

THE TREATY CHALLENGE:
LOCAL GOVERNMENT AND MAORI

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A Scoping Report :: 2002 :: Janine Hayward

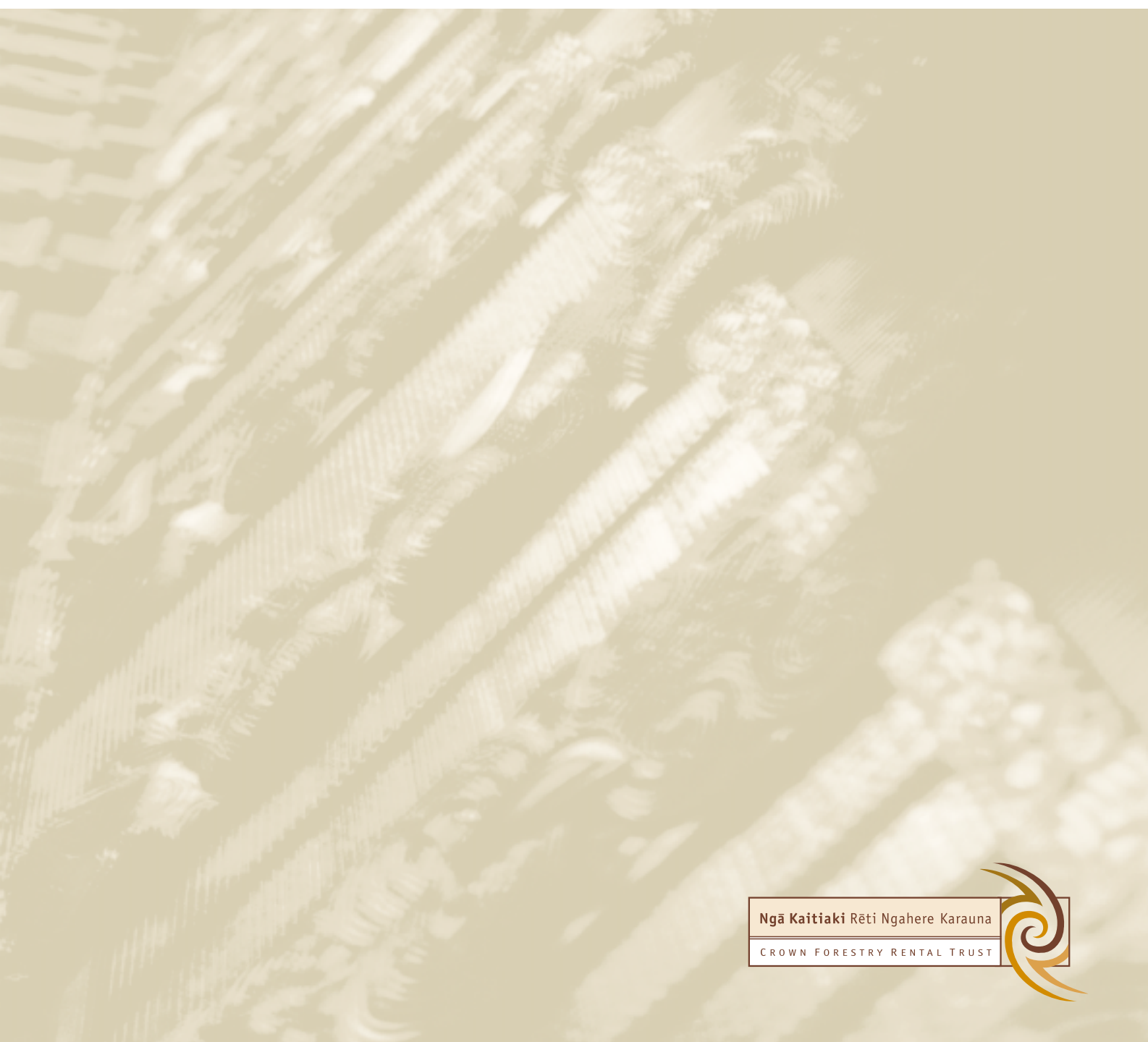


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Preface

Local government and Maori have a fascinating, challenging and at times frustrating, relationship. This scoping report discusses specific matters relating to Maori and local government and makes recommendations for further research. The report is in three sections:

- 1 the constitutional relationship between Maori and local government
- 2 Maori representation in local government
- 3 Maori, local government and environmental management.

Conclusions and recommendations are provided at the end of each section, and overall conclusions are given at the end of the report, including recommendations for a full report on Maori and local government. The sections of the report are problematic in the sense that the issues are so intimately related that overlap is unavoidable, and is in fact necessary if the issues are to be understood. The sections are useful, however, in terms of organising the information and making recommendations. The report is largely contemporary in focus, although some historical events are raised to give context to the discussion. Every effort has been made to balance theoretical discussion of abstract ideas such as ‘the constitution’, ‘consultation’ and ‘identity’ with examples of those ideas in practice.

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Part 1: Maori, Local Government, and the Treaty of Waitangi

1.1 Introduction

The relationship between local government and Maori under the Treaty of Waitangi is an important matter of considerable debate. This debate turns on one question: does local government have obligations to Maori under the Treaty of Waitangi? Two schools of thought have emerged over the last decade. The Waitangi Tribunal, and other commentators, has stated that, in devolving its ‘kawanatanga’ to local government, the Crown also conferred Treaty obligations, which must be upheld. The letter of the law, however, takes a more conservative approach. Until recent reforms, the Local Government Act has been completely silent on the Treaty of Waitangi, while other legislation (such as the Resource Management Act) makes vague provisions for local authorities to recognise Maori needs and take the Treaty into account under certain circumstances only. Between these two divergent views, local government and Maori have struggled to come to terms with their relationship.

The purpose of part one of this report is to investigate the broad issues surrounding the relationship between Maori, local government and the Crown under the Treaty of Waitangi. The first section considers the early beginnings of the relationship between Maori and the Crown, making the observation that the Crown Treaty partner evolved after 1840 in ways not agreed to by the Maori Treaty partner. One aspect of this evolution was the creation of provincial and then local government, which caused tension and distress for Maori. Section two addresses the reform of local government in the late 1980s, again illustrating that these reforms constituted further evolution of the Treaty partner as the Crown devolved authority to local government, which was not agreed to by Maori. The Moutoa Gardens dispute clearly demonstrates the implications of local government reform in terms of the relationship between Maori, local and central government under the Treaty. Finally, Section three addresses the current review of the Local Government Act, and considers options for local government and Maori relations under the Treaty.

1.2 Local government, central government and Maori: early beginnings

The Treaty of Waitangi, 1840, identified ‘the Queen’ as the Treaty partner¹ and was presented to Maori in a manner, which emphasised the role of Queen Victoria, the newly crowned monarch. Maori would have understood from the letter of the Treaty that the British Queen was a central, active figure in British politics. In fact, the actual ‘law making and unmaking powers’, which were to shape the colony’s development, rested with a group of elected representatives in Britain.² Following the signing of the Treaty, the reality of the situation slowly revealed itself to Maori as ‘kawanatanga’ was incrementally vested in developing settler government. This occurred in three stages. The first stage was direct British rule in Aotearoa through British representatives from 1840 to 1852. Second, from 1852, partly representative settler government was established which was still accountable to British authority. Until 1856, Maori policy was still considered an ‘imperial matter’ outside the competence of the colonial legislature, and the governor continued to decide Maori policies according to ministerial advice from British representatives. After 1856, however, ‘responsible’ settler government was established which was independent from British influence and, after 1863, settler government was accountable to voters in New Zealand on all matters including Maori affairs.

In retrospect, what is remarkable about this transition of kawanatanga from the Queen to the settler government is the acceptance today that the Queen’s obligations to Maori under the Treaty were also devolved. As contentious as Treaty issues currently are, it would stretch credibility to argue that the only Treaty partner with obligations to Maori is the Queen because the New Zealand government did not sign the Treaty. However, the devolution of kawanatanga did not end at the central government level, although many argue that the devolution of Treaty obligations did. As provincial and local government were established, these new units of government took on greater authority (particularly in recent decades). The question is whether these local levels of government also inherited Treaty obligations, as settler government had inherited these from the original Treaty partner. Or, is there an arbitrary point at which kawatanga continues to flow down, but the concomitant Treaty obligations to Maori do not?

¹ I have discussed this further at: J Hayward, ‘In Search of a Treaty Partner: Who or what is “the Crown”’, PhD thesis, University of Victoria, 1995

² L. Cox (1993) *Kotahitanga: The Search for Maori Political Unity* Oxford University Press, Auckland, p 4

As settler government developed, so to did the legislative framework to support it. The Constitution Act 1852 established a General Assembly in New Zealand and created electoral districts for the election of members of the House. A two-tier parliament emerged with a supreme legislature and a series of six subordinate provincial councils. In 1853, elections were held for the provincial councils and, in 1854, the first national elections took place with the first New Zealand parliament formally opening on 27 May 1854. Section 71 of the Act allowed for the, '[s]etting apart of districts in which the laws, customs and usages of the Aboriginal or Maori 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'. Local authorities could thereby encourage Maori development under the Treaty. This section of the Act was, however, never implemented and the provinces were short lived; replaced by local government. Colin James describes the transition saying: 'In our politics local government is a leftover, created not from the ground up by local citizens but by fiat of the central government in 1877 when it abolished the provinces.... Ever since then central government has treated local government somewhat like a child, expected to get its chores done and not ask questions, assumed to be lacking in competence and so swaddled by controls.'³

Hirini Matunga argues that all local government legislation (since the 1852 Act) has subordinated the place of Maori in local government.⁴ Others cite examples of 'constant and frequently deliberate, violations of the Treaty' by provincial and later regional / local government, including the seizure of Maori land for public works, the granting of mining licenses on Maori land and the levying of taxes on Maori land.⁵ Recognition of Maori in local government legislation did not begin until the 1970s, when the Town and Country Planning Act 1977 required local government to recognise Maori interests and values (although the Act made no direct reference to the Treaty of Waitangi). Maori urbanisation had increased rapidly by the 1970s, which no doubt brought Maori to the attention of town planners. By 1984, local government constituted three distinct strands of regional and territorial authorities and special purpose boards with varying size, capacity and calibre between the units and between regions. Following amendments to

³ C. James (1999) 'Local body politics' *Management May*, pp 36–39

⁴ H. Matunga (1989) *Local Government: A Maori Perspective* A Report for the Maori Consultative Group on Local Government Reform, p 2

⁵ J. Kelsey (1989) 'The Treaty of Waitangi, Local Government and Resource Management Law Reform', Paper presented at the *New Zealand Institute of Planning Conference*, Waikato University, p 2

the Town and Country Planning Act in 1987, local government was further compelled to acknowledge Maori values in resource management decision making. Provision was made for Maori traditional and cultural uses, including fishing grounds (section 33 2A) though still without reference to the Treaty. In 1987, the Labour Government announced radical reform to the structure and function of local and regional government based on the principles of greater autonomy and improved accountability, intended to radically reduce the number of territorial local bodies, corporatise local government trading activities, and introduce new instruments of accountability.⁶ These reforms were to have a considerable impact on Maori, and set the scene for local government's relationship with the Treaty of Waitangi to the present day.

1.3 Maori, Local Government and the Treaty: Local Government Reform 1980s

After 1840, when the Queen's kawanatanga was devolved to settler government in New Zealand, Treaty obligations to Maori were also transferred (despite the fact that these obligations were repeatedly breached). The reform of local government in the 1980s (in the conjunction with the Resource Management Act 1991, discussed in Part Three) further devolved kawanatanga, this time from central government to local government. Since those reforms, however, it has remained a matter of some debate whether the Crown also devolved its Treaty obligations to local government.

In February 1988, a government report invited public submissions on the government's reform policies for local government. This emphasised that the reforms were '[t]aking place in the context of increased awareness of, and emphasis on the place of the Treaty of Waitangi in Government.'⁷ Despite this, it did not address the question of local Government and Maoridom until the final chapter, 'Constitutional Issues', which offered the 'vague and unsubstantial musing'⁸ that Maori had not historically enjoyed any special place in local government as tangata whenua. The report acknowledged that such a place for Maori should exist and suggestions were made for Maori representation in local

⁶ E.M. McLeay (1991) 'Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation' *Political Science* vol 43 no1, July, p 32

⁷ The Officials Co-ordinating Committee on Local Government (1988) *Reform of Local and Regional Government. Discussion Document* Department of Internal Affairs, Wellington, pp 2-3

⁸ R. Mahuta (1989) 'Reform of Local and Regional Government. A Tainui Perspective' *New Zealand Geographer* vol 44, no 1, p 84

authorities.⁹ Submissions responding to the report demonstrated little support for special consideration of Maori during the reforms.¹⁰ Local authorities expressed the general view that ‘[the Treaty] has no place in local government’.¹¹ Maori similarly expressed concern that a relationship with local government was not an appropriate expression of the Treaty partnership.¹²

The Maori Local Government Reform Consultative Group (MCG) was established in May 1988 to ensure that Maori issues would be considered during the reforms. Some members of the group expressed concern about the relationship between Maori and local government with regard to the Crown’s responsibilities under the Treaty. The minutes of one meeting record the comment that ‘all the functions undertaken by local authorities ... impinge on the rights of the Maori people under the Treaty of Waitangi.’¹³ Another member said, ‘the Treaty of Waitangi must be honoured and ... there needs to be commitment from the Crown and from local government, by way of statutory provisions and direction, as you can’t rely on goodwill alone.’¹⁴ In keeping with this sentiment, the MCG recommended to government that the principles of the Treaty of Waitangi should be incorporated into amended local government legislation.

Hirini Matunga wrote an independent report for the MCG which emphasised the essential principle that, ‘[t]he Crown can’t divest itself of Treaty obligations or confer an inconsistent jurisdiction on others. The Crown should provide for its treaty promises when vesting responsibilities in local authorities.’¹⁵ As Matunga explained, ‘simply stated [the principle means that] local and regional government need clear statutory

⁹ The Officials Co-ordinating Committee on Local Government (1988) *Reform of Local and Regional Government. Discussion Document* Department of Internal Affairs, Wellington, pp 59–60

¹⁰ G. Bush (1990) ‘The Historic Reorganisation of Local Government’, in M. Holland and J. Boston (eds) *The Fourth Labour Government. Politics and Policy in New Zealand* (2 ed) p 239

¹¹ The Bridgeport Group (1988) *Synopsis of Submissions on Reform of Local and Regional Government* Report to The Officials Committee on Local Government, Department of Internal Affairs, Wellington, p 43

¹² The Bridgeport Group (1988) *Synopsis of Submissions on Reform of Local and Regional Government* Report to The Officials Committee on Local Government, Department of Internal Affairs, Wellington, p 45

¹³ Maori Local Government Reform Consultative Group, ‘Minutes of the Second Meeting’, State Insurance Building, Wellington, 9 June 1988, p 4

¹⁴ Maori Local Government Reform Consultative Group, ‘Minutes of the Second Meeting’, State Insurance Building, Wellington, 9 June 1988, p 4

¹⁵ H. Matunga (1989) *Local Government: A Maori Perspective* A Report for the Maori Consultative Group on Local Government Reform, Wellington, p 6

guidelines outlining their treaty obligations, and how these obligations are to be met when making decisions about land and resources.¹⁶ He emphasised:

While there may be moral, and certainly cultural imperatives which compel local government to recognise the significance of the Treaty, there is currently no legislative imperative. Some local authorities have attempted to address their obligations under the treaty but usually failed. Most have left the issue for central government to deal with.¹⁷

The Local Government Amendment (No.8) Bill responded in part to Maori concerns. It proposed the establishment of Maori Advisory Committees (MACs) to facilitate consultation and discussion between tangata whenua and regional councils/territorial authorities. According to Elizabeth McLeay, these proposals were ‘very much addenda to the extensive changes made to the local government system by the Labour government’. The Bill was not passed before Labour was voted out of office in 1990, and therefore its provisions were never implemented.¹⁸ The submissions received on the Bill, however, indicated the general view that the Treaty was not relevant to local government because it was a contract between Maori and the Crown.¹⁹ Submissions from Maori demonstrated a resistance to local government as a Treaty partner. Some argued that involving local government would dilute the Crown’s role and obligations under the Treaty. The possibility of Maori consulting with multiple Treaty partners in local government was rejected as a device to distance the Crown from its obligations to Maori.²⁰ Others insisted that local government legislation include the proviso that regional councils and territorial authorities may not act in a manner that is inconsistent

¹⁶ H. Matunga (1989) *Local Government: A Maori Perspective* A Report for the Maori Consultative Group on Local Government Reform, Wellington p 9

¹⁷ H. Matunga (1989) *Local Government: A Maori Perspective* A Report for the Maori Consultative Group on Local Government Reform, Wellington p 13

¹⁸ E. McLeay (1991) ‘Two Steps Forward, Two Steps Back: Maori Devolution, Maori Advisory Committees and Maori Representation’ *Political Science* vol 43, no 1, Victoria University Press, Wellington, July, p 32

¹⁹ The Bridgeport Group (1990) *Reform of Local and Regional Government: Synopsis of Submissions on Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement* Report to the Officials Co-ordinating Committee on Local Government, pp 16&61; also see submissions 57, 20 and 14.

²⁰ The Bridgeport Group (1990) *Reform of Local and Regional Government: Synopsis of Submissions on Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement* Report to the Officials Co-ordinating Committee on Local Government p. 17.

with the Treaty of Waitangi. ‘To provide less is to delegate Crown responsibility without Crown treaty obligations.’²¹

The speed of local government reform was breathtaking, raising serious questions about the extent to which public (particularly Maori) submissions and concerns influenced the process and outcomes. The Local Government Amendment (No.3) Act was passed before the submissions on the first discussion document had closed.²² The Act directed the Local Government Commission to prepare final schemes for regional and local units of government in one year. Further measures implementing local government restructuring were passed in the Local Government (No.2) Act 1989.²³ By November 1989 the new system was in full operation and new units of local government were established. Despite the measures taken to canvass Maori opinion during the reform, the Local Government (No.2) Act was heavily criticised for its ‘indefensible silence on treaty matters.’²⁴ The Act made no provision for Maori involvement in the consultation process, nor did it say how Maori could be incorporated into the process of decision making at the local government level. Perhaps of greatest concern, in retrospect, is the loss of an excellent opportunity for the government to reconcile the increasing tension regarding the role of local government under the Treaty. The lapsed Local Government (No 8) Bill was further evidence of the Crown’s failure to protect Maori Treaty interests. In short, the local government reforms did nothing to answer the question of local government obligations to Maori under the Treaty. This is despite the fact that the kawanatanga the Crown devolved to local authorities would have direct impact on Maori (particularly after the passing of the Resource Management Act 1991). The consequences of the lack of certainty created by the reforms were most evident during events at Moutoa Gardens in 1995.

On 1 March 1995, Wanganui River Maori began a peaceful celebration of their ‘Wanganuitanga’ (sovereignty as the indigenous people of Wanganui) at Moutoa

²¹ *Bill for the Establishment of Maori Advisory Committees in Local Government and Explanatory Statement*, Submission No. 48, p. 2; Iwi Transition Agency (1990) *Report of the Iwi Transition Agency Working Group on the Runanga Iwi Bill, Local Government Amendment (No.8) Bill and the Resource Management Bill*, Iwi Transition Agency

²² G. Bush (1990) ‘The Historic Reorganisation of Local Government’, in M. Holland and J. Boston (eds) *The Fourth Labour Government. Politics and Policy in New Zealand* (2 ed) p 239

²³ T. Burhs and R. Bartlett (1993) *Environmental Policy in New Zealand: The Politics of Clean and Green?* Oxford University Press, Auckland, p 120

²⁴ Sir Graham Latimer, Chair of the New Zealand Maori Council, quoted in J. Kelsey (1990) *A Question Of Honour? Labour and the Treaty 1984 - 1989* Allen and Unwin, Wellington, p 181

Gardens. Maori had used the site in recent times for official occasions, as it was the traditional site of a Maori marae. Local Maori, who were occupying the gardens, named the gardens 'Pakaitore Marae'. Within the next two days it became clear that the occupation was a protest by Maori, who claimed the land belonged to them and not the Wanganui District Council. By 9 March, as the issue continued unresolved, pressure within the Wanganui community had begun to mount. On 17 March, the council presented a five-point plan²⁵ to Maori and called for an immediate response from the protesters. When no response appeared forthcoming, the council ordered an eviction notice, allowing the protesters seven days to vacate the gardens. Maori insisted they were moved from their land in 1845 by the army who used it as a parade ground. They claimed that in 1848, the Crown purchased 82,000 acres of land from local Maori at about threepence per acre. The gardens themselves were said to be part of a fishing village that had not been intended for sale.²⁶ The council, on the other hand, argued that the land had been legally purchased from Maori and was now the property of the Wanganui District Council, to be enjoyed by the whole community.

The question repeatedly raised during the 'reoccupation' of the gardens was; who is responsible for resolving the protest, the council or central government? Wanganui Mayor, Chas Poynter, initially showed a determination to resolve the dispute through iwi/council dialogue 'in a manner which could be a model for the rest of New Zealand.'²⁷ Soon, however, the first signs of the Mayor's doubts about the council's involvement in the affair were beginning to show. He advised that the council had confirmed its ownership of the gardens and that 'if there is no compliance by Maori occupying Moutoa Gardens the situation becomes a Government issue.'²⁸ He stated that the council had no mandate to negotiate Maori sovereignty over the land, saying '[t]hat must be negotiated between the partners of the Treaty of Waitangi, iwi and the Crown.'²⁹ He later emphasised this position, saying:

²⁵ 'Maori protesters demand "supreme authority" over land' (17 March 1995) *The Dominion*. The five-point plan proposed the establishment of a trust to manage the Gardens, to research the historical evidence of the Gardens' ownership, identify other contentious land in Wanganui, re-site monuments offensive to Maori, oversee the sharing of the Gardens by Maori and Pakeha, and resolve the issue in the Wanganui community.

²⁶ 'The taking of Moutoa' (18 March 1995) *The Dominion*

²⁷ 'Moutoa Gardens occupied by river Maori' (1 March 1995) *Wanganui Chronicle*

²⁸ 'City's people have Moutoa ownership, Council told' (13 March 1995) *Wanganui Chronicle*

²⁹ 'Meter ticks on Maori occupiers' (23 March 1995) New Zealand Press Association

This is getting into a much wider area now and it's something that I believe the Government won't be able to back away from. ... [T]hey've got people in the Justice Department ... that are quite conversant with all this sort of problem and maybe they could help with some sort of personnel in that area. ... The Prime Minister's Department said that they're keeping a close watching brief on the matter and that's the sort of response I would have expected.³⁰

As events unfolded it became clear that the relationship between Maori, local government and the Crown (particularly after the local government reforms) was complex and uncertain. Local governments, such as the Wanganui District Council, now had the authority to make decisions affecting Maori. But these councils were uncertain about their responsibilities to Maori under the Treaty, and certainly aware of councils' limitations in addressing and resolving Treaty issues. In the case of Moutoa Gardens, Maori asserted that their sovereignty was the basis for negotiations with the Council. The Mayor was emphatic that the issue could not be dealt with by local authorities, and was the responsibility of central government.³¹ He urged central government to resolve the issue. The Alliance Leader, Sandra Lee, called for National Prime Minister, Jim Bolger, to provide informed leadership. Lee said:

[i]t is not good enough for the Prime Minister to wash his hands of this issue and turn his back on both the local city council and the local Maori. ... The Crown has the responsibility in this matter as it was the original benefactor of this public reserve, now vested in the local council.³²

Lee also pointed out that because local government was not the ministers, the Waitangi Tribunal or the Crown, it could not provide solutions required to resolve the issue satisfactorily. She explained that the Government had the legislative provisions to find an easy and immediate solution to the problem.³³ The government maintained that it would not get involved in what it insisted was a local issue.³⁴ However, the Prime Minister conceded on 20 March, '[c]learly if there were to be a rash of sit-ins the government

³⁰ Mayor Chas Poynter (14 March 1995) *Morning Report* National Radio

³¹ 'Maoris rally to fight eviction from gardens' (23 March 1995) *The Dominion*

³² 'Protester study peace plan' (16 March 1995) *The Dominion*

³³ Sandra Lee, (24 March 1995) *Morning Report*, National Radio. According to Lee, the Reserves Act and Te Ture Whenua Act would allow joint management of the land. See: 'Protester study peace plan' (16 March 1995) *The Dominion*

³⁴ 'PM shies off direct involvement' (14 March 1995) *Wanganui Chronicle*

would have a different response.’³⁵ But when pressed for further comment, he stated, ‘[w]e [the Government] just simply are not involved. It is not our land, it is not our park.’³⁶

At 5pm on Thursday 30 March, the deadline for eviction passed without incident or confrontation between the police and the protesters. The District Council advised the following morning that it would take the protesters’ claim to the High Court to resolve the question of land ownership. The government was silent on the matter, maintaining a policy of non-involvement. Finally, following seventy-seven days of occupation, the High Court ruled (despite the absence of the protesters for the hearing) that the land was council land, gifted previously by the Crown, and should be vacated by the protesters. Having been gifted by the Crown, the land should be regarded as private land. The Judge considered it ‘a matter of regret’ that as such, it would be excluded from the recommendatory function of the Waitangi Tribunal (which is not allowed to consider claims brought against private land, including council land).³⁷ Following the High Court’s ruling, and once again faced with the prospect of eviction, the protesters left the gardens before the police were required to intervene.

In June 1999, the protest flared again when local Maori advised Council that they were planning to stay overnight at Pakaitore to discuss and remember important events throughout history. Following the general election later that year, Prime Minister, Helen Clark, announced that central government would play an active role in resolving the issue, which Mayor Chas Poynter welcomed. Within ten months, a tripartite agreement on Moutoa Gardens between the Crown, the council and local Maori was negotiated. The three parties agreed in principle to cancel the vesting of Moutoa Gardens in the Council and instead re-vest it in the Crown, maintaining its historic reserve status and introducing joint management between the three groups.³⁸

³⁵ Press Announcement (20 March 1995) New Zealand Press Association

³⁶ ‘Pressure on as activists head for Moutoa Gardens’ (24 March 1995) New Zealand Press Association

³⁷ Judgment of Heron J, High Court of New Zealand, Wanganui Registry, 11 & 12 May, 1995. The Tribunal’s jurisdiction regarding private land was amended in 1993.

³⁸ D. Laurence (20 December 2000) ‘Settlement expected to strengthen community’ *Wanganui Chronicle*; D. Laurence (19 December 2000) ‘Settlement over Moutoa Gardens’ *Wanganui Chronicle*

1.4 Local government review 2001 and options for the future

Confusion within local government about its obligations (or lack of) under the Treaty continued in the late 1990s and into the new decade. Newspapers constantly reported of tension within local government regarding Treaty initiatives. In Wellington, councillors reportedly objected to bicultural references in Wellington City Council documents saying it was silly to ‘put Treaty obligations into a charter when the council did not know what those obligations were.’ Other councillors accused their colleagues of attempting to ‘delete the council’s Treaty obligations to Maori by pretending they did not know what their obligations were.’³⁹ ‘The Government must clarify the obligations the Treaty of Waitangi places on local government’ said a Wellington City councilor, as the council struggled to define its Treaty obligations. The council was finally reported to have agreed that it has obligations under the Treaty. Exactly what those obligations are, to whom, and how they will be manifested were also items on the agenda – ‘but the committee members couldn’t get past stage one’.⁴⁰ The chairman of Wellington City Council’s Maori subcommittee was reported to have fears that some councillors may be incapable of understanding what the council’s relationship with Maori should be. He said ‘there are a significant number of councillors who have no understanding of what a relationship with Maori should be.’⁴¹ Manukau City Council demonstrated similar confusion and concern when it considered hiring Geoffrey Palmer (constitutional lawyer) to clarify the council’s relationship with Maori. It was reported that the council had had a ‘tumultuous time in dealing with Maori issues.’⁴² Other practitioners appear less sympathetic. According to a Christchurch City councillor, ‘local bodies did not sign onto the Treaty, so they should not be bound by what it said’. ‘[T]he only real alternative is to take the Treaty of Waitangi and make a piece of legislation that supercedes it and makes everyone equal in the eyes of the law.’⁴³

Summarising this general mood, Professor Ngatata Love has said that local bodies have ‘long laboured under uncertainty as to the nature of their Treaty role. And Maori people did not distinguish between governance by central government and by local

³⁹ ‘Council argues over Treaty’ (16 December 1999) *The Evening Post*

⁴⁰ R. Berry (14 February 2000) ‘Treaty duties stump meeting’ *The Evening Post*

⁴¹ R. Berry (13 December 1999) ‘Fears over Maori relationship’ *The Evening Post*

⁴² ‘Council reviews stand on Treaty’ (20 April 2000) *Howick & Pakuranga Times*

⁴³ S. Oldham (25 August 2001) ‘Booth rejects treaty link’ *The Press*

government.’⁴⁴ Dr Love noted that there is a widespread perception within local government that it is, somehow, independent of the Crown and therefore not obliged to adhere to the Treaty principles that bind the Crown. He stressed that the need to clarify this is central to the local government-tangata whenua relationship.⁴⁵ A report by the Ministry for the Environment, which surveyed Maori and local government, explained that council personnel do not believe they constitute the Crown with regard to their relationship with iwi, but iwi often do not distinguish between central and local government especially for resource management purposes. Some council personnel sought clarity on the constitutional relationship between local government and iwi under the Treaty of Waitangi. A number of personnel reported that internally there had been no formal debate about the Treaty and local government’s obligations under it, but that considerable informal debate had taken place.⁴⁶

The Labour-Alliance Government came to power in 1999 amidst this growing uncertainty on a platform addressing Maori affairs (amongst other things), including Maori relations with, and access to, local government. In early 2000, the forum ‘Central and Local Government Working Together’ was intended to forge new relationship and clarify the roles and functions of each level of government. Prime Minister Helen Clark and other ministers met in Wellington on 7 March 2000 for the first forum meeting with Local Government New Zealand (LGNZ), which represents the 86 authorities in New Zealand. LGNZ’s President said this was an important ‘first’ as local government had sought formal dialogue with central government for years. Six key issues were raised at the forum – one of which was the Treaty of Waitangi.⁴⁷

Labour-Alliance wasted no time in announcing a review of the Local Government Act 1974, which was seen as an unnecessarily long and over-prescriptive piece of legislation. The review was one component of three concurrent reviews of local government law (the other two being a review of the local electoral system, enacted in May 2001, and a review of the local authority funding powers). The government announced that one purpose of the review was to clarify local government’s relationship with Maori under the Treaty of Waitangi. The consultation document outlining the review contained detailed proposals

⁴⁴ ‘Written constitution receives support’ (22 March 1999) *The Dominion*

⁴⁵ ‘Need to alleviate Maori suspicions’ (September 1996) *New Zealand Local Government* pp 8–9

⁴⁶ Ministry for the Environment (2000) *Iwi and local government interaction under the Resource Management Act 1991: Examples of good practice.*, Wellington, p 5

⁴⁷ ‘Update of rating laws promised’ (8 March 2000) *Otago Daily Times*

on all aspects of the review except local government's relationship with Maori and the Treaty, stating instead a desire to consult with Maori before making any decisions. This in itself attracted criticism:

One startling omission from the discussion document is any analysis or proposals on what local government's relationship to the Treaty should be. One can argue that the Treaty is the Crown's responsibility and that local government is not the Crown. But if the Crown devolves some of its powers and governance to local government, but does not devolve any responsibility for the Treaty partnership, how does that partnership get exercised in relation to the functions the Crown no longer performs itself?⁴⁸

The Department of Internal Affairs took the review proposals to the public in a series of meetings throughout the country; in many cases this included separate consultation with Maori. The Local Government Bill was introduced to the House just before Christmas 2001. The final reading of the Bill is expected in October 2002. Parts 2, 5, and 13 of the Bill are particularly relevant for Maori. Part 2 of the Bill considers the relationship of local authorities to the Treaty of Waitangi, and 'provides that the principles of the Treaty of Waitangi are relevant to local authorities', which includes improving the effectiveness of local government for Maori (including accountability of local government to Maori) and enhancing Maori participation. In Part 5, the principles of decision-making include the provision that 'a local authority must, in making significant decisions related to land and bodies of water, take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.' It also requires that a local authority must establish, maintain, and foster processes encouraging Maori participation in decision-making processes. Part 13 of the Bill amends the Local Electoral Act 2001, in providing local government with the power to establish Maori wards and Maori constituencies.

Does the Bill in its current form clarify the role of local government under the Treaty of Waitangi? The Federation of Maori Authorities Inc. (FOMA) was one of many groups to make a submission on the Bill. FOMA stated that the Bill is:

⁴⁸ J. Fitzsimons (20 July 2001) 'Which way Local Government? Have your say' *Hauraki Herald*

fatally flawed.... There is no onus on Local Authorities to protect Maori interests in accordance with the principles of the Treaty of Waitangi. Under the new regime any such protection will continue to remain dependent on local government goodwill. Furthermore, ‘the Local Government Bill in its current state is insufficient to meet Crown Treaty obligations to actively protect Maori interests, in this instance at the level of local government.’⁴⁹

A review of relevant parts of the Bill would seem to confirm these concerns. Part 2 of the Bill says that the Treaty principles are ‘relevant to local authorities’. This is far from an express provision that local government has Treaty obligations. It does not (as other legislation has) state that local authorities are required to ‘take into account’, ‘have regard to’, or ‘uphold’ Treaty principles. The fact that Treaty principles are ‘relevant to local government’ gives very little guidance to local authorities about appropriate ways to act to comply with this provision. In fact, local authorities may argue that while they recognise the Treaty principles are relevant, they chose not to apply them in their decision-making. As FOMA noted: ‘The stated policy objective of the Bill, in seeking a clarification of local government’s relationship with the Treaty of Waitangi, appears to merely perpetuate the status quo and falls short of an effective commitment to advance future prospects for Maori development within a local and regional context.’⁵⁰

Furthermore, the Bill provides no guidance for local government on what those principles are. This is not unusual – the Resource Management Act, Environment Act, Conservation Act, and other legislation, which refers to the Treaty principles, do not state what these principles are either. But experience has shown that much time, energy and money is spent attempting to establish what these principles are. No doubt the revised Local Government Bill will also be subject to debates about the nature of Treaty principles that have plagued the RMA and other legislation. Perhaps the most (and only) positive thing to be said about Part 2 of the Bill is the fact that, for the first time, the Treaty of Waitangi is mentioned at all in local government legislation. Having said that, Part 2 is far from the sort of express provision required to determine once and for local government’s obligations to Maori under the Treaty.

⁴⁹ Federation of Maori Authorities Inc (28 February 2002) ‘Submission to the Local Government and Environment Select Committee on the Local Government Bill, Wellington

⁵⁰ Federation of Maori Authorities Inc (28 February 2002) ‘Submission to the Local Government and Environment Select Committee on the Local Government Bill, Wellington, p 4

Part 5 of the Bill is a more express provision. It requires at section 62 that:

62. The principles of decision-making

The principles of decision-making are as follows:

- (c) a local authority must, in making significant decisions related to land and bodies of water, recognise and respect the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

There is some concern, however, that this provision overlaps unnecessarily with the Resource Management Act 1991, and that this will cause confusion for both local government and Maori. For example, the Christchurch City Council's submission on the Bill, said that the Council 'strongly supports the introduction of this Bill' subject to concerns centered on the level of decision-making referred to in Part 5. The Council pointed out that this provision should only apply to decisions of the full Council, not the 'multitude of decisions made by a local authority on an every day basis'. It suggested that the provision should be re-titled '*Principles of Significant Decision-Making*'.⁵¹ The Council raised concerns also about the potential overlap between decision-making under the Local Government Act and decisions made that might pertain to Section 8 of the RMA. It urged that:

this issue must be put beyond doubt in this Bill and that the Bill should clearly state that the principles [of decision-making] ... do not apply to decisions made under other statutes and that the principles should only apply to decisions made under the Local Government Act. If this does not occur, then there will be uncertainty created for local authorities, and their other statutory decisions could well be

⁵¹ Christchurch City Council (2001) 'Submission to the Local Government and Environment Committee on the Local Government Bill', pp 9–10

subject to legal challenge because it would be argued that they had not complied with [the provision] ... in its entirety.⁵²

The Local Government Bill in its current form is one of several options that were available to the Labour-Alliance Government in seeking to bring clarity and certainty to local government and Maori relations under the Treaty. Other options might equally have been considered, and could still be considered in the future. In a report written for Local Government New Zealand in 1998, Chen and Palmer presented a range of options. These were as follows:

- + For local government to ‘do nothing’ otherwise known as the minimalist approach
- + To educate the staff and elected representatives of local government regarding the Treaty
- + To incorporate reference to the Treaty in the Local Government Act
- + To review local government law to integrate Treaty considerations, and coordinate the Local Government Act with the Resource Management Act
- + To incorporate Maori participation as a specific Treaty obligation in the Local Government Act
- + To include the Treaty in an entrenched constitution

The first two of these options represent a minimalist approach, which would allow local government to continue to marginalize Treaty obligations, should it wish to do so. The current Local Government Bill would appear to make it more difficult for any council to maintain the minimalist approach, although the Bill falls short of providing the express provision to ensure local government was compelled to uphold Treaty obligations. The third option, to incorporate reference to the Treaty in the Local Government Act, is essentially what has occurred with the Local Government Bill. As Chen and Palmer noted, the scope of Treaty obligations is not necessarily clarified in this option – while it is clear that *some* kind of obligation exists, it becomes a costly and time-consuming process inevitably involving the courts to find out the nature and extent of that obligation. The Local Government Bill in its current form may attract litigation and, ironically, increase uncertainty about local government’s Treaty obligations.

⁵² Christchurch City Council (2001) ‘Submission to the Local Government and Environment Committee on the Local Government Bill’, p 11

The next possibility, to review local government law in order to co-ordinate it with the Resource Management Act, was also an issue raised by the Christchurch City Council in its submission on the Bill (as discussed above). In particular, the Local Government Bill is not clear how the obligation on local authority decision-makers to consult with Maori relates to similar obligations local governments have under Section 8 of the Resource Management Act 1991. The tremendous amount of litigation and confusion surrounding section 8 of the RMA (as discussed in Part 3 of this report) is problematic enough for Maori and local government without a further layer of confusion being added. Chen and Palmer's next option, to incorporate Maori participation outcomes in the Local Government Act has, in part, been met by Part 5 of the Bill under which a local authority must establish, maintain, and foster processes encouraging Maori participation in decision-making processes. It remains to be seen how effectively this express provision assists Maori participation. Chen and Palmer's final option, to include the Treaty in an entrenched constitution, could answer the question of local government's Treaty obligations, and is Palmer's personal preference of all options available.⁵³ It is a far more expansive option than the current review and Bill, and is controversial and hotly debated.

1.5 Conclusions

After 1840, the kawanatanga Maori ceded to the Queen was transferred to settler government, and with it (as is now widely accepted) Treaty obligations were also transferred. In the late 1980s, there began a reform process that further transferred or devolved Crown kawanatanga, this time to local government. This transfer occurred through the local government reforms (as discussed here) and the Resource Management Act 1991 (as discussed in Part Three of this report). This time, however, it is a matter of some contention as to whether Treaty obligations also flowed down to local government. The Waitangi Tribunal has argued that the Crown did confer its Treaty obligations to local government. The Manukau Report (1985) and the Ngawha Geothermal Resources Report (1993) are cited as the leading statements regarding local government obligations under the Treaty. The Manukau report said 'It follows that the Crown cannot divest itself of its Treaty obligations or confer any inconsistent jurisdiction on others.'⁵⁴ The Ngawha Geothermal Report similarly stated,

⁵³ 'Written constitution receives support' (22 March 1999) *The Dominion*

⁵⁴ Waitangi Tribunal (1985) *Report of the Waitangi Tribunal on the Manukau Claim* Department of Justice, Wellington

The Crown obligation under article 2 to protect Maori rangatira is a continuing one. It cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local and regional authorities. If the Crown chooses to so delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled.⁵⁵

Despite the Tribunal's consistent approach, the letter of the law does not endorse this view. Prior to the current Local Government Bill, local government legislation has said nothing about local government's obligations to Maori under the Treaty. With such polarised views co-existing, it is little wonder that uncertainty has developed about the place of local government under the Treaty of Waitangi. Despite the Labour-Alliance Government's attempts to alleviate this tension, the current Local Government Bill may not do enough to clarify local government's position and bring certainty to all parties. Other options are available, which might be considered in the future, should the current reforms be found lacking.

1.6 Recommendations for further research

This section of the scoping report has focussed on local government reform since the 1980s. It asks whether the Crown actively protected Maori interests when it devolved authority to local government, and whether Maori were adequately consulted and their concerns heeded. Further research is required to ask these questions in the historical context, particularly during the establishment of provincial and local government. Some research has already been done on the historic relationship between Maori and local government, particularly in regard to rates.⁵⁶ This, and other similar research, gives important context to contemporary constitutional issues discussed here. A broader picture is required, however, of the historical relationship between local government, central government and Maori under the Treaty of Waitangi. Such research could be guided by the question: did the Crown actively protect Maori interests in establishing provincial and (later) local government?

⁵⁵ Waitangi Tribunal (1993) *Ngawha Geothermal Resource Report 1993* Brooker and Friend Ltd, Wellington, pp.153–154

⁵⁶ In particular, see: M. La Rooij, "That most difficult and thorny question": the rating of Maori land in Tauranga County' Report commissioned by the Waitangi Tribunal for Wai 215-Tauranga Moana District Inquiry, April 2002; and T. Bennion, 'Maori and rating law' Waitangi Tribunal Rangahaua Whanui Series, July 1997.

Part 2: Maori representation and Local Government

2.1 Introduction

Some aspects of Maori representation in local government have recently enjoyed unprecedented debate and reform and will no doubt dominate local politics in the near future. This discussion of Maori representation is in two sections. The first assesses the recent legislative provisions relating to Maori representation in local government: the Local Electoral Act 2001, the Local Government Bill, and the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001. This legislation has created a multifaceted approach to Maori representation in local government. The second half of the discussion addresses other matters of representation relating to environmental decision-making (discussed in Part Three of this report). It also considers controversy and confusion over who represents Maori interests to local government. Do tangata whenua have a privileged position over taura here and urban Maori?

Questions of ‘representation’ are complex. The identity and role of the ‘representative’ has attracted a great deal of attention from theorists throughout the years. What is the role of a representative; to act as a mouthpiece for the constituency’s concerns? Or, to act in the best interests of the constituency according to the representative’s judgement (for which they were elected?) In what ways does a representative ‘represent’? Must they physically resemble the members of their constituency in order to truly represent them? Can men represent women? Can Pakeha represent Maori? Will a representative necessarily share the views of constituents just because they share the same gender, or ethnicity? Arguing a case for Maori representation (at any level) means defending a series of contentious assumptions. First, it must be accepted that Maori have distinct interests that are best understood and protected by Maori representatives. It must also be accepted that Maori representatives in general seats cannot effectively represent Maori interests. Finally, a Maori constituency must be identified to vote for Maori representatives, and it is assumed that Maori representatives, once in office, will act in the best interests of their Maori constituency. Each of these assumptions has been vigorously debated recently in relation Maori representation in local government, and these debates are outlined below.

2.2 Maori representation in local government: debate and reform

The issue of Maori representation in local government has gained currency in local and national debates in recent years. In 2000, an iwi forum in New Plymouth recommended to the District Council that Maori need their own elected representatives to give them an accountable voice. The hui noted that the current Maori councillor on the District Council was the first to be elected.⁵⁷ At the same time, campaigns for special Maori seats on the Taupo District Council were also debated. A Taupo Maori resident publicly supported Maori representation on council, saying: ‘Consultation is all very well. At the end of the day I think it’s important that Maori should have the right to be part of the final decisions that take place concerning them. ... [A]t present, Maori don’t bother standing for council because they don’t think they can win.’⁵⁸ In Wellington, where only one Maori candidate had ever been elected to the Wellington City Council (in the 1960s) proposals were made that local iwi should be represented at council committees, but not have voting rights.⁵⁹

The Labour-Alliance Government, elected to office in November 1999, began to investigate options for Maori representation at the local level early in its term. Minister of Local Government, Sandra Lee, proposed the introduction of Single Transferable Vote (STV) for local government elections (to take effect in 2004). Lee noted, however, that ‘the question of separate Maori constituencies is of particular sensitivity. I am only too well aware that community attitudes to this issue are likely to be somewhat divided.’⁶⁰ The Government went on to advance local Maori representation on three levels with the Local Electoral Act 2001, the Local Government Bill, and the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001.

The Local Electoral Act was passed in 2001. It gives local authorities the option at the 2004 local body elections to retain the current voting system, or move to the Single Transferable Vote (STV) system. STV is anticipated to be more effective in electing

⁵⁷ J. Gifford (14 June 2000) ‘Maori call for council reps’ *Daily News*

⁵⁸ L. McMichael (4 August 2000) ‘Special Maori council seats her aim...’ *Taupo Times*

⁵⁹ R. Berry (15 March 2000) ‘Time for another Maori on council, says candidate’ *The Evening Post*

⁶⁰ S. Lee, Minister of Local Government (May 2000) ‘Speech to Labour Local Government Sector Council’, Parliament Buildings, Wellington

Maori, as well as other minority groups.⁶¹ Under the current First Past the Post system of voting, a majority of voters can cast multiple votes to elect all the candidates; the outcome does not reflect the opinion of the whole community, only the preference of the majority (which may be only a slight majority). Under STV, however, voters list their candidates according to preference. Imagine the voter being able to physically stand next to their preferred candidate, along with others who voted for them. If one candidate receives an overwhelming majority of the votes (so has many voters standing with them), some voters might see their vote is not required, and move to stand with the candidate they next prefer. On the other hand, a voter who finds they are standing next to a candidate with very few other voters might feel their vote is being wasted and move to stand beside their next preferred candidate to register their vote. This analogy explains (rather crudely) how STV works. The system allows (when votes are counted) for the transfer of votes amongst a ranking of candidates, thereby allowing excess votes (for very popular candidates) and wasted votes (for very unpopular candidates) to be transferred to the next most preferred candidate. Under these circumstances the impact of the majority is minimised and the outcome better reflects the voting preferences of the entire community. Therefore, although candidates do not actually ‘see’ the vote counting (as this analogy suggests) STV ensures that their vote is not wasted.

STV has received support because of its potential in improving the representation of many minority groups. As one commentator notes:

Certainly we need more Maori representation. But Maori are often not voting their own into power If Maori don't vote, you can't blame the system for that. The single transferable vote option ... would go further to address the representation imbalance than special ethnic seats. Merit, not race, should decide who represents voters.⁶²

For that very reason, however, STV also has shortcomings for Maori. It does not guarantee Maori representation, nor does it support the ‘right’ to representation many Maori feel they are entitled to under the Treaty of Waitangi. Some STV advocates, however, argue that Maori would be better served under this system of representation

⁶¹ For further discussion, see J. Boston, S. Levine, E. McLeay, and N. Roberts (1996) *New Zealand Under MMP: A New Politics?* Auckland University Press: Bridget Williams Books, Auckland, pp 20–21, 36–37

⁶² R. MacBrayne (19 February 2001) ‘Maori seats quota runs risk of ‘them and us’, *New Zealand Herald*

than any other. Rod Donald (Green Party co-leader and MP) made his preference for STV clear during debates about the seats for Maori in the Bay of Plenty (as discussed below). He said:

If [the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001] does get extended across the whole country it will definitely short-change Maori, and for those members who were not in the Chamber the last time I presented this information, I will briefly summarise what the Parliamentary Library statistician calculated for me. If we simply apply the formula in this bill to every regional council in the whole country, there would be a minimum of 12, and a maximum of 14, Maori seats on regional councils, from a total of 184 seats. I invite any member on the Government side of the Chamber to tell me why he or she thinks that is a fair shake for Maori, because clearly it is not. It means that Maori would end up with about half the number of seats that their proportion of the population should entitle them to. That is why this bill is not a way forward for advancing Maori representation in this country. The way forward is the single transferable vote system, and that is what I would urge members on all sides of the Chamber to adopt.⁶³

In addition to STV, a second initiative by the Labour Alliance government that affects Maori representation is the Local Government Bill (also discussed in Part One of this report). This Bill allows territorial authorities and regional councils to (amongst other things) establish Maori wards or constituencies, for electoral purposes (Section 19Z). This provision has caused concern for Maori and non-Maori alike. One commentator noted soon after the Bill's first reading that it: 'has a number of Maori deeply disappointed. ... The reforms ... have done little to satisfy Maori concern that they should have fair representation and an appropriate voice in local body affairs.' He voiced particular concern that the Bill does not explain the basis for setting up Maori seats. Would hapu, iwi or other boundaries be used? Under the Bill, it is the responsibility of councils to determine these matters, but questions arise as to whether they have the expertise; the few Maori in local government may get more work as a result of the provision.⁶⁴ Some councils have already expressed an interest in the Maori ward system,

⁶³ Rod Donald (29 August 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, (in Committee) *Hansard*

⁶⁴ Mana News (22 January 2002) *National Radio*

while others seem less enthusiastic. A Te Atiawa representative in the Hutt Valley said he would argue that local authorities in his region should have seats for Maori too. Mayoral candidates in Hutt City were reportedly not impressed with the idea.⁶⁵ Environment Canterbury chairman and Christchurch Mayor, on the other hand, both publicly rejected the possibility that the Bay of Plenty model would work in Christchurch, saying that the move would be separatist, patronising to Maori, and unnecessary. This is despite the fact that only one Maori has ever been elected to the city council.⁶⁶

The Bay of Plenty legislation referred to above was the third initiative advanced under the Labour-Alliance Government in the form of the Bay of Plenty Regional Council (Maori Constituency Empowering) Act 2001. Twenty-eight percent of the Environment Bay of Plenty (EBOP) constituency identifies as Maori, and Maori are significant property owners and ratepayers in the region. At the 1995 local body elections, no Maori were elected to EBOP. A working party comprising both Maori and non-Maori was set up by council to investigate the establishment of a Maori constituency to address this problem. The working party recommended to council that a Maori constituency for EBOP should be established to ensure Maori representation on council. The working party proposed that, in addition to the general roll, three separate Maori electoral districts should be established with eligible voters enrolled on a Maori electoral roll (similar to the national Maori electorates.)

The Bay of Plenty Regional Council appointed Judge Peter Trapski as an independent commissioner to conduct hearings and report on the proposal to establish a Maori constituency for the Bay of Plenty Regional Council. Seven hundred and ten written submissions were received in favour of the proposal and 252 against.⁶⁷ His report considered all the written and oral submissions and recommended that the council continue to promote Maori representation. The council drafted a Bill, proposing Maori constituencies for EPOB, which was introduced to the House in September 2000, and finally passed in October 2001. It was subject to intense scrutiny and debate in the House and in the media. Key opponents to the Bill, and their objections to it, were soon apparent. Generally, opposition to the Bill called it undemocratic, patronizing to Maori,

⁶⁵ 'Potential for tension seen in idea of Maori seats guaranteed' (21 July 1998) *Hutt News*

⁶⁶ S. Oldham (19 June 2001) 'Leaders deny ChCh Maori are out in the cold at council' *The Press*

⁶⁷ 'Maori divided over idea of separate council roll' (15 July 1998) *The New Zealand Herald*. For general discussion of submissions favouring the reform, see 'EnvBOP to hold public meeting to establish Maori constituency' (29 May 1998) *Whakatane Beacon*

and divisive for New Zealand. Mita Ririnui, the member most closely associated with the Bill, summarised the opposition to the Bill thus:

This bill has been subject to the most rigorous and vicious attacks from the most senior and long-serving members of Parliament. It has been described as racist, as separatist, and as a form of apartheid by members of the Opposition, despite Judge Peter Trapski's finding that the bill does conform to the delivery of the democratic process in Aotearoa and that it does conform to our constitutional principles. The Justice and Electoral Committee also received advice from the Ministry of Justice that the bill is not in breach of the Human Rights Act.⁶⁸

MP Ken Shirley, of the ACT Party, was one member who strongly opposed the Bill. He said 'The only outcome from this is polarization and social disharmony'.⁶⁹ Shirley proposed a Private Members Bill, which aimed to preclude separate rolls based on race for local body elections.⁷⁰ At the third reading of the Bill, Shirley said:

What we have here is a proposal based on a dual electoral roll and on ethnicity. That is wrong in principle, and is the crux of the concern that ACT and I have with this legislation. It is a mistake to divide any population into separate electoral rolls based on ethnicity. It is not a recipe for increasing social harmony; it is a recipe for increasing polarisation and marginalisation. Of course it is becoming increasingly more difficult to draw the line on that ethnic divide, and the reality is that with the passage of each generation the line becomes more masked. Essentially what this bill is asking for is almost patronising to Maori in a reverse way. It is saying: "Here's a quota system that has to be reinforced by legislation.

In proposing alternatives, Shirley drew the following analogy:

The women's movement from the 1970s onwards was determined to have greater women participation in local government. They did, and full credit to them. We

⁶⁸ M. Ririnui (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*

⁶⁹ 'Maori seats to Parliament' (14 August 1998) *Whakatane Beacon*

⁷⁰ K. Melville (15 June 1999) 'MP acts to block Maori seats' *Whakatane Beacon*

changed society's attitudes. How did we do that? It was through active groups like the Women's Electoral Lobby and through strong female candidates who started standing.... Today, the gender divide is no longer present in local government. I applaud that. I think local government is much stronger for having done away with that gender divide. But was that achieved by having separate rolls for women and men? Of course it was not. To have separate rolls for men and women would have been foolish.⁷¹

Winston Peters, of New Zealand First, also opposed the Bill. He espoused that 'election should be based on merit, not race'.⁷² At the third reading of the Bill, Peters said:

There is no future for Maoridom in this handout mentality, whereby some people in the Labour Party and the Alliance sit there and say that they are going to pigeonhole two seats for Maori – as though we cannot compete, as though we cannot compete against those members, as though we cannot beat them! That is a second-class “Cinderella-isation” of Maoridom. It is making a bunch of Cinderellas. Those members are saying that we cannot compete against them. They should not kid themselves. It ain't true! But, more important, if Maori wanted to get together now, and organise their candidates now, and campaign for them now, they would have massive representation throughout the whole Bay of Plenty.

He ended with the comment, 'as South Africa is winding down from its apartheid regime, the Labour Party and the Alliance are constructing one in this country. That is regrettable.'⁷³

Richard Worth, of the National party also spoke in opposition to the Bill at its third reading. He reiterated the concerns of other members opposing the Bill, in saying:

The other issue I will talk about for a moment ... is that it is right to say there is a race-based element in this legislation. I believe the bill is inconsistent with a key

⁷¹ K. Shirley (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*

⁷² 'Maori divided over idea of separate council roll' (15 July 1998) *The New Zealand Herald*

⁷³ W. Peters (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*, vol 58

concept that now dominates New Zealand life and thinking. I tell Mr Samuels that I shall put it this way: one nation, many peoples, shared values. I do not believe that Maori really need Parliament to provide statutory props for their advancement. I believe it is demeaning to Maori interests to give them aspects of privilege. They do not seek that. I suggest that they seek to be treated on the basis of one nation, many peoples, shared values. What I do not like about this legislation is that it seems to suggest, in a way that I find really offensive, that Maori people are helpless and hopeless. We know that that is simply not so. Worse still, this type of legislation raises an expectation of preferment and privilege. New Zealand has moved on from that. Other speakers on the Government side of the House have spoken very eloquently about issues of past injustice and future direction. I feel hugely uneasy that we have allowed ourselves to be drawn into a consideration in this legislation that gives – and it is contrary to the Human Rights Act, I would argue – a privilege or a benefit to a particular section of the community that does not need it. That really goes back to the first comment I made: this particular regional council has strong, effective, and competent Maori representation.

There are a lot of opportunities within the framework of our Government in this country for Maori people to contribute, and they do make an invaluable contribution. I suggest that there should be every incentive for them to make a continuing, compelling contribution, just as there should be for Korean people, for Taiwanese people, and for people from the People's Republic of China to do the same. We are all one nation. I think we need to guard that position very jealously.⁷⁴

Finally, Warren Kyd, also of National, added his opposition to the Bill at its third reading. He said, in relation to the comments of a previous speaker who supported the Bill:

I listened to the previous speaker with some fascination. I was pleased to hear him say that he favoured democracy, and that democracy was about numbers, because that is what we have in a democracy: the greater number of the people prevail. But democracy also says that we have one law for all people, and all people are equal

⁷⁴ R. Worth (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*, vol 58

before the law. We find it hard to understand how there can be laws for separate representation in a democracy.

...

[W]e are one nation of people; we have many things in common. We have different languages, different cultures in many ways, and different religions, perhaps. In many things we are different, but when it comes to the vote, to the government of this country, to matters of war and peace, we have to be one people. Countries that are not become divided and divisive.⁷⁵

In reflecting on the objections these Members raised to the Bay of Plenty legislation, it is important to remember (as discussed above) that the current Local Government Bill allows all councils to introduce a similar ward system in order to allow for Maori representation of Maori constituencies. The debate played out in the House over the EBOP reforms may, therefore, be played out at the local level in many regions in the future. That each different region may undergo a similar process of debate seems an unnecessary duplication of time and effort. A national debate is required to thrash out the issues surrounding Maori representation at any level, and to establish a case for Maori representation, if such a case can be successfully made. If a case is made, then local authorities and local Maori can negotiate how the model of representation would best work in their own community. To ask every community to decide for itself whether Maori have a right to representation on council seems an unnecessary burden on already strained community relations. This is itself may be problematic, although some advocate support for this approach. At the third reading of Bay of Plenty Bill, Mita Ririnui advocated support for this approach, saying:

The aim of this bill is to allow the Bay of Plenty Regional Council to establish a Maori constituency for the election of councillors. Such an undertaking would guarantee Maori within the Bay of Plenty a voice on this important decision-making body. This is a local solution to a local problem – a bill tailored specifically to meet the needs of the local community, something that local government should do.

⁷⁵ W. Kyd (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*, vol 58

In absence of a national debate about local Maori representation, however, it is useful to consider responses to the objections raised in order to prepare local communities for the issues they may face in the future. Members supporting the Bay of Plenty Bill (which included Maori MPs from ACT and National) responded to some of the issues their colleagues raised. For example, Georgina Te Heuheu (National) said:

Two matters, in my view, go to the heart of this bill, both of which I feel are designed to test our resolve to ensure that democracy, a word that we are so ready to fling around this House, works well in our country. The first is the endeavours to reconcile majoritarian democracy with minority rights. Both Britain and Spain, which run very vigorous democracies, have had to deal with this issue in respect of minority constituencies, and are doing well. In seeking to reconcile such interests it is no answer, in my view, for the majority to knock down a proposal because of some perceived damage to democracy. After all, that becomes tyranny of the majority over the minority. That might be the case in other countries, but it is not the case in New Zealand, and it ought never to be.⁷⁶

Parekura Horomia (Labour) also responded to criticisms of the Bill. He said:

This bill gives effect to the Treaty of Waitangi in providing equitable representation and partnership in decision making. Three quarters of the submissions to Judge Trapski were in favour of the bill. That is quite an interesting majority. This Government is aware that one size does not fit all. Those who are afraid of separate development are trapped in an old, colonial world view.

...

No one should compare this bill, which offers Maori in the Bay of Plenty an opportunity to participate and contribute proactively in local government, with what the indigenous people of South Africa suffered under apartheid. Members of other parties have said that. It is shameless and disturbing that in this modern world and modern day people still want to throw around and pontificate the old colonized notions of what is good for Maori and what is bad for Maori. We do know what is good for us. We want a better life for our people. We want to accelerate our

⁷⁶ G. Te Heuheu (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*, vol 58

development on all fronts. We know that the local authority's rules and legislation impinge on the daily lives of our people. These are different times.⁷⁷

Nandor Tanczos (Green Party) also addressed the issue of comparisons with apartheid in South Africa, amongst other things, saying:

One of the things that I take deep exception to is the comparison of this bill to apartheid. ... I find it difficult to see how this bill can be compared, as it has been many times, to apartheid. I was in South Africa in January, visiting my family. I met people there who had been imprisoned for many years ... people who had been exiled for many years ... and people whose close family and friends had been tortured, murdered, and intimidated by State agencies for their principled stand for representation. I ask how that is even remotely similar to what this bill is doing. What semblance at all does that have to what this bill is doing? In fact, this bill aims to ensure representation. This bill denies no one representation based on his or her ethnicity. It is aimed at ensuring representation. If anything, it is the exact opposite of apartheid.

...

The other comment that has been made in this House is that this bill is patronising to Maori. ... The interesting contradiction is that this bill was requested by local Maori. Maori in the Bay of Plenty have been campaigning for many years for this bill. ... Will we not give people what they want because it would be patronising to do so? I find that a strange kind of logic.⁷⁸

It certainly seems illogical to compare the Bay of Plenty initiative with apartheid in South Africa. Apartheid was forced upon Black South Africans and left them disenfranchised, while the Bay of Plenty initiative came from Maori and seeks to empower them; this is only the beginning of fundamental differences between the two schemes. It is mischievous at best for these comparisons with apartheid to continue to be bandied about by people who should (unless it is their intention to be recklessly provocative) have a more sophisticated understanding of these issues. Other criticisms

⁷⁷ P. Horomia (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard*, vol 58

⁷⁸ N. Tanczos (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard* vol 58

raised by objectors are equally flawed. The proposition that the Bay of Plenty initiative is patronising to Maori is, in itself, a patronising attempt to derail a Maori initiative that threatens the status quo. Similarly deficient is the argument that women achieved an increase in local government representation without special seats – Maori can too. This mistakes women as a ‘minority’ when, as 50 percent of the population, women have an advantage over Maori who are a true minority in terms of numbers. This is only one of many reasons that representation issues for Maori and for women are not easily compared – again the comments by opposition to the Bill reveal a lack of understanding of this.

In attempting to defend the Bay of Plenty initiative, proponents tended to rely on two justifications. The first was the number of Maori who live in the Bay of Plenty. It was emphasised that despite making up 28 percent of the population, Maori in the region had failed to gain any representation. Although this argument works well in this, and many other regions where the Maori population is high, it does not work well for regions where the Maori population is low. Do Maori in such regions also have the right to representation? The debate over the Bay of Plenty did not make this clear; it will be a matter for each region to decide for itself.

The second justification often raised in the Bay of Plenty debate was the Maori seats in Parliament. For example, Dover Samuels, Labour MP for Te Tai Tokerau (a Maori seat) said in support of the Bay of Plenty Bill, ‘The constitutional right of Maori to elect Maori members in specific Maori electorates came from this Parliament. Our people out there in the constituencies, in the regional and district councils, ask for nothing more or less than the right to be able to exercise their democratic right in exactly the same way that we do in this House.’⁷⁹ As I have argued elsewhere, this may not be a well conceived strategy.⁸⁰ The four Maori seats were first introduced in 1867 as a quid pro quo between representation in the North Island, and burgeoning numbers of settlers in the South Island during the gold rush period. Debate at the time saw little constitutional significance in creating the seats; indeed they were seen as a temporary measure. As Alan Ward has observed, ‘[i]n this way, an important feature of New Zealand’s constitution, remaining to this day, stumbled into being.’⁸¹ Debate about the seats since 1867 has been dominated

⁷⁹ D. Samuels (3 October 2001) Bay of Plenty Regional Council (Maori Constituency Empowering) Bill, Third reading, *Hansard* vol 58

⁸⁰ J. Hayward (2002) ‘Getting beyond ‘consultation’: the Treaty challenge for local government’, in J. Drage (ed) *Empowering Communities? Representation and Participation in New Zealand’s Local Government*, Victoria University Press, Wellington

⁸¹ A. Ward (1995) *A Show Of Justice* Auckland University Press, Auckland, (reprinted edition) 1995, p 209

by political pragmatism. After 1935, the Labour party cemented a relationship with Maori to make the four Maori seats ‘safe seats’ for Labour. The National Party, when in government, chose not to abolish the seats and hoped that Maori might outgrow them, or that National might win them. The seats endured despite constant debate and without any constitutional principles to support them. Again, practicality rather than principle led to the retention of the seats: there was simply no political advantage in abolishing them.⁸² Under these circumstances, it would seem wise for advocates of Maori representation at the local level to take the opportunity to build their own case for Maori representation. More is said about this in the conclusion to this part of the report.

To summarise this discussion, the Labour-Alliance Government has introduced a multi-faceted approach to Maori representation in local government. Under the Local Electoral Act 2001, councils have the option to move to the STV system of voting for the 2004 local body elections. This system is believed to best serve Maori (and other minorities) in ensuring their representation. The Government also supported the Bay of Plenty initiative, which created Maori wards (and therefore a general and Maori rolls, like the national model) in the Environmental May of Plenty region. Unlike STV, this initiative guarantees Maori representation (as long as Maori stand in the seats available). Finally, with the Local Government Bill, the Government proposes to allow any council to introduce a ward system without needing special legislation (like the Bay of Plenty Act) to do so. Although this initiative seems to advance Maori representation in leaps and bounds, the concern is that the onus is now on local communities to debate and resolve issues surrounding Maori representation which have not adequately been resolved at the national/constitutional level.

2.3 Who represents Maori / tangata whenua?

The issues discussed above, regarding Maori representation on local authorities, are not the only level at which Maori representation is being debated in relation to local government. Two other matters are discussed here. First, who has the right to ‘represent’ the interests of local Maori to local government? Second, aside from direct representation in local government, in what other ways can Maori views be ‘represented’ in local decision-making?

⁸² M. Sorrenson (1986) ‘A History of Maori Representation in Parliament’ *Report of The Royal Commission on the Electoral System: Towards a Better Democracy* Wellington, pp B29–B58

Part Three of this report discusses the implications of the Resource Management Act 1991 (RMA) for Maori and local government. One issue which has dominated the relationship between Maori and local government under the RMA, which is discussed here, is who represents Maori, or more precisely tangata whenua (as the Act stipulates) for the purposes of the Act? This debate is multifaceted. Are hapu or iwi the more appropriate level of representation for Maori?⁸³ Although the Act specifies ‘tangata whenua’, who will represent the interests of taura here (Maori from other regions) and urban Maori in local decision-making? Should the views of these groups be represented at all?

To date, tangata whenua have most often been given priority over other local Maori by local authorities. In some regions, many tangata whenua groups compete for council attention. But the rights of ‘taura here’ Maori are of increasing significance to local politics.⁸⁴ ‘Taura here’ are Maori who live in one region and claim tangata whenua status elsewhere (for example, Tainui Maori living in Canterbury, or Ngai Tahu living in Auckland). The Resource Management Act specifies that local authorities should consult with ‘tangata whenua’. Section 6(e) identifies the relationship of Maori with their *ancestral* lands, which clearly implies a tangata whenua status. In 1992, the Commissioner for the Environment stated that ‘taura here’ should not be accorded equal status with tangata whenua groups’ as ‘they have the same rights as the general public locally, and can only claim rights to participate in tino rangatiratanga in their own tribal area elsewhere.’⁸⁵ In 1995, the following opinion was published in *New Zealand Local Government*:

Waikato hapu or iwi are tangata whenua in the local authority areas which cover their areas of traditional association. Maori whose tribal association are with other areas, but who currently live in the Waikato, are not tangata whenua in Waikato. Instead they are taura here (visitors), who are tangata whenua in other areas. Any special relationship Waikato local authorities build with taura here or urban Maori

⁸³For example, see: P. McDonald (September 1991) ‘Consultation with Iwi’, in *Planning Quarterly* pp 8-10

⁸⁴ I have also discussed these issues at: J. Hayward (1999) ‘Local Government and Maori: Talking Treaty?’, *Political Science*, vol 50, no 2, pp 182-194

⁸⁵ Parliamentary Commission for the Environment (1992) *Proposed Guidelines for Local Authority Consultation with Tangata Whenua* Wellington, p 22

are above and beyond those built with tangata whenua, and come into the same category as relationships with any other special interest group.⁸⁶

Despite the general opinion that tangata whenua take priority over other local Maori, some local councils, however, have taken a different approach to. The Hutt City Council, for example, went beyond the requirements of the RMA and developed formal consultative relationships with taura here in the region.⁸⁷ Recently, there have been reports of increasing agitation amongst taura here who feel disenfranchised under the RMA provisions, and seek dialogue with their local authority. In 1999 it was reported that a confederation of iwi and hapu was formed in the Wellington region to give a voice to non-tangata whenua. According to reports, it was not intended to compete with other local iwi, and hoped to be recognised by local tangata whenua and seek representation on local government.⁸⁸ Apparently the local council had reached agreement on a commitment to local iwi, but was less clear on the commitment to taura here.⁸⁹ Soon after it was reported that, ‘A decision to exclude Maori who don’t belong to local iwi from representation on Wellington City Council committees has shocked members of the council’s Maori subcommittee. They say the decision by the council’s strategy committee breaches its Treaty of Waitangi obligations and will have to be reconsidered.’ The strategy subcommittee had reportedly rejected a recommendation from the Maori subcommittee that applications from the 70 percent of the Maori population considered ‘taura here’ or Maori who don’t belong to the local iwi. A Maori spokesperson said ‘The council had a Treaty obligation to ensure all Maori had a say’.⁹⁰ These increasing demands from taura here force councils to consider moving beyond their statutory obligations and build relationships with all Maori not just tangata whenua.

Closely related to the issue of taura here are questions regarding the status of ‘urban Maori’; those Maori who live in an urban environment, and do not maintain regular links with their genealogical tribes elsewhere. Some urban Maori are said to not know who their tribes are, so are not considered tangata whenua in any region and are potentially disenfranchised as a result. Once again, according to the RMA only tangata whenua need to be consulted, but this begs the questions of the rights of ‘disenfranchised’ urban

⁸⁶ S. Weston (July 1995) ‘Meeting our obligations’ *New Zealand Local Government* p 10

⁸⁷ J. Hayward (1999) ‘Local Government and Maori: Talking Treaty?’ *Political Science* vol 50, no 2

⁸⁸ R. Berry (9 December 1999) ‘Maori group wants regional voice’ *The Evening Post*

⁸⁹ R. Berry (14 February 2000) ‘Treaty duties stump meeting’ *The Evening Post*

⁹⁰ R. Berry (1 March 2000) ‘Decision irks council Maori subcommittee’ *The Evening Post*

Maori. Does a local authority have obligations to all Maori in their region under the Treaty of Watiangi (regardless of the RMA provisions)? Do Maori who are not tangata whenua have a right to have their views represented in the decision-making process? The profile of urban Maori groups was boosted in recent years when the Waitangi Tribunal's report found in favour of the Urban Maori service provider, the Waipareira Trust. It said: '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'.⁹¹ The Tribunal recommended, therefore, that agencies consult not only with tangata whenua, but also with Urban Maori authorities. Waitakere City Council (Auckland) liaises with Te Whanau O Waipareira Trust, which is a pan-tribal organisation operating in the area of social services. According to the Mayor, the council recognises that the trust speaks for a whole generation of Maori who have lost touch with their tribal roots. This creates some conflict with iwi groups, but the Mayor believes that a council must represent all people, and that open debate should be welcomed.⁹²

In addition to questions of who has the right to 'represent' the interests of local Maori in decision-making, trends have been developing in exploring ways to represent Maori aside from election to local office, as discussed above. Some councils have been exploring the possibility of appointing Maori representatives to council standing committees (which are usually only made up of elected councillors). For example, the New Plymouth District Council has 'controversially' investigated ways to represent Maori until law changes allow direct Maori representation. One interim measure being considered is the appointment of Maori representatives to council standing committees (which would be the first time non-councillors had been appointed to its standing committees.)⁹³ New Plymouth District Council voted 9 to 7 to recommend Maori representatives in council business. The recommendation by the iwi liaison subcommittee is that each hapu be invited to send a representative to workshops on the annual plan process. Those opposing the recommendation voiced concerns about 'democracy' saying that 'no sector should have special treatment.' Concern was also voiced about the role iwi would be allowed to play in the workshops, as unelected participants.⁹⁴

⁹¹ Waitangi Tribunal (1998) *Te Whanau o Waipareira Report* Brookers, Wellington, p 235

⁹² Quoted in K. Ombler (February 1998) 'Iwi issues becoming easier to unravel' *New Zealand Local Government* p 14

⁹³ A. Paltridge (2 September 2000) 'NPDC to look at improved iwi links' *Daily News*

⁹⁴ G. Brown (31 October 2000) 'Move to overturn role of Maori reps defeated' *Daily News*

Other initiatives also boost ways for Maori to represent Maori interests. Maori in the Hutt Valley have the right to instigate meetings with councillors on matters of concern to them, and have as many representatives ‘at the table’ as councillors. They have voting rights and rights to 15 minutes to address councillors before meetings.⁹⁵ The Napier-Hastings Joint Issues Group was reported to have proposed to strengthen the Maori advisory committees by establishing a regional Maori local government forum.⁹⁶ The appointment of Maori to community boards was raised in a discussion paper released in 1999 by the Society of the Local Government Managers. The paper made suggestions about the appropriateness of separate Maori representation and commented on the difficulties, which would be involved with separate roles and votes for Maori. It also discussed the appointment of Maori representatives by the tangata whenua.⁹⁷

Although Maori representation on council currently dominates debate, there are initiatives, as this discussion demonstrates, to provide Maori with access to decision-making in addition to election to council. These initiatives will be limited, however, by debates about which Maori views should be represented to council, tangata whenua, taura here, or/and urban Maori?

2.4 Conclusion

The recent legislative provisions relating to Maori representation, and questions about who has the right to represent local Maori views, demonstrate the complexity and uncertainty surrounding Maori representation. Do Maori have the right to guaranteed representation at any level? If so, which Maori have that right? All Maori, or only some Maori? Under the Local Government Bill, many local communities will debate these issues amongst themselves in the near future. These communities should be encouraged to engage in constructive debate; to avoid the arguments of ‘apartheid’ and ‘divisiveness’ seen recently in the House of Representatives and consider instead the real issue underpinning Maori representation – the Treaty of Waitangi. Can a case be built for Maori representation (at any level) according to the principles of the Treaty?

⁹⁵ ‘Potential for tension seen in idea of Maori seats guaranteed’ (21 July 1998) *Hutt News*

⁹⁶ ‘Don’t forget the rest of us’ (2 June 1999) *Hawkes Bay Today*

⁹⁷ M. Crean (8 October 1999) ‘Drop treaty, urges councillor’ *The Press*

Since the 1990s, the Waitangi Tribunal has asserted an overarching ‘principle of exchange’, which says ‘The Treaty is essentially a contract or reciprocal arrangement between two parties, the Crown and Maori’.⁹⁸ Within this overarching theme, the Tribunal has explored two integral concepts, which are particularly relevant to Maori representation: the Crown obligation actively to protect Maori Treaty rights, and the right of tribal self-regulation. These ideas were explored in *Ngai Tahu Sea Fisheries Report 1992*, *Ngawha Geothermal Resources Report*, *Maori Development Corporation Report*, 1993, *Te Whanganui-a-Orotu Report*, *The Turangi Township Report*, *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and *Rekohu*. In each case, the Tribunal explored to some degree the notion that the essential exchange between Maori and the Crown (under articles one and two of the Treaty) requires the Crown actively to protect Maori, which includes the Maori right to tribal self-regulation. Issues of rangatiratanga also arose from these discussions, particularly in the Fisheries Commission Report, which noted: ‘There is a rangatiratanga that attaches in our view to whanau, hapu, iwi and the Maori as a people. ... [T]he level at which Maori should be dealt with, must depend upon the case.’⁹⁹ The *Te Whanau o Waipareira Report*, 1998, discussed the principle of rangatiratanga, saying:

Rangatiratanga, in this context [of the report], is that which is sourced to the reciprocal duties and responsibilities between leaders and their associated Maori community. It is a relationship fundamental to Maori culture and identity and describes a leadership acting not out of self-interest but in a caring and nurturing way with the people close at heart, fully accountable to them and enjoying their support. ... But [rangatiratanga] is attached to a Maori community and is not restricted to a tribe. The principle of rangatiratanga appears to be simply that Maori should control their own tikanga and taonga, including their social and political organization, and, to the extent practicable and reasonable, fix their own policy and manage their own programmes.’¹⁰⁰

⁹⁸ Waitangi Tribunal (1992) *Te Roroa Report*, p 30

⁹⁹ Waitangi Tribunal (1992) *Appointments to the Treaty of Waitangi Fisheries Commission Report*, Department of Justice, Wellington, p 10

¹⁰⁰ Waitangi Tribunal (1998) *Te Whanau o Waipareira Report*, GP Publications, Wellington, pxxv

The Wananga Capital Establishment Report (1999) said ‘Rangatiratanga involves, at the very least, a concept of Maori self-management’.¹⁰¹ Finally, *The Pakakohi and Tangahoe Settlement Claims Report*, 2000, said:

the relevant principles are those guaranteeing rangatiratanga to Maori groups in the conduct of their own affairs, requiring the Crown and Maori to act reasonably and in with absolute good faith towards one another, and enjoining the creation of fresh grievances from the treatment of historical claims.¹⁰²

In looking for a way to build a persuasive case for Maori representation, local communities can turn to these Treaty principles as a starting point. These principles emphasise the notion of exchange in articles one and two and the duties to both parties which flow from that. The fact that Maori have been excluded from effective representation at the national level (until recently, arguably) and at the local level is in direct tension with the principles of active protection and rangatiratanga. If a case can be made for Maori representation, using these principles, many other issues still remain. What form of Maori representation is best; the Bay of Plenty model or STV? Where does rangatiratanga reside amongst those Maori seeking representation? Do taura here and urban Maori have rangatiratanga, which should be represented, at the local level, or can only tangata whenua make that claim? Most importantly, the principles discussed above describe the obligations of the Crown; whether local government is also obliged to uphold these principles is, of course, another matter.

2.5 Recommendations for future research

Further research on aspects of Maori representation at the local and national level is urgently required. Issues surrounding Maori representation will become more high profile in the near future, particularly as local councils grapple with the possibility of Maori seats (assuming that the current provisions in the Local Government Bill are passed into law). The research required might include the following considerations.

1. It is important to clarify the constitutional purpose of the Maori seats in Parliament when they were established and as they were debated throughout

¹⁰¹ Waitangi Tribunal (1999) *The Wananga Capital Establishment Report*, GP Publications, Wellington, p xi

¹⁰² Waitangi Tribunal (2000) *The Pakakohi and Tangahoe Settlement Claims Report*, Legislation Direct, Wellington, p 55

the years. In particular, research is needed into the position Maori asserted at the time the seats were established. Were they considered a ‘Treaty right’? Or was there some other constitutional justification for their establishment?

2. The Treaty principles, which support the case for Maori representation at any level, must be considered. Is guaranteed representation a Treaty right?
3. Statistics on current and past Maori representation at the local level are needed. This should include not only the number of Maori elected to council, but also the voting statistics for Maori region by region, if possible.
4. Under the Local Government Bill, councils will have the opportunity to introduce Maori seats/wards. If this provision becomes law, case studies of those councils that choose to take up this provision would be invaluable. These would demonstrate the debates the community and council entered into, and the model of representation chosen for that particular community.

Part 3: Maori, Local Government, and Environmental Management

3.1 Introduction

The Resource Management Act 1991 (RMA) is the primary mechanism by which Maori can currently participate in local environmental decision-making. It has, however, proved an extremely problematic and challenging mechanism for both local government and Maori. The RMA requires all decision-makers to take into account the principles of the Treaty of Waitangi, but it does not provide any detail regarding the nature of those principles, or the relationship between local government and Maori under the Treaty. The context of constitutional uncertainty surrounding local government's Treaty responsibilities (as discussed in Part One) has meant that goodwill on the part of local government and Maori is the essential ingredient to a productive relationship under the RMA. In the ten years since the RMA was passed, some very good progress has been made in some regions, although astonishingly little has been achieved in other districts.

The Treaty of Waitangi was New Zealand's first environmental management regime. With bold simplicity it envisaged a relationship between the Crown and Maori which distinguished law making authority (*kawanatanga*) from resource ownership (*tino rangatiratanga*). History has shown that the tension between law-making and resource ownership was quickly tipped in favour of Crown *kawanatanga*, enabling the Crown to also claim ownership of resources through the law.¹⁰³ Through the settlement of Treaty grievances, this historic injustice is slowly being addressed. In the meantime, however, the environmental management dynamic has changed again. Through the local government reforms (discussed in Part One) and the Resource Management Act 1991, local government has been (often unwillingly) drawn into the Crown/Maori dynamic. The uncertain status of local government under the Treaty, and the uncertain parameters of the 'consultation' provisions of the RMA has made progress difficult for relations between Maori and local government.

In failing to respond to Maori, local government runs the risk of becoming irrelevant to Maori. Historically, the relationship between Maori and local government has been tense

¹⁰³ For further discussion of the processes and mechanisms by which this occurred, see: A. Ward (1997) *The National Overview*, vol 1, Report Commissioned by the Waitangi Tribunal, Wellington

and constitutionally problematic. For its part, local government has generally resisted being drawn into the Treaty partnership, while Maori have preferred to deal with the central government as the appropriate Treaty partner, remaining suspicious of the actions and motives of local government.¹⁰⁴ Until recently, the Local Government Act has been silent on treaty matters, which has only fuelled uncertainty in the relationship. Despite its ambivalence to the Treaty, local government has historically had a big impact on Maori. A keynote speaker at one local government conference pointed out in his address that, ‘local government over the decades has, in fact, largely ruled the life of the Maori. Consider ... where Maori can live, how they can utilise their land, in a sense their very socio-economic development has been governed to a pronounced degree by the local administration – that is, local government.’¹⁰⁵

This discussion focuses on how Maori can participate in environmental management at the local level (which should be read in conjunction with representation issues raised in Part Two of the report). It first reviews the resource management law reform process (1988-1991) and sets out those aspects of the Resource Management Act 1991 (RMA) of most relevance to Maori and the Treaty. It then secondly takes a closer look at section 8 of the Act – specifically the debate about whether consultation is a Treaty principle under this section of the Act. Thirdly, it reviews the progress (or lack thereof) in relations between Maori and local government under the Resource Management Act from 1991 to 2001. This draws on government reports, as well as newspaper and other articles, to show general trends and specific examples. Finally, this discussion considers two aspects of the RMA that show the greatest future potential for Maori participation in environmental management (under present circumstances). These mechanisms are section 33, which allow local bodies to transfer authority to iwi, and iwi management plans, which allow Maori to feed information into decision-making processes.

3.2 Resource management law reform and the Resource Management Act 1991

Prior to the Resource Management Act, there was very limited provision for Maori input into resource management planning and decision-making in New Zealand. Both the Town and Country Planning Act 1977 and the various Local Government Acts lacked adequate

¹⁰⁴ ‘Need to alleviate Maori suspicions’ (September, 1996) *New Zealand Local Government* p 8

¹⁰⁵ ‘Need to alleviate Maori suspicions’ (September, 1996) *New Zealand Local Government* p 8

recognition (or any recognition at all) of the Treaty of Waitangi, and failed to accommodate appropriately Maori interests.

The local government reforms, as discussed in Part One of this report, were an essential foundation for the Fourth Labour Government's Resource Management Law Reform (RMLR) from 1988 to 1991.¹⁰⁶ In August 1988, 'Directions for Change. A Discussion Paper' provided the framework for the RMLR debate.¹⁰⁷ The Treaty of Waitangi was afforded only token recognition in the discussion document, stating that the Treaty of Waitangi was of special significance to the review and acknowledging that '[t]he Crown has particular responsibilities to the Maori people under the Treaty of Waitangi.' It said that 'Maori could expect the Crown not to establish new tiers of government or resource management procedures in a way that is inconsistent with the principles of the Treaty.'¹⁰⁸ There was much optimism from Maori that they would finally be given a decisive voice in resource management. Maori sent a clear directive to those driving the reforms that the issue of resource *ownership* must be resolved before any issues of resource *management* could be addressed. This demand was made in reference to the many outstanding grievances of Maori across the country relating to the loss of land as well as water, foreshore, geothermal and mineral resources. Although the Labour Government had initially signaled that the Treaty of Waitangi was a priority in RMLR, on receiving this message from Maori, the Government returned an equally clear message; there would be no addressing issues of ownership in RMLR.

In December 1988 the Government published its proposals for resource management law reform, making no mention of its responsibilities to Maori under the Treaty of Waitangi. A number of working papers produced throughout 1988 did, however, discuss RMLR from a Treaty perspective. One paper observed that: '[m]any authorities take a different view [on the relationship between the Treaty and local government]. They feel that the whole area of the relationship of the Treaty to resource management and planning rests with central government and that local authorities should have no responsibility in this area.'¹⁰⁹

¹⁰⁶ Also see: J. Hayward (1998) 'The Treaty of Waitangi, Maori and the evolving Crown' *Political Science*, vol 49, no 2, pp 161–171

¹⁰⁷ Ministry for the Environment (1988) *Directions for Change. A Discussion Paper* Wellington

¹⁰⁸ Ministry for the Environment (1988) *Directions for Change. A Discussion Paper* Wellington p 23

¹⁰⁹ The Bridgeport Group (July 1988) *Resource Management Law Reform. Review of the Submissions of the Future Role of Local and Regional Government*, Working Paper no 3, Ministry for the Environment, Wellington, p 19

A majority of local bodies who wrote submissions on the proposed reforms, however, rejected responsibilities under the Treaty. For example the Waimate Plains District Council gave no response to questions regarding the principles of the Treaty and responded to all other questions with ‘non-applicable’ or ‘rejected’.¹¹⁰ Other authorities rejected the idea of ‘special treatment’ for Maori by councils. Taupo City Council stated, ‘[w]e see no room in local government for any different treatment between individuals and groups.’¹¹¹ Similarly, the Tuapeka County Council stated that only matters of council land control were effected by the Treaty of Waitangi and no special constitutional arrangements were necessary in local government under the Treaty because New Zealand was an equal society.¹¹² The Ashburton Borough Council stated emphatically, ‘[t]he Treaty of Waitangi issue is one of equity between the Crown and the Maori people and not an issue for resolution at the local government level.’¹¹³ Similarly, the Queenstown-Lakes District Council agreed that the Treaty of Waitangi needed to be addressed by Central Government.¹¹⁴ As later discussion shows, despite over ten years of experience since the RMA was passed, these sorts of attitudes still prevail within some quarters of local government.

In December 1989, when the Resource Management Draft Bill was introduced to the House, over 1300 written submissions from the public were received. These submissions also revealed concern about Maori/local government relations. Maori expressed concern that the Treaty was not adequately acknowledged. Te Runanga a iwi o Ngapuhi stated that the Resource Management Bill ‘limits the ability of the Runanga to have “te tino rangatiratanga” over resources claimed by Ngapuhi and it will determine the relationship the iwi will have with government at a local, regional and national level in terms of resource management planning.’¹¹⁵ Te Runanga emphasised that the most important clauses in the Bill were the ones that outlined the proposed relationship between iwi, local and regional government. They felt the wording had to be changed to make iwi management plans an integral part of district planning (see discussion below).¹¹⁶ Also,

¹¹⁰ *Reform of Local and Regional Government*, submission no 414, section 8.5

¹¹¹ *Reform of Local and Regional Government*; submission no 365, p 6

¹¹² The Bridgeport Group, *Reform of Local and Regional Government*; submission no 345, p 13

¹¹³ *Reform of Local and Regional Government*; submission no. 391, p 15

¹¹⁴ *Reform of Local and Regional Government*; submission no 406

¹¹⁵ *Resource Management Bill*, submission no 12w, p 1

¹¹⁶ *Resource Management Bill*, submission no 12w, p 4

the Department of Maori Studies at Victoria University declared, '[w]e do not support the Resource Management Bill because the Bill does not acknowledge the Treaty of Waitangi as establishing the constitutional relationship existing between the Crown and Maori of New Zealand'.¹¹⁷ In a similar vein, Te Whanau-A-Haunui argued that, '[t]he Bill transfers management powers to Local Government without adequately ensuring that the Crown's obligations under the Treaty of Waitangi are able to be fulfilled.'¹¹⁸ Te Whanau also stated, '[u]nder the Bill, many of the resource management responsibilities have been delegated to local authorities. It is arguable whether local government is an 'agent' of the Crown and therefore subject to the Treaty. However, that point is incidental to the issue of the *Crown's* responsibilities under the Treaty.'¹¹⁹ Te Whanau went on to say:

The Crown has demonstrably failed to ensure that its Treaty obligations can be met in transferring responsibilities to Local Government and therefore it has conferred an inconsistent jurisdiction in a manner which the tribunal said not to. It has done this by not giving a clear direction to Local Government as to what effect the Treaty has on their functions and by not affording Maori interests an appropriate place under the Bill.¹²⁰

The Whakatane Association for Racial Understanding similarly expressed concern that '[t]here is no obligation on local bodies to ensure the Treaty is honoured, nor on any other government personnel.'¹²¹ And the Tauranga Moana District Maori Council warned the select committee that, '[i]t would be advisable for a Treaty reference to affirm the importance of the Crown's continuing obligations to Maori. In the transfer of decision making powers to sub-national units of government, it is important that the Crown protect the Treaty interests of Maori.'¹²²

In retrospect, it is clear that the concerns outlined by Maori during the RMLR process were justified. The RMA in its final form (as discussed below), failed to address the

¹¹⁷ *Resource Management Bill*, submission no 424w

¹¹⁸ *Resource Management Bill*, submission no 426w, p 2

¹¹⁹ *Resource Management Bill*, submission no 426w, p 3

¹²⁰ *Resource Management Bill*, submission no. 426w, p 4

¹²¹ *Resource Management Bill*, submission no 752w, p 1

¹²² *Resource Management Bill*, submission no 655w, p 1

questions of resource ownership, which Maori considered most important. Furthermore, the manner in which Treaty issues were marginalised in the Act (also discussed below) was to create a framework of uncertainty for Maori that persists today. At the basis of this uncertainty is the lack of clarity regarding the obligations of local government to Maori under the Treaty of Waitangi.

The RMA replaced approximately 70 statutes pertaining to resource management nationwide. The Act was heralded as a mechanism for integrating resource management that replaced the earlier piecemeal approach. The central purpose of the Act (as stated in section 5) is to promote the sustainable management of natural and physical resources.

The Act contains a number of sections relating to Maori and the Treaty including:¹²³

- + section 6 (e): In achieving the purpose of the RMA, all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources ... shall recognise and provide for the following matters of national importance ... the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu and other taonga
- + section 7 (a): In achieving the purpose of the RMA all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to kaitiakitanga
- + section 8: In achieving the purpose of the RMA all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi
- + section 33 (1) and (2): A local authority that has functions, powers, or duties under the RMA may transfer any one or more of those functions, powers or duties to another public authority in accordance with this section. For the purposes of this section, “public authority” includes any iwi authority

¹²³ For a comprehensive list of the provisions relating to Maori, see Ministry for the Environment (2000) *Iwi and local government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington, Appendix 2, ‘Provisions in the RMA that recognise Maori interests in natural resources’ pp 43–46

- + section 61 (2): When preparing or changing a regional policy statement, the regional council shall have regard to any relevant planning document recognised by an iwi authority affected by the regional policy statement
- + section 62 (1)(b): A regional policy statement shall ... state matters of resource significance to iwi authorities
- + First Schedule, Section 3 (1)(d): During the preparation of a proposed policy statement or plan, the local authority concerned shall consult the tangata whenua of the area who may be so affected, through iwi authorities and tribal runanga

Through these (and other) provisions, the relationship between Maori and local authorities was established. Section 6(e) provides perhaps the clearest opportunity for Maori integration into environmental decision-making. It requires decision-makers to recognise and provide for Maori relationships with their resources. Equally important is the requirement at section 3 (1) (d) in the first schedule for local authorities to consult with tangata whenua in the preparation of a policy plan or statement. To date, these provisions have provided Maori with the best leverage to access decision-making, and local authorities with the clearest guidelines regarding their obligations to Maori under the Act.

Other provisions are less clear in their instructions to Maori and councils. In particular, section 8 has created tremendous debate. While it requires decision-makers to take into account the principles of the Treaty of Waitangi, it does not define what is required in order to ‘take into account’, nor does it provide any guidelines as to the relevant Treaty principles. Over time, as discussed in detail below, RMA debate has focused on the principle of consultation, and its applicability and limitations in terms of section 8.

3.3 Section 8 and ‘Consultation’

In 1987, the Court of Appeal began the debate as to whether consultation is a Treaty principle, and Waitangi Tribunal reports have since developed the notion of consultation further.¹²⁴ Within the context of the Resource Management Act, however, particularly in

¹²⁴ The court decision referred to here was *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641. For further discussion of the development of Treaty principles, see A. Ward (1997) *National Overview*, report commissioned by the Waitangi Tribunal, Wellington, appendix, pp. 475-494. For further developments of the principle of consultation, see Waitangi Tribunal

the findings of the Environment Court, consultation under section 8 has been a controversial and much debated matter. As the discussion below outlines, the fundamental question is whether consultation is a Treaty principle in terms of section 8 of the Act. Even if it is accepted as a principle, subsidiary questions arise about when the consultation requirement has been satisfied. In short, the lack of specificity in section 8 of the RMA has created more than a decade of debate, confusion and frustration for Maori and local government.

There have been a variety of approaches to the duty imposed by section 8. The lack of express provision for councils to consult with Maori on resource consents (although they must consult on making or changing policy statement and plans) and the question of whether consultation is actually a Treaty principle means it is difficult to find an unqualified statement that consultation is a principle. Even in the Court of Appeal decisions in 1987 and 1989 (Forests case), the statements regarding consultation are limited. The Tribunal has said: ‘On matters which might impinge on a tribe’s rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resource – mahinga kai – also require consultation with Maori people concerned.’¹²⁵

The Environment Court (previously the Planning Tribunal) has often considered this matter. In the early years of the RMA, the Planning Tribunal recognised consultation with tangata whenua as a Treaty principle in relation to section 8 of the Act.¹²⁶ In the *Gill v Rotorua District Council* (1993), Kenderdine J. found that section 8 of the RMA imposes a duty of consultation on councils. The Judge overturned a council decision on the basis that it had not actively consulted with Maori. This decision was followed by *Haddon v Auckland Regional Council* in which case Kenderdine J. found that consultation had not occurred early enough.¹²⁷

(1987) *Report of the Waitangi Tribunal on the Manukau Claim* Wellington, p 87; Waitangi Tribunal (1988) *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* Wellington, p 193; Waitangi Tribunal (1992) *The Ngai Tahu Sea Fisheries Report 1992* Wellington, p 272; and Waitangi Tribunal (1993) *Ngawha Geothermal Resource Report 1993* Wellington, pp 101-102

¹²⁵ P. McDonald (September 1991) ‘Consultation with Iwi’ *Planning Quarterly* pp 8–10 (quoting from the *Ngai Tahu Report* p 245)

¹²⁶ P. Beverley (1997) ‘The incorporation of the principles of the Treaty of Waitangi into the Resource Management Act 1991’ *Journal of Environmental Law*, vol 1, no 1, p 129

¹²⁷ For further comment on *Haddon vs Auckland Regional Council and Auckland City Council* see A. Dormer (January 1994) ‘Consultation, the Treaty, and RMA’ *New Zealand Local Government* p 6

The *Gill* approach was endorsed in the High Court in the *Quarantine Waste (NZ) Ltd v Waste Resources Ltd*.¹²⁸ At issue in this instance was the question as to where the responsibility for consultation lay, with the local government, or with the resource consent applicant. Blanchard J. stated, ‘It should be emphasised that the statutory and Treaty obligation of consultation is that of the consent authority – as the local government agency – not that of the applicant.’¹²⁹

Subsequently, however, Planning Tribunal/ Environment Court decisions became unsettled and inconsistent on the matter of consultation, and often were in conflict with *Gill*. In particular, before the *Quarantine* decision was reached, the Tribunal ruled on *Ngatiwai Trust Board v Whangarei District Council* and *Hanton v Auckland City Council*, which departed from *Gill*.

In relation to *Ngatiwai Trust Board v Whangarei District Council*,¹³⁰ Kenneth Palmer notes:

With reference to s 8 of the RMA, it was necessary to consider the particular function or power being performed, and the context, in order to analyse the nature and the extent of responsibility incumbent on the person under the section. If the person’s particular function or duty is perceived as affecting or likely to affect a matter founded upon or arising out of the Treaty, then the person must take into account such Treaty principles or principles as are relevant.¹³¹

In relation to *Hanton v Auckland City Council*,¹³² the Tribunal drew a distinction between the position of the Crown and that of the local authority. This radically challenged previous thinking with regard to local government Treaty obligations. According to Kenneth Palmer the decision stated:

¹²⁸ High Court, Auckland CP 306/93, 2 March 1994

¹²⁹ K. Palmer (1994) ‘Consultation with tangata whenua under the Resource Management Act’, *Resource Management Bulletin*, 1 BRMB, Issue 2 pp 21–23

¹³⁰ Planning Tribunal Decision A 7/94 11 Feb 1994

¹³¹ K. Palmer (1994) ‘Consultation with tangata whenua under the Resource Management Act’, *Resource Management Bulletin*, 1 BRMB, Issue 2, p 21

¹³² Planning Tribunal Decision A 10/94, 1 March 1994

Although s 8 requires consent authorities to take into account the principles of the Treaty, we do not find in its language any imposition on consent authorities of the obligations of the Crown under the Treaty or its principles. Where ... the consent authority is a Minister of the Crown, then it is to be expected that the Minister's decision would take into account those obligations. But where the consent authority is not a Minister of the Crown, but a local authority or some other person, we do not find authority in s 8 for the proposition that by exercising powers and duties 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.¹³³

Palmer explains that the Tribunal gave three further reasons to distinguish the position of the Crown from that of a local authority under section 8. First, a consent authority was not disposing of Crown assets which might place them beyond the reach of being available to compensate for grievances; second, the authority was following a detailed code of procedure which did not overlook the place of the tangata whenua, but which omitted any express duty of consultation; and third, the consent authorities' function was to act judicially, and "consultation with one section of the community prior to a public hearing of those who choose to take part would be inconsistent with that character of its function."¹³⁴

The Hanton decision draws attention to a possible distinction between the Crown and local authority obligations under the Treaty. This contrasts dramatically with the Waitangi Tribunal's view in the Manukau Harbour report that 'the Crown cannot divest itself of its Treaty obligations or confer an inconsistent jurisdiction on others'. The Hanton decision placed the onus on Maori to make clear their interests in issues subject to resource consent, to ensure consultation is undertaken. This is despite the fact that Maori are reluctant to disclose waahi tapu sites as a matter of cultural preference.

¹³³ K. Palmer (1994) 'Consultation with tangata whenua under the Resource Management Act', *Resource Management Bulletin*, 1 BRMB, Issue 2, p 22

¹³⁴ K. Palmer (1994) 'Consultation with tangata whenua under the Resource Management Act', *Resource Management Bulletin*, 1 BRMB, Issue 2, p 22

Later decisions of the Environment Court (which replaced the Planning Tribunal in 1996) show further development of the notion of consultation under the RMA. The ruling for *Mangakahia Maori Komiti v Northland Regional Council* (in 1996) presented the circumstances sufficient for council staff to listen passively to and record the concerns of Maori when the differences between Maori and council were ‘deeply-rooted’. In keeping with *Gill* however, the Judge also stated that circumstances arise where the council staff are ‘duty bound to consult and where the duty embraces the need for discussion of options ... in keeping with the principle of frankness and openness.’ The Judge’s comments reflect on an unsettled area of the law surrounding section 8, by providing three fundamental principles:

1. the starting point is the duty to apply the Principles of the Treaty (which in some cases involves a duty to consult);
2. underlying the duty to apply the Principles of the Treaty is a more general duty to act in good faith and fairly;
3. the manner in which the Principles of the Treaty are applied will depend upon the particular circumstances of each case.¹³⁵

Uncertainty arose again, however, with *Te Atiawa Tribal Council v Taranaki Regional Council*,¹³⁶ in which Sheppard J. suggested that the duty to consult *derives from* the Treaty principle of partnership. Consultation is, therefore, not a principle per se, but rather a mechanism by which principles can be put into effect.¹³⁷

In an attempt to bring certainty and clarity to both Maori and local authorities in terms of the case law on consultation, the Ministry for the Environment has regularly published working papers updating the current requirements for consultation, according to case law. The 1999 working paper advised that the courts have adopted a holistic application of sections 6(e), 7(a) and 8 in recent years. In particular the report concludes that according

¹³⁵ P. Beverley (1997) ‘The incorporation of the principles of the Treaty of Waitangi into the Resource Management Act 1991’ *Journal of Environmental Law*, vol 1, no 1

¹³⁶ Environment Court, A 15/98, 13 February 1998

¹³⁷ G. Lanning (1998) ‘Maori issues – Tanga whenua evidence and consultation’ *Resource Management Bulletin* Issue 13, pp 153–154

to recent case law, ‘Consultation is to be approached in a holistic manner. It is not an end in itself, but a means to take into account the relevant Treaty principles ...’¹³⁸

Assuming for a moment that all parties accepted consultation as a Treaty principle under section 8, other issues remain. Most importantly, how does a council officer go about consulting with Maori on resource consent issues to satisfy section 8 and avoid opening the council up to legal challenge in the Environment Court?¹³⁹ It is still unclear what must be done for the principle of consultation to have been ‘taken into account’.¹⁴⁰ The leading case on consultation generally is *Wellington International Airport Ltd v Air NZ* (1991) (Court of Appeal), which says, amongst other things that:

- + consultation is the statement of a proposal not yet fully decided on
- + consultation includes listening to what others have to say and considering responses
- + sufficient time must be allowed and genuine effort must be made
- + the consultee must be adequately informed to make useful responses
- + the party consulting must remain open minded.¹⁴¹

The question of what constitutes adequate consultation has preoccupied councils, and has also been played out before the Planning Tribunal and Environment Court. The RMA, however, is silent on the matter, particularly with regard to section 8.¹⁴²

Payment for consultation is also a highly contentious issue. Helen Hughes, previously the Commissioner for the Environment, says: ‘The Local Government Act provides the framework within which councils can allocate funding to persons or groups to provide services which are consistent with the council’s functions set out in the RMA. In turn, the

¹³⁸ Ministry for the Environment (1999) *Case Law on Tangata Whenua consultation* RMA Working Paper, Wellington, p 4

¹³⁹ See, for example, Waikato Regional Council (October 1997) ‘Iwi Relationships: Strategic Issue Report’, Environment Waikato, p 10

¹⁴⁰ P. Beverley (1997) ‘The incorporation of the principles of the Treaty of Waitangi into the Resource Management Act 1991’ *Journal of Environmental Law*, vol 1, no 1, pp 125–162

¹⁴¹ Ministry for the Environment (1999) *Case Law on Tangata Whenua consultation* RMA Working Paper, Wellington, p 11

¹⁴² For a general discussion of consultation, see, C. Cheyne et al (December 1999) ‘Engaging Citizens: Factors in Consultation’, *Public Sector* vol 22, no 4, pp 2–6

RMA enables councils to charge for particular administrative activities.¹⁴³ She explains further that:

[Resource consent] applicants should understand that in some cases the tangata whenua are “experts”, in the same way as scientists or engineers, and that the provision of information can involve large amounts of time and effort on their part. The ability of the tangata whenua to charge applicants directly is neither permitted nor prohibited under the RMA so that the issue must be addressed by the two parties. The position is really no different from that between any applicant and consultant, and would normally be dealt with by way of contract.

In one region, a consultation contract was set up between Kapiti Coast District Council and Te Atiawa iwi. The iwi would be paid \$1200 per quarter to advise the council on resource consents. One spokesperson said ‘it’s coming to be a proper partnership relationship, and that’s great.’¹⁴⁴ Hughes optimistically notes, ‘I am sure that with good will and some imagination, both the process and any associated funding issues can be worked through.’¹⁴⁵ Her comment highlights the pervasive theme associated with section 8; goodwill must compensate for the lack of express provision for councils to consult with Maori.

3.4 Local government and Maori relations under the RMA 1991-2001

As discussion above indicates, the relationship between Maori and local government under the RMA has largely been dominated by the uncertainty surrounding those provisions of the Act relating to the Treaty of Waitangi and Maori (particularly in relation to section 8). This uncertainty is most evident in the volume of publications produced to assist Maori and local government relations under the Act. These began soon after the Act was passed, and have continued unabated. Perhaps most disconcerting is the similarity between the earliest and most recent publications in terms of the problems identified in local government/ Maori relations. Although some progress has no doubt

¹⁴³ H. Hughes (1994) ‘Payment for consultation with the tangata whenua’ *Resource Management Bulletin*, 1 BRMB, Issue 2, pp 23–24

¹⁴⁴ H. Zwatz (7 December 1999) ‘Consultation contract set up between council, Te Atiawa iwi’ *Horowhenua-Kapiti Chronicle*

¹⁴⁵ H. Hughes (1994) ‘Payment for consultation with the tangata whenua’ *Resource Management Bulletin*, 1 BRMB, Issue 2, pp 23–24

been made in many regions, a lack of development in the legislative framework surrounding the relationship means that some questions have become perennial, and have been accepted as such. Where goodwill does not exist, local government and Maori may be trapped in a cycle of uncertainty and frustration.¹⁴⁶

In 1992, the Parliamentary Commissioner for the Environment investigated the new consultation structures established by a number of regional councils under the RMA. The report shows early indications that councils had different levels of commitment to Maori under the Act. In reporting on her findings, the Commissioner made the general observation that:

local government feels pressured by multiple community demands and statutory time constraints, and is uncertain about the practical local implications of the principles of the Treaty and the requirements for consultation. Tangata whenua we have spoken to for the most part believe that even when consultation does take place, tribal concerns, cultural differences, and rights under the Treaty are not taken seriously by either local or central government.¹⁴⁷

Section 8 of the Act was found to be largely unfulfilled by the regional councils. Furthermore, while some councils had established Maori Consultative Committees, these were generally found to be lacking. Perhaps more seriously, the Commissioner detected a general scepticism amongst Maori regarding the commitment of central and local government to Treaty issues under the RMA.¹⁴⁸

The Commissioner proposed guidelines that highlighted the need for a direct and meaningful role for Maori in the decision-making process, as well as financial and technical assistance to Maori. The Commissioner also raised the possibility of a formal charter between tangata whenua and local authorities, prioritising areas of Maori interest and concern.¹⁴⁹

¹⁴⁶ I have discussed these findings in more detail also at, Janine Hayward, 'Local Government and Maori: Talking Treaty?', in *Political Science*, vol 50, no 2, January 1999, pp 182–194.

¹⁴⁷ *Proposed guidelines for Local Authority Consultation with Tangata Whenua*, p. iii.

¹⁴⁸ *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*.

¹⁴⁹ *Proposed Guidelines for Local Authority Consultation with Tangata Whenua*.

In 1995, Nuttal and Ritchie¹⁵⁰ released findings that some councils had made progress in consulting with Maori; 47 percent of regional policy statements showed evidence of consultation with Maori, while a further 26 percent indicated some manner of interaction with iwi. Only 50 percent of the District Plans, on the other hand, showed evidence of consultation. Nuttal and Ritchie noted that councils are only obliged to demonstrate that iwi were consulted during the preparation and alteration of policy statements and plans. There is no requirement for this consultation to refer to the Treaty (although Nuttal and Ritchie admitted that it was difficult to conceive of this not being the case).¹⁵¹ With respect to section 8 of the Act, while almost all councils acknowledged the statutory obligation to take into account the principles of the Treaty (which includes consultation), only half of them demonstrated that a consultation process has been established for this purpose.¹⁵²

In 1995, an article published in *Local Government New Zealand* reviewed progress since the RMA was passed. It noted that:

- + local government has become a Treaty of Waitangi partner through devolution of responsibility from central government;
- + the Resource Management Act accords special status to tangata whenua and their long-standing use and guardianship of the land for which they hold mana whenua (customary authority) status. ...
- + Council Maori advisory committees are not a popular consultation mechanism – iwi groups wish to work with the real decision makers;
- + The Resource Management Act can be a very powerful piece of legislation which provides for considerable delegation of authority from local authorities to tangata whenua – to date this has barely been picked up.¹⁵³

¹⁵⁰ P. Nuttal and J. Ritchie (1995) *Maaori Participation in the Resource Management Act*, 'The Products', Tainui Maori Trust Board and the Centre for Maaori Studies and Research, University of Waikato. Nuttal and Ritchie analysed the contents of fifteen regional policy statements and ten district plans.

¹⁵¹ P. Nuttal and J. Ritchie (1995) *Maaori Participation in the Resource Management Act*, 'The Products', Tainui Maori Trust Board and the Centre for Maaori Studies and Research, University of Waikato, pp 62-63

¹⁵² P. Nuttal and J. Ritchie (1995) *Maaori Participation in the Resource Management Act*, 'The Products', Tainui Maori Trust Board and the Centre for Maaori Studies and Research, University of Waikato, p 68

¹⁵³ S. Weston (July 1995) 'Meeting our obligations' *New Zealand Local Government*, p 9

The controversial aspect of this is the first statement, that local government had become ‘a Treaty of Waitangi partner’. The author, Weston, went on to state: ‘The first and second points – local government as a treaty partner and special status for tangata whenua – underlie the whole issues of local government consultation with tangata whenua. Both of these are “non-negotiables”’.¹⁵⁴ While some would applaud Weston’s sentiment, earlier discussion of the Planning Tribunal decisions at the time show that there was, in fact considerable uncertainty about local government obligations under the RMA.

Uncertainty was still evident in late 1997, when Local Government New Zealand (LGNZ) released a report on local government, Maori, and the Treaty, which described practices in operation within local government.¹⁵⁵ It found that 39 percent of councils also had iwi representatives on working parties and sub-committees that dealt with resource management matters and other issues relating to Maori.¹⁵⁶ Mike Reid, strategy leader with Local Government New Zealand, was impressed with the findings of the report. He said, ‘It really showed there is a lot more happening than people might think. I’m impressed with what a number of councils are doing, and in nearly all cases councils are trying to achieve better. No-one is resting on their laurels’.¹⁵⁷ The report also demonstrated the diversity of mechanisms used by councils to fulfil the consultation requirement. It revealed that 42 percent of councils had established, or were in the process of establishing, a charter with local Maori (as recommended by the Parliamentary Commissioner for the Environment in 1992).

Charters have continued to be signed since the LGNZ report, but they continue to raise controversy. In 2000, it was reported, for example, that Ngati Paoa signed a formal Memorandum of Understanding with the Hauraki District Council, making them the second iwi to sign the council-drafted agreement in the past year. It was noted that council intended to sign with others in the future.¹⁵⁸ The Manukau City Council voted in an agreement, which requires council to give iwi a list of all notified applications, so that

¹⁵⁴ S. Weston (July 1995) ‘Meeting our obligations’ *New Zealand Local Government*, p 9

¹⁵⁵ 75 percent (9 out of 12) of regional councils and 66 percent (6 out of 9) district councils responded to the survey.

¹⁵⁶ Local Government New Zealand (1997) *Liaison and Consultation with Tangata Whenua: A Survey of Local Government Practice* Wellington, p 7

¹⁵⁷ Quoted in K. Ombler (1998) ‘Iwi issues becoming easier to unravel’, *New Zealand Local Government* Wellington, p 12

¹⁵⁸ J. Gibson (22 February 2000) ‘Sealed with a hongi’ *Hauraki Herald*

the iwi could assess which are of interest to local Maori. Consent applicants would then consult directly with Maori, leaving council out of the equation.¹⁵⁹ North Shore City Council was reported to have been trying to establish a process for iwi consultation since the RMA in 1991. It was considering adopting an agreement, similar to Manukau City Council, requiring consent applicants to go to tangata whenua to consult on issues of interest to them. This raised the controversy, however, that the obligation is on *councils*, not *consent applicants*, to consult.¹⁶⁰

Taking a different approach, the New Plymouth District Council has established an iwi liaison officer who is contracted by the council, while the South Taranaki District Council holds meetings every six weeks between Maori representatives and the district council (and have done for nearly ten years).¹⁶¹ In Nelson City Council region, on the other hand, not only council, but also some applicants have to consult with iwi over resource issues, ‘and iwi spokesmen said this week that they would start charging for the time they spent dealing with such approaches.’ The various tribes in the region have rejected an attempt by the council to streamline the negotiation process to consult with all Maori at once.¹⁶²

A Ministry for the Environment report in 1998 investigated the obstacles to effective Maori participation in resource management processes.¹⁶³ It revealed that councils regarded hui (meetings) as the most effective method of consultation because varying Maori perspectives could be expressed and explained to council within this environment. Furthermore, councils stated that Maori input was usually sought during the initial stage of the deliberative process, and that a majority of councils funded this consultation

¹⁵⁹ K. Robson (31 May 2000) ‘Council acts on consents deal with iwi’ *Papatoetoe & Otahuhu Week*; K. Robson (30 May 2000) ‘Consents deal pushed forward’ *Manurewa Week*

¹⁶⁰ B. Carter (14 June 2000) ‘Consent call hurting all ratepayers’ *Shore News*

¹⁶¹ R. Maetzig, A. Paltridge, and S. Hepburn (15 June 2000) ‘Tiptoeing through iwi consultation process’ *Daily News*

¹⁶² S. Speedy (5 May 2000) ‘Iwi want pay for being consulted’ *Nelson Mail*

¹⁶³ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organizations in Resource Management Act processes*, Wellington, p 1. Two questionnaires, similar in structure but identifying different issues, were sent out to 86 councils and 80 Maori organisations, with responses from 46 councils and 25 Maori groups.

process with Maori. Finally, council staff indicated that they generally felt they had an adequate understanding of Maori resource management concepts.¹⁶⁴

Maori, on the other hand, believed contracts for service were the most effective means of consultation, although over half agreed that hui were an effective means of soliciting information from Maori. While councils indicated that they pay for the consultancy they receive, over half the Maori groups who responded felt that this funding was inadequate. Overall, however, the majority of Maori respondents characterised their relationship with councils as satisfactory or better.¹⁶⁵

In 1998, the Parliamentary Commissioner for the Environment updated its 1992 report to investigate ‘the opportunities and constraints, provisions and alternative options for tangata whenua involvement in local authority environmental management and planning’.¹⁶⁶ The report found that there was greater awareness amongst some councils to recognise and provide for Maori under the RMA. Likewise, there was increased awareness amongst Maori of the opportunities for involvement in resource management. At the same time, however, some issues remained largely unchanged since 1992. Progress in some regions was still clearly lacking. In 1999 one councilor reported that ‘Compared with other councils, the Tararua District Council has not yet been exposed to or challenged over Treaty of Waitangi issues’.¹⁶⁷ According to the Commissioner’s report, consultation processes were still emphasised over environmental outcomes and there was a general continuing dissatisfaction amongst both Maori and council personnel regarding the fulfillment of RMA requirements regarding (amongst other things) the principles of the Treaty. On a more positive note, Hastings City Council announced it was to develop a Treaty ‘toolbox’ to assist with Maori consultation, modeled on an initiative which divided Manukau City Council; one of the councillors called it an ‘evil document’ which treated Maori differently from non-Maori. The toolbox recommends:

- + recognising the council-Maori relationship

¹⁶⁴ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organizations in Resource Management Act processes*, Wellington, pp 5, 8 & 10

¹⁶⁵ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organizations in Resource Management Act processes*, Wellington, pp 12, 15 & 17

¹⁶⁶ Parliamentary Commissioner for the Environment (1998) *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management*, Wellington

¹⁶⁷ ‘Council seen to be putting off workshop on treaty’ (2 September 1999) *Dannevirke Evening News*

- + recognising the full range of local Maori groups
- + consultation
- + koha (where appropriate)
- + learning Maori protocols
- + bilingual publications.¹⁶⁸

In 2000, the Ministry for the Environment released *Iwi and local government interaction under the Resource Management Act: Examples of good practice*. The report was based on interviews carried out in 1998 with members of local government and iwi. The Ministry's Chief Executive stated, in introducing the report, that 'notwithstanding ongoing difficulties, local government and iwi are developing effective working relationships, and utilizing diverse mechanisms that reflect the distinctive communities and the priority issues facing them.'¹⁶⁹ Despite these encouraging sentiments, tensions were still evident in various regions around the country. Whakatane District Council was accused of not doing enough for local Maori; 'the draft annual plan cites the Treaty of Waitangi in the Statement of Principles and then blithely ignores any consideration'. One critic said 'the council needs to be strategic and implement robust Treaty policy ... This would include ... Treaty workshops for all council staff and adopting a policy for Maori seats representation within council.'¹⁷⁰

The Ministry for the Environment report reflects this continued strain by recounting iwi and local government views separately; indicating their disparity. Iwi believed that partnership formed the basis of iwi and local authority relations, as set out in the Treaty and in section 8 of the RMA. Iwi regularly commented, however, that partnership with local government had not been achieved; some believed that local authorities did not desire a partnership with local Maori. Iwi members indicated that they had a comprehensive knowledge of both the Treaty and the RMA provisions relating to Maori, and viewed these in relation to other issues such health, education, employment and community development.¹⁷¹

¹⁶⁸ M. Brooker (30 May 2000) 'Council to develop guide to Treaty issues' *Hawkes Bay Today*

¹⁶⁹ Ministry for the Environment (2000) *Iwi and Local Government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington, p iii

¹⁷⁰ 'Council told Maori not getting a fair deal' (31 May 2000) *Whakatane Beacon*

¹⁷¹ Ministry for the Environment (2000) *Iwi and Local Government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington, pp 3–5

Local government, on the other hand, was predominantly concerned about the constitutional relationship between local and central government under the Treaty, with many council personnel asserting that local government is not the Crown and that constitutional clarity of the relationship between local authorities and iwi under the Treaty is required. The relationship with Maori was seen as one of many competing relationships between local government and the wider community, although there was also (contradictorily) consensus that iwi had a right to participate in resource management processes, often with a special status. Although local government complied with the clearly defined provisions of the RMA, with less well-defined issues, including financial assistance to iwi, section 8 of the Act, and giving preferential treatment to iwi, councils' approach was cautious.¹⁷²

The report commented '[t]he lack of clarity in defining the constitutional relationship between iwi and local government under the RMA specifically and Treaty of Waitangi generally is sometimes posited as underpinning difficulties facing the two parties as they interact on resource management processes.' It concluded, however, that '[t]he lack of clarity in defining the relationship does not preclude iwi and local government from working together co-operatively to achieve the purpose of the RMA. It is evident from the case study interviews [which form the basis of the report] that local government and iwi are establishing good working relationships.'¹⁷³ The report advised that it is good practice for local government councilors and staff to recognise and understand iwi concerns, to endeavour to deal with iwi concerns, to involve iwi in plans, policies and consent processes as early as possible, and to reflect iwi concerns in planning documents.¹⁷⁴

It seems, therefore, that while generalisations can be made about progress in relationships between Maori and local government, each region has its own story to tell. In 1999, Wellington Regional Council proposed establishing a Wairarapa Maori liaison officer for a trial period of one year. A spokesperson for the council said 'it's the council's "stated

¹⁷² Ministry for the Environment (2000)) *Iwi and Local Government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington, pp 5–6

¹⁷³ Ministry for the Environment (2000) *Iwi and Local Government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington, pp 6–7

¹⁷⁴ Ministry for the Environment (2000) *Iwi and Local Government interaction under the Resource Management Act 1991: Examples of good practice*, Wellington p 8

intention” to strive for better relationships with Maoris’.¹⁷⁵ In 2000, the Council was reported to have appointed a Maori commissioner to attend all resource consent hearings to meet the council’s Treaty obligations. Despite the fact that one councilor opposed the move, saying ‘I’m convinced this isn’t fair on other groups of people’, the Council was said to be ‘leading New Zealand in the area.’¹⁷⁶ Wellington City Council also announced in 1999 that it would appoint a Maori manager to help the council with issues affecting Maori, and to improve relations between council and Maori and guide council in its Treaty obligations to Maori.¹⁷⁷

Reports from other regions have been less positive. When, for example, Gisborne District Council formed a Maori committee; one objector was reported to state that ‘He accepted that the tangata whenua had a special position in New Zealand but could not accept this special accommodation [by the council] unless it was supported by the community.’ The council had already entered a formal declaration with local iwi under the terms of the Treaty of Waitangi, and have an iwi liaison officer.¹⁷⁸ Furthermore, following its creation in 1989, Taranaki Regional Council took steps to establish an iwi liaison committee, to develop a Declaration of Understanding with iwi and impose on itself a Code of Conduct in its interactions with iwi. In June 2000, it was reported that it had ‘all started to go wrong’. Relations in Taranaki became public when it was reported that the relationship between Maori and council had stalled, and accounts differed on the reason for the breakdown. The iwi liaison committee accused the council of under-resourcing; the council chairman said that he was saddened that it was no longer possible to get Maori parties together, for ‘Maori-related reasons’; and the general manager said that clarity on Treaty settlement issues was needed to the situation could improve.¹⁷⁹ Problems had also apparently arisen with iwi involvement in the consent process. According to reports, the Taranaki settlement process was causing ‘enormous acrimony in Taranaki ... within and between iwi, whanau and hapu.’ There were also said to be ongoing frustrations amongst iwi about the lack of resourcing to take part in the RMA process. The chairman of the Taranaki Regional Council’s iwi liaison committee responded to these reports, however, saying that it was ‘obvious that the TRC did not want to share its power, resources and buildings with iwi.’ ‘There is no place for racist institutions like the Taranaki Regional

¹⁷⁵ ‘Council wants iwi links. \$30,000 for Maori liaison’ (21 June 1999) *Wairarapa Times-Age*

¹⁷⁶ A. Johnson, ‘Iwi have say in resource consents’ (4 August 2000) *Evening Post*

¹⁷⁷ L. Haines, ‘Maori manager for city council’ (17 December 1999) *The Dominion*

¹⁷⁸ M. Spence (14 April 2001) ‘“Back-burner” bid attacked. Representation for Maori in spotlight’ *Gisborne Herald*

¹⁷⁹ R. Maetzig (9 May 2000) ‘Impasse in TRC, iwi consultation process’ *Daily News*

Council’ he said.¹⁸⁰ A Taranaki Maori leader similarly accused the New Plymouth District councillors of failing to recognise the Treaty and called for a ministerial review, alleging ‘widespread opposition to the treaty principles within council.’ One councilor had written a letter to the paper stating that he ‘did not recognise the Treaty of Waitangi’, calling it an ‘antediluvian (ridiculously old-fashioned) piece of New Zealand history that is also pontificated ad nauseum.’¹⁸¹

Each local community in New Zealand will have its own story to tell about relations between local government and Maori under the RMA. This discussion has shown that, where progress has been made, it is due largely to goodwill on both sides. The RMA Treaty provisions provide little compulsion for local government to accept Treaty obligations, and raises confusion as to when those obligations have been fulfilled, if they are accepted at all.

3.5 Section 33 and Iwi Management Plans

Given the uncertainty and frustration surrounding section 8 of the RMA, increasing attention has been paid in recent years to other provisions in the RMA which might more effectively provide for Maori interests. In particular, section 33, which allows councils to transfer authority to iwi, and iwi management plans, are both excellent opportunities for Maori to participate actively in local decision-making. As with other provisions in the Act, however, they have their limitations.

Section 33 of the RMA allows a local authority to transfer the functions, powers, or duties it has under the Act (with some exceptions) to another public authority, which includes (amongst others) an iwi authority.¹⁸² For many years, Maori seemed unaware that this provision existed, although in recent years interest has been increasing.¹⁸³ In particular, the regional councils’ responsibilities regarding biophysical resources (air, water, land) and councils’ role in monitoring the state of the environment, attract interest from Maori in terms of requesting the transfer of that authority under section 33. The

¹⁸⁰ R. Maetzig (10 June 2000) ‘Committee puts onus on regional council’ *Daily News*

¹⁸¹ G. Brown and R. McLean (11 November 2000) ‘Council cops flak for Treaty snub’ *Daily News*

¹⁸² Thanks for Liz Clarke of Ministry for the Environment for her own research into this area.

¹⁸³ Nga Kaiwhakamarama I Nga Ture / Maori Legal Services Inc. (1999) ‘The Resource Management Act 1991: An Introduction’ (video recording) Tawera Productions Ltd

Ministry for the Environment discovered in its interviews with iwi published in 2000, that iwi seek transfers under section 33, particularly for monitoring purposes. According to the Ministry, '[s]ome iwi anticipate participating with local authorities in natural and physical resource management, but they do not see their kaitiaki (steward or guardian) role as duplicating or replacing local authorities.'¹⁸⁴

Section 33 provisions include:¹⁸⁵ Subsection (3) which states that when a power has been transferred to another body, the local authority who transferred it retains overall responsibility for it; subsection (4) which requires that the local authority can only make a transfer when (amongst other things) it is convinced that the transfer is efficient, and that the authority accepting the transfer has demonstrated technical or special capability or expertise. Despite increased interest, few formal requests for a transfer have been made by iwi. Those requests, which have been made, have not been successful.¹⁸⁶ Several key impediments to Maori successfully applying for a transfer have been identified. The application process for section 33 is not clear, and no prescribed guidelines for an application are provided. Nevertheless, council generally does not regard verbal requests from iwi as an application. Indeed, the predominant reason councils give for not transferring functions to iwi is the lack of formal requests.¹⁸⁷

A second problem is defining an iwi authority. The Act simply states that an iwi authority represents an iwi and has the authority to do so. Thomson et al observe that section 33 applications have (so far) largely come from marae, hapu, or trust boards, who have not been recognised as an iwi authority under the Act. Furthermore, the definition of an iwi also causes anxiety amongst local authorities who are 'concerned that in recognising an applicant as an iwi authority in a particular area, they might cause offence

¹⁸⁴ Ministry for the Environment (2000) *Iwi and local government interaction under the Resource Management Act 1991: examples of good practice*, Wellington, p 4

¹⁸⁵ The Resource Management Act is undergoing amendments which include changes to section 33 of the Act. In May 2001, the Local Government and Environment Select Committee said that the Act should allow local authorities to transfer *any* of its functions, powers or duties (*including* the power to approve a policy statement or plan) to another public authority (except the power of transfer itself). In addition, the committee seeks to repeal subsection 3 (which said that the local authority is still responsible for the transfer) to make the person to whom the transfer was *made* responsible for all aspects of the transfer.

¹⁸⁶ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organisations in Resource Management Act processes*, Wellington

¹⁸⁷ J. Thomson, H. Rennie, T. Tuta-Nathan (July 1999) 'Transferring Resource Management Act functions to iwi and other public authorities: Asymmetric progress', New Zealand Geographical Society Conference, Massey University

to another iwi authority that might also claim manawhenua for that area.¹⁸⁸ Finally, the criteria specified in the three-step test seem to disqualify many Maori applicants. Councils tend to interpret ‘efficiency’ as ‘cost-effective’, and judge the transfer to Maori predominantly on that basis. Also, the technical expertise required of iwi is an obstacle to a transfer being made, despite the fact that, as Thomson et al suggest, iwi could contract organisations to provide the expertise they lack if they are granted a transfer, in much the same way that local authorities and government departments do now.¹⁸⁹

The major hurdle to local authorities granting transfers to iwi, however, appears to be a lack of trust on the part of local authorities. According to a survey of Maori by the Parliamentary Commissioner for the Environment, ‘tangata whenua reported widespread reluctance within councils to even consider the possibilities under section 33.’¹⁹⁰ Thomson et al conclude that trust, goodwill, and relationships building will probably be the only way that transfers will occur in the future.¹⁹¹ Tangata whenua generally, however, see councils as fearful and distrustful of the notion of devolving authority to Maori.¹⁹² In defence of the councils’ lack of action under section 33, the Ministry for the Environment has noted that some councils believe the implications of transferring powers and functions to iwi are not well understood. Also, some councils consider the demands and expectations of iwi unrealistic, and their understanding of the process insufficient.¹⁹³ Some local authorities told the Ministry they would consider devolving authority to iwi under section 33 in the future if iwi identified specific heritage issues, or lands of specific significance to iwi, and furthermore, if iwi demonstrated an expertise that the council lacked in protecting such places. Others commented that a Waitangi Tribunal recommendation might prompt them to devolve authority to an iwi wishing to become kaitiaki of a local resource, or alternatively to an iwi that showed an interest in

¹⁸⁸ J. Thomson, H. Rennie, T. Tuta-Nathan (July 1999) ‘Transferring Resource Management Act functions to iwi and other public authorities: Asymmetric progress’, New Zealand Geographical Society Conference, Massey University

¹⁸⁹ J. Thomson, H. Rennie, T. Tuta-Nathan (July 1999) ‘Transferring Resource Management Act functions to iwi and other public authorities: Asymmetric progress’, New Zealand Geographical Society Conference, Massey University

¹⁹⁰ Office of the Parliamentary Commissioner for the Environment (1998) *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* Wellington, p 71

¹⁹¹ J. Thomson, H. Rennie, T. Tuta-Nathan (July 1999) ‘Transferring Resource Management Act functions to iwi and other public authorities: Asymmetric progress’, New Zealand Geographical Society Conference, Massey University

¹⁹² Office of the Parliamentary Commissioner for the Environment (1998) *Kaitiakitanga and Local Government: Tangata Whenua Participation in Environmental Management* Wellington, p 71

¹⁹³ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organisations in Resource Management Act processes*, Wellington, p 9

monitoring a particular resource. Other councils cautioned that they would only transfer authority under very specific circumstances.¹⁹⁴

In addition to section 33 transfers, iwi management plans have attracted attention as a mechanism for Maori to increase their access to decision-makers under the RMA. Hirini Matunga has long advocated the importance of iwi management plans for Maori. In 1993, he argued:

Iwi management plans are now an integral part of the resource management framework in this country. Iwi recognise the importance of these written statements as a means to identify their intent regarding their social, economic, cultural and environmental development. “This is who we are.” “This is what we think.” “This is what we’ve been saying for years.” It is not surprising that iwi and hapu are embracing the plans as a means to signal their intent to the outside world.¹⁹⁵

Matunga described iwi management plans as a ‘talking point’, and an opportunity for local authorities and iwi to talk ‘chief to chief’. He recognised also, however, that local authorities needed to be mindful of, and be prepared to cope with the fact that such plans need to be integrated with, incorporated into or adopted by the many other resource management agencies that co-habit within an iwi’s territories. ‘The degree of integration, incorporation or adoption’ according to Matunga, will ‘depend on the willingness of an agency to listen constructively to what is being articulated.’¹⁹⁶

Matunga identified three broad approaches to incorporate iwi policy:

- + Direct incorporation of iwi policy into local authority policy statements and plans

¹⁹⁴ Ministry for the Environment (1998) *He Tohu Whakamarama: A report on the interactions between local government and Maori organisations in Resource Management Act processes*, Wellington, p 9

¹⁹⁵ H. Matunga (March 1993) ‘Walking the Talk. Incorporation of iwi policy into the process of local government’ *Planning Quarterly* p 4

¹⁹⁶ H. Matunga (March 1993) ‘Walking the Talk. Incorporation of iwi policy into the process of local government’ *Planning Quarterly* p 4

- + The establishment of mechanisms by local authorities to implement iwi policy, including Maori committees, secretariats, liaison officers and consultancies, as well as direct representation for Maori on committees
- + Partnership agreements between Maori and local government to monitor the implementation of iwi policy

Matunga advised that once an iwi management plan is received by council, the local authority should:

- + Establish a 'project team' comprising senior staff from departments whose operations come within the ambit of iwi policy identified in the plan, and iwi representatives, is desired
- + List all statements and plans into which iwi policy can be incorporated
- + Develop a timeframe to carry out the incorporation
- + Identify times the team will report back to iwi
- + 'obtain concurrence of iwi to the incorporation process'¹⁹⁷

According to Matunga, in deciding how iwi policy is then incorporated, four categories of action will emerge:

- + iwi policy is consistent with local government policy and therefore can easily be incorporated
- + iwi policy is outside local government policy, and will need to be endorsed before it is incorporated
- + iwi policy cannot be supported in its present form, but negotiation, compromise, revision, may achieve a solution
- + iwi policy is in direct conflict with local government policy, or outside its statutory bounds and cannot be incorporated.¹⁹⁸

¹⁹⁷ H. Matunga (March 1993) 'Walking the Talk. Incorporation of iwi policy into the process of local government' *Planning Quarterly* p 5

¹⁹⁸ H. Matunga (March 1993) 'Walking the Talk. Incorporation of iwi policy into the process of local government' *Planning Quarterly* p 5

He concludes that there is ‘a clear directive [in the RMA] to local authorities that an iwi management plan which has the iwi’s seal of approval on it is indeed a relevant planning document, and therefore articulates what is “significant” to the iwi.’¹⁹⁹ In 1995, it was noted that : ‘Some iwi have produced iwi planning documents which set out their areas of concern. This approach serves both a general education role for Councils and developers, and also helps reduce the number of occasion when iwi groups are asked to prepare virtually identical information.’²⁰⁰ In 1998, research by the Ministry for the Environment showed that a majority of Maori included in their study received some support from council to develop iwi management plans, although one third of Maori did not.²⁰¹

The report said further:

Until these [iwi management] plans are more widely established, it is likely that some councils will develop regional and district plans with inadequate provision for Maori values, interests and practices, and will find it difficult to fulfil their obligations under the Act. Options, such as transferring powers to iwi organisations, may therefore continue to be underutilised by councils because of a lack of specific or realistic proposal/framework accompanying such requests. The development of iwi resource management plans however, may provide the necessary framework from which specific proposals for section 33 transfers could be realistically considered.²⁰²

3.6 Conclusions

The RMA has, for the most part, created an environment in which there is potential for Maori participation in local environmental decision-making, but only where goodwill exists between Maori and local government. The ongoing preoccupation with ‘consultation’ issues has overshadowed, to some extent, more potentially useful parts of

¹⁹⁹ H. Matunga (March 1993) ‘Walking the Talk. Incorporation of iwi policy into the process of local government’ *Planning Quarterly* p 5

²⁰⁰ S. Weston (July 1995) ‘Meeting our obligations’ *New Zealand Local Government* p 11

²⁰¹ Ministry for the Environment (1998) *He Tohu Whakamarama. A report on the interactions between local government and Maori organizations in Resource Management Act processes* Wellington, p 17

²⁰² Ministry for the Environment (1998) *He Tohu Whakamarama. A report on the interactions between local government and Maori organizations in Resource Management Act processes* Wellington, p 23

the Act for Maori, which might allow direct participation, such as section 33, and iwi management plans.

3.7 Recommendations for further research

A tremendous amount of research has been done in the last ten years on the relationship between Maori and local government under the Resource Management Act 1991. This scoping report has summarised this research as succinctly as possible. It is difficult to imagine that any future research on this matter could shed new light on the matter, or progress understanding further. Instead, a fresh approach is required in getting past the seemingly intractable problems associated with consultation. In particular, any future research should look to establishing a case for direct participation by Maori in local authority decision-making. Mechanisms such as section 33 and iwi management plans are discussed here, but others may be explored in future research.

Part 4: Conclusions: Treaty settlements and the future of Maori/Local Government relations

4.1 Conclusions

The relationship between Maori and local government is dependent on goodwill on both sides. Where goodwill exists, innovative and productive relationships can develop. Even then, however, the lack of express provision in the Resource Management Act and Local Government Act relating to local government obligations to Maori under the Treaty places strain and uncertainty on both parties. It is not yet clear whether the Local Government Bill (discussed in Part One) will bring clarity to this situation. Despite these obstacles, the relationship between Maori and local government is important. As Treaty grievances are settled, the relationship between local government and Maori will be all the more important. Settlements have had significant consequences for resource ownership and management in various regions.²⁰³ For Maori, these settlements provide an economic base which was previously lacking and, in some cases, the return of natural resources to Maori ownership and management (such as the re-vesting of pounamu or greenstone to Maori in the Ngai Tahu settlement).²⁰⁴ A report released in 2000 revealed that some local government personnel believe that Treaty claims create tense relations between iwi and local authorities, which can ‘affect the ability of iwi and local authorities to work together for resource management purposes’.²⁰⁵ However, it also noted that where iwi have explained their claims to local authorities, some of these tensions have been dispelled. Furthermore, when a claim has been settled it can improve the relationship. The report recommended that it was good practice for local authorities and iwi to ‘maintain communication links when a Treaty claim is in hearing or settlement negotiations’ and suggested that local authorities attend Tribunal hearings.²⁰⁶

²⁰³ This is also discussed by H. Matunga (2000) ‘Declonising Planning: The Treaty of Waitangi, the Environment, and a Dual Planning Tradition’, in P.A. Memon and H. Perkins (eds), *Environmental Planning and Management in New Zealand*, Dunmore Press, Palmerston North, p 37

²⁰⁴ See; Ngai Tahu (Pounamu Vesting) Act 1996, which arose out of the Deed of Settlement between Ngai Tahu and the Crown.

²⁰⁵ Ministry for the Environment (2000) *Iwi and Local Government Interaction under the Resource Management Act 1991: Examples of Good Practice*, Wellington, p 9

²⁰⁶ Ministry for the Environment (2000) *Iwi and Local Government Interaction under the Resource Management Act 1991: Examples of Good Practice*, Wellington, p 9

Treaty settlements provide an important nexus between Maori and local government, and may provide opportunities to create new relationships free from the constraints and uncertainties of the RMA. The role local government can play in Treaty settlements is of increasing interest. According to the Ministry for the Environment, local authorities are constrained in their involvement in Treaty settlements because they are not party to the negotiations between Maori and the Crown. The Crown is generally willing, however ‘to explore ways to improve the interaction between respective local authorities and iwi, providing the local authorities are also willing.’ The Ministry cites the case of the Ngai Turangitukua settlement, in which the Taupo District Council, at the Crown’s request, assisted the Crown to reach a settlement. The Ministry notes: ‘[t]hrough its involvement the Council was able to improve its relations with Ngati Turangitukua.’ The cases of settlements agreed to between the Crown and Ngai Tahu and Ngati Turangitukua respectively, contain redress that impacts on the local authorities located within the claimants’ rohe. Examples of redress that involves local authorities assisting with implementation include:

- + Monitoring by the Ministry for the Environment [of local government performance regarding Treaty provisions of the RMA]
- + Statutory acknowledgement [of sites of significance to Maori in the local government rohe]
- + Council or Crown reserves of significance to iwi transferred to the iwi, with ongoing management performed by the local authority or iwi (subject to the Reserves Act 1977)
- + Place name changes²⁰⁷

There may come a time when local government plays a more active part in negotiating the return of lands acquired from Maori by former local authorities or by the Crown, which was later transferred to local authorities.²⁰⁸ The Manawatu-Wanganui Regional Council has indicated that it wants to be involved in the negotiations leading to a final settlement of Whanganui River ownership and management. ‘As the authority responsible for river management, under the Resource Management Act, the recommendation [in the Waitangi Tribunal’s Whanganui River Report] for iwi ownership

²⁰⁷ Ministry for the Environment (2000) *Iwi and Local Government Interaction under the Resource Management Act 1991: Examples of Good Practice*, Wellington, p 10

²⁰⁸ ‘Need to alleviate Maori suspicions’ (1996) *New Zealand Local Government*, September, pp 8–9

of the riverbed and water does not sit well with the regional council.’ Dialogue between council and River Trust Board had been on hold during the hearings, but the release of the report seemed a good time for council to starting talking with Maori ‘about the report and about what happens next’.²⁰⁹ Furthermore, Waitakere Mayor, Bob Harvey, spoke on behalf of Te Kawerau a Maki at the Waitangi Tribunal’s Kaipara hearings, in what was described as ‘an unusual move’. Tribunal Director Morrie Love commented that ‘Members of local bodies do appear [before the Tribunal] but they’re normally there to represent their own interests. It is very unusual for one to appear on behalf of the claimant group.’²¹⁰

The relationship between Maori and local government will be of increasing significance in the future, particularly in terms of Treaty settlements. There is tremendous potential in this relationship; much hinges on the success of the current local government review and the future debates in local communities about Maori representation. Regardless of the limitations of current and future legislative frameworks, however, very effort should continue to be made by all parties to secure a solid future for local government and Maori under the Treaty of Waitangi.

4.2 Recommendations for a full report

The following is a recommendation for the content of a full report on Maori and local government, based on the discussion and analysis of this scoping report. These general comments are to be read in addition to the recommendations made at the end of each section of this report.

Part One: Maori, local government, and the Treaty of Waitangi

Current legislation (particularly the Resource Management Act 1991 and the Local Government Bill 2001) does not bring certainty to the relationship between local government and the Treaty of Waitangi. The constitutional conundrum is whether local government has obligations to Maori under the Treaty of Waitangi. Further research could address the following questions to advance understanding of these issues:

²⁰⁹ C. Rowatt (21 July 1999) ‘Regional council keen to open river talks’ *Wanganui Chronicle*

²¹⁰ J. Brown (10 March 2000) ‘Mayor speaks up for iwi rights’, *New Zealand Herald*

1. Did the Crown actively protect Maori interests when it first established and empowered provincial/ local government? Were Maori sufficiently consulted? Did the Crown heed the concerns Maori voiced?
2. Has the Crown actively protected Maori interests in subsequent local government reforms? (This scoping report would indicate that it did not actively protect Maori interests during the reforms of the 1980s, but further research is required regarding earlier reforms also.)
3. Case studies of the interface between local government and local Maori regarding Treaty issues (such as Maori tino rangatirataga) would reveal the level of local government commitment to the Treaty in practice. This scoping report referred to the Moutoa Gardens protest as one example – this may be a full chapter in a future report, or other examples might be found to illustrate similar issues.

Part Two: Maori representation and local government

Maori representation will become an increasingly important matter in the near future, and is likely to be debated at the local and national level. Further research is required in the following areas to ensure future debate is well informed and productive.

1. What (if any) debate occurred when the Maori seats were first introduced (1867) to justify their creation in constitutional terms? On what basis were the seats later defended when their existence was questioned – were arguments presented in terms of Treaty rights, or principles? In particular, it would be interesting to review Maori debate about the seats, to identify any Treaty rights or principles being asserted.
2. What are the Treaty principles that would support the case for guaranteed local Maori representation? Is representation at the local level a ‘Treaty right’? If so, what does that mean?
3. More statistical data is required on local Maori representation. How many Maori have been elected to local government; when and where were they elected? Also, what do we know about the voting behaviour of Maori in local body elections?

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