

A Power of General Competence - Should it be Granted to Local Government in New Zealand?

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I. INTRODUCTION

For some time in New Zealand, local government has been calling for central government to grant it a power of general competence so that it can undertake a more significant role in the governance of New Zealand.¹ As the Department of Internal Affairs has recently stated:²

The current [Local Government Act 1974] generally requires everything local government does to be authorised in law, in detail. In contrast, it is proposed that a new law would give councils scope to choose activities they undertake and how they should undertake them, subject to public consultation processes. This is sometimes referred to as a ‘power of general competence’.

Central to the issue of providing local government with “a less prescriptive, more flexible and empowering legislative framework”³ through a power of general competence, is that local authorities are statutory corporations. As such, the powers of local authorities are considered as generally limited to those conferred on them by statute. The judiciary has taken the view that statutes granting powers to statutory

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¹ Promotion of a power of general competence took shape mainly during the last term of the Fourth Labour Government as part of a wider package of local government reforms. See Department of Internal Affairs, *Towards a Power of General Competence for Local Government in New Zealand - A Discussion Paper* (1987); Jansen, “Local Government and the Power of General Competence” (2000) paper presented at “Building the Constitution Conference”, Wellington, 7-8 April, 2000; Chen and Palmer, *Reform of Local Government – A Power of General Competence* (1998) (unpublished) 18-27.

² Department of Internal Affairs, *Review of the Local Government Act Summary* (2001) 2.

³ Cabinet, *Review of Local Government Act: Development of Policy Framework* (draft) (September 2000).

corporations should be interpreted conservatively as not granting a power of local competence, unless the power is clearly intended.⁴

However, the current prescriptive and complex legislative framework, together with the strict application of the doctrine of *ultra vires*, has become a source of frustration for both local authorities and central government.⁵

Potentially, there are two solutions to the issue of prescriptive local government legislation. Legislation could be simplified to clearly state what local authorities can do and how they can do it. Alternatively, local authorities could be empowered, through a power of general competence, to determine this for themselves. The exact form that this second solution could take has already been the subject of some debate in New Zealand. During the last term of the Fourth Labour Government, an examination as to whether local authorities should have a power of general competence was undertaken.⁶ During the term of the National Government that followed, however, the inquiry was stalled.

After the election of the current Labour/Alliance Government, the proposal to grant a power of general competence was again placed on the central government policy agenda.⁷ Labour Party policy states that a “key feature of [new local government legislation] will be a power of general competence for local authorities”.⁸ The Labour/Alliance Government has instructed the Department of Internal Affairs to review the Local Government Act 1974 (“the Act”) with a view to making it more empowering.

In light of these developments, it is opportune to examine what a power of general competence might mean for local government in New Zealand. Part II of this article canvasses arguments for the proposition that local government should be granted a power of general competence. Part III examines some of the options available: while some promote a ‘pure’ power of general competence, others advance positions that involve the mere simplification of existing powers. Part IV briefly canvasses some overseas experience. Significantly, New Zealand is not

⁴ For a discussion of the application of *ultra vires* to local government in New Zealand, see Palmer, *Local Government Law in New Zealand* (2 ed, 1993) 45-57.

⁵ Stigley, “Local Government’s Growing Importance in the Constitution” (2000) paper presented at “Building the Constitution Conference”, Wellington, 7-8 April; Jansen, *supra* note 1. See also various contributors to School of Political Science and International Relations, “Local Government in New Zealand” (1989) 50 *Political Science*.

⁶ McKinlay, *Local Government Reform: What was Ordered and What has Been Delivered* (Research Monograph Series No. 1, Local Government New Zealand, Wellington, December 1994) 11-12.

⁷ New Zealand Labour Party, *Labour on Local Government - Policy Document of the New Zealand Labour Party*, October 1999. See also, Alliance Party, *Alliance Policy on Local Government*, October 1999.

⁸ *Ibid* 3. See also, Department of Internal Affairs, *Vote Local Government – Briefing for the Incoming Minister* (1999) 13.

alone in currently reconsidering the role of local government. Other countries, including some in Europe, the United States, Canada, Australia and the United Kingdom are undertaking similar reviews. This provides for consideration in Part V of the more significant questions associated with the grant of a power of general competence, namely: the nature of the relationship between central government and local government; the nature of the relationship between regional government and territorial local government; the role of the courts; issues of accountability, regulatory powers and revenue; and the issues concerning the Treaty of Waitangi. Part VI concludes that there will be sufficient advantages involved in granting local government a power of general competence as long as there are also sufficient checks and balances established.

II. SHOULD LOCAL GOVERNMENT BE GRANTED A POWER OF GENERAL COMPETENCE?

A number of commentators promote the view that local government should be granted a power of general competence.⁹ They argue that the current powers do not permit local government to play the role being asked of it and that since the 1989 reforms,¹⁰ local government has developed sufficiently to be able to handle these new powers. They further contend that the statutory restraints on local government are no longer appropriate and that the Act requires radical reform.

1. Definitions

In its 1987 Discussion Paper, the Department of Internal Affairs described the power of general competence as follows:¹¹

A power of general competence is a legal basis for local government, defined and granted by Parliament, in which local authorities are empowered to do anything that they see as being necessary or desirable for the good

⁹ Jansen, *supra* note 1; Stigley, *supra* note 5; Chen and Palmer, *supra* note 1.

¹⁰ Between 1988–1992, New Zealand local government underwent significant structural reform. This involved amalgamating and rationalising territorial authorities, and the corporatisation of local functions to establish larger territorial authority units in accordance with Ministerial initiatives. Palmer, *Local Government Law in New Zealand* (2 ed, 1993) 7.

¹¹ Minister of Local Government, “Opening Address” presented at the Conference of the New Zealand Counties Association (2 June 1986).

government of their districts and regions, provided it is not otherwise contrary to the law.

More recently, the Hon Sandra Lee has described the power as “refer[ing] to legislation that contains a broadly expressed set of empowering provisions, underpinned by requirements for higher standards of transparency and accountability”.¹²

Therefore, the power of general competence is a statutory power that enables local authorities to independently determine what actions are in the best interests of their citizens.¹³ As a result, the level of independent decision-making power for local authorities is contingent upon the level of competence ascribed to local government by central government. Another corollary of the power of general competence is that all local government actions must be within the statutory framework that either enables, or enables as well as restricts, the power.¹⁴

While consideration of various definitions of the power of general competence is helpful, it is more useful to focus on how a power of general competence might differ from existing powers or others that have been proposed. This is because consideration of the power of general competence may potentially and significantly depart from current understandings about the powers of local government.¹⁵ Therefore, various conceptual approaches to empowering local government will be discussed in Part III of this article.

2. New Demands

The role that local government is now being asked to play in the overall governance of New Zealand has shifted significantly since the reforms of 1989. Leadership in community governance tends to be emphasised over the direct provision of local services.¹⁶ Moreover, the

¹² Minister of Local Government, “Keynote Address” presented at the Local Government Communicators Conference, Wellington, 30 March 2000.

¹³ Chen and Palmer, *supra* note 1, 18.

¹⁴ *Ibid* 18-19. The statutory framework of a power of general competence may attach words of limitation, although it is a matter of contention as to the appropriateness of limiting the power through words of limitation.

¹⁵ *Supra* note 13.

¹⁶ Jansen, *supra* note 1; Stigley, *supra* note 5; Chen and Palmer, *supra* note 1; School of Political Science and International Relations, *supra* note 4; Local Government New Zealand, *A Vision and Strategy for Local Government in 2010* (2000); Bush, *Local Government and Politics in New Zealand* (2 ed, 1995); Howell, McDermott and Forgie (eds), *Governance and Management in New Zealand Local Government* (Department of Management Systems, Massey University) (1995); Business Roundtable, *Local Government in New Zealand: An Overview of Economic and Financial Issues* (1995); Jansen, *New Zealand Local Government in the 1980s: Reform or Restructuring?* (1993) (Unpublished Ph D thesis, University of Waikato), particularly at 295-298; McDermott, Forgie and Howell, *An Agenda for Local Government* (1996).

Labour/Alliance Government is encouraging local government to take an active role in areas such as employment generation, local economic development and public transport.¹⁷

The context within which these changes are taking place is affecting perceptions about the role and function of both spheres of government. In the face of increasing challenges such as globalisation, central government in New Zealand has been departing from many of its traditional roles, especially in the areas of welfare provision, ownership and regulation. The resulting changes have led to either increased devolution to local government or to the creation of gaps, which have become areas of interest for local government. The diversity of New Zealand society has reduced the effectiveness of a 'one size fits all' approach. Local government, by fulfilling its communities' desire for voice and autonomy, and through developing its own competency, has found itself seeking a greater role in the governance of New Zealand from central government. This has raised the question about whether local government is unnecessarily constrained in its ability to play this new role in an unwieldy and prescriptive legal environment.¹⁸

3. Higher Degrees of Competency

Some commentators have argued that local government is not yet competent to take on these new roles or to handle an expansion of its legal powers.¹⁹ Historically, local government has not had extensive powers.²⁰

In summary, local government has historically been caught in a vicious circle. Small size and strictly defined powers has led to a limited range of functions being performed. This in turn has led to the gathering of meagre resources. Having been of minor practical importance relative to central government, local government has gained a low public profile, which has entailed a low level of political interest and consequent weak accountability.

However, things have changed over the past decade. For instance, local government now has much stronger local authority units than in the past, a wider set of functions, a stronger resource base and a more accountable and responsive managerial and political system.²¹ The 1989

¹⁷ Supra note 7. See also Prime Minister and Minister of Local Government, "Addresses" presented at the Local Government New Zealand Annual Conference, Christchurch, 10 July 2000.

¹⁸ See commentators, supra notes 1, 5 and 16.

¹⁹ New Zealand Business Roundtable, supra note 16.

²⁰ Department of Internal Affairs, supra note 1, 9-12.

²¹ Ibid.

reforms increased the capacity of local government to address complex matters, particularly in the areas of strategic management, policy development and accountability, which have further increased the effectiveness of the sector.²² While there is no doubt that improvements could be made, the combined effect of the above changes over the past decade suggests that local authorities are competent to deal with a grant of greater powers.²³

4. Constitutional Restraints

The constitutional framework of local government in New Zealand builds largely upon New Zealand's British inheritance.²⁴ Local authorities are statutory corporations and, as such, exercise only those powers conferred upon them by statute.²⁵ Section 37L of the Act specifies the nature of local authority incorporation:²⁶

Every regional council and every territorial authority shall be a body corporate with perpetual succession and a common seal, and, subject to this and any other Act, shall be capable of acquiring, holding, and disposing of real and personal property, of entering into contracts, of suing and being sued, and of doing and suffering all such other acts and things as bodies corporate may do and suffer.

At first glance, the corporate power of local authorities appears unlimited. However, the empowering words of section 37L(4) are qualified by the term "subject to this and any other Act", and the preferred legal view is that the subsection is enabling only.²⁷ Consequently, the substantive powers of local authorities are to be found in the provisions of the Act and a large number of other statutes through which central government prescribes the functions, powers and duties of local government.²⁸

²² See commentators, *supra* notes 1, 5, 16 and 17. See also Hall, *A Power of General Competence in Local Government: The Likely Form and Structure of a General Power to Govern and its Implications for Local Planning Authorities in New Zealand* (1998) (Unpublished B. Plan Dissertation, University of Auckland) 49-58.

²³ *Ibid.*

²⁴ Palmer, *supra* note 4, 1-3. For a commentary on the legal origins of local government in the United Kingdom, see Jennings, "Central Control" in Laski et al, *A Century of Municipal Progress 1835-1935* (1935) 417-454.

²⁵ Palmer, *supra* note 4, 45-98.

²⁶ For similar general powers, see also Local Government Act 1974, ss 247B and 247C.

²⁷ Palmer, *supra* note 4, 18.

²⁸ *Ibid.* Palmer states at 18 that: "The continuation of the limited power conferred on local authorities to expend out of general revenues funds for purposes not authorised by any Act or law, confirms the absence of a power of general competence or unrestricted powers of a natural person."

When considering the legal powers of statutory corporations, the New Zealand courts have followed British precedent and taken the view that the doctrine of ultra vires should be applied to local authorities.²⁹ The basis for ultra vires emerged out of early decisions of the British courts, which examined the powers of statutory corporations to construct public works, especially railways.³⁰ Ultra vires was later applied to municipal corporations when it was demonstrated that the Municipal Corporations Act 1835 had established them as instruments of government. From municipal corporations, the doctrine of ultra vires was then applied to new statutory authorities, county councils, urban and rural district councils and metropolitan borough councils.³¹ The courts assumed that Parliament did not intend for subordinate bodies to possess indefinite powers that might affect the private property rights of other persons or the authority of Parliament itself.³² In order to protect the public interest, the activities and exercise of powers by these bodies became subject to judicial oversight in accordance with the ultra vires doctrine.

However, some have questioned whether the doctrine needs to be applied as strictly to local authorities as it has been to other statutory corporations.³³ The New Zealand courts have largely followed British precedent and taken the view that the doctrine of ultra vires applies to New Zealand statutory corporations as it has to British statutory corporations.³⁴ Consequently, the courts strictly construe legislation against the existence of a power unless it is clear from the legislation that the power should exist.³⁵ In *Takapuna City Council v Auckland Regional Council*, McMullin J stated, citing from Halsbury's Laws of England, that:³⁶

The powers of a corporation created by statute are limited and circumscribed by the statutes which regulate it, and extend no further than is expressly

²⁹ *Infra*, note 36.

³⁰ *Colman v Eastern Counties Ry. Co.* 10 Beav 1, 16 LJ Ch 73, 50 ER 481; *East Anglian Ry. Co. v Eastern Counties Ry. Co.* 11 CB 775, 21 LJ CP 23, 138 ER 680; *Ashbury Railway Carriage & Iron Co v Riche* (1875) 7 LR HL 653; *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 481. For a discussion of these cases and the early emergence of the doctrine of ultra vires as applied to statutory corporations, see Jennings, *supra* note 21, 417-454.

³¹ Jennings, *supra* note 21, 417-454. See also, *Attorney-General v Aspinnall* (1837) 2 My and Cr 613, 40 ER 773; *Attorney-General v Poole Corporation* (1838) 4 My and Cr 17; *Attorney-General v Wilson* (1840) Cr and Ph 1, 41 ER 389; *Attorney-General v Lichfield Corporation* (1848) 11 Beav 120, 50 ER 762. For the application of the doctrine to local authorities in New Zealand, see Palmer, *supra* note 4, 45-98.

³² *Ibid.*

³³ Palmer, *supra* note 4, 48. It is worth noting that the courts did, at least in general terms, initially distinguish between elected local government bodies and other bodies in the application of the ultra vires doctrine. See *Kruse v Johnson*, 2 QB 91, 99 per Lord Russell.

³⁴ Palmer, *supra* note 4, 46.

³⁵ See McKinlay, *supra* note 6, 11.

³⁶ [1972] NZLR 705, 711. Halsbury's Laws of England (3 ed) 62 para 129.

stated therein, or is necessarily and properly required for carrying into effect the purposes of its incorporation, or may be fairly regarded as incidental to, or consequential upon those things which the legislature has authorised. What the statute does not expressly or impliedly authorise is to be taken to be prohibited.

As a mere ‘creature of statute’, the constitutional status of local government is subordinate to that of Parliament and its powers must be strictly construed. While this form of local government may have served us in the past, present and future aspirations for local government suggest that this status may be restrictive and no longer useful.³⁷

5. The Local Government Act 1974

As the Hon Sandra Lee, Minister of Local Government, has stated:³⁸

There is a real need to replace the current Local Government Act. The Act is a collection of fragments enacted at different times, reflecting different approaches. In fact, since 1974 it has been amended 150 times, in a very ad hoc way. Not surprisingly, it can be confusing and unclear for local authorities and citizens alike.

Local government itself has also become increasingly frustrated by a statute that has been described as “one of the longest, most intricate, and unwieldy statutes [in] the New Zealand statute book”.³⁹ In its Briefing Paper to the Incoming Minister, Local Government New Zealand stated that: “Many of our member authorities believe [the Local Government Act 1974] prevents them from fulfilling their community governance mandate and from effectively meeting the needs of their communities.”⁴⁰

As the Minister of Local Government has noted, the Act lacks coherence, is confusing to use, has become in many respects outdated, is needlessly detailed, and as a consequence, is expensive and difficult to administer.⁴¹ Furthermore, the powers in the Act are variable and seem to reflect inconsistent policy objectives underlying certain sections due to the Act’s ad hoc amendment. Such powers fail to reflect a vision of what

³⁷ Supra note 7.

³⁸ Minister of Local Government, supra note 12.

³⁹ Palmer, “Local Government, the Constitution and the Future” in Howell, McDermott and Forgie (eds), *Governance and Management in New Zealand Local Government* (1995) 324.

⁴⁰ Local Government New Zealand, *Briefing Paper to the Incoming Minister* (1999).

⁴¹ Minister of Local Government, Speech to the Labour Local Government Sector Council (12 May 2000).

level of powers is necessary to fulfill the function of local government and the level of prescriptive drafting of those powers.⁴²

In addition to the Local Government Act 1974, much legislation governing local authorities is contained in other statutes, such as the Local Elections and Polls Act 1976 and the Rating Powers Act 1988, which also tend to suffer from similar deficiencies as are found in the Local Government Act 1974. Any grant of a power of general competence would need to relate to the various other statutes that govern local government activity. Moreover, there are numerous local government statutes that grant specific functions and powers to particular local authorities.⁴³

III. APPROACHES TO EMPOWERING LOCAL GOVERNMENT THROUGH A POWER OF GENERAL COMPETENCE

Having established a number of reasons in favour of granting local government a power of general competence, this part of the article seeks to clarify what is meant by a power of general competence through examining the various extents of the application of the power.

Most discussion in New Zealand has centered on the consideration of four options as to how local government might be empowered.⁴⁴ The first option is a 'rationalisation and consolidation' of existing powers on the basis of existing assumptions about the relationships between central and local government. The second option may be described as the 'power of a natural person' approach. This involves effectively abandoning detailed prescriptions of how functions are to be undertaken. The third option involves a power of general competence, and the fourth option narrows the application of a power of competence to a specified range of functions.

⁴² See for example, the seemingly overly prescriptive powers in the Local Government Act 1974 in respect of roads (s 319), water races (s 426), sewerage and stormwater drainage (ss 442-452) and the development of land for housing (ss 550-561) compared with more enabling sections, such as the general powers to borrow (s 122ZA), control of the source of water supply (s 378) waste management (s 540) and more general powers, such as the powers over works and contracts (ss 247B and 247C).

⁴³ Department of Internal Affairs, *Cabinet Paper to the Cabinet Committee on Reform of Local Government and Resource Management Statutes* (1989) 8.

⁴⁴ See also Hall, *supra* note 22, 15-16.

1. A Rationalisation and Consolidation of Existing Powers

The option of a rationalisation and consolidation of the functions and powers of local authorities aims to remove the prescriptive rules from the Act and replace them with more broadly drafted functions and powers.⁴⁵

While a rationalisation and consolidation of existing powers might provide greater assurance to local authorities about what their functions and powers are and what they are able to undertake, it also perpetuates the existing limitations under which they operate. There is also a risk that this approach will not provide the necessary flexibility for variations between individual local authorities, nor encourage greater local autonomy or accountability to the local community.⁴⁶

2. The Powers of a Natural Person

The option of granting local authorities the powers of a natural person seeks to remove the detailed prescription in the Act about what powers local authorities have to undertake particular functions.

Modern statutory drafting of the functions, powers and duties of statutory corporations has sought to distinguish clearly between the ‘functions’ of these corporations and their ‘powers’.

An example of this modern approach is found in sections 707ZZK and 707ZZJ of the Act, which grant functions and powers to Infrastructure Auckland. Section 707ZZK broadly defines the functions of Infrastructure Auckland to be “to contribute funds, by way of grants ... for the purpose of providing (a) Land transport; or (b) Any passenger service; or (c) Any passenger transport operation; or (d) Stormwater infrastructure”. Infrastructure Auckland is then separately granted the powers of natural persons in order to carry out these functions.⁴⁷

However, the question arises as to whether it would be appropriate to grant local authorities the powers of ‘natural persons’, as opposed to retaining their existing powers of body corporates and their separate regulatory and coercive powers.⁴⁸ Arguably, the powers of natural persons and those of local authorities are different things. For example, natural

⁴⁵ Department of Internal Affairs, *supra* note 43, 8.

⁴⁶ *Ibid* 9.

⁴⁷ Local Government Act 1974, s 707ZZJ.

⁴⁸ Local Government Act 1974, s 37L(4). For similar general powers, see also Local Government Act 1974, ss 247B and 247C.

persons do not have the power to regulate, tax or search other people's property.

While the concept of the 'powers of natural persons' has been applied to the 'powers' of statutory authorities, there also remains the issue of how to deal with 'functions'. As stated above, where statutory corporations have a narrow set of functions, modern statutes typically prescribe them. However, in the case of local authorities that have numerous and much broader functions, and have expressed a desire for greater flexibility, this approach may be deficient.

Nonetheless, granting local authorities the power of natural persons, or allowing section 37L(4) of the Act to have a much wider application in any new local government statute, would have the effect of narrowing the application of the ultra vires doctrine. There would be more focus on what functions local authorities would be able to undertake, rather than on the extent of the powers they have to undertake them. Even so, it may still be appropriate for Parliament to more carefully prescribe the powers of local authorities to carry out some functions, especially where they involve regulatory, coercive or financial power, or where that power may impinge directly on private property rights.

The capacity of companies in New Zealand has been reformed over recent years. In 1984, companies were granted "rights, powers and privileges of a natural person"⁴⁹ and in 1993, companies were provided with "[f]ull capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and ... full rights, powers, and privileges".⁵⁰ Significantly, the 'natural person' concept as a model for company capacity was replaced with the concept of full capacity because of the inherent differences that exist between corporations and natural persons.⁵¹

3. A Power of General Competence

As stated earlier in this article, there is a lack of certainty as to what is meant by the granting of a power of general competence to local authorities. Conceptually, a power of general competence could grant local authorities complete discretion over the functions and powers they might undertake, perhaps including an authority to amend or extend their

⁴⁹ Companies Act 1955, s 15A.

⁵⁰ Companies Act 1993, s 16. See also Shapira, "The Capacity Provisions of the Companies Bill" [1993] NZLJ 207.

⁵¹ Shapira, "Ultra Vires not Quite the End" [1985] NZLJ 124. See also *Re Ahari Properties Ltd* [1990] BCR 218, 223.

powers beyond those initially granted by Parliament. It could amount to a broad power to govern.⁵²

More typically, a power of general competence for local authorities would only involve granting greater discretion over what functions may be undertaken so that local authorities might more easily meet the needs of their residents and ensure the good government of their districts. The power of general competence is usually defined so that local authorities have broad discretion over what functions they might perform, but a narrower discretion over what powers they have in order to perform those functions, and no authority to amend or extend their powers.⁵³

This approach appears to have been adopted in a number of Australian local government statutes. For example, section 3 of the Local Government Act 1995 (Western Australia) provides that:

3.1 (1) The general function of a local government is to provide for the good government of persons in its district.

(2) The scope of the general function of a local government is to be construed in the context of its other functions under this Act or any other written law and any constraints imposed by this Act or any other written law on the performance of its functions.

(3) A liberal approach is to be taken to the construction of the scope of the general function of a local government.

Although the general function includes executive as well as legislative powers, authority for powers that regulate or control the activities of individuals and actions that may affect the rights of citizens are still specifically provided for in the legislation.⁵⁴

4. A Power of Competence over a Specified set of Functions

Another approach to determining the functions of local authorities is to grant a lesser degree of discretion or a power of competence over a

⁵² Minister of Local Government, *supra* note 41. There are a number of instances where the New Zealand Parliament has granted bodies a power of general competence. The Cook Islands Constitution Act 1964 (NZ), Niue Constitution Act 1974 (NZ) and Tokelau Act 1948 (NZ), for example, make provision for self-government by the peoples of these Islands.

⁵³ Department of Internal Affairs, *supra* note 43, 9.

⁵⁴ Chen and Palmer, *supra* note 1, 19.

limited and specified range of functions. While this option would appear to increase the flexibility of local authorities, these bodies might still be in the position of not being able to undertake any function they consider beneficial to their community because it falls outside the range of functions that have been specified. On the other hand, this option may be preferable to a broader discretion or power of general competence, as local authorities would have a clearer definition of their functions and, presumably, less adjustment would be required. Another alternative might be to grant a broad power of competence over specified functions in areas such as health, welfare and community development, but more prescriptive powers with regard to functions of a regulatory nature.⁵⁵

An example of the approach to grant a power of competence over a limited and specified range of functions can be found in the Local Government Act 1989 (Victoria). In this statute, the functions of local government are specified in the First Schedule. Local authorities in Victoria are empowered to carry out those functions and also any other functions conferred on them by or under the statute or any other statute. Section 8(3) also provides that a local authority has “the power to do all things necessary or convenient to be done for or in connection with the performance of its functions and to enable it to achieve its purposes and objectives”. While some commentators claim that the generality of this power is not limited by the conferring of specific powers and that the functions in the First Schedule do not limit the breadth of functions and powers conferred on a particular local authority,⁵⁶ others disagree.⁵⁷

The granting of a power of competence over a limited and specified range of functions could be approached from the inverse position.⁵⁸ Instead of central government setting out which functions local authorities may perform, it could simply determine which functions local authorities would be prohibited from performing and everything else would be permitted.⁵⁹

IV. OVERSEAS EXPERIENCE

The prescriptive nature of the powers currently afforded to New Zealand local government, while similar in many respects to that of the

⁵⁵ Department of Internal Affairs, *supra* note 1, 7.

⁵⁶ Chen and Palmer, *supra* note 1, 34.

⁵⁷ Department of Internal Affairs, *supra* note 1, 7-8.

⁵⁸ Hall, *supra* note 22, 28-29.

⁵⁹ Department of Internal Affairs, *supra* note 1, 9.

United Kingdom, is not a model necessarily replicated in other countries. Indeed, the constitutional arrangements of many other countries often give local authorities broader powers, including a power of general competence.

1. Continental Europe

In continental Europe, local government is generally treated differently from the way it is treated in New Zealand or in the United Kingdom.

In France, local communes enjoy a general power to act for their communities. Since the 1970s, France has also been engaged in a process of decentralising central government power to local government.⁶⁰ In Germany, local government plays a significant role within the overall structure of government. Article 28 of the Basic Law (German Constitution) guarantees the communes:

[T]he right to regulate on their own responsibility all the affairs of the local community within the limits set by law ... [and] the right of self-government in accordance with the law within the limits of the functions given them by law.

The Constitution of each state within Germany may also grant further protection to local government.⁶¹

Recently, Scandinavian countries have encouraged 'free commune experiments', which involve relieving local authorities from certain regulations and enhancing their autonomy. The objective has been to encourage more innovative and effective local decision-making.⁶² The initiative originated in 1984 in Sweden as a potential answer to the problem of excessively prescriptive central government regulation and was adopted to assess the opportunities for substantially boosting municipal autonomy.⁶³ Denmark, Norway and Finland have also adopted the course formulated in Sweden.⁶⁴

The European Charter of Local-Self Government ("the Charter"), produced by the member states of the Council of Europe, includes a principle relating to a power of general competence. Article 4 (2) of the

⁶⁰ McFadden J, *A Power of General Competence – The Time Has Come* (Scottish Local Government Information Unit Discussion Paper No. 2) (1997) 1.

⁶¹ Ibid.

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid. See also Kitchin, *A Power of General Competence for Local Authorities in Britain in the Context of European Experiments* (Scottish Local Government Information Unit) (1996).

Charter states that “local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority”.⁶⁵

2. North America

To overcome the severity of the application of the doctrine of ultra vires, most local authorities in the United States now enjoy what is described as ‘municipal home rule’ (“Home Rule”). The concept of municipal home rule is similar to a power of general competence and occurs where state governments include home rule provisions in their state constitutions.⁶⁶ Home Rule provisions generally entitle municipalities to exercise a power of initiative in municipal affairs, allowing them to operate under a general grant of authority rather than relying on individual delegations of authority for particular purposes. Home Rule also marks out for local government an area of autonomy that is immune from state control.⁶⁷

In Canada, local government is a creation of provincial government and the only powers enjoyed are those powers delegated by provincial government.⁶⁸ Nonetheless, many of the provinces in Canada have granted wide-ranging powers to their local government units. In spite of this, the Canadian courts have typically taken a narrow interpretation of these powers. In seeking a way to make the powers granted to local authorities more enabling, the Province of Alberta recently passed legislation that granted its municipalities jurisdiction over generally defined functions. In addition, Alberta bestowed its municipalities with the powers of a natural person and included interpretive clauses in their legislation designed to encourage the judiciary to give greater deference to municipal actions.⁶⁹

3. Australia

In Australia, there is no formal recognition of local government in the Federal Constitution and, consequently, the powers of local authorities

⁶⁵ European Charter of Local Self-Government, ETS 122. See McFadden, *supra* note 60, 2.

⁶⁶ Hughes et al, *The Constitutional Status of Local Government in Other Countries* (1998).

⁶⁷ Frug, *Local Government Law* (2 ed, 1994) 70-71.

⁶⁸ Hoehn, *Municipalities and Canadian Law – Defining the Authority of Local Governments* (1996).

⁶⁹ *Ibid.*

vary from state to state.⁷⁰ In most Australian states, local authorities enjoy a form of power of general competence.⁷¹

Despite this legislative approach, the courts have up until recently tended to take a narrow interpretation of the scope of these powers.⁷² To overcome this, the style of legislative drafting has changed to give local government inclusive rather than exclusive powers, which is intended to overcome a restrictive application of the *ultra vires* doctrine.⁷³ The most recent developments have taken place in Western Australia where the Local Government Act 1995 (Western Australia) confers on its local authorities the powers of natural persons, as well as general powers to act for the good government of persons in its districts.

4. The United Kingdom

A key issue for the United Kingdom Government in its programme to modernise local government has been whether to grant a power of general competence.⁷⁴ The Local Government Act 2000 seeks to modernise local government by granting it a wide new general power to promote the economic, social and environmental well-being of local communities.⁷⁵

A power of general competence for local authorities in Scotland has also become a significant issue following the establishment of a Scottish Parliament. The final report of the Local Government Commission recommended that local authorities should be given a power of general competence.⁷⁶ The Scottish Executive has recently issued its response to the Commission's report and has agreed in principle that a power of general competence may be appropriate, but that further consultation is required concerning the implications of such a power.⁷⁷

⁷⁰ Pearson, *Local Government Law in New South Wales* (1994) 3-8.

⁷¹ Supra note 66; Chen and Palmer, supra note 1, 28-42; Hood, "Unlikely Entrepreneurs – The Commercial Dealings of Australian Local Government" in Horrigan (ed) *Government Law and Policy – Commercial Aspects* (1998) 205.

⁷² See Hood, supra note 71, 214-221.

⁷³ Ibid.

⁷⁴ For example, see generally, the work of the United Kingdom Local Government Information Unit.

⁷⁵ Local Government Bill 1999 (UK). For a commentary on these provisions see Cirell and Bennett, "Heavenly Freedom", *Local Government Chronicle*, 17 December 1999, 14.

⁷⁶ The Scottish Office, *The Report of the Commission on Local Government and the Scottish Parliament* (1999).

⁷⁷ The Scottish Executive, *Report of the Commission on Local Government and the Scottish Parliament: The Scottish Executive's Response* (1999).

5. Summary

The prescriptive model of local government powers adopted in New Zealand is not applied in other countries. While much can be learnt from the alternative arrangements in other countries, some significant differences in overall constitutional arrangements, as well as the breadth of functions that exist, may make the application of these arrangements inappropriate in New Zealand.

V. ISSUES AND IMPLICATIONS OF A POWER OF GENERAL COMPETENCE

There are a number of issues and implications involved in granting a power of general competence to local government in New Zealand. While some of these have been described earlier, this part of the article will more closely examine some (but by no means all) of these issues in more detail, namely: the relationship between central and local government; the relationship between the levels of regional government and territorial local government; an increased role for the courts; accountability; regulatory powers; revenue; and obligations under the Treaty of Waitangi.

1. The Relationship between Central and Local Government

Although there are some signals that attitudes might be changing, New Zealand's governmental structure is still very centralist.⁷⁸ There are concerns that granting a power of general competence could lead to duplication of functions and ill-defined jurisdictional limits between central and local government.⁷⁹ There are also concerns that a lack of clear separation of powers and functions could cause much confusion.⁸⁰

It has been argued that a power of general competence must underpin any new partnership between central and local government and “[a]s with any normal partnership, the allocation of functions and powers would be a

⁷⁸ Examples of centralism abound and include, for example, a wide range of ministerial powers of consent or intervention, a large number of mandatory functions, a tendency for decentralisation of central government functions rather than a devolution of these functions and often a discordance of administrative boundaries between central government agencies and local authorities. See Department of Internal Affairs, *supra* note 1, 40-43. See, for a contrasting view, Stigley, *supra* note 5.

⁷⁹ Department of Internal Affairs, *supra* note 1, 43.

⁸⁰ Hall, *supra* note 22, 23.

matter for negotiation, and these decisions may be made binding through contracts (both formal and informal).”⁸¹ This might also require a set of specific guidelines to assist in the allocation of functions and provide better coordination and communication between central and local government than what is presently experienced.⁸²

Should a more far-reaching form of a power of general competence be introduced, consideration about how the power relates to the constitutional powers of central government and public administration generally will be needed. As has happened in other jurisdictions, subsequent legislation can intentionally or unintentionally undermine the power of local government and its objective to provide local government with more autonomy.⁸³ Consequently, there may be a need to provide constitutional protection for the new power granted to local government by requiring that any amendments to the new Local Government Act or any other legislation applying to local government be read consistently with a ‘power of general competence’.⁸⁴

While the degree of authority to be granted to local authorities remains unclear at present, it is unlikely that local authorities would be placed beyond Parliament’s control. As the Department of Internal Affairs has stated:⁸⁵

Some commentators writing about the reform of local government law have gone so far as to suggest some form of constitutional reform to provide for the position and powers of local government. This could largely place local government beyond the power of Parliament. We don’t propose this. We take it as given that the powers of local government will be those in the law as passed by Parliament. The questions asked are about what those laws should say. This reflects the basic constitutional principle of *parliamentary sovereignty* (Parliament is the source of all law).

It may be expected that despite being granted wider powers, central government will still wish to determine the basic framework for local government units, including their constitution, geographic boundaries, electoral system and also a range of mandatory functions such as those in

⁸¹ Department of Internal Affairs, *supra* note 1, 43. The Department of Internal Affairs has suggested a set of draft guidelines to assist with this partnership.

⁸² *Ibid* 44.

⁸³ It has been noted that past attempts to move in this direction in Australia have been met by the courts with a mixture of “incredulity, disingenuous disobedience and down-right hostility”. Department of Internal Affairs, *supra* note 1, 16. See also Hall, *supra* note 22, 41-44.

⁸⁴ Department of Internal Affairs, *supra* note 1, 23-26.

⁸⁵ Department of Internal Affairs, *Thinking Local - A Discussion Paper on the Reform of the Local Government Act* (2000)(emphasis added).

the field of resource management.⁸⁶ However, for the effective operation of a power of general competence, it is important that mandatory functions be kept to a minimum.⁸⁷ Nonetheless, in seeking to provide for national standards, it may also be appropriate for central government to enact these and be able to override locally set standards.⁸⁸ Finally, the introduction of a power of general competence may make it possible to do away with most local government statutes that are currently used to empower local authorities in specific situations.⁸⁹

2. The Relationship between Regional Government and Territorial Local Government

Local government in New Zealand can be described as a dual system rather than a two-tier system. It comprises both regional and territorial levels of local government with both a division and an overlapping of functions between them. The grant of a power of general competence raises the question of whether it would be practicable to grant this power to both regional and territorial councils, or just to one level.⁹⁰

(a) Granting a Power of General Competence to Territorial Authorities

It may be appropriate that the powers of regional councils remain prescribed over a clearly specified range of environmental or resource management functions and that only territorial local authorities be granted a power of general competence. Perhaps a power of general competence is more suited to community and economic development roles that involve facilitation and infrastructure development which have traditionally been undertaken by territorial local authorities. The counter argument is that the pressure to grant local authorities a power of general competence comes from the larger urban areas where regional councils have in the past played significant roles in community and economic development and where there are increasing needs for regional collaboration across multiple functions. It is submitted that regional councils should be granted a power of general competence.

⁸⁶ Department of Internal Affairs, *supra* note 1, 5.

⁸⁷ *Ibid* 5.

⁸⁸ *Ibid* 19.

⁸⁹ *Ibid*.

⁹⁰ Bush, *supra* note 16, 39-40.

(b) Granting a Power of General Competence to both Regional and Territorial Authorities

It may, on the other hand, be preferable to avoid pre-determining which level of local government has which powers. For instance, both regional and territorial levels of local government could be granted a power of general competence but also be provided with a mechanism to facilitate negotiation between themselves of an appropriate 'division of labour'.⁹¹ Nonetheless, the lack of clear separation of powers and functions might cause too much confusion and overlap, both for the local authorities themselves and for the public.⁹²

(c) Granting a Power of General Competence to a Unitary Local Government

One rather more adventurous solution to the issue is for one layer of local government in New Zealand to be abolished and for the current functions of both regional and territorial local authorities to be combined.⁹³ However, there are questions about whether 'one size should fit all'. It may be more appropriate that different approaches should be taken in different parts of New Zealand.

The most appropriate solution appears to be that first proposed, which retains the prescriptive powers and functions of regional councils, the focus of which is predominantly environmental regulation or resource management, and for territorial local authorities to be granted a power of general competence.⁹⁴ However, one of the constraints that might need to be imposed on a grant of a power of general competence to territorial local authorities is that they should not undertake any of the functions or powers of a regional council unless this is agreed to by territorial local authorities.⁹⁵ Mechanisms might be provided to allow for the transfer of functions between the two levels of local government similar to those that currently exist in the Act.⁹⁶

⁹¹ Department of Internal Affairs, *supra* note 1, 47.

⁹² Hall, *supra* note 22, 23.

⁹³ Parliamentary Commissioner for the Environment/Controller and Auditor-General, *Local Government Environmental Management – A Study of Models and Outcomes* (1999).

⁹⁴ Hall, *supra* note 22, 25-27.

⁹⁵ *Ibid* 24.

⁹⁶ Local Government Act 1974, ss 37SC and 37SD.

3. The Role of the Courts

Some commentators caution that the grant of a power of general competence will increase the role of the judiciary in determining the boundaries of that power.⁹⁷ This may lead, at least initially, to a round of legal decisions and potentially a more uncertain and adversarial environment for local government as the new powers become bedded in by case law.

An inhibiting impact on local government initiative may result, equal to that which is currently suffered under a prescriptive statutory environment. Indeed, situations might arise following judicial intervention that require Parliament to re-intervene with legislation in order to clearly define some aspect of local government powers.⁹⁸

For instance, in Queensland, where local government has been granted a power of general competence for some time, the State Crown Solicitor and the courts have progressively weakened the breadth of discretion as a result of narrow interpretations of the power.⁹⁹ In Queensland, the courts have taken a narrow view that the general powers conferred upon local government are “not to be read as going beyond the accepted notions of what the role of local government ought to be”.¹⁰⁰ Concerns regarding the role of the courts and their inclination to narrowly interpret a power of general competence have also arisen in Canada.¹⁰¹ One approach used in Canada, and more recently in Australia, in an effort to overcome this tendency is for Parliament to direct the courts to take a broad approach to the interpretation of the power.¹⁰²

4. Accountability

A key issue regarding the grant of a power of general competence is the corresponding need to consider how to balance the power with mechanisms to ensure that local government can be held accountable for the exercise of its wider powers. Currently, local government is accountable both ‘downwards’ to its electorate or community, and also

⁹⁷ Department of Internal Affairs, *supra* note 1, 13.

⁹⁸ *Ibid.* See also Hall, *supra* note 22, 70-72.

⁹⁹ Department of Internal Affairs, *supra* note 1, 13.

¹⁰⁰ *Ibid.*

¹⁰¹ Hoehn, *supra* note 68.

¹⁰² Department of Internal Affairs, *supra* note 1, 14-15; Hall, *supra* note 22, 72. See, for example, Local Government Act 1995 (WA), s 3.1(3), which provides that: “A liberal approach is to be taken to the construction of the scope of the general function of a local government”. See also Hoehn, *supra* note 68.

‘upwards’ to central government and Parliament.¹⁰³ The latter form of local government accountability takes the form of requirements to follow detailed statutes and regulations passed by Parliament and the Executive. In addition, there are a number of mechanisms for direct control, such as requirements for ministerial consents to certain actions, the right of judicial review over council actions and powers of investigation by central government agencies, such as the Audit Office and the Ombudsman.¹⁰⁴

The grant of a power of general competence will involve an increase in local autonomy and, therefore, a shift in the emphasis and accountability of local government more towards its local electorate or community and away from central government. Inevitably, questions arise as to whether the accountability provided through local democratic and electoral systems could be improved. Local government does not presently enjoy significant electoral turnout, although there have been a number of suggestions made for improving this, including proportional representation, preferential voting, a shorter or longer term of office for councillors, electronic voting, rolling elections, referenda and separate representation (for example, for Maori).¹⁰⁵ Accountable local democracy may also depend partly on the character of the elected representatives, where they are drawn from, and on their relationship with the administration of the local authority. Consideration has been had to increasing the remuneration of councillors, making their positions full-time and seeking ways of making it more practicable for a diversity of people to serve as councillors.¹⁰⁶

In addition to improving representative democracy, there are also suggestions for improving participatory democracy through greater community participation in the development of long-term financial plans, annual plans, district plans and waste management plans.¹⁰⁷

The accountability of democratic institutions also depends upon the availability of information. Local government has, like central government, become subject to requirements for providing official information under the Local Government Official Information and Meetings Act 1987. While this legislation has been a foundation for more

¹⁰³ See Department of Internal Affairs, *supra* note 1, 27-34. See also Chen and Palmer, *supra* note 1, 43-44.

¹⁰⁴ Department of Internal Affairs, *ibid.* It might be noted that the executive branch of Government is also subject to similar kinds of accountability mechanisms.

¹⁰⁵ *Ibid.* 68.

¹⁰⁶ *Ibid.* 27-34. See also Chen and Palmer, *supra* note 1, 47-48.

¹⁰⁷ Controller and Auditor General, *Public Consultation and Decision-making in Local Government* (1998).

open and transparent local government, suggestions have been made that these requirements could also be improved.¹⁰⁸

Under a power of general competence, local government would remain accountable to judicial oversight, although consideration should be had to directing the courts to take a broad interpretation of the empowering provision. However, as previously noted in this article, the role of the judiciary could change and, consequently, consideration might need to be had about alternatives to judicial review through the High Court.

Finally, there are also several central government agencies independent of local government that have the purpose of ensuring local government accountability including various ministers, Parliament (especially its select committees), the Ombudsmen, the Controller and Auditor-General, the Parliamentary Commissioner for the Environment, the Local Government Commission, the Waitangi Tribunal and individual members of Parliament. A grant of a power of general competence involves an increase in local autonomy and therefore a shift in the emphasis and accountability of local government towards its local electorate or community. There may be a need to consider reducing current accountability to these central government agencies or amalgamating local and central checks and balances to create a Parliamentary Commissioner for Local Government.¹⁰⁹

5. Bylaw-Making Powers

The making and enforcement of bylaws are some of the primary means by which local authorities regulate their areas. These powers are currently consistent with local government's subordinate status and are subject to a number of constraints:¹¹⁰

Bylaws are a form of subordinate legislation and, under the constitutional principle of Parliamentary supremacy, there is no inherent power held by local authorities to make bylaws. The right to make bylaws and the content of any bylaw must be authorised by statute, as interpreted by the courts.

The right to make bylaws must be authorised by a statute either specifically or by necessary implication. To be enforceable, the provisions

¹⁰⁸ Department of Internal Affairs, *supra* note 1, 27-34.

¹⁰⁹ *Ibid.*

¹¹⁰ Palmer, *supra* note 4, 423

should be reasonably clear and certain in their meaning.¹¹¹ Bylaws can be challenged as to their validity on the basis of whether they are *intra vires* the powers of the local authority, not repugnant to the general law of the land, certain and positive in their terms and reasonable.¹¹²

Under the Act, local authorities already have seemingly broad powers to make bylaws. For instance, they have powers under section 684 to make bylaws for the “good rule and government of the district”, although this general power is complemented by a significant number of more specific powers that tend to undermine the generality of this power. Further, because there is no compulsory requirement in New Zealand for ministerial confirmation of bylaws - as there is in Britain - the courts in New Zealand address bylaws with a somewhat freer hand than their British counterparts.¹¹³

The granting of a power of general competence raises the issue of whether local authorities should also be granted broader discretion as to which activities can be regulated through bylaws.¹¹⁴ It will also be important that appropriate mechanisms are put in place to protect the public interest. Bylaws could be made subject to ministerial confirmation or revocation. Alternatively, as Chen and Palmer have suggested, this role could be given to the Regulations Review Select Committee of Parliament.¹¹⁵ It may also be appropriate to require local authorities to publish their bylaws, to have mandatory sunset clauses and for model bylaws to be encouraged through Standards New Zealand.¹¹⁶

Effective operation of a power of general competence may also require discretion for local authorities as to how bylaws and other regulatory measures can be enforced. For example, it may be preferable for local authorities to set their own limits in respect of fines, penalties and even offences, subject to appropriate review by the courts.¹¹⁷

6. Revenue

Reflecting its traditionally limited range and scale of functions, local government has a relatively narrow taxation base, focused primarily on

¹¹¹ Ibid. See, *Masterton Co-operative Dairy Co Ltd v Wairarapa Milk Board* [1964] NZLR 771 (CA). See also, Inglis, “Statutory Regulations” (1959) 35 NZLJ 133.

¹¹² *Kruse v Johnson* [1898] 2 QB 91. See also Bylaws Act 1910, s 8(2), which has recently been repealed.

¹¹³ Palmer, *supra* note 4, 430-439. See also, *Grater v Montagu* (1940) 23 NZLR 904, 906; *McCarthy v Madden* (1914) 33 NZLR 1251, 1267; *Masterton Co-operative Dairy Co Ltd v Wairarapa Milk Board* [1964] NZLR 771, 778.

¹¹⁴ Chen and Palmer, *supra* note 1, 45-47.

¹¹⁵ Ibid 26-27.

¹¹⁶ Department of Internal Affairs, *supra* note 1, 49-50.

¹¹⁷ Ibid.

property rates. Nonetheless, local authorities in New Zealand, compared with their counterparts overseas, have been granted considerable discretion over the range of 'rating tools' that they can use and the levels of revenue they can obtain through property rates.

Local authorities in New Zealand have a choice of one of three rating options: land value; capital value; and annual value. They also have the option of imposing on occupiers fixed charges for particular services, in addition to uniform annual charges, without linking the charges to the valuation of occupiers' properties. In addition, since 1969, local authorities have been able to apply limited differential rating. As one commentator notes:¹¹⁸

In broad terms, the right to establish or vary a differential system confers a substantial legislative power on the local authority to impose the most efficacious rating system, being the essence of true local government.

While property rates may be appropriate to fund the property services that have traditionally been the core of local government activity, they may be an inappropriate mechanism to fund the wider range of services that could arise under a power of general competence.¹¹⁹

An important condition for the successful operation of a power of general competence is that the methods of funding should serve as much as possible to reinforce and not undermine local autonomy. The grant of a power of general competence suggests a corresponding need for greater flexibility in the ways in which local authorities obtain funding.¹²⁰

7. Te Tiriti o Waitangi/The Treaty of Waitangi

For Maori, who traditionally operate at a local or regional (hapu/iwi) level, interaction with local authorities regarding their lands, forests, fisheries and other taonga should be beneficial for Maori in terms of Maori rights and expectations under the Treaty of Waitangi ("the Treaty").¹²¹ However, the experience of local government for Maori has not generally been positive and has often involved deliberate violations of the Treaty.¹²²

¹¹⁸ Palmer, *supra* note 4, 386. The power appears to be unique to New Zealand and South Australia.

¹¹⁹ Department of Internal Affairs, *A Future Direction for Local Government Funding Powers – A Consultation Document* (1999).

¹²⁰ Palmer, *supra* note 4, 308-309.

¹²¹ Ballara, *Iwi – The Dynamics of Maori Tribal Organisation from c. 1769 to c. 1945* (1998); Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989* (1990) 165.

¹²² Examples include: the allocation of so-called waste lands; surveying and roading on Maori-owned land to facilitate Pakeha settlement; levying rates and taxes on rural Maori land followed by forced sale for non-

The Minister of Local Government has signaled Government's intention to review the relationship between Maori and local government when it considers the grant of a power of general competence.¹²³

There are varying views on the obligations of local government to Maori under the Treaty. One view is that the Treaty contains obligations that should exist only between central government, as the true representative of the Crown, and Maori. An alternative view is because local government derives its powers of local governance from central government, obligations under the Treaty must also 'flow down' to local government.¹²⁴

It is the second view that appears to hold the most currency.¹²⁵ This view is compelling in light of the fact that the authority ceded to the Crown by Maori - the 'kawanatanga' - is exercised not only by the Crown itself in its executive capacity at central government level, but also by statutory bodies or officers created or empowered by the Crown, which necessarily includes local government authorities. These authorities exercise 'kawanatanga-iti', or that part of kawanatanga that it has been deemed by central government appropriate for local authorities to exercise.

One consequence of the exercise of kawanatanga-iti by any local authority under the Treaty is the obligation in Article II to observe the 'rangatiratanga' of those iwi and hapu whose rohe, or territorial boundaries, fall within the jurisdiction of the local authority.

Despite the currency and logic of the view that obligations under the Treaty must also 'flow down' to local government, issues remain as to the precise nature of these obligations. The lack of clarity about the nature of these obligations is in part due to the lack of express Treaty obligations contained in the Local Government Act 1974, as well as to some of the decisions of the Environment Court.¹²⁶ Moreover, the process of

payment; seizure of disproportionate amounts of Maori land for public works; and the location of sewerage outlets and hazards on or near Maori settlements and fishing grounds. See Ward (ed), *Waitangi Tribunal Rangahaua Whanui Series* (1997); Kelsey, supra note 121, 165.

¹²³ Minister of Local Government, supra note 32, Cabinet, supra note 12.

¹²⁴ Hayward, "Local Government and Maori: Talking Treaty?" School of Political Science and International Relations, supra note 5, 182 at 191. See also, The Bridgeport Group, *Resource Management Law Reform - Review of the Submissions of the Future Role of Local and Regional Government* (1998) 19; Chen and Palmer, supra note 1.

¹²⁵ See, for instance, Matunga, *Local Government: A Maori Perspective* (A Report for the Maori Consultative Group on Local Government Reforms) (1989) 6. See also Waitangi Tribunal, *Ngawha Geothermal Resource Report* (1993) 153-154. For further discussion see Hayward, supra note 124. See also, Brookfield, *Waitangi and Indigenous Rights: Revolution, Law and Legitimation*, (1999) 156; Chen & Palmer, *Local Government and the Treaty of Waitangi* (A Paper by Chen & Palmer, Barristers and Solicitors, for Local Government New Zealand) (1998) 18.

¹²⁶ *Haddon v Auckland Regional Council* [1994] NZRMA 49; *Gill v Rotorua District Council* [1993] 2 NZRMA 604; *Ngatiwai Trust Board v Whangarei District Council* [1994] NZRMA 269.

devolution of kawanatanga by the Crown to local authorities and the shift in accountability (both democratic and participatory) to local communities in recent years has placed greater political power, especially over resource management matters, in the hands of local authorities and away from the Crown. This process has also created a lack of clarity about the relationship between Maori and local authorities. Despite this, it is clear that local authorities are 'creatures of statute' and have no powers or kawanatanga except those which are devolved to them from the Crown through statute.

Important issues have been raised by a number of commentators about the implications for iwi/Maori of granting local government a power of general competence. There are also questions about how the obligations of local government in terms of the Treaty might best be met within the context of a power of general competence. For example, it has been argued that:¹²⁷

[I]t is clear that clarification of the constitutional position of local government is of primary importance to the government – tangata whenua relationship. This is particularly the case if local government is to advocate for a power of general competence.

It has also been contended that granting local authorities a power of general competence may enable them to respond more effectively to issues of iwi/Maori concern. It may enable local authorities to develop more positive relationships with iwi/Maori over a greater range of issues than are currently permitted. Rather than being limited to resource-management issues, local authorities may find that wider Treaty responsibilities may enable them to work co-operatively with iwi/Maori on, for example, community and economic development projects.¹²⁸

Wider powers may encourage local authorities to devolve functions to local iwi/runanga and provide Maori communities with a greater degree of local governance, although "devolution is as much about political will as it is about the provision of an adequate range of tools for it to actually occur".¹²⁹ Circumstances and community values, both Maori and non-Maori, vary considerably from one part of the country to another and might best be dealt with locally through the kind of flexibility envisaged under a power of general competence.

¹²⁷ Love, "Local Government/Tangata Whenua Relationship" Keynote Speech, Local Government Annual Conference (1996) 4.

¹²⁸ Te Puni Kokiri, *Iwi/Maori and Local Government*, Discussion Document - Prepared for Focus Group Sessions (17 November – 9 December 1999).

¹²⁹ *Ibid* 27.

However, a grant of a power of general competence has the potential to further disenfranchise iwi/Maori in terms of status. "A freer reign over a wider canvas may raise concerns amongst iwi/Maori about rangatiratanga and their ability to govern and influence within their own rohe."¹³⁰ Te Puni Kokiri suggests that a power of general competence could render local councils vulnerable to intense lobbying. In a more congested lobbying environment, the ability of iwi/Maori to voice their concerns and issues may be diminished.¹³¹

Te Puni Kokiri has suggested that there may be a need to balance the introduction of a power of general competence with greater obligations to involve iwi/Maori in local council decision-making. The need for greater accountability measures on the part of local authorities could "include steps to more significantly involve iwi/Maori in agenda and priority setting, the establishment of benchmarks for council performance, and monitoring progress on benchmarks".¹³²

One mechanism that central government has used frequently to provide a measure of certainty about the existence of Treaty obligations – and to also retain some flexibility about how those obligations might be implemented – is the use of a general 'Treaty clause' in empowering legislation.

It seems appropriate that the current reform of the Local Government Act 1974, at a minimum, should consider the formulation of a general Treaty clause similar to that used in the State-Owned Enterprises Act 1986 or the Resource Management Act 1991, as a limiting provision on any grant of a power of general competence.¹³³

A general-purpose Treaty clause would enable each local authority to be proactive in formulating views and processes about how their Treaty obligations should be met, while providing certainty that such Treaty obligations do exist. There currently exists a level of certainty provided through judicial interpretation of existing Treaty clauses that would lessen the impact of introducing a clause for local government.¹³⁴

Beyond formulating a general-purpose Treaty clause, it may also be appropriate to embed more specific obligations in new legislation that more clearly meet the obligations inherent in the 'principles' of the Treaty of Waitangi, such as the obligation on the Government to consult with Maori. Considerable precedent for this exists in the Resource Management Act 1991 and in other legislation. Moreover, consideration

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ State Owned Enterprises Act 1986, s 9; Resource Management Act 1991, s 8.

¹³⁴ Ibid 25-31. See Chen & Palmer, *supra* note 125, 25-31.

will also need to be given to how Maori electoral representation can be improved along with the types of partnership relationships with tangata whenua, or local iwi/Maori groups, that local government has already developed. Local government may also need to be guided about how to respond to taura here and urban Maori. In addition, new legislation may need to provide mechanisms that encourage the management arm of local authorities to improve their response to the Treaty, for example, through equal employment opportunities.

VI. CONCLUSION

As stated at the beginning of this article, local government in New Zealand has for some time been calling for central government to grant it a power of general competence. With the election of a Labour/Alliance Coalition Government, it appears that this call is finally being heeded. Labour Party policy prior to the election stated that a “key feature of [new local government legislation] will be a power of general competence for local authorities”.¹³⁵

Several compelling reasons have been advanced as to why local government should be granted a power of competence. The first reason is the observation that the current powers in the Local Government Act 1974 are too prescriptive and inflexible and do not allow local government to play the role being asked of it in the overall governance of New Zealand.

The second reason is the argument that local government is comprised of stronger local authority units than in the past: it is now used for managing a wider set of functions and it is supported by a stronger resource base and a more accountable and responsive political system. Consequently, it is in a position to ‘handle’ a power of general competence.

The third reason is that the current constitutional status of local government – which dictates that local government powers must be strictly construed and that local governments are primarily responsible to Parliament - has become less relevant and in the protection of the public interest. Indeed, local government has become more competent, transparent and accountable to its local community.

¹³⁵ See *supra* notes 1 and 2.

Finally, the intention to undertake a comprehensive review of the Local Government Act 1974 offers up an opportunity to re-think the fundamental ways in which powers are granted to local authorities.

Nevertheless, the prospect of granting local government a power of general competence raises a number of issues and implications. The ways in which central and local government should relate to each other in a situation where both have broad discretionary powers to engage in similar functions and activities on behalf of local communities is one significant issue to be addressed.

The second issue is whether to grant a power of general competence to both regional councils and territorial local authorities (and, indeed, to community boards), or to one level of local government only and, if so, which one would be more practicable.

The third issue concerns the role of the judiciary in determining the boundaries or limits to a power of general competence and whether it would be useful for Parliament to provide guidance through a clause directing the judiciary to take a broad approach to its interpretation of the new powers in new legislation.

The fourth issue considers the appropriate mechanisms needed to ensure local authorities are accountable, especially to their communities, for the exercise of a power of general competence, particularly when making bylaws or determining their levels of revenue.

The final issue concerns the content of obligations of local government to Maori under the Treaty and the effect that these obligations might have on the power of general competence. Changing the nature of local government at the fundamental level that is required by a grant of a power of general competence is bound to have very complex and unpredictable ramifications. Faced with this scenario, it might be safer to stay with the devil-you-know and take only gradual steps to extend the powers of local government. However, the demands of the new role that local government is expected to take in local governance, especially in light of the expected partnership with central government, requires that some bold advances be made of which the grant of a power of general competence could be one.



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