation with Tangata Whenua: A survey of local government practice December 1997* (Local Government, New Zealand, Wellington, 1997) 16 ["*Tangata Whenua Consultation*"]. Local Government New Zealand considers that local government is sometimes a licensee, rather than an agent for the Crown.

60 *Miller v New Zealand Railway Corporation* (18 February 1993) unreported, High Court, Wellington, AP 61/92. This follows the tests adopted in the English jurisdiction for Crown agency. See *Tamlin v Hannaford* [1950] 1 KB 18. See also *British Broadcasting Corporation v Johns* [1965] Ch 32. The English cases suggest that the courts are interested in asking whether the entity acts on its own behalf, and whether it is a body exercising functions of the government in such a manner that it is entitled to Crown immunities. There is a strong inference that if the entity has commercial functions then it is not part of the Crown, even when the function is a public duty or service. See *Waitākere City Council v Housing Corporation of New Zealand* [1992] 3 NZLR 591 for New Zealand authority on this issue. See *Kinross v GIO Australia Holdings Ltd* [1995] 129 ALR 283 for Australian authority.

61 See P Hogg *Liability of the Crown* (2ed, Carswell, Toronto, 1989) 250. See also *Halsbury's Laws of England* (4ed, Butterworths, London, 1974) vol 9, "Corporations", paras 1203/1210, 717/721.

62 Local Government Says above n 23, 1. Compare Audit Office *Report on Statements of Corporate Intent* (Audit Office, Wellington, 1990) 8. The Audit Office reviews the accountability structures of State-Owned Enterprises and states that these structures are similar to local government authorities and public companies.

63 See *Halsbury's Laws of England* (4ed, Butterworths, London, 1974) vol 9, "Corporations", para 1210, 721. When functions of an entity are connected with matters which are essentially the province of government then an inference is more readily drawn that the entity acts on behalf of the Crown. See A E Currie *Crown and Subject: a treatise on the rights and legal relationship of the people of New Zealand as set out in the Crown Proceedings Act 1950* (New Zealand Legal Publisher, Wellington, 1953) 41. Personal comment by Chris Koroheke (Cultural Liaison Officer) at the Auckland Regional Council, Auckland, 2 August 1998.

64 *Constitutional and Administrative Law* above n 26, 504. Joseph states that the Crown could include any public body administering a service within the province of government.

65 This is analogous to the principles underlying the Ombudsman Act 1975 and official information legislation. If executive power is being exercised then the principles of open government encapsulated in legislation are more likely to apply.

tasks recently devolved from central government control.⁶⁶ In performing those tasks they could readily be considered Crown agents under the functional test. Hence environmental management activities (pursuant to the RMA) require fulfilment of Treaty obligations, as do activities such as the provision of electricity.

7 Conclusion

The authorities suggest that it is inappropriate to conceptualise local government as the Crown for Treaty purposes. The statutory scheme does not support a definition of local government as the Crown. The available case law and Parliamentary select committee reports suggest that local government is not the Crown, but does exercise powers of Káwanatanga. However, reference to these authorities does not mean that local government has no Treaty obligations.

C Where Does Local Government Fit Under the Treaty?

1 Commentary

Most mainstream formulations of Treaty relationships invoke notions of partnership between Māori and 'the Crown'.⁶⁷ This notion has informed the paper's discussion of the appropriateness of conceptualising local government as the Crown or as a Crown agent. It is submitted that the Treaty is essentially a redistribution of power. Māori redistributed exercise of powers of Káwanatanga to the Crown whilst preserving rangatiratanga.⁶⁸ It was the exercise of powers of Káwanatanga that carried Treaty responsibilities, not the Crown label.

It is submitted that the Treaty is not about labels, but is primarily about roles and obligations. Concentration on labels has restricted Treaty jurisprudential thinking. The functions of Káwanatanga were, and are, important. If any Pákehá body which is exercising Káwanatanga affects Māori, then Treaty obligations operate. It should not matter whether the body is central government, local government or a private body. Extension of Treaty relationships beyond the Crown-Māori relationship creates greater accountability at local levels for actions impinging on Treaty rights.

Local government does not need to be artificially conceptualised as the Crown in order to possess Treaty responsibilities. Local government is exercising powers that

⁶⁶ Local government could be considered a Crown delegate. See *Halsbury's Laws of England* (4ed, Butterworths, London, 1996) Vol 8(2), "Constitutional Law", para 365, 242. This seminal text states that a delegate is machinery through which functions of the principal are performed. It may be argued that local government performs functions of an executive nature ordinarily performed by the Crown.

⁶⁷ *Lands case* above n 3, 667. *Muriwhenua Fishing Report* above n 3, 192.

⁶⁸ See J Williams "Not Ceded but Redistributed" in *Sovereignty and Indigenous Rights* above n 11, 193.

have been assumed by the Crown, rightly or wrongly, on a Treaty basis. These include defining Māori environmental management structures and controlling transport systems (such as the roads and rivers). If local government did not exercise these powers, then central government would exercise them, or at least control their performance.

It is contended that local government exercises powers of Kāwanatanga that regulate and affect Māori. It has the ability to tax its citizenry.⁶⁹ It has law making powers.⁷⁰ It can compulsorily acquire property pursuant to the Public Works Act 1981.⁷¹ Private bodies are unable to exercise these powers. Furthermore, section 37K(f) of the LGA states that one local government purpose is the delivery of appropriate facilities and services on behalf of central government. This supports the contention that local government has powers of Kāwanatanga.

It is arguable that local government exercises powers of Kāwanatanga but only the Crown has Treaty obligations. This argument assumes that devolution of power does not carry with it devolution of obligations. Hence, the Crown retains all Treaty obligations unless there is specific devolution of those obligations.⁷² The logical conclusion of this is that if the Crown devolves all powers of Kāwanatanga without simultaneous devolution of Treaty obligations, it still retains those obligations, even though it may not be exercising powers of Kāwanatanga anymore and has basically no existence. This is a strange conclusion that is not acceptable. In the event that the Crown disappears altogether, for example if Aotearoa became a republic, then Treaty obligations must fall somewhere. This paper contends that those obligations fall upon the entities which are exercising powers of Kāwanatanga, whether or not there are statutory guidelines for such responsibility.

69 Rating Powers Act 1988. See also T Bennion *Māori and Rating Law* (Rangahaua Whānui National Theme I, Waitangi Tribunal, Wellington, 1997) 1. Bennion makes the pertinent comment that rating issues are still a concern to Māori even though local government bodies can no longer threaten Māori land owners with sale of Māori land as a final resort. The Ratings Powers Act 1988 prevents the power of sale of Māori land on the basis of rates arrears. It was considered that the local government power of sale of Māori land contravened the Treaty principle of active protection. Personal comment by Kenneth Palmer (Lecturer) at Auckland University Law School, Auckland, 17 August 1998.

70 Local Government Act 1974, ss 680-684. Operative planning schemes or resource management plans have the force of a regulation. Local government can enact bylaws pursuant to statutory authority. *Local Government* above n 32, 423.

71 Public Works Act 1981, s 16. The Public Works Act 1981 contains no specific requirements to take Treaty considerations into account when Māori land is being considered for public works purposes. See C Marr *Public Works Takings of Māori Land 1840-1981* (Rangahaua Whānui National Theme G, Waitangi Tribunal, Wellington, 1997) 13.

72 See J Martin "Devolution and Decentralisation" in J Boston (ed) *Reshaping the State: New Zealand's Bureaucratic Revolution* (Oxford University Press, Auckland, 1991) 268.

2 *Waitangi Tribunal*

The Waitangi Tribunal has addressed issues surrounding the Crown devolution of responsibilities to other bodies.⁷³ It has consistently maintained that the Crown cannot avoid Treaty obligations by conferring an inconsistent jurisdiction on others.⁷⁴ This perspective considers that the Crown retains Treaty obligations if executive responsibilities are transferred to local government. Such an arrangement means that the Crown is a necessary backstop for Māori if local government authorities do not abide by Treaty principles.⁷⁵

The Waitangi Tribunal has therefore interpreted its mandate to include local government activities on the basis that the Crown is responsible for local government acts or omissions by virtue of the Crown prescribed delegation of powers.⁷⁶ The nature of the legislative backdrop means that any local government act or omission reliant on statute or regulation can be made the subject of a Waitangi Tribunal claim.⁷⁷ This situation is problematic for several reasons. First, the backlog of Waitangi Tribunal claims and the rate at which claims are being processed suggests that any present local government breach of Treaty principles would not attract quick investigation and recommendations.⁷⁸ Second, it will (under the present framework) lead to inefficiencies with Māori continually returning to the Crown over failure to ensure Treaty principles are upheld by local government even though reform has lessened Crown control over local government. Third, it hinders the development of Treaty relations when parties other than the Crown (central government) and Māori are involved.

Presently the TOWA prevents the Waitangi Tribunal from recommending the return of local government land.⁷⁹ Some Māori claim that this provision enables the Crown to

73 *Orákei Report* above n 44, 136.

74 *Manukau Report* above n 3, 73. See Waitangi Tribunal *Motunui-Waitara Report - Wai 6* (2ed, Government Printer, Wellington, 1985) 55.

75 See *In Search of* above n 20, 197.

76 See *Local Government* above n 32, 97.

77 Treaty of Waitangi Act 1975, s 6.

78 The Waitangi Tribunal has been reporting on claims at a rate of approximately 3 per year. There are over 300 claims awaiting research and reporting. However, because of the 'casebook' method by which a number of related claims are analysed together, it is estimated that the present claims could be researched and reported on within the next decade. Personal Comment by Ian Shearer (Manager) at the Waitangi Tribunal, 4 August 1998. See also L Theron "Healing the Past: A Comparative Analysis of the Waitangi Tribunal and the South African Land Claims System" (1998) 28 VUWLR 311, 317.

79 See above n 43.

distance itself further from its ability to perform its Treaty obligations by removing vast tracts of physical resources from potential recommendation. The Waitangi Tribunal could recommend compensation for resources now controlled by local government.⁸⁰

IV INITIATIVES - WHAT HAS LOCAL GOVERNMENT DONE TO UPHOLD THE TREATY?

A Introduction

Local government has been instrumental in the dispossession of Māori resources and the subordination of Māori self-government. This cultural arrogance has provoked inherent Māori suspicion of local government, has contributed to diminished regional growth, and has created limited opportunities for harmonious relations between Māori and local government. This Part considers recent local government responsiveness to Treaty issues in relation to planning and representation.

B Planning

Māori ability to be active participants in local government planning beyond resource management has been minimal. Participation is often reduced to Pākehā mainstreaming in the form of voting at local government elections and as employees. Minimal participation by Māori as Māori has lessened local government Treaty responsiveness and ensured Māori are not accorded a different position from other interest groups in planning processes and the outcomes of such processes. There is no national strategy for ensuring Māori participation in local government activities apart from environmental management.

Few local government authorities have even skeletal references to Māori as tangata whenua in such planning.⁸¹ This may flow from the lack of clarity in the constitutional relationship between Māori and local government. Where there is a large percentage of Māori in the region, the relations between Māori and local government are developing as a matter of need.⁸² However, such arrangements are not noticeable in the larger metropolitan areas where Māori population ratios are much smaller, and corporation activities far greater. Wellington City Council for example has two Memoranda of

80 *Lands case* above n 3, 693. The Treaty principle of 'redress' suggests that if the Crown fails to protect rangatiratanga it is obliged to make redress. This could be through monetary compensation or the return of resources.

81 *Tangata Whenua Consultation* above n 59, 22-38.

82 For example, the Opotiki District Council has acknowledged Treaty principles in a draft "Memorandum of Understanding", outlining basic principles for a working relationship between the Council and iwi. The Wairoa District Council has a Māori Policy Document setting out an intent to ensure full Māori participation in decisions that concern Māori and the Council.

Understanding with local iwi, but has no reference to guaranteed Māori participation in the Council's massive corporate activities.⁸³

C Representation

Historically Māori have not obtained guaranteed Māori representation in local government.⁸⁴ The effectiveness of the Māori vote has been weakened by the low Māori voter turnout in local elections.⁸⁵ These factors and the lack of Māori candidates, have produced relative invisibility of Māori on local government authorities. Māori are inevitably forced into lobbying individual Pākehā councillors for their support.⁸⁶ This has complicated relations between local government and Māori by forcing Māori into lobbying as an interest group without distinct rights as tangata whenua, and therefore increased the costs of Māori participation in local government decision-making.

Some local governments have adopted consultative strategies in a bid to improve Treaty responsiveness, forgetting that Māori demand representation as well as consultation.⁸⁷ This approach often concentrates on local government in its environmental management capacities rather than in its administrative and corporate capacities. This excludes Māori from effective Māori representation in all local government affairs.

The Local Government Amendment (No 8) Bill was mooted near the end of the period of the Labour Government reform of local government. It required local government authorities to establish Māori Advisory Committees as sub-committees of the authority. The Bill was not passed. Some local government authorities have established bodies similar to the Māori Advisory Committees suggested by the Bill.⁸⁸ However, these committees have often been consultative rather than decision-making bodies. The

83 Privatisation of local government corporate activities makes it even more difficult for Māori effectively to participate in local governance and the local economy.

84 There are 39 Māori Councillors out of 1123 councillors nationwide: Local Government New Zealand Poll 1995 (Local Government New Zealand Database). This may change with the October 1998 local government elections.

85 Personal Comment by Don Riezebos (Chief Executive Officer) at the Local Government Commission, Wellington, 15 September 1997.

86 Personal comment by Anake Goodall (Ngai Tahu) at Ngai Tahu Group Management Ltd, Christchurch, 18 September 1997.

87 *Uruamo v Carter Holt Harvey* (24 May 1996) unreported, Planning Tribunal, A 43/96. This case illustrates the differences between representation and consultation.

88 See the Napier City Council, South Wairarapa District Council and Rangitikei District Council for example.

Waitangi Tribunal warned that token representation effectively provides a Māori rubber-stamping mechanism and is not a complete solution to Māori representation.⁸⁹

A more appropriate strategy is currently being advocated for Environment Bay of Plenty. The Māori constituency comprises 29 percent of the population. However, there are no Māori representatives on the 11 member Bay of Plenty Council. Former Judge, Peter Trapski, (acting as an Independent Commissioner) has recently recommended that a Māori constituency be established.⁹⁰ Under this model Māori as tangata whenua would have guaranteed representation on the Council, ensuring Māori participation in all Council decision-making. Trapski recommends that 3 out of 12 seats be for Māori representatives. However, for implementation the proposal requires legislative change, and members of Parliament have already strongly opposed such changes.⁹¹

V *POLICY - ADVANTAGES AND DISADVANTAGES OF LOCAL GOVERNMENT HAVING TREATY OBLIGATIONS*

A *Introduction*

This Part outlines the basic advantages and disadvantages of local government having Treaty obligations. This encourages an informed discussion and conclusion on the recommendations which follow this Part.

B *Advantages*

Expanding Treaty relations to include non-Crown bodies such as local government counters the reduction in the activities of the Crown through privatisation and devolution. Ensuring local government has Treaty obligations acknowledges the realities of change in the exercise of powers of Kāwanatanga, and the redefinition of the Crown. This nullifies the effect of the Crown disappearing and rendering its Treaty obligations unfulfilled.

Criticism of the conceptualisation as derogating from the Treaty Crown-Māori relationship can (in theory at least) be countered with the suggestion that the Crown

⁸⁹ *Manukau Report* above n 3, 80.

⁹⁰ Judge P Trapski "The Proposal to Establish a Māori Constituency" (Rotorua, 1998) 1 [*Environment BOP*]. Contrast W Winiata "The Treaty of Waitangi: Māori Political Representation" (Māori Political Representation Conference, Wellington, 1-2 May 1997) Appendix 2. Winiata proposes local body governance based on three councils - a Tikanga Pakeha Council, a Tikanga Māori Council, and a Joint Council. The Joint Council would have responsibility to pass proposals agreed to by the other two Councils. This form of Māori representation is independent from tikanga Pakeha, unlike Trapski's proposal which envisages guaranteed Māori representation in a tikanga Pakeha setting.

⁹¹ "MPs attack Māori seats proposal" *Rotorua Daily Post*, Rotorua, 9 July 1998, 1. Section 3 of the Local Government Amendment Act (No 2) 1986 provided for similar guaranteed Māori representation on the Auckland Regional Authority. However, this provision was repealed in 1992.

retains primary responsibility for actively protecting Māori interests. This is comparable to the New Zealand Law Commission recommendations on the liability of the Crown for breaches of the New Zealand Bill of Rights Act 1990 ('the NZBORA'). The New Zealand Law Commission stated that the Crown is primarily liable for breaches of the NZBORA, although making public bodies such as local government liable will have incentive effects on such bodies to comply with the NZBORA.⁹² The suggested expansion of the Crown is motivated by the principle that greater Treaty responsibility needs to be taken by authorities at local levels apart from central government as the Crown.

Local government having Treaty obligations beyond environmental management increases the potential for greater equity for Māori. The RMA presently operates in a vacuum with regards to Treaty responsiveness. It is contended that local government has no incentive outside the RMA to treat Māori differently from other interest groups. Treaty obligations will encourage local government to ensure Māori participation, as *tangata whenua*, in local government activities. Local government will become more accountable to Māori outside of the regular sanction of electoral retribution.

It is efficient for the Crown and Māori if local government has Treaty obligations. Māori would be able to take claims to the Waitangi Tribunal against local government breaches of Treaty principles. This would mean that the Crown would not be used as a backstop for Treaty claims. Māori development would not focussed initially on the ability to communicate to local government through Crown officials based in Wellington. Instead, Treaty discourse will occur at the local level, where Māori development occurs. The disadvantage of this situation is that the major costs for active protection of Māori interests would be transferred to local government.

C Disadvantages

If local government has Treaty obligations, the financial cost of local government decision-making would increase.⁹³ Depending on the strength of the obligations, local government may be required to guarantee Māori participation in all decision-making processes or consultation in all processes.⁹⁴ The potential for increased costs is emphasised with the contention that there is no guarantee of certainty with local

92 *Crown Liability* above n 24, 30.

93 Any action should be preceded by a financial and non-financial cost-benefit analysis of present local government-Māori relations. This analysis would inform the debate over local government-Māori relations and may alter the extent of this paper's recommendations. This does not make the paper's recommendations superfluous until the analysis is completed; the recommendations are submitted as a useful starting point for further development of local government-Māori Treaty relations.

94 The differences in strength of Treaty obligations are noted in Part III B of this paper.

government having Treaty obligations. Treaty provisions in the RMA have not increased the certainty over Treaty responsiveness in environmental management issues. Instead, they have contributed to greater litigation in the Environment Court.

Treating Māori differently from other segments of the population will attract the argument that the decision-making processes are undemocratic and contribute to separatism/apartheid. Māori are able to participate in the present system as voters and employees of local government authorities. Māori can stand for election.⁹⁵ To differentiate on the basis of race is discriminatory and tantamount to racism. Hence, it is inappropriate to give Māori different treatment on a Treaty basis.

Conceptualising local government as the Crown, or as a Crown agent having Treaty obligations concerns both Māori and local government. Some criticise the conceptualisation as diminishing the significance of Crown-Māori relations. Some Māori consider that there is no distinction between local government and central government, and are unwilling to confuse the situation further.⁹⁶ Others reject the suggestion on the basis that central government does not even have legal Treaty obligations (in a non-Crown capacity) therefore local government cannot either. The Crown has refused to take responsibility for the actions of local authorities.⁹⁷ A prominent Cabinet Minister recently made the comment that local government is neither central government nor a private body, suggesting that the Crown does not consider itself responsible for development of local government - Māori relations.⁹⁸

The movement of Treaty obligations to local government is arguably contradictory. Treaty obligations should evolve as the Crown evolves. As the Crown's powers of Kāwanatanga increased, so did Treaty obligations. As the Crown's powers of Kāwanatanga decrease, it is questionable whether Treaty obligations remain at the highpoint of the Crown's powers. To pin the obligations at the highpoint of the Crown's powers, and then move those obligations to local government authorities exercising devolved powers, disregards the evolutionary nature of Crown-Māori relations. Perhaps Treaty obligations rise and fall depending on the role of the Crown. This paper suggests

95 D Ponter *Proceedings of a Seminar on Resource Management and the Treaty of Waitangi* (Resource Planning Publication No 7 prepared for the Bay of Plenty Regional Council, 1992) 5-7.

96 See T Tutua-Nathan "Iwi-Local Government Partnership/Consultation" *Environment BOP* above n 95, 62. See R Mahuta "Reform of Local and Regional Government: A Tainui Perspective" *New Zealand Geographer* (1989) 44 (1), 84.

97 See New Zealand Office of Treaty Settlements *Crown Policy Proposals on Treaty Claims Involving Public Works Acquisitions* (New Zealand Office of Treaty Settlements, Wellington, 1996) 3.

98 Rt Hon D Graham "Speech" (Local Government New Zealand Conference, Dunedin, 30 June 1998) 5.

that powers of Káwanatanga are distinct from the Crown. These powers are not necessarily exercised only by the Crown. It is submitted that Treaty obligations are applicable to all exercise of powers of Káwanatanga, whether or not those powers were actually exercised by the Crown in 1840. This suggests that the post-1840 Crown assumption of powers of Káwanatanga, which have subsequently been devolved, are qualified by Treaty obligations regardless of where and by whom they are being exercised.

D Conclusion

The potential for local government to have Treaty obligations (outside the RMA) is a trade off between policy arguments. At the heart of this policy debate is greater Treaty responsiveness at local levels versus increased costs in local government decision-making. It is contended that with appropriate statutory guidance on Treaty responsiveness, problems of cost encountered with Treaty obligations can be minimised. Hence, it is considered that local government having Treaty obligations is appropriate.

VI RECOMMENDATIONS - WHAT SHOULD HAPPEN NOW?

A Introduction

The responsibility to clarify local government Treaty obligations rests primarily with central government and Māori.⁹⁹ Local government participation in this process is important. However, without legislative change, local government goodwill presently relied on by Māori (except where there are statutory provisions) will not amount to greater fulfilment of Treaty obligations and rights. It will instead relegate Māori to the status of an interest group. This paper advocates change in the attitudes and actions of central government, local government and Māori .

B Central Government

It is recommended that central government should make legislative changes to ensure a Treaty-driven system of local government.¹⁰⁰ This suggestion envisages greater Crown

99 Any change in the nature of the Crown-Māori relationship needs to be discussed first between the parties to the relationship. This preserves the mana of the parties and allows for acceptable (rather than imposed) development of Treaty relations.

100 See The Bridgeport Group *Reform of Local and Regional Government, Synopsis of Submissions on Bill for the Establishment of Māori Advisory Committees in Local Government and Explanatory Statement* (Report to the Officials Co-ordinating Committee on Local Government, 1990) 16. These recommendations incorporate greater Crown participation in the facilitation of Māori-local government relationships without derogating from the historical significance of the Crown-Māori relationship. The participation could include the establishment of a Māori Local Government Commission which revises local government Treaty responsiveness. See H Matunga *Local Government: A Māori Perspective* (A Report for the Māori Consultative Group on Local Government Reform, 1989) 13.

monitoring of local government in relation to Treaty issues and increased responsiveness of local government to Māori.¹⁰¹ Statutory guidelines for local government on how to meet obligations would ensure Māori are not forced to depend on Pākehā goodwill for Treaty rights to be upheld. Guidelines for local government would also encourage greater efficiency, as Māori would be less likely to approach the Crown over local government omissions to ensure Treaty obligations are met. The existence of guidelines may lessen the room for local government and Māori to develop relations.¹⁰² However, it is submitted that this is a necessary trade-off for greater certainty in the development of these relations.

Treaty settlement negotiations may require local government participation when the Crown and Māori finalise settlement details. During this process central government needs to address the management of the ongoing relationship between state apparatus (including local government) and Māori. This mirrors the Canadian experience where provincial government is included in the negotiations process.¹⁰³ It also suggests less emphasis on finality between the Crown and Māori, and encourages support by local government of Māori affairs.

Greater empowerment of Māori at local government levels needs consideration. This empowerment must occur simultaneously with constitutional change recognising and clarifying the Treaty relationships identified earlier in this paper. Legislation has previously provided for Māori self-government. For example section 71 of the Constitution Act 1852 acknowledged Māori self-government in Māori areas.¹⁰⁴ It provided for the, "[s]etting apart of districts in which the laws, customs and usages of the Aboriginal or Māori inhabitants of New Zealand should for the present be maintained for the government of themselves, in all their relations to and dealings with each other."

101 The results of implementation of the RMA highlights the advantages and disadvantages of requiring local government to consider Treaty principles in decision-making.

102 Personal comment by Chris Koroheke (Cultural Liaison Officer) at the Auckland Regional Council, Auckland, 2 August 1998.

103 *The Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (The Tungavik and the Minister of Indian Affairs and Northern Development, 1993) 191. Article 23 for example places employment obligations on the Federal and Provincial Governments.

104 See generally C Wickliffe "Indigenous Polities, self-government, law, citizenship and property rights: inside out, outside in: a comparative study of the United States of America, Canada and New Zealand" (LLM Thesis, Victoria University of Wellington, 1997). Wickliffe argues that the British common law protected an aboriginal right to self-government. Section 71 was not repealed until 1986. See generally L Cox *Kōtahianga: The Search for Māori Political Unity* (Oxford University Press, Auckland, 1993) 28.

However, its force was never tested; it was never used. There have been numerous statutes accommodating limited Māori self-government.¹⁰⁵ The major recent attempt by the Crown to give Māori limited self-government came with the Rānanga Iwi Act 1990. However, it was repealed soon after enactment. One possibility for central government consideration in the present statutory framework is a redrafting of section 33 of the RMA to make it easier for local government to transfer powers to iwi to control (and not only to manage) areas of significance to iwi.¹⁰⁶

C Local Government

Local government authorities need to address Treaty relations more seriously.¹⁰⁷ Initially this requires local government authorities to identify where they stand in relation to Treaty issues. Second, it requires local government authorities to approach Treaty discussion with an open mind.¹⁰⁸ Immediate measures include local government investing resources in educating itself on Treaty issues, and establishing clear channels of communication with Māori. Local Government New Zealand has encouraged this approach by stating that Māori are not just another interest group.¹⁰⁹

Local government should develop options for guaranteed Māori representation. Such representation may be different for different parts of the country. Māori Advisory Committees, formal guaranteed representation and Special Working Parties are several of the many options available to local government.¹¹⁰ This representation also needs to

105 See for example the Māori Councils Act 1900.

106 Section 33 of the Resource Management Act 1991 allows local government authorities to devolve limited functions to Māori. Personal Comment by D Ponter (Manager) at Te Puni Kōkiri, Wellington, 6 August 1998. Ponter considers that the present statutory framework does not empower Māori to be responsible for resources that are transferred to Māori management under s 33 of the Resource Management Act 1991. Ultimate responsibility is left to local government, while management is transferred to Māori. See RN Fraser "Section 33 of the Resource Management Act 1991" (Unpublished LLB (Hons) paper, Victoria University of Wellington, 1997). Fraser comments on the statutory and non-statutory constraints of devolution of authority under s 33 of the Resource Management Act 1991, and suggests that there are statutory inconsistencies for such devolution compared to devolution to Māori under the Fisheries Act 1996.

107 Personal comment by Mike Read (Adviser) at Local Government New Zealand, Wellington, 18 September 1997.

108 *Manukau Report* above n 3, 84. Personal comment also by V Payne (Whakatohea) at Beca Carter Hollings Ferner Ltd, Tauranga-Moana, 2 August 1998.

109 *Tangata Whenua Consultation* above n 59, 19.

110 Representation could be of a similar nature to Māori representation in Parliament. Section 45 of the Electoral Act 1993 guarantees separate Māori representation in Parliament. The number of Māori seats is dictated by the number of electors on the Māori roll.

acknowledge the implicit differences between tangata whenua and the general Māori populace in each region.

Meaningful involvement by Māori in all planning is necessary for local government to be committed to the Treaty. Researching of Māori initiatives is an important way for local government to respond to Māori. Instead of adopting a negative approach to notions of tino rangatiratanga, local government may consider how local government can affirmatively encourage Māori aspirations for Māori self-government. This may require greater use of the devolution provisions in the RMA and the Fisheries Act 1996.¹¹¹

Co-management strategies adopted in Canada provide further alternatives for greater Māori self-government. Co-management synthesises negotiation and mutual accommodation of Māori and local government in the governance of the environment and resources.¹¹² Boards or committees which are responsible for water management, land use, planning and environmental management could have a 50:50 Māori and local government representation. Although this framework does not provide self-government for Māori, it would constitute explicit local government implementation of the principle of active protection and develop relations further.

D Māori

Paramount to the reinvigoration of Māori self-government is education. Māori have to invest resources (maybe in conjunction with local government and central government) in researching and developing Māori frameworks of resource management and Māori self-government. Investment in learning Pākehā techniques is also important in order for Māori to participate fully in environmental affairs.

Māori need to consider the ability of local government to assist Māori self-government. This involves rallying around iwi management plans and contributing to Māori service provision to Māori and the general community.¹¹³ It requires greater participation in local government elections and open communication with (albeit Pākehā dominated) existing local government authorities. Māori must necessarily consider the development of the Treaty relations to apply to all local government activities. If this does not happen, Māori and the Crown will be locked in a time-warp that does not recognise

111 Fisheries Act 1996, ss 174-185.

112 See P Usher "Common Property and Regional Sovereignty" Seminar on Common Property Issues (National Center for Development Studies, Australian National University, 1996) 5. Usher supports the notion of a continuing and evolving relationship between partners, similar to McHugh's relational approach.

113 Consider Te Rūnanga o Ngāti Hauiti *Ngāti Hauiti Kaupapa Taiao Environmental Policy Statement* (Te Rūnanga o Ngāti Hauiti, Rangitikei, 1996).

the practical reality that active protection of Māori interests better takes place at local levels.

VII CONCLUSION

It is submitted that conceptualising local government as the Crown is inappropriate and only a short term issue of definition which obscures the notion that Treaty obligations fall upon bodies exercising powers of Kāwanatanga. More important to Treaty jurisprudence is the development of relations between Māori and local government, and greater control and power over resources for Māori. The ad hoc and piecemeal development of local government Treaty responsibilities to date, coupled with the extent of local government powers, demand action from the Crown and Māori. It is submitted that action means a Treaty-driven legislative agenda focussed on requiring local government authorities to comply with the Treaty in all their activities. This agenda is part of a wider constitutional agenda required to address state-Māori relations in the next millenia. Any devolution of powers of Kāwanatanga to local government does not absolve the Crown of its Treaty responsibilities to Māori. However, it gives the Crown a monitoring responsibility in the development of local government-Māori relations.

Central government and local government need to consider sharing power with Māori, instead of hoping that Māori entitlements and demands will be satisfied with policies that effectively mainstream Māori into Pākehā society. Anything less than an increase in power for Māori would signal yet another failure in respecting the Treaty and the rights enunciated by the Draft Declaration.

