The Treaty of Waitangi in Legislation

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suggests that generic references to the Treaty of Waitangi in legislation must be accompanied by specific provisions spelling out what it means.

The Treaty of Waitangi is the founding document of New Zealand. In 1990 the then President of the Court of Appeal, now Lord Cooke of Thorndon, said of the Treaty "It is simply the most important document in New Zealand's history". [1990] NZULR 1. In essence, the Treaty of Waitangi symbolises and expresses an agreement between Maori and the Crown in 1840 on how coercive power should be shared in New Zealand.

Legislation is the primary instrument of coercive power of the New Zealand Government; usually proposed and applied by the executive branch of government, finalised by the Legislative branch, and interpreted by the judicial branch of government. Legislation symbolises and expresses the will of government in exercising power in New Zealand.

What then is the relationship between New Zealand's founding agreement on how to share coercive power and the primary instrument of government's coercive power?

You might think that looking to the "constitution" would provide a ready answer to this. Yet even the United States constitution displays an agnosticism as to the fundamental relationship between its constructed government and its indigenous inhabitants. There, it was left to the US Supreme Court under Chief Justice Marshall in the early nineteenth century to find that nation's own halfway house for the status of American Indian tribes as possessing the status of "domestic, dependent nations": (Cherokee Nation v State of Georgia 30 US 1 (1831) (5 Peters 1) at 16). The US Courts have been exploring the ambiguous parameters of that status ever since. The Canadian Charter of Rights and Freedoms has contained since 1982 a more explicit, but still opaque recognition of some constitutional protection for First Nations peoples. Section 35(1) provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". The meaning of this has had to be filled in by a succession of controversial decisions by the Canadian Supreme Court.

New Zealand's constitutional arrangements are much more informal than the North American examples. In my view, that is a good thing. It means our constitution is flexible and dynamic and can evolve with changing social, economic and cultural circumstances. It also means, however, that the fundamental principles of the constitution can always be questioned, and can always be seen as being "at risk" as well. The changing place of the Treaty of Waitangi in our constitution is a good illustration of both the opportunities and risks of these aspects of constitutional life in New Zealand.

TREATY CLAUSES IN LEGISLATION

From a traditional legal perspective the Treaty of Waitangi exists in a shadowland; half in and half out of the law. It is "part of the fabric of New Zealand society": Huia Development Trust v Waikato Valley Authority [1987] 2 NZLR 188, 210. But it has no legal "status" in and of itself. In order for the Treaty to be part of the law it has to be made so. The primary way in which this occurs is through incorporation in legislation.

It is worth noting, in passing, that despite the traditional perspective the Treaty of Waitangi has legal effect in other ways. There has been increased judicial, academic and political regard for the informal constitutional status of the Treaty over the last fifteen years. This has added to the ways in which the Treaty is found to have influence by the Courts. In interpreting legislation, Courts will call on a number of aids, such as those referred to in the Interpretation Act 1999. On increasing occasions, Courts will refer to the Treaty of Waitangi as an aid to interpretation - simply because of its informal constitutional importance. (See Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179.) In applying the principles of administrative law under applications for judicial review Courts can find that the Treaty is a relevant consideration to which a decision-maker must have regard. Attorney-General v New Zealand Maori Council [1991] 2 NZLR 129 (See Janet McLean, "Constitutional and Administrative Law: The Contribution of Lord Cooke" in The struggle for simplicity in the law: Essays for Lord Cooke of Thorndon, ed Paul Rishworth (Butterworths, 1997). In addition, analysis of the content of the common law doctrine of aboriginal title and customary rights can shade into analysis of the implications of the Treaty of Waitangi: Te Rūnanga o Te Ika Whenua v Attorney-General [1994] 2 NZLR 20.

The primary way in which the Treaty has legal effect in New Zealand is where legislation refers to it. The biting effect of the Lands case, (NZ Maori Council v Attorney-General [1987] 1 NZLR 641) which represents the seminal modern awakening of the legal importance of the Treaty was only possible because s 9 of the State-Owned Enterprises Act 1986 stated that:

Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

It was in interpreting this section, and only because of this section, that the Court of Appeal found that the Crown was
obliged to work out a system to safeguard Maori claims under the Treaty before transferring land to SOEs.

This is comforting for the traditional lawyer. It means that the particular words that Parliament adopts in referring to the Treaty might affect the way in which it has legal effect. And, indeed, the statute book contains a rich variety of forms of reference to the Treaty of Waitangi. I set out below several interesting examples of a general reference to the Treaty are. The *actor* (who) is in *italics*, the *action* (what) is underlined and the nature of the requirement in relation to the Treaty (how) is in *bold* in the quoted sections:

- this Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi, s 4 Conservation Act 1987;
- in relation to the transfer, pursuant to this Act, of any land, or any interest in land, to a Crown Research Institute or a subsidiary of a Crown Research Institute, the *shareholding ministers* shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), s 10 Crown Research Institutes Act 1992;
- in achieving the purpose of this Act, 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 (Te Tiriti o Waitangi), s 8 Resource Management Act 1991;
- all persons exercising the functions and powers under this Act shall have regard to the principles of the Treaty of Waitangi (Te Tiriti o Waitangi), s 4 Crown Minerals Act 1991;
- it is the duty of the *Council of an institution*, in the performance of its function and the exercise of its powers, – (b) To acknowledge the principles of the Treaty of Waitangi, s 181 Education Act 1989.

Other Acts refer to a particular (or general) aspect of what the Treaty means:

- whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, their taonga, and whereas the Maori language is one such taonga, Preamble, Maori Language Act 1987.
- whereas the Treaty of Waitangi established the special relationship between the Maori people and the Crown, and whereas it is desirable that the spirit of the exchange of kawanatanga for the protection of rangatiratanga embodied in the Treaty of Waitangi be reaffirmed: And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people, Preamble, Te Ture Whenua Maori Act 1993.

Other sections in the statute book do not explicitly invoke the Treaty of Waitangi but do refer to matters which are at the heart of the Treaty, and presumably would be interpreted in the context of the Treaty, eg:

- “In achieving the purpose of this Act, all persons exercising functions and powers under it shall recognise – (c) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga”, s 4 Historic Places Act 1993.

There are some interesting points to be found in comparing the provisions quoted above. First, there do appear to be clear distinctions in the force of those provisions that require someone to “give effect to” the Treaty compared to those which require someone to “have regard to” or “take into account” or not to “act inconsistently” with the Treaty. For example, there is likely to be a difference in whether a substantive obligation to comply with the Treaty is created or a procedural obligation is created for the decision-maker to turn his or her mind to the Treaty. Also, a strict reading of the differences between these formulations might find a difference in the extent to which positive action is required to be undertaken.

Second, there are a variety of different actors who are affected by the Treaty in these clauses in relation to a variety of different sorts of activities. These range from those interpreting an Act (anyone reading it to see what it means but ultimately, and authoritatively, the Courts), to those exercising general or specific powers and functions under it. There are also distinctions between different decision-makers being affected by the Treaty in some Acts. For example, shareholding ministers of Crown Research Institutes (CRIs) are affected but CRIs themselves are not.

Finally, there are the references to the “principles” of the Treaty of Waitangi rather than to the Treaty itself. This is not the place to analyse what the principles of the Treaty are or might be. I have faced various queries from foreign and domestic commentators as to whether the reference to "principles" is a “plot” — but some of them have suspected it to be plot to enhance the Treaty's effect and some to constrain it. I suggest that this formulation indicates that it is the spirit and extent of the Treaty which is important, rather than its bare words. This is consistent with the constitutional significance of the Treaty and the broad, open-textured reading of such documents.

And it is this last point that leads me in the direction of questioning the utility of ordinary statutory interpretation as a form of Treaty analysis.

**The Futility of Textual Interpretation**

The Treaty of Waitangi is not sensibly susceptible to ordinary techniques of statutory interpretation as they have evolved in a common law system. There are three reasons for this:

First, the Treaty of Waitangi is a document of constitutional importance. As such, common law principles of statutory interpretation themselves set the Treaty apart by requiring that it, and references to it, be interpreted generously, as always speaking and in light of evolving social circumstances as well as its original intent. The then and current Presidents of the Court of Appeal made this crystal clear in the 1987 *Lands* case:

A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any Court or responsible lawyer in New Zealand at the present day suggesting otherwise. (Cooke P at 655.)

Whatever legal route is followed the Treaty must be interpreted according to its principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise. (Richardson J at 673.)

Second, the terms of most legislative references and more importantly the Treaty itself do not yield black and white answers from straight textual analysis. The essence of the Treaty of Waitangi surely lies in the balance of articles one and two – the balancing of te tino rangatiratanga with kawanatanga. As the Waitangi Tribunal characterised it in 1983 in the Motunui-Waitara Report (1983 at pp 55, 65, 61):

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The Treaty represents the gift [by Maori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants ... That then represents the exchange of gifts that the Treaty represented. The gift of the right to make laws, and the promise to do so so as to accord the Maori interest an appropriate priority. This balancing act is not aided by looking more closely at the words or the original intent. I acknowledge that this takes us directly into the great jurisprudential debates of North American constitutionalism. I argue that context is more important than text. And the context is social, economic, political, with a special nod to culture. Balancing these factors is primarily the job of elected representatives – also known as politicians. Lawyers and Judges should certainly be only a secondary resort. Lawyers are not trained to think laterally about ill-framed and changing issues, or to identify and analyse the policy effect of a wide variety of options for dealing with an issue, or to make tradeoffs between loudly competing political interests. Politicians, on the basis of sound professional advice, are better placed for these challenges.

Third, and underlying the first two points, the reason that its words do not materially aid our application of the Treaty of Waitangi lies in its essential nature: the Treaty of Waitangi does not express a contract; it expresses an ongoing relationship, or set of relationships. In arguing this I draw on the work of others, in particular Dr Paul McHugh and Professor Ken Coates (See Living Relationships: Kokiri Ngati - the Treaty of Waitangi in the New Millennium (Wellington, Victoria University Press, 1998). The relationships between the Crown, Maori and other New Zealanders are complex, enduring and evolving. We do not expect them to cease. A perspective of the Treaty that emphasises relationships moves beyond formalistic legal constructs to look at what is actually going on between people.

As Casey J said in the Lands case (at 702):

I think the deliberate choice of the expression “inconsistent with the principles of the Treaty” in preference to one such as “inconsistent with its terms or provisions” points to an adoption in the legislation of the Treaty’s actual terms understood in the light of the fundamental concepts underlying them. It calls for an assessment of the relationship the parties hoped to create by and reflect in that document, and an inquiry into the benefits and obligations involved in applying its language in today’s changed conditions and expectations in the light of that relationship.

If the Treaty of Waitangi expresses the parameters of a relationship rather than the terms of a contract, then we must expect a particular issue that arises within that relationship to be resolved through discussion, consultation, and dialogue within the context of the time rather than being determined by the original and general expression of the relationship.

If your purpose in referring to the Treaty in legislation is to enhance its symbolic value, then strictly speaking you have no need to give it a particular legal effect

If the Treaty of Waitangi expresses a set of relationships what point is served by referring to those relationships in legislation? Addressing the “why” question in relation to the Treaty in legislation gets us quite a long way.

I suggest that there are two primary reasons to refer to the Treaty in legislation: for symbolic value and for instrumental value.

Symbolic value
The words “symbolic value” are often prefaced by the word “only”. This distorts me. Symbolism is a corner-stone of constitutional arrangements. The normative value of symbolism is a core element of the force of constitutional conventions. Furthermore, symbolism is intimately tied up with identity – whether it is the identity of a nation, an iwi or hapu or even a government agency.

I suggest that the most important reason to refer to the Treaty of Waitangi in legislation is if the state wishes to reinforce the symbolic value of the Treaty. Legislation is the primary, and most authoritative expression of authority in a liberal democratic state. Legislative recognition of the set of relationships expressed in the Treaty confers legitimacy on those relationships. Furthermore, given the founding character of the Treaty, it also confers legitimacy on the state itself. No doubt different groups in New Zealand would see different aspects of such symbolism and would disagree on whether it is justified. But in the long term, symbolism is the most important, and most undervalued, function of legislation. It signifies fundamental values.

If the Treaty is referred to in legislation for its symbolic value, what sort of reference is required? A general reference. A legislative mihi. A bow in the direction of the Treaty that acknowledges its presence. This could be contained in a general statute. Suggestions at the constitutional conference held in 2000 on this topic included one by Denese Henare that the Treaty of Waitangi could be included as a preamble to the Constitution Act 1986 (See Denese L Henare, “Milennial thoughts on Maori Development”, Appendix A to the Annual Report of the Law Commission, 2000). In particular pieces of legislation, a reference to the Treaty might look pretty much like many of the clauses quoted earlier in this paper. And, contrary to the instincts of statutory interpreters, the exact words of the acknowledgment don’t matter too much – it’s the symbolism that counts.

But let’s be clear: If your purpose in referring to the Treaty in legislation is to enhance its symbolic value, then strictly speaking you have no need to give it a particular legal effect. It does not need to have a legal status that would see Judges interpreting and applying it directly. That is the realm of instrumental value.

Instrumental value
The second reason to refer to the Treaty in legislation is if Parliament intends to create some legal effect that is relevant to the Treaty. This is the instrumental value of legislation: its practical effect. Let us pause here.

The purpose of most legislation is to enable something to be done that otherwise could not be, or to prevent something from being done that otherwise could. Detailed provisions in legislation therefore create functions, powers and duties and even organisations. They define behaviours that should not occur, and the consequences of them occurring.

WHY REFER TO THE TREATY?

If the Treaty of Waitangi expresses a set of relationships what point is served by referring to those relationships in legislation?
I have argued above that the Treaty expresses an ongoing set of relationships between the Crown, Maori and other New Zealanders. It is a general expression of those relationships. Yet it is not useful to refer to a general expression of relationships in a set of detailed statutory provisions when you are concerned with the instrumental value of those provisions. When the legislative drafter is formulating specific statutory provisions to achieve a set of policy objectives referring to the Treaty alone does not help very much. The Treaty of Waitangi is expressed too generally to have a clear implication for most detailed legislative clauses. Simple reference to it leaves the legal and policy implications unclear on the face of the statute and leaves the discretion to fill in their meaning to lawyers’ arguments and Judges’ decisions. As the Courts themselves have consistently stressed, resolving the policy questions raised by the Treaty of Waitangi requires political engagement first and foremost. Lawyers and Judges may be able to offer assessments of those resolutions but are poorly placed to forge them.

The real task within government lies in the detail of policy analysis and its translation into legislation. Successive governments have maintained that the Treaty of Waitangi is relevant to policy-making. The Cabinet Manual 2001 (para 5.35) requires Ministers, in every Cabinet paper proposing legislation, to draw attention to any aspects that have implications for or may be affected by the Treaty of Waitangi. If this is to be satisfied, the Treaty implications must be considered in relation to the detail of policy, including policy that requires implementation by legislation. Setting out how to do that is a matter for another paper. However, a comprehensive revision and expansion of the Legislation Advisory Committee Guidelines is about to be issued and should be consulted by all those having input into the policy and legislative process. These Guidelines retain and reinforce an emphasis on the need to precisely ascertain Maori rights and interests affected by legislation and how the Crown’s power to govern relates to them. This was summarily described in the 1991 version of the Guidelines as follows (Legislation Advisory Committee, Legislative Change: Guidelines on the Process and Content, Report No 6 (rev ed, 1991), para 42):

It is very important that attention is focused on the specific aspects of the Treaty which are relevant. What are the guaranteed rights or interests which are put in question? What is the role of the Crown’s right to govern?

Undertaking this analysis requires willingness on the part of policy-makers to do a lot of work. Answering detailed policy questions of how Maori interests are or should be affected by the creation of a new function, power or duty can be difficult. It requires a detailed set of questions to be worked through. Two papers by Bill Mansfield commissioned for the Ministry of Justice in 1999 (“Legislative References to the Treaty of Waitangi” and “The Identification of Maori Treaty Interests that may be Affected by Legislative Proposals and the Consideration of Mechanisms for the Safeguarding of those Interests: A Guide to Process”) suggested a step by step guide to the process of identifying and addressing Maori Treaty interests that may be affected by a legislative proposal:

- **relationships and consultation**: identify whether there is a relevant relationship in existence, whether it is at the appropriate level, and whether additional or different relationships are needed;
- **deconstruction of proposal into decision-making elements**: identify the decisions that will be taken under the legislative proposal and the decisions that will need to be taken to give effect to it, group them into useful categories of decisions (such as decisions relating to the exercise of public powers; matters of fact; matters of law; issues of policy; operational matters; the allocation of public resources; access to, or the use of public resources) and identify when each decision needs to be made and the time period to which it relates;
- **identification of affected Maori interests**: consider which decisions have the potential to impinge on Maori interests;
- **mechanisms for safeguarding Maori interests**: consider whether the decision can be circumvented, or appropriate safeguards included or whether the possible decision would be a clear breach of the Treaty and must be precluded by legislation. The paper suggests a list of helpful questions in this regard, including considering whether the decision-maker should be, who should be consulted and how, whether the method and timing of decision-making should be specified, and whether general policy, plans or staff guidance should be required to be developed.

These sorts of questions are difficult and require a lot of work to answer. In particular, the task of determining what are Maori interests requires detailed consideration and, probably, consultation of some sort. For what it’s worth, I suggest that it may often be useful to view Maori interests as rooted in the distinctiveness of Maori culture and the need for cultural survival – the right of Maori to live as Maori. The task of working through the details of these questions is part of the point of filling in the specifics of the policy implications.

The same sort of detailed consideration of policy implications has to be worked through in formulating policies that impinge on other interests. There are a variety of general values, such as enhancing democracy, preserving the rule of law, and protecting individuals’ liberty that must be attended to in working through the detailed legislative provisions required to achieve public policy purposes. Attending to the health of the relationships between the Crown, Maori and other New Zealanders must surely be one such value. If it is, then the detailed policy and legislative work simply has to be done.

And when the answers to these questions are worked out, they are unlikely to require legislative reference to the Treaty of Waitangi per se. Rather, any legislative reference is likely to be to the interests protected by the Treaty and the factors which make up the appropriate balance between kawanatanga and tino rangatiratanga. These legislative provisions will elaborate and fill out the meaning of the Treaty. And they will be formulated by the political process, with all its negotiation, consultation and iterative decision-making. The several controversial versions of the “Treaty clause” in the Health and Disability Bill as it passed through Parliament in 2000 provides a fascinating example of this process.

The Treaty clause in the NZ Public Health and Disability Act

The New Zealand Public Health and Disability Bill as introduced and passed in 2000 has contained a series of permutations of cls 3 (the purpose clause) and 4 (Treaty of Waitangi) concerning the Treaty of Waitangi:
Ne w Zealand Public Health and Disability Bill:

As introduced:

"3 Purpose
The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and to establish new public health organisations in order to –

(d) consistently with the purposes specified in paras (a) to (c), recognise and respect the principles of the Treaty of Waitangi."

As reported back from the Select Committee on majority vote, and passed
(changes marked)

"3 Purpose
(1) The purpose of this Act is to provide for the public funding and provision of personal health services, public health services, and disability support services, and to establish new publicly-owned health and disability organisations in order to pursue the following objectives –

(b) reduce health disparities by improving the health outcomes of Maori and other population groups;

(2) The objectives stated in subs (1) are to be pursued to the extent that they are reasonably achievable within the funding provided.

(3) To avoid any doubt, nothing in this Act
(a) entitles a person to preferential access to services on the basis of race; or
(b) limits s 73 of the Human Rights Act 1993 (which relates to measures to ensure equality).

4 Treaty of Waitangi
This Act is to be interpreted in a manner that is consistent with the principles of the Treaty of Waitangi.

4 Treaty of Waitangi
"In order to recognise and respect the principles of the Treaty of Waitangi, and with a view to improving health outcomes for Maori, Part 3 provides for mechanisms to enable Maori to contribute to decision-making on, and to participate in the delivery of, health and disability services."

I suggest that the key change made in the provisions above lies in the shift from the general to the specific. Instead of purporting to affect the interpretation of the whole Act in a general but unspecified way, the new cl 4 clarifies Parliament's intention behind the specific provisions in part 3 of the Act. This means that a Court (or anyone else for that matter, can focus on interpreting how Parliament intended to "recognise and respect" the principles of the Treaty by turning to the specifics in part 3 rather than starting from scratch.

Part 3 of the Act relates to District Health Boards (DHBs) and includes a variety of provisions relating to specific ways in which Maori interests are taken into account. These provisions include:

• specific references to Maori interests in establishing the objectives and functions of DHBs (ss 22 and 23);
• specific imposition of a duty on a Minister to ensure Maori membership on DHBs proportional to the number of Maori in the resident population (ss 29) and Maori representation on community and public health advisory committees, disability support advisory committees, and Hospital advisory committees (ss 34-36);
• specific requirements on a DHB to train Board members relating to, and keep an up-to-date record of the familiarity of Board members with, Maori health issues, Treaty of Waitangi issues, and Maori groups or organisations in the district (Sch 3); and
• more general provisions that can extend to DHBs’ relationships with Maori among others, such as the power to enter into cooperative agreements and service agreements (ss 24 and 25).

(If may be queried why it is only Part 3 that is identified as relevant. While Part 3 contains more provisions directly and obviously relevant to Maori interests, the development of a Health and Disability Strategy under part 2 and the relevance of Maori tikanga to inquiry procedure under part 5 also seem relevant to Maori interests under the Treaty.)

Whatever your position on the substance of these provisions, it is in them that we see the specific operationalisation of the relationships between the Crown, Maori and other New Zealanders that is expressed in general terms in the Treaty of Waitangi. It is provisions such as these that give substance and certainty to how those relationships should work. It is here that endless debate over abstract ideologies must give way to working out pragmatic solutions to problems in the real world.

Specificity and certainty are not new legal concepts. They have an honourable jurisprudential pedigree resonating in the rule of law. In relation to the Treaty of Waitangi there are a variety of examples of specific legislative provisions that are intended to achieve Treaty-related policy objectives. The State-Owned Enterprises Act 1987 and Resource Management Act 1991 are just two examples of Acts that contain detailed legal provisions constituting a specific regime of protection of Maori interests. But they also both contained
generic references to the Treaty with general effect, as noted above.

The issue then becomes what sort of a generic reference to the Treaty should be left in legislation, should it have legal effect, and if so what sort?

With the State-Owned Enterprises Act, s 9 was found by the Courts to have a significant effect as a “safety net” (or undertow) in requiring the Crown to go further than the specific provisions that were judged in those circumstances not to meet the standard of the generic provision. This effectively meant the Courts formulating their own view of what the relationships expressed by the Treaty should mean in specifics even when Parliament has already turned its “mind” to that question. There is a legitimate argument that a generic reference to the Treaty is a desirable residual safety-net underneath the high-wire of parliamentary deal-making on Treaty interests. It can be argued that:

- Parliament, as an institution rooted in the principle of majority rule, is not well-placed to safeguard the interests of a minority, especially where there are majoritarian political incentives not to do so;
- where the Courts are faced with a specific statutory regime outlining Parliament’s intent in how to protect Maori interests the Courts can and should generally be expected to be reluctant to substitute their own judgment of what is appropriate for Parliament’s judgment;
- there may be extreme cases where judicial scrutiny of a specific legislative regime reveals manifest injustices when considered against general principles of healthy relationships as expressed in the Treaty of Waitangi. It is a worthwhile safeguard for the minority to enable the Courts to express this as a view. In these cases, anyway, the Courts are likely simply to point out the deficiency and to leave the formulation of a new specific regime to the policy-making and political machinery – as occurred in the Lands case.

On balance I consider that these arguments, while validly made, are ultimately unconvincing. I suggest that:

- as I have argued above, the New Zealand Courts are not trained in, or well-suited to, what is essentially a policy-making job of balancing the interests under the Treaty of Waitangi;
- the advent of MMP has increased the diversity of representation in Parliament, and particularly improved the political power of Maori. This political power, rooted in democratic representation, is a much better way of influencing political decisions than relying on the Courts;
- if the approach outlined here is followed Parliament will have considered and decided on the specifics of how to protect Maori Treaty interests. Courts should be constrained to their usual function of interpreting Parliament’s expressed intention rather than effectively legislating themselves with little to rely on, regarding controversial policy issues;
- if a generic reference to the Treaty in a particular statute is still necessary to protect the minority Maori interest, then it must be necessary in all statutes and should therefore be a generic provision residing in the Constitution Act 1986 or Interpretation Act 1999. This requires a more general, informed, constitutional debate than we have had to date on these issues.

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CONCLUSION

Whether and how the Treaty of Waitangi should be referred to in legislation are current questions that arise every time a new piece of legislation is developed. These questions provoke visceral political reactions from all sides of the political spectrum. The answers matter.

I argue that it is important to consider the purpose of referring to the Treaty in legislation.

The symbolic value of referring to the Treaty of Waitangi in legislation should not be underestimated as a purpose. This purpose may be satisfied by a general reference to the Treaty as contained in a variety of current statutes. But achieving this symbolic value should not involve attaching legal effect to a generic clause. To do so leaves the details of that legal effect to be filled in by lawyers and the Courts. In New Zealand’s constitutional system, our Courts should not be deciding such broad policy issues. They are not trained for it or suited to it. Their reputation with the public will suffer in the long term if they continue with that function and their general function itself will be perceived to have changed.

The instrumental value of referring to the Treaty in legislation is the value that lies in its legal effect. This value will not be well-achieved by a general reference to the Treaty itself. Rather, the legal effect of the Treaty that is desired in a particular area of law is a policy question that requires detailed consideration. The answer, if it requires legislation at all, will require a detailed legislative elaboration of the intended application of the Treaty of Waitangi. This sort of analysis poses a challenge to current systems of policy-making. It requires hard work on hard issues. But if Cabinet and Parliament do not consider these issues of detail then general references to the Treaty will ensure that the Courts will have to. If government and Parliament wants to live up to the rhetoric of taking seriously the relationship between the Crown, Maori and other New Zealanders, this detailed policy work simply must be done, as it is for other general public policy values. Parliament can no longer afford to avoid the hard issues of detail by passing generic provisions that leave the details to the Courts to fill in.

Finally, I note that the symbolic and instrumental values of referring to the Treaty in legislation may combine to reinforce each other. As in the NZ Public Health and Disability Act 2000 a generic reference to the intention of specific provisions to recognise and respect the Treaty, as long as it is accompanied by the specific legislative provisions that achieve particular Treaty-inspired purposes, achieve both symbolic and instrumental purposes. While the political negotiations in 2000 which led to this formulation may have been difficult, their product may also point us in a useful direction for the formulation of future references to the Treaty of Waitangi:

- a generic symbolic legislative mihia to the Treaty of Waitangi, without general legal effect;
- as long as it is combined with:
- specific legislative provisions that achieve Parliament’s specific policy purposes in attending to the health of the relationships between the Crown, Maori and other New Zealanders as expressed in the Treaty of Waitangi.

In following this current we may be closer to discerning the dimensions of the creature that is the Treaty of Waitangi – fished up on a legislative hook, cast by the executive and reeled in by the judiciary from the depths of our legal system.