LET TE REO SPEAK: GRANTING LEGAL PERSONALITY TO TE REO MĀORI

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Against the background of increasing concern about the future sustainability of te reo Māori, this article proposes, as one way to improve the prospects of the language, that te reo Māori be recognised as having legal personality.

"Ko tōku nui, tōku wehi, tōku whakatiketike, tōku reo."[1]

(My language is my greatness, my inspiration, that which I hold precious).

"Ko te reo te mauri o te mana Māori."[2]

(Language is the life force of Māori prestige).

"If the language dies the culture will die, and something quite unique will have been lost to the world."[3]

I INTRODUCTION

The importance of a language to the wellbeing of a people, to the maintenance of a culture's uniqueness and to a strong sense of identity cannot be overstated.

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1 Te Ururoa Flavell MP "Flavell: Endangered Languages Conference" (XVI Foundation for Endangered Languages Conference – Language Endangerment in the 21st Century: Globalisation, Technology and New Media, AUT University, Auckland, 12 September 2012).

2 Sir James Henare (Waitangi Tribunal hearings on the Wai 11 claim, 24–28 June 1985).

3 Waitangi Tribunal *Report of the Waitangi Tribunal on the te Reo Māori Claim* (Wai 11, 1986) [Wai 11 Report] at 1.

The importance of te reo Māori to Māori identity has been recognised many times. The Waitangi Tribunal has said of te reo Māori: "describing te reo as a taonga understates its importance … without it, Māori identity would be fundamentally undermined, as would the existence of Māori as a distinguishable people".[4] Hana Jackson, in the Māori language petition delivered to Parliament on 14 September 1972, said that te reo Māori is "the only real symbol of our Māori identity … it is our link with the past and all its glories and tragedies. It is our link with our tipuna".[5]

Unfortunately, the last century has seen a significant decline in the proportion of people able to use te reo Māori.[6] There have been efforts to revitalise the language, and these have enjoyed some success,[7] but the prospect remains that this treasure will be lost to future generations of New Zealanders.

The purpose of this article is to propose a new solution to the problems facing te reo Māori. The proposal is that te reo Māori be given legal personality. The article first briefly considers the latest reports on the state of te reo Māori, all of which underline the importance of protecting and fostering the language. The article then describes some of the measures currently being taken to sustain the language, presents some of the problems experienced with the current efforts and discusses briefly some recent proposals to address the issues. The Treaty of Waitangi context within which any revitalisation efforts should fit is also addressed.

The idea of using legal personality to address current issues faced by Māori was first put forward in 1996, and the advantages of this solution are outlined, along with the practicalities of such a solution. It is appreciated that recognising the legal personality of te reo would be only one part of the broader effort that is needed to halt the continuing decline in the health of te reo. This legal proposal would be complemented by political and social endeavours. However, the stability and practical benefits that will come with the use of legal personality mean that the recommended legislative measure is a fundamental part of any solution.

II THE STATE OF TE REO

Since the establishment of the Waitangi Tribunal, reports on three major claims have commented on the state of te reo Māori. The first claim, Wai 11 (the te reo Māori claim), was

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4 Waitangi Tribunal *Te Reo Māori* (Wai 262 Chapter 5 Pre-Publication Report, 2010) at 48.

5 Quote from David Williams *Crown Policy Affecting Māori Knowledge Systems and Cultural Practices* (a report commissioned by the Waitangi Tribunal, 2001) at 164–165.

6 Wai 11 Report, above n 3.

7 Kōhanga reo, kura kaupapa, wharekura, Te Ātaarangi and Te Panekiretanga o Te Reo exemplify the extent of progress that is recognised across indigenous communities around the world. Legal successes include the first bar admission ceremony conducted in te reo Māori in the High Court at Wellington on 18 December 2013, and the use of Māori concepts in legislation: see Arnu Turvey "Te ao Māori in a "Sympathetic" Legal Regime: The Use of Māori Concepts in Legislation" (2009) 40 VUWLR 531.

lodged in 1984 and the Tribunal Report was released in 1986. In more recent times, the Reports in Wai 262 (Ko Aotearoa Tēnei) and Wai 2336 (the Kōhanga Reo claim) have expressed concern at the continuing decline of the language.

A Wai 11: The Te Reo Māori Claim

In Wai 11 the claim was that the Crown had failed to protect the Māori language, and that this was a breach of the Treaty of Waitangi. Among other things, the claimants asked that the Māori language be recognised as an official language throughout New Zealand and for all purposes.

The Tribunal agreed that te reo Māori is a taonga guaranteed under the Treaty and that the Crown therefore has significant responsibilities for its protection. The Tribunal said "the 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence".[8] The Tribunal did not recognise an absolute right to use the Māori language,[9] but rather a general right.[10] The conclusion that te reo Māori is a taonga under art 2 of the Treaty is now widely accepted, and was acknowledged by the Crown in the preamble to the Māori Language Act 1987.[11] It has also been acknowledged by the courts.[12]

The Tribunal concluded that the evidence on the state of te reo in 1986 was sobering and said:[13]

> It is clear that the Maori language in New Zealand is not in a healthy state at the present time and that urgent action must be taken if it is to survive … the Maori people themselves have begun the task of revival but they are working under severe disadvantages, financial and otherwise.

The Crown, it said, had not kept its promise to protect the language.[14] The Tribunal made a number of recommendations, including that legislation be passed to confer official language status on te reo Māori, and to allow the language to be used in courts and in dealings with government departments.

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8 Wai 11 Report, above n 3, at [4.2.4].

9 As, for example, in Canada, where all official documents are in two languages.

10 At [8.2.9].

11 That preamble relevantly reads: "Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Māori people, among other things, all their taonga: And whereas the Māori language is one such taonga."

12 For example, in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) at 578 per Cooke P.

13 Wai 11 Report, above n 3, at [3.3].

14 At 1.

B Wai 262: Ko Aotearoa Tēnei

The Wai 262 Report, which was released on 2 July 2012, was the first whole of government report prepared by the Waitangi Tribunal. The Wai 262 claim was about mātauranga Māori: the unique Māori way of viewing the world, which includes Māori culture. The original 1991 claim arose from concerns about the use of indigenous plants, and plants which had been brought from Hawaiki,[15] for scientific research and commerce. In 1997 an amended statement of claim was filed, broadening the scope of the claim to include te tino rangatiratanga of iwi over indigenous flora and fauna, and all their treasures.

Chapter 5 of the Report is concerned with te reo Māori. In that chapter, the Tribunal outlined the decline of te reo, and the variety of steps that have been undertaken since 1987 to revitalise the language. The revitalisation was led by Māori, and most of the steps taken were initiated by Māori. The Report concluded that in the 1980s and in the early to mid-1990s there was a true revival of te reo, and that it had been achieved through education. However, the Tribunal concluded, from 1994 to 1999 te reo had been in renewed decline. The Report noted that "in 2010 there must be a deep-seated fear for the survival of te reo … and a deep unease about the Crown's responses to the situation".[16]

C Wai 2336: Kōhanga Reo Claim

The kōhanga reo movement originated in the 1970s and 1980s as part of the Māori language renaissance. It is the principal institutional vehicle for passing on Māori language and tikanga to the youngest generation.[17] The movement rapidly expanded from 1982 to 1990, with the Department of Māori Affairs as the lead government agency. Enrolments peaked in 1993, but steadily declined from 1997 to 2002 after the transfer of responsibility for kōhanga reo to the Ministry of Education in 1990. Since 2003 the movement has been marginalised and has further declined. The transfer to the Ministry of Education brought kōhanga reo under a more rigid, rules-based early childhood education (ECE) compliance regime managed from Wellington.[18] It also brought major changes to the funding regime.

Wai 2336, released in May 2013, is the Report on the Kōhanga Reo claim. The claimants had asked for an urgent inquiry into alleged acts and omissions of the Crown in relation to kōhanga reo, especially in relation to a Report of the Government's Early Childhood Education Taskforce and the potential development of government policy which could affect kōhanga reo. That Report again

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15 According to Māori myth, Hawaiki is the original home of the Māori.

16 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) [Wai 262 Report] at [5.5.8].

17 Waitangi Tribunal *Matua Rautia: The Report on the Kōhanga Reo claim* (Wai 2336, 2013) at 15.

18 At [2.3].

highlighted the concern of the Tribunal that if action is not taken, te reo may be lost to many communities.

The Tribunal found in Wai 2336 that the Crown's funding regime was inequitable and unfair, and did not provide kōhanga reo with the same level of support as other ECE services. It also found Te Kōhanga Reo Trust had been significantly underfunded for the work it was required to do as the representative for the kōhanga reo movement.[19] Further, it found that while in the 1980s the Crown recognised the urgent support kōhanga reo needed, this had not been recognised in recent years and post-2003 the Crown had engaged in "a piecemeal approach to addressing the kōhanga reo context, with significant policy, funding and regulatory shortfalls".[20]

The results of these shortcomings were stark: the Waitangi Tribunal had found in Wai 262 that, had numbers of enrolments in kōhanga reo remained at their 1993 peak, then by 2008 there would have been 18,300 young Māori children enrolled in kōhanga reo. Instead, in 2008 there were only 8,700 enrolled.[21] One consequence of that fall in numbers is found in the proportion of young Māori able to speak te reo: in 1996, 21.9 per cent of Māori children under 10 could speak te reo. By 2006, only 18.2 per cent of Māori under five, and 18.8 per cent of Māori between five and nine, could speak te reo.[22]

D Census Data

The most recent information on the current health of te reo Māori has come from the 2013 census. The census reveals that, of those New Zealanders who identified as Māori, 21.3 per cent (125,352) can hold a conversation about a lot of everyday things in Māori. That is a 4.8 per cent decrease from the 2006 census data. Of the total New Zealand population, 3.5 per cent can speak te reo Māori.

III THE CURRENT FRAMEWORK

A The Māori Language Act and the Māori Language Commission

The Māori Language Bill was introduced on the same day as the Waitangi Tribunal released its Report on Wai 11 in 1986. The Act was enacted in English.[23]

The key outcomes of the Māori Language Act 1987 were that te reo Māori was conferred official language status in New Zealand,[24] and that there is a right to speak te reo Māori in courts,

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19 At [11.6] and [11.6.2].

20 At [11.8].

21 At [2.5].

22 At [2.5].

23 There is a te reo Māori version, which was produced in haste and is not official.

commissions of inquiry and some tribunals. It does not confer a right to communicate in te reo Māori in dealings with government departments.

The Act also established the Māori Language Commission, now also known as Te Taura Whiri i te reo Māori.[25] The Commission has five members, all appointed by the Minister of Māori Affairs.[26] Its functions are set out in s 7 of the Māori Language Act, and include the promotion of the Māori language, and reporting to the Minister of Māori Affairs from time to time upon any matter relating to the Māori language. Achievements of the Commission include the establishment of Te Wiki o te reo Māori (Māori Language Week) which is observed every year, and the publication of *Te Matatiki*, a dictionary of modern Māori language which made accessible the range of new vocabulary created by the Commission to allow learners and speakers of te reo to describe contemporary concepts.[27]

B Criticisms of the Māori Language Act and the Māori Language Commission

One of the Waitangi Tribunal's suggestions in Wai 262 was that there needs to be a shift from a view that the Crown is Pākehā, English-speaking and distinct from Māori, to a view that the Crown speaks Māori and represents Māōri. In her commentary on the advance publication of ch 5 of the Wai 262 Report, Māmari Stephens noted "the importance of the legislative framework in the implementation of the protection and revitalisation of te reo Māori".[28] Stephens argued that the shift to a view of the Crown as speaking, and representing, Māori cannot yet be achieved because the current protections for te reo are incoherent and largely ineffective.

In Wai 11, the Waitangi Tribunal had noted that there is a difference between recognition of the official status of a language and enabling the use of the language widely.[29] In line with this, Stephens suggested that "the statutory rights, set out in the Māori Language Act 1987, obstruct

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24 Māori Language Act 1987, s 3. The other official languages of New Zealand are English and New Zealand Sign Language (see the New Zealand Sign Language Act 2006). There is no legal authority for the official status of the English language in New Zealand: it is a de facto official language.

25 The original Māori name for the Commission was a transliteration from the English: Te Komihana mo te reo Māori.

26 The portfolio is now called Māori Development, but the Māori Language Act 1987 still refers to the Minister of Māori Affairs.

27 Māori Language Commission *Te Matatiki: Contemporary Māori Words* (Oxford University Press, Auckland, 1996).

28 Māmari Stephens "Taonga, Rights and Interests: Some Observations on WAI262 and the Framework of Protections for the Māori Language" (2011) 42 VUWLR 241.

29 Wai 11 Report, above n 3, at [8.2.8].

rather than facilitate the use of Māori in legal as well as more broadly civil contexts".[30] She instanced the fact that, although s 3 of the Act confers on te reo Māori official status, the Act provides little guidance as to what this status actually means.[31] She observed that s 4 of the Act grants a statutory right to speak Māori in certain legal proceedings, but this right does not include a right to make written submissions in te reo and does not extend to all New Zealand's tribunals.[32] Further, courts and tribunals may, in their rules, require notice of a person's intention to speak Māori.[33] Even in the Māori Land Court, advance notice of an intention to use te reo must be given so an interpreter can be arranged.

Stephens concluded that "[o]utside of Parliament[34]… rights to the Māori language have not been articulated or enacted in such a way that recognises the transcendent importance of the Māori language as taonga."[35]

The members of the Māori Language Commission are appointed by the Minister of Māori Affairs. This fact was identified in the Wai 262 Report as a matter of potential concern, because of the possibility that the Commission does not necessarily reflect the wishes of Māori and that that is likely to affect the level of acceptance and support by Māori of the work of the Commission. It also opens to question the independence of the Commission in the undertaking of its functions.

Further, as the Commission currently operates, it is not insulated from the funding priorities of the government of the day. The funding to the Commission may be reduced at any time, so there is an ever present risk of under resourcing.

C Other Revitalisation Efforts

Māori groups have advocated for, and implemented, a range of programmes and measures targeted at the revitalisation of te reo Māori. The Waitangi Tribunal commented that:[36]

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30 Stephens, above n 28, at 243.

31 At 249 and 250. There has also been limited judicial guidance on this. In *Ngaheu v Ministry of Agriculture and Fisheries* (1992) 5 PRNZ 201 (HC) at 206, Fisher J said s 3 of the Māori Language Act 1987 was a relevant factor to be taken into account by a court in deciding whether to exercise its discretion to allow submissions to be made in te reo.

32 At 252–253.

33 For example, the High Court Rules, r 1.11, require 10 working days' written notice of an intention to speak Māori.

34 In the House of Representatives there is a right for members to address the speaker in English or Māori (or New Zealand Sign Language): see the Standing Orders of the House of Representatives 2014, SO 108.

35 Stephens, above n 28, at 257.

36 Wai 262 Report, above n 16, at [5.3.3].

> … alongside land, the health of te reo has been one of the two great galvanising issues in Māori protests over Treaty rights during the last three or more decades.

These revitalisation efforts are comprehensively charted in the Report on the Wai 262 claim, so it suffices to provide a brief summary of them here:

(a) September 1972: 30,000 signature petition presented to Parliament calling for Māori language and culture to be taught in schools, leading to the annual celebration of Māori Language Day (Māori Language Week from 1975).[37]
(b) 1978: 30,000 signature petition presented to Parliament calling for a Māori Television Unit to be established within the New Zealand Broadcasting Corporation.[38]
(c) 1979: Te Ātaarangi[39] initiated.
(d) 1981: Te Wānanga o Raukawa established to teach Māori culture and knowledge at a tertiary level.
(e) April 1982: First kōhanga reo opens in Wainuiomata.
(f) 1985: First kura kaupapa Māori opens in West Auckland.[40]
(g) 1986: Passing of the Māori Language Act 1987.[41]
(h) 1987: Radio station Te Ūpoko o te Ika receives funding as a pilot for the introduction of a network of Māori radio stations.
(i) 1993: Te Māngai Pāho established by an amendment to the Broadcasting Act 1989 to fund Māori language and culture broadcasting.
(j) 2001: Māori television service established.
(k) 2004: Māori Television went to air.

A key issue with current efforts in relation to the revitalisation of te reo Māori is that they often depend on a political desire for their implementation and on the maintenance of that political desire for their continuance. The linkage to politics is not conducive to sustainability of endeavour. This is illustrated by the conclusions in the Waitangi Tribunal's Report in Wai 2336, the Kōhanga Reo claim.

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37 This petition was presented by Ngā Tamatoa Council.

38 This petition was presented by the Te Reo Māori Society.

39 This is a community-based Māori language learning programme for adults.

40 Kura kaupapa Māori are Māori language immersion schools.

41 This was prompted by the Waitangi Tribunal's Report into the Wai 11 claim: Wai 11 Report, above n 3.

IV A NEW WAY FORWARD AND CURRENT SUGGESTIONS

A The Need for a Treaty Compliant Regime

The Waitangi Tribunal,[42] Parliament and the courts have all confirmed that te reo Māori is a taonga and thus protected by art 2 of the Treaty of Waitangi. Because there is undeniably a Treaty interest at play, the Waitangi Tribunal in Wai 262 stressed the need for a Treaty compliant regime to be developed to restore te reo Māori to full health.[43]

The Tribunal in Wai 262 advocated Crown protection of te reo Māori to accord with Māori preferences and to be determined, in large measure, by Māori ideas. "This kind of partnership or co-ownership is inherent in the Treaty."[44] The Tribunal has also noted the need for the Crown to see te reo not as something "external to itself, but a core part of the society it represents".[45]

The Waitangi Tribunal has highlighted four key principles it sees as self-evident components of the Crown's Treaty obligation to protect te reo:[46]

(a) Partnership;
(b) a Māori-speaking government;
(c) wise policy; and
(d) adequate resources.

B Suggestions from the Waitangi Tribunal

In its various reports, the Waitangi Tribunal has made suggestions as to how te reo can be revitalised. In summary, these suggestions have been:

(1) Te Taura Whiri should be restructured, so that the Board also includes members appointed by Māori to reflect the principle of partnership.[47] The Tribunal has not recommended substantive amendment of the Māori Language Act.

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42 Wai 11 Report, above n 3, at [4.2.4]. It should be noted, however, that the Tribunal has rejected claims that institutions or technologies (for example wānanga or the radio spectrum) which are used to protect or promulgate the language, are taonga. See for example Waitangi Tribunal *Report of the Waitangi Tribunal on Claims Concerning the Allocation of Radio Frequencies* (Wai 26, 1990); and Waitangi Tribunal *The Wananga Capital Establishment Report* (Wai 718, 1999).

43 Wai 262 Report, above n 16, at [5.5.3].

44 At [5.5.1(1)].

45 At [5.5.1(1)].

46 At [5.5.3].

47 At [5.6.2].

(2) Te Taura Whiri should have greater powers over the development and management of te reo Māori so that it can be "the lead Māori language sector agency".[48] The Māori Language Act contemplated that Te Taura Whiri would be the public body responsible for the Māori language. Te Puni Kōkiri currently undertakes many of the functions that, it seems, were intended for Te Taura Whiri.[49]

(3) Te Taura Whiri should be given greater powers "to require other agencies to contribute to Māori language revival efforts".[50]

(4) There should be a requirement for authorities and agencies in districts which meet a particular threshold of te reo Māori speakers to consult with iwi in the formulation of their language plans, and a similar requirement for schools which have a certain percentage of Māori children on their rolls.[51]

(5) Te Taura Whiri should monitor carefully the health of te reo Māori and report on progress every two years.[52]

More generally, in Wai 262, the Tribunal noted that, to date, the most successful language revitalisation efforts have been those initiated by Māori themselves. Therefore, many of its recommendations aimed to empower Māori to take a lead in the development of te reo strategy.

C Mai Chen's Suggestion

At the Treaty Debates on 26 January 2012, Mai Chen focused on the Report and on the state of te reo in Wai 262 and presented her thoughts as to a way forward.[53] She suggested that what is needed is a rebalancing of kawanatanga and te tino rangatiratanga. A new agency or new laws are not necessary, she argued; rather the Māori Language Act should be amended. Māori need to be empowered to exercise self-determination in respect of their language: Revitalisation of the language will not come from the statutes, but from the communities themselves.

Chen suggested modernising the Māori Language Act and taking advantage of the approach used in the New Zealand Sign Language Act 2006. This proposal would require two main changes to the Act: first, the elaboration of a series of principles like those contained in s 9 of the New

48 At [5.6].

49 At [5.6.1].

50 At [5.6.3]. There are elements of compulsion in the language regimes of other countries, such as Wales and Canada.

51 At [5.6.5].

52 At [5.6.6].

53 Mai Chen "Pathways to Partnership – the Wai 262 Report" (Treaty Debates, Te Papa, Wellington, 26 January 2012).

Zealand Sign Language Act,[54] and secondly, provision of a general regulation-making power like that in s 13(1) of the New Zealand Sign Language Act to enable gaps in the legislation to be filled so that the legislation might properly fulfil its purpose.[55]

This proposal refines the existing regime which the statistics show is not working. More is needed. The problem that faces te reo Māori needs a radical solution.

D The Māori Language Bill

In July 2014, the Minister of Māori Affairs, Dr Pita Sharples, released the Government's new Māori Language Strategy.[56] It proposed a new model for governance of te reo Māori, whereby control of Te Taura Whiri and Te Māngai Pāho (the Māori broadcasting agency) would be handed over to a new corporate entity to be called Te Mātāwai, to be run by iwi. Te Mātāwai would also assume the functions currently performed by Te Putahi Paoho (the Māori Television Service Electoral College) with regard to the Māori Television Service. Te Taura Whiri and Te Māngai Pāho would cease to be Crown entities, and would become statutory entities overseen by Te Mātāwai.

Legislative steps have been taken to implement this proposal in the form of the Māori Language (Te Reo Māori) Bill[57] which, as at 6 March 2015, had passed its first reading and been referred to Select Committee. The Select Committee's Report is due on 31 July 2015. The Bill has also been referred to the Waitangi Tribunal, and is being considered by the Māori Language Advisory Committee.

The Bill will replace the Māori Language Act 1987, amend the Broadcasting Act 1989 and amend the Māori Television Service (Te Aratuku Whakaata Iriranga Māori) Act 2003. The Bill affirms the status of te reo Māori as a taonga of iwi, and recognises the role of iwi and Māori as

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54 These are principles to guide government department when exercising its functions and powers. They direct that government departments, where reasonably practicable, should consult the deaf community on matters relating to New Zealand Sign Language (NZSL); use NZSL in the promotion of government services and the provision of information to the public; and make government services and information accessible to the deaf community through the use of appropriate means.

55 That section provides:

> (1) The Governor-General may from time to time, by Order in Council, make regulations for all or any of the following purposes:
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> (a) prescribing the standards of competency that a person who is to act in legal proceedings as an interpreter of NZSL must attain:
>
> (b) providing for any other matters contemplated by this Act or necessary for its administration or necessary for giving it full effect.

56 Te Puni Kōkiri *Te Rautaki Re Māori: Māori Language Strategy 2014* (2014).

57 Māori Language (Te Reo Māori) Bill 2014 (228-1).

kaitiaki.[58] It re-enacts the provisions relating to the official status of te reo Māori, and to the right to use te reo Māori in legal proceedings.[59] It establishes Te Mātāwai as an independent statutory entity to provide leadership on behalf of Māori in their role as kaitiaki of te reo Māori, and provides for Te Taura Whiri and Te Māngai Pāho to be under the leadership of Te Mātāwai.[60]

The Bill sets out principles to guide government departments in exercising their functions and powers:[61]

(a) iwi and Māori should be consulted on matters relating to the Māori language (including, for example, the promotion of the use of the language):

(b) the Māori language should be used in the promotion to the public of government services and in the provision of information to the public:

(c) government services and information should be made accessible to iwi and Māori through the use of appropriate means (including the use of the Māori language).

These principles explicitly do not confer on any person any legal right that is enforceable in a court of law, and apply only "as far as is reasonably practicable".[62]

The debate on the first reading of the Bill highlighted areas of concern. Some of these were:

(a) The Bill does not express strongly enough the nature and extent of the Crown's ongoing obligation to protect te reo in light of the transfer of responsibilities to Te Mātāwai.

(b) The principles outlined in cl 7 of the Bill might have the unintended consequence of narrowing the manner in which the public sector participates in its role to extend the use of and sustain the language.

(c) The Bill does not recognise the role of grassroots organisations and educational institutions.

(d) The Bill will create another bureaucracy without a measurable increase in the number of te reo speakers.

(e) Te Mātāwai will not be equipped to represent a diverse range of Māori interests, with only seven members appointed by iwi clusters, and with iwi clusters representing such diverse interests (for example, the Tāmaki cluster including iwi from Auckland to Cape Reinga).

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58 Clauses 4 and 11.

59 Clauses 5 and 6.

60 Clause 3.

61 Clause 7(1).

62 Clause 7(1) and (2).

(f) The Crown might be reducing its commitment to te reo through installing Māori as kaitaiki.

(g) Under the Bill in its current form, funding is to be negotiated between the Crown and Te Mātāwai, rather than provided on the basis of evidence.

(h) Under the Bill, Te Taura Whiri and Te Māngai Pāho will become statutory entities and will lose independent Crown entity status. This may make those organisations more subject to political influence.

The Bill has received negative feedback: Te Taura Whiri advice says the agency was set up on the advice of the Waitangi Tribunal to fulfil the Crown's obligation to protect te reo Māori. It says the plan to establish Te Mātawai would breach that obligation and create unnecessary duplication and cost.[63] Government departments are reportedly concerned that the Crown will lose control of millions of dollars of funding.[64] Some individual Māori also oppose the plan: Willie Jackson has said the proposal will sideline the very people who drove the Māori language renaissance; iwi are not ready for it; and he is concerned iwi and language fundamentalists will take over.[65]

The Māori Council has filed a claim, Wai 2441, with the Waitangi Tribunal relating to the Te Mātāwai proposal, claiming that the Māori Council should have been consulted on language strategy but was not, and that the Government has thereby failed to protect te reo Māori by not ensuring that a coordinated approach to revitalising the language is implemented.

V LEGAL PERSONALITY

Having considered the health of te reo and the limited success of efforts to date to heal the language, and having addressed current proposals to revitalise te reo, this Part proposes another solution: give te reo Māori legal personality. This Part first describes legal personality, then discusses how to give legal personality to te reo and why that might be desirable.

A Legal Personality as the Basis for Rights

Personality is a legal fiction used to identify the subjects of the law. In a European conceptualisation of the world there are two matters – people and things. The bearers of legal rights, duties and other relations are known as legal persons.[66] Despite the use of the term "person", it is

63 "Officials unhappy with Te Matawai plan" (7 April 2014) Waatea News <www.waateanews.com>.

64 Jonathan Milne "Minister in pre-election 'race' attack" *The New Zealand Herald* (online ed, Auckland, 6 April 2014).

65 Willie Jackson "Minister's Māori Language Strategy is Wrong" (11 July 2014) Radio Live <www.radiolive.co.nz>.

66 William Twining "Chapter 15: Some Basic Concepts", online supplement to William Twining *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, Cambridge, 2009) at 2. Legal persons are also sometimes known as "legal units", "legal subjects" and "legal entities".

not only natural persons, nor even all natural persons, who are legal persons.[67] The term "person" tends to confuse matters, so that legal persons which are not natural persons are viewed as extensions or exceptions, when in fact non-natural legal persons play very significant roles in economic, political and social life.[68] The term "subject"[69] of law may perhaps be a more useful analytical concept.[70] Here the concept of "person" used is the one familiar in New Zealand's legal tradition.

Using the fiction of legal personality, some humans may not be granted personality (for example, slaves) so that legally they become things, and personality can be attributed to things (including land and ideas) so that legally they become persons. Therefore legal persons are both individual humans and other things which have had legal personality conferred upon them. Where legal persons are not humans of full age and capacity, it is necessary for the law to organise some way for them to interact with other legal persons. This is easily done by the appointment of an agent, guardian, administrator or committee. A company is an example of an artificial legal person, and in its case, it is the directors who interact with the world on behalf of the company.

In Part VI of this article, contemporary specific examples of where legal personality has been given to non-natural persons in New Zealand will be discussed. The idea of giving legal personality to abstractions is not new, and the device of legal personality has been used in many legal systems, including the Common Law, to give rights to entities, collectives, and groupings to achieve a range of objectives.

Beyond the granting of legal personality to entities such as companies or the Crown, an example in New Zealand of an abstraction being given legal personality is that of Public Trust.

The Public Trust Office was set up statutorily in the 19th century. Till 2001, the relevant law was in the Public Trust Office Act 1957. This is interesting because of the use made of corporate identity in the Public Trust Office Act 1957 and its predecessors.[71] Section 5(2) said: "The Public Trustee shall be a corporation sole with perpetual succession and a seal of office." This was therefore a situation where a public office was identified by statute as a legal person and personified by a natural person in much the same way that the Crown is a corporation sole. The 1957 Act was repealed by the Public Trust Act 2001. That Act exemplifies another use of the concept of legal

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67 Slaves are not legal persons; nor are partnerships.

68 Twining, above n 66, at 3.

69 As used in the German tradition.

70 Twining, above n 66, at 3.

71 An early forebear was the Public Trust Office Consolidation Act 1894.

personality. In s 7(1) the Act "establishes Public Trust".[72] Section 3(a) indicates that the purpose of the Act is "to establish Public Trust as a statutory corporation that is a Crown entity". The legislation is express and pointed: there is an independent legal person, a corporation which is not now "the Public Trustee", but which is the idea of "public trust". This example demonstrates not only the possibilities provided by the tool of legal personality, but also (along with the more recent use in the context of Treaty settlement statutes), the willingness of the legislature to maximise the opportunities presented by legal personality.

In other legal systems, examples of the conferral of legal personality on non-human entities include the granting of personality to Hindu idols, artefacts, funds, ancestors, ghosts and many forms of human association.[73]

B Legal Personality for Taonga

In 1996, the suggestion was made in the article "Personality and Legal Culture" that legal personality might be given to various taonga, and that giving legal personality to taonga was not inconsistent with the nature of taonga in the Māori legal system. Taonga were described as being identifiable through "their special relationship to people, because of their links to, and the length of, their history and generally because of their value to the culture".[74] After analysing the nature of taonga, it was said that, in English terms, a taonga can have a personality and may be a person, at least for certain purposes. If a common law court were to apply Māori law, "it could be expected to recognise important taonga as legal persons and accordingly as the bearers of the rights and duties which attach at Common Law" [75] The article concluded that the conceptual possibility of recognising and attributing rights and duties to taonga through the grant of personality existed in the common law system. This could be done by prerogative grant, by the effect of precedent or by parliamentary action.[76]

C Advantages of Using Legal Personality

One of the key issues with the current efforts of te reo Māori revitalisation is that they often rely on political will, or the energy of a particular group of people at a particular time, for their success. The result is that, depending on conditions, efforts may not be constant and corresponding successes may not be sustained. It is suggested that a legal response involving the grant of legal personality to

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72 The original version of s 7 went on to say that "Public Trust is a body corporate with perpetual succession". In 2004, that last sentence was removed and in its place s 7A(1) states "Public Trust is a Crown entity for the purposes of section 7 of the Crown Entities Act 2004". The entity, Public Trust, is a corporation.

73 See Tony Angelo "Personality and Legal Culture" (1996) 26 VUWLR 395.

74 At 397.

75 At 404.

76 At 407.

te reo will foster a steady and continuous facilitation of revitalisation efforts which is less vulnerable to policy shifts. The need for such stability is justified by the central role of te reo Māori in relation to Māori culture and identity.

The ubiquity of the voluntary attribution of personality to entities other than human individuals attests to the advantages of doing so. Most obviously, advantages include:

(a) identification;
(b) continuity (and perpetual succession);
(c) liabilities, rights and responsibilities;
(d) legal separation of individual humans from the corporation;
(e) the ability to own property; and
(f) the ability to sue and be sued in one's own name.

The conferring of legal personality on te reo Māori would be a recognition of the fundamental importance of the language to the Māori nation and for New Zealand as a whole. The same was true of granting te reo official status. However, as has already been discussed, that granting of official status has not had any well-defined or meaningful practical consequences.

Christopher Stone in his essay *Should Trees Have Standing?*[77] sets out the advantages of conferring legal personality on natural objects. It is the argument in this article that conferring legal personality on te reo Māori would confer similar benefits on the language. Major practical benefits of personality were identified by Stone.[78] As they would relate to te reo Māori, they are:

(1) Te reo Māori would have standing in its own right. Affording te reo legal personality would give the language its own voice. It would speak for itself. It is no barrier that a person, in the form of a language entity, is not capable of physically speaking, just as it is no barrier that a person in the form of a company cannot actually talk. The practical effect would be that if an action of a particular government department, for example, had an adverse (and justiciable) impact on te reo Māori, the language would have the ability to bring an action against that department in its own right, and would not need to rely on any other person whose interests were indirectly affected to bring the action.

(2) Te reo Māori would have recognition of its own injuries. As things stand, any injuries caused by the decline of the language have to be shown to have harmed legal persons. Affording te reo legal personality would mean that the direct injuries to the language itself would be measured.

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77 Christopher D Stone *Should Trees Have Standing? Law, Morality, and the Environment* (3rd ed, Oxford University Press, Oxford, 2010).

78 At xii.

(3) Te reo Māori would be a beneficiary in its own right. Thus any damages payable from any legal action brought by te reo would go to te reo. This practical benefit flows from the benefit of recognition of te reo's own injuries. Te reo would then have use of these resources to advance its own purposes; for example, it might choose to apply them to repair the injury cause by the breach. Depending on how te reo was incorporated, it is likely that it would be required to use its resources only in furtherance of the interests of the language. By contrast, if te reo did not have personality and damages were payable to a third party who had brought the action because of the indirect injury to that third party, there would be no guarantee that any damages paid would be applied to supporting the language.

Te reo Māori would have material rights, for example, it could own property.

VI INNOVATIONS

The New Zealand Government has in the past few years demonstrated a willingness to use concepts of legal personality to find solutions to difficult problems in the area of Treaty settlements. The examples discussed below demonstrate the possibility of uses of legal personality in the Treaty settlement context. An example is also given as to how legislation has been used for intellectual property concepts, which are traditionally difficult to apply to indigenous cultural products. The final example given is from Ecuador, where Christopher Stone's ideas about giving legal personality to nature were put into practice for the first time.

A The Whanganui River

On 5 August 2014, Whanganui Iwi and the Crown signed a deed of settlement settling the historic claims of the Iwi in relation to the Whanganui River. The deed of settlement (Ruruku Whakatupau) has two parts, once of which is called Te Mana o te Awa.[79] The deed recognises the Whanganui river, or Te Awa Tupua, as an "an indivisible and living whole comprising the Whanganui River from the mountains to the sea, incorporating its tributaries and all its physical and metaphysical elements".[80] It states that Te Awa Tupua is a legal person with the rights, powers, duties and liabilities of a legal person, and that the rights, powers and duties of Te Awa Tupua are to be exercised on behalf of, and in the name of, Te Awa Tupua by Te Pou Tupua, and in accordance with the deed of settlement.[81] Te Awa Tupua legislation is to provide for these matters.[82] The Crown-owned parts of the bed of the Whanganui River are to be vested in Te Awa Tupua.[83]

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79 *Ruruku Whakatupua: Te Mana o Te Awa Tupua* (deed of settlement signed by the Crown and Whanganui Iwi, 6 August 2014, Rarana Marae).

80 At [2.1].

81 At [2.2]–[2.4].

Te Pou Tupua is to be the human face of Te Awa Tupua.[84] It comprises a singular role exercised jointly by two persons appointed in a process symbolic of the Treaty partnership between the Crown and iwi: one person is to be nominated by iwi with interests in the Whanganui River, and the other will be nominated by the Crown. Nominees will be appointed jointly by the Crown and Iwi by agreement.[85] The functions of Te Pou Tupua will be to act and speak on behalf of Te Awa Tupua, uphold the status of Te Awa Tupua and Tupua Te Kawa,[86] promote and protect the health and wellbeing of Te Awa Tupua, exercise landowner functions in relation to land vested in Te Awa Tupua, administer Te Korotete o Te Awa Tupua,[87] maintain the Te Awa Tupua register,[88] and take any other action reasonably necessary to achieve its purpose and exercise its functions.[89]

Te Pou Tupua will receive $200,000 annually from the Crown for 20 years as a contribution to the costs associated with the exercise of its functions.[90]

B Te Urewera

On 4 June 2013, the Crown signed a Treaty settlement agreement with Ngai Tūhoe. One of the key features of that agreement was the notion that Te Urewera[91] would be given legal personality by way of Act of Parliament. That Act received the Royal assent on 27 July 2014.[92]

The Bill noted: "The Bill recognises the mana and intrinsic values of Te Urewera by putting it beyond human ownership."[93] The Act does that by creating the legal entity Te Urewera, which has all the rights, powers, duties and liabilities of a legal person.[94] The National Park is vested in that

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82 At [2.15].The legislation implementing the agreement had not been introduced to Parliament as at 6 March 2015. Before legislation can be introduced, the deed of settlement must go through a ratification process, whereby eligible members of Whanganui iwi vote on whether to ratify the deed.

83 At [6.1].

84 At [3.1].

85 At [3.6]–[3.9].

86 A set of intrinsic values outlined in the deed which represent the essence of Te Awa Tupua.

87 A fund into which the Crown will pay $30 million to support the health and wellbeing of Te Awa Tupua.

88 A register of accredited hearing commissioners developed and maintained for certain resource consent application relating to the Whanganui River.

89 At [3.3].

90 At [3.31].

91 Formerly a National Park in the east of the North Island.

92 Te Urewera Act 2014.

93 Te Urewera-Tūhoe Bill 2013 (146-1) (explanatory note).

94 Te Urewera Act 2014, s 11.

legal entity,[95] and is made inalienable.[96] The entity Te Urewera will therefore own the National Park in perpetuity. The Explanatory Note states: "Legal identity is the vehicle by which New Zealand recognises the existence of a separate and distinct identity which can be the subject of defined rights for legal purposes".[97] This solution to the issue of ownership recognises, as is set out in s 3 of the Te Urewera Act 2014, that "Te Urewera has an identity in and of itself".[98]

The human agents for Te Urewera are the Te Urewera Board.[99] The Board's purposes are to act on behalf of, and in the name of, Te Urewera, and to provide governance for Te Urewera in accordance with the Act.[100] The Board has eight members – for the first three years half of those are appointed by Tūhoe, and the other half by the Crown.[101] After the first three years, the composition of the Board will change so that there will be nine members: six appointed by Tūhoe and three by the Crown (by the Minister of Māori Affairs).[102] The Board members are required to act in the interests of Te Urewera, and not on behalf of their appointers.[103] Principles for the implementation of the Act are set out in s 5, which requires all persons performing or exercising functions under the part of the Bill relating to the legal entity to act in accordance with those principles.

C Te Tiriti o Waitangi

Another innovative suggestion for the use of legal personality for redressing and preventing Treaty of Waitangi breaches was put forward by Alex Frame.[104] A submission on the Bill which later became the Foreshore and Seabed Act 2004 proposed that Te Tiriti (the Treaty of Waitangi) be deemed a legal person by Act of Parliament. New Zealand's foreshore and seabed would then be vested absolutely in Te Tiriti and in turn the control and management of the estate of Te Tiriti would be vested in a Treaty Council. The Council would be made up of three people nominated by the Prime Minister and appointed by Parliament, three people appointed by Māori, and a former High

95 Section 12.

96 Section 13.

97 Te Urewera-Tūhoe Bill 2013 (146-1) (explanatory note).

98 Te Urewera Act 2014, s 3(3).

99 Established by s 16 of Te Urewera Act.

100 Section 17.

101 Section 21(1). The Crown appointees are appointed jointly by the Minister of Māori Affairs and the Minister for Treaty of Waitangi Negotiations

102 Section 21(2).

103 Section 23.

104 In a submission to the Select Committee considering the Foreshore and Seabed Bill in 2004 that Te Tiriti o Waitangi be declared a legal person. The submission was published at "Treaty Title Proposed for Foreshore and Seabed" *Te Mātāhauariki Newsletter* (New Zealand, Issue 8, October 2004).

Court Judge to be appointed by the Attorney-General in consultation with the Chief Justice. The Council would control and manage the estate of Te Tiriti in accordance with the articles of the Treaty, the general laws of New Zealand, any relevant norms of international law and principles to be set out in the Act.

The proposal flowed from work done by Alex Frame in the early 1990s relating to control of land and natural resources.[105] In that work, Frame had proposed a system of "Treaty Title", which gave the treaty legal personality so that land (or natural resources) could be vested in the Treaty, rather than the Crown or Māori. The proposal was intended to neutralise title or ownership issues. He stated: "There is no theoretical or legal reason why the Treaty should not have legal personality attributed to it."[106]

D A Local Example: Intellectual Property Rights in the Ka Mate Haka

The law of intellectual property allows for protection of ideas for those who create them.[107] Essentially it allows for the creation of property rights[108] in things that are intangible and perhaps not traditionally thought of as capable of being quantified and owned. This is done both by the common law (for example, the tort of passing off) and by statute (for example, copyright, trademarks and patents).

The worldwide intellectual property system has favoured trade and economic endeavours.[109] Indigenous peoples have raised concerns over the use of their traditional knowledge, which is often treated as if it is free for anybody to use and for any purpose.[110] Ownership of intellectual property rights is important for indigenous peoples wishing to control the use of their knowledge, because it is the key to protection and control.[111] However, there are numerous challenges relating to the use of intellectual property law to protect traditional knowledge: for example, some intellectual property

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105 This work is published as two appendices to the thesis: James Douglas Kahotea Morris "Affording New Zealand rivers legal personality: a new vehicle for achieving Maori aspirations in co-management?" (LLM Thesis, University of Otago, 2009). The author of that thesis obtained the work under the Official Information Act 1982.

106 Alexander Frame "Legal Models for Cooperation Between Maori and the Crown in Control of Land and Resources" (13 September 1991) (Obtained under Official Information Act 1982 Request to the Ministry of Justice) at 10–11.

107 Susy Frankel *Intellectual Property in New Zealand* (2nd ed, Lexis Nexis, Wellington, 2011) at 3.

108 For example, the Copyright Act 1994 (at s 14(1)(a)) and the Trade Marks Act 2002 (at s 9) expressly state that copyright and trade marks respectively are property

109 Frankel, above n 107, at 117.

110 At 116

111 At 133.

rights have a limited lifespan,[112] which does not sit well with the Māori concept of kaitiakitanga, whereby taonga are protected for future generations.

The legislature has the power to circumvent these difficulties by legislating them away. While there has not been a general reform of the laws of intellectual property in New Zealand to deal with the conflict between traditional knowledge and Western notions of intellectual property, Parliament has intervened to create unique individual property rights to solve a particular problem in a particular case. As a result of the agreement reached in their settlement of historic Treaty of Waitangi grievances, the Ka Mate Haka was attributed to the people of Ngāti Toa Rangatira. In the Haka Ka Mate Attribution Act 2014, the Crown acknowledges that the Ka Mate Haka is a taonga of Ngāti Toa Rangatira, and is an integral part of their history, culture and identity. The Crown also acknowledges the role of Ngāti Toa Rangatira as a kaitiaki of the Haka, and recognises that Ngāti Toa Rangatira holds the right of attribution.[113] Subject to waiver by Ngāti Toa Rangatira,[114] that right of attribution means that anything to which the right applies, including publication of Ka Mate for commercial purposes or communication of Ka Mate to the public, must include a statement that Te Rauparaha was the composer of Ka Mate and a chief of Ngāti Toa Rangatira. The right to attribution is able to be enforced by the rights' representative on behalf of Ngāti Toa Rangatira, by application for a declaratory judgment.[115] While this is not an example of the use of legal personality, it is an example of the intervention of the legislature to use familiar western legal concepts to protect an intangible taonga.

E An International Example: Giving Nature Legal Personality

The suggestion in Christopher Stone's article[116] was that Nature should be given legal personality. In 2008, Ecuador became the first country in the world to attribute rights to nature. In its Constitution, "nature" is defined as the place "where life is reproduced and occurs" and the Constitution states that nature has the "right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes".[117] Nature cannot vindicate its own rights; instead individuals and groups must call upon public authorities to enforce nature's rights.

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112 At 135. Copyright, for example, depending on the work involved, lasts for the life of the author plus 50 years, or a flat 50-year period. Patents exist for a 20-year period.

113 Haka Ka Mate Attribution Act 2014, s 8.

114 Defined as Te Rūnanga o Toa Rangātira Inc or the person to whom the right to enforce the right of attribution has been assigned in accordance with the constitutional documents of Ngāti Toa Rangatira.

115 Section 11.

116 See above n 7.

117 Constitution of Ecuador, art 71.

The Constitution of Ecuador describes "persons, communities, peoples and nations" as bearers of rights. Nature is described not as a bearer of rights, but as a subject "of those rights that the Constitution recognises for it".[118] However, the Constitution also provides that all rights are of equal importance.[119] All the rights and guarantees in the Constitution are able to be exercised, promoted and enforced before competent authorities and "shall be directly and immediately enforced by and before any civil, administrative or judicial servant, either by virtue of their office or at the request of a party".[120] Furthermore, the Constitution states that where there is doubt as to the scope of legal provisions relating to environmental issues, "the interpretation most favourable to Nature shall prevail".[121] There are further provisions in the Constitution recognising the distinctiveness of the rights of nature. For example, art 72, in recognising nature's right to be restored, requires that the restoration is independent from obligations on the State and other parties to compensate "individuals and communities that depend on affected natural systems".

Having been ratified only in 2008, it is too early to tell whether the inclusion of the rights of nature in the Ecuadorean Constitution has been effective.[122] Certainly it can be said that the rights of nature contained in the Constitution are not as strong as envisaged by Stone: in Ecuador, nature cannot enforce its own rights; it must rely on individuals or groups to do this for it.

VII LEGAL PERSONALITY FOR TE REO

A Legal Personality for an Abstraction

A key difference between Te Urewera and the Whanganui River on the one hand, and te reo Māori on the other, is that the former have a physical aspect. It is easier to conceptualise how physical property (such as a forest or a riverbed) may be incorporated and become an entity. It is perhaps not so easy to conceptualise how an intangible thing can be given personality. In this context, it is useful to recognise that both Te Urewera and the Te Awa Tupua have both physical and non-physical aspects. Te Urewera, for example, is not merely the land or the forest, but is "a place of spiritual value, with its own mana and mauri", which "has an identity in and of itself".[123] This is recognised in the background section to the Te Urewera Act 2014. This has not prevented or hindered the incorporation of Te Urewera. Similarly, the legal entity which will be established by

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118 Article 10.

119 Article 11(6).

120 Article 11(1) and (3).

121 Section 1 of ch 2.

122 See Joel I Colón-Ríos "Notes on the Theory and Practice of the Rights of Nature: The Case of the Vilcabamba River" in Paul Martin and others (eds) *In Search of Environmental Justice* (Edward Elgar, Cheltenham, 2015) (forthcoming).

123 Te Urewera Act 2014, s 3.

legislation in relation to the Whanganui River, Te Awa Tupua, is defined as "an indivisible and living whole comprising the Whanganui River … and all its physical and *metaphysical elements*".[124] The two other examples given: the suggestion of legal personality for the Treaty and of attributing right to nature also go some way towards illustrating how a non-physical entity such as a language might be given legal personality.[125] The Ka Mate Haka example is intended to illustrate that the law has no problem with defining and recognising intangibles (and in that case, an intangible taonga) in order to protect them.

As Twining has said:[126]

> If one accepts a formal conception of a legal subject [or person] as any unit that is treated by a legal system as being capable of bearing rights, duties and other relations, this need not give rise to many conceptual difficulties.

And as Sir John Salmond said:[127]

> A person is any being whom the law regards as capable of rights and duties … Legal persons, being the arbitrary creations of the law, may be of as many kinds as the law pleases.

Aside from this, a useful way of thinking about the idea of legal personality for a language is to consider the way the law deals with the concept of non-physical property. Intellectual property law has long recognised that there can be property in an idea; that is, that the idea can be recognised and given protection as such.

B Practicalities

The best mechanism for conferring legal personality on te reo Māori is an Act of Parliament. There are other possibilities: for example, over time, as Māori law is incorporated into the common law, te reo could come to have legal personality, in accordance with the Māori view of the language as a taonga of great importance. Alternatively legal personality could be granted by royal prerogative: by royal grant (letters patent) or royal charter. However, a legislative solution is both quicker and much clearer.

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124 *Ruruku Whakatupua: Te Mana o Te Awa Tupua*, above n 79, at [2.1] (emphasis added).

125 Earlier in the article, companies and Public Trust were also discussed, as examples of where legal personality has been conferred and created entities from non-physical ideas which previously had no legal rights.

126 Twining, above n 66, at 3.

127 John W Salmond *Jurisprudence or the Theory of the Law* (2nd ed, Stevens and Haynes, London, 1907) at §§ 108 and 113.

An Act would recognise the existence and importance of te reo Māori in a purpose clause, confer legal personality on te reo Māori, accord it all the powers of a person of full age and capacity, and specify that its powers be used in furtherance of the purposes of the Act.

Once legal personality was granted to the language, it would be necessary to designate those who will be the agents for the language (in the same way as directors speak for a company). A revamped Te Taura Whiri Board could perform this function (or alternatively, Te Taura Whiri could continue as a separate organisation with clearly defined functions subordinate to the entity Te Reo Māori). The Act could establish this agent as an advisory board to the language, and set out criteria for its membership. A theme running through all the suggestions about the way forward for the revitalisation of te reo Māori emphasises the need for self-determination – for the movement to come from the people themselves. The Waitangi Tribunal's recommendations about including Māori appointed members must be taken into account: the composition of the Board might reflect the partnership of the Crown and Māori under the Treaty of Waitangi, and should also engage the Crown.

Auditing and financing of the entity would also need to be provided for in the Act. One of the concerns identified with the current regime is the potential for political concerns to affect how much funding is available for the Māori language. Certainty of funding is necessary to ensure Te Reo Māori is able to plan into the future. The financial support given to Te Reo Māori by the Government should be given a certainty which will put it beyond the regular annual government budget. Appropriations should therefore be set out in the Act, and be automatic and payable out of public money without further appropriation than the Act itself.[128] These statutory appropriations could be tied to a figure such as gross domestic product (GDP) so, for example, every year a certain percentage of GDP is automatically appropriated to the Māori language. Alternatively, they could be set every year by an independent body charged with that function.[129] Clear auditing provisions would be required to ensure that this public money is appropriately used.

The legislation proposed in this article envisages a repeal of the Māori Language Act 1987, and so certain provisions of the Māori Language Act would need to be carried over into the new Act –

128 Section 9A(1) of the Judicature Act 1908, relating to the payment of salaries and allowances of judges, is an example of where this is already done in legislation. The relevant part of that section reads "There shall be paid to the … Judges, out of public money, without further appropriation than this section [salaries and allowances etc]".

129 As the Remuneration Authority, established by the Remuneration Authority Act 1977, determines the salaries of judges and various other office holders (see for example s 9A(1)(a) of the Judicature Act 1908).

for example those about te reo Māori as an official language, and those relating to its use in judicial proceedings.[130]

VIII CONCLUSION

This article proposes that te reo Māori be given legal personality. It argues that this proposal recognises the value of the language, and allows for a long-term and durable solution to the problem of how to administer and fund the revitalisation of te reo in a way that accords with the principles of the Treaty of Waitangi and recognises the value of te reo Māori.

The law thrives on fictions. It flourishes by their use. Personality is a regularly used fiction. The Common Law has used it to great advantage over the centuries – for the state, for public officers, for commercial ends. And in a private international law context, the Common Law has accepted that personality is bestowed by the relevant culture.

The law is capable. Personality is in the armoury. If the community for whom te reo is a taonga wish, the Crown should be told: "Don't tell me you love me, show me!"

In 1986, when reporting back on the Māori Language Bill, the Māori Affairs Select Committee said "full recognition of Maori as an official language … should be a progressive and gradual policy to be implemented systematically as resources and public acceptance allow."[131] Almost 30 years have passed since then. Now is the hour.

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130 There would be potential for these provisions to be strengthened, but that is outside the scope of this article. If the suggestion of a revamped Te Taura Whiri Board were taken up, Te Taura Whiri would also need to feature in the new Act.

131 (9 June 1987) 481 NZPD 9337.

APPENDIX

Māori Language Act 2015

1 Title

This Act is the Māori Language Act 2015.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1

Te Reo Māori

Subpart 1 – Purpose

3 Purpose of this Act

The purpose of this Act is to establish te reo Māori as a body corporate, in order to affirm and enhance the status of the Māori language as a taonga of iwi and Māori.

Subpart 2 – Legal identity of Te Reo Māori

4 Te Reo Māori declared to be a body corporate

(1) Te Reo Māori is established as a body corporate.
(2) Te Reo Māori shall–
  (a) have perpetual succession and a common seal;
  (b) have an office at such place as it may designate;
  (c) have all the rights of a natural person of full age and capacity; and
  (d) carry on all such activities as may appear to it to be requisite, advantageous, convenient or conducive to the fulfilment of its purposes.

5 Purposes of Te Reo Māori

(1) The purposes of Te Reo Māori are–
  (a) to ensure that all that can be done to guarantee the vitality of te reo Māori is done;
  (b) to encourage the use of te reo Māori at all levels and in all circumstances in the life of New Zealand; and
  (c) to support and sustain te reo Māori as an official language of New Zealand.

Subpart 3 – Recognition of Māori language

6 Recognition of te re Māori as taonga

(1) Te reo Māori is a taonga of iwi and Māori.
(2) Iwi and Māori are the kaitiaki of te reo Māori.

7 Te reo Māori is an official language of New Zealand

Te reo Māori is an official language of New Zealand.

8 Right to speak Māori in legal proceedings

…

Subpart 4 – Interpretation and other matters

9 Interpretation

…

10 Act binds the Crown

This Act binds the Crown.

Part 2

Governance and Management of Te Reo Māori

Subpart 1 – Te Reo Māori Board

Establishment of Board

11 Board established

Te Reo Māori Board is established.

Purposes, Functions and Powers of Board

12 Purposes of Board

(1) The purposes of the Board are–
   (a) to act on behalf of, and in the name of, Te Reo Māori; and
   (b) to provide governance for Te Reo Māori in accordance with this Act.

13 Functions of Board

…

14 General Powers of Board

(1) The Board has full capacity and all the powers reasonably necessary to achieve its purposes and perform its functions.
(2) In performing its functions, the Board must act consistently with-
   (a) this Act; and
   (b) any other lawful requirement.

15 Decision making affecting dialects of te reo Māori

The Board must consider and provide appropriately for the relationship of iwi and hapu with Te Reo Māori when making decisions which may affect dialects.

Membership of Board

16 Appointment of members of Board

(1) The Board consists of x members, appointed as follows:
  (a) X members, appointed by ….
  (b) X members, appointed by the Minister.

(2) In making an appointment, an appointer must consider whether the proposed member has the mana, standing in the community, skills, knowledge or experience to–
  (a) participate effectively in the Board; and
  (b) contribute to achieving the purposes of the Board.

17 Disqualification

Persons who would be disqualified under section 30 of the Crown Entities Act 2004 must not be appointed to the Te Reo Māori Board.

Terms for Board and members

…

Vacancies

…

Liability

…

Decision making

…

Part 4

Miscellaneous Matters

18 Appropriation

(1) There shall be paid to Te Reo Māori on 1 January in every year a sum of money equal to xx% of the New Zealand Gross Domestic Product.
(2) The sum referred to in subsection (1) shall be paid without further appropriation than this section.

19 Interpretation of te reo Māori in proceedings

(1) Where in case before a court, a party to the proceedings or the court proprio motu raises a matter relating to the meaning or interpretation of a word of phrase in te reo Māori, the court shall seek the advice of Te Reo Māori on that question and adjourn the proceedings for 30 days or earlier receipt of advice from Te Reo Māori.

(2) Where a court refers a matter to Te Reo Māori under this section the court shall briefly state the facts and context relevant to the language enquiry and request a response from Te Reo Māori as to the meaning of the word or phrase in the particular context.

(3) Where a court refers a matter to Te Reo Māori under this section Te Reo Māori shall prepare a formal response to the question from the court.

(4) Where within 30 days from the date of the request under this section the court receives the information from Te Reo Māori the court shall determine the te reo Māori matter on the basis of the advice given by Te Reo Māori.

(5) Where within 30 days from the date of the request under this section there has been no response from Te Reo Māori to an enquiry by a court, the court shall determine the language matter before it in accordance with the ordinary rules of evidence.