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ACCESS TO ELECTORAL RIGHTS

NEW ZEALAND

Fiona Barker and Kate McMillan

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Access to Electoral Rights

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1. Introduction

This report sets out the rules of access to electoral rights in New Zealand and discusses some elements of contestation in relation to the franchise and electoral representation.[1] New Zealand is known internationally for having been the first country to grant women the vote, in 1893. Perhaps lesser known is its liberal franchise regime in relation to non-citizen voting: all legal permanent residents are eligible to vote in national elections after one year's residence. New Zealand is also notable for being one of the few countries without a formal, written constitution. Instead, statutes, common law, conventions, and the Treaty of Waitangi all combine to constitute the constitutional framework of the country (Miller 2015).[2] Constitutional development, and in particular the process of fully severing the historical colonial ties with the United Kingdom, has been characterized by incremental and piecemeal change, often undertaken with little public debate and with no obvious guiding philosophy about the boundaries of the demos. Yet, some changes have occurred quickly and unexpectedly due to another key feature of New Zealand's constitutional framework—parliamentary sovereignty. Taken together with the fact that New Zealand is a unitary country with a unicameral parliament, this means governments able to command a majority in the legislature can pass laws quickly and largely unfettered.

Since electoral reform in 1993, which moved New Zealand from a First Past the Post (FPP) to a Mixed Member Proportional (MMP) system,[3] the greater number and diversity of political parties in the legislature has made multi-party government—

[1] The authors thank Amy Duxfield for research assistance and the New Zealand Electoral Commission for comments on an earlier draft. We would like to acknowledge the support of the New Zealand European Union Centres Network and the ANU Centre for European Studies during the research and writing of the report.

[2] The Treaty of Waitangi, signed in 1840 between over 500 Māori chiefs and the British Crown, is now widely acknowledged as a founding document of New Zealand. Its constitutional importance has increasingly come to be acknowledged in legislation and common law, yet its precise constitutional status remains the subject of legal and political debate. As Section 3.4 explains, rights guaranteed to Māori under the Treaty of Waitangi, as well as the Treaty's principles and spirit, have been invoked in debate about electoral rights, most notably in debate about separate Māori seats in Parliament.

[3] Under MMP voters have two votes: one for an Electorate MP and one for a Party. Electorate MPs, are elected with a plurality of votes in a single member electoral constituencywhile List MPs, are elected via closed party lists. The overall distribution of seats in Parliament reflects each party's share of the nationwide party list vote; thus, a party winning ten per cent of the party list vote is entitled to ten per cent of seats in Parliament. For more detailed explanation of MMP in New Zealand, including threshold rules and the balance of List and Electorate seats, see Miller (2015).

either as formal coalition or via confidence and supply agreements—or minority government the norm. A greater level of scrutiny of law-making has emerged, but parliament remains sovereign and governments with numbers in parliament to pass legislation can still do so quickly and with little concern for judicial checks. This has been felt in the realm of electoral rights, as Section 2.1 on controversial prisoner disenfranchisement legislation explains. Further, as many electoral law provisions remain unentrenched,[4] the power of parliamentary sovereignty is clear. Section 3.4 discusses this further in relation to the dedicated Māori seats in parliament.

In the area of electoral rights, legislation from the 120-member parliament is the primary source to consult,[5] with only limited case law on the matter. On one hand, this may be due to the supremacy of the legislature and its tendency to legislate preemptively to resolve problems that might otherwise have made their way through the judicial system.[6] On the other hand, the lack of judicial activity may also reflect the straightforward and inclusive electoral rules; the highly liberal franchise arguably leaves little to be challenged.

This report explains the main features of electoral rights in New Zealand as they relate to citizen residents (Section 2.1), non-resident citizens (Section 2.2) and non-citizen residents (Section 2.3). Section 2.1 pays particular attention to the controversial issue of prisoner voting, which is one of the few aspects of electoral rights that have seen recent case law. Section 3 outlines the historical development and contemporary functioning of the reserved Māori seats in New Zealand's parliament. It also explains the difference in Māori representation at national and local levels. Section 4 details logistical aspects of exercising one's right to vote in New Zealand, from registering as an elector and a candidate to casting one's vote both in the country and from abroad.

2. Eligibility: electoral rights in New Zealand elections

2.1. Citizen residents

The Electoral Act 1993 sets out who may vote. Section 12(a) of the New Zealand Bill of Rights Act 1990 (BORA) provides for a general right to vote for New Zealand citizens:

> 12 Electoral rights
> Every New Zealand citizen who is of or over the age of 18 years—

[4] The Electoral Act is one of the few statutes in New Zealand that contains entrenched clauses. However, only some of the Electoral Act is entrenched, and it is generally agreed a simple majority in Parliament could unentrench, and thus override, even these clauses.

[5] On some occasions parliament has more than 120 Members. Section 192(5) of the Electoral Act 1993 states that, if a party's share of the party vote entitles it to a number of seats in Parliament that is smaller than the number of its Electorate MPs, then that party does not have electorate seats taken away from it. It is, though, not allocated any List MPs. For the life of that Parliament there will be more than 120 MPs, known as an "overhang". There have been overhangs on three occasions since MMP was introduced—the 2005-08 Parliament had 121 MPs, the 2008-11 Parliament 122 MPs, and 121 MPs sit in the current Parliament.

[6] Section 2.3 gives an example of this.

> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot;

The Electoral Act 1993 'gives effect to and limits' the general right to vote expressed in s 12(a) of BORA (Butler & Butler 2015, p.476), although in some aspects it also extends the BORA rights (as discussed later in relation to non-citizen residents). Aside from limitations relating to the requirement to be enrolled[7] and certain residence criteria, the primary restrictions on the right to vote occur on the grounds of certain classes of people with a mental disability, incarceration, and convictions relating to corruption.

The voting age

Section 3 of the Electoral Act 1993 sets at 18 years the age at which citizen residents may register as electors and vote in elections. The age threshold of 18 years is consistent across all levels (national, regional, local) and types (legislative, referendums) of election, and applies both to the right to vote and the right to stand as a candidate. The voting age was lowered incrementally over time, being set first at 20 years in 1969, before the age of political maturity was fixed at 18 years in time for the 1975 election, bringing New Zealand into line with comparable countries.

Mental disabilities

In general terms, a mentally disabled person may register as an elector and may exercise their right to vote. Indeed, the Electoral Act 1993 (s 86) allows someone to receive the assistance of another person in the electoral registration process if they are 'lacking the capacity to understand the nature of the decision to register as an elector', although they may not subsequently receive assistance to vote if they lack the capacity to make a voting choice (Barrett 2011; Geddis 2014).

However, s 80 of the Act does provide for the disenfranchisement of mentally disabled persons who are detained in a hospital or some other secure facility if one of three conditions holds. First, they lose the right to register as an elector if they have been found unfit to stand trial, acquitted by reason of insanity, or found on conviction to be mentally impaired and have been detained by court order for more than three years. Second, a person is similarly disenfranchised if they have been subject to a compulsory treatment or care order for more than three years, where this order has been made under section 45(2) of the Mental Health (Compulsory Assessment and Treatment) Act 1992.[8] Finally, a person is ineligible to register as an elector if they have been detained in hospital with their consent for psychiatric treatment or care, and would otherwise be subject to a sentence of imprisonment.

In each of the situations noted above, the mentally disabled person is disqualified from registering as an elector, which means that the provisions apply to national, regional and local elections, and also makes them ineligible to stand as a candidate for election.

[7] See section 4.1 for further details of enrolment requirements and procedures.
[8] Section 45(2) relates to people being held in prison who need mental health treatment.

Voting restrictions on persons convicted of criminal offences

The name of any person who has been convicted of a 'corrupt practice' is entered on the Corrupt Practices List for a period of three years (Electoral Act 1993, s 100), and anyone whose name is on the Corrupt Practices List is disqualified from registering as an elector and therefore may not vote or stand as a candidate. Sections 215 – 218 of the Electoral Act 1993 detail electoral practices that qualify as 'corrupt', including personation (e.g. impersonating another voter or attempting to vote multiple times), bribery, treating of voters (e.g. providing 'food, drink, entertainment') and undue influence over voters (e.g. making threats of violence). In the case of bribery and treating, a person may also be charged with corrupt practice if they have been the *recipient* of money, office, employment, food, drink, entertainment etc.[9]

In New Zealand, the law regarding disenfranchisement of prisoners has varied considerably over the decades and has been a notable exception to the otherwise liberal character of New Zealand's franchise laws. Currently, as a result of the Electoral (Disqualification of Sentenced Prisoners) Act 2010, and the subsequent amendment of the Electoral Act 1993 s 80(1)(d), all prisoners under sentence of imprisonment on polling day are disenfranchised, regardless of the length of the sentence. The legislation disqualifies prisoners from registering as electors and provides for the removal from the electoral roll of the names of those already registered. As prisoners are disqualified from being registered as electors, they are therefore also prohibited from standing as candidates.[10]

The 2010 law returned New Zealand to an earlier restrictive position on prisoner enfranchisement. From the passage of the Electoral Act 1956 until 1975, and then again from 1977 until 1993, all convicted prisoners were disenfranchised.[11] In a brief liberalising period in 1975,[12] the Labour Government repealed the 1956 provision, thereby allowing all prisoners to vote (Barker & McMillan 2014). However, in 1977 the conservative National Party government returned to the 1956 position of a blanket ban on all convicted prisoners. It was not until 1993 that prisoner voting laws were again liberalised, this time to a mid-way position that disenfranchised only those prisoners convicted of more serious offences. Thus, from 1993 until the current legislation was passed in 2010, prisoners serving a sentence of three years or more, preventive detention or life imprisonment were disenfranchised. The three-year threshold for disqualification was designed, based on the recommendations of the Royal Commission on Electoral Reform, to match the three-year period after which New Zealand citizens abroad lose their right to vote until they visit the country again.[13]

[9] The Act also outlines "illegal" practices that can be prosecuted, but which would not result in a person convicted of the offence being placed on the Corrupt Practices List.

[10] As prisoners' names must be removed from the electoral roll when they are sentenced to a term of imprisonment, the onus falls on the prisoner to actively re-register once s/he is released from prison. As Geddis (2016) notes, this may lead to longer-term disenfranchisement, since prisoners frequently come from social groups that are already less likely to enrol as electors.

[11] In 1905, prisoners who were convicted of offences punishable by one year or more imprisonment (or the death penalty) were disenfranchised.

[12] As the report discusses elsewhere, other liberalizing measures enacted in 1975 included lowering the voting age to 18 years, enfranchising non-citizen voters, and altering the definition of Māori from one based on blood quantum to one that allowed electors to self-identify as Māori (Atkinson 2003).

[13] Geddis (2011) and Robins (2006) provide detailed accounts of the history of, and debates about, prisoner voting in New Zealand.

The 2010 Act began as a so-called Member's Bill, sponsored by an individual Member of Parliament; the law was passed, though, largely along party lines.[14] During its passage through the legislature, the Bill attracted considerable criticism not only from legal scholars[15] and practitioners (e.g. New Zealand Law Society, Human Rights Commission), but also from within government. The Attorney-General's report on the bill stated that it breached the BORA, because disenfranchising prisoners via such a blanket ban was not sufficiently linked to the objective of punishment. Further, he noted the legislation would have an arbitrary effect, since disenfranchisement depended on whether or not a prisoner happened to be incarcerated at election time, rather than on the seriousness or type of the crime, or the length of imprisonment to which the prisoner had been sentenced (Finlayson 2010). Despite these concerns the bill was passed into law.

The validity of the new provisions on prisoner disenfranchisement have been challenged in court by serving prisoners, led by Arthur Taylor. Included among their several judicial actions,[16] two notable cases were taken up by the High Court. In 2015 Taylor sought a declaration that s 80(1)(d), as amended by s 4 of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010, is inconsistent with s 12 of the BORA.[17] The Court confirmed that the BORA is not supreme law and that therefore no court may declare legislation invalid on the grounds that it is inconsistent with BORA. BORA does, however, require that limitations on the rights it provides be 'justified in a free and democratic society' (s 5), and s 7 requires the Attorney-General to report to parliament where a Bill is inconsistent with BORA, as the Attorney-General did in that case (Finlayson 2010). The Court determined that it had jurisdiction to make a declaration of inconsistency, and it found that the importance of the right to vote and the nature of the inconsistency were sufficiently fundamental to democracy to demand a formal declaration. It therefore made such a formal declaration of inconsistency.[18]

Subsequently, Taylor and other prisoners brought a different case before the High Court, challenging the validity of s 4 of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.[19] They contended that this indirectly amended s 74 of the Electoral Act 1993, an entrenched clause that would need a 75% majority in parliament to be changed. As the 2010 amendment was passed with a bare majority (63-58), the claimants argued that it was invalidly enacted. The Court concluded that s 74 of the Electoral Act 1993 was not entrenched in its entirety; rather, s 268 of the Act entrenches s 74 only in relation to the minimum voting age.

[14] MPs from the governing National Party and its support party ACT supported the legislation.
[15] In addition to criticising the law's substance, Geddis (2016) argues that the process of lawmaking—consideration of the Bill in legislative committees and parliamentary debate—was highly flawed, especially given the serious limitations it placed on citizens' rights.
[16] Prior to the 2014 general election Taylor and other prisoners unsuccessfully sought an injunction against the Electoral Commission carrying out the election unless prisoners were enfranchised—see, *Taylor v Attorney General* [2014] NZHC 2225. After that election they unsuccessfully lodged an election petition, arguing that disenfranchising prisoners had made the election "unlawful"—*Taylor v Key* [2015] NZHC 722.
[17] *Taylor v Attorney-General* [2015] NZHC 1706
[18] This was significant also because it was the first time a court has made such a formal declaration of inconsistency with BORA.
[19] *Taylor v Attorney-General* [2016] NZHC 355.

The amendment relating to sentenced prisoners therefore did not trigger a super-majority requirement and was therefore validly enacted.[20]

Together, the several judicial actions relating to the disenfranchisement of sentenced prisoners have served to underline the strength of parliamentary sovereignty in New Zealand. Thus, in electoral rights, as more generally, even though the courts have over time considered BORA a 'constitutional' document, not only is it '*not* supreme law; it is in fact *subordinate* to any other inconsistent enactment, regardless of when that enactment was passed or made' (Butler & Butler 2015, pp.5–6). Courts have no capacity to act beyond making a formal declaration of inconsistency, which, as the Court noted in *Taylor v Attorney-General* [2015], serves mainly to draw political attention to the issue. Lawmakers retain full power to decide limitations on electoral rights, despite the significant implications such limits might have for rights laid out in the BORA.

2.2. Citizens abroad

Eligibility criteria

All eligible voters are able to vote from abroad in both national and local body elections, including both citizens and those who are defined as 'permanent residents' under section 73 of the Electoral Act 1993 (see Section 2.3 below). Citizens who wish to exercise a vote from abroad must remain on the electoral roll and return to New Zealand at least once between elections (i.e. every three years). Exemptions from the requirement to return home every three years in order to remain eligible may be applied to members of the New Zealand Defence Force, New Zealand diplomats and foreign trade representatives and their families. Permanent residents who wish to exercise an external vote must, similarly, remain on the electoral roll; in contrast with citizens residing abroad they are required to visit New Zealand at least once per year.

There are no restrictions on the ability of citizens or permanent residents to cast votes from abroad based on the number of citizenships they hold. There are also no differences in eligibility based on whether one has citizenship by birth, by descent or by grant, although citizenship by descent can only be passed on to one generation, so the voting rights of New Zealanders abroad are generally limited to first generation born abroad. An exception holds for those citizens by descent who convert their status to citizenship by grant (for which they pay a fee) and who may then transmit their citizenship to a next generation born abroad that will again enjoy voting rights.

Citizens (but not permanent residents) who live abroad may also stand as candidates in national and local elections. In 2014, for example, an Australian-based New Zealand citizen, Vicky Rose, stood for the Ikaroa-Rāwhiti seat (a Māori electorate) in the national Parliament as a member of the Expats Party.

[20] The Constitution Act 1986 entrenched the three-year term of Parliament. The entrenched provisions of the Electoral Act 1993 are those that relate to the minimum voting age (s 74), the existence of the Representation Commission (s 28), division of the county into general electoral districts, including the mechanism for calculating the South Island seats (s 35), the specification that the electoral population in all electoral districts must be within five per cent of the population quota specified for different types of electorates (s 36), and the method of voting (s 168). According to s 268 of the Electoral Act, these provisions can be changed by a 75% majority vote in parliament, or by a majority of valid votes cast in a poll of all electors.

Despite the relatively liberal franchise laws for non-resident citizens and permanent residents, and the large number of ways in which it is possible to cast a vote from abroad, levels of turnout remain low.

Mode of representation

External voters are represented via 'assimilated representation'. They continue to be enrolled in the electorate[21] in which they were enrolled prior to their departure from New Zealand. In the case of voters who are either citizens by descent, or who attained voting age after they left New Zealand, their enrolment will be in the electorate where their parents are or were last enrolled. In order for either group to be eligible to vote, however, they must have spent at least one year of residence in New Zealand.

2.3 Foreign residents: New Zealand as the liberal outlier

The right to vote

New Zealand is unusual by international standards in that it grants the right to vote in national parliamentary elections not only to citizens, but also to permanent residents. Electoral laws do not discriminate among nationals of different countries, and a relatively short period of residency in New Zealand is required. Permanent residents are eligible to enrol as an elector and to vote provided they are over 18 years of age and have lived in New Zealand continuously at some time for a period of 12 months or more.

For the purposes of eligibility to register as an elector, section 73 of the Electoral Act 1993 defines as a 'permanent resident' someone who:

a) resides in New Zealand; and
b) is not—
   (i) a person to whom section 15 or 16 of the Immigration Act 2009 applies.
   (ii) a person obliged by or under that Act to leave New Zealand immediately or within a specified time; or
   (iii) treated for the purposes of that Act as being unlawfully in New Zealand.

Thus, s 73(b)(i) excludes those who have been convicted of certain offences, deported or are a security risk, and s 73(b)(ii) excludes those who are resident in New Zealand on a temporary permit such as a student visa or a temporary visitor's permit. Aside from these exclusions, however, all resident visa holders who meet the above criteria, and have at some time resided continuously in New Zealand for at least one year, are considered as permanent residents for the purposes of the Electoral Act 1993 and may register as an elector. These criteria therefore certainly include those who are defined as permanent residents under the Immigration Act 2009,[22] but also include persons on visas who are not required to leave New Zealand immediately or within a

[21] "Electorate" is the term used in New Zealand for electoral constituencies.
[22] It is important to note that Section 4 of the Immigration Act 2009 has a different meaning of "permanent resident"; namely, someone who is a "holder of a permanent resident visa".

specified time.[23] Other categories of people, such as Australian citizens, are also eligible, as the Immigration Act permits them to enter New Zealand and stay indefinitely.

It is difficult to say for certain what motivated New Zealand policy makers when they took the decision in 1975 to expand the franchise to include non-citizens. The New Zealand Citizenship Act 1948 had created New Zealand citizens, but not until 1975 did parliament update the Electoral Act to recognize the existence of New Zealand citizens and not merely 'British subjects'. Indeed, lawmakers turned their attention to this issue primarily as part of a broader move to stop the unrestricted immigration of British subjects into New Zealand.[24] In 1974 the words 'British subject' were dropped from New Zealand passports, and a year later the Electoral Act made the same adjustment to electoral rights (McMillan 2004). Under section 39 of the Electoral Act 1956, electors had to be a 'British subject ordinarily resident in New Zealand' (and who had resided continuously for at least one year). The Electoral Amendment Act 1975 dropped the requirement of British subjecthood, but, unlike Australia and Canada at their historical junctures, did not replace it with a citizenship requirement.

The expansion of the franchise was consistent with the liberalising thrust of the 1975 Act in other respects; ideals may therefore have played a part. Yet, there was almost no public discussion of this expansive redefinition of the demos, nor did committee members considering the bill spend much time deliberating on this point (McMillan 2015; Barker & McMillan 2014). One consideration that was explicit, though, was a desire not to disenfranchise anybody as a result of the reform. When they came to remove the British subjecthood requirement, lawmakers were reluctant to disenfranchise British subjects who had not taken out New Zealand citizenship, preferring instead to enfranchise all non-citizen permanent residents (Barker & McMillan 2014).

The right to stand as a candidate

Non-citizens in New Zealand enjoy active, but not passive voting rights. The 1975 Act stated that only New Zealand citizens are eligible to be elected to Parliament, although holding dual nationality is not an impediment to election. One exception in the 1975 legislation was that anyone already enrolled as an elector on 22 August 1975 remained eligible to stand for election, even if they did not possess New Zealand citizenship. This grandfathering provision was, however, removed in 2003; from that time onwards even those enrolled as electors prior to August 1975 would now need to become New Zealand citizens in order to be eligible for election to parliament (Privileges Committee of the New Zealand Parliament 2003).[25]

Two cases related to passive franchise rights have arisen in recent years. In 2002, newly elected List MP for the United Future party, Kelly Chal, could not take up her seat when it was discovered that, while she was a permanent resident, she did not hold New Zealand citizenship. She was replaced by the next person on the party's list (New Zealand Parliamentary Library 2002; United Future NZ Party 2002).

[23] Thus, persons on a long-term work visa could be eligible, even though they do not hold a "permanent resident visa", as s 73(b)(ii) does not apply to them.
[24] This was partly a response to restrictions the United Kingdom had begun placing on immigration from Commonwealth countries.
[25] The exception was, however, retained for sitting MPs at the time of the legislation.

A more consequential case was that of Harry Duynhoven, a Member of Parliament who had been entitled to Dutch citizenship at birth, and who had held that citizenship, but whose citizenship was revoked due to a law change in the Netherlands in 1995. When he was elected to parliament in 2002 he was not a Dutch citizen, but he subsequently applied to have his Dutch citizenship reinstated, as he was eligible to do under the Dutch law. As a result, it was believed that this caused s 55(1)(c) of the Electoral Act to apply to him; at the time, the clause prohibited undertaking an act 'whereby he or she may become a subject or citizen of any foreign State or Power, or entitled to the rights, privileges, or immunities of a subject or citizen of any foreign State or Power …'. The question therefore arose as to whether, in applying to become, and then becoming, a Dutch national, Harry Duynhoven would be disqualified from being a Member of the Parliament based on s 55(1)(c).

This question was not taken before a court; rather, the parliament's Privileges Committee considered the matter. A majority of the Committee considered that s 55(1)(c) clearly did apply to Mr Duynhoven. While dual citizenship was (and is) not an impediment to candidacy, *acquisition* of a foreign citizenship while a Member of Parliament was prohibited. However, a majority of the Committee also favoured passing legislation to avoid the MP's seat being declared vacated, as they considered s 55(1)(b) and (c) to be 'ambiguous and obscure' (Privileges Committee of the New Zealand Parliament 2003, p.11). These sections were subsequently repealed and amended, with retrospective effect for Mr Duynhoven.

3. Indigenous electoral rights: the Māori seats and the Māori Electoral Option

As in many settler societies, electoral rights for indigenous peoples did not take the same path as for the majority (European settler) population. A particular feature of New Zealand's political system is the existence of dedicated seats in parliament for New Zealand's indigenous Māori. As of 2016, there are seven Māori seats representing Māori electorates that are overlain across the General electorates. One Māori electorate (*Tāmaki Makaurau*) covers the Auckland area; the other six electorates cover the rest of the country, making each very large. Once in parliament, MPs elected from Māori electorates have the same rights and responsibilities as any other MP. Similarly, electors registered on the Māori roll have the same electoral rights as a voter on the General roll; that is, one vote for an electorate MP and one vote for a party list.

3.1. Historical development of the Māori seats in New Zealand's Parliament

In 1867 the Māori Representation Act established four Māori seats and enfranchised Māori males 21 years of age and over, including 'half-castes', but excluding those convicted of treason or other serious offences. The Act stated that the representatives of the Māori electorates were to be elected by eligible (Māori and half-caste) electors, and were to be Māori. Initially, the Māori seats were intended as a temporary, five-year measure, but were subsequently extended once and then in 1876 made indefinite.

There are varying explanations of the origins of the Māori seats and of the extent to which the intent behind their creation was idealistic or cynical. The effect, though, was to create a system of distinctive parliamentary representation that has endured until today. In 1986 the Royal Commission on electoral reform concluded: 'although they were not set up for this purpose, the Māori seats have nevertheless come to be regarded by Māori as an important concession to, and the principal expression of, their constitutional position under the Treaty of Waitangi.' (Royal Commission on the Electoral System 1986, p.86)

The history of the Māori seats was closely tied up in the incremental development of voting rights among the European settler population. The New Zealand Constitution Act 1852 had enfranchised (for elections to the House of Representatives and provincial councils) all males over 21 years of age, provided they met the landholding requirement, which related to a certain value of freehold estate, leasehold, or tenement. Māori males were not formally excluded from the franchise; however, in practice most could not meet the landholding requirements, because Māori land was generally owned communally. In order to be eligible to vote, Māori would need to 'individualise their land' (Wilson 2010, p.43).[26] In creating the Māori seats, the 1867 Act removed the property qualification for Māori males, meaning full Māori male suffrage came about 12 years before that of non-Māori males.

The 1867 Act did not, though, fully harmonise electoral rights for Māori and non-Māori. For instance, whereas the secret ballot was made compulsory in the General (European) electorates in 1890, it took until 1937 for this practice to be applied to Māori electorates. Further, compulsory enrolment was introduced in 1924 in the General electorates, but not until 1956 in the Māori electorates. Finally, while the provisions of the Electoral Act that regulate the General electorates are entrenched, the same is not true for Māori electorates; technically a simple majority in parliament could abolish the Māori electorates.

Changes to the Māori seats over time have related to: a) who was eligible to vote in them; and b) the number of seats and the basis upon which they are calculated. Initially blood quantum determined the roll on which an elector could register—Māori who were at least 'half-caste' were required to vote in Māori electorates, while those 'less than half-caste' were to register on the General roll. A change came initially in 1967, when an amendment to the Electoral Act allowed Māori to stand as candidates in General electorates (and vice-versa).[27] Then, in 1975 Māori electors were also given the right to choose whether they would vote in General or Māori electorates. Māori were defined henceforth as 'anyone descended from a Māori', the effect of which was to introduce self-identification.

3.2. The Māori Electoral Option

The 1975 Act also introduced the Māori Electoral Option (MEO), which is held immediately after the five-yearly national census. The MEO allows persons of Māori descent to choose whether to be enrolled in a General or a Māori electorate. At the

[26] In parallel, the legislature was addressing the similar predicament faced by goldminers. The Miners Franchise Act 1860 enfranchised goldminers who had held their license for three months or more, but did not hold property, while the Westland Representation Act 1867 established two seats for miners.
[27] The first two Māori MPs elected to General seats entered parliament in 1975.

start of the MEO period, forms are sent to all those electors who identified themselves as New Zealand Māori or descendants of New Zealand Māori when they first enrolled as an elector. These electors may choose whether to remain on the roll on which they are currently registered or to switch to the other roll.

The MEO became particularly important from the time of electoral system reform in New Zealand, when the Electoral Act 1993 reintroduced a provision of the 1975 Act that had been swiftly repealed by the incoming National government late in 1975—namely, that the number of Māori seats can increase or decline, depending on the number of voters of Māori descent who choose to register on the Māori roll.[28] This provision thus removed discrepancies between General and Māori seats in the number of electors per electorate.[29]

The functioning of the MEO therefore became of real interest to citizens and organisations that sought to enhance Māori representation via an increase in the number of Māori seats. In two separate actions, a group of claimants argued the government was not dedicating sufficient resources to the MEO. First, a claim was brought before the Waitangi Tribunal, arguing that the Crown had an obligation under the Treaty of Waitangi to protect the right of Māori to be represented in Parliament. They claimed that the Electoral Amendment Act 1993 introduced special needs in promoting Māori enrolment and education, but that insufficient funding had been provided to properly inform Māori of their rights under the MEO. The Waitangi Tribunal agreed with much of the claim, finding that the Crown is 'under a Treaty obligation actively to protect Māori citizenship rights and, in particular, existing Māori rights conferred under the Electoral Act 1993.' This obligation, it agreed, arose particularly from article 3 of the Treaty of Waitangi, which extended to Māori the Queen's 'royal protection and imparts to them all the Rights and Privileges of British subjects'—the franchise was one such right and privilege to be fostered. The Tribunal found that measures necessary to educate Māori voters on the MEO, such as face-to-face (*kanohi ki te kanohi*) communication and appropriately targeted methods of mass communication, had not been sufficiently funded and that the Crown had not consulted sufficiently with relevant Māori organizations to ensure the rights of Māori were 'actively' protected. The Waitangi Tribunal's recommendations are, however, not binding, and the government declined to act on its recommendations.

The same claimants took a case to the High Court, and then to the Court of Appeal, challenging the determination of the dates for the MEO as well as the process by which the MEO was conducted on the grounds that the government had not done enough to publicise to Māori electors its existence and importance.[30] The Court found that 'reasonable' steps were taken to bring the MEO to the attention of Māori electors. While noting the duty on government to ensure voters were given adequate information about the MEO, the Court found that this arose not from the Treaty of Waitangi but could simply be inferred from statute. It concluded that, while the government may not have done as much as it could have, its efforts to notify Māori voters and publicise the MEO did meet the test of 'reasonableness'.

[28] The Royal Commission on Electoral Reform (1986) had recommended removing the Māori seats, arguing that a proportional electoral system would likely ensure adequate Māori representation in parliament. However, in the face of strong opposition by Māori organizations this recommendation was not adopted.

[29] For instance, in 1867 there were four seats for 50 000 Māori, but 72 seats for 250 000 Europeans (Waitangi Tribunal 1994).

[30] *Taiaroa v Minister of Justice* [1995] 1 NZLR 411.

Since the changes in 1993, the number of Māori seats has risen from four to seven,[31] reflecting a rise in the number of new enrolments on the Māori roll. After the exercise of the Māori Electoral Option in 2013, 413,348 electors of Māori descent were enrolled, of whom 55% had chosen to enrol on the Māori Roll and 45% had chosen to be on the General Roll (Electoral Commission 2014).[32]

Over the years, there has been controversy about the Māori seats. Some New Zealanders argue that they constitute a 'special privilege' for Māori and undermine the principle of equal citizenship. Others claim this is a legitimate form of dedicated representation, grounded in principles of minority rights and indigenous self-determination or, more strongly, argue that the obligation to provide some degree of autonomy arises from the Treaty of Waitangi. The Green Party and Māori Party have consistently advocated full entrenchment of the Māori seats in the Electoral Act, while the centre-right National Party and the right-liberal ACT party have both had the policy of abolishing the Māori seats. The National Party has, however, never acted on this policy. Moreover, since 2008 it has signed confidence and supply agreements with the Māori Party in order to form governments, as part of which National agreed not to take any action to remove the Māori seats.

3.3. Māori representation in local government

Unlike at the national level, no system of guaranteed Māori representation exists at the local level.[33] Section 19Z of the Local Electoral Act 2001 allows any territorial authority to resolve to establish one or more Maori ward or constituency within its district, which would elect Māori member(s) onto the city, district or regional council.[34] A Māori ward may also be established if five per cent of the enrolled electors of the relevant local authority demand in writing a poll on the question and this is supported in the poll. Moreover, the local authority itself can decide to hold a poll on the matter of creating a Māori ward or constituency. Schedule 1A of the Act provides for the number of Māori members on a territorial authority to be elected in the Māori ward(s) to be proportional to the Māori share of the electors.[35]

The provisions for establishing Māori wards have rarely been invoked. As of 2016, of the 11 Regional Councils, 61 territorial authorities (city and district councils), and six unitary councils (incorporating both regional and territorial roles), only one—Waikato Regional Council—had established separate Māori wards under the provisions of the Local Electoral Act (Te Puni Kōkiri 2015). It created two Māori wards, each electing one member to council. One other authority, Bay of Plenty

[31] In 1996 there were five seats, in 1999 this rose to six, and since 2002 there have been seven seats.
[32] During the 2013 MEO 8261 voters chose to switch from the Māori to the General roll, while 8859 chose to switch to the Māori roll. Newly enrolling electors of Māori descent were much more likely to choose to enrol on the Māori Roll (6454) than the General Roll (2721) (Electoral Commission 2014).
[33] One reason why there may be less attention to Māori representation at the local level is that, as the legislation clarifies, it is the Crown, and not local government, that is party to the Treaty of Waitangi and that has direct obligations to Māori. The Local Government Act 2002 did, however, place an active responsibility on local authorities to ensure that they provide opportunities and processes for Maori to contribute to decision-making processes and that they engage in capacity enhancement.
[34] Such a resolution takes effect for the following two elections of the local authority and then continues unless either a subsequent resolution of the council or a poll of electors (local referendum) decides not to continue the Māori ward.
[35] The number of Māori members was to be calculated by the ratio of Māori to general electors, multiplied by the total number of seats on the territorial authority (excluding the mayor).

Regional Council, had previously established a Māori ward (electing three members), but had done so not on the basis of the 2001 Act, but by special enabling legislation (Sullivan 2003).[36]

At the end of the 2000s, when the government decided to unify all territorial authorities and regional councils across Auckland, there was considerable debate about whether or not elected Māori representation should be integrated into the new unitary council structure. The Royal Commission established to consider the future of governance in Auckland recommended that a new Auckland Council have three Māori seats (out of 23 on the council), of which two would be elected via Māori wards and one would be appointed (Royal Commission on Auckland Governance 2009). It considered this to be consistent with the spirit and intent of the Local Government Act 2002. However, the National Government of the day chose not to accept those recommendations and the eventual Local Government (Auckland Council) Act 2009 established a 20 member Auckland Council with no Māori wards.[37] It instead established an Independent Māori Statutory Board to 'promote social, economic, environmental, and cultural issues of significance' to Māori in Auckland, but which holds purely advisory functions (Minister of Local Government 2009).

4. Exercising electoral rights

4.1. Registration procedures: Becoming a Voter (for all categories, all levels of election)

It is compulsory for all those eligible to vote to register to vote, although it is not compulsory to cast a vote. This applies to all citizens and permanent residents (as defined by the Electoral Act) 18 or over, and the process is the same for all eligible voters, and for all types of election. The New Zealand Electoral Commission oversees the process of voter enrolment, and provides up-to-date electoral rolls to local councils ahead of local body elections.

Enrolment can be conducted online by creating a verified 'RealMe' account and then uploading the completed form. Alternatively, printed forms are available from Post Offices, via download, via text or via a Freephone number. For each of these options the form can be completed, signed and posted. It can also be scanned or photographed and uploaded to elections.org.nz/enrolme, emailed to enrolme@elections.org.nz or faxed to +64 4 801 0709.

Voters are encouraged to check their details between elections to make sure the details are correct. This can be done online by entering name, birthdate and address details into a search engine. Changes can be made online if any of the details are incorrect. RealMe registered users can also check enrolment details online. Voters can also visit a PostShop, call a Freephone number, or text a freetext number to check

[36] Bay of Plenty Regional Council (Māori Constituency Empowering) Act 2001.
[37] In doing so, it went against both the stated wishes of the Minister of Māori Affairs and the weight of public submissions to the parliamentary committee considering the bill.

that their details are accurate. If their details are inaccurate they will be given a new form to complete and return. Eligible voters are required to inform the Registrar of Electors if they move house. This can be done via any of the methods outlined above. Otherwise, they remain on the roll.

The Registrar of Electors holds periodic enrolment update campaigns, particularly ahead of elections. They send a form to all enrolled voters detailing the information currently held about them, along with a form allowing people to update their details if they have changed since the last election. Eligible voters need to make the changes, sign the form and return. If no changes are required they do not need to do anything; they remain enrolled. Voters can enrol to vote right up until the day before election day, although they will be required to cast a special vote if they enrol past the deadline for enrolment for an ordinary vote.

Electoral information is available on the Electoral Commission's website in 27 different languages, including sign language.

Citizen residents

Citizens who are 18 years or older must enrol to vote by completing the enrolment registration process described above.

For those who do not wish their personal details to be published on the Electoral Roll, they may apply to have their details included only on a confidential unpublished roll. Such people need to provide evidence that their personal circumstances warrant non-inclusion on the public roll. Acceptable evidence includes things such as a protection order in force under the Domestic Violence Act 1993, a restraining order under the Harassment Act 1997 or a statutory declaration from the police, a Barrister, solicitor, employer, Justice of the Peace, that their safety or that of their family would be compromised by having their details published on the electoral roll. The unpublished roll is confidential and can only be viewed by the Registrar of Electors.

Non-citizen residents

The procedures for non-citizen residents to enrol are the same as for citizens. In addition, the Registrar of Electors checks that non-citizens meet the definition of a permanent resident provided in the Electoral Act.

Non-resident citizens and permanent residents

It is not compulsory to enrol to vote if one lives abroad. For those who wish to enrol to vote, or to maintain their enrolment status, there are several enrolment options available: they can enrol or update their details online (only an option for those with a verified RealMe account or who have previously registered to update their details using a RealMe Logon); pick up an enrolment form from any NZ diplomatic post; ring a New Zealand number to get the form sent to them; or ask a friend or family member to complete an enrolment form for them. If they choose the latter option, they must ensure that the person who fills out a form on their behalf is themselves a registered elector or someone who holds the Power of Attorney over them. Such people are required to write 'Elector Overseas' next to their own signature, or, in the

case of the Power of Attorney, 'Elector Overseas – Power of Attorney' next to their own signature.

4.2. Registration procedures: Becoming a Candidate (all categories of person, all levels of election)

Only New Zealand citizens are eligible to stand as candidates for national and local government. To be eligible to stand as a candidate, a citizen must be enrolled as a voter and not be disqualified from voting. Section 52 of the Electoral Act sets out special rules applicable to public servants who wish to stand as candidates. In order to avoid the 'possibility of real or perceived conflicts of interest' state servants are required to take a leave of absence from their government positions between nomination day and the day after election day. If elected, state servants are deemed to have vacated their positions (Electoral Commission 2016).

To become an independent candidate for national parliament, an individual must be nominated by two enrolled voters by a date publicised by the Electoral Commission. This process can be followed also for those candidates wishing to stand for a registered party that is not making a bulk nomination, or as a candidate for an unregistered party. Candidates may not nominate themselves and may not stand in more than one electorate. Candidates who wish to stand as a candidate for a registered party must be nominated by that party by the date publicised by the Electoral Commission. This applies to both list and electorate candidates. Those wishing to stand as a list candidate must be included on the Party List submitted to the Electoral Commission by the due date.

4.3. Casting the Vote: Residents in national elections

Voting booths are open between 9.00 am and 7.00 pm on election day. In national elections voters can vote in a voting booth within their own electorate or in another electorate as a 'special voter', although frequently voting places will issue ordinary votes for adjoining electorates. For by-elections (to replace an electorate MP between national elections) voters may only vote in a booth in their own electorate.

All those enrolled sufficiently early before election day will have been sent an 'Easy Vote' card or a letter from the Electoral Commission in the mail. Voters can present these cards or letters to the returning office in order to be issued with voting papers. If a voter does not have either an Easy Vote card or a letter they simply tell the returning officer their name and address. The returning officer will locate their name on the electoral roll.

For those who are not able get to their own electorate on election day there are two options. They may choose to vote in advance in their own electorate. If they are unable to vote in advance, or prefer to vote on election day, but are unable to be in their own electorate on that day, they can go to any voting booth in the country and request to make a special vote. They will be given a declaration form to complete and their voting papers. The declaration forms can also be applied for in advance from advance voting booths or from a Returning Officer in their electorate.

Those who wish to enrol after Writ Day or who are on the unpublished roll will also need to cast a special vote and thus fill in the declaration form discussed above.

Those who need assistance to vote, such as those who are vision impaired, have severe difficulty with writing or reading, or those who have difficulty with the English language may request help by asking an electoral officer at the voting place or may take a friend or family member to the advance voting or voting place to help. (Electoral Commission 2016).

Section 162 of the Electoral Act 1993 requires employers to allow their employees opportunities to vote if they have not had reasonable opportunities to do so before starting work on election day, and the employer cannot make reductions to an employee's wages for doing so. Ship crews must be permitted by the master of the ship to go ashore to vote if the ship is located within the electorate within which they are enrolled. Penalties apply for employers who do not meet these requirements.

4.3.1. Casting the Vote: Residents in local body elections

All enrolled voters may vote in local government elections where they live. Two tiers of local government exist: 11 regional councils and 67 territorial councils. The latter includes city councils, district councils, local boards or unity authorities, the members of which all of which are directly elected. In addition, a proportion of community board and district health boards are directly elected.

Those who own properties outside the area in which they are enrolled to vote are eligible to go on a 'ratepayer' roll. This allows them to vote in local body elections both inside their own district and in any district where they own property, although the Local Electoral Act 2001 does not allow people to have more than one vote in the same election. This prohibition means that an individual voter who owns two properties within the same regional council district but in separate territorial council areas will be eligible to cast a vote for the mayoral and district council in both council areas in which they own houses, but, as the houses are in the same larger regional council area, they will only be eligible for one regional council vote and one district health board vote. If they own properties in different regional council areas, they will be eligible for one vote in each level of local body government in each region they own property in. While this does allow individuals to have more than one vote in local bodies nationally, arguably it does not breach the one-person, one-vote rule, as they are limited to one vote per election.

Voting occurs by postal vote, although the Local Electoral Amendment Act 2004 also allows for booth voting. A proposal to trial online voting in local government elections planned for late 2016 was rejected by the Government in April 2016 (RNZ 2016).

4.4. Casting the Vote in national elections: Non-residents

Non-resident voters in national elections are able to get their voting papers in one of three ways. Papers may be downloaded from the Electoral Commission's website; voters may request that voting papers be sent to them by the Electoral Commission; or

papers may be picked up from any overseas New Zealand diplomatic mission. Once completed, the voting papers can be uploaded to the Electoral Commission's website, or faxed, posted or couriered either to the Electoral Commission or to a New Zealand diplomatic post.

All overseas voting papers returned to an overseas post must be received by the end of voting at that post, usually 4.00 pm local time on the day before polling day. Those returned to the Electoral Commission must be returned before 7.00pm on election day.

Non-resident voters wishing to vote in a local body election do not have the same range of options in accessing voting papers as those voting in national elections. Voting is by mail only, and non-resident voters are required to have their voting papers sent to them at their residential address and to return those papers by post to the Electoral Commission.

5. Conclusion

New Zealand continues to be an example of a country with liberal and inclusive franchise laws. Most notable is the liberality of its franchise laws in relation to non-citizen voters, who are granted national voting rights after only one year's residence. This unusual feature of New Zealand's electoral system has been largely uncontroversial since its introduction in 1975, even as the number of people to whom the non-citizen voting laws extend has radically increased due to high levels of inward migration. Little statistical data is available on the electoral participation of non-citizens in New Zealand, making it difficult to make any claims about the political effects of enfranchising new migrants in this context.

Another notable feature of New Zealand's franchise laws is the presence of separate seats for Māori, and the use of an ethnic self-identification process for enrolment on the Māori electoral roll. Unlike non-citizen voting, the presence of the Māori seats has been periodically controversial (section 3.2), with, for example, the right-of-centre National Party stating in 2008 it would abolish the Māori seats when all historical Treaty of Waitangi claims were settled. National later entered an agreement with the Māori Party to withdraw the question of the Māori seats from the 2014 referendum on the electoral system (Taonui 2015), but the libertarian ACT Party continues to advocate for the seats' abolition. The question of Māori political representation also raises controversy in the context of local body elections, where there is no legal requirement for seats to be reserved for Māori.

New Zealand's electoral processes facilitate citizens' and permanent residents' access to their electoral rights, and rates of enrolment remain high: 90.16% of the eligible population were enrolled to vote in 2016 (Electoral Commission 2016). Nonetheless, the Electoral Commission has expressed concern about the declining levels of voter turnout, with the turnout in 2011 and 2014 recording the lowest ever levels of voter turnout with 74.2 and 77.9 per cent respectively (Electoral Commission 2016). As is common elsewhere, there is a strong age effect, with levels of electoral enrolment lowest among eligible voters 18-24 years old (Electoral Commission 2016). Low levels of turnout amongst young people and other sectors of

the community are unlikely, however, to be the result either of the franchise laws, or of their implementation, both of which tend to be more inclusive than is the international norm.

A similar point may be made about the low turnout among New Zealand's large diasporic population. Despite voting rights being available to New Zealand citizens and residents who regularly return home, and the availability of a comparatively wide range of mechanisms for casting an external vote, rates of participation for overseas-based New Zealanders remain very low. Reasons for low levels of turnout are unlikely to be associated with the difficulty of voting, as New Zealand facilitates overseas voting through a wider range of mechanisms than is common internationally (IDEA, 2007).

In conclusion, New Zealand's franchise laws are, by international standards, highly inclusive and effectively delivered by the agency tasked with managing elections. As a result, a large proportion of the population is enfranchised. However, New Zealand, like many other immigration countries, is experiencing a large increase in temporary migration, facilitated by the creation of a range of temporary work visas. The presence in New Zealand of a growing number of temporary migrants means a growing proportion of the resident population does not benefit from New Zealand's non-citizen voting rights.

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