
THE TRUTH ABOUT THE MAORI SEATS

Jeremy Sparrow

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TABLE OF CONTENTS

Introduction	1
Chapter 1: A Brief History of the Maori Seats	3
1.1 Origin of the Maori Seats.....	3
1.2 How Have the Maori Seats Survived?.....	5
1.3 Maori Representation under the Electoral Act 1993.....	7
Chapter 2: Political Representation and the Maori Seats	9
2.1 The Guarantee of Political Representation for Maori.....	9
2.2 The Royal Commission’s Recommendations.....	9
2.3 Maori Representation at the Electorate Level.....	11
2.4 Maori Representation at the National Level.....	12
2.4.1 Guaranteed versus Effective Representation.....	14
2.5 The Overhang.....	16
2.6 Fairness and Separate Seats.....	18
2.6.1 Female Representation.....	18
2.6.2 Asian Representation.....	19
Chapter 3: Indigeneity and the Maori Seats	20
3.1 The Indigenous Symbol.....	20
3.2 Defining Indigenous.....	20
3.3 The Relationship between Indigeneity and the Maori Seats.....	22

3.3.1 Maori and the Diminution of Blood.....	23
3.4 Concluding Thoughts on Indigeneity.....	25
Chapter 4: The Treaty of Waitangi and the Maori Seats.....	26
4.1 What is the Treaty of Waitangi?.....	26
4.2 The Treaty Symbol.....	27
4.3 The Orthodox Legal Status of the Treaty.....	28
4.3.1 The Principles of the Treaty.....	28
4.4 The Relationship between the Treaty and the Maori Seats.....	29
4.4.1 Article Three and the Maori Seats.....	30
4.4.1.1 Citizenship.....	31
4.4.1.2 Discrimination.....	31
4.4.1.3 Partnership.....	33
4.4.1.4 The Creation of the Maori Seats.....	34
4.4.2 Article Two and the Maori Seats.....	35
4.4.2.1 Tino Rangatiratanga.....	35
4.4.2.2 Taonga.....	36
4.4.2.3 Active Protection.....	36
4.5. Concluding Thoughts on the Treaty.....	37
Chapter 5: Democratic Equality, Nationhood and the Maori Seats.....	40
5.1 Do the Maori Seats Breach the Principle of Democratic Equality?.....	40
5.2 Should the Electorate be Defined in Ethnic Terms?.....	41

5.2.1 Bicultural or Multicultural?.....	41
5.2.2 The Defining Common Feature.....	42
5.3 Looking Forward to the Future.....	42
Chapter 6: The Future of the Maori Seats.....	44
6.1 Entrenchment of the Maori Seats.....	44
6.1.1 Constitutional versus Political.....	45
6.1.2 Standing Orders of the House of Representatives.....	45
6.2 Abolition of the Maori Seats.....	46
6.3 The MMP Referendum and the Maori Seats.....	48
6.4 A Binding Referendum on the Future of the Maori Seats.....	49
Conclusion.....	51
Bibliography.....	53

“My Lords and Gentlemen, that all the world may see to what a point we are come, that we are not like to have a good end, when the divisions at the beginning are such.”

King Charles II, at the dissolution of the Oxford Parliament

INTRODUCTION

New Zealand's Parliament contains a number of 'dedicated' or 'reserved' seats for Maori. The seats guarantee those Maori who choose to enrol and vote on a separate electoral roll a direct voice in Parliament. They were introduced as a temporary expedient in 1867 and still exist today as a distinctive feature of New Zealand's constitutional democracy, notwithstanding the introduction of proportional representation. Despite the long history of separate Maori representation, the legal and political issues surrounding the seats ensure they still remain a hotly contested and challenging issue. Those who argue for retention of the seats appeal to their powerful political symbolism, while those who argue for abolition consider the seats as anachronistic and inconsistent with the nature of the New Zealand state today. Given the current government's proposal to establish "a group to consider constitutional issues including Maori representation" and the upcoming referendum on Mixed-member Proportional (MMP), it is timely for all New Zealanders to tackle the issues surrounding separate Maori representation.¹

This paper recommends abolishing the Maori seats. Its purpose is to identify the arguments for retention of the seats, and persuade the reader that these justifications are no longer convincing. Though this paper traverses through inherently controversial and complex issues, its intention is to be positive and to encourage New Zealanders to unite and form a common view for the future.

Chapter 1 gives an historical overview of Maori representation, providing the context to engage in the debate on the separate Maori seats. It does this by giving an insight into the purpose of the seats' implementation, providing an account of the regulatory history of the seats and outlining the contemporary form that separate representation takes in the Electoral Act 1993. In the following chapters, the paper moves on to separately scrutinise each argument for the seats' retention before addressing the calls for entrenchment of the seats and proposing a new way forward.

The guarantee of Maori political representation that the seats provide is analysed within Chapter 2. The chapter outlines the Royal Commission's recommendations for a common roll under MMP and argues that maintaining separate seats does not provide Maori with effective representation. It also looks at dedicated seats for other interest groups, and addresses the issue of 'the overhang'. Chapter 3 considers the definition of 'indigenous' before examining whether the notion that the seats are a symbol of indigeneity is justifiable in contemporary New Zealand. The relationship between the Treaty of Waitangi and the separate seats is analysed in Chapter 4. It considers the two texts of the Treaty before moving on to address its orthodox legal status. It

¹ New Zealand Government *Relationship and Confidence and Supply Agreement between the National Party and the Maori Party* (2008) at 2.

then critiques the two main arguments for retention, based on Articles Two and Three, while also examining the Treaty's principles. It also discusses 'equality' and whether the seats are a discriminatory privilege before considering the inherent spirit within the Treaty. Chapter 5 investigates the claim that the seats do not breach the principle of democratic equality. It then discusses whether it is justifiable to define electorates in ethnic terms in contemporary New Zealand. Chapter 6 critiques the arguments for entrenchment before moving on to examine whether the forthcoming referendum on the electoral system is an appropriate time to address the future of the Maori seats. The paper then concludes by encouraging a united future for all New Zealanders.

CHAPTER 1: A BRIEF HISTORY OF THE MAORI SEATS

The history of Maori representation in Parliament is already well documented. It is beyond the scope of this paper to detail this rich history.² Instead, this chapter will offer a brief summary of the history of separate Maori representation in Parliament from its origin until the present, considering the regulatory history of the separate seats and concluding by examining the current statutory provisions which provide for the seats. Only once this backdrop is set may we then delve into the important issue of whether the seats ought to exist in New Zealand today.

1.1 Origin of the Maori Seats

The New Zealand Constitution Act 1852 (UK) introduced self-government and made provision for the first elections in New Zealand.³ Males over 21 who were British citizens and met the individual property qualification could vote. This property qualification was a requirement in Britain and the Colonial Office made no exception for the colonies.⁴ The property franchise was based on individual title.⁵ However, Maori property was held in a system of tribal ownership.⁶ Maori men could vote if they converted their land into individual titles, thus, on paper, the electoral franchise was ‘colour-blind’ – Maori and non-Maori men had an equal opportunity to vote.⁷ However, the idea of individual land ownership was anathema to Maori and the reality of their communal ownership meant that in a practical sense, the majority of Maori failed to qualify for the vote.⁸ This presented a problem in need of legislative action. Maori were paying tax and living under the laws of the new Parliament, yet they themselves were not represented.⁹ Several initial attempts to enfranchise Maori were unsuccessful.¹⁰

² For comprehensive accounts of the history of Maori separate representation see generally MPK Sorrenson “A History of Maori Representation in Parliament” in Royal Commission on the Electoral System Appendix B *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986); John Wilson *The Origins of the Maori Seats* (Parliamentary Library, Wellington, 2003); Sarah McClelland “Maori Electoral Representation: Challenge to Orthodoxy” [1997] 17(3) NZULR 272.

³ The Act established the central legislature called the General Assembly.

⁴ Philip Joseph *The Maori Seats in Parliament: Te Oranga O Te Iwi Maori: A Study of Maori Economic and Social Progress* (New Zealand Business Roundtable, Wellington, 2008) at 6 [“The Maori Seats in Parliament”].

⁵ Constitution Act 1852 (UK) 15 & 16 Vict, ss 7 and 42.

⁶ McClelland, above n 2, at 275.

⁷ Office of the Race Relations Conciliator *Let’s Work Together = “Kia Mahi Tabi Tatou” Unit 6 “The Dilemma of Separate Maori Seats in Parliament” Retain? Dissolve? Change?* (1984) at 3.

⁸ Rozalind Dibley “Maori Representation in Parliament: The Four Maori Seats” (MA Thesis, Victoria University of Wellington, 1993) at 4.

⁹ Andrew Geddis “A Dual Track Democracy? The Symbolic Role of the Maori Seats in New Zealand’s Electoral System” (2006) 5(4) Election Law Journal 347 at 352 [“A Dual Track Democracy”].

¹⁰ The first initial legislative attempt put forward was to give Maori representation in both Houses of Parliament. However, this proposal along with those of electing European members to represent the natives and to recognise Maori land tenure as a qualifying property interest failed. For more on this see McClelland, above n 2, at 272-275; Joseph “The Maori Seats in Parliament”, above n 4, at 6-8.

The Maori seats are a defining feature of our electoral system. Therefore, one would assume they were introduced on a considered and principled basis.¹¹ However, that was not the case. In fact, as Alan Ward has written, the seats “stumbled into being”.¹² Four separate Maori electorates based on an adult male franchise were established through the Maori Representation Act 1867 and were expected to last for five years.¹³ The seats were a temporary expedient while the Native Land Court individualised the communal Maori land and by doing so granted male Maori the necessary property qualifications to vote.¹⁴ It was hoped that the four separate seats would disappear and Maori would vote on the common roll once they obtained the requisite property qualifications.¹⁵ The seats were a mouthpiece for Maori – a matter of goodwill rather than principled reform or a serious attempt at political representation.¹⁶ Although the individualisation of Maori land was encouraged, this process of ‘individualising’ land proved to be lengthy and complex.¹⁷ Accordingly, the seats were retained in 1872¹⁸ for another five year period before Parliament voted in 1876¹⁹ to extend their existence indefinitely.²⁰ Maori could vote in the Maori electorate and the European electorate, provided they met the property qualifications. This right was abolished when the Maori Representation Act 1867 was repealed and its main provisions incorporated into the Electoral Act 1893.²¹ At this point, as the Royal Commission noted, “the creation of a system of dual representation based on separate electoral arrangements for Maori and non-Maori was set firmly in place.”²² Separate Maori representation has been retained under each succeeding electoral Act.²³

Since 1956, certain provisions of the applicable Electoral Act have been ‘entrenched’.²⁴ However, the sections allowing for the Maori seats have never been ‘entrenched’.²⁵ In 1967 it became

¹¹ Philip Joseph, Professor of Law at the University of Canterbury “The Maori Seats in Parliament” (second of the 2009 Treaty debates series in Soundings Theatre, Te Papa, Wellington, 2009) [“Treaty debate”].

¹² Alan Ward *A Show of Justice: Racial “Amalgamation” in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1973) at 209.

¹³ See the Maori Representation Act 1867. The Act defined a Maori as “a male aboriginal inhabitant of New Zealand of the age of twenty-one years and upwards and shall include half-castes.” Under this Act, Maori were given universal male suffrage. However, it was not until 1879 that non-Maori achieved this.

¹⁴ The Maori Representation Act 1867 was accepted by the Members of Parliament and passed into law because it was to be a temporary measure: see Sorrenson, above n 2, at 20.

¹⁵ *Ibid.*

¹⁶ Ward, above n 12, at 209. If the Maori seats were allocated according to population, then in 1867 Maori were entitled to 20 out of the 70 seats that were in existence. Thus, the seats were a numerically disproportionate form of representation.

¹⁷ Geddis “A Dual Track Democracy?”, above n 9, at 352.

¹⁸ See the Maori Representation Act Amendment and Continuance Act 1872.

¹⁹ See the Maori Representation Acts Continuance Act 1876 which provided for the Maori Representation Act 1867 to remain in force until expressly repealed by a later Act of the General Assembly.

²⁰ Geddis “A Dual Track Democracy?”, above n 9, at 352.

²¹ This Act also granted the vote to all adult women making New Zealand the first self-governing nation to do so. Abolition of the Maori seats did not occur despite universal adult suffrage.

²² Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (1986) at 83.

²³ The seats are presently constituted in the Electoral Act 1993, see page 7.

²⁴ Section 189 of the Electoral Act 1956 was the ‘entrenched provision’.

possible for any Maori to contest a European electorate, and in the same way for any non-Maori to contest a Maori electorate. This removed the electoral guarantee of reserving the four seats for specifically Maori representatives that had existed for 100 years.²⁶ From 1893 and up until 1975, “the way in which an individual was entitled to participate in the electoral process was determined by his or her ancestry (or blood quantum)”.²⁷ This meant that any full blooded Maori had to be on the Maori roll whereas any person who had less than 50 per cent Maori blood had to be on the European roll.²⁸ Those who were of ‘equal blood’ or ‘half-castes’ had a choice of which roll to be on. However, in 1975 the definition of ‘Maori’ was amended so that electors of Maori descent could choose to go on either the Maori or the General roll.²⁹ There was no reference in the law for a requisite level of ‘Maori blood’. Despite this significant change, the number of separate Maori seats remained fixed at four regardless of the Maori electoral population.

1.2 How Have the Maori Seats Survived?

At the time of their creation, the Maori seats were not expected to be permanently embedded in our electoral system. They were intended to be temporary and give parliamentary representation to Maori until they met the necessary property qualifications to vote on the common roll. Once universal suffrage was introduced in 1893, one would think the seats had achieved their purpose. Yet, the Maori seats survived, as Joseph writes “through indifference and neglect”.³⁰ The seats were retained throughout the life of the First-Past-the-Post (FPP) voting system,³¹ but when the Royal Commission on the Electoral System was created in 1985, the issue of Maori representation in Parliament came directly under the microscope.

Along with its broad and inclusive terms of reference to review the electoral system, the Royal Commission was specifically directed to consider “the nature and basis of Maori representation in Parliament”.³² The Royal Commission recommended New Zealand replace FPP with MMP, a

²⁵ Section 268 of the current Electoral Act 1993 entrenches the formula for creating General electoral districts. However, the Maori seats are not entrenched. See Chapter 6.

²⁶ Wilson, above n 2, at 1.

²⁷ Geddis “A Dual Track Democracy?”, above n 9, at 353.

²⁸ The Election Court demonstrated this in *In re Raglan Election Petition (No 4)* [1948] NZLR 65 at 87–88 by disqualifying 15 votes from a European electorate due to the voters possessing over 50 per cent Maori blood.

²⁹ The European roll was renamed the General roll in 1975.

³⁰ Joseph “The Maori Seats in Parliament”, above n 4, at 5.

³¹ Under FPP – a system of plurality – the country was divided into a number of geographic constituencies. Individual candidates ran for election in each of these constituencies or ‘electorates’ which directly corresponded to a seat in Parliament. Voters in each constituency cast their ballots for their preferred candidate and the candidate who received the most votes in each constituency was elected to Parliament to represent that particular region. For more on this see Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, Wellington, 2007) at 26 [“Electoral Law”].

³² Royal Commission on the Electoral System, above n 22, at xiii.

proportional system of voting. The Commission believed there would be no need for separate Maori representation and the seats should be abolished.³³

In 1992, the National Government, in implementing the Royal Commission's recommendations, introduced the Electoral Law Reform Bill. The Bill provided for a binding referendum to be held on MMP which also would have abolished the separate Maori seats. However, despite the Royal Commission's reservations about retaining separate Maori seats, its recommendations for reform were hedged.³⁴ Members of the Electoral Law Reform Select Committee attended a series of *bui* which revealed deep opposition to abolishing the seats.³⁵ The disapproval arose due to Maori uncertainty about whether they would receive increased representation under MMP as the Royal Commission had envisioned, and more fundamentally Maori felt the dedicated seats were an acknowledgment of their right as *tangata whenua*.³⁶ Due to this opposition, submissions received by the Committee, and the difficulty in waiving the four per cent threshold for parties "primarily representing Maori interests",³⁷ the Committee departed from the Royal Commission's recommendation on this issue. The Committee recommended Parliament retain the Maori seats. Parliament agreed and the seats were kept as part of the Electoral Act 1993 which was enacted into law when the New Zealand public voted to replace FPP with MMP.³⁸

As a result of the introduction of MMP, there has been one further important change. The four fixed seats have been replaced with a formula to enable proportionality between the number of Maori seats and the number of Maori choosing to enrol on the Maori electoral roll. The legal basis for this major amendment, along with the separate Maori seats generally, is the Electoral Act 1993.

³³ Ibid, at 51-52, 63 and 81-106. For the Royal Commission's reasons see Chapter 2.

³⁴ Claudia Geiringer "Reading English in Context" [2003] NZLJ 239 at 239.

³⁵ Sir John Wallace – a member of the Royal Commission who attended the *bui* – questioned whether this opposition represented, as the Government believed, "nearly unanimous opinion".

³⁶ Geddis "A Dual Track Democracy?", above n 9, at 358.

³⁷ See Chapter 2.

³⁸ Under MMP – a system of proportional representation – voters get two votes – an 'electorate vote' and a 'party vote'. Electorate MPs are elected to represent a specified number of 'electoral districts' (at present 63 General and 7 Maori electorates). The constituency candidate who received the greatest number of electorate votes wins that electoral district's seat in Parliament. After the electorate seats are filled, additional 'list seats' are then distributed between those political parties who either win five per cent of the party vote, or at least one electorate seat. These party list MPs are elected from pre-determined party lists according to the nationwide percentage of party votes cast for each party. Thus, each party's representation in Parliament is roughly proportional to the nationwide electoral support it receives, which is measured by its share of the overall party vote. Hence, it is the party vote that determines the final make-up of the House of Representatives. Therefore, if a political party receives 25 per cent of the party vote, it will be entitled to at least 30 seats – these MPs will consist of the electorate seats the political party has won, plus the additional list seats to guarantee proportionality. Parliament usually consists of 120 members unless there is an overhang. For more on this see Geddis "Electoral Law", above n 31, at 31-32. For more on the overhang see Chapter 2.

1.3 Maori Representation under the Electoral Act 1993

A “Maori” is defined as “a person of the Maori race of New Zealand; and includes any descendant of such a person”.³⁹ Every Maori “shall have the option” to enrol on either the Maori or General electoral roll in the Maori or General electoral district in which he or she resides.⁴⁰ Astonishingly, whether one ‘fits’ into this definition of Maori is purely reliant on self-identification. No proof whatsoever is needed. Therefore, any New Zealand citizen can be enrolled in a Maori electorate by *claiming* Maori descent.⁴¹ However, this choice of roll can only be made at the time the person first enrolls to vote or in accordance with the Maori Electoral Option (MEO).⁴² Outside of this MEO period, voters are restricted from switching between rolls.⁴³ The MEO is four months long and it must be held every five years in combination with the census.⁴⁴ Each elector can only change rolls once during each MEO.⁴⁵ Because a voter can only change rolls during the MEO, and the number of Maori seats in Parliament essentially depends on the number of Maori electors that choose to enrol on the Maori roll, the MEO period is of vital importance in ultimately determining the number of Maori seats in Parliament.⁴⁶ Since MMP has been introduced, the numbers of Maori enrolling on the Maori roll has increased in both “absolute and relative terms.”⁴⁷ Thus, the number of Maori seats has risen from four in 1993 to seven in 2008. If all Maori were enrolled on the Maori roll, there would be about 13 Maori electorates.⁴⁸

The Electoral Act 1993 specifically provides for separate Maori representation through the Maori electoral districts and the Maori electoral population. The Maori electoral population is those who have chosen to register in a Maori electoral district and also a proportion of the estimated number of persons of Maori descent who are either under 18 years or who have not registered as electors.⁴⁹ The Representation Commission uses the Maori electoral population to divide New

³⁹ Electoral Act 1993, s 3(1) (definition of “Maori”).

⁴⁰ *Ibid*, s 76(1).

⁴¹ Alexandra Xanthaki and Dominic O’Sullivan “Indigenous Participation in Elective Bodies: The Maori in New Zealand” (2009) 16(2) *International Journal on Minority and Group Rights* 181 at 196. See Chapter 3.

⁴² Electoral Act 1993, s 76(2).

⁴³ *Ibid*, s 79.

⁴⁴ *Ibid*, ss 77(2) and 77(4). Section 77(5) states that if Parliament is due to expire in the year of the census, the MEO must be held the following year.

⁴⁵ *Ibid*, s 78(1). Section 78 also outlines the requirements the Registrar must undertake with respect to posting and returning the prescribed forms. For commentary on this see Geddis “Electoral Law”, above n 31, at 100.

⁴⁶ Geddis “Electoral Law”, above n 31, at 100. To see the Government’s obligations under the MEO see *Taiaroa v Minister of Justice (No 1)* HC Wellington CP 99/94, 4 October 1994 and *Taiaroa v Minister of Justice (No 2)* [1995] 1 NZLR 411 (CA). For commentary on this see Geddis “Electoral Law”, above n 31, at 100-103.

⁴⁷ Geddis “A Dual Track Democracy?”, above n 9, at 356. In 1993, before MMP, voters on the Maori roll accounted for 40.9 per cent of the total number of enrolled Maori (101,585 persons were on the Maori roll, with 146,689 persons of declared Maori descent on the General roll). In 2008, following the completion of the last MEO period, voters on the Maori roll accounted for 56.6 per cent of the total number of enrolled Maori (229,666 persons were on the Maori roll, with 175,764 persons of declared Maori descent enrolled on the General roll).

⁴⁸ Xanthaki and O’Sullivan, above n 41, at 197.

⁴⁹ Electoral Act 1993, ss 45 and 3(1) (“Maori electoral population”); Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson Brookers, Wellington, 2007) at 345 [“Constitutional and Administrative Law”].

Zealand geographically into Maori electoral districts.⁵⁰ These electorates are superimposed on the same geographical space as that of the General electorates.⁵¹ As there are far fewer Maori electorates than there are General electorates, the Maori electorates are generally much larger.⁵² The Maori electoral districts directly relate to the Maori seats in Parliament. Therefore, voters who are on the Maori roll can vote for a candidate in the Maori electoral district in which they reside. Maori and General electorate Members of Parliament (MPs), as well as those MPs elected through the list seats, all sit in the same Parliament and receive one vote on every parliamentary matter.

This chapter has given a brief overview of the history of separate representation in New Zealand and outlined the current electoral law surrounding the Maori seats. Keeping this knowledge and context in mind, this paper now turns to debate whether the separate seats should still exist in contemporary New Zealand. As will be seen, a closer look at the apparent justifications exposes them to be ill-founded.

⁵⁰ Electoral Act 1993, s 45(1). Section 45(3) of the Electoral Act provides the formula for the creation of the districts. The Maori electoral population is divided by the population quota for General seats in the South Island (which is the South Island General electoral population divided by 16). This formula ensures the population quota of each Maori and General electoral district is approximately the same. An adjustment of \pm five per cent in the electoral population for each Maori or General seat is permissible. For more on this see Geddis “Electoral Law”, above n 31, at ch 5; Joseph “Constitutional and Administrative Law”, *ibid*, at 345.

⁵¹ Susan Banducci, Todd Donovan and Jeffrey Karp “Minority Representation, Empowerment, and Participation” (2004) 66(2) *Journal of Politics* 534 at 536.

⁵² *Ibid*. See Chapter 2.

CHAPTER 2: POLITICAL REPRESENTATION AND THE MAORI SEATS

New Zealand is a representative democracy meaning that every citizen may participate in the law-making process by electing politicians into Parliament.⁵³ Governance is undertaken by these individuals who have been elected to *represent* the people. Therefore, all New Zealanders have a vested interest in ensuring that the people (comprised of many groups including Maori) are *effectively* represented as a lack of representation can lead to political instability.⁵⁴

2.1 The Guarantee of Political Representation for Maori

Retaining the seats gives Maori a guaranteed voice in Parliament. Maori have proportionally been under-represented throughout New Zealand's political history; therefore the seats act as a worthwhile safety valve to ensure the Maori voice is heard. Through the dedicated seats, Maori can participate in the political process through representatives who Maori themselves have chosen.⁵⁵ Those MPs are then directly accountable to Maori.⁵⁶

2.2 The Royal Commission's Recommendations

Despite recognising the guarantee of a Maori voice, the Royal Commission still recommended their abolition.⁵⁷ The Commissioners felt that the FPP electoral system was ineffective at protecting Maori interests. As Maori MPs only represented Maori, this gave the appearance that General electorate MPs only represented non-Maori. Maori were removed from the mainstream political agenda as non-Maori MPs had little electoral incentive to cater for Maori interests – they were in theory only responsible to the communities that separately elected them.⁵⁸ This, along with various issues such as the unmanageable size of Maori electorates, convinced the Commissioners to propose a system with “no separate Maori constituency or list seats, no Maori roll, and no Maori option.”⁵⁹

⁵³ New Zealand Bill of Rights Act 1990, s 12(a). Setting aside age, criminal restrictions and state of mind, see Electoral Act 1993, s 80.

⁵⁴ Sustainable Future Institute *Effective Maori Representation in Parliament: Working Towards a National Sustainable Development Strategy* (Sustainable Future Institute Limited, Wellington, 2010) at 86.

⁵⁵ Geddis “A Dual Track Democracy?”, above n 9, at 358.

⁵⁶ Geiringer, above n 34, at 239.

⁵⁷ The Royal Commission did not consider retaining the seats under MMP as they felt effective Maori representation could be adequately provided for under a unified roll.

⁵⁸ Royal Commission on the Electoral System, above n 22, at 90. The Commission observed, at 92, that “[t]he Labour Party's domination of the Maori seats since 1943 has meant that neither it nor any other party has any real *electoral* incentive to commit resources to the development of policies for the Maori people, or to campaign vigorously for their votes” (emphasis in the original).

⁵⁹ *Ibid*, at 101.

The Commission concluded that the MMP system with a common roll would provide “optimal conditions for the effective representation of Maori interests.”⁶⁰ While recommending a common roll, the Royal Commission proposed to waive the four per cent threshold for sharing in allocation of list seats for parties “primarily representing Maori interests”.⁶¹ However, this was not adopted as it was felt this concept was “a nebulous one which would give rise to great difficulties in practice.”⁶² The Commission felt the system they proposed would require all political parties to cater for Maori (and other ethnic groups) interests. In the pursuit of maximising votes, party lists would have to become more representative of the population as a whole, which in turn would promote ethnic diversity. As Maori are a numerically significant minority, the Commission predicted Maori would achieve equitable representation through more Maori becoming MPs (even without the Maori seats) in both General electorate seats and as candidates through the party lists.⁶³ It was also thought that Maori MPs would be spread across more political parties ensuring Maori concerns were being represented more effectively in Parliament.⁶⁴ The Commission also saw other advantages under MMP. They expected that Maori political participation would rise due to the “strong incentives for Maori to become involved politically in established parties or in a Maori party.”⁶⁵ Furthermore, arguments of equality before the law and the feeling that society would become more cohesive as a consequence of all MPs being accountable to Maori, led the Commission to recommend a unified electorate.⁶⁶

However, although MMP was introduced, the electoral separation of Maori and non-Maori rolls survived.⁶⁷ Nonetheless, the objection that the system isolates Maori and removes Maori issues from the mainstream political agenda is, to a large extent, now negated by the party vote under MMP.⁶⁸ Despite the split roll for electorate seats, it is the party vote which is the most important since it ultimately determines the allocation of seats in Parliament.⁶⁹ It would be politically unwise for political parties not to compete for this. However, the criticism of the separate Maori roll still carries significant weight with respect to electorate MPs.

⁶⁰ Ibid, at 113.

⁶¹ Ibid, at 101.

⁶² Douglas Graham, Minister of Justice of New Zealand “Electoral Reform Bill 1993, Second Recording Speech Notes” (speech to the House of Representatives, Wellington, 1993) [“Electoral Reform Bill 1993”]. The Minister stated: “For example, who would apply the rule, and by what criteria?”

⁶³ Royal Commission on the Electoral System, above n 22, at 101-103.

⁶⁴ MMP Review Committee “Report of the MMP Review Committee: Inquiry into the Review of MMP” [2001] I AJHR 23 at 44.

⁶⁵ Royal Commission on the Electoral System, above n 22, at 102.

⁶⁶ Ibid, at 93. The Commissioners stated, at 103, that MMP would “encourage the growth of understanding between Maori and non-Maori and the desire on the part of both to look to the common interest.”

⁶⁷ This is detailed in Chapter 1.

⁶⁸ As noted earlier, MMP is an electoral system of proportional representation in which the number of seats each political party holds is roughly proportionate to its share of the overall party vote.

⁶⁹ Sustainable Future Institute, above n 54, at 29.

2.3 Maori Representation at the Electorate Level

The Maori electorates overlap with the General electorates. In other words, they are laid over the existing pattern of territorial representation.⁷⁰ This creates two main problems which adversely affect Maori representation.

First, the lines of responsibility and accountability between constituents and MPs are blurred.⁷¹ Maori who have chosen to be on the General roll still reside in a Maori electorate; however they may not consider the Maori constituent MP as their representative.⁷² Moreover, those MPs in the General seats are entitled to feel less accountable to their Maori constituents (as opposed to their predominantly non-Maori constituents).⁷³ Concerns about Maori can be left for the Maori MP to deal with, which encourages the non-Maori MP to primarily focus on non-Maori concerns. Furthermore, as the Royal Commission correctly noted, many General electorates have strong political party organisations within them, but with the system of separate representation there is no incentive for these organisations to share their personnel and resources with the Maori electorate MP in their locality.⁷⁴

The second problem is the unwieldy size of the Maori electorates which renders them unworkable. When discussing the proposed number of electorate seats under the new MMP system, the then Minister of Justice Douglas Graham said, “[l]ess than 60 constituency seats would result in some of the rural seats becoming so large as to be difficult to manage.”⁷⁵ The government of the day was concerned with 60 seats posing a problem yet at present seven Maori electorates cover the entirety of New Zealand.⁷⁶ For example, while the Maori electorate Te Tai Tonga is 147,000 sq km, the Epsom electorate is 22 sq km.⁷⁷ It is totally unreasonable to expect even the most diligent Maori electorate MP to provide adequate service to their constituents.⁷⁸ The seats are cumbersome to administer and are bound to result in constituent dissatisfaction as a result of this tenuous link between Maori MPs and their constituents.

However, if a common roll had been introduced as the Royal Commission had suggested, all electorate MPs would be *accountable* to *all* constituents, including all Maori.⁷⁹ Accountability

⁷⁰ Royal Commission on the Electoral System, above n 22, at 83.

⁷¹ Sustainable Future Institute, above n 54, at 88.

⁷² Banducci, Donovan and Karp, above n 51, at 536.

⁷³ Geiringer, above n 34, at 241.

⁷⁴ Royal Commission on the Electoral System, above n 22, at 95.

⁷⁵ Graham “Electoral Reform Bill 1993”, above n 62.

⁷⁶ Electors ranging as far as Lower Hutt, Bluff, Hokitika and Christchurch are all represented by the same Maori electorate MP. It is difficult to see how these electors have concerns more in common with each other than those of their neighbours.

⁷⁷ This equates to the Te Tai Tonga electorate being nearly seven thousand times the size of the Epsom electorate.

⁷⁸ Royal Commission on the Electoral System, above n 22, at 94.

⁷⁹ There would also be a reduction in cost as a common roll would eliminate the need to continue with a Maori roll, a Maori electoral option, and different voting arrangements.

would compel all constituent MPs to pay direct attention to Maori issues. Both Maori and non-Maori would have ready access to their local MP to whom they could appeal for assistance.⁸⁰ Furthermore, as Maori would be within reach of the local activities of the political parties, the Royal Commission expected Maori political participation to rise through an increase of enrolment and voter turnout.⁸¹ A common roll, therefore, would improve representation for Maori at the electorate level. The next issue to examine is that of Maori representation at the national level.

2.4 Maori Representation at the National Level

MMP has delivered what the Royal Commission predicted. After five general elections, we now have a more representative and diverse Parliament which more closely mirrors the characteristics of New Zealand society.⁸² Minor political parties, that formerly had little or no representation, have now gained representation under MMP. Moreover, the clear disparity of Maori parliamentary representation under FPP has largely been remedied. The number of Maori MPs in Parliament has increased as Maori are reasonably represented on party lists right across the political spectrum.⁸³ MMP has also seen Maori MPs hold positions of power in government including ministerial portfolios. Thus, are the dedicated seats superfluous, under MMP, as the Royal Commission argued?

Table A looks at Maori membership in Parliament with and without the dedicated Maori seats.

⁸⁰ Royal Commission on the Electoral System, above n 22, at 99.

⁸¹ *Ibid*, at 102. Clearly Maori political participation is an important issue in itself which unfortunately is beyond the scope of this paper.

⁸² Geddis “Electoral Law”, above n 31, at 34.

⁸³ Catherine I Magallanes “Dedicated Parliament Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination” (2003) Murdoch University Electronic Journal of Law 10(4) <www.murdoch.edu.au>.

Table A:

	1993 ⁸⁴	1996	1999	2002	2005	2008
A: Maori Population (as a % of total pop.) ⁸⁵	12.9%	14.5%	14.5%	14.0%	14.0%	14.0%
B: Maori MPs (out of total MPs) ⁸⁶	7 of 99	16 of 120	16 of 120	20 of 120	23 of 121	20 of 122
C: Maori MPs (as a % of total MPs)	7.1%	13.3%	13.3%	16.7%	19%	16.4%
D: Representational disparity (i.e. C - A)	- 5.8%	- 1.2%	- 1.2%	2.7%	5%	2.4%
E: Maori seats in Parliament	4	5	6	7	7	7
F: Maori MPs (without Maori seats)	3 of 95	11 of 115	10 of 114	13 of 113	16 of 114	13 of 115
G: Maori MPs (as a % without Maori seats)	3.2%	9.6%	8.8%	11.5%	14.0%	11.3%
H: Representational disparity (i.e. G - A)	- 9.7%	- 4.9%	- 5.7%	- 2.5%	0%	- 2.7%

We can see from the data that since 2002 the number of Maori MPs has *exceeded* the relative national population of Maori. However, those who advocate for retention of the seats point out that it is the Maori seats that maintain the Maori presence in Parliament over and above that of the relative Maori population. Based purely on the statistics, it appears they have a *prima facie* case that retention of the seats is needed to ensure proportionate Maori representation. However, there are three arguments to be made in response.

First, it is important to acknowledge that the purpose of our system of parliamentary representation is to provide fair and effective representation for *all* New Zealanders.⁸⁷ As the percentage of Maori MPs now exceeds the relative national population of Maori, do the seats not then represent a form of reverse discrimination based on ethnicity?⁸⁸

Second, the Royal Commission predicted that if the seats were abolished, the numbers of Maori in General and list seats would increase.⁸⁹ In 2005, the number of Maori MPs in Parliament was proportionate to that of the Maori population, *excluding* those in Maori seats. In 2002 and 2008 Maori had a representational deficit of 2.5 per cent and 2.7 per cent respectively. If the seats were abolished, it is likely those deficits would decrease as more Maori would be included on the party lists and selected as candidates in winnable constituent seats in order to fill these ‘extra’ seats. Although this is speculative, it is not at all unlikely that the absorption of the Maori roll

⁸⁴ 1993 was the last election in New Zealand under First-Past-the-Post.

⁸⁵ Row A compares the Maori ethnic group as a percentage of the total population. This data is sourced from Statistics New Zealand “2006 Census Data - QuickStats About Culture and Identity” (2006) Statistics New Zealand <www.stats.govt.nz> [“2006 Census: Culture and Identity”].

⁸⁶ Parliamentary Library “The Origins of the Maori Seats: Parliamentary Library Research Paper” (Parliamentary Library, Wellington, 2009) at appendix 1. Maori MPs are listed by name at 27-29.

⁸⁷ Sustainable Future Institute, above n 54, at 21.

⁸⁸ Joseph “The Maori Seats in Parliament”, above n 4, at 11-12. See Chapter 4.

⁸⁹ Royal Commission on the Electoral System, above n 22, at 102.

into the General roll would have this effect. Furthermore, this system would deliver a more ‘representative’ outcome for *all* New Zealanders.

The third response requires a detailed examination of whether guaranteed seats in Parliament really provide effective representation for Maori.

2.4.1 Guaranteed versus Effective Representation

Support for retention of the seats rests on the fact they provide a guaranteed voice for Maori and are a symbol of indigeneity and the Treaty. However, the obsession with this ‘symbolic guarantee’ and whether or not Maori MPs are in relative proportion to their population, completely bypasses the fundamental question of whether the seats actually provide Maori with *effective* representation.⁹⁰ It is this distinction that is of crucial significance to this debate. In the current Parliament, the Maori seats have delivered five MPs from the Maori Party⁹¹ and two from the Labour Party respectively. The government is National led, with support from the Maori Party, United Future and the ACT Party. The relationship and confidence and supply agreement between the National Party and the Maori Party resulted in significant policy gains for the Maori Party, in addition to their co-leaders obtaining ministerial portfolios (outside of cabinet). Despite having five MPs, the Maori Party survives in Parliament by virtue of the Maori seats. Two questions arise which each require further examination. As the seats ensure Maori Party presence in Parliament, are Maori achieving effective representation? And if the Maori Party *is* effectively representing Maori, are the seats holding Maori back?

At the 2008 election the Maori Party received only 2.39 per cent of the party vote (less than half of the required 5 per cent threshold).⁹² However, the party holds 4.1 per cent of the seats in Parliament.⁹³ While the election delivered considerable policy gains for the Maori Party, including gaining Ministerial portfolios, on these party vote figures it is difficult to conclude that the election delivered significant policy gains for *all* Maori.⁹⁴ The majority of Maori did not support the Maori Party through their party vote. There were 405,430 people of Maori descent enrolled on both rolls in 2008.⁹⁵ Voter turnout from the Maori roll was 62.4 per cent.⁹⁶ If we assume the

⁹⁰ In other words, if separate representation does not deliver an effective voice for all Maori, then defending the seats on the grounds they are ‘symbolic’ or a ‘guarantee’ is actually counterproductive.

⁹¹ The Maori Party is a relatively new phenomenon in New Zealand electoral politics. The party was established in 2004 in the wake of a *bikoi* (march) from the Far North to the steps of Parliament in protest at the government’s proposed seabed and foreshore legislation. For more on the Maori Party see Kaapua Smith “Maori Party” in R Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, South Melbourne, 2010) 509.

⁹² Electoral Commission *New Zealand Electoral Facts and Stats 2008* (2009) at 8. This was up slightly from 2005 where they received 2.12 per cent of the vote.

⁹³ The result is a Parliamentary overhang – see page 16.

⁹⁴ Sustainable Future Institute, above n 54, at 109.

⁹⁵ Electoral Commission, above n 92, at 4.

⁹⁶ Elections New Zealand “Party Votes and Turnout by Electorate” (2008) Statistics <<http://2008.electionresults.govt.nz>> [“Party Votes and Turnout by Electorate”].

same percentage for Maori on both rolls then approximately 252,988 votes were cast by Maori.⁹⁷ The Maori Party received only 55,980 party votes.⁹⁸ This tells us that a maximum of only 22 per cent of Maori who voted gave the Maori Party their party vote. Accordingly, at least 78 per cent voted for a different political party.⁹⁹ Therefore, are the seats really providing Maori with effective representation? These figures beg to differ. On the other hand, this analysis does not take into account that many Maori split their vote. This leads us to the second question.

Conventional wisdom holds that abolishing the Maori seats would end the Maori Party's representation in Parliament.¹⁰⁰ But would it? At present many Maori voters give their electorate vote to the Maori Party and then give their party vote to a different party (primarily the Labour Party). If the seats were removed, this would challenge the Maori Party's continued existence and raise the question whether the party *is* providing Maori with an effective voice in Parliament.¹⁰¹ In other words, if the seats were no longer there, would those Maori on the Maori roll continue to place their party vote elsewhere?¹⁰² Of course this is only speculation, but it is likely the strategic voting (if that is what it is) would end. And if that *is* the case, does the current system actually inhibit the Maori Party's potential? If the Maori Party solely campaign for the Maori electorate vote, the maximum level of representation they can gain is limited to seven MPs.¹⁰³ How many more seats might they win if the seats were abolished and they instead targeted the party vote? Moreover, if the seats were abolished and the Maori Party's survival placed in issue, political participation of Maori is likely to increase. Political parties that would otherwise presume Maori would give the Maori Party their party vote would likely afford greater attention to Maori issues. Furthermore, under a common roll, political parties representing Maori interests, such as the Maori Party, can campaign to *all* New Zealand citizens (not just those on the Maori roll) thereby developing wider political support and gaining even more seats in Parliament.¹⁰⁴

It is important that the people are represented in Parliament. However, the critical question is not the *guarantee* of representation; rather how representation can be most *effective*. Abolition of the Maori seats would improve effective Maori representation both at an electorate and national level. Furthermore, there are two additional arguments for their abolition.

⁹⁷ Sustainable Future Institute, above n 54, at 76.

⁹⁸ Elections New Zealand "Party Votes and Turnout by Electorate", above n 96.

⁹⁹ Sustainable Future Institute, above n 54, at 76. This calculation assumes that New Zealanders of non-Maori descent did not give their party vote to the Maori Party. However, where non-Maori New Zealanders did give their party vote to the Maori Party, it would result in reducing the 22 per cent and increasing the 78 per cent accordingly.

¹⁰⁰ Joseph "Treaty debate", above n 11.

¹⁰¹ Philip Joseph "The Maori Seats in Parliament" (2009) New Zealand Centre for Political Research <www.nzcpnr.com> ["The Maori Seats"].

¹⁰² Joseph "Treaty debate", above n 11.

¹⁰³ This is assuming that no more Maori seats are added in further MEO periods. However, even if more were added, there will only ever be a fixed number of seats the Maori Party could win.

¹⁰⁴ Sustainable Future Institute, above n 54, at 95.

2.5 The Overhang

The underlying principle behind MMP is that each qualifying political party's representation in Parliament is closely proportionate to the nationwide party votes they receive.¹⁰⁵ Thus, in a House of 120 MPs, 20 per cent of the party vote means at least 24 seats in Parliament. However, if a political party wins more electorate seats in Parliament than its party vote entitles it to, it retains those electorate seats, and Parliament swells in size to more than its usual 120 members.¹⁰⁶ This outcome is called a parliamentary 'overhang'. The Maori seats will not produce overhangs *per se*; rather, it is the way in which voting patterns in the Maori seats have *in practice* created overhangs at the last two elections.¹⁰⁷ Furthermore, it is likely these patterns will continue. Hence, this criticism carries significant weight. There are two main concerns with the overhang.

First, as MMP is a system of proportional representation, it is important that the proportionality of party support is followed. However, retaining the Maori seats looks likely to continue to cause parliamentary overhangs that distort the fairness of proportional representation. An illustration helps to explain this issue. In 2008, the Maori Party won five electorate seats. However, their party vote of 2.39 per cent would have entitled the Party to only three seats.¹⁰⁸ Hence, the present parliamentary overhang of two has increased Parliament's size to 122 members. This means in order to form a government, the number of votes needed is 62. The latest ONE News Colmar Brunton poll has the National Party on 49 per cent.¹⁰⁹ (National has polled between 49 per cent and 54 per cent since the 2008 election).¹¹⁰ Assuming the Maori Party's electorate seats are held at the next election, National, if they received 50 per cent (or slightly more) of the party vote, would *not* have the requisite numbers to form a single-party government.¹¹¹ This outcome would be completely undemocratic and fundamentally contrary to the expressed will of the New

¹⁰⁵ See above n 38.

¹⁰⁶ Electoral Act 1993, s 192(5). See Geddis "Electoral Law", above n 31, at 32; Peter Dunne "Time to let the people decide" *Dominion Post* (New Zealand, 18 March 2008) at B5.

¹⁰⁷ A parliamentary 'overhang' has only ever been 'caused' as a result of the voting patterns within the Maori electorates and their relationship with the Maori Party. It has happened at the last two elections: the Parliament elected in 2005 had an overhang of one, and the Parliament in 2008 had an overhang of two.

¹⁰⁸ Electoral Commission, above n 92, at 8.

¹⁰⁹ Colmar Brunton "ONE News Colmar Brunton Poll: August 2010" (2010) Colmar Brunton <www.colmarbrunton.co.nz>. Labour is on 35 per cent, the Greens on 7 per cent, the ACT Party on 2.7 per cent, the Maori Party on 2.3 per cent and New Zealand First on 2.3 per cent respectively. (Note: this poll was taken before the 'self-destruction' of the ACT Party, see Deborah Coddington "The Self Destructive Gene of Individualism" (17 September 2010) Pundit <www.pundit.co.nz>.)

¹¹⁰ See Colmar Brunton "ONE News Colmar Brunton Polls" (2010) Colmar Brunton <www.colmarbrunton.co.nz>. In the ONE News Colmar Brunton polls in 2010 the National Party polled 54 per cent in February, 54 per cent in April and 49 per cent in May: see Colmar Brunton "2010 Poll Results" (2010) Colmar Brunton <www.colmarbrunton.co.nz>.

¹¹¹ This is, of course, excluding the possibility of support partners. Further, if National received 49 per cent of the party vote, as the latest poll predicts, this criticism still has value as their party vote will increase to slightly over 50 per cent due to the 'wasted vote' (i.e. the percentage of party votes given to parties who do not meet the 5 per cent threshold. For example, at the 2008 election, the New Zealand First party received 4.07 per cent of the party vote but did not win a seat in Parliament.)

Zealand public.¹¹² Indeed, the overhang would ultimately trump proportionality.¹¹³ This scenario could give the Maori Party, by virtue of the Maori seats, a potential ‘veto’ on who could govern.¹¹⁴ The Royal Commission expressed concerns at the Maori seats being used in this way. The Commissioners did not think it appropriate that “any minority group should have the power of veto in the legislature of a democratic nation.”¹¹⁵ Furthermore, the Maori Party’s aim is to win all the Maori seats at the 2011 election.¹¹⁶ If this happens, and the Maori Party’s party vote continues to stay more or less at the level it has enjoyed since 2008, Parliament’s overhang could increase to four.¹¹⁷ That means there would be 124 MPs and in order to form a government, the number of votes needed would increase to 63. Again, this could prevent a political party who received 50 per cent of the vote forming a government and the scale of it would be made possible as a result of the Maori seats.

Second, the parliamentary overhang grants disproportionate power. The Maori Party received 2.39 per cent of the party vote, however, as a result of the overhang, received 4.1 per cent of seats in Parliament.¹¹⁸ Thus, the overhang has given the Maori Party inflated and disproportionate leverage in coalition talks to form a government.¹¹⁹ Furthermore, the Party has gained arguably excessive influence over public policy in Parliament due to their disproportionate representation. The criticism of the racial tail wagging the dog strengthens the more overhang seats there are.¹²⁰

If the number of overhang seats continues to rise, the proportional aspect of MMP becomes increasingly distorted. If the Maori seats were abolished, there would be a significantly lower chance of an overhang occurring.¹²¹ Moreover, if overhang became a permanent feature of MMP, major parties could respond by creating ‘electorate seat’ only parties and ‘party vote’ only parties. All electorate seats would then become overhangs and Parliament could swell to up to 190 MPs.¹²² Thus, it is vital that overhang does not become an enduring aspect of MMP.

¹¹² Dunne, above n 106, at B5; Joseph “The Maori Seats in Parliament”, above n 4, at 20-21.

¹¹³ Joseph “Treaty debate”, above n 11.

¹¹⁴ Dunne, above n 106, at B5.

¹¹⁵ Royal Commission on the Electoral System, above n 22, at 93.

¹¹⁶ See TVNZ *Sunday* “Hone Harawira: Home Truths” (7:30pm September 26 2010, TVONE).

¹¹⁷ The Maori Party’s party vote has hovered around 2 per cent since the 2008 election: see Colmar Brunton “ONE News Colmar Brunton Polls” (2010) Colmar Brunton <www.colmarbrunton.co.nz>. It is possible this overhang could increase even more in the future if another Maori electorate is added at a MEO.

¹¹⁸ Electoral Commission, above n 92, at 8.

¹¹⁹ Joseph “The Maori Seats in Parliament”, above n 4, at 21.

¹²⁰ A common criticism of MMP relates to the influence that minor parties can exert over the make-up of government. For other criticisms see fn 349.

¹²¹ The Maori electorates seem more likely to elect a candidate from a minority party than the General electorates. In 2008, five out of seven Maori candidates were elected from a minor party compared to three out of 63 candidates in the General electorates.

¹²² See David Farrar “An unproportional result” (10 March 2008) Kiwiblog <www.kiwiblog.co.nz>.

2.6 Fairness and Separate Seats

As seen above, those who argue for retention of the seats appeal to the fact that Maori have proportionately always been under-represented in Parliament and the seats act as a valuable safety valve. Yet, does this adequately rationalise purely Maori seats? In other words, can one convincingly argue that Maori are the only interest group whose needs necessitate dedicated seats to ensure adequate political representation?

Other minority groups such as Pacific Islanders, Asians, Christians and farmers would all benefit greatly from dedicated representation. Yet, *all* other interest groups must compete for representation under a unified electorate. Naturally, anyone may start an Asian or a farmers' political party. However, there would likely be resentment from the wider community if these groups were automatically granted dedicated seats in Parliament.¹²³ But Maori are given this privilege. If we are going to grant a minority separate seats in Parliament to ensure political representation, why not be consistent and recognise all minorities? It seems entirely arbitrary and unjust that the law should favour one minority, whilst ignoring all the others.¹²⁴

The MMP Review Committee suggested it is the duty of political parties to ensure that ethnic minorities and women are adequately represented in Parliament. The Committee “felt the use of the list provided the best means of ensuring a balance of representation, and that it remained the responsibility of political parties to ensure such a balance was maintained through candidate selection procedures.”¹²⁵ But does this reasoning suffice? Let us examine two examples.

2.6.1 Female Representation

As noted, New Zealand has no special electoral arrangements designed to ensure female representation.¹²⁶ It was not until 1933 that a woman first won a seat in Parliament.¹²⁷ In 1996, women parliamentary membership constituted 29.2 per cent.¹²⁸ In over a decade, this has slightly risen to 32.2 per cent and 33.6 per cent in 2005 and in 2008 respectively.¹²⁹ If we are gifting seats to ensure adequate representation, why do we not guarantee female seats in Parliament? The representational disparity between the female population and their parliamentary membership is close to 18 per cent whereas the discrepancy for Maori without the seats is under 3 per cent.

¹²³ Bob Jones “Maori seats give unwarranted influence based on race” (2008) New Zealand Centre for Political Research <www.nzcprr.com>.

¹²⁴ David Round *Truth or Treaty?: Commonsense Questions about the Treaty of Waitangi* (Canterbury University Press, Christchurch, 1998) at 21 [“Truth or Treaty?”].

¹²⁵ MMP Review Committee, above n 64, at 46.

¹²⁶ *Ibid*, at 42-43. “This contrasts with the position overseas, most notably with the Nordic countries that have traditionally had very high levels of women’s representation. In those countries, many parties operate informal party quotas for women or other systems that allow them to balance their party lists with respect to gender.”

¹²⁷ Elections New Zealand “Women in Parliament” (2005) Elections New Zealand <www.elections.org.nz>.

¹²⁸ MMP Review Committee, above n 64, at 43.

¹²⁹ Electoral Commission, above n 92, at 11.

2.6.2 Asian Representation

Despite New Zealanders of Chinese descent living in New Zealand for over 150 years, it took until 1996 for an MP of Asian descent to be elected to Parliament.¹³⁰ At the 2001 census, those of Asian ethnicity represented 6.4 per cent of the New Zealand population.¹³¹ Following the 2002 and 2005 elections, there were only two Asian MPs representing 1.67 per cent of Parliament's membership – a representational deficit of nearly 5 per cent.¹³² At the 2006 census, those of Asian ethnicity represented 8.8 per cent of the New Zealand population.¹³³ Yet, following the 2008 election, there were only six Asian MPs representing 4.9 per cent of Parliament's membership – a representational deficit of nearly 4 per cent.¹³⁴ The Asian population has soared from less than 100,000 in 1991, to 173,000 in 1996 and numbered 354,000 at the last census.¹³⁵ However, the Asian population are grossly under-represented in Parliament. Why do we have no reserved seats in Parliament for a minority group that clearly needs them? Although the number of Asian MPs did increase at the last election, a representational deficit of nearly 4 per cent still remains. In contrast, Maori are over-represented in Parliament by 2.7 per cent. Furthermore, while Maori have been the largest ethnic minority group in the past, the Asian population is expected to increase at a much faster rate than any other ethnicity, with Statistics New Zealand projecting the Asian population will match the Maori population as soon as 2026.¹³⁶ If anything, the Asian population should have reserved seats in Parliament as a safety valve to guarantee adequate political representation.

The Maori seats guarantee a Maori voice in Parliament. However, this chapter has shown maintaining separate representation does not give Maori an effective voice. Further, the claim that the seats are necessary in order to ensure adequate political representation is not justifiable when other interest groups, who are disproportionately represented, do not have dedicated parliamentary seats. Moreover, the Maori seats can manipulate the electoral outcome through overhang.

As the Royal Commission duly noted, the Maori seats are also significant for Maori in ways that go beyond the issue of political representation.¹³⁷ The following two chapters examine arguments of a 'symbolic' nature.

¹³⁰ MMP Review Committee, above n 64, at 44.

¹³¹ Statistics New Zealand "2006 Census: Culture and Identity", above n 85.

¹³² Electoral Commission, above n 92, at 11.

¹³³ Statistics New Zealand "2006 Census: Culture and Identity", above n 85.

¹³⁴ Electoral Commission, above n 92, at 11.

¹³⁵ Statistics New Zealand "2006 Census: Culture and Identity", above n 85.

¹³⁶ Statistics New Zealand "National ethnic population projections: 2006 (base) – 2026 update" (2010) Statistics New Zealand <www.stats.govt.nz> ["Population Projections"].

¹³⁷ Royal Commission on the Electoral System, above n 22, at 85.

CHAPTER 3: INDIGENEITY AND THE MAORI SEATS

3.1 The Indigenous Symbol

Maori feel the dedicated seats are “synonymous with the indigenous voice”.¹³⁸ Put another way, as Maori are *tangata whenua* they should be “afforded special constitutional recognition”.¹³⁹ Maori recognise they are one of many minorities in New Zealand. However, indigeneity is “a different issue” and it requires “a different set of constitutional guarantees”.¹⁴⁰ The seats are symbolic as they recognise Maori are more than just another minority group.¹⁴¹ They are justified as recognising the important place Maori have in our constitutional structure as the indigenous people of New Zealand. This seemingly simple assertion in fact raises a number of hard questions. What does indigenous mean? Who can claim to be indigenous? Regardless, should an apparent indigenous people be entitled to a different set of guarantees at electoral law?

3.2 Defining Indigenous

After over twenty years of international debate and negotiation, the United Nations General Assembly adopted a Declaration on the Rights of Indigenous Peoples (UNDRIP) on 13 September 2007.¹⁴² New Zealand, along with the United States, Australia and Canada, voted against its adoption. Nevertheless, in 2010 New Zealand endorsed the UNDRIP.¹⁴³ However, nowhere in the declaration is there even an attempt to define exactly who or what an ‘indigenous’ person is.¹⁴⁴ That seems surprising given such a definition is not unreasonable.¹⁴⁵ In fact, the background paper prepared by the Secretariat of the Permanent Forum on Indigenous

¹³⁸ Tariana Turia, Co-leader of the Maori Party, “Maori and Parliament” (speech given at Maori and Parliament: the 8th Parliamentary Conference, Parliament Buildings, Wellington, 8 May 2009).

¹³⁹ Mason Durie “Tino Rangatiratanga” in M Belgrave, M Kawharu and D Williams (eds) *Waitangi Revisited: Perspectives on the Treaty of Waitangi* (2nd ed, Oxford University Press, Auckland, 2005) 3 at 14 [“Tino Rangatiratanga”].

¹⁴⁰ *Ibid*, at 14-15.

¹⁴¹ Xanthaki and O’Sullivan, above n 41, at 205. It is also argued the seats are “anchored to the concept of biculturalism” – see Chapter 5.

¹⁴² David Round “United Nations Declaration on the Rights of Indigenous Peoples” [2009] NZLJ 392 at 392 [“UN Declaration”]. It is worth noting that a declaration has no direct binding international legal effect. The government has said the declaration will not interfere with our existing national frameworks – see New Zealand Government “National Govt to support UN rights declaration” (2010) Beehive <www.beehive.govt.nz>. Nevertheless, Armstrong writes, there is an implication that in endorsing the declaration, the Government has increased their responsibility to address issues of Maori sovereignty – see John Armstrong “Nats give in to Maori over rights declaration” (20 June 2010) NZ Herald <www.nzherald.co.nz>.

¹⁴³ United Nations Economic and Social Council “Permanent Forum on Indigenous Issues Ninth Session: New Zealand Announces Support for Indigenous Rights Declaration” (2010) United Nations <www.un.org>. There is unfortunately not enough space here to consider the implications this declaration will have on New Zealand. For present purposes, the discussion on the declaration revolves around defining (or more appropriately not defining) ‘indigenous’.

¹⁴⁴ David Round “Who is indigenous?” (2010) New Zealand Centre for Political Research <www.nzcpr.com> [“Who is indigenous”].

¹⁴⁵ *Ibid*.

Issues states “[the Working Group on Indigenous Populations] rejected the idea of a formal definition of indigenous peoples that would be adopted by States.”¹⁴⁶ Instead, the “prevailing view today is that no formal universal definition of [indigenous peoples] is necessary.”¹⁴⁷ Indeed, no official definition of ‘indigenous’ has ever been adopted by any UN-system body.¹⁴⁸ Instead, according to the UN Forum, “the most fruitful approach is to identify, rather than define indigenous peoples.”¹⁴⁹ This absence of clarity does not bode well for the supposed symbolism inherent in the Maori seats. For that reason, both Maori and the UN must, for all practical purposes, apply some sort of definition to ‘indigenous’.

The Oxford English Dictionary tells us that someone or something ‘indigenous’ is “native to” or “born or produced naturally in a land or region”.¹⁵⁰ In that sense, then, are not *all* of us that were born in New Zealand indigenous? We are all ‘native’ and we are ‘people of the land’ or *tangata whenua*.¹⁵¹ But this cannot be the indigeneity that Maori claim. Instead, perhaps ‘indigenous’ alludes to those people whose ancestors have inhabited a place from time immemorial.¹⁵² Yet, if that is so, then New Zealand has *no* indigenous people as Maori arrived in New Zealand only 700-800 years ago.¹⁵³ At a United Nations forum to discuss indigenous issues, the ‘Indigenous Voices Fact Sheet’ stated that according to a common, as opposed to a UN-sanctioned definition, indigenous peoples are the descendants “of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived.”¹⁵⁴ However, if that is the case are not European New Zealanders indigenous as they were here before migrants settled from say China or Japan?

It is clear that these cannot be the meanings that Maori and the UN bestow on ‘indigeneity’. Instead they take the word ‘indigenous’ to mean something along the lines of ‘having ancestors who arrived in a particular region first’ or ‘first occupancy’. However, that ‘definition’ poses several problems. Waldron illustrates one by stating:¹⁵⁵

¹⁴⁶ Secretariat of the Permanent Forum on Indigenous Issues “Department of Economic and Social Affairs: Workshop on Data Collection and Disaggregation for Indigenous Peoples” (2004) United Nations <www.un.org>.

¹⁴⁷ Ibid. A working definition of “indigenous communities, peoples and nations” is developing though collective agreement on this is proving difficult.

¹⁴⁸ United Nations Permanent Forum on Indigenous Issues “Indigenous People, Indigenous Voices Fact Sheet” (2008) World Indigenous Peoples’ Conference on Education <www.wipce2008.com>. There is a “modern understanding” of the term, however, universal agreement has not been reached.

¹⁴⁹ Ibid.

¹⁵⁰ JA Simpson and ESC Weiner *Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989) vol 2 at 867.

¹⁵¹ Round “Truth or Treaty?”, above n 124, at 74.

¹⁵² Ibid.

¹⁵³ Ibid, at 76.

¹⁵⁴ United Nations Permanent Forum on Indigenous Issues, above n 148.

¹⁵⁵ Jeremy Waldron “Indigeneity? First Peoples and Last Occupancy” (2003) 1(1) *New Zealand Journal of Public Law* 55 at 63 [“Indigeneity?”].

It would be silly to describe the first European whalers who reached the sub-Antarctic Islands - Auckland Island, Campbell Island – as indigenous to those islands, even though they are, strictly speaking, the first peoples of those islands...

Moreover, the ancient Ainu people of Japan numbering only a few thousand are said to be the indigenous people of Japan.¹⁵⁶ Yet, other Japanese who have inhabited Japan for over 5000 years are not.¹⁵⁷ Surely the passage of time and whether people have become the dominant inhabitants of a territory over *thousands* of years is relevant in determining whether they are indeed ‘people of the land’ or ‘indigenous’. What would this imply for Britain? No descendants of for instance the Celts, the Romans or the Anglo-Saxons may claim indigeneity, despite their ancestors occupying the lands for thousands of years.¹⁵⁸ Yet Maori are indigenous to New Zealand after only 800 years? Evidently the reasoning holds that no matter how long one’s ancestors have inhabited a place their descendants will never be indigenous if someone else’s ancestors lived there first.¹⁵⁹ For that reason, as David Round asks, “[s]hould the United States of America own the moon because its men landed there first?”¹⁶⁰ Quite frankly the whole idea of indigeneity and who is and who is not ‘indigenous’ seems, more than anything, to be a *political* question.¹⁶¹

But let us put the difficulties of defining indigeneity behind us. For present purposes we will assume, as is generally accepted, that Maori are the ‘indigenous’ people of New Zealand by virtue of first occupancy. Accordingly, are dedicated seats in Parliament purely on account of indigeneity justifiable?

3.3 The Relationship between Indigeneity and the Maori Seats

Any claim that Maori must enjoy a superior status and receive guaranteed parliamentary seats as a symbol of indigeneity is likely to cause resentment in many non-Maori New Zealanders. The general duty of a government to be fair and just to *all* the people living in a territory cannot be trumped by an apparent special duty that it owes to those who claim to be indigenous.¹⁶² The preamble to the 1948 Universal Declaration of Human Rights speaks of “the inherent dignity and of the equal and inalienable rights of *all* members of the human family”.¹⁶³ Article 1 then reads “[a]ll human beings are born free and equal in dignity and rights.”¹⁶⁴ There is no status

¹⁵⁶ Round “UN Declaration”, above n 142, at 394.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Round “Truth or Treaty?”, above n 124, at 74-75.

¹⁶⁰ Round “UN Declaration”, above n 142, at 394.

¹⁶¹ Round “Truth or Treaty?”, above n 124, at 76.

¹⁶² Jeremy Waldron “Who Was Here First? Two Essays on Indigeneity and Settlement” (papers delivered to the Columbia Law School, New York, September 2003) at ‘introduction’ [“Who Was Here First?”].

¹⁶³ Universal Declaration of Human Rights, preamble (emphasis added).

¹⁶⁴ Ibid, art 1.

based solely on indigeneity that can grant superior political rights amounting to guaranteed representation.

But, even *if* we accept the concept of ‘first occupancy’ as defining ‘indigenous’ and even *if* we accept that indigeneity *is* enough to justify special parliamentary seats, there is still one further hurdle for the indigenous people of New Zealand to cross. That obstacle is in determining who the indigenous people of New Zealand are.

It is commonly understood that the Maori were the first to inhabit New Zealand.¹⁶⁵ Therefore, the application of ‘indigenous’ to Maori is fairly straightforward. However, gifting separate seats in Parliament to the first occupants of our land “requires some method of determining who is eligible to vote in those separate electorates and who is not.”¹⁶⁶ The Royal Commission correctly notes, “[t]hat immediately introduces problems of the definition of ‘Maori’ for electoral [law] purposes.”¹⁶⁷ Accordingly, who are ‘indigenous Maori’ or put another way, what is a Maori in New Zealand today?

3.3.1 Maori and the Diminution of Blood

It is extremely misleading to refer to Maori as one group and non-Maori as another.¹⁶⁸ Don Brash, in his ‘Nationhood’ speech, noted that “[t]here is no homogenous, distinct Maori population [as] we have been a melting pot since the 19th century...”¹⁶⁹ While this may be true in a literal sense and is recognised as such for census purposes, the law takes quite a different approach by way of focusing on ancestry.

In defining ‘ethnic group’ the quinquennial census directs respondents to answer on the basis of the ethnic group or groups that “you belong to”.¹⁷⁰ For census purposes a ‘self-identification’ test is probably most appropriate as one’s culture and who one identifies with is a personal choice – however this does mean that, for example, individuals who have no Maori descent can identify as Maori.¹⁷¹ In contrast, the test at electoral law – instead of self-identification – becomes one of ancestry. As noted in Chapter 1, the definition of “Maori” was changed in 1975 to remove any

¹⁶⁵ See generally Michael King *The Penguin History of New Zealand* (Penguin Books, Auckland, 2003); DR Simmons *The Great New Zealand Myth: A Study of the Discovery and Origin Traditions of the Maori* (A. H. & A. W. Reed, Wellington, 1976).

¹⁶⁶ Royal Commission on the Electoral System, above n 22, at 95.

¹⁶⁷ *Ibid*, at 95.

¹⁶⁸ Don Brash, Former leader of the NZ National Party, “Nationhood” (speech to the Orewa Rotary Club, Orewa, 27 January 2004).

¹⁶⁹ *Ibid*.

¹⁷⁰ Statistics New Zealand “2006 Census: Definitions and Questionnaires” (2006) Statistics New Zealand <www.stats.govt.nz> [“2006 Census: Definitions and Questionnaires”].

¹⁷¹ This self-identification test can cause problems for statistics purposes – for example, with respect to religion, when 53,000 New Zealanders in 2001 claimed that the force was with them by declaring their religion as a Jedi Knight. See Alan Perrott “Jedi Order lures 53,000 disciples” (August 31 2002) *New Zealand Herald* <www.nzherald.co.nz>.

reference to a particular blood quantum.¹⁷² Maori now means “a person of the Maori race of New Zealand; and includes any descendant of such a person”.¹⁷³ All one needs to do in order to enrol on the Maori roll is to *claim* Maori ancestry.

The notion that the Maori seats highlight the unique constitutional position of Maori is undermined when, in practice, any person can enrol in a Maori electorate. Non-Maori may be removed from the Maori roll if an elector or the Registrar objects.¹⁷⁴ However, in order to enrol, anyone could *claim* descent and register. As no proof is required, this ‘powerful’ symbol suddenly appears to lose much of its strength. Moreover, even if every person on the Maori roll was a ‘Maori’, within the Electoral Act definition, is that really a sufficient symbol of indigeneity? In other words, is someone who is, for example, one-sixty-fourth or one-thirty-second Maori actually an indigenous Maori? Genetically they are not. Instead, they are actually a person of mixed European-Maori descent who chooses to highlight the cultural identity of some of their ancestors, rather than assume the others.

At the last census, 14 per cent of New Zealand’s population claimed Maori ethnicity.¹⁷⁵ This proportion is expected to continue to grow into the future.¹⁷⁶ Yet, while the number of people who identify or claim descent may well be increasing, all these people have European blood. Thus, it is just as accurate to state that the number of European New Zealanders with some Maori blood is increasing.¹⁷⁷ For two centuries there has been considerable intermarriage between Maori and non-Maori producing children of mixed blood. As our population continues to grow, slowly but surely, we are becoming one people.¹⁷⁸ Perhaps one day all New Zealanders will have some Maori ancestry. Will separate representation end then? We are splitting the country into indigenous and non-indigenous when after many generations this ‘problem’ will eventually disappear.¹⁷⁹

The standard response from Maori is that “‘Maori-ness’ is a cultural and familial state of being, regardless of the total genetic inheritance of a particular person, and regardless of the degree of brownness of the skin.”¹⁸⁰ Undoubtedly embrace your culture, embrace your family, embrace who you are; that cannot be disputed. But for the purposes of *electoral law*, it is not justifiable for

¹⁷² See Chapter 1.

¹⁷³ Electoral Act 1993, s 3(1) (definition of “Maori”). That same definition is within the Te Ture Whenua Maori Act 1993 at s 4.

¹⁷⁴ Ibid, ss 95, 96, 98(1)(h) and 118.

¹⁷⁵ Statistics New Zealand “2006 Census: Culture and Identity”, above n 85.

¹⁷⁶ See generally Statistics New Zealand “Population Projections”, above n 136.

¹⁷⁷ Round “Truth or Treaty?”, above n 124, at 70.

¹⁷⁸ David Round “The Maori Seats in Parliament” (2008) New Zealand Centre for Political Research <www.nzcpnr.com> [“The Maori Seats in Parliament”].

¹⁷⁹ Round “Truth or Treaty?”, above n 124, at 193.

¹⁸⁰ RN Himona “Full-bloodedness” (2001) Maori People of Aotearoa / New Zealand – From Hawaiki to Hawaiki <www.maaori.com>.

any person to have a guaranteed voice in Parliament based on indigeneity when other New Zealanders do not.

3.4 Concluding Thoughts on Indigeneity

It should not matter what colour you are, what your ethnic origin might be, whether you migrated to New Zealand only recently, or whether your ancestors arrived many generations ago.¹⁸¹ For many people, irrespective of their ethnicity, New Zealand is home and they have nowhere else ‘to go back to’. Just because one ethnic group has been here for longer than another does not mean that its members should be entitled to separate seats in Parliament at the expense of all other New Zealanders. Instead, as Don Brash informs us:¹⁸²

What we are seeing is the emergence of a population in New Zealand of multi-ethnic heritage – a distinct South Seas race of New Zealanders – where more and more of us will have a diverse ancestry. Hopefully, we will get joy and pride from all the different elements that go to make us who we are.

¹⁸¹ Brash, above n 168.

¹⁸² Ibid.

CHAPTER 4: THE TREATY OF WAITANGI AND THE MAORI SEATS

‘For some it’s a living document that defines us as a nation, for others it’s a relic of our colonial past that’s best forgotten.’¹⁸³

4.1 What is the Treaty of Waitangi?

Signed in 1840, the Treaty of Waitangi (or *Te Tiriti o Waitangi*) is the document from which constitutional government in New Zealand has developed.¹⁸⁴ While ensuring the safety and stability of Maori and non-Maori, the primary purpose of the Treaty was to transfer Maori sovereignty to the British Crown in a manner considered valid at international law.¹⁸⁵ Maori and English versions were signed on 6 February 1840 at Waitangi and subsequently in many different places throughout New Zealand by representatives of the British Crown and over 200 Maori chiefs.¹⁸⁶ However, extensive debate centres on the exact effect of the Treaty. This primarily stems from difficulties in its interpretation because the English and Maori versions of the Treaty are not exact translations of one other.¹⁸⁷ McHugh notes, “[t]he shade of difference between the two was too subtle to be depicted”.¹⁸⁸

The Treaty itself consists of only three short articles. In the English version of Article One, sovereignty over New Zealand is ceded to the British Crown.¹⁸⁹ However, in the Maori text only *kawanatanga* or governance was ceded.¹⁹⁰ According to the English text, Article Two guarantees Maori “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties”.¹⁹¹ However, in the Maori text, all the people of New Zealand are

¹⁸³ TVNZ *Marae: The Great Waitangi Debate* (10am August 1, TVONE).

¹⁸⁴ Dominic O’Sullivan “The Treaty of Waitangi in Contemporary New Zealand Politics” (2008) 43(2) *Australian Journal of Political Science* 317 at 317. For more on the events leading up to the signature of the Treaty, see generally, Roger B Evans *The Truth about the Treaty: Division or Harmony?* (Lal Bagh Press, Kerikeri, 2004).

¹⁸⁵ King, above n 165, at 151-167. Whether or not the Treaty is valid at international law is a matter of debate: see Matthew Palmer *The Treaty of Waitangi in New Zealand’s Law and Constitution* (Victoria University Press, Wellington, 2008) at 154-168 [“The Treaty of Waitangi”]; Round “Truth or Treaty?”, above n 124, at 110-113. Nevertheless, as we will see, for present purposes this matter is largely immaterial.

¹⁸⁶ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (4th ed, Oxford University Press, Melbourne, 2004) at 333 [“Bridled Power”].

¹⁸⁷ Anthony Wicks “The Treaty and the Seats” [2008] NZLSJ 381 at 384.

¹⁸⁸ Paul McHugh *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 3.

¹⁸⁹ Treaty of Waitangi Act 1975, sch 1 “Treaty of Waitangi/Te Tiriti o Waitangi”.

¹⁹⁰ Ibid; Ian H Kawharu “Translation of Maori text” by IH Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 319 at 319-321.

¹⁹¹ Treaty of Waitangi Act 1975, sch 1 “Treaty of Waitangi/Te Tiriti o Waitangi”.

guaranteed *tino rangatiratanga*, which translates to “the unqualified exercise of chieftainship” over their lands, villages and *taonga* (or treasures).¹⁹² Article Two also granted the British Crown the pre-emptive right of purchase over lands.¹⁹³ Under Article Three, Maori received “all the Rights and Privileges of British Subjects” in the English text.¹⁹⁴ Yet, in the Maori version, the text translates to mean the “Queen will give [Maori] the same rights and duties of citizenship as the people of England”.¹⁹⁵ A final clause stated that the chiefs “having been made fully to understand the Provisions of the foregoing Treaty” accepted the “spirit and meaning” of the document and would attach their “signatures or marks” to it.¹⁹⁶ On 21 May 1840, British sovereignty was declared over all of New Zealand.¹⁹⁷

4.2 The Treaty Symbol

The Maori seats are seen as a visible symbol and practical manifestation of the Treaty in Parliament.¹⁹⁸ The seats have come to be regarded by Maori as the principal expression of their constitutional position under the Treaty.¹⁹⁹ Furthermore, it is asserted that substantive parliamentary representation for Maori is *required* by the Treaty.²⁰⁰ In addition, the seats are viewed as “fundamental within the framework of Treaty of Waitangi principles.”²⁰¹

Against this background we may now analyse the relationship between the Treaty of Waitangi and the dedicated parliamentary seats. First, it is necessary to outline the legal status of the Treaty in New Zealand.

¹⁹² Ibid; Kawharu, above n 190, at 319-321.

¹⁹³ Treaty of Waitangi Act 1975, sch 1 “Treaty of Waitangi/Te Tiriti o Waitangi”. Round “Truth or Treaty?”, above n 124, at 111-112 notes that, “[w]hile some declare the Treaty unalterable forever, this particular provision disappeared long ago, and no-one seems to have disputed the validity of its disappearance.”

¹⁹⁴ Treaty of Waitangi Act 1975, sch 1 “Treaty of Waitangi/Te Tiriti o Waitangi”.

¹⁹⁵ Kawharu, above n 190, at 319-321. Another difference (while of less importance) is that within the Maori version, *Ingarami*, meaning England, is used throughout whereas in the first paragraph of the English version, the text reads “the United Kingdom of Great Britain and Ireland”.

¹⁹⁶ Treaty of Waitangi Act 1975, sch 1 “Treaty of Waitangi/Te Tiriti o Waitangi”; King, above n 165, at 159.

¹⁹⁷ Lieutenant-Governor Hobson issued two proclamations. The first proclaimed “all rights and powers of Sovereignty” over the North Island on the basis of cession through the Treaty of Waitangi. The second proclaimed sovereignty over the southern islands (South and Stewart Islands) by right of Captain James Cook’s discovery in 1769 and so had no relation at all to the Treaty. These two proclamations were subsequently ratified by the British Government and published in the London Gazette of 2 October 1840. They authoritatively established British sovereignty over New Zealand.

¹⁹⁸ Tama W Potaka “Legislation and the Legislature” in M Mulholland and V Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 83 at 96.

¹⁹⁹ Royal Commission on the Electoral System, above n 22, at 86.

²⁰⁰ See Electoral Law Reform Committee “Report on the Electoral Reform Bill” [1993] I AJHR C17 at 12. This was a recommendation of the National Consultation Hui (held at Turangawaewae Marae, Ngaruawahia) attended by Iwi representatives, the Minister of Justice and members of the Electoral Law Reform Committee.

²⁰¹ MMP Review Committee, above n 64, at 20-21. Turia, above n 138, has stated the seats are a “legitimate means of meeting the Crown’s treaty obligations”.

4.3 The Orthodox Legal Status of the Treaty

Much water has flowed under the bridge since the signing of the Treaty changed life in New Zealand.²⁰² That said, ever since 1840 there has been continuous uncertainty and debate about the meaning of the Treaty and its place in our constitution.²⁰³ Unfortunately, it is beyond the scope of this paper to delve deep into these issues.²⁰⁴ For present purposes, we must concern ourselves with the current orthodox status of the Treaty.

The Court of Appeal in *New Zealand Maori Council v Attorney-General* (the *Lands* case) reaffirmed the Privy Council ruling in *Hoani Te Heuheu Tukino v Aotea Maori District Land Board* that Treaty rights were not directly enforceable through the courts as they did not impose any domestic legal obligations unless Parliament specifically incorporated them in legislation.²⁰⁵ Thus, Parliament can choose to incorporate aspects of the Treaty into legislation, but this is the only way in which the Treaty can become legally enforceable in national law. As the Treaty of Waitangi is neither supreme law, a bill of rights, nor constitutionally entrenched, its recognition therefore effectively hinges on political will.²⁰⁶ This orthodoxy preserves Parliament's powers of legislation as sovereignty in New Zealand resides in Parliament.²⁰⁷ There are only a few areas, relating to Maori land, language and fisheries, where Parliament has directly referred to the articles of the Treaty.²⁰⁸

4.3.1 The Principles of the Treaty

In 1986, Parliament enacted the State-Owned Enterprises Act. When the Bill was proceeding through Parliament, the Government made a last minute amendment (without referring the Bill

²⁰² Simon Reeves *To Honour the Treaty: The Argument for Equal Seats* (2nd ed, Earth Restoration Ltd, Auckland, 1996) at 69.

²⁰³ Palmer "The Treaty of Waitangi", above n 185, at 85.

²⁰⁴ For perspectives on this debate see Janine Hayward "The Treaty and the Constitution" in R Miller (ed) *New Zealand Government and Politics* (5th ed, Oxford University Press, South Melbourne, 2010) 105; Nigel J Jamieson "Talking Through the Treaty – Truly a Case of *Pokarekare Ana* or 'Troubled Waters'" (2004) 10 NZACL 101; Sustainable Future Institute, above n 54; Palmer "The Treaty of Waitangi", above n 185; Round "Truth or Treaty?", above n 124.

²⁰⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) [the *Lands* case] at 655 per Cooke P and 691-692 per Somers J; *Hoani Te Heuheu Tukino v Aotea Maori District Land Board* [1941] NZLR 590, [1941] AC 308 (PC). For commentary, see Palmer "The Treaty of Waitangi", above n 185, at 25 and 168. Of course, other international treaties have a similar status. Executive ratification of an international covenant or treaty only affects New Zealand law if the legislature incorporates its provisions in domestic statute.

²⁰⁶ Mason Durie "A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa" in C James (ed) *Building the Constitution* (Victoria University of Wellington, Wellington, 2000) 414 at 417 ["Constitutional Change"].

²⁰⁷ The *Lands* case, above n 205, at 655 per Cooke P and 691 per Somers J. The classic statement is that of Albert V Dicey *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, London, 1885) at 36: "The principle of parliamentary sovereignty means neither more nor less than this, namely, that parliament thus defined has, under the English constitution the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of parliament."

²⁰⁸ Palmer "The Treaty of Waitangi", above n 185, at 25.

back to a Select Committee) and inserted a new clause under urgency.²⁰⁹ This clause, which became s 9, stated: “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi”. However, the ‘principles’ were never defined, which ultimately led to unelected Court of Appeal judges assigning meaning to the notion of ‘principles’.²¹⁰ Various statutes now require compliance or due respect to be paid to the ‘principles of the Treaty’, all without defining them.²¹¹

In order to establish what these principles are we must primarily turn to judgments from the courts. The *Lands* case is still accepted to be the leading case on Treaty principles.²¹² In this landmark decision, the Court of Appeal highlighted that there are two core principles that define the Treaty relationship.²¹³ These are “partnership” (or more accurately “a relationship akin to partnership” between Maori and the Crown) and “active protection”.²¹⁴ These principles will be examined in due course.

4.4 The Relationship between the Treaty and the Maori Seats

As mentioned above, the courts cannot directly recognise the Treaty as a source of law without direct reference in legislation. Yet, the provisions within the Electoral Act that establish the Maori seats *do not* refer to the principles of the Treaty or to the Treaty itself. Accordingly, those who advocate for retention of the seats based on the Treaty are not doing so from a legal standpoint. Instead, they argue from a moral or a higher constitutional perspective that the Treaty *ought* to have a different place in our constitutional structure. That said, it is still of paramount importance to investigate whether the moral arguments carry any significant persuasiveness. Despite the lack of the Treaty’s legal force, if the seats are viewed as a symbol of the Treaty, it is crucial that there are convincing reasons behind them in order for them to be justifiable in contemporary New Zealand. These moral arguments are founded primarily on Articles Two and Three in conjunction with the ‘principles’.

²⁰⁹ Brash, above n 168. For the reasons why the clause was enacted, see Round “Truth or Treaty?”, above n 124, at 122-123.

²¹⁰ Brash, above n 168.

²¹¹ Round “Truth or Treaty?”, above n 124, at 121. For example, the ‘principles of the Treaty’ are referred to in the Conservation Act 1987, the Resource Management Act 1991 and other statutes that deal specifically with Maori issues.

²¹² *New Zealand Maori Council v Attorney-General* [2007] NZCA 269, [2008] 1 NZLR 318 at [72].

²¹³ There are more than two Treaty principles although for present purposes the two most ‘important’ principles are also the two used to argue for retention of the Maori seats. For a comprehensive summary of the developments in the jurisprudence of Treaty principles see *Carter Holt Harvey Ltd v Te Runanga O Tūwharetoa Ki Kāwharua* [2003] 2 NZLR 349 (HC) at [27].

²¹⁴ The *Lands* case, above n 205, at 664 per Cooke P, at 693 per Somers J and at 702 per Casey J.

4.4.1 Article Three and the Maori Seats

As has been seen, Article Three granted Maori equality in terms of the rights, privileges and duties of citizenship.²¹⁵ Although a Parliament was not established until 12 years after the Treaty, “[g]iven the nature of Englishmen, there almost certainly would be a Parliament before too long (and there was).”²¹⁶ Accordingly, electoral rights come under the banner of citizenship as every New Zealand citizen is entitled to participate in the electoral system through voting for representatives in Parliament.²¹⁷

The words of the Treaty do not, of course, specifically set out that there would be dedicated Maori representation in Parliament.²¹⁸ However, it is argued that the equality provided for Maori in Article Three ought to be *substantive* as opposed to *formal* equality and therefore the seats are mandated by the Treaty.²¹⁹

Formal equality requires treating people identically in order to treat them equally, whereas substantive equality requires treating people differently in order to treat them equally.²²⁰ In relation to the Maori seats, the argument from formal equality is that all citizens should have identical voting rights. In other words, all people must be given the same chance to *participate* in the electoral process, thus Maori are to be guaranteed identical voting rights as the rest of the population.²²¹ However, if Article Three guarantees substantive equality, then Maori must be guaranteed equality in *representation*.²²² In other words, substantive equality demands that the proportion of Maori in Parliament mirrors the proportion of Maori in the New Zealand population.²²³ The reserved seats are therefore arguably justified as a way of ensuring substantive representation.²²⁴ Nonetheless, as will be seen, it is clear that Article Three granted Maori *formal* equality for a number of reasons.

²¹⁵ Of course this was British citizenship. New Zealand citizenship wasn’t established until 1948 (Statute of Westminster Adoption Act 1947). New Zealand citizens were no longer considered British subjects under the Citizenship Act 1977. This arguably in itself poses an interpretative problem for Article Three.

²¹⁶ *Taiaroa v Minister of Justice (No 1)*, above n 46, at 68-69.

²¹⁷ New Zealand Bill of Rights Act 1990, s 12(a). Setting aside age, criminal restrictions and state of mind, see Electoral Act 1993, s 80.

²¹⁸ Geddis “A Dual Track Democracy?”, above n 9, at 358.

²¹⁹ Xanthaki and O’Sullivan, above n 41; Wicks, above n 187; James Sullivan “Seeking the Significance of the Maori Seats: A Constitutional Right to Separate Representation?” (LLB (Hons) Dissertation, University of Otago, 1998) [“Seeking the Significance of the Maori Seats”].

²²⁰ Douglas Rae “Two Contradictory Ideas of (Political) Equality” (1981) 91(3) *Ethics* 451 at 452; Law Reform Commission of Western Australia *Aboriginal Customary Laws: Final Report: The Interaction of Western Australian Law with Aboriginal Law and Culture* (R94, 2006) at 8; Wicks, above n 187, at 387. The difference can be framed in terms of ‘equality of treatment’ versus ‘equality of outcomes’.

²²¹ Wicks, above n 187, at 387.

²²² *Ibid.*

²²³ *Ibid.*

²²⁴ *Ibid.*

4.4.1.1 Citizenship

First, the purpose of Article Three was to grant Maori the same rights and duties of citizenship as the people of England. This citizenship label entitles citizens to vote, to participate in the political process, and to be represented in Parliament by democratically elected representatives. However, citizenship gives no guarantee of separate representation based on ethnicity, religion or any other form.²²⁵ Sir Tipene O'Regan supports the formal equality interpretation noting that the guarantee under Article Three gives Maori "no greater and no lesser rights in social and legal terms than are available to the general populace".²²⁶ In fact, the right to vote is a privilege which Englishmen only achieved after hundreds of years of battle and bloodshed.²²⁷ The Treaty cannot imply a superior form of citizenship.²²⁸ Indeed, any argument for different treatment under Article Three based purely on an ethnic basis is, to quote O'Regan, "fundamentally repugnant".²²⁹

4.4.1.2 Discrimination

Second, Article Three *must* be viewed as a guarantee of formal equality because viewing the seats as a form of substantive equality essentially means they are a discriminatory privilege. This is because the seats are defined and accordingly gifted by the state on the grounds of ethnicity. This reasoning calls for immediate abolition of the Maori seats.

The Federal Court of Australia in *Telstra Corporation Ltd v Hurstville City Council* held that:²³⁰

[D]iscrimination means differential treatment, or put another way, the failure to treat all persons equally where there is no reasonable distinction to justify different treatment. The discrimination may be positive, such as by conferring a benefit, or negative, for example by imposing a restriction. Yet in each case there will be discrimination.

The International Convention on the Elimination of All Forms of Racial Discrimination declares that: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction ... to equality before the law."²³¹ This

²²⁵ Sustainable Future Institute, above n 54, at 96.

²²⁶ Tipene O'Regan "A Ngai Tahu Perspective on Some Treaty Questions" (1995) 25(2) VULawRw 178 at 178.

²²⁷ Reeves, above n 202, at 78.

²²⁸ O'Sullivan, above n 184, at 326.

²²⁹ O'Regan, above n 226, at 189.

²³⁰ *Telstra Corporation Ltd v Hurstville City Council* [2002] FCAFC 92, (2002) 189 ALR 737 at 752. This case was upheld on appeal in *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595 (HCA).

²³¹ International Convention on the Elimination of All Forms of Racial Discrimination, art 5.

includes the enjoyment of “the right to *participate* in elections-to vote and to stand for election on the basis of universal and equal suffrage”²³²

The New Zealand Court of Appeal has also noted the importance of “ensuring that all persons similarly situated will be treated equally by those who apply the law.”²³³ The Court goes on to state “the notion that like should be treated alike has been an essential tenet in the theory of law.”²³⁴ Furthermore, the House of Lords held that, “[t]he question is whether persons in an analogous or relevantly similar situation enjoy preferential treatment, without reasonable or objective justification for the distinction”.²³⁵

The Human Rights Act 1993 states that indirect discrimination occurs where a “practice, requirement, or condition ... has the effect of treating a person or group of persons differently on one of the prohibited grounds of discrimination.”²³⁶ These prohibited grounds include, but are not limited to, race, sex, colour or ethnic origin.²³⁷ Unless the plaintiff establishes “good reason” for the difference in treatment, discrimination will be established.²³⁸

However, s 19(2) of the New Zealand Bill of Rights Act 1990 states that “measures taken in good faith for the purpose of assisting or advancing ... groups of persons disadvantaged because of discrimination” that would be unlawful under the Human Rights Act 1993, do not constitute discrimination.²³⁹ Nevertheless, are Maori “disadvantaged because of discrimination”? A representative democracy, such as New Zealand, must “avoid barriers for the representation of minorities.”²⁴⁰ Maori confront no such barriers given separate seats are not needed in order for Maori to gain representation under MMP. There is no systemic bias against Maori preventing them from entering Parliament.²⁴¹ Maori are free, as are all New Zealanders, to cast their vote and compete for parliamentary representation.

Therefore, the onus is evident: those seeking retention of the Maori seats must show an objective justification or good reason for their continued existence otherwise the seats are a form of discrimination. However, what justification is there? As has already been seen, the separate

²³² Ibid, art 5 (c) (emphasis added.) While seemingly advocating for formal equality, the ICERD does encourage special measures to be undertaken “to ensure the adequate development and protection of certain racial groups and individuals belonging to them” (art 2(2)). However, these special measures must be temporary in nature until equality is reached and should not “lead to the maintenance of separate rights for different racial groups” (art 1(4)).

²³³ *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 93 per Thomas J.

²³⁴ *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 (CA) at 94 per Thomas J.

²³⁵ *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL) at 115 per Lordingham.

²³⁶ Human Rights Act 1993, s 65.

²³⁷ Ibid, s 21.

²³⁸ Ibid, s 65.

²³⁹ New Zealand Bill of Rights Act 1990, s 19(2).

²⁴⁰ Joseph “The Maori Seats in Parliament”, above n 4, at 12.

²⁴¹ Luke Malpass and Oliver Marc Hartwich *Superseding MMP: Real Electoral Reform for New Zealand* (Centre for Independent Studies, New South Wales, 2010) at 16.

seats do not provide Maori with effective representation, nor are they a justifiable symbol of indigeneity or a right under the Treaty of Waitangi. Moreover, if the number of Maori MPs *exceeds* the relative national population of Maori, then the dedicated seats become a form of reverse discrimination based on ethnicity. This is clearly not the guarantee of equality provided for in Article Three of the Treaty. Thus, as no good reason exists and Maori are not discriminated against, the seats are a discriminatory privilege and contradict the formal equality provided for by the Treaty.

4.4.1.3 Partnership

It is argued that in order for the Treaty to signify a ‘partnership’, Maori must be proportionately represented in Parliament and the seats can be justified as a necessary way of achieving this representation.²⁴² There are two responses to this claim. The first is to note that while the seats are a guarantee of representation, the real issue is whether they provide Maori with *effective* representation. Chapter 2 showed that is not the case. The second point is to examine the concept of ‘partnership’. Joseph writes:²⁴³

Partnership is a substantively neutral concept. It posits reciprocal rights and responsibilities ... founded on notions of “reasonableness, mutual cooperation and trust”.²⁴⁴ The concept does not impose normative obligations as would require the Crown to grant rights of separate Maori representation.

Furthermore, even *if* the concept of ‘partnership’ mandated separate representation, the Crown must weigh any obligation that it owes under the Treaty against its wider obligations to the New Zealand public.²⁴⁵ To presume the Crown’s obligations to Maori are “absolute” or “unqualified” would be “inconsistent with the Crown’s other responsibilities”.²⁴⁶

In fact, one of the greatest difficulties with this idea that the Treaty created a ‘partnership’ between the Crown and Maori is that the Crown now *includes* Maori.²⁴⁷ If non-Maori or *Pakeha* is substituted for Crown, then the Treaty is nullified.²⁴⁸ If Maori are ‘partners’ with the Crown, then how can they be protected subjects at the same time? In fact, the Treaty only created reciprocal duties *like* those of partners requiring each party to act towards each other reasonably, honourably and in good faith.²⁴⁹ The intention was never to create a partnership to govern the

²⁴² Wicks, above n 187, at 388 and 392.

²⁴³ Joseph “The Maori Seats in Parliament”, above n 4, at 17.

²⁴⁴ *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, [1994] 1 AC 466 (PC) [the *Broadcasting Assets* case] at 517 per Lord Woolf.

²⁴⁵ *Ibid*; *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (CA) [the *Radio Frequencies* case].

²⁴⁶ The *Broadcasting Assets* case, above n 244, at 517 per Lord Woolf.

²⁴⁷ O’Sullivan, above n 184, at 320.

²⁴⁸ *Ibid*.

²⁴⁹ The *Lands* case, above n 205, at 664 per Cooke P and 693 per Somers J.

country.²⁵⁰ Any such claim puts non-Maori New Zealanders into an inferior position.²⁵¹ In any event, as Bassett writes, “what can do more to foster the concept of ‘partnership’ than recognition that all citizens enjoy the same rights?”²⁵² Accordingly, the principle of ‘partnership’ does not mandate separate Maori representation and cannot be seen as a guarantee of substantive equality.

4.4.1.4 The Creation of the Maori Seats

Parliament’s purpose in creating the seats also supports the idea that Article Three guarantees formal equality. First, as Chapter 1 showed, the seats were introduced as a temporary expedient while the Native Land Court individualised Maori land. They were not created to give expression to Article Three as there was no guarantee of separate representation in the Treaty.²⁵³ As shown, they were established 27 years later for reasons *not* related to the Treaty.²⁵⁴

Second, in *Taiaroa v Minister of Justice (No 1)*, McGechan J addressed the meaning of Article Three.²⁵⁵ His Honour concluded that while the seats were broadly consistent with Treaty principles, Article Three did not guarantee Maori dedicated seats in Parliament. His Honour paid particular attention to citizenship rights that were granted and also the nature of the seats’ introduction.²⁵⁶

I accept Article 3 conferred on Maori equivalent rights to vote for, and rights to stand for election to, any future Parliament. ... Maori were granted “rights and privileges of British Subjects”. I do not accept that vision extended precisely at the time to a right to separate Maori seats in such future Parliament. Those involved were not clairvoyant.

Accordingly, no one may claim differing electoral rights under Article Three of the Treaty.

²⁵⁰ Douglas Graham, Former Minister of Justice of New Zealand “Should the Maori Seats be Retained, Entrenched, Abolished or Should Parliament Contain a Maori House?” (speech to the Faculty of Law, The University of Auckland, 2009) [“Retained, Entrenched or Abolished?”].

²⁵¹ Round “Truth or Treaty?”, above n 124, at 127.

²⁵² Michael Bassett “The Maori Seats” (2009) New Zealand Centre for Political Research <www.nzcp.com>.

²⁵³ Sustainable Future Institute, above n 54, at 96.

²⁵⁴ Ibid.

²⁵⁵ *Taiaroa v Minister of Justice (No 1)*, above n 46.

²⁵⁶ Ibid, at 68-69.

4.4.2 Article Two and the Maori Seats

Under Article Two, it is claimed the seats are a form of *tino rangatiratanga* and a Maori *taonga*.

4.4.2.1 Tino Rangatiratanga

According to the Maori version, *tino rangatiratanga* (chieftainship) is guaranteed over lands, villages and *taonga*. The argument goes that one aspect of *tino rangatiratanga* is the ability of the Maori seats to guarantee representation for Maori.²⁵⁷ However, there are numerous problems with this argument.

First, under the Maori version, it is not just Maori that are guaranteed *tino rangatiratanga*. In fact *all* New Zealanders are guaranteed *tino rangatiratanga* over their lands, villages and treasures.²⁵⁸ Accordingly, there is no basis to grant Maori guaranteed representation based on Article Two when all other New Zealanders have no such guarantee.

Nevertheless, it is argued that as Maori are guaranteed *tino rangatiratanga*, then if the seats help Maori assert this, it would be contrary to this guarantee if they were abolished. However, the Royal Commission held that separate representation is an inappropriate vehicle for self-determination. The Commission made it clear that the Maori seats were not, and never had been “an appropriate means of securing the Maori constitutional position.”²⁵⁹ Although the Commissioners acknowledged that Maori were entitled to protection for their rights, they felt that any responsibility for this protection must be found “outside an electoral system based on equality of the vote.”²⁶⁰

Furthermore, even *if* the Maori seats were seen as an appropriate vehicle for *tino rangatiratanga*, the seats do not mirror *tino rangatiratanga* at the time of the Treaty’s signing. The Treaty itself was with tribes – not a state or a race.²⁶¹ The Maori seats result in some tribes having representatives in Parliament from a completely different tribe.

Moreover, does the guarantee of *tino rangatiratanga* have any bearing on who may vote in the seats? In other words, can those Maori whose ancestors did not sign the Treaty rely on this guarantee of *tino rangatiratanga*? The Treaty was signed by over 200 Maori chiefs, however many

²⁵⁷ Durie “Tino Rangatiratanga”, above n 139 at 14-15; Geddis “A Dual Track Democracy?”, above n 9, at 358; Wicks, above n 187, at 397-402.

²⁵⁸ Kawharu, above n 190, at 319-321.

²⁵⁹ Royal Commission on the Electoral System, above n 22, at 110. The Commissioners reasons were: first, the seats were intended to serve other purposes. Second, the seats were never more than a temporary arrangement. Third, the protection of constitutional rights should not be the sole, or even the major, responsibility of persons who by the nature of their positions must be involved in the party political system. And fourth, the method by which Maori MPs are elected is totally dependent on the political forms and traditions of another culture.

²⁶⁰ Ibid, at 81 and 87.

²⁶¹ Round “Truth or Treaty?”, above n 124, at 13.

tribes declined to sign or never had the opportunity.²⁶² This poses a major problem. Should descendants of Maori tribes who never signed the Treaty be entitled to enrol on the Maori roll and claim this guarantee of *tinio rangatiratanga*? It seems reasonable that as the Treaty was made with tribes, then those entitled to be on the Maori roll should be descended from a signatory chief. David Round astutely observes that “[i]t is a strange sort of agreement whose morally binding force does not depend on whether one has actually agreed to it or not.”²⁶³

4.4.2.2 Taonga

The English version of Article Two is clearly concerned with *property* rights alone. Separate seats cannot be claimed on this basis. Nevertheless, Wicks observes that under the Maori text *taonga* are protected and various courts have held this to extend beyond property rights.²⁶⁴ He notes that the Privy Council in *New Zealand Maori Council v Attorney-General* (the *Broadcasting Assets* case) recognised that the Maori language is protected under Article Two.²⁶⁵ Further, in *Bleakley v Environmental Risk Management Authority*, it was held that spiritual beliefs could classify as *taonga*.²⁶⁶ However, no court has embraced *political* rights under Article Two.²⁶⁷ Furthermore, despite the fact we are told the Treaty is an “embryo”²⁶⁸ and a “living document”²⁶⁹ it would be an extremely strained interpretation to extend *taonga* to include separate dedicated seats in a Parliament that did not even exist in 1840.

As mentioned above, the principles of active protection and partnership characterise the Treaty relationship.²⁷⁰ We have already seen that ‘partnership’ does not mandate dedicated Maori seats.

4.4.2.3 Active Protection

The Waitangi Tribunal held:²⁷¹

[T]he Crown is under a Treaty obligation actively to protect Maori citizenship rights and in particular existing Maori rights to political representation conferred under the Electoral Act 1993. This duty of protection arises from the Treaty generally and in particular from the provisions of Article 3.

²⁶² Ibid, at 68.

²⁶³ Ibid, at 69.

²⁶⁴ Wicks, above n 187, at 398.

²⁶⁵ The *Broadcasting Assets* case, above n 244.

²⁶⁶ *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC) at [76]-[83].

²⁶⁷ Joseph “The Maori Seats in Parliament”, above n 4, at 5.

²⁶⁸ The *Lands* case, above n 205, at 663 per Cooke P.

²⁶⁹ *Mason-Riseborough v Matamata-Piako District Council* [1998] 4 ELRNZ 31 at 47.

²⁷⁰ See the *Lands* case, above n 205.

²⁷¹ Waitangi Tribunal *Maori Electoral Option Report* (1994) at ch 5 “Findings and Recommendations” at 1.

However, the Tribunal's reasoning is not convincing. First, what does "the Treaty generally" mean? The Tribunal cannot be implying that the Treaty has meaning beyond its text and purpose.²⁷² It cannot be assumed the Tribunal would manipulate or manoeuvre the Treaty to achieve a political cause.²⁷³ But referring to the Treaty "generally" does not clarify its meaning.²⁷⁴ Instead, one must look at the Treaty text itself. It is not convincing for the Tribunal to claim to use the Treaty "generally" though not engage the Treaty's provisions.

Second, the Tribunal refers to the duty of protection arising "in particular" under Article Three. The Maori text of the Treaty states the "Queen will give [Maori] the same rights and duties of citizenship as the people of England".²⁷⁵ As seen, this cannot grant superior citizenship rights. Furthermore, the Court of Appeal has held that the duty extends only to "active protection of Maori people in the use of their lands and waters"²⁷⁶ These are Article Two rights. Joseph notes:²⁷⁷

If one were to transpose the duty of active protection from Article 2 to Article 3, then the Treaty might furnish a justification for juxtaposing separate Maori representation alongside the universal franchise. But no one has this licence. It is 170 years too late to rewrite the Treaty.

Accordingly, the Crown's duty of active protection to Maori, which arises under Article Two, does not mandate separate representation.

4.5 Concluding Thoughts on the Treaty

The Electoral Act makes no reference to the Treaty. Thus, those who argue that the Treaty mandates separate representation have no legal basis for their claims. Nevertheless, this chapter has revealed that the claims made are not convincing as separate seats are not consistent with or guaranteed under the Articles of the Treaty, or Treaty principles. Accordingly, the seats are not justified in contemporary New Zealand based on the claim they are an important Treaty symbol.

²⁷² Philip Joseph "The Future of Electoral Law" (paper presented to the 'Reconstituting the Constitution' Conference, Wellington, 2 September 2010) at 6 ["The Future of Electoral Law"].

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ Kawharu, above n 190, at 319-321.

²⁷⁶ The *Lands* case, above n 205, at 664 per Cooke P.

²⁷⁷ Joseph "The Future of Electoral Law", above n 272, at 6.

In fact, those who use the Treaty as a means of retaining the seats completely disregard its spirit and meaning. Jamieson enlightens us:²⁷⁸

[The Treaty's] original concept, the principle of *he inī tahi tatou*, instead of being divisive, unites together and constitutes one single, uniquely New Zealand identity ... Being Maori or being Pakeha, or being Pakeha-Maori in whatever proportions one cares to recognise, thus becomes a secondary instead of a previously primary characteristic.

At the time the Treaty was signed, Maori society was an oral rather than a literate one.²⁷⁹ Accordingly, those Maori present at the signing of the Treaty would have instead placed “more value and reliance” on what Governor Lieutenant Hobson and the missionaries said, rather than the specific words of the actual Treaty.²⁸⁰ Yet the spirit of the Treaty, embodied in the words Hobson uttered to each signatory as they appended their mark, *he inī tahi tatou*, has been dishonoured and even betrayed in the last thirty years.²⁸¹ Rather than approaching the future with a common goal, the Treaty has been politically manipulated to continuously look backwards creating resentment and division.²⁸² There is grave danger in trying to give the Treaty a political after-life. Chapman warns us that:²⁸³

The very concept of that modest little document, more than 150 years after its date, according “rights”, that is, special rights, to some, on the footing that that “some” are in a never-ending, exclusive and cosy, relationship with the Government (“the Crown”), to which all others are not admitted, must be unacceptable, quite apart from being utterly unworkable. For that is the road to one set of rules, perquisites and advantages for one group, and another set of rules for the rest.

The Treaty continues to divide, rather than unite, our nation. It is not fair or just for the courts to generate Treaty ‘principles’ all aimed at advancing the interests of one section of society, as opposed to society as a whole.²⁸⁴ Our nation should not be ruled by the political endeavours of unelected judges or by the words of a Treaty set down over a century and a half ago by half a dozen men in a ship’s cabin – none of whom were trained in the intricacies of their task.²⁸⁵ Our nation should be ruled by us, the people.

²⁷⁸ Jamieson, above n 204, at 122.

²⁷⁹ James Belich *Making Peoples: A History of the New Zealanders from Polynesian Settlement to the End of the Nineteenth Century* (Penguin Books, Auckland, 1996) at 195-196.

²⁸⁰ Ibid.

²⁸¹ Evans, above n 184, at 57; Joseph “Constitutional and Administrative Law”, above n 49, at 51.

²⁸² Evans, above n 184, at 57.

²⁸³ Guy Chapman “The Treaty of Waitangi – fertile ground for judicial (and academic) myth-making” [1991] NZLJ 228 at 229.

²⁸⁴ Ibid, at 236.

²⁸⁵ Round “Truth or Treaty?”, above n 124, at 87; Joseph “Constitutional and Administrative Law”, above n 49, at 51.

As Baragwanath J notes, “[i]t is time to recognise that the Treaty did not contemplate a society divided on race lines between ... Maori and non-Maori, set against one another in opposing camps.”²⁸⁶ Instead, as Jamieson concludes:²⁸⁷

The first principle of the Treaty, despite all governmental engineering to the contrary, is still – as first stated by Pakeha and enthusiastically accepted by Maori – *he iwi tabi tatou* – we are now one people.

²⁸⁶ *Ngati Maru Ki Hauraki Inc v Kruithof* HC Hamilton CIV2004-485-330, 11 June 2004 at [48] per Baragwanath J.

²⁸⁷ Jamieson, above n 204, at 125.

CHAPTER 5: DEMOCRATIC EQUALITY, NATIONHOOD AND THE MAORI SEATS

Democratic equality is the foundational principle of the electoral system. It is the “linchpin of representative democracy”.²⁸⁸ In the context of a general parliamentary election, Geddis states:²⁸⁹

[The principle of democratic equality] mandates that each individual member of the New Zealand community should be able to cast a vote as to who will gain lawmaking power, with the vote of any one voter potentially being as determinative of the issue as is the vote of any other.

Those who argue for retention of the seats claim this principle is *not* breached.

5.1 Do the Maori Seats Breach the Principle of Democratic Equality?

Joseph argues that the separate seats are “fundamentally at odds” with the principle of democratic equality.²⁹⁰ *Prima facie*, this appears to be the case. The Maori electorates only cater for a certain class of persons and exclude all others. Each individual Maori voter seems to hold a greater right at the ballot box than another elector from any other ethnic group.²⁹¹ Yet, are these assertions actually correct?

Geddis shows that retaining separate representation for Maori does *not* in fact breach the ideal of democratic equality.²⁹² This is because democratic equality “at its core refers to the electoral rights of individual voters in relation to one another.”²⁹³ Maintaining the Maori electorates does not result in any difference between *individual* electoral rights held by a Maori elector and a General elector.²⁹⁴ Electors in General and Maori electorates both get a single electorate vote for their constituent MP.²⁹⁵ The number of electorates is allocated in equal proportion to the size of each ethnic grouping. The votes are counted in exactly the same way, with elected MPs from both rolls sitting in the same legislature.²⁹⁶ Furthermore, the party vote, counted on a national basis, is the most important under MMP as it determines proportionally the representation of political parties.²⁹⁷ Thus, preserving the Maori electorates does not breach the principle of *democratic* equality between *individual* voters. Instead, Geddis notes, concerns about equality are

²⁸⁸ Joseph “The Maori Seats”, above n 101.

²⁸⁹ Geddis “A Dual Track Democracy?”, above n 9, at 362.

²⁹⁰ Joseph “The Maori Seats”, above n 101.

²⁹¹ Geddis “A Dual Track Democracy?”, above n 9, at 361.

²⁹² *Ibid.*, at 361-363.

²⁹³ *Ibid.*, at 363.

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*, at 362.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

not based on democratic equality, rather whether it is desirable to define the electorate in purely *ethnic* terms and give an ethnic group a special status.²⁹⁸

5.2 Should the Electorate be Defined in Ethnic Terms?

Defining the electorate in ethnic terms is *not* a desirable practice for a number of reasons. It forces us to ask hard questions about the make-up of contemporary New Zealand. Namely, what defines our country in the 21st century? Do we want to continue down the bicultural path or is it time to accept that our country has developed and grown into something so much more?

The 1986 Royal Commission, perhaps wisely, did not specifically consider these wider questions. That said, the Commission did note that its recommendation to abolish the Maori seats would “be of real benefit in helping break down separateness and division within our community in the sense of encouraging Maori and non-Maori to look to the interests of the other.”²⁹⁹ Yet, as we have seen, the seats were not abolished. Separatism and division still remains.

One could argue that if it is appropriate to define the electorate *geographically* to ensure that diverse communities are represented, then it must also be appropriate to ensure that *ethnic* communities are represented.³⁰⁰ However, this argument appears to miss the fact that there are only two groups represented in the ethnic electorates; Maori and everyone else. Differentiating only the Maori ethnicity suggests Maori are worthy of more consideration than anyone else.

5.2.1 Bicultural or Multicultural?

Distinguishing the electorate between Maori and non-Maori is a “political and structural concession to the validity of biculturalism.”³⁰¹ But is contemporary New Zealand really a bicultural country? Maori make up 14 per cent of the population.³⁰² The remaining 86 per cent of non-Maori consists of Asian, European, and Pacific Islanders to name just a few. We are not simply a society of non-Maori and Maori. Rather, we are one country with many peoples.

We should be proud of the bicultural foundation of our nation, but it is essential that we realise we are now a multicultural and multiracial country with a mosaic of nationalities. As Winston Peters said in his maiden speech to Parliament, “New Zealand is not a monotonous garden where every flower is the same; it is a garden where the diversity of the blooms enriches the

²⁹⁸ Ibid, at 363.

²⁹⁹ Royal Commission on the Electoral System, above n 22, at 105.

³⁰⁰ Deborah “Are the Maori seats undemocratic?” (22 October 2008) In a Strange Land <www.inastrangeland.wordpress.com>.

³⁰¹ Geiringer, above n 34, at 241.

³⁰² Statistics New Zealand “2006 Census: Culture and Identity”, above n 85.

view.”³⁰³ We need to appreciate and enjoy our differences, and recognise how they can add value to our country.³⁰⁴ A divisive electoral system is not the answer. The Maori seats are the anachronistic ‘power base’ of biculturalism prevailing in NZ and must be abolished. They work against the development of New Zealand as a multicultural nation. It is imperative that the electoral system recognises and caters for the increasingly diverse New Zealand society.³⁰⁵ We need to be a country where we celebrate our differences, where our diversity enriches us, where ethnicity matters but does not bestow privilege, and where all citizens are united equally under the law. Despite our all differences, there is one feature that we all have in common. We are New Zealanders.

5.2.2 The Defining Common Feature

As New Zealanders we live together, work together, marry one another and raise our children together.³⁰⁶ We have all become, by the very act of our birth, *tangata whenua* or indigenous people of New Zealand.³⁰⁷ Though we may identify as Maori, Asian, European or Indian, or we may believe in a different God, the one underlying feature we all have in common is that we are New Zealanders. We should be defined by what we are, rather than by what we are not. The core issue is whether we ought to look back to our bicultural past or realise the multicultural nature of our society, accept that we are all New Zealanders, that we all belong to this country and have no other, and move forward.³⁰⁸ There is no justification for maintaining one electoral roll for one race and one roll for everybody else.

5.3 Looking Forward to the Future

The challenge for our generation today is to adapt to our ever increasingly diverse society and to prepare for the future ahead of us. Our population is set to become more ethnically diverse with significant increases in mainly the Asian and Pacific Island populations.³⁰⁹ There are two paths that our country can take. The first is to move into the new millennium intent on travelling backwards by maintaining our long-outdated bicultural electoral system. However, we cannot turn the clock back. Instead, we must use the rich tapestry of our heritage to move forward as a nation.³¹⁰ We must work hard to create a unified nation with the interests of all New Zealanders

³⁰³ See Simon Bridges “Diversity Enriches the View” (2010) National <www.simonbridges.co.nz>.

³⁰⁴ Trevor Mallard, Co-ordinating Minister for Race Relations “We Are All New Zealanders Now” (speech to the Stout Research Centre for New Zealand Studies, Victoria University, Wellington, 28 July 2004).

³⁰⁵ Royal Commission on the Electoral System, above n 22, at 52.

³⁰⁶ Phil Goff, Leader of the NZ Labour Party, “Nationhood” (speech to Grey Power, Palmerston North, 26 November, 2009).

³⁰⁷ Evans, above n 184, at 57.

³⁰⁸ Contrast ONE News “Paul Henry apologises to Governor-General” (4 October 2010) TVNZ <www.tvnz.co.nz>; ONE News “TVNZ suspends Paul Henry over Governor-General remarks” (5 October 2010) TVNZ <www.tvnz.co.nz>.

³⁰⁹ Statistics New Zealand “Population Projections”, above n 136.

³¹⁰ Goff, above n 306.

at heart.³¹¹ We cannot continue to deny our multicultural society. Rather, we should be embracing it. The seats – the symbolic pinnacle of our bicultural philosophy – need to be abolished.

Some may say that all this talk of being a unified multicultural nation is naive or unrealistic. But, is it not an attractive goal to aspire to? We need to move forward – not on different paths, but on one path.³¹² This approach will help us progress towards a more effective and equitable electoral system that unites, rather than divides, society.³¹³ Let's create a New Zealand that we can be truly proud of.

³¹¹ Ibid.

³¹² Bill English “The Treaty of Waitangi and New Zealand Citizenship” [2002] NZLJ 254 at 258.

³¹³ Sustainable Future Institute, above n 54, at 113.

CHAPTER 6: THE FUTURE OF THE MAORI SEATS

6.1 Entrenchment of the Maori Seats

Section 268 of the Electoral Act 1993 singularly ‘entrenches’ various features of the electoral process.³¹⁴ These features can only be amended or repealed by either a 75 per cent majority in Parliament, or a majority of valid votes cast pursuant to a referendum.³¹⁵ However, the entrenchment provisions *within* s 268 are not in themselves entrenched. Thus, no special ‘manner and form’ requirement is needed in order for Parliament to amend or completely repeal, with a simple majority, s 268 itself.³¹⁶ Despite the legal efficacy never being tested in the courts, this ‘entrenching provision’ has created a powerful constitutional convention precluding the legislature interfering with fundamental electoral matters, without the requisite majority.³¹⁷ Section 268 ‘entrenches’ the statutory provisions that create and regulate the General electorate seats.³¹⁸ However, the statutory provisions that provide for separate Maori representation are not entrenched.³¹⁹ Thus, a simple majority of MPs could abolish the Maori seats.

As the retention of the seats effectively depends on political will, their future is thought to be in doubt. This uncertainty has prompted calls for the Maori seats to be entrenched, providing a sense of constitutional certainty for Maori.³²⁰ Indeed, Professor Ranginui labelled the lack of entrenchment as “perhaps the most discriminatory measure of all in the application of the law to Maori representation.”³²¹ On the other hand, there are two main reasons why the calls for entrenchment of the seats are *not* convincing.

³¹⁴ Specifically: the term of Parliament (s 17(1) of the Constitution Act 1986); the definition of “Adult” (ss 3(1) and 60(f)); the definition of “General electoral population” (s 3(1)); the Representation Commission (s 28); the division of New Zealand into General electoral districts including the mechanism for determining the 16 South Island seats (s 35); the allowance for the plus or minus five per cent of the electoral population in an electorate (s 36); the qualification of electors (s 74); and the method of voting (s 168).

³¹⁵ Electoral Act 1993, s 268(2).

³¹⁶ See generally, Andrew Geddis “‘Manner and Form’ in the House of Lords” [2005] NZLJ 415.

³¹⁷ Sullivan “Seeking the Significance of the Maori Seats”, above n 219, at 17. Parliament could choose to test the *legality* of the ‘entrenched provisions’ by either ignoring them, or repealing s 268 itself.

³¹⁸ See above fn 314.

³¹⁹ Specifically: the definition of Maori (s 3(1)); the definition of the Maori electoral population (s 3(1)); the Maori electoral districts which establish separate Maori representation and the method for determining the Maori seats (s 45); the Maori electoral option (ss 76-79); and the supply of electoral information to “designated bodies” (ss 111C-112).

³²⁰ See Ann Sullivan “Minority Indigenous Representation” in M Mulholland and V Tawhai (eds) *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia Publishers, Wellington, 2010) 251 at 264 [“Minority Indigenous Representation”]; Wicks, above n 187, at 401-402; Graham “Retained, Entrenched or Abolished”, above n 250.

³²¹ Maori Party “Election Policy” (2008) Maori Party <www.maoriparty.org>. This claim is rather ironic considering, as Chapter 4 showed, the seats themselves are a discriminatory privilege.

6.1.1 Constitutional versus Political

First and foremost, a distinction must be drawn between “constitutional process and politically contestable policy”.³²² The former can be entrenched; however, the latter must never be entrenched.³²³ The entrenchment provisions are aimed at protecting the integrity of the electoral system by stipulating special ‘manner and form’ procedures in order for legislative change.³²⁴ The procedures have, as Joseph notes, a “constitutional mandate”.³²⁵ By contrast, separate Maori representation is a complex and politically contentious issue. Parliamentary sovereignty dictates that the House must remain free to debate such politically contestable issues, thus the seats are not a legitimate subject-matter worthy of constitutional entrenchment. The intention of s 268 was *not* to insulate substantive policy from political debate. Joseph argues that matters of on-going debate and political judgment, such as separate Maori representation, should not be “ring-fenced and shielded from scrutiny through constitutional protections. The political judgments of one generation should not, and cannot, claim universal validity for future generations.”³²⁶

6.1.2 Standing Orders of the House of Representatives

Parliament’s Standing Orders are “rules for the conduct of proceedings in the House of Representatives and for the exercise of powers possessed by the House.”³²⁷ Under Standing Order 262, “a proposal for entrenchment must itself be carried in a committee of the whole House by the majority that it would require for the amendment or repeal of the provision to be entrenched.”³²⁸ In other words, if an amendment was proposed to include the Maori seats as entrenched provisions in s 268, a 75 per cent supermajority vote is needed. This requirement ensures the requisite moral authority to bind later Parliaments.³²⁹

Nevertheless, Standing Order 4 allows the House to suspend any one of its standing orders by a bare majority of its members.³³⁰ Accordingly, as the House can suspend its standing orders and s 268 is not in itself entrenched, it is possible for Parliament to entrench the Maori seats by a

³²² Joseph “The Future of Electoral Law”, above n 272, at 7.

³²³ Ibid. Joseph notes that typical subjects of entrenchment include “a country’s primary electoral machinery, the separate functions of government, the independence of courts and a bill of rights.”

³²⁴ Joseph “Constitutional and Administrative Law”, above n 49, at 567.

³²⁵ Joseph “The Future of Electoral Law”, above n 272, at 7.

³²⁶ Ibid.

³²⁷ Standing Orders of the House of Representatives 2008, SO 1.

³²⁸ Ibid, SO 262. This entrenchment rule was introduced by the non-partisan Standing Orders Committee in 1995.

³²⁹ Joseph “Constitutional and Administrative Law”, above n 49, at 564. The rationale for the requirement to pass entrenching provisions by the same supermajority is to counter the moral argument that it is ‘inequitable’ for one Parliament to pass a law under a simple majority vote that seeks to bind future Parliaments by requiring them to assemble larger majorities to amend or repeal that law: see Andy Nicholls “Chapman Tripp on entrenching the Maori Seats” (29 October 2008) Kiwiblog <www.kiwiblog.co.nz>; Joseph “The Future of Electoral Law”, above n 272, at 7-8.

³³⁰ Standing Orders of the House of Representatives 2008, SO 4.

simple majority. But this method of entrenchment would be viewed as unprincipled and undermine any moral authority that s 268 had.³³¹ There would be little moral obligation for a future parliamentary majority to abide by a ‘manner and form’ process which was enacted without following the 75 per cent supermajority rule.³³² However, entrenching the seats in contravention of standing orders would not affect the *legal* status of entrenchment.³³³ Thus, an attempt to abolish the seats by a bare majority in the face of an entrenchment provision may be contested in court, despite contravention of Standing Order 262. However, the entrenchment provision *itself* could be repealed by a simple majority and then the seats abolished. It would be difficult to criticise this process from a moral point of view if Standing Order 262 was ignored when the Maori seats were ‘entrenched’. Accordingly, it is difficult to see a government circumventing accepted constitutional processes to entrench separate Maori representation.

Therefore, in political reality, agreement between the Labour Party and the National Party is needed in order for entrenchment of the Maori seats to eventuate. Coupled with the knowledge that separate Maori representation is a political rather than a constitutional issue, entrenchment of the seats appears particularly unlikely.

6.2 Abolition of the Maori Seats

This paper has argued that there are no justifications for retaining the Maori seats and accordingly they should be abolished. As the Maori seats are not ‘entrenched’, this can be achieved by a simple parliamentary majority. However, is abolition of the Maori seats on the political horizon? Prior to the 2008 general election, the National Party stated in its electoral law policy document that it wished to abolish the seats and “see all New Zealanders on the same electoral roll.”³³⁴ Despite this policy, the National Party in its post-election confidence and supply agreement with the Maori Party agreed “it [would] not seek to remove the Maori seats without the consent of the Maori people.”³³⁵ Both parties also agreed they would “not be pursuing the entrenchment” of the seats.³³⁶ Thus, the status quo looks set to continue. Both the National Party and the Maori Party did agree to “the establishment (including its composition and terms of reference) by no later than early 2010 of a group to consider constitutional issues including Maori representation.”³³⁷ Yet, as of October 2010, there is no indication such a group has been established.

³³¹ Sullivan “Minority Indigenous Representation”, above n 320, at 261-262.

³³² *Ibid.*

³³³ *Pickin v British Railways Board* [1974] AC 765 (HL) per Lord Reid: “the idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution.” See also *Namoi Shire Council v A-G (NSW)* [1980] 2 NSWLRD 639 (NSWSC); Joseph “Constitutional and Administrative Law”, above n 49, at 439-440.

³³⁴ National Party “Policy 2008: Electoral Law” (2008) NZ National Party <www.national.org.nz>.

³³⁵ New Zealand Government, above n 1, at 2.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

In fact, abolition of the seats would galvanise Maori opposition. Joseph suggests abolition would “draw cries of racism, breach of the Treaty of Waitangi and even threats of social disorder.”³³⁸ While abolishing the seats might seem easy to do in a strictly legal sense, accomplishing the desired outcome runs through difficult political territory.³³⁹ Furthermore, as seen, the National Party and the Maori Party have agreed the seats will not be abolished without the consent of Maori.³⁴⁰ However, what does this mean and is it justifiable?

As Chapter 1 showed, the number of Maori seats under MMP is directly tied to the number of electors who choose to go on the Maori roll.³⁴¹ Maori can only change rolls during the MEO.³⁴² Accordingly, as enrolment on the Maori roll is voluntary, the MEO creates a ‘de facto referendum’ among all Maori electors allowing them to decide whether the Maori seats should be retained by electing whether or not to go on the Maori roll.³⁴³ The outcome of the ‘de facto referendum’ determines whether the number of Maori seats rises or falls.³⁴⁴ Thus, Maori can decide whether they want the seats because if Maori no longer wished to retain them, they could choose to enrol on the General roll.³⁴⁵ However, the issue of whether there should be separate Maori representation in the national legislature is *not* a question that Maori alone should decide. McRobie notes:³⁴⁶

Whenever electoral systems are devised, law-makers endeavour to incorporate those representational principles that are broadly accepted by the society in which, and for whom, the electoral system will operate.

Orentlicher states:³⁴⁷

Since democracy is, by definition, government with the consent of the governed, the boundaries of political commitment should be determined in accordance with the principles of consent.

Accordingly, the New Zealand public ought to be entitled to determine the future of separate Maori representation. Furthermore, because the number of list MPs decreases with the addition

³³⁸ Joseph “The Maori Seats in Parliament”, above n 4, at 21.

³³⁹ See David Beatson “Maori Seats are the great Survivors” (22 October 2008) Pundit <www.pundit.co.nz>.

³⁴⁰ New Zealand Government, above n 1, at 2.

³⁴¹ See Chapter 1.

³⁴² Ibid.

³⁴³ Geiringer, above n 34, at 241; Geddis “A Dual Track Democracy?”, above n 9, at 355; Wicks, above n 187, at 383.

³⁴⁴ Geddis “A Dual Track Democracy?”, above n 9, at 351.

³⁴⁵ Graham “Electoral Reform Bill 1993”, above n 62.

³⁴⁶ Alan McRobie “The Electoral System” in P Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) 312 at 319.

³⁴⁷ Diane F Orentlicher “Separation Anxiety: International Responses to Ethno-separatist Claims” (1998) 23 *Yale Journal of International Law* 1 at 48.

of each Maori seat, the issue is not simply for Maori to decide; rather it is an issue for all New Zealanders.³⁴⁸ The upcoming referendum, where the electoral system will be debated and scrutinised, seems the logical time to decide whether New Zealanders wish to retain the seats.

6.3 The MMP Referendum and the Maori Seats

In 2008, the National Party campaigned on the basis that if elected, they would hold a binding referendum on MMP.³⁴⁹ The National Party has delivered on this pre-election promise and the first referendum will be held in conjunction with the 2011 general election and will ask voters two questions.³⁵⁰ Voters will be asked to choose between retaining the MMP voting system and changing to another system.³⁵¹ The second question asks voters to select an alternative voting system, regardless of whether they chose to retain MMP.³⁵² If the majority of electors vote for change, there will be a second referendum held in conjunction with the 2014 general election.³⁵³ This referendum will ask voters to choose between MMP and the preferred alternative voting system (selected in the second question of the first referendum).³⁵⁴ The 2017 general election will then either be conducted under MMP or the preferred alternative voting system.³⁵⁵

This upcoming referendum presents a perfect opportunity for New Zealanders to consider the desirability of separate Maori representation. The referendum gives electors the power to significantly change the electoral system, and as the Maori seats are a part of that system, their future should be reconsidered. However, the National Party and the Maori Party agreed that there would not be “a question about the future of the Maori seats in the referendum on MMP.”³⁵⁶ Further, the legislation to permit the referendum is already through its first reading

³⁴⁸ Waikato Times “Maori seats an issue for us all” (8 October 2008) Stuff <www.stuff.co.nz>.

³⁴⁹ National Party, above n 334. The referendum will be the opportunity for voters to review the voting system and decide if they want to keep it. Five general elections have been held under the MMP voting system, and the National Party believes it is timely to consider how that system has worked. MMP has dramatically changed the electoral landscape as the two-party Parliament has ended, and the House now more closely represents the characteristics of contemporary New Zealand. However, there are a number of perceived flaws with the MMP system which, in part, have led to the upcoming MMP referendum. Namely: (1) MPs being defeated in their electorates returning to Parliament via the party list. (2) List MPs elected solely on the basis of their party crossing the threshold by virtue of winning an electorate seat, claiming to remain in Parliament after deserting their party. (3) The overhang problem which can distort proportionality. (4) The influence of the minor parties on the configuration of government. (5) The fact that the people elect their Parliaments but not their governments. (6) The 5 per cent or one-seat electorate threshold that a party needs to be represented in Parliament has created discrepancies in the proportionality of election outcomes. For example, in the 2008 election, the ACT Party won five seats with 3.65 per cent of the vote due to just one electorate seat, while New Zealand First won zero seats with 4.07 per cent. See Malpass and Hartwich, above n 241, at vii; Joseph “The Maori Seats in Parliament”, above n 4, at 21; Dunne, above n 106, at B5.

³⁵⁰ Ministry of Justice “MMP Referendum: Timeline for Referendum on MMP Voting System” (2010) Ministry of Justice <www.justice.govt.nz>.

³⁵¹ Ibid.

³⁵² Ibid. The alternative voting systems will be: First-Past-the-Post (FPP), Preferential Vote (PV), Single Transferable Vote (STV) and Supplementary Member (SM).

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ New Zealand Government, above n 1, at 2.

and select committee hearings on it have been completed.³⁵⁷ The Electoral Legislation Committee is due to report back to Parliament by 8 November.³⁵⁸ Hence, there is no chance the future of the Maori seats will be addressed in the upcoming referendum. Therefore, depending on the outcome of the 2011 referendum, this paper recommends a binding referendum on the future of the Maori seats at either the 2014 or 2017 general election.

6.4 A Binding Referendum on the Future of the Maori Seats

If MMP is retained in 2011, there should be a question on the Maori seats' future at the 2014 general election. If the majority of electors vote for change and there is a second referendum held in 2014, then there should be a question on the future of the Maori seats at the 2017 general election. Allowing New Zealanders to decide the fate of the Maori seats at the same time as a general election ensures a high voter turnout, which is important to ensure the legitimacy of the result. Furthermore, tackling the question of the Maori seats after the decision is made on the electoral system counters the criticism that combining the future of MMP with the future of the Maori seats risks overwhelming voters.

If the majority of voters choose to abolish the seats, the 2017 election under MMP or the 2020 election under the preferred alternative voting system will then be conducted without the Maori seats. Alternatively, if the majority of electors vote to retain the seats, then the status quo continues. At least this process would ensure the separate seats were sanctioned by a majority of New Zealanders.

In 2000, a survey of New Zealand electors from both rolls was undertaken by the New Zealand Election Study on the opinions of MMP. The sample of electors was asked the following question:³⁵⁹

“Do you think the future of the Maori seats in Parliament should be decided by Maori, or by all New Zealanders?”

75 per cent responded “all New Zealanders” whilst only 20 per cent responded “Maori alone”.³⁶⁰ The statistics speak for themselves. New Zealanders want to make the call on the future of separate Maori representation and they should be allowed to. At present, despite their unjustified status, the Maori seats still will exist after the upcoming referendum. Voters will be given no

³⁵⁷ New Zealand Parliament “Electoral Referendum Bill” (2010) New Zealand Parliament <www.parliament.nz>. The Electoral Referendum Bill passed its first reading on 22 April 2010. Select Committee submissions were due by 10 June 2010.

³⁵⁸ Ibid.

³⁵⁹ New Zealand Election Study “Electoral system opinion and the evolution of MMP: A report to the Electoral Commission” (2000) New Zealand Election Study <www.nzes.org>.

³⁶⁰ Ibid. The study states that, “Maori on the General roll follow the same pattern as other New Zealanders on the issue of who should decide, while Maori roll respondents are only a little more likely to say ‘Maori alone’.”

direct say about whether the Maori seats are desirable under the chosen system. This is not acceptable. Thus, this paper recommends the issue needs to be addressed at a subsequent referendum. We need to stop passing this issue on to future generations simply because it is too challenging for the current generation to resolve. All New Zealanders need to decide whether the seats are desirable in contemporary New Zealand. And as Minogue notes, “we should remember that there are no serious grounds for distrusting the wisdom of the New Zealand electorate.”³⁶¹

³⁶¹ Kenneth Minogue *Waitangi: Morality and Reality* (New Zealand Business Roundtable, Wellington, 1998) at 89.

CONCLUSION

The Maori seats were introduced as a temporary expedient in 1867. Yet, they still exist today. The rationales relied upon to justify the existence of the seats are unconvincing and cannot withstand scrutiny. Simply put, the Maori seats are well past their expiry date.

MMP has remedied the disparity of Maori parliamentary representation under FPP. However, by retaining separate seats, Maori are not provided with the effective representation that they would enjoy under a common roll. The size of the Maori electorates ensures they are unworkable and cumbersome to administer. Further, a common roll would ensure all electorate MPs are accountable to *all* Maori. The Maori Party's presence in Parliament would also be put directly under the spotlight. *If* the Maori Party is providing Maori with effective representation, it is likely the Party would be more successful under a common roll vying for the national party vote, in contrast to only ever winning a maximum of seven electorate seats.

The seats as a symbol of indigeneity are not justifiable in New Zealand today. There is no duty on a government to grant superior political rights amounting to guaranteed representation to those who claim to be indigenous. Further, the symbolic significance of the seats is tarnished when one requires no proof to enrol. Moreover, the considerable intermarriage that has resulted in the diminution of Maori blood casts significant doubt on whether the seats are still appropriate in contemporary New Zealand.

The Electoral Act 1993 does not refer to the Treaty of Waitangi or its principles. Furthermore, the moral arguments that the Treaty provides for separate representation are flawed. The Crown's duty of active protection under Article Two, the guarantee of *tino rangatiratanga*, the principle of partnership, and the electoral rights provided for in Article Three do not mandate separate Maori seats. Instead of a superior form of citizenship, the Treaty provides for unanimity and equality. Rather than being divisive, its real spirit is one of unity and harmony.

The Maori seats do not breach the principle of democratic equality. Rather, they force us to question whether defining the electorate as Maori and non-Maori is a desirable practice in contemporary New Zealand. The seats are the symbolic pinnacle of our bicultural past when the multicultural reality of our state screams otherwise. Rather than the most powerful political and law-making institution in the country being divided at its core, this paper calls for New Zealand to truly become a united nation.

Accordingly, as no justification remains, the Maori seats should be abolished. Furthermore, this paper has shown that the seats are a discriminatory privilege. It is also unjustifiable to maintain the seats as a safety valve for Maori when other sectors of society are clearly in greater need of a

proportionate voice in Parliament. A common roll would also reduce the likelihood of a parliamentary overhang occurring.

The proposed entrenchment of the seats can be opposed on two grounds. The seats present a politically contestable and complex issue, not a legitimate subject-matter worthy of constitutional entrenchment. Further, Standing Order 262 requires a 75 per cent supermajority to entrench the Maori seats. Thus, in political reality, entrenchment appears unlikely.

Abolition, in a strictly legal sense, can be undertaken by a simple parliamentary majority. However, there is no current political appetite to abolish the seats. Instead, either retention or abolition should be legitimised by *all* New Zealanders at a binding referendum. By doing so, Parliament would ensure the electoral system as a whole is supported by the majority of electors. Depending on the outcome of the 2011 referendum, this paper recommends that the issue be decided at the 2014 or 2017 general election. Clearly, this recommendation is ambitious. But it is essential that *this* generation finds a way forward. And as Winston Churchill said, “let us go forward together.”³⁶²

In order to abolish the seats, an Act of Parliament is needed. Likewise, in order to initiate the binding referendum process, Parliament must pass legislation. Hence, in the final analysis, the future of the Maori seats depends on political whim. Thus, will the abolition contended for throughout this paper *ever* occur? One can only speculate. Politics, remember, always comes down to a numbers game in the end.³⁶³ It is the art of the possible.

³⁶² Winston Churchill, Prime Minister of Britain “Blood, Toil, Tears and Sweat” (maiden speech to the House of Commons as Britain’s new Prime Minister, 1940).

³⁶³ Tim Watkin “ACT exiting, stage right? Or will the Nats decide ‘they’re worth it?’” (17 September 2010) Pundit <www.pundit.co.nz>.

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