

Me He Korokoro Tui: Searching for Legal Maori Language and the Rights to Use It

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I INTRODUCTION

Merely to use the Maori language in any context can be a powerfully political, even transformative act. Speaking Maori publicly in New Zealand, a primarily monolingual English-speaking country, can transform the simple act of pushing a child on a swing at the park, or getting the groceries, into a conscious or unconscious statement that the Maori language has somehow survived against all the odds stacked against it. Using the Maori language in such humdrum situations can perform, even if only fleetingly, a type of transformative magic that reclaims a public space for Maori thinking and Maori ways of being. A large part of the battle for revitalisation of endangered indigenous languages (which Maori surely remains) is to fight for more such ground and more freedom for that transformative magic to occur. One part of that battle is to claim back the use of the Maori language not only in the domestic sphere, but also within the civic culture of the New Zealand state. "Civic culture" in this context refers to the crucial areas of administration, politics, the economy and (civic, as opposed to traditional) law.¹ While Maori was (albeit inconsistently) one of the two languages of administration and civic law in 19th century New Zealand, it largely lost that civic status in the 20th century.² Our work at the Legal Maori Project in particular is aimed at assisting in the restoration and enhancement of Maori as a language of law, in particular, of *Western* concepts of law. This paper will set out the background and aims of the Project, but it will also sound a warning: despite the high intentions of the Project and the resources being produced, we contend the rights framework within which the Maori language of law is to be revitalised is insufficient for the task. The recognition of rights that led to the enactment of the Maori Language Act ("Act") requires progressive implementation. Instead, the Act reflects a mere snapshot of a limited entitlement and has been outstripped by other initiatives in other areas concerned with the revitalisation of te reo Maori. In short the Act should be amended to ensure that the language rights that have developed over time in Aotearoa New Zealand are no longer frozen and keep pace with the developments of the language itself.

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¹ Stephen May "Misconceiving minority language rights" in *Language Rights and Political Theory* Kymlicka, W and A Patten (Eds) (New York: Oxford University Press, 2003) 127.

² For useful discussion on the presence and use of the Māori language in government and Parliament see Phil Parkinson "Strangers in the House": The Maori Language in Government and the Maori Language in Parliament 1840-1900 - [2001] *V.U.W.L.Rev* 45; (2001) 32 *V.U.W.L.R* 865.

II THE LEGAL MAORI PROJECT – A BACKGROUND

The Legal Maori Project, funded by the Foundation for Research, Science and Technology was established in 2008 at the Victoria University of Wellington, in the Law Faculty. It currently operates within the disciplines of law and applied linguistics in order to achieve two primary aims:

- to normalise the Maori language in the enactment, use and communication of Western legal ideas; and
- to provide bilingual Maori speakers with a legal language environment in which they can effectively *choose* to use Maori rather than English to express such ideas.

Assisting bilinguals to make the choice to use Maori as a *normal* language of civic culture, including Western law is critically important. Research suggests successful Maori language revitalisation requires that bilinguals must have a net preference for carrying out at least some of their activities in Maori. Revitalisation of the use of Maori in legal contexts therefore needs to be aimed at making such a net preference both desirable and feasible.³

In order to achieve these aims the Project will produce, by the end of 2011, a dictionary of legal Maori terms. This dictionary will be based on a specialised legal terminology (“lexicon”) derived an extensive collection of texts (a “corpus”) gathered from the 1830s until the present day.

The design of the Project is influenced strongly by the framework outlined by Joshua Fishman in his important work on reversing language shift (RSL).⁴ However this Project is also influenced by commentators offering subsequent theoretical analysis of the RSL model, such as Benton (2001) and Spolsky (2004) who emphasise enhancing the functionality of the Maori language. This analysis recognises that linguistic management measures for reversing language shift cannot be effective alone, but also require concomitant socio-political developments in the Maori community such as increasing wealth, political power and the increasing visibility of Māori language speakers in the education system and political life.⁵

In accordance with the notion that civic culture is one area of functionality the Maori language worth fostering, and reclaiming, the Project accordingly seeks to prove or otherwise the following hypothesis:

The Maori language has developed a terminology or a Language for Special Purposes (LSP) used to communicate and transmit information about Western legal concepts.

³See Grin, F. and Vaillancourt, F (1998) *Language Revitalisation Policy: An Analytical Survey. Theoretical Framework, Policy Experience and Application to Te Reo Maori*. New Zealand Treasury Working Paper 98/06 Wellington, New Zealand/Aotearoa. Available at http://www.Maorilanguage.info/mao_lang_abib.html (last accessed 25 August 2010).

⁴ Fishman, Joshua A. (1991) *Reversing Language Shift; Theoretical and Empirical Foundations of Assistance to Threatened languages*. Clevedon: Multilingual Matters. See also Fishman, Joshua A., ed. *Can Threatened Languages Be Saved? Reversing Language Shift, Revisited: A 21st Century Perspective*. (Multilingual Matters Ltd: 2000), xi, 503 pp.

⁵ See for example Crystal in Bernard Spolsky *Language Policy* (Cambridge University Press, 2004) pp 215-216.

We contend that this legal Maori LSP has been developing since at least the middle of the 19th century, arguably from as early as 1820 when the Lord's Prayer (with its legal ideas of "kingdom", "covenant" and "trespasses") was translated and disseminated in Maori along with the first written Maori grammar.⁶ The development of the legal Maori LSP obviously relied heavily on traditional Maori law, which of course had developed its own specialised legal terminology. As Paterson identifies, Maori engagement with Christianity, its missionaries and its texts reflected a sympathetic resonance between a highly developed regulatory system of tikanga and many Christian legal ideas.⁷ Much early Maori writing (and writing aimed at Maori) also reflected these often syncretic legal ideas. In order to demonstrate our hypothesis, therefore, we need to look closely at the Maori language texts from the 19th century up until the present that will grant us insights into the engagement between the Maori language and Western legal ideas. Those texts will enable us to define and explore a legal Maori LSP.

Indeed, there are several thousand pages of publicly available, printed, Maori language documents discussing, applying, translating, critiquing and interpreting Western legal concepts. The vocabulary captured in those documents is likely to include such a terminology because the documents are fairly specialised and include:

- dozens of Acts and Bills that were translated into Maori in the 19th century in whole or in part;
- many Crown-Maori agreements, including land deeds;⁸
- *Nga Korero Paremete*, the collected Maori translations of the speeches of Maori members of Parliament;
- The Maori Kotahitanga Parliament proceedings of the 1890s;
- *Te Kahiti o Niu Tireni*: the official government organ to communicate with Maori from 1865; and
- Anglican Synod proceedings, from the Waiapu Diocese that provide examples of legal language from Canon law.

In addition to the 19th century texts, there are also significant 20th and 21st century texts, including transcripts of Maori language proceedings of the Maori Land Court. Within all those texts, we think, resides an extensive legal Maori terminology that is yet to be extracted and examined. The Project therefore involves gathering a representative body, or corpus, of electronically available texts in the Maori language, including such sources as these that are most likely to contain that legal Maori terminology. Criteria for including texts in the Legal Maori Corpus are that such texts must be:

⁶ In Thomas Kendall Samuel Lee *A Grammar and Vocabulary of the Language of New Zealand* (London: London Missionary Society, 1820). Text available at <http://www.nzetc.org/tm/scholarly/tei-KenGramm.html>.

⁷ Lachy Paterson Maori "Conversion" to the Rule of Law and Nineteenth-Century Imperial Loyalties *Journal of Religious History* Vol. 32, No. 2, June 2008 216-233, 217.

⁸ Large collections of land deeds are publicly available such as those published by Turton and McKay, but other agreements also exist outside of those publications, that reside in archive repositories. See RP Boast "Recognising Multi-Textualism: Rethinking New Zealand's Legal History" (2006) 37 *V.U.W.L.R* 547-582.

- printed in Maori, between the years of 1830-2009;
- printed *to be read or distributed* to 3 or more Maori speakers; and
- with the *communicative function* of explaining, clarifying and challenging and using Western legal concepts.

These criteria are necessarily restrictive largely on the basis of the prohibitive cost of digitising handwritten sources in order to analyse the vocabulary in those texts. We hope it may become possible to use those sources, as well as (eventually) transcribed oral sources, thereby making the Corpus more representative of all legal Maori language.⁹

One happy result of the digital collation of the types of texts mentioned above has been the establishment of He Pataka Kupu Ture (the Legal Maori Archive), created in collaboration with the New Zealand Electronic Text Centre as the first output of the Legal Maori Project and hosted by the NZETC at <http://www.nzetc.org/tm/scholarly/tei-corpus-legalMaori.html>. Whereas the paper-based texts have all been publicly available, until now they have been effectively sequestered in a wide range of repositories. To have them available in one place in an online archive will, we hope be a spur for further research on the Maori language and New Zealand legal history.

The Corpus was 'closed' at the end of 2009, after which no further texts were admitted. The aggregate text from the Corpus was then analysed in early 2010 in order to extract and examine the legal Maori terminology. That terminology will then form the basis of a dictionary of 2,500 legal Maori terms defined by their usage in language, offering examples and alternative meanings where necessary. By examining a large and representative body of documents and collating the various appearances and use of a given term or concept, we expect there can be a high level of user confidence regarding the accuracy of the entries that will comprise the dictionary.

Hopes are high then, that we can produce over the next two years a useful resource base for Maori speakers that will encourage the revitalisation of Maori as a language of civic culture, including of Western law. Presuming this is the case, what are the implications for this revitalisation in the existing language rights framework? While we seek to argue a legal Maori LSP exists, the rights to use this language register effectively are limited and these limitations threaten its ongoing viability and development.

III MAORI LANGUAGE RIGHTS IN NEW ZEALAND

It is important to consider the rights context within which the use of legal terminology in Maori will often take place. The claim to a right to language, as well as the collation of substantial linguistic evidence that such a terminology exists are both necessary tools in rehabilitating Maori to its status as a viable legal language, and enhancing the efficiency of that language. Rights to language exist in a number of international instruments, but we will only look at one domestic instrument in particular detail.¹⁰ Further, this paper examines the extent to which the right to

⁹ Phil Parkinson and Penny Griffith's annotated bibliography of *Books in Maori 1815-1900* proved an invaluable reference during the project for information on the provenance and location of various texts.

¹⁰ Article 1(3) of the Charter of the United Nations states that human rights and fundamental freedoms should be encouraged and promoted without distinction as to race, sex, language, or religion. Article 2 of the International Covenant on Economic, Social and Cultural Rights states that: 'the state parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised without discrimination of any kind

language in New Zealand can facilitate the use of te reo Maori in legal contexts. In fact the right to use the Maori language in legal contexts exists but is simply too narrowly cast to make the *choice* to use Maori in such contexts a viable and realistic one. The outputs of the Legal Maori Project may assist in delineating and disseminating a legal Maori vocabulary, but this lexicographical waka may yet founder on the rocks of a rights framework that is not only insufficient in scope but simply incompatible with the obligation on the Crown to uphold progressively the specific right to the Maori language under the Treaty of Waitangi.

A THE TREATY RIGHT

In Aotearoa New Zealand there is a special layer of protection of the right to use the Maori language that arises out of a duty to uphold the language. The Treaty of Waitangi, Article 2 states:

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangitira ki nga hapu – ki nga tangata katoa o Nu Tirani te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa. Otia ko nga Rangitira o te wakaminenga me nga Rangitira katoa atu ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te Wenua – ki te ritenga o te utu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Her Majesty the Queen of England **confirms** and **guarantees** to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and **other properties which they may collectively or individually possess** so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf. [emphasis added]

This Treaty-based right to the Maori language has been recognised by the Waitangi Tribunal, Parliament, and the courts of New Zealand, all of which have affirmed that the Maori language is, and was, a taonga for the purposes of Article 2, and therefore subject to the guarantee of tino rangatiratanga in the Maori language version of the Treaty, as well as to the guarantee of full exclusive and undisturbed possession, as set out in the English version of the Treaty. That particular acceptance only came after a combination of events in the 1960s, 1970s and 1980s brought the plight of the language to the foreground of public attention. Such events included the Maori Language Petition of 1972, signed by 30,000 people, which requested that Maori language be offered in all schools, and the Land March of 1975. Other political actions were carried out by activist groups such as Nga Tamatoa, and

as to... language...'. Article 2 of the International Covenant on Civil and Political Rights states: "each State party to this recent covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant, without distinction of any kind, such as... language...".

societies for the protection of the language such as the Te Reo Maori Society, and the Wellington Māori Language Board, Nga Kaiwhakapumau i te Reo. In 1984 Nga Kaiwhakapumau i te Reo lodged a claim (Wai 11) before the Waitangi Tribunal. The Waitangi Tribunal subsequently found the language to be a taonga for the purposes of the Treaty of Waitangi. As such, the Crown was bound by certain obligations, as a Treaty partner:¹¹

The evidence and argument has made it clear to us that by the Treaty the Crown did promise to recognise and protect the language and that that promise has not been kept. The 'guarantee' in the Treaty requires affirmative action to protect and sustain the language, not a passive obligation to tolerate its existence and certainly not a right to deny its use in any place. It is, after all, the first language of the country, the language of the original inhabitants and the language in which the first signed copy of the Treaty was written.

This obligation as viewed by the Waitangi Tribunal is a proactive one to protect and sustain the language that imports with it a correlating right that accrues not only to individual Maori but to Maori collectives.¹² At the heart of some of the most influential submissions before the Tribunal was the notion that the recognition of te reo Maori should be progressively realised. At para 4.2.7 of the Report the Tribunal placed significant weight on the submissions of the New Zealand Section of the International Commission of Jurists as presented by the late Martin Dawson in regard to the interpretation of the word “guarantee” within the Treaty text:

...the point was made that the word denotes an active executive sense rather than a passive permissive sense, or in a phrase "affirmative action". To quote from the submission: "By these definitions therefore, the word (guarantee) means more than merely leaving the Maori people unhindered in their enjoyment of their language and culture. It requires active steps to be taken to ensure that the Maori people have and retain the full exclusive and undisturbed possession of their language and culture..."

Also in evidence before the Waitangi Tribunal, Secretary for Justice, Stanley Callaghan appears to acknowledge that the rights were to be progressively realised and should not be frozen when exercised specifically within the courts:¹³

"... the Department accepts that it would be practicable and not prohibitively expensive to proceed along the lines of the Welsh Language Act provided that the right given is limited for **the time being** to a right to address the Court or give evidence in Maori. This would exclude an obligation to provide for transcripts and court documents in Maori as a consequence ... The time has come for change and we look forward to these developments as **representing an important forward step** in recognising the deep-seated wish of many

¹¹ Waitangi Tribunal *Te Reo Maori Report: Wai 11* (Government Printer, Wellington: 1986) 5.

¹² Hohfeld in Joseph William Singer "The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld" [1982] *Wis L Rev* 975, 986. See also, Ed Willis, *Statutory Incorporation of Rights Derived from the Treaty of Waitangi*, LL.M unpublished dissertation 2008 6-21.

¹³ See above n 11 para 8.2.4

Maori people for their language and culture to flourish through its daily use in New Zealand ..." [emphasis added]

The Maori Affairs Select Committee further developed this notion of progressive realisation in considering the *Reo Maori Report* and submissions on the Maori Language Bill. They observed that "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".¹⁴ While this observation surely was intended to deflect criticism for the Bill's failure to adopt all recommendations of the Waitangi Tribunal in the *Reo Maori Report*, it is also important recognition that the measures comprising official recognition (including official recognition of te reo Maori in the legal system) should not remain in a frozen state.

Ultimately the Crown's obligations were to be reflected, in part at least, in the Maori Language Act 1987. While the Crown did not adopt all recommendations of the Tribunal, of the 5 recommendations issued by the Tribunal, the first was directly relevant to supporting and recognising the use of Maori in legal contexts:¹⁵

1. TO THE RIGHT HONOURABLE THE PRIME MINISTER that legislation be introduced enabling any person who wishes to do so to use the Maori language in all Courts of law and in any dealings with Government Departments, local authorities and other public bodies (refer para. 8.2.8).

As will be seen, the response to this recommendation has not, so far, provided effective recognition of the Maori language in legal contexts *or* implemented the progressive realisation of the right to use Maori in legal contexts.

The Maori Language Act 1987

Obviously the Act was enacted, in part, as the Crown's response to the findings of the Waitangi Tribunal and the Maori language claim (Wai 11), but it was also enacted in large part to address the findings in *Mihaka v. Police* [1980] 1 NZLR 462 that the Maori language had, at the time of that case, no real official status in New Zealand and therefore could not be a language used as of right in court proceedings.¹⁶

The preamble to the Act recognises a duty placed upon it, affirming the Tribunal's approach, in stating that "in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga: and ... the Maori language is one such taonga". In particular the Act was a legislative response that only addressed the first two of the five recommendations of the Waitangi

¹⁴ (9 June 1987) 481 NZPD 9337. See Clare Tattersall "A Right to language: Two Acts" Unpublished LLB(Hons) Research Dissertation, 27.

¹⁵ See above n11, para 10.1

¹⁶ See *Pakitai Raharuhi v. New Zealand Police* AP 51/03 High Court Rotorua per Justice Baragwanath page 15 for the observation that the Maori Language Act 1987 was passed at least in part as a response to *Mihaka*. Te Ringa Mangu Mihaka, himself has often stated publicly that the case was "the straw that broke the camel's back" in achieving legal recognition of the right to speak Maori.

Tribunal's report.¹⁷ Interestingly, a second claim was lodged with the Waitangi Tribunal on the Crown's failure to await the release of the *Reo Maori Report* before submitting the Maori Language Bill to the House.¹⁸ The other major explicit legislative response to the recommendations of the Tribunal (and to subsequent case-law) in the *Reo Maori Report* is the passage of the Maori Television Service Act 2003, a direct response to Recommendation Four; that broadcasting legislation and policy have regard to the Tribunal's finding of the Crown obligation to recognise and protect the Maori language. While it is important to note the likely influence the *Reo Maori Report* may have had on other legislative developments, such as crucially important amendments to the Education and Broadcasting Acts of 1989, it is equally important to note the limited scope of the Act itself. The Act, including its preamble, must then be read just as one important element of the Crown's legislative recognition of that duty.

i. Section 3

Section 3 of the Act merely states "The Maori language is hereby declared to be an official language of New Zealand". There is little guidance in the Act or elsewhere as to what this status really means. Certainly, this status is a step up from the earlier "official recognition" afforded Maori under s77A of the Maori Affairs Act 1953, which was effectively ignored by the Court in the *Mihaka* case, which refused to countenance that such recognition might extend to a right to speak Māori before the courts.¹⁹ While denoting Maori as an official language was not one of the recommendations of the Waitangi Tribunal, applying this status appears to have been a response to some of the Waitangi Tribunal's concerns from the *Reo Maori Report*:²⁰

Official recognition must be seen to be real and significant which means that those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so. To recognise Maori officially is one thing, to enable its use widely is another thing altogether. There must be more than just the right to use it in the Courts. There must also be the right to use it with any department or any local body if official recognition is to be real recognition, and not mere tokenism.

It is clear from the above extract that the Tribunal did not accept that "official language" status merely gave rise to a right to use Maori in the courts. This status was also important in other civic contexts to enable wide usage. However, the observations of the Secretary for Justice, Stanley Callaghan, before the Tribunal appeared to view official status in the context of legal proceedings, although he also viewed such status as an important aim to achieve as a question of rights, and not

¹⁷ The second recommendation was for the establishment of a supervisory body that came to be known as Te Taura Whiri i te Reo Maori.

¹⁸ Huirangi Waikerepuru *Second Claim to the Waitangi Tribunal regarding the failure of the government to await the Tribunal's decision on WAI 11* (submissions to the Maori Affairs Committee in Respect of the Maori Language Bill 1986), See Clare Tattersall "A right to language? Maori language and the law: two Acts", unpublished LLB (Hons) Research Paper, Victoria University of Wellington 2009, 27.

¹⁹ *Mihaka v Police* [1980] 1 NZLR 453, 462-463 (CA) Richardson J for the Court.

²⁰ Above, n 11, 8.2.8.

merely to enable native speakers to be understood:²¹

"... The present interpretative facilities when English is not understood and the various programmes which promote a much greater recognition and understanding of Maori culture do not of course meet the demands of the claimants that the Māori language be given some official status in our courts of law. While the present arrangements may provide for justice to be done in a strict, legalistic sense, a Maori may have an overwhelming sense of grievance and loss of dignity felt through being unable, because of fluency in English, to speak Maori in a court in his own land. That may give rise to such a deep-seated sense of injustice as to prejudice the standing of the courts in some Maori eyes. It seems to us that despite the strict logic of the present situation the time is now appropriate to consider change. Certainly the present situation is at odds with our bicultural foundation at Waitangi in 1840
..."

Indeed the Tribunal's concern to enable the wide use of Maori through effective official recognition is not fully recognised in the Act. No guidance is given to explain what "official status" might mean. Judicial determination of the implications of official status has also been limited. Justice Fisher discussed the importance of s3 in the case of *Ngaheue v MAF* and concluded that the official status of Maori was a 'relevant factor' to be taken into account when determining if the court would use its discretion to allow the submission of Maori language documents; a right not supported by the Act itself. His Honour said:²²

One [relevant factor to the exercise of the court's discretion] is the declaration in s 3 Maori Language Act that "the Maori language is hereby declared to be an official language of New Zealand" and the long title to the Act which, among other things, declares the Māori language to be an official language of New Zealand. That suggests that although there is no right to file a document expressed in Māori the Courts should be sympathetic to the idea if in the circumstances it would be sensible and practicable to do so.

In this case at least "official status" was considered a relevant consideration in determining use of the court's discretion. In the absence of further judicial determination of what this status actually means it may well be that the effect of official status of the Maori language will continue to be determined in the context of the courts. This limitation does not reflect the Tribunal's preference that "official status" be more broadly understood, as described above.

²¹ Ibid, para 8.2.3.

²² *Ngaheue v MAF* (1992) 5 PRNZ 201, 206.

ii. Section 4

Moving on from the official status denoted under Section 3, Section 4 of the Act creates a statutory right to speak Maori in certain legal proceedings.²³ It is important to know the exact legal circumstances in which this right can be enforced. “Legal proceedings” are defined in s2:

Legal proceedings means—

- (a) Proceedings before any court or tribunal named in Schedule 1 to this Act; and
- (b) Proceedings before any Coroner; and
- (c) Proceedings before—

(i) Any Commission of Inquiry under the Commissions of Inquiry Act 1908; or

(ii) Any tribunal or other body having, by or pursuant to any enactment, the powers or any of the powers of such a Commission of Inquiry,— that is required to inquire into and report upon any matter of particular interest to the Maori people or to any tribe or group of Maori people;

Schedule 1 of the Act sets out the relevant courts and tribunals in which the right can be enforced. All courts are included, but only a small number of tribunals are included. Schedule 1 currently provides for Maori to be used in the following tribunals:

- The Waitangi Tribunal
- The Employment Relations Authority
- The Equal Opportunities Tribunal [now replaced by the Human Rights Review Tribunal]
- The Tenancy Tribunal
- Planning Tribunals [now replaced by the Environment Court]
- Disputes Tribunals established under the Disputes Tribunals Act 1988

Given that the Ministry of Justice administers now 25 tribunals and statutory authorities through its tribunals unit (not including the Waitangi Tribunal as a permanent Commission of Inquiry) this list is small indeed.

“Legal proceedings” does not include proceedings in other legal contexts such as Parliament. Indeed developments of the use of te reo Maori within Parliamentary proceedings has developed without recourse to the Act, although probably influenced by it. In this instance Standing Order 104 provides that a member may address the Speaker in English or in Maori.²⁴ This Order replaces the original Order 150 that predated the passage of the Maori Language Act 1987. That Order was subject to a Speaker’s Ruling that when a Member chooses to speak in Maori he or she does so as

²³ This right is also provided in s24g of the New Zealand Bill of Rights Act 1990.

²⁴ Standing Order 104, Standing Orders of the House of Representatives as amended 2008.

of a right stemming from the Standing Order (as opposed to some other source such as the Act).²⁵

When a member speaks in Maori, that member does so as of right under the Standing Orders. Whatever time is allowed by the Standing Orders for that particular type of speech, the whole of that time may be used in Maori. The translation is for the benefit of the members who do not understand Maori and it is in addition to the time in which the member is entitled to speak on that particular Bill or whatever.

This right derives from the Standing Orders that govern the rules of procedure for the House and its committees. Therefore, it is narrowly applied and does not extend to other aspects of Parliamentary business, and certainly has no such protection from the Act itself.

The right to use Maori in legal proceedings as provided for in the Act may only be exercised in a narrow range of forums, and the content of the right itself is quite circumscribed:

- 4(1) In any legal proceedings the following persons may speak Maori, whether or not they are able to understand or communicate in English or any other language:
 - a. Any member of the court, tribunal, or other body before which the proceedings are being conducted
 - b. Any party or witness
 - c. Any counsel; and
 - d. Any other person with the leave of the presiding officer.
- (2) The right conferred by subsection 1 of the section to speak Maori does not
 - a. Entitle any person referred to in that subsection to insist on being addressed or answered in Maori; or
 - b. Entitle any such person other than the presiding officer to require that the proceedings or any part of them be recorded in Maori.
- (3) Where any person intends to speak Maori in any legal proceedings, the presiding officer shall ensure that a competent interpreter is available.
- (4) Where, in any proceedings, any question arises as to the accuracy of any interpreting from Maori into English or from English into Maori, the question shall be determined by the presiding officer in such manner as the presiding officers thinks fit.
- (5) Rules of court or other appropriate rules of procedure may be made requiring any person intending to speak Maori in any legal proceedings to give reasonable notice of that intention, and generally regulating the procedure to be followed where Maori is, or is to be spoken in such proceedings.

²⁵ 1997, Vol. 562, p. 3192. Kidd. Standing Order 104 (and previously Standing Order 150) has been in operation since 1985.

- (6) Any such rules of Court or other appropriate rules of procedure may make failure to give the required notice a relevant consideration in relation to an award costs, but no person shall be denied the right to speak Maori in any legal proceedings because of any such failure.

The right provided under s4 is a right to speak Maori only. It is not however limited only to the submission of oral evidence or the giving of testimony in the Maori language, as counsel may also use Maori pursuant to section 4.

There has been some judicial determination of the broad application of this right. Under s4(1) the right to speak Maori in the Court extends not only to those whose first language is Maori but also to any eligible person. In *R v Hohua* T13/90 (Rotorua High Court) at page 11 of the judgment Justice Fisher stated:

The significance of section 4 of the Maori Language Act was that it conferred an additional right to speak Maori. This new right did not spring from functional necessity. It was not designed to bring to bridge a gap in the understanding of English. That much is clear from the fact that the right is there "whether or not they are able to understand or communicate in English...". The long title to the Act commences by describing it as "an Act to declare the Maori language to be an official language of New Zealand..." I take it that the Act was designed to promote the use of Maori as an end in itself. 26

This and other cases subsequent to the passage of the Act, according to Summer Kupau show that the courts have been co-opted into acting in such a way to preserve the language, rather than only acting in respect of the needs of individual petitioners.²⁷ Nevertheless, the fact remains that the right preserved is only a right to speak, with no formal recognition of a right to submit written documentation in legal proceedings. Such submission may only take place as an exercise of judicial discretion. All the restrictions mentioned essentially undermine the Tribunal's original recommendation. Spoken Maori may only be used in the courts as of right, and only before a limited number of tribunals. Written Maori is not protected at all by the Act, and neither written nor spoken Maori is protected in dealings with Government departments, local authorities or other public bodies by this Act. These limitations have been in place and essentially unchanged since 1987.

New Zealand case law has shown, after the release of the *Te Reo Maori Report* and the passage of the Act, that the courts acknowledge the legally protected role and place of the Maori language as a taonga. Case law also acknowledges there must be some progressive realisation of the Treaty guarantee. Neither did the Crown challenge the notion that the obligation to protect the language was a progressive one in the Maori Council broadcasting cases before the Court of Appeal and the Privy Council, which challenged Crown proposals to transfer and then sell state broadcasting assets, and this approach was accepted by those Courts.²⁸

²⁶ See also *R v. Hillman* T 2/89 Tauranga DC. The Court there recognised the Act was intended to foster the language as a taonga.

²⁷ Summer Kupau "Judicial enforcement of "official" indigenous languages: Comparative analysis of the Maori and Hawaiian Struggles for cultural language rights" 26 U. Haw.L. Rev. 495 – 535, 519.

²⁸ See *New Zealand Maori Council v. Attorney General* (3 May 1991) HC WN CP 942-88 (HC).

Such progressive realisation requires a level of intervention to develop the language and the institutions of the State to ensure that Maori can be used in any official (including legal) capacity. Once that ground has been lost, it is very difficult indeed to reclaim.

It might be argued that the release of Te Rautaki Reo Maori, the Maori Language Strategy in 1995 and its revision in 2003 may be a manifestation of such a progressive realisation of the Treaty right. Indeed the Strategy is programmatic, aimed at achieving the following outcome by 2028:

By 2028, the Maori language will be widely spoken by Maori. In particular, the Māori language will be in common use within Maori whanau, homes and communities. All New Zealanders will appreciate the value of the Maori language to New Zealand society.

Nothing in the Strategy however provides for an enhanced legislative recognition of te reo Maori beyond what exists now in the Act. There are 6 lead agencies charged with certain responsibilities under the Strategy, TPK, Te Taura Whiri, Te Mangai Paho – the Maori Broadcasting Funding Agency, the Ministry for Culture and Heritage, the Ministry of Education, and the National Library of New Zealand. The Ministry of Justice is not included in this list. Plainly, by such absences, the Strategy is not aimed at providing for progressive realisation of the right to speak Maori in legal proceedings.

Similarly, other developments in Parliament under the Standing Orders are important, but also do not amount to progressive recognition of the right to use Maori in legal proceedings as defined under the Act. This observation is not intended to decry the progress made in the recognition of Maori in Parliamentary proceedings. Since 2007 funding has been made available for simultaneous interpretation within the House, matching the availability of such interpretation since 2000 in Maori Select Committee proceedings.²⁹ These developments are important and facilitate the use of te reo Maori in a vital legal environment, but are the result of the application of Standing Order 104 and Speaker's Rulings since 1985, rather than as a result of the implementation of the Act. Significant progress has been made in enhancing the availability and efficacy of te reo Maori, but not by virtue of the Act. Simply put, the Act is now outdated and requires amendment to reflect the developments of the last 22 years. Protection of the Maori language in the courts has not been progressively realised, and indeed, developments elsewhere have largely outstripped the protections set up for the Maori language by virtue of the Act.

²⁹ Maori Party Press release www.scoop.co.nz/stories/PA0705/S00388.htm (accessed 20 September 2010)

V CONCLUSION

As mentioned in the introduction, Maori retained significant official utility, at least to some degree, for parts of the 19th century, at least during periods when relative peace existed between Maori and the Settler governments. Standing Orders in the late 1860s and the introduction of Maori representation in Parliament retained a place for the Maori language as seen in the dissemination (albeit sporadic) of Acts and Bills in the Maori language, and the use of Maori in Government communications to Maori communities.³⁰ By the end of the century however, Maori all but disappeared from the legal and official landscape. Only in the last few years has Maori begun to return as a language of official government usage, and even then, the re-emergence is relatively small, including measures such as the limited use, since 2007, of simultaneous interpretation services in parliamentary debates as well the limited translation or Maori language summaries of some Select Committee proceedings and reports.³¹ In addition some government and government agency website information is provided in Maori.³²

In the New Zealand domestic legal context and internationally, the right to speak Maori in a legal forum such as the Courts is protected. However, speakers of Maori who wish to take up this right are given little assistance. If, for example, a Maori speaker knows little or no legal Maori terminology, exercising a right to use Maori in a court may be laudable as a political statement, yet ill-advised as a means of effective communication for either the speaker or the hearer. Developing and disseminating such a terminology may render the choice to use Maori in such a setting less risky, and can assist in the normalisation of the language in such settings. Both lexical development and progressive legislative recognition of the right to use Maori in legal contexts are necessary to assist in the restoration of Maori as a language of Western law. While lexical development is underway, legislative protection of the right remains frozen and needs to be revisited in view of the developments elsewhere in public recognition of te reo Maori as a valid language of civil discourse.

³⁰ See generally, Phil Parkinson, *Maori Language in Government* (2001) V.U.W.L.R Monograph.

³¹ The Office of the Clerk of the House of Representatives is responsible for the provision of Maori language translation and interpretation and these services are provided by the Te Reo Maori Language Services unit. For further details see the *Annual Report for the year Ending 30th of June 2008* page 18 available at http://www.parliament.nz/NR/rdonlyres/7DCCB0EF-8497-4AE4-BAD4-7A9A58103687/93685/OOCAnnualReport2008_1.pdf (date of last access 30 January 2010)

³² See for example Land Information New Zealand (responsible to the Minister for Land Information) provides Maori language translation of terms, information and procedures pertaining to Māori land <http://www.linz.govt.nz/survey-titles/maori-records/what-is-maori-land/index.aspx> (date of last access 30 January 2010)