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**THE MĀORI SEATS IN PARLIAMENT:
CONTINUING JUSTIFICATIONS FOR
GUARANTEED REPRESENTATION**

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I ABSTRACT

The objective of this paper is to analyse whether the Māori seats in Parliament should be retained. The author sets out the history of the seats and then poses three questions regarding their continuing existence. First, why are Māori entitled to separate representation when other equally under-represented groups are not? Second, if Māori are entitled to special representation measures, are the seats providing quality representation? And third, how do the seats fit into the wider New Zealand society and impact upon the rights of non-Maori?

The author argues that Māori are unique in the New Zealand political environment by virtue of their status as indigenous people and Treaty partner to the Crown, and furthermore, that this status warrants special electoral measures. There is an increasing international movement to recognise the unique political rights of indigenous peoples, epitomised by the proposed Draft Declaration on the Rights of Indigenous Peoples. Stronger reasons for retaining the seats can be found in the Treaty partnership, and guarantees of rangatiratanga, taonga and the rights and privileges of British citizens.

Māori's special status requires more than token measures, it requires meaningful representation. Despite the Royal Commission's concerns, the author argues that the seats now provide this under MMP. While other methods of representation in Parliament could be adopted, these do not have the same advantages as the seats. Alternative measures, which would increase Māori control over their own affairs and arguably give more weight to the Treaty partnership, such as a Māori state or separate Parliament, are unlikely to be implemented.

Although the seats give Māori something more than other groups, this does not have a detrimental impact on the rights of other New Zealanders. The author submits that the seats are not discriminatory, nor do they undermine the electoral system. In any case the seats can be justified in a free and democratic society under the New Zealand Bill of Rights Act 1990. The author concludes that the seats have a continuing role to play in New Zealand and should be retained.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 14,883 words

II INTRODUCTION

Parliament is the supreme lawmaker and has the power to impact greatly on the lives of all New Zealanders. As such, it is important that all New Zealand citizens can participate in this process through democratic Parliamentary elections.¹ In order to help Māori participate, special measures have been implemented.

The Electoral Act 1993 provides for special Māori electoral districts.² Only Māori can vote on the Māori roll for the seats in these districts, although they may choose to vote on the general roll for the general seats instead.³ The number of voters on the Māori roll influences the number of Māori electoral districts, and consequently Māori seats.⁴ Currently seven of the 120 seats in Parliament are from Māori electorates.⁵ But in total 18 Members of Parliament (MPs) identify themselves as Māori, a number roughly in proportion to the population.⁶

While it is undeniably important that Māori be represented in Parliament, the question is whether they should enjoy guaranteed representation, a benefit not offered to any other group.⁷ This has been the topic of much debate over the years, and a call to abolish the seats has re-emerged as a political platform for the National,⁸ New Zealand First,⁹ and ACT¹⁰ parties. Recently, the Electoral (Racially-Based Representation) Referendum Bill

¹ Note that there are exceptions as to who can vote. For example, voters must be over the age of eighteen and satisfy certain residency requirements. See the Electoral Act 1993 s 80 for disqualifications from registration.

² Electoral Act 1993 s 45.

³ Electoral Act 1993 ss 76 - 79 outline how this option may be exercised.

⁴ The number of voters on the Māori roll is divided by the quota for General electoral districts in the South Island to get the number of seats: Section 45(3)(a) Electoral Act 1993.

⁵ Elections New Zealand: NZ Electoral system at <<http://www.elections.org.nz/elections/esyst/mroll.html>> (last accessed 5 June 2003).

⁶ Māori make up just under 15% of the population, equivalent to 18 seats in Parliament. See www.stats.govt.nz/domino/external/pasfull.nsf/web/Media+Release+2001+Census+Snapshot+4+Māori (last accessed 7 July 2003).

⁷ RJ O'Connor "The Future of Māori Representation in Parliament" [1999] NZLJ 175, 176.

⁸ Hon Bill English, Leader of the National Party "Address to the National Party Lower North Island Regional Conference" (National Party Lower North Island Regional Conference, Masterton, 4 May 2003).

⁹ Rt Hon Winston Peters "Stealing Policies Won't Save Bill Says Winston" (4 May 2003) Press Release.

¹⁰ Stephen Franks, ACT New Zealand Māori Affairs Spokesman, "ACT Tautoko For National's Kaupapa" (4 May 2003) Press Release, 1. Stephen Franks, ACT New Zealand Māori Affairs Spokesman "Give Māori Credit, Labour" (5 May 2003) Press Release.

unsuccessfully sought referendums on Māori representation in Parliament and at local government level.¹¹

On the other hand, there have been moves to guarantee Māori representation in other branches of government. For example, the Local Electoral Amendment Act 2002 allows regional councils to establish Māori wards for electoral purposes.¹² The Local Government Act 2002 provides for one of the Local Government Commission's three members to have knowledge of tikanga Māori, and be appointed after consultation with the Minister of Māori Affairs.¹³ Similarly, there have been suggestions for any Supreme Court to include one judge versed in tikanga Māori.¹⁴

These trends pull in different directions and New Zealand must decide which path to take. This paper will examine the question of whether the seats should be abolished or retained.

In order to address this issue, the history of the seats, and their original justifications will be set out. While initially the seats were required for effective Māori representation in Parliament, many of the original justifications no longer apply. Although Māori should not be penalised for the seats' dubious origins, the seats should not survive merely by default either. If they are to be kept this must be on a rational basis, and justifications for their continuing existence must be sought.

A contemporary examination of the seats is required. First it must be established what differentiates Māori from others, and whether this warrants special representation unavailable to similarly under-represented groups. This discussion will focus on the status of Māori as tangata whenua, the indigenous people of New Zealand, and the Treaty of Waitangi.

¹¹ See (4 December 2002) 604 NZPD 2519 for the Bill's defeat.

¹² Local Electoral Amendment Act 2002 s 6, inserting new s19Z into the Local Electoral Act 2001.

¹³ Local Government Act 2002 s 33(2). See also s 14(1)(d) and s 81 which state that a Local Authority must provide opportunities for Māori to contribute to decision making.

Next the seats must be examined to see whether they are providing the required representation. Is there substance behind the symbolism? The Royal Commission on the Electoral System did not think the seats were meeting their goals, and this gives much weight to the movement to abolish them. The views of the Royal Commission will be analysed under the current electoral system, as will alternative proposals for representation. If the seats are not effective, their legitimacy is undermined and they become a token gesture. If this is the case, alternatives must be investigated, including the removal of all special measures. Arguably, even if the seats are providing effective representation in Parliament, this is not enough to embody a true Treaty partnership. Alternatives giving Māori greater decision-making powers will also be discussed.

Finally, there will be an analysis of the seats' impact on the rest of society. Māori rights are important, but those must be balanced against the rights of other New Zealanders. A common complaint against the seats is that they discriminate against non-Māori, and that their presence undermines the democratic integrity of our electoral system. These concerns must be examined and the question of whether the right balance has been struck between Māori and non-Māori rights determined. The seats will be analysed under the New Zealand Bill of Rights Act 1990, which is the appropriate legal framework for determining whether a group is privileged or disadvantaged by a certain measure. Māori representation must be achieved in a manner consistent with a free and democratic society.

III HISTORY OF THE MĀORI SEATS

The first Parliament was established in New Zealand by the New Zealand Constitution Act 1852 (UK). It had six elected Provincial Councils and a General Assembly with a nominated Legislative Council and an elected House of Representatives. All males over twenty-one with a freehold estate within the electorate valued at £50 or more, a leasehold

¹⁴ Report of the Advisory Group to the Attorney-General "Replacing the Privy Council: A New Supreme Court" (Office of the Attorney-General, Wellington, April 2002) 24. Note however that this does not appear in the Supreme Court Bill 2002, no 16-1.

of at least £10, or a tenement with an annual rent of £10 in town or £5 in rural areas, were able to vote. While not directly discriminating against Māori, the effect was that most Māori, with their communal ownership of generally unregistered land, were unable to vote.¹⁵

In response to this situation, the Māori Representation Act 1867 provided for three Māori representatives in the North Island and one in the South Island. This motivation for the seats is illustrated in the preamble to the Act:

WHEREAS owing to the peculiar nature of the tenure of Māori land and to other causes the native aboriginal inhabitants of this colony of New Zealand have heretofore with few exceptions been unable to become registered as electors or vote at the election of Members of the House of Representatives or of the provincial councils of the said colony and it is expedient for the better protection of the interests of Her Majesty's subjects of the native race that temporary provision should be made for the special representation of such of Her Majesty's native subjects in the House of Representatives or of the provincial councils of the said colony.

Protecting Māori was not the only concern, however. The Act was a useful way to reward loyal Māori, placate rebels and assure Britain that it was protecting Māori rights.¹⁶ The seats were also conceptually linked to the demands of South Island gold diggers who received increased representation in a separate Act passed the same day.¹⁷ While some commentators argue that there were higher principles involved,¹⁸ the end result was a temporary measure that left Māori substantially underrepresented.¹⁹

The seats were extended for a further five years in 1872, and in 1876 were extended indefinitely. However this was not in order to protect Māori, but rather out of fear that Māori would hold the balance of power in too many North Island seats if a common roll were established.²⁰ It was expected that in time miscegenation and a steadily declining

¹⁵ MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B - 13 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

¹⁶ Sorrenson, above, B - 20.

¹⁷ Westland Representation Act 1867.

¹⁸ See Sarah A McClelland "Māori Electoral Representation: Challenge to Orthodoxy" (1997) NZULR 272.

¹⁹ The Act was only meant to stay in place for five years. Some 50 000 Māori were given 4 seats, compared to 72 seats for the 250 000 Pākehā: Sorrenson, above, B - 21.

²⁰ Sorrenson, above, B - 24.

Māori population, combined with the rapid increase in the European population, would remove this danger.²¹

There was discontent with separate representation and the Māori seats underwent various modifications to make them more consistent with the General seats,²² but it was not until 1986 that their future was seriously considered. A Royal Commission on the Electoral System (The Royal Commission) was established to investigate the options for a new electoral system for New Zealand, including whether to retain the Māori seats.²³

Although The Royal Commission regarded Māori representation as a positive goal for an electoral system, they favoured abolishing the Māori electoral option, roll and the seats. The Royal Commission considered that separate Māori seats meant that non-Māori MPs were effectively given a license to ignore Māori.²⁴ Furthermore, the Māori MPs were reliant on the majority for support, so were ineffective at representing Māori concerns.²⁵ The Royal Commission thought that Mixed Member Proportional (MMP) system would be the most effective means of ensuring appropriate Māori representation in Parliament,²⁶ combined with the waiver of the proposed 4% threshold for Māori parties.²⁷

This proposal to abolish the seats met strong Māori resistance based on the cultural and constitutional importance of separate Māori representation.²⁸ As a result the seats were retained under MMP.

In 2001 the MMP Review Committee reconsidered the issue of Māori seats, but could not reach unanimous agreement on the whether they should be abolished or retained, nor

²¹ Sorrenson, above, B – 24.

²² See the Electoral Amendment Act 1950 s 4 and the Electoral Act 1956 s 43 for example, which respectively scheduled Māori elections on the same day as General electorates, and made enrolment compulsory. The Electoral Amendment Act 1975 s 17 gave Māori the choice of registering on either roll.

²³ Their report can be found at Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

²⁴ Royal Commission, above, 91.

²⁵ Royal Commission, above, 91.

²⁶ Recommendation 3 of the Royal Commission, above, 106.

²⁷ Royal Commission, above, 101.

²⁸ MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I 23 A, 19.

whether the provisions dealing with them should be entrenched.²⁹ In response to the Report, the Government maintained the status quo, noting that any changes to the voting system should not be lightly made, nor too frequently.³⁰

IV SYMBOLISM: THE SPECIAL STATUS OF MĀORI

While changes to the electoral system should not be made lightly, unmeritorious measures should not be maintained by default either. Many of the original justifications for the seats, such as the property qualification preventing Māori registration, or special representation for gold diggers, have long since ended. However, just because the original reasons for their existence no longer apply does not mean that the seats should be discontinued. But if they are to remain, contemporary justifications must be found.

The first question to address when considering the maintenance of the status quo is whether Māori are entitled to special representation. There are other groups in society who are similarly under-represented in Parliament and yet do not receive the same benefits.³¹ Two bases for differentiating Māori, notably their status as tangata whenua, and the Treaty of Waitangi, will be examined to see whether these justify special representation. If they do not, the seats' legitimacy is undermined.

A Indigenous Rights

Despite some similarities with other under-represented groups in Parliament, Māori are unique as the indigenous people of New Zealand. In the words of academic commentator Andrew Sharp:³²

Māori have insisted they are not just another ethnic group ... They are tangata whenua, 'children of the land', intimately connected with the place in a way far deeper than any Pākehā could be, or any other

²⁹ MMP Review Committee, above, 19 - 27.

³⁰ Ministry of Justice "Government Response to Report of MMP Review Committee on Inquiry into the Review of MMP" [2001] AJHR A5, 5.

³¹ For example, with only 35 female MPs out of 120, women are not represented in Parliament proportionate to the wider population

³² Andrew Sharp "Blood, Custom and Consent: Three Kinds of Māori Groups and the Challenge They Present to Governments" (2002) 52 UTLJ 9, 10 - 11.

recent immigrant. Other peoples can go home; Māori have nowhere else to go. As original inhabitants too – as an ‘indigenous’ people – they have special claims against Pākehā and their state.

This indigenous status may give Māori a unique claim to guaranteed representation.³³ Māori were here first and were exercising sovereignty, which was then acquired by Britain in dubious circumstances.³⁴ Māori argue that their rights to participate in decision-making should continue, post cession of sovereignty, because of this, and that they should be recognised by the Government as equals.³⁵

Indigeneity alone has not yet been recognised as a basis for political rights in New Zealand, but there is increasing international awareness of the rights of indigenous people, and over time the position may change. At the United Nations a Working Group on Indigenous Populations (WGIP) has been established,³⁶ and has produced a Draft Declaration on the Rights of Indigenous Peoples (the Draft) for adoption and proclamation by the General Assembly.³⁷ The Draft is currently before the Commission on Human Rights where an open-ended inter-sessional working group (the Working Group) is considering it.³⁸

Unlike other international documents, the Draft Declaration would clearly apply to all indigenous peoples.³⁹ WGIP has declined to define the term “indigenous”, and prefers

³³ Trevor Knight “Electoral Justice for Aboriginal People in Canada” (2001) 46 McGill LJ 1063, 1091.

³⁴ The Māori understanding of the Treaty has been challenged on the basis of bad translations and inadequate explanations. It must also be noted that not all Chiefs signed the Māori version, and that some of those that did sought to revoke their signature soon after. For a history of the Treaty and the circumstances surrounding it see Claudia Orange *The Treaty of Waitangi* (Allen & Unwin and Port Nicholson Press, Wellington, 1987).

³⁵ Andrew Sharp “Blood, Custom and Consent: Three Kinds of Māori Groups and the Challenge They Present to Governments” (2002) 52 UTLJ 9, 10 – 11.

³⁶ ECOSOC Resolution 1982/34 (7 May 1982).

³⁷ The final text as agreed upon by WGIP at its eleventh session can be found at E/CN.4/Sub.2/1993/29/Annex I 23 August 1993.

³⁸ Sarah Pritchard “Working Group on Indigenous Populations: mandate, standard-setting activities and future perspectives” in Sarah Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (The Federation Press, Annandale (NSW), 1990) 50.

³⁹ For example, the International Covenant on Civil and Political Rights (12 November 1968) 999 UNTS 272 gives rights, such as self-determination, which indigenous people seek. However, it is not clear whether this applies to indigenous peoples or not as the Human Rights Committee has refused to determine whether they can claim this right as it is outside the Covenant's individual complaint mechanism: *Lubicon Lake Band v Canada*, Communication No 167/1984, UN Doc CCPR/C/41/D/167/1984 (1990), paras 13.3 and 32.1. Of course, the same issue as to whether indigenous people are a “people” qualifying for self-determination is proving contentious in deliberations regarding the Draft Declaration.

indigenous peoples to define themselves.⁴⁰ However, a commonly used definition is that of the Special Rapporteur Martinez Cobo, which includes both subjective and objective elements:⁴¹

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories ... They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Māori fit this definition as they were here before European colonisation, consider themselves distinct from Pākehā and, as the Treaty claims process shows, they have made great efforts to reclaim their culture, their language and their lands and resources to pass on to other generations. Even if Māori were not the very first people here, there is still good reason to treat them as indigenous.⁴² Within any criterion Māori fit the term.⁴³

As an indigenous people, Article 4 of the proposed Draft Declaration would recognise that Māori have the right to participate fully in the political life of the State. The proposed Article 19 further provides that Māori should be entitled to:

participate fully if they so choose, at all levels of decision making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own decision-making institutions.

Some State Parties to the Declaration have expressed concern that as currently drafted, Article 19 gives an unconditional right of participation, and that conflicting interpretations

⁴⁰ UN Doc E/CN.4/Sub.2/1982/33, para 42. See also Article 8 of the Draft Declaration which recognises the right of indigenous populations to identify themselves as indigenous.

⁴¹ As cited in Sarah Pritchard "Working Group on Indigenous Populations: mandate, standard-setting activities and future perspectives" in Sarah Pritchard (ed) *Indigenous Peoples, the United Nations and Human Rights* (The Federation Press, Annandale NSW, 1990) 43.

⁴² F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 78, 80 – 81. Note however that FM Brookfield suggests that where an indigenous people recognises principles of conquest and seizure of power in their own customs (for example when Māori colonised the Chatham Islands) then this undermines to some extent their claims to continuing sovereignty when colonised themselves.

⁴³ Ian Brownlie *Treaties and Indigenous Peoples: The Robb Lectures 1991* (Clarendon Press, Oxford, 1992) 55.

are possible.⁴⁴ While State Parties may prefer an interpretation where lesser forms of participation, such as consultation, could be enough, the proposed Draft requires *full* participation through representatives chosen by the indigenous groups themselves.

If implemented, Article 4 would protect the seats. As will be discussed in Part V, the seats ensure Māori have a direct say in what decisions are made in Parliament, the highest level decision-making body in New Zealand. Furthermore, MPs for the Māori seats are elected exclusively by Māori, and so reflect their own values and concerns. That the seats are an appropriate method of Māori participation, is shown by their strong Māori support.⁴⁵

It is important to remember that the Draft Declaration has yet to be put to the United Nations General Assembly and so as yet gives no protection to the seats. The progress on the Draft Declaration is slow,⁴⁶ and it is predicted that significant changes will be made before it is put to the General Assembly.⁴⁷ It is difficult to imagine how New Zealand, among other key nations, would come to sign the Draft Declaration as currently formulated.⁴⁸ To do so could well create a host of internal legal challenges, increase non-indigenous anxiety and result in political turmoil.⁴⁹

⁴⁴ See the comments of Norway and Chile respectively in ATSIIC *International Indigenous Issues: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (1999) at http://www.atsic.gov.au/Issues/indigenous_rights/international/draft_declaration/draft_dec_six_five.asp (last accessed 19 August 2003).

⁴⁵ This support can be seen in the large number of Māori choosing the Māori roll. 14 000 Māori voters moved from the General roll to the Māori roll at the last electoral option, and over 15 000 of the 18 500 Māori registering for the first time signed on to the Māori roll: "Parliament's Māori Seat anachronism" (24 January 2003) *The Dominion Post* Wellington, 4.

⁴⁶ In its first four years of discussion, the Commission adopted only two Articles. Heather S Archer "Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States" (1999) 5 *J Intl Legal Stud* 205, 208.

⁴⁷ Archer, above, 213.

⁴⁸ For example, currently Article 3 of the Draft Declaration would give indigenous people the right to self determination, which in a broad form may give a right to secede from the State. Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 39.

⁴⁹ Coates, above, 39.

Even if adopted by the General Assembly in substantially the same form as WGIP recommended, the seats might not be effectively protected by the Declaration. It will be a declaratory statement with only moral force and will require State ratification.⁵⁰ Once ratified, the Declaration has no guidelines or specific directions as to what is required and States can determine what is required themselves, and do nothing or only effect minimal changes.⁵¹ Nor is there any complaint mechanism included.⁵² Indigenous groups regard the Declaration as being too flexible in this regard.⁵³

Therefore while Māori status as tangata whenua is part of the context for special recognition, it does not currently give substantive rights. Other justifications must be sought out.

B The Treaty of Waitangi 1840

Māori are also unique in their status as Treaty partner to the Crown. As a constitutional document of great importance,⁵⁴ the Treaty of Waitangi 1840 (the Treaty) gives Māori a stronger claim to special representation than the Draft Declaration. There is an established jurisprudence regarding Treaty rights, and a political sentiment that New Zealand should aim to recognise the special relationship created by this document, and honour the guarantees contained therein.

⁵⁰ Heather S Archer "Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States" (1999) 5 J Intl Legal Stud 205, 219.

⁵¹ Archer, above, 239.

⁵² Even if such a mechanism were included, there could still be difficulties enforcing decisions made under it. For example, although the Human Rights Committee considers its views to be binding (JS Davidson "Intention and Effect: The Legal Status of the Final Views of the Human Rights Committee" (2001) NZ Law Rev 125, 142), the majority of the Court of Appeal has considered they are not binding on New Zealand, although they do have moral force: *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 (CA), per Keith J for the Court. On appeal, the Judicial Committee preferred not to conclude on this aspect. While they accepted that the views were not binding, and that the State party is free to criticise or refuse to implement them, the Committee nonetheless sympathised with Thomas J in the CA (dissent) that its functions are adjudicative: *Tangiora v Wellington District Legal Services* [2000] 1 NZLR 17, 21 (PC) per Lord Millet.

⁵³ Archer, above, 238.

⁵⁴ *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140, 184 – 185 (CA) per Thomas J (dissenting); *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513, 516 (PC) per Lord Woolf.

Although the Electoral Act does not show the Treaty's significance in this area by direct reference, the Treaty is of general application and colours all matters to which it has relevance.⁵⁵ Whether the general relationship created by the Treaty, and the guarantees under Articles II and III, are relevant to the seats will now be examined. If so, this gives weight to the Māori claim for special representation.

1 Relationship between Māori and the Crown

In *New Zealand Māori Council v Attorney-General*⁵⁶ Cooke P described the Treaty as a "partnership between races".⁵⁷ This partnership was about creating one nation where Māori and Pākehā could peacefully coexist as equals.

Some argue that the partnership does not protect the seats, in fact it is a reason to abolish them. According to this view, because the seats give Māori something that others do not get, they foster separatism and undermine the Treaty partnership.⁵⁸ A partnership requires Maori to get the same rights, not more.

However, the goal of the seats is not separatist. Instead they aim to give Māori a proper place in the decision making process so that they can enjoy the same benefits as Pākehā. President Cooke was very clear in the *Māori Council Case* that a partnership does not require Maori to be assimilated, but that they can retain their unique characteristics and rights within this relationship.⁵⁹ The seats try to ensure that New Zealand law and policy does not ignore the Māori Treaty partner by assuming they have the same needs as other New Zealanders.

The partnership relationship creates responsibilities analogous to fiduciary duties. The Crown has to actively protect Māori interests, to the fullest extent reasonably

⁵⁵ *Barton-Prescott v Director-General Social Welfare* [1997] 3 NZLR 179, 184 (HC) per Gallen and Goddard JJ.

⁵⁶ [1987] 1 NZLR 641.

⁵⁷ *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 664 (CA).

⁵⁸ See for example the ACT Party submissions to the MMP Review Committee: MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I 23 A, 21.

⁵⁹ *New Zealand Māori Council* [1987], above, 664.

practicable.⁶⁰ Abolishing the Māori seats is only in line with protection of Māori interests if Maori are able to participate properly in decision making without them,⁶¹ or they are replaced with a more suitable method for Māori input.⁶² At the very least, as a Treaty partner, Māori should be consulted before the seats are abolished.

It is important to note that as a product of statute, the seats would require legislation to remove them. If removed contrary to Crown policy, arguably there would be no breach by a Treaty partner. The Treaty was signed by over 500 Māori Chiefs and representatives of the British Crown, whose responsibility now resides with the Crown in right of New Zealand.⁶³ The "Crown" is a nebulous concept, but in its constitutional role it can be considered the embodiment of executive government.⁶⁴ The Crown is not Parliament.

However, while MMP has certainly made legislative policy more contestable, especially where there is a minority Government or policy differences between coalition parties,⁶⁵ it is unlikely that the seats would be removed against Crown wishes. The Government still controls the legislative programme as it initiates most legislation and determines the position of bills on the Order Paper. As such, the Crown still retains much control over what happens in Parliament.

Furthermore, some commentators now suggest that a constitutional convention is developing whereby the New Zealand Parliament may not legislate contrary to the Treaty principles,⁶⁶ despite the orthodox position that the Treaty does not limit Parliament's

⁶⁰ *New Zealand Māori Council* [1987], above, 664, per Cooke P.

⁶¹ See Part VB(1) below, which argues that this is not currently possible.

⁶² For example, the New Zealand Māori Council has recommended a Senate (ten Māori, ten non-Māori) and two legislative bodies, a chamber of Māori representatives (fifteen members) and a general chamber (eighty five members): M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 297. See Part VB(2) and (3): Other Alternatives for a further discussion.

⁶³ *New Zealand Māori Council v Attorney-General* [1994], 1 NZLR 513, 517 (PC) per Lord Woolf. The existence of the Crown in right of New Zealand is confirmed by the Constitution Act 1986, s 2.

⁶⁴ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 548.

⁶⁵ Joseph, above, 318.

⁶⁶ Blades "Article 27 of the International Covenant on Civil and Political Rights: A Case Study on Implementation in New Zealand" [1994] 1 CNLR 1, 32 fn 197.

sovereignty. In any case, the Courts will not lightly ascribe to Parliament an intention to breach Treaty principles and will try to interpret legislation consistently.⁶⁷

2 *Specific guarantees under the Treaty*

Aside from creating an on-going relationship between the Crown and Māori, the Treaty also made certain guarantees to Māori, which should be upheld. Whether separate political representation is necessary to fulfil these promises must be examined.

(a) Sovereignty, kawanatanga and tino rangatiratanga

The Māori and English versions of the Treaty are not exact translations of one another. This gives rise to arguments over what was actually ceded by Māori. Most of the 500 Chiefs signed the Māori version, under Article II of which Māori retained tino rangatiratanga over their taonga.⁶⁸ Te tino rangatiratanga can be translated as full authority.⁶⁹ Combined with the cession of kawanatanga in Article I, meaning governance,⁷⁰ this leaves open the argument that Māori thought they were ceding something less than sovereign power.

While arguments for a reassertion of Māori sovereign power may be attractive,⁷¹ it must be recognised that both versions gave some legitimacy to the British presence, and to

See also the Legislative Advisory Committee *Legislative Advisory Committee Guidelines on Process and Content* (2001, Wellington) chapter 5 which states that all legislation is expected to comply with the Treaty; and the Department of the Prime Minister and Cabinet *Cabinet Office Manual* para 5.35 at <http://www.dPMC.govt.nz/cabinet/manual/5.html> (last accessed 19 August 2003) where it states that Ministers must draw Cabinet's attention to any implications concerning Treaty principles when bids are made to include bills in the legislative programme.

⁶⁷ *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140, 160 (CA).

⁶⁸ Claudia Orange *The Treaty of Waitangi* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) 1, 41.

⁶⁹ "Full authority" is the translation preferred by the Waitangi Tribunal. See Waitangi Tribunal *Muriwhenua Fishing Claim: Wai 22* (Department of Justice, Wellington, 1987) 174.

⁷⁰ MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B- 10 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3. See also I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives on the Treaty of Waitangi* (Oxford University Press, Auckland, 1989), 319

⁷¹ For example, at international law the doctrine of contra proferentem states that ambiguities or uncertainties in the Treaty should be resolved against the Crown as the party which drafted it and put it forward. This would mean disputes over cession of sovereignty should be resolved in favour of Māori.

the exercise of Crown authority in New Zealand.⁷² The English version of Article II makes it clear that sovereignty was ceded to Britain. It is generally accepted that this happened, partly through discovery, partly through cession, partly through occupation and partly by assertion.⁷³ The Courts accept Parliament's sovereignty.⁷⁴

The British had a very precise understanding of what "sovereignty" meant. In the words of Paul McHugh:⁷⁵

It was the power to make and enforce commands which, in turn, issue from a political superior, knowing subjection to no other body. It is thus a power of independent lawmaking and enforcement. English law has long recogni[s]ed that the sovereignty of the Crown over its territory is exclusive and exhaustive ... The Crown's title to its territory is indivisible – it shares the sovereignty with no one.

It is important to emphasise that in New Zealand the Crown's sovereignty is seen to be exclusive, with no room for rangatiratanga as a separate source of sovereign power.⁷⁶ While Māori, in effect, continued governing themselves in some areas, and their customs continued after 1840, under British constitutional theory this occurs with the presumptive permission of the Crown rather than as an exercise of independent and continuing sovereignty.⁷⁷

But accepting British sovereignty does not mean Māori lost all rights – even a literal reading of the English version gives them some control. Rangatiratanga could be seen as

However, that the Court of Appeal has interpreted both versions together, rather than one taking precedence over the other: *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641.

⁷² F M Brookfield "The New Zealand Constitution - the Search for Legitimacy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 1, 5.

⁷³ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 38.

⁷⁴ See Somers J in *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641, 690 where he states that "I am of the opinion that the question of sovereignty in New Zealand is not in doubt ... Sovereignty resides in Parliament". No other member of the Court dissented on this point. See also *Manukau v Attorney-General* [2000] NZAR 621 (HC) where the Executive Council of the Hereditary Sovereign Confederation of United Tribes of Nu Tireni (New Zealand) challenged Parliamentary sovereignty, but the claim was struck out as so untenable that it could not succeed.

⁷⁵ PG McHugh "Constitutional Theory and Māori Claims" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 25, 37.

⁷⁶ McHugh, above, 39.

⁷⁷ McHugh, above, 40.

entitling Māori to a measure of autonomy within New Zealand.⁷⁸ This would recognise the power of Māori to control and define their individual and collective identities.⁷⁹

Whether the seats fulfil this definition of rangatiratanga is debatable. The seats necessarily function within a non-Māori institution, where Māori are a minority and are subject to non-Māori ideals and demands. As such they could be considered too weak a form of participation to qualify as rangatiratanga.

Nevertheless, the Waitangi Tribunal has accepted that the seats could be seen as an expression of autonomy within the New Zealand State, and has suggested that they could be the closest form of rangatiratanga currently available to Māori.⁸⁰ The seats give Māori some say on laws and policy that will impact on Māori cultural, economic and social wellbeing. Rather than having decisions made for them, Māori can play an active part in the process. As such, they allow Māori to exercise a limited amount of control over their collective destiny by guaranteeing them a place in the Legislature. Furthermore, the seats recognise that Māori did have some prior sovereign rights and that while no longer sovereign, have a special interest in the way the country is run.

(b) Taonga

Even if it is not accepted that rangatiratanga embodies autonomous rights, or that the seats express this, a limited reading based on the English version of the Treaty includes in rangatiratanga the right to "full exclusive and undisturbed possession" of taonga. Taonga means "things that are highly valued", and is a wider concept than the English version, including both tangible and intangible things,⁸¹ and could potentially encompass the seats. If the seats are taonga, they must be actively protected.

⁷⁸ The Waitangi Tribunal *Māori Electoral Option Report: Wai 413* (Brookers Wellington, 1994) 4.

⁷⁹ Patrick Mackhelm "First Nations Self Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382, 387.

⁸⁰ The Tribunal did not express an opinion on whether they were an expression of rangatiratanga, as this was only brought up in the claimant's closing address: Waitangi Tribunal *Wai 413*, above, 4, 14.

⁸¹ Waitangi Tribunal *Manukau Claim Report: Wai 8* (Government Printer, Wellington, 1985) 70.

The Waitangi Tribunal has required a high evidentiary onus to be met before something is found to be a taonga. A tradition of longstanding is not enough.⁸² As the seats were created post 1840 by non-Māori, and continue to function according to non-Māori rules in a non-Māori environment where Māori are a minority, it is questionable whether they qualify as taonga.

On the other hand, although originally a Pākehā creation, the seats have been indigenised.⁸³ The traits valued in Māori MPs are not necessarily the same as for those in General seats, and Māori MPs are subject to different expectations.⁸⁴ For example, they must be competent on the Marae and knowledgeable about tikanga Māori. The seats are highly prized within Māoridom and have taken on a cultural significance far beyond that envisaged in 1867. The huge amount of support for the seats can be seen in the uproar created by attempts to abolish them under the new Electoral Act,⁸⁵ the increasing number of Māori enrolled on the Māori roll,⁸⁶ and the great standing and honour of the Māori MPs within the Māori community.⁸⁷

Although the Waitangi Tribunal ultimately left open the possibility that the seats were taonga, it stated in the *Māori Electoral Option Report* that:⁸⁸

the right of political representation in the form of four Parliamentary seats reserved to Māori has long been a highly valued right and expression of rangatiratanga, as is the Māori language. The right of political representation has now been enhanced by the Electoral Act 1993 and the evidence before us strongly suggests that the present rights are highly prized.

Further arguments for their recognition as taonga can be made by analogy. In the *Te Reo Māori Report*, the Waitangi Tribunal held that language was a taonga. They came to this conclusion on the basis that language was an essential part of the culture, and was

⁸² See Waitangi Tribunal *The Petroleum Report: Wai 796* (Legislation Direct, Wellington, 2003) 42 - 44.

⁸³ MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B - 57 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

⁸⁴ Sorrenson, above, B - 57.

⁸⁵ The opposition is recorded at MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I 23A, 19.

⁸⁶ The increasing number of Māori on the Māori roll has allowed the number of seats to rise from four to seven over the last two electoral options.

⁸⁷ The mana of the MPs is described in Nick Venter "Horomia: On the Marae He's The Man" (14 July 2003) *The Dominion Post* Wellington, 2.

highly prized among Māori as the very claim itself and the widespread support in Māoridom showed.⁸⁹ Furthermore, the right to use Māori language would have been one of the rights the Chiefs would have expected to be covered by the Treaty.⁹⁰

Applying this to the Māori seats, political power was an essential part of the Māori culture. Prior to European colonisation Māori had well-established tribal governance structures and lived in a highly political atmosphere.⁹¹ If the Chiefs had realised they would lose their mana, they would not have signed the Treaty.⁹² The seats are the contemporary realisation of this rangatiratanga, and are taonga, which must be protected. The Treaty is a living document, and its guarantees must be applied in light of modern circumstances, not limited to 1840.⁹³

Even if the seats are not themselves taonga, arguably they are necessary to protect other established taonga such as lands, fisheries, and language. While it was accepted in *New Zealand Māori Council v Attorney-General*⁹⁴ that the Crown is not obliged to go beyond taking action that is reasonable in the prevailing circumstances when protecting taonga, the Māori seats are a reasonable means of doing so. Other ways for Māori to protect taonga, such as having their interests taken into account under the Resource Management Act,⁹⁵ or through consultation,⁹⁶ only go some of the way. Parliament is the supreme lawmaker, and thus has ultimate control over what happens to these resources. Recent examples, such as the announcements that legislation will be passed to deny

⁸⁸ Waitangi Tribunal *The Māori Electoral Option Report: Wai 413* (Brookers, Wellington, 1994) 33.

⁸⁹ Waitangi Tribunal *Te Reo Māori Report: Wai 11* (Department of Justice, Wellington, 1986) 20.

⁹⁰ Waitangi Tribunal, *Wai 11*, above, 22.

⁹¹ MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B-6 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

⁹² R J Walker "The Treaty of Waitangi as the Focus of Māori Protest" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 263, 266.

⁹³ *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641, 650 (CA) per Cooke P for the Court.

⁹⁴ [1994] 1 NZLR 513, 517 (PC).

⁹⁵ Resource Management Act 1991 s 6(e) provides that the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wahi tapu, and other taonga must be taken into account when exercising the functions and powers under the Act.

⁹⁶ In *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 560 (CA) Cooke P for the Court recognised that rights of consultation are not enough to protect taonga.

purported Māori ownership over the foreshore,⁹⁷ or prevent compensation for lost oil rights on their land,⁹⁸ demonstrate that the Legislature has the power to impinge on Māori property rights, and is willing to use it. As such, it is imperative that Māori have at least some active part in making those decisions.

(c) Rights and Privileges of British Citizens

Article III of the Treaty gave Māori all the "Rights and Privileges of British Subjects", but this does not necessarily advance the case for separate representation. It could be argued that Article III only guarantees Māori the same rights as British citizens and so does not cover special measures such as the Māori seats. Māori are entitled to political representation, but only when exercised in the same manner as for all other citizens.

This is not an attractive argument. The Waitangi Tribunal considered that the extension to Māori under Article III of these rights and privileges necessarily included the right of political representation.⁹⁹ The Tribunal even went so far as to say that it was difficult to imagine a more important or fundamental right.¹⁰⁰ The rights and privileges of British citizens were given as consideration for the substantial concessions made by Māori under the first two Articles,¹⁰¹ and as such must be meaningful rights. The Crown has vigorously enforced its side of the Treaty bargain, and Māori should get the benefit of the guarantees made to them. Sometimes in order to enjoy the equality of rights and privileges, special measures are needed. If the seats are needed in order for Māori to enjoy effective representation, as will be examined in the next Part, then they must be retained.

V ***SUBSTANCE: QUALITY REPRESENTATION?***

⁹⁷ The legislation will deem the seabed and foreshore to be in the public domain rather than use ownership concepts. Some Māori MPs such as Parekura Horomia have supported the move, others such as Tariana Turia are less accepting. See Nick Venter and Gordon Jon Thompson "Beaches for all: Angry Māori groups warn of protest" (19 August 2003) *The Dominion Post* Wellington A1.

⁹⁸ See "Clark rejects Māori oil claims" (20 May 2003) *The Dominion Post* Wellington, 1.

⁹⁹ Waitangi Tribunal *Māori Electoral Option Report: Wai 413* (Brookers, Wellington, 1994) 12.

¹⁰⁰ Waitangi Tribunal, *Wai 413*, above, 12.

¹⁰¹ Waitangi Tribunal, *Wai 413*, above, 13.

A *The Māori Seats*

Indigenous status and Treaty rights provide theoretical justifications for separate representation, but to create a true Treaty partnership there must be substance behind the theory. For adequate protection of taonga, or true enjoyment of the same rights as British citizens, the Treaty requires meaningful participation and active protection of Māori rights. If the seats are not providing this, they must either be reworked or removed. As opponents of the seats place much importance on the fact that the Royal Commission recommended abolishing the seats, it is necessary to examine the reasoning behind those recommendations.

1 *The Royal Commission's recommendations*

The Royal Commission believed that Māori should be represented in the House, but that it must be done in an effective manner. To test whether the seats provided the required quality of representation, the Commission set out five principles, constituting:¹⁰²

the conditions under which an important minority might reasonably expect to enjoy a just and equitable share of political power and influence in a decision-making system which is subject to the majority principle and over which the political parties hold sway.

These principles are that:¹⁰³

- Māori interests should be represented in Parliament by Māori MPs
- Māori electors ought to have an effective vote competed for by all political parties
- All MPs should be accountable in some degree to Māori electors
- Māori MPs ought to be democratically accountable to Māori electors
- Candidate selection procedures of the political parties should be organised in such a way as to permit the Māori people a voice in the decision of who the candidates are to be.

The principal disadvantage of the seats in light of these objectives was that, traditionally, the seats allowed non-Māori MPs, the majority in the House, to ignore

¹⁰² Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3, 87.

Māori concerns.¹⁰⁴ Even in areas where Māori held large numbers, they were not using their voting power to bring about greater responsiveness to Māori concerns.¹⁰⁵ Because the seats were for all intents and purposes viewed as Labour seats, there was no incentive for any political party to campaign vigorously for them by offering policies better suited to Māori concerns.¹⁰⁶

Historically, the effectiveness of Māori MPs was not a matter of what they could achieve, but of how much they were allowed to achieve.¹⁰⁷ There were very few periods when a Māori MP held the position of Minister of Māori Affairs and so there was little chance for Māori to initiate policy. The overall record of Parliament in dealing with Māori was largely unsatisfactory.¹⁰⁸

Further difficulties were found in the large demographic size of the electorates, which made adequate service impossible and hindered the development of grass roots parties.¹⁰⁹ The fixed number of seats was also felt by Māori to be unjust, and provided little incentive for registration on the Māori roll.

Overall, the Royal Commission considered that the seats fell far short of ensuring an effective vote for Māori electors or in holding all MPs accountable to Māori. As such the seats made it extremely difficult for Māori MPs to protect and promote Māori concerns.¹¹⁰

The Royal Commission concluded that the electoral system should be changed to MMP, and that this would enable better representation for Māori without the need for the seats.¹¹¹ A common roll under an appropriate electoral system would:¹¹²

¹⁰³ Royal Commission, above, 88.

¹⁰⁴ Royal Commission, above, 90.

¹⁰⁵ Royal Commission, above, 91.

¹⁰⁶ Royal Commission, above, 92.

¹⁰⁷ Royal Commission, above, 92.

¹⁰⁸ Royal Commission, above, 90.

¹⁰⁹ Royal Commission, above, 94 – 95.

¹¹⁰ Royal Commission, above, 97 – 98.

¹¹¹ Recommendation 3: Royal Commission, above, 106.

¹¹² Royal Commission, above, 98.

provide Māori electors with a more effective vote and with the assurance that all MPs and not just Māori MPs were in some degree accountable to Māori electors. As a result, all MPs would be forced to compete for Māori votes at election time, and the political parties would therefore be under some pressure to give greater attention to Māori interests and concerns in the development of policy and to pursue those interests more vigorously while in office. They would also be under some pressure to offer Māori as candidates, to service Māori constituents in ways that met their expectations, and to target Māori electors in their canvassing and other electioneering processes.

2 *Effectiveness of the seats under MMP*

While the views of the Royal Commission carry great weight, they must be viewed in context.¹¹³ Importantly the recommendations were made under a First-Past-the-Post (FPP) electoral system. They now require re-examination in light of the change in 1993 to a Mixed-Member-Proportional (MMP) electoral system.

The most obvious change is that under MMP the number of MPs who identify themselves as Māori has increased. While this is a good sign, merely increasing the numbers does not ensure better quality of representation. The real question is whether Māori concerns are being properly protected and promoted in the House. The disadvantages of the seats identified by the Royal Commission have been lessened by the change in electoral system.¹¹⁴ Although general constituency MPs may still feel less accountable to Māori than to their largely non-Māori constituents, there are now also list MPs, for whom Māori and non-Māori vote in exactly the same way. As Māori make up twelve percent of the enrolled voting population, no political party can afford to ignore their concerns.¹¹⁵ A reflection of this newly found Māori political power, is the fact that political parties are increasingly fielding Māori candidates in general constituency and list seats.¹¹⁶

Although, currently, all seven Māori MPs are Labour MPs, the 1996 election saw New Zealand First take a clean sweep of the seats. This was seen as an indication that Māori

¹¹³ See Claudia Geiringer "Reading English in Context" [2003] NZLJ 239.

¹¹⁴ Geiringer, above, 241.

¹¹⁵ Geiringer, above, 241.

¹¹⁶ Geiringer, above, 241.

were preparing to set out in new directions.¹¹⁷ It has provided incentive for political parties to campaign for the seats, although it can be questioned just how compatible such a campaign would be with the current policy of the Right that they should be abolished.

Regardless of this increased accountability of political parties and general MPs to Māori, the guaranteed Māori seats are still required. A Māori MP standing outside the Māori seats cannot necessarily promote Māori interests effectively and might not be able to give adequate representation.¹¹⁸ It is important that Māori have representatives to voice their perspective and to reflect their needs in the policy process.¹¹⁹ As stated in the appendix to the Royal Commission's report:¹²⁰

Those who chose to stay on the rolls of the Māori seats are participating in a unique and valuable sub-system. Here electors can choose representatives of their own culture who can express their constituents' attitudes, views and responses, articulate their needs, and attend to their contacts with Departments and officialdom and mediate one to the other. No MP in a General electorate could consistently perform such a task, for he or she is tied in terms of time and is responsible for expressing the interests and considering the views of constituents predominantly or overwhelmingly of another culture.

Even though the Māori MPs do not have the numbers to stop legislation they can at least make sure the Māori viewpoint is heard and considered. The Māori MPs have been successful in transforming Māori activism into politically acceptable programmes and have been able to alert the Labour Party to relevant issues and trends within Māoridom that would have otherwise escaped notice.¹²¹ Furthermore, recent events have shown that Māori MPs are becoming more willing to flex their political muscle. While Māori MPs are in the minority in Parliament, they can still be effective in highlighting Māori concerns.¹²²

¹¹⁷ Jonathon Boston, Stephen Levine, Elizabeth McLeay, Nigel S Roberts *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 71.

¹¹⁸ M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 296.

¹¹⁹ Trevor Knight "Electoral Justice for Aboriginal People in Canada" (2001) 46 McGill LJ 1063 1068.

¹²⁰ Robert Chapman "Annex Voting in the Māori Political Sub-System 1935 - 1984", B-107 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

¹²¹ Augie Fleras, as cited in Knight, above, 1079.

¹²² See for example the statements made by the Māori MPs when Labour announced it would be legislating against Māori customary title over the foreshore, or that it would not recognise Māori title to oil: Nick Venter "Revolt by Māori MPs over foreshore" (25 June 2003) *The Dominion Post* Wellington, 1; Tracy

We must be careful not to judge Māori MPs by Pākehā standards such as performance in debate.¹²³ The qualities for leadership in Māori are different, and at times incompatible with those in the Pākehā community.¹²⁴ The Māori MPs are expected to be equally proficient on the Marae as in Parliament, no mean feat.¹²⁵ Furthermore, Māori generally suffer more socially and economically than non-Māori and this brings particular challenges to the Māori MPs when serving their electorates.

Some of the administrative difficulties caused by such large electorates will have been lessened by the fact that the Māori seats are now proportionate to the Māori roll. As more Māori register on the roll, there will be more Māori seats, and thus a corresponding diminution in the geographical size of the electorate. This will enable Māori MPs to better service their constituents. However, since the Māori electorates remain much larger than those of General electorates, this is still a problem, but not, in itself, a reason for abolishing the seats.

It is also important to remember that, while not ultimately recommending the retention of the seats, the Royal Commission's found that the seats had considerable advantages over other systems of representation. Importantly, the seats guaranteed Māori a place in the national forum where their voices could be heard on matters important to them. The seats ensured Māori issues could be kept before Parliament regardless of non-Māori attitudes, or the number of Māori. Furthermore, the Māori MPs were directly accountable to Māori.¹²⁶

Watkins and Ruth Berry "Turia Breaks Ranks on Oil Claim" (21 May 2003) *The Dominion Post* Wellington, 1.

¹²³ MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B – 56 in Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3. See also Nick Venter "Horomia: On the Marae He's The Man" (14 July 2003) *The Dominion Post* Wellington, 2.

Parekura Horomia been recently ridiculed in House, but on Marae is supported wholeheartedly by Māori.
¹²⁴ See Raj Vasil *What do the Māori Want? New Māori Political Perspectives* (Random Century, Auckland, 1990) 73 – 83.

¹²⁵ Sorrenson, above, B – 57.

¹²⁶ Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3, 89.

Māori MPs did, of course, have party obligations too, but had to be accountable for their party policies to Māori. The Māori MPs could provide an effective channel for explaining the policies to their constituents and for taking Māori responses back to the party.¹²⁷

The Royal Commission noted that the system had been adapted to function in Māori ways.¹²⁸ The Māori seats meant that MPs representing Māori were appropriate spokespeople. Almost all candidates for the seats were fluent in Māori, competent on the Marae, strongly committed to the preservation of Māori cultural identity, and had experience in dealing with Māori cultural issues.¹²⁹ As such, they could understand Māori, and represent them in Parliament in ways that non-Māori could not. These qualities meant Māori MPs carried personal and tribal mana.

Under MMP the advantages identified by the Royal Commission still hold true. Māori MPs in the Māori seats remain directly accountable to their Māori constituents, and provide Māori with a guaranteed voice in Parliament. The MPs themselves continue to be appropriate representatives for the Māori people. Thus while the disadvantages of the seats found by the Royal Commission have diminished under MMP, their advantages have remained. When viewed according to the Royal Commission's criteria in a contemporary context, the seats provide effective representation, as required under the Treaty.

B Other Alternatives

The seats are not the only way to achieve the goals set out by the Royal Commission; nor are they necessarily the best way to do so. Other alternatives must be considered before a decision whether or not to retain the seats can be made.

1 Relying on MMP alone

¹²⁷ Royal Commission, above, 90.

¹²⁸ Royal Commission, above, 90.

¹²⁹ Royal Commission, above, 89.

Abolishing the seats and leaving Māori representation in the hands of the general voting public is an obvious possibility. MMP has certainly increased the number of Māori elected to the House and perhaps this is all that is required to protect taonga, or to express the Treaty partnership. With more voices in Parliament, Māori will have more of a stake in decision-making.

However, while the number of Māori MPs has certainly increased, this is not to a level proportionate to their population, unless the Māori seats are taken into account. Nor have other typically under-represented groups, such as women, attained proportionate representation with MMP alone.¹³⁰ Relying on only MMP also leaves the possibility that no Māori politicians will be elected.¹³¹ If that were to happen, Māori views might be effectively ignored. Three of the major parties have based their political platforms on treating Māori the same as everyone else despite their unique concerns,¹³² and if a right wing government were formed, the extent to which Māori concerns would be represented in Parliament is likely to be limited. While the same danger faces minority groups, there are reasons why this is more of a concern regarding Māori. As discussed earlier, the Treaty requires Māori to play a role in decision-making.

Even if Māori were elected to Parliament in a general seat, they would not be able to campaign effectively for Māori rights when representing a predominantly non-Māori

¹³⁰ Women outnumbered men 105 to 100 in the 2001 census, see Statistics New Zealand <www.stats.govt.nz/domino/external/web/Prod_Serv.nsf/htmldocs/Women> (last accessed 8 July 2003), but in Parliament there are only 35 women out of 120 MPs see Parliamentary Services <<http://www.ps.parliament.govt.nz/schools/texts/members.html>> (last accessed 19 August, 2003).

¹³¹ Although Māori are currently proportionately represented in Parliament (although notably only with the Māori seats), this is not the point. Similar arguments were made in respect of the need for a Bill of Rights in New Zealand. Although no Government was likely to sweep away basic rights, this might not always be so. There is always the danger that they will be gradually eroded, and as such they need proper protection. See "A Bill of Rights for New Zealand: A White Paper" [1985] AJHR A5 27 – 28.

¹³² See the National Party's "One Nation" campaign: Hon Bill English, Leader of the National Party "Address to the National Party Lower North Island Regional Conference" (National Party Lower North Island Regional Conference, Masterton, 4 May 2003). Also the New Zealand First Race Relations Policy at <www.nzfirst.org.nz/policies/racerelations.php> (last accessed 6 May 2003), and the ACT Party policies, where separate treatment for Māori is labeled racist and discriminatory. For example Stephen Franks, ACT New Zealand Māori Affairs Spokesman, "ACT Tautoko for National's Kaupapa" (4 May 2003) Press Release. United Future believes it is "bad principle to give one class of citizens greater rights than others". See United Future Policy on Bi-Culturalism and Treaty Issues at <www.unitedfuture.org.nz/policies/treaty.php> (last accessed 6 May 2003).

electorate, or voting public for the list seats. This would only be possible where their party took a pro-Māori stance, which considering the controversy surrounding Māori issues such as foreshore rights, is not something the mainstream parties would do lightly. “Māori parties” could do this, but they have so far failed to secure seats under MMP. Additional measures are needed.

2 *Complementing MMP with other measures in Parliament*

(a) Removal of the threshold for Māori parties

Although the Royal Commission recommended abolishing the seats, they did recognise that MMP alone would not ensure adequate Māori representation. They recommended that the Representation Commission be required to take “the community of interest among the members of Māori tribes” into account in determining constituency boundaries and also waiving the proposed 4% threshold for parties representing primarily Māori interests.¹³³ In their view, this would provide incentives for non-Māori parties to take proper account of Māori concerns and to allow Māori to be able to mount an electoral challenge if dissatisfied with the performance of existing parties.¹³⁴

However, the waiver has been dismissed as unworkable and ineffective – who would define a “Māori party” for example?¹³⁵ Ironically, under MMP the seats may actually provide the advantage that the Royal Commission hoped to engender by waiving the threshold for Māori parties once the seats were abolished, as the threshold does not apply where one or more party candidates is successful in an electorate seat.¹³⁶ It is unlikely that a Māori candidate would be elected to a general constituency when promoting a Māori platform, but this is far more likely in the Māori seats.

(b) Party list requirements

¹³³ Royal Commission on the Electoral System “Towards a Better Democracy” [1986] AJHR H3, 101.

¹³⁴ Royal Commission, above, 101.

¹³⁵ See the Second Reading of the Electoral Bill: Hon D A M Graham (3 August 1993) 537 NZPD 17085, Christopher Laidlaw (3 August 1993) 537 NZPD 17149 and Hon Mrs T W M Tirikatene-Sullivan (3 August 1993) 537 NZPD 17100. The MMP Review Committee unanimously rejected the implementation of the waiver when it came up for reconsideration in 2001: MMP Review Committee “Inquiry into the Review of MMP” [2001] AJHR I 23 A, 26

¹³⁶ Claudia Geiringer “Reading English in Context” [2003] NZLJ 239, 241.

Another alternative is to have a compulsory Māori presence on party lists. For example, a modified zipper system could be used. This would involve a requirement that every sixth list candidate was Māori.¹³⁷ Another option would be to require that each party have at least one Māori in their first ten list candidates.¹³⁸

There are several difficulties with these systems. First, they only apply to the list seats and so would only impact on some of the seats in Parliament. Secondly, these systems would also have a disproportionate impact on smaller parties who may not receive any electorate seats.¹³⁹ Thirdly, these measures would rely a great deal on the goodwill of the parties themselves. For example, with a guaranteed top ten list placing requirement, smaller parties would be able to put a token Māori as their tenth candidate, safe in the knowledge that he or she stood no chance of being elected. It might also mean that parties refuse to field any Māori in electorate seats.

Fourthly, MPs would not be as accountable to Māori. They would be elected by the whole population and not Māori exclusively, and so would have to consider the non-Māori majority. However, Māori MPs would not suffer this problem to the same degree as Māori list MPs currently. As their positions would be guaranteed to a greater extent, Māori list MPs would be better able to adopt Māori stances on important issues without fear of losing their list ranking or of sacrificing re-election. On the other hand, if parties felt that their voters were being alienated this may cause them to either only put Māori candidates low on their lists, or only endorse candidates who will tow the Pākehā line - relegating the measure to mere tokenism.

Finally, the fact that it would not be exclusively Māori electing the MPs would mean that the parties, and the predominantly non-Māori voting public, would be determining

¹³⁷ Every 6th candidate would be equivalent to the proportion of Māori in the general population (15%).

¹³⁸ See the submissions for improving women's representation in the MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I 23 A, 42 - 43.

¹³⁹ For example the ACT and Green parties currently only have list MPs. Progressive has one list and one electorate, and New Zealand First and United both have more list than electorate. Only Labour and National

who is an appropriate spokesperson for Māori, rather than Māori themselves. These measures could therefore be less effective at achieving quality Māori representation, and of embodying the Treaty, than the seats have been; and would be equally open to charges of unfairness from other groups.¹⁴⁰

3 Greater recognition of Māori political rights

While the justification for special Māori representation is the Treaty, it is recognised that the Māori seats, even under MMP, nor the alternatives so far discussed, do not make Māori an equal Treaty partner. Some commentators have even gone so far as to suggest that "no Parliamentary decision since 1840 may have been properly and justly made given that it would always have been by a legislature in which Māori were completely under-represented."¹⁴¹ They argue that a partnership requires Māori have half the seats in Parliament, to be filled as they wish.¹⁴² This argument relies on the idea of "one partner, one vote" rather than "one person, one vote", as is the present position.

Arguably the very idea of the seats is not in line with the guarantees under the Treaty. They are not a particularly effective expression of rangatiratanga, as they necessarily operate within a Pākehā institution where Māori are a minority. Some Māori regard the seats an attempt to marginalise Māori, and call for their boycott.¹⁴³ It can certainly be questioned whether Māori should be fighting for guaranteed representation in a Pākehā institution such as Parliament, or whether there are more appropriate forms of participation available.

received more electorate than list MPs. See Parliamentary Services at <http://www.ps.parliament.govt.nz/schools/texts/members.html> (last accessed 19 August 2003).

¹⁴⁰ See *Jepson and Dyas-Elliot v The Labour Party* [1996] IRLR 166 (ET) where the British Labour Party's policy of using all women shortlists in "winnable" seats was held to be sex discrimination in breach of the Sex Discrimination Act 1975. Note however that as a result of this decision the Sex Discrimination (Election Candidates) Act 2002 (UK) was passed which allows political parties to adopt positive quotas in selecting candidates.

¹⁴¹ Simon Reeves *To Honour the Treaty: The Argument for Equal Seats* (2 ed, Earth Restoration Limited, Auckland, 1996) x.

¹⁴² Reeves, above, 1.

¹⁴³ See Dr Ranginui Walker's comments in Helen Bain "A Matter of Choice for Māori" (9 April 2001) *The Dominion* Wellington 12. Also, Appendix III to the Plenary Resolutions in Ranginui Walker (ed) *Māori Representation Conference Turangawaewae Marae 26-27 April 1985* (Centre for Continuing Education, University of Auckland, Auckland, 1985).

Greater Māori rights have been considered in the past. Britain recognised Māori sovereignty as expressed by the 1835 Declaration of Independence, and despite later statements to the contrary,¹⁴⁴ it is clear that Māori have long been capable of governing both themselves and others. Before the Treaty was signed, the possibility of a Māori body governing both races was considered, as was a separate Māori government, and incorporation of the Chiefs into a European style government.¹⁴⁵ While these were ultimately rejected, the Pākehā Government did continue to recognise the possibility of Māori governance. Section 71 of the Constitution Act 1852 (UK) allowed the Crown to create districts where Māori could govern both races according to their own laws and customs so long as these were “not repugnant to the Principles of Humanity”. While this provision was never invoked, it was not repealed until 1986.

When considering alternatives, we must be mindful that time has passed and it is no longer possible to put things back the way they were prior to 1840. A modern, forward thinking solution must be achieved. Two main alternatives will be discussed – a separate Māori state and Parliamentary reform. While these alternatives may seem extreme now, race relations in New Zealand have come a long way in the last twenty years and what then seemed impossible now exists. We should not close our minds to the possibilities.¹⁴⁶

(a) A separate state

The concept of a Māori state is well founded. There is a shared cultural heritage, physical distinctiveness, a pre-colonisation history, aspirations of self-determination and a

¹⁴⁴ See the comments of Prendergast J in *Wi Parata v The Bishop of Wellington* (1877) 3 Jur R (NS) 72, 77 - 78 (SC) where he states that “The Māori tribes were incapable of performing the duties and therefore of assuming the rights of a civilised community.” He goes on to state that as such they were incapable of having sovereignty, let alone ceding it. This approach has long since been departed from in the Courts. See for example *Te Heuheukino v Aotea District Māori Land Board* [1941] NZLR 590 (PC) per Viscount Simon LC for the Court, where the Treaty was held to be a valid treaty of cession, implying that Māori did indeed have sovereignty to cede pre-1840.

¹⁴⁵ Claudia Orange *The Treaty of Waitangi* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) 29, 31.

¹⁴⁶ Overseas examples show what can be done. For example, Lebanon’s National Assembly reformed its parliament in 1990 so that the Christian majority (both politically and based on population) now shares half

rejection of non-Māori as the appropriate authors of Māori policy.¹⁴⁷ Furthermore, even after the Treaty was signed Māori still exercised autonomy in certain areas,¹⁴⁸ and later attempts were made to establish independent and sovereign Māori communities, such as Parihaka. While none of these communities has endured, with a modern reinvention of section 71 of the New Zealand Constitution Act 1852, a modified concept of Māori Districts might still be possible.¹⁴⁹

Federalism has been one suggestion. This provides extensive self-government for a national minority, as it guarantees the ability to make decisions without being outvoted by the dominant group in the larger society.¹⁵⁰ New Zealand could be divided into four provinces – Upper North Island, Auckland and surrounds, Lower North Island and the South Island.¹⁵¹ Each province would have the same status and have its own government and revenue. As Māori are predominant in the North, they would effectively have control over that province and would thus enjoy a measure of self-determination, although non-Māori living within the province would equally be able to participate, at least in theory.¹⁵²

The obvious problem with such a proposal, however, is that Māori are not concentrated in one geographical area, but can be found throughout New Zealand.¹⁵³ As such, any efforts to federalise New Zealand by creating a Māori State would be fraught with difficulties: Why should one iwi's ancestral lands be chosen over another? Would Māori have to give up resources outside the state that Māori have traditionally used? Even if Māori could agree as to what area should be chosen, there are other difficulties

of its 108 seat parliament with Muslims, as opposed to the 5-4 ratio they previously enjoyed: Simon Reeves *To Honour the Treaty: The Argument for Equal Seats* (2 ed, Earth Restoration Limited, Auckland, 1996) 53.

¹⁴⁷ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 473.

¹⁴⁸ F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 114 – 115.

¹⁴⁹ F M Brookfield "The New Zealand Constitution - the Search for Legitimacy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 1, 14.

¹⁵⁰ Geoff Gilbert "Autonomy and Minority Groups: A Right in International Law?" (2002) 35 *Cornell Intl LJ* 307,337.

¹⁵¹ Raj Vasil "Indigenous Rights and the Constitution" in Colin James (ed) *Building the Constitution* (Brebner Print, Wellington, 2000) 214, 217.

¹⁵² Vasil, above, 217.

¹⁵³ Vasil, above, 217

such as the extent of their law making powers.¹⁵⁴ Would Māori really be able to govern the state as they saw fit, or would the governance structure be imposed by Parliament?

While overseas examples of Greenland and Nunavut can be pointed to as self-government successes, their application in New Zealand is somewhat limited.¹⁵⁵ Both are marginal economic areas in hostile environments where there were few opportunities for commercial exploitation. The populations were overwhelmingly indigenous anyway, and so there was little protest over the extension of administrative powers to the indigenous peoples.¹⁵⁶ Furthermore, both states have been extremely costly to establish.¹⁵⁷

Although, generally, New Zealand society is too integrated to establish a separate state, this may still be possible in the Ureweras where the Tuhoe were originally to have self-government under the Urewera District Native Reserve Act 1896.¹⁵⁸ Just because it may not be possible to set aside a piece of land like this for Māori elsewhere is not a reason for denying Tuhoe.¹⁵⁹ However, if Tuhoe were to get such self-government rights some alternative would surely have to be offered to other Māori for whom this is not possible.

As an alternative, a state based on ethnicity instead of territoriality could be established.¹⁶⁰ Māori would have their own branches of government and laws, while still

¹⁵⁴ For example, in the United States of America, the American criminal code applies on Indian reservations but not tax laws for example.

¹⁵⁵ Greenland was granted self rule by Denmark by the Home Rule Act 1979. Nunavut is a self governing territory in Canada. It is governed by the indigenous Inuit people. Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 65.

¹⁵⁶ For example, the cost of establishing Nunavut was about \$1 billion, without considering the ongoing operating costs: Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 65.

¹⁵⁷ Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 65.

¹⁵⁸ F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 172.

¹⁵⁹ Brookfield *Waitangi and Indigenous Rights*, above, 172.

¹⁶⁰ Raj Vasil "Indigenous Rights and the Constitution" in Colin James (ed) *Building the Constitution* (Brebner Print, Wellington, 2000) 214, 217- 218.

living in the same geographical area as non-Māori. The difficulty with such a situation is enforcement. Would people be able to claim membership when it suited them, for example to escape criminal or tax law, while at the same time reaping the benefits of the existing State? There are already complaints that there is one law for Māori and another for non-Māori,¹⁶¹ and an ethnic state would only fuel this resentment.

(b) Parliamentary reforms

Rather than a separate Government, there have also been proposals to increase Māori participation in the current system. There has been a number of attempts at a Māori Parliament since 1840,¹⁶² or perhaps even before,¹⁶³ and similar proposals still exist today.

A separate House of Representatives requires a structure parallel to the established Parliament. This would work in conjunction with the Crown, in much the same way that the Sami Parliament and the Norwegian Government or the Assembly of First Nations and the Canadian Government interact.¹⁶⁴ A separate Parliament would mean that Māori would not have to continually struggle to avoid being swamped by mainstream politics and securing a fair deal from Pākehā.¹⁶⁵

¹⁶¹ See National Party policy of "One citizenship for all" which states that currently there are different rules for Māori and Pākehā, and that this should be changed.

¹⁶² For example, the second Māori King Tawhaio suggested a Legislative Council of Chiefs to then Native Minister John Ballance, who rejected the proposal. Tawhaio established his own Convention of Chiefs called Kauhanganui in 1891 anyway. It was largely based on Westminster principles and had a written constitution, and even provided for a judiciary.

Other attempts include those of Paremata Māori to establish a separate Māori Parliament with the Native Rights Bill 1884. The European MPs left the House so that there was no quorum to hear the Bill.

The Kotahitanga movement fought for the establishment of a Māori Parliament with full and equal participation in the functions of State for Māori.

See M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 465 – 466; and Claudia Orange *The Treaty of Waitangi* (Allen & Unwin and Port Nicholson Press, Wellington, 1987) 226.

¹⁶³ James Busby, the British Resident in New Zealand, saw this assembly of Chiefs for the Declaration of Independence in 1835 as the beginnings of a Māori Parliament. See MPK Sorrenson "Appendix B: A History of Māori Representation in Parliament", B-7 in the Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3.

¹⁶⁴ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 474.

¹⁶⁵ Raj Vasil *What do the Māori Want? New Māori Political Perspectives* (Random Century, Auckland, 1990) 68.

Other proposals call for the establishment of an upper house. New Zealand had a Legislative Council until 1950, which included at least one Māori representative from 1872 onwards.¹⁶⁶ Contemporary proposals for a new upper house vary in that some require complete Māori membership, others merely proportional,¹⁶⁷ and others a 50-50 split.¹⁶⁸ In most cases the upper house would monitor proposed legislation to ensure it is consistent with the Treaty.¹⁶⁹

The ideas of a Māori senate and a separate Māori lower house have also been combined.¹⁷⁰ Consistent with their ideal of a bicultural nation, the New Zealand Māori Council has endorsed Parliamentary reform. They have proposed a Senate (ten Māori, ten non-Māori) and two legislative bodies, a chamber of Māori representatives (fifteen members) and a general chamber (eighty five members). This is arguably more consistent with the idea of a partnership, as there is greater equality of voting rights.¹⁷¹

However, there are a number of issues to be worked through before such arrangements can be implemented. Any establishment of a Māori Parliament should be just that, the question is whether non-Māori would accept it. Māori should not be forced to work within the Pākehā Westminster system.¹⁷² If a Māori Parliament or upper House is established, members should be elected according to Māori values and definitions of "democracy".¹⁷³ It must incorporate tikanga Māori,¹⁷⁴ and be established with the consent of Māori. Māori have increasingly come to view Pākehā political institutions as

¹⁶⁶ The Waitangi Tribunal *The Māori Electoral Option Report: Wai 413* (Brookers, Wellington, 1994) 6.

¹⁶⁷ R J O'Connor *The Future of Māori Representation in Parliament* [1991] NZLJ 175, 178.

¹⁶⁸ See Appendix III to the Plenary Resolutions in Ranginui Walker (ed) *Māori Representation Conference Turangawaewae Marae 26-27 April 1985* (Centre for Continuing Education, University of Auckland, Auckland, 1985) 19.

¹⁶⁹ See for example Appendix III to the Plenary Resolutions in Walker (ed), above, 19.

¹⁷⁰ See Appendix III to the Plenary Resolutions in Ranginui Walker (ed), above, 20.

¹⁷¹ M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 297.

¹⁷² Simon Reeves *To Honour the Treaty: The Argument for Equal Seats* (2 ed, Earth Restoration Limited, Auckland, 1996) 65.

¹⁷³ Reeves, above, 66.

¹⁷⁴ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 474.

tools for Pākehā domination and Māori subordination and there should be flexibility in any new constitutional arrangements.¹⁷⁵

The difficulty here is that Māori tikanga would not necessarily allow all Māori to participate. Māori women for example may find themselves shut out.¹⁷⁶ One would hope that Māori would adopt suitable methods for choosing representatives that allowed all Māori to contribute, but what should be done if Māori do not?

Many non-Māori, even those in favour of giving Māori a fair deal, may find a Māori Parliament difficult to accept. It involves placing limits on the sovereignty of Parliament, and challenges the idea of a single nation.¹⁷⁷ In New Zealand Māori calls for rangatiratanga are often interpreted as separatist, and that whatever Māori gain somehow takes away from the rest of the nation. However, there does not have to be a zero sum equation, as the experiences of Canada and the United States of America show.¹⁷⁸ Māori can gain greater rights without detracting from the overall sovereignty of the State.¹⁷⁹

Non-Māori may be more willing to accept an independent Māori body that advises, but is not binding on the Crown. However, Māori would probably only see this as an interim solution at best, and would have trouble accepting it as an expression of self-determination,¹⁸⁰ as any such body would still be dependent on Pākehā participation to

¹⁷⁵ Raj Vasil *What do the Māori Want? New Māori Political Perspectives* (Random Century, Auckland, 1990) 66.

¹⁷⁶ See Ani Mikaere "Māori and Self Determination in Aotearoa/New Zealand" (Sami Parliament Conference on Sami Determination, Arvidsjaur, Sweden, 28 May 1999) 13. Here she labels the New Zealand Māori Council a "largely male and conservative constitution". Would the same fate await a Māori Parliament?

¹⁷⁷ Durie "Mana Māori Motuhake", above, 474.

¹⁷⁸ In both Canada and the United States of America, an inherent right of First Nations to self-government is recognised. In the United States this was recognised by the Supreme Court in *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) Marshall CJ and in Canada by s 35 of the Constitution Act 1982 (Canada Act 1982 (UK), sch B) and *Campbell v British Columbia (Attorney-General)* (2000) 189 DLR (4th) 333 (BCSC) Williamson J.

¹⁷⁹ Patricia Sarr "Introduction" in Ken S Coates and P G McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 9, 14.

¹⁸⁰ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 474 – 475.

avoid becoming marginalised and impotent.¹⁸¹ For example, many Māori have become disillusioned with the New Zealand Māori Council. Despite its effectiveness as a Māori political body, the Council has had trouble shaking of the image of being a State institution.¹⁸²

To be effective, any proposal must give Māori the power to have a real impact on legislation. For example, while the Sami Parliament is an impressive idea, it has only limited decision-making powers and mainly provides advice to the Norwegian Parliament.¹⁸³ Arguably this does not go far enough in providing self-government.¹⁸⁴ Mason Durie suggests that any national Māori body politic must be consistent with tino rangatiratanga. As such, it must have authority to:¹⁸⁵

- Formulate Māori policy
- Manage and implement Māori policy
- Actively participate in the development and interpretation of law
- Plan for the needs of future generations
- Audit national policies and legislation
- Make appointments to national Māori institutions and Māori appointments to Crown agencies
- Control and manage public spending for Māori
- Develop foreign policy for Māori
- Pursue Māori interests abroad.

Non-Māori express concern that if Māori had these powers, they could hold the country to ransom. This is scaremongering, and fails to realise that Māori need an

¹⁸¹ Raj Vasil *What do the Māori Want? New Māori Political Perspectives* (Random Century, Auckland, 1990) 128.

¹⁸² F M Brookfield *Waitangi and Indigenous Rights: Revolution, Law and Legitimation* (Auckland University Press, Auckland, 1999) 151.

¹⁸³ Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 57.

¹⁸⁴ Coates, above, 57. Nevertheless, even with limited powers the existence of such a Parliament is important symbolically and is the first step in allowing greater rights to evolve.

¹⁸⁵ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 473.

effective government too. Any parliamentary reforms would require sensible give and take between the Māori and non-Māori representatives. If non-Māori were accepting of Māori concerns, there is no reason why Māori would not return the favour. For example, while Māori might want to establish laws promoting te reo in the classroom, they would equally see the need for sensible laws regulating education generally.

Māori are not agreed on the benefits of a separate Parliament either. There is concern that a separate Parliament would decrease the influence of Māori in mainstream politics.¹⁸⁶ Despite the obvious impact on Māori of general legislation concerning health or welfare, there is a worry that Māori may in fact get relegated to "Māori issues" only. Thus any division in jurisdiction between the two Parliaments would need to be carefully considered.

There are also particular concerns as to whether it would undermine tribal authority to negotiate their own affairs.¹⁸⁷ Tribes have their own autonomy and are unable to speak for one another.¹⁸⁸ This was seen as a significant reason for the failure of Mana Motuhake to gain more than a few northern tribes' acceptance despite the leadership of Matiu Rata.¹⁸⁹ As such, it could be argued that any political organisations would have to be iwi based, with pan-Māori concerns pursued through confederations of such organisations.¹⁹⁰ However, despite current difficulties in getting different iwi to agree,¹⁹¹ some suggest that with greater prosperity and education, Māori will come to see past tribalism and focus on wider Māori concerns.¹⁹²

(c) Feasibility of a Māori state or Parliamentary reforms

¹⁸⁶ Coates, above, 42.

¹⁸⁷ M H Durie "Mana Māori Motuhake The State of the Māori Nation" in Raymond Miller (ed) *New Zealand Government and Politics* (Oxford University Press, Auckland, 2001), 464, 473.

¹⁸⁸ M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 297.

¹⁸⁹ Raj Vasil *What do the Māori Want? New Māori Political Perspectives* (Random Century, Auckland, 1990) 68.

¹⁹⁰ Vasil, above, 68- 69.

¹⁹¹ See the problems in allocating the Fishing quota, for example. This is a reflection of the different needs, ideals, and capabilities of the iwi.

¹⁹² See Vasil, above, 70.

There are many issues to be worked through before either alternative raised could become a reality. The difficulties in getting Māori and non-Māori to agree, combined with the difficulties of getting either party to agree within themselves, are immense.

While certainly the examples of a Sami Parliament or the Nunavut State can be cited as showing that such arrangements are possible, care must be taken when trying to translate these to a New Zealand environment.¹⁹³ For example, New Zealand does not have the same large tracts of land where few non-indigenous people live that made the Nisga'a settlement possible.¹⁹⁴ If we do implement one of these arrangements, we should learn from the overseas experiences, but take care to make it relevant and effective for New Zealand circumstances.

This all takes time and money. Considering the controversy over the seats, if either alternative is to become a reality, it will not be for a long time yet.¹⁹⁵ The seats certainly should not be abolished until replaced by a more suitable expression of rangatiratanga. Even if a separate Māori state or Parliament were established, Māori representation of some description would still be required in the non-Māori House.¹⁹⁶ Much of the policy of the existing Pākehā Government would inevitably impact, either directly or indirectly, on Māori government.¹⁹⁷ Moreover, the likelihood of other options actually coming into fruition depends largely on the performance of the Māori MPs in Parliament anyway.¹⁹⁸ Therefore, while not the strongest possible expression of Treaty rights, they may be the best currently available, and are necessary in order to implement anything more.

VI WIDER IMPLICATIONS: THE NEW ZEALAND BILL OF RIGHTS ACT

¹⁹³ Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 42.

¹⁹⁴ Coates, above, 42.

¹⁹⁵ Coates, above, 75.

¹⁹⁶ Trevor Knight "Electoral Justice for Aboriginal People in Canada" (2001) 46 McGill LJ 1063, 1094.

¹⁹⁷ Knight, above, 1094.

¹⁹⁸ Jonathon Boston, Stephen Levine, Elizabeth McLeay, Nigel S Roberts *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 70.

So far, only the rights of Māori have been examined. Consistently with their rights under the Treaty, and with their role as tangata whenua, they are entitled to effective guaranteed representation in Parliament, and that the seats are an effective way of doing this. However, the majority of New Zealanders are non-Māori, and their rights must be balanced against the rights of Māori to separate representation. For example, complete Māori sovereignty would clearly embody rangatiratanga under the Treaty, and would give Māori strong representation, but would have a disparate impact on the non-Māori members of society.

In order to determine whether the seats infringe the rights of other groups, they must be examined under the proper legal framework - the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The Bill of Rights applies to all acts done by the legislative, executive or judicial branches of the Government of New Zealand, or by any person in the performance of a public function, power or duty imposed by law.¹⁹⁹ The provisions of the Electoral Act 1993 passed by the Legislature and implemented by the Executive are clearly covered by the Bill of Rights. However, as Parliament is able to pass any law it likes, even if legislation passed is inconsistent with the Bill of Rights, it must be upheld.²⁰⁰ The most that can be achieved is a declaration of inconsistency.²⁰¹

If a declaration of inconsistency were issued, the validity of the seats would be undermined, and this would be a strong argument in favour of their abolition. Such a declaration could be sought on two bases - that they discriminate against non-Māori in breach of section 19 of the Bill of Rights, or that they breach the right to elections of equal suffrage under section 12.

A Discrimination?

1 What is discrimination?

¹⁹⁹ New Zealand Bill of Rights Act 1990, s 3.

²⁰⁰ New Zealand Bill of Rights Act 1990, s 4.

²⁰¹ *Moonen v Film & Literature Board of Review* (1999) 5 HRNZ 224, 234 (CA).

Only Māori can register on the Māori roll and vote for the Māori seats.²⁰² The Electoral Act defines Māori as a person of the Māori race of New Zealand, and their descendants.²⁰³ This has led some non-Māori to label the seats “discriminatory”, some have even go so far as to call them a form of apartheid.²⁰⁴ Discrimination is divisive to a community and should not be encouraged.

Section 19(1) of the Bill of Rights states that everyone has the right to freedom from discrimination on the grounds set out in the Human Rights Act 1993. One of these grounds is discrimination based on race.²⁰⁵

Neither the Bill of Rights nor the Human Rights Act defines “discrimination”. The White Paper left open the question of whether discrimination incorporates the idea of ‘something unjustified, unreasonable, or irrelevant’, or whether a mere distinction was enough.²⁰⁶ It was of the opinion that the result would be the same in either interpretation because even if only a mere distinction were needed, section 5 justified limitations would still apply.²⁰⁷ However, it does note that section 19 does not require identical treatment in every respect.²⁰⁸

The New Zealand courts have not, as yet, given a definitive meaning to discrimination, but some guidance can be found in the Court of Appeal case of *Quilter v Attorney-General*.²⁰⁹ This dealt with the question of whether the Marriage Act 1955 allowed for same-sex marriages, and if not, whether that was discrimination. Despite the different approaches of the Court, the judges were unanimous that discrimination involved a distinction based on a prohibited ground and that not all distinctions were

²⁰² Electoral Act 1993, s 76.

²⁰³ Electoral Act 1993, s 3.

²⁰⁴ See comments of then Prime Minister, Sir Keith Holyoake in 1965. Cited in MPK Sorrenson “Appendix B: A History of Māori Representation in Parliament”, B – 50, in The Royal Commission on the Electoral System “Towards a Better Democracy” [1986] AJHR H 3.

²⁰⁵ Human Rights Act 1993, s 21(1)(f).

²⁰⁶ “A Bill of Rights for New Zealand – A White Paper” [1984] 1 AJHR A6, 86.

²⁰⁷ A White Paper, above, 86.

²⁰⁸ A White Paper, above, 86.

²⁰⁹ [1998] 1 NZLR 523 (CA).

discriminatory.²¹⁰ Inherent in this is the idea that there must be some element of unfairness before even prima facie discrimination is found.

The unfairness requirement is in line with international documents ratified by New Zealand, which may be of assistance when interpreting domestic legislation.²¹¹ For example, Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as:²¹²

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of human life.

In evaluating whether an action is contrary to the Convention the Committee on the Elimination of Racial Discrimination is required to ascertain whether that action has an "unjustifiable disparate impact" on a group distinguished by race, colour, descent or national origin.²¹³

When this is applied to the Māori seats, the fact that only Māori can register for those seats is a distinction based on race. However, whether this involves disadvantage to non-Māori is a more difficult question.

The concern is that Māori are guaranteed representation in the House, when other identifiable groups, who are similarly under-represented in Parliament, do not receive the same guarantee and so are disadvantaged.²¹⁴ Admittedly, the seats give Māori greater

²¹⁰ *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA). See Gault J at paras 527, Thomas J at paras 532 - 540, and Tipping J (Richardson J concurring) at paras 573.

²¹¹ *Northern Health Regional Authority v Human Rights Commission* (1997) 4 HRNZ 37, 58 (HC) Cartwright J.

²¹² CERD (25 October 1966) 660 UNTS 291.

²¹³ Definition of Discrimination in CERD *General Recommendation 14* (General Comments), Forty-second session, A/48/18 (22 March 1993), Art 1 para 1.

²¹⁴ In the Bill of Rights s 7 report for the Local Government Bill 2001, clause 12.4, which would amend the Local Electoral Act 2001 so that Māori wards or constituencies could be created, was considered to be prima facie discrimination on this basis. (This was ultimately done under the Local Electoral Amendment Act 2002). Contrast this with other measures in the Bill to encourage Māori participation such as consultation with Māori, or the requirement to take into account Māori culture and traditions, for example. These were not found to be prima facie discrimination as such considerations were not required to be at the exclusion of other groups: Ministry of Justice *Preliminary Legal Advice: Compliance with the New Zealand Bill of*

opportunity to influence legislation and put across their point of view. The existence of guaranteed seats for Māori also means that there are seven less seats to represent the views of non-Māori.

However, the Māori seats do not prevent people of any other racial backgrounds from exercising their right to vote. Although they cannot vote on the Māori roll they are still entitled to vote on the General roll, providing they meet the criteria.²¹⁵ The Māori seats do not affect the make up of the other 113 seats in Parliament. New Zealand has a wide range of groups represented in Parliament including men and women, heterosexuals, transsexuals, homosexuals, Rastafarians, Muslims, a wide range of Christians, New Zealand Europeans, Māori, Asians, and Polynesians. These are spread across six parties with a variety of political stances, and between them represent electorates covering all of New Zealand.

It is also important to remember that the seats are part of the general New Zealand Parliament and are responsible for making the general law of New Zealand.²¹⁶ They are not making a separate law for Māori. This suggests that the seats are not discriminatory.

2 *Positive discrimination*

Even if there were some disadvantage to another group as a consequence of the seats, this is not necessarily discrimination. The aim is equal outcomes rather than equal treatment. Evidence shows that equal outcomes are best achieved if individual backgrounds are taken into account.²¹⁷ While it would be ideal if everyone could achieve the same results without disadvantaging any other group, this is not always possible. Generally in order to advance equality something must be taken from the advantaged

Rights Act 1990: Local Government Bill 2001 (5 December 2001) confirmed in Ministry of Justice *Legal Advice: Compliance with the New Zealand Bill of Rights Act 1990: Local Government Bill 2001* (17 December 2001).

²¹⁵ See Electoral Act 1993, s 80 for disqualifications for registration.

²¹⁶ Royal Commission on the Electoral System "Towards a Better Democracy" [1986] AJHR H3, 94.

²¹⁷ M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 288.

group and given to those less favourably situated.²¹⁸ This does not constitute discrimination.

Section 19(2) of the New Zealand Bill of Rights Act 1990 states that:

Measures taken in good faith for the purposes of assisting or advancing persons or groups disadvantaged because of discrimination that is unlawful by virtue of Part II of the Human Rights Act 1993 do not constitute discrimination.

Thus for the seats to qualify as positive discrimination -

- The system must be implemented in good faith
- The purpose must be to assist or advance a disadvantaged group
- That group must be disadvantaged due to unlawful discrimination under Article II of the Human Rights Act

The first criterion is perhaps the most straight forward. The retention of the seats has been carefully considered by the Royal Commission on the Electoral System, the House of Representatives, and The MMP Review Committee. The decision to retain them was not made lightly, and was an important issue when our electoral system was reviewed in 1993.

The seats were retained on the basis that Māori and Pākehā wanted them kept, alternative suggestions for advancing Māori representation were not workable, the disadvantaged position of Māori in our society, and the constitutional importance of the seats.²¹⁹ Their existence remains under continual scrutiny as shown by the National Party

²¹⁸ *Coburn v Human Rights Commission* [1994] 3 NZLR 323, 340 (HC) per Thorp J in relation to the affirmative action provisions of the Human Rights Act.

²¹⁹ See debate at the second reading of the Electoral Bill (3 August 1993) 537 NZPD 17082 onwards. Particularly Hon D A M Graham (3 August 1993) 537 NZPD 17085, Christopher Laidlaw (3 August 1993) 537 NZPD 17149 and Hon Mrs T W M Tirikatene-Sullivan (3 August 1993) 537 NZPD 17100. The seats were not originally contained in the Bill, although some members also make comments supporting them at the Bill's introduction. See Hon Mrs TW M Tirikatene-Sullivan (15 December 1992) 532 NZPD 13167-13168 and Steve Maharey (15 December 1992) 532 NZPD 13171 - 13172.

calls for their abolition earlier this year.²²⁰ The seats are a measure to boost Māori representation made in good faith, not as a means of disadvantaging any other group.

As a positive discrimination measure, the purpose of the seats could be regarded as either a means of giving Māori proportionate representation in Parliament, or as a way of addressing their wider socio-economic disadvantage. On either analysis the aim is to help a disadvantaged group. The importance of proving that the group is disadvantaged is demonstrated by the decision in *Amaltal Fishing Co Ltd v Nelson Polytechnic*,²²¹ which dealt with a fishing cadet course where all places were reserved for Māori or Pacific Island applicants, and their fees fully paid. The Complaints Review Tribunal found that the action was taken in good faith and that it was done for the purpose of assisting or advancing a group of a particular race, but due to lack of evidence, could not be satisfied that those persons needed assistance to achieve an equal place in society.²²²

The evidence here shows that without the Māori seats, Māori would be under-represented in Parliament.²²³ Māori also continue to lag far behind non-Māori on many socio-economic indices. For example, Māori have significantly lower life expectancy,²²⁴ and are overrepresented in unemployment statistics.²²⁵ When employed, Māori are concentrated in lower paid occupations and can expect to be paid less than a non-Māori with the same qualifications.²²⁶ Mason Durie states that:²²⁷

²²⁰ See Hon Bill English, Leader of the National Party "Address to the National Party Lower North Island Regional Conference" (National Party Lower North Island Regional Conference, Masterton, 4 May 2003).

²²¹ [1996] NZAR 97.

²²² *Amaltal Fishing Co Ltd v Nelson Polytechnic* [1996] NZAR 97, 113.

²²³ In total 18 MPs in Parliament identify themselves as Māori, seven of these representing Māori seats. This is 15% of the seats in the House, equivalent to the Māori 15% of the population. However, when only the 113 General seats are considered, Māori make up 9.7% of these seats. (Although of course this would probably have been higher if the two rolls were merged.)

²²⁴ Māori life expectancy is lower than that of non-Māori by about 7 years, although the gap is narrowing.

See Statistics New Zealand: Life Expectancy and Death Rates – Family:

<http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/092edeb76ed5aa6bcc256afe0081d84e/82dfd788a5ad21c1cc256b1800046afc?OpenDocument> (last accessed 23 July 2003)

²²⁵ See Statistics New Zealand: Unemployment – Family:

<http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/092edeb76ed5aa6bcc256afe0081d84e/4ec3eca00597817fcc256b1800046afc?OpenDocument> (last accessed 23 July 2003)

²²⁶ See Statistics New Zealand Concentration in Lower Paid Occupations – Family:

<http://www.stats.govt.nz/domino/external/Web/nzstories.nsf/092edeb76ed5aa6bcc256afe0081d84e/00038a08326dbb77cc256b1800034e9b?OpenDocument> (last accessed 23 July 2003)

on every measure of well-being, there are severe disparities between Māori and non-Māori; and that an objective of the Treaty, to provide for British government and settlement without disadvantage to Māori people, has not been achieved.

The technical difficulty in applying section 19(2) is that the disadvantage must be due to discrimination on a prohibited ground. It is not always possible to show actual discriminatory acts against the group, despite general social disadvantage resulting in their under-representation in the activity.²²⁸ Colour, Race and Ethnic origins are all prohibited grounds of discrimination under Part II of the Human Rights Act,²²⁹ but in order to justify the seats this must be linked to Māori under-representation in Parliament, or their social disadvantage.

Once the objective has been suitably defined, the next step is to consider whether the special measures aimed at assisting the disadvantaged group are rationally and logically connected to that objective.²³⁰ Obviously if the purpose is to increase Māori representation in Parliament, then guaranteed seats are a logical means of doing this. If the purpose is to alleviate social and economic disadvantages, the basis is less clear. Although directly addressing these problems via education, health and employment initiatives would be a more rational way of achieving these goals, the Māori MPs may be necessary to bring attention to these problems and push for funding. It is widely accepted that equality of civil and political rights is interconnected with the enjoyment of socio-economic rights.²³¹

²²⁷ M H Durie "The Treaty of Waitangi: Perspectives for Social Policy" in I H Kawharu (ed) *Waitangi: Māori and Pākehā Perspectives of the Treaty of Waitangi* (Oxford University Press, Auckland, 1989) 280, 287.

²²⁸ For example, male schoolteachers are an under represented group but this may not be because of discrimination, but for other reasons: Ministry of Justice *The Non-Discrimination Standards for Government and the Public Sector* (Ministry of Justice, Wellington, 2002) 21.

²²⁹ Human Rights Act 1993, s 21 (e), (f) and (g) respectively.

²³⁰ *Roberts v Ontario* (1994) 117 DLR (4th) 297. Note that the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights (ICCPR) were of great importance in drafting the Bill of Rights, and the White Paper invites lawyers and Courts in New Zealand to draw on Canadian jurisprudence where relevant: "A Bill of Rights for New Zealand - A White Paper" [1984] 1 AJHR A6, 65.

²³¹ C L Ryan "Discrimination Against Māoris and Islanders In New Zealand" in W A McKean (ed) *Essays on Race Relations and the Law in New Zealand* (Sweet & Maxwell, Wellington, 1971) 81, 83.

The Māori seats qualify as a positive discrimination measure and it is hard to see how a challenge from Pākehā could succeed. Pākehā are in the majority in Parliament, and enjoy an advantageous place in society. The Māori seats do little to disturb this. Furthermore, the very reason for having positive discrimination clauses is to prevent such groups from using “equality before the law” to strike down programmes from which they are excluded.²³² This was considered so self-evident that the Bill of Rights did not originally include a positive discrimination clause.²³³

A worthier claim could come from another ethnic minority with similar difficulties accessing the political process, or who suffer similar disadvantage. If positive discrimination is the rationale then should not all disadvantaged groups receive the same protection? Positive discrimination measures should not be a means of authorising discrimination between disadvantaged groups.²³⁴ The Convention on the Elimination of All Forms of Racial Discrimination suggests that where an affirmative action provision maintains separate rights for different racial groups, this is still discrimination.²³⁵ On this basis it could be argued that since the Māori seats maintain separate rights for different groups, they should be discontinued.

However, the United Nations Committee on the Elimination of Racial Discrimination has praised Government initiatives to address disadvantage of Māori and other ethnic minorities in New Zealand.²³⁶ The Committee had the provisions of the Electoral Act

²³² *Roberts v Ontario* (1994) 117 DLR (4th) 297, 302 – 303 (per Houlden JA), 315 (per Finlayson JA), 332 – 333 (per Weiler JA).

²³³ “A Bill of Rights for New Zealand – A White Paper” [1984] 1 AJHR A6, 86. Section 19(2) was ultimately included as the Justice and Law Reform Committee considered that it was best to make the position clear, and that it might also serve an educative function: Justice and Law Reform Committee “Interim Report of the Inquiry into the White Paper – A Bill of Rights for New Zealand” [1986] AJHR I-8A, 51.

²³⁴ *Roberts v Ontario*, above, 303 per Houlden JA. Finlayson JA dissented from the majority decision on the basis that an incidental discriminatory effect within the target group of a special programme should not of itself disqualify it from the protection of the affirmative action clause. No rational connection must be shown but if it is, then that is a complete answer to claims of discrimination. The discrimination could be justified on another basis. (See pages 318-319).

²³⁵ International Convention on the Elimination of All Forms of Racial Discrimination, (25 October 1966) 660 UNTS 291, Article 1.4.

²³⁶ The New Zealand Ministry of Foreign Affairs & Trade New Zealand’s 12th/13th/14th Periodic Report under the International Convention on the Elimination of All Forms of Racial Discrimination at www.mfat.govt.nz/foreign/humanrights/conventions/cerupdate.html (last accessed 15 July 2003).

outlined to them in *New Zealand's 12th, 13th and 14th Consolidated Report to the Committee on the Elimination of Racial Discrimination*.²³⁷ The Committee welcomed the introduction of amendments to the electoral system, particularly the Māori electoral option, noting that it contributed to an appreciable increase in the representation of Māori in Parliament.²³⁸ Furthermore, if representation were guaranteed to all disadvantaged groups, floodgates problems would have to be overcome.²³⁹ But as previously noted, there are good reasons based on Māori status as tangata whenua and as a Treaty partner, why Māori warrant guaranteed representation when others do not.

3 *Is a positive discrimination analysis appropriate?*

While the Māori seats could constitute an affirmative action measure and are justifiable on that basis, this is not the best way of viewing the seats. To view them as a positive discrimination measure gives some substance to ACT's claim that the seats are patronising and imply Māori are in need of protection.²⁴⁰ Furthermore, a positive discrimination analysis does not really answer the question of why other disadvantaged groups do not receive similar representation. More importantly, it views the seats as a temporary measure. The essence of positive discrimination measures is that they aim to redress some imbalance or disadvantage. Once that disadvantage is gone, the measure must also disappear. This means that when Māori achieve proportionate seats in Parliament without the need for guaranteed representation, or depending on how the objective is defined, Māori achieve an equal position in New Zealand society, then the seats must be abolished. The idea of 'extra' rights for Māori does not fit comfortably within this framework.²⁴¹ To keep them when they have done their job would be discrimination.

²³⁷ See Ministry of Foreign Affairs Website:

<http://www.mft.govt.nz/foreign/humanrights/reports/12th14thperiodicreports.html> (last accessed 18 July 2003), para 149 – 155.

²³⁸ See CERD A/57/18 (2002) at

<http://www.bayefsky.com/docs.php/area/conclobs/state/123/node/3/treaty/cerd> (last accessed 18 July 2003).

²³⁹ Mai Chen and Sir Geoffrey Palmer *Public Law in New Zealand: Cases, Materials, Commentary and Questions* (Oxford University Press, Auckland, 1993) 700 - 701.

²⁴⁰ MMP Review Committee "Inquiry into the Review of MMP"[2001] AJHR I 23 A, 21.

²⁴¹ Benedict Kingsbury "Competing Conceptual Approaches to Indigenous Group Issues in New Zealand" (2002) 52 UTLJ 101, 105.

However, the issue of guaranteed Māori representation is not just about ensuring Māori are heard in Parliament; but about acknowledging their special relationship with the Crown and their status as the indigenous people of New Zealand. A positive discrimination analysis ignores these important reasons for having the seats – the status of Māori as tangata whenua, and the Treaty of Waitangi, as discussed earlier. These arguments warrant protected seats regardless of Māori socioeconomic position, or their numbers in Parliament. To treat the seats as anything less undervalues their importance.

The relationship between the Crown and Māori is ongoing. While governments may prefer to view things on the basis that any issue, whether related to land or constitutional aspirations, can be settled once and for all, indigenous peoples approach grievances from a completely different standpoint.²⁴² Indigenous groups tend to approach the problem as one step on the path towards cultural survival.²⁴³ The seats must be viewed as a long-term measure. Although they help to address Māori disadvantage, they are required regardless of this, and so long as there are Māori in New Zealand, they should have a guaranteed place in the Legislature.

B Electoral Rights

Aside from claims of discrimination, separate Māori representation is also alleged to have a negative impact on the rights of other New Zealanders by threatening the integrity of our electoral system. Several submissions to the MMP Review Committee complained that while the seats may be effective at representing Māori, they undermined the democratic principle that every vote should be equal, and that in the long run they threatened the proportionality of the system with Māori votes carrying greater weight.²⁴⁴

²⁴² Ken S Coates "International Perspectives on Relations with Indigenous Peoples" in Ken S Coates and PG McHugh *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Victoria University Press, Wellington, 1998) 19, 29.

²⁴³ Coates, above, 29.

²⁴⁴ MMP Review Committee "Inquiry into the Review of MMP"[2001] AJHR I 23 A, 20.

Section 12 of the Bill of Rights states that every New Zealand citizen over the age of 18 years can vote in elections for the House of Representatives, which elections shall be by *equal suffrage*.²⁴⁵ This is similar to Article 25 of the International Covenant on Civil and Political Rights (ICCPR), whose obligations the Bill of Rights was aimed at incorporating into New Zealand domestic law.²⁴⁶ Article 25 of the ICCPR states that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in his country

The Human Rights Committee has noted that although the ICCPR does not impose any particular electoral system, the principle of “one person, one vote” must apply and the vote of one elector must be equal to the vote of another. The Committee rejects the drawing of electoral boundaries and methods of allocating votes that distort the distribution of voters or discriminate against any group.²⁴⁷

It could be argued that the Māori seats are inconsistent with equal suffrage because not everyone has the option of voting for them, but Māori can choose whether to register on the Māori or General roll. As such, Māori could appear to have more voting power than other groups.

The Justice and Law Reform Committee considered that the use of the term “equal suffrage” was unlikely to require a certain electoral system, such as MMP, to be established.²⁴⁸ Similarly, it cannot require the seats be abolished. The Māori seats leave

²⁴⁵ Emphasis added.

²⁴⁶ See the long title of the Act – “An Act – (a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and (b) to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights”.

²⁴⁷ Human Rights Committee *CCPR General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25)* (12/07/96). Adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996.

²⁴⁸ Justice and Law Reform Committee “Interim Report of the Inquiry into the White Paper – A Bill of Rights for New Zealand” [1986] AJHR I-8A, 42. This is in line with the General Comments on Article 25

the principle of "one person, one vote" intact. Māori do not get any more votes than anyone else. Moreover, nobody can vote for any seat they like. To vote in any electoral district there are certain requirements, such as residency. Yet nobody would claim this is contrary to the idea of equal suffrage.

Equality does not necessarily require the same treatment; in fact sometimes it requires different treatment to ensure that all groups can effectively enjoy the same rights. In 1867 when the seats were introduced it was recognised that special Māori representation was needed to ensure Māori really did receive rights of equal suffrage.²⁴⁹ Since the Māori option was revised so that the number of Māori seats now reflects the number on the Māori roll, there has been a large increase in Māori registration.²⁵⁰ The Māori seats are an important way of ensuring that Māori do exercise their democratic rights and that their suffrage has real meaning.

Another facet to this argument against the seats is that the Māori vote is worth more, as the average number of voters in the Māori electoral districts is slightly lower than for general districts.²⁵¹ However, the White Paper states:²⁵²

"equal suffrage" does not require an exact equality of population for electorates. The present 10 percent differentiation allowed under the Electoral Act s 17 (itself a "reserved provision") is

of the ICCPR: Human Rights Committee *CCPR General Comment 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25)* (12/07/96), adopted by the Committee at its 1510th meeting (fifty-seventh session) on 12 July 1996. And it is also consistent with the European Commission of Human Rights decision of *The Liberal Party v United Kingdom* [1980] 4 EHRR 106 where even though a first past the post electoral system in Britain did not adequately represent minorities, there was no breach of Articles 3 and 14 of the European Human Rights Convention guaranteeing the free expression of opinion of the people in the choice of a legislature and freedom from discrimination. It is worth noting that there was no requirement of equality in the secret ballot.

²⁴⁹ See the preamble to the Māori Representation Act 1867.

²⁵⁰ In the 1997 option 10 517 new Māori enrolments were on the Māori roll, and only 2 664 were on the General roll, allowing the number of seats to increase from four to five. MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I 23 A, 22. At the 2001 electoral option 14 000 Māori voters moved from the General roll to the Māori roll, and over 15 000 of the 18 500 Māori registering for the first time signed on to the Māori roll. This allowed the number of Māori seats to increase to seven:

"Parliament's Māori Seat anachronism" (24 January 2003) *The Dominion Post* Wellington, 4.

²⁵¹ The average for Māori districts is 53 099 people, whereas for the South Island and North Island General districts it is 54 308 and 54 296 people respectively. See Statistics New Zealand Media Release Electoral Populations Calculated

<<http://www.stats.govt.nz/domino/external/pasfull/pasfull.nsf/web/Media+Release+Electoral+Populations+Calculated+2001+Media+Release?open>> (last accessed 18 July 2003).

²⁵² "A Bill of Rights for New Zealand – A White Paper" [1984] 1 AJHR A6, 78 (emphasis added).

already one of the narrowest in Western democracies. Only if the permitted discrepancies in the populations of electorates were gross might a court hold that this Article had been infringed.

Clearly the approximate 2.2 per cent difference in average population between the Māori and General electorates does not come anywhere near a "gross discrepancy" constituting unequal suffrage.

C Justified Limitations

Even if, contrary to the foregoing arguments, the seats do infringe either the right to freedom from discrimination or electoral rights of non-Māori, the seats may still be justified under the Bill of Rights. Rights do not exist in a vacuum, and it is necessary to place some limits on them.²⁵³ Section 5 of the New Zealand Bill of Rights Act 1990 states that:

subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law in a free and democratic society.

Even prima facie discrimination may not actually be a breach of the New Zealand Bill of Rights Act.

1 Is a section 5 analysis appropriate?

In *Quilter* Thomas J stated that a section 5 analysis was inappropriate for discriminatory provisions as discrimination can never be reconciled with democratic ideal of equality before the law:²⁵⁴

By its very nature discrimination on any of the grounds specified in section 21 cannot be open to justification in a free and democratic society. ... Discrimination in all its forms is odious. It is hurtful to those discriminated against and harmful to the health of the body politic. As such, it is or should be repugnant in a free and democratic society. There are, in other words, no "reasonable limits" prescribed by law which could be demonstrably justified in a free and democratic society. Discrimination and democracy are inherently antithetical.

²⁵³ Justice and Law Reform Committee "Interim Report of the Inquiry into the White Paper – A Bill of Rights for New Zealand" [1986] AJHR I-8A, 26.

²⁵⁴ *Quilter v Attorney-General* [1998] 1 NZLR 523, 540 (CA).

However, this prohibition on the use of section 5 is only workable if a high test of what constitutes discrimination is adopted. The other judges decided the case on the basis that the Marriage Act was inconsistent with the Bill of Rights and so must be applied. This meant that they did not have to determine whether it was discriminatory, nor whether it was justified. Nevertheless, Tipping J clearly contemplated that section 5 could be applied to discrimination. He states that not all discrimination is unlawful and a balancing act is required. The purpose of anti-discrimination legislation is:²⁵⁵

to give substance to the principle of equality under the law and the law's unwillingness to allow discrimination on any of the prohibited grounds unless the reason for the discrimination serves a higher goal than the goal which anti-discrimination laws are designed to achieve.

Even accepting that section 5 can be applied to discrimination, another issue regarding the relationship between sections 4 and 5 arises. In *Ministry of Transport v Noort* the Court of Appeal was divided in this regard.²⁵⁶ Cooke P and Gault J considered that section 5 had no application once the provision was found to be inconsistent with the Bill of Rights. Section 5 is subject to section 4 which states that the Courts cannot refuse to enforce a provision, or hold it to be invalid, revoked or ineffective, simply because it is inconsistent with the Bill of Rights.

Applying this to the Māori seats, the Electoral Act 1993 is clear that non-Māori cannot vote for those seats, and special Māori representation must be enforced, even if it were found to be discriminatory or contrary to electoral rights.²⁵⁷ There is no room for an alternative interpretation under section 6.²⁵⁸

On the other hand, the remaining judges in *Noort*, Richardson, Hardie Boys and McKay JJ, thought it was necessary to first have regard to section 5 before finding a breach of the Bill of Rights. This view is preferable. The Court of Appeal in *Moonen v*

²⁵⁵ *Quilter*, above, 573.

²⁵⁶ [1992] 3 NZLR 260.

²⁵⁷ This was the approach taken in *Re Bennett* (1993) 2 HRNZ 358 (HC) where Grieg J decided that the Electoral Act must prevail over the Bill of Rights section 12. The Electoral Act was clear that those detained in penal institutions pursuant to a conviction cannot vote, despite the Bill of Rights allowing all citizens over 18 the right to do so.

*Film & Literature Board of Review*²⁵⁹ suggested in obiter dicta that section 5 may require the Courts to make a declaration indicating that, although the provision must be upheld and enforced according to section 4, it is inconsistent with the Bill of Rights and cannot be justified in a free and democratic society.²⁶⁰ Thus it is still necessary to consider section 5 limitations, despite the clear inconsistency with the Electoral Act provisions.

2 The section 5 test

The Court of Appeal in *Moonen* developed guidelines for assessing whether a limitation on rights is justified in a free and democratic society according to section 5.²⁶¹

- Identify the objective that the Legislature was trying to achieve through the statutory provision
- Assess the importance and significance of that objective
- Assess whether the importance of the objective is proportionate to the way it has been achieved
- Assess whether there is a rational link between the means used and the objective so that there is as little interference as possible with the right
- Assess whether the limitation is justifiable in light of the objective.

In applying this test, the Court must consider all the issues which may have a bearing on the individual case. This may include social, legal, moral, economic, administrative, ethical or other concerns.²⁶²

In *R v Oakes*, the Supreme Court of Canada set out some of the core principles in a free and democratic society. Pertinent to the Māori seats, these included commitment to social justice and equality, accommodation of a wide range of beliefs, respect for cultural

²⁵⁸ Section 6 states that where an interpretation consistent with the New Zealand Bill of Rights Act 1990 is properly available, that interpretation must be preferred.

²⁵⁹ (1999) 5 HRNZ 224 (CA) Tipping J.

²⁶⁰ *Moonen v Film & Literature Board of Review* (1999) 5 HRNZ 224, 234 (CA) Tipping J. Some commentators have approved this. See Andrew Butler "Judicial Indications of Inconsistency – A New Weapon in the Bill of Rights Armoury?" [2000] NZ Law Rev 43.

²⁶¹ *Moonen*, above, 233 - 234.

²⁶² *Moonen*, above, 234.

and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.²⁶³

3 Application of the test to the Māori seats

(a) Importance of the objective

Put simply, the seats are a way of guaranteeing a Māori presence in the Legislature, and of ensuring Māori access to, and participation in, the legislative process. This is important for a number of reasons. Parliamentary representation enables Māori to take part in shaping the policies and legislation that will affect them. This helps protect their resources and helps to address the social and economic disadvantage Māori suffer. The goal of improving the quality of life for Māori, and trying to raise it to the same level as that enjoyed by non-Māori is undeniably important. There should not be such disparities on racial lines.

But why guaranteed representation? Surely representation for any group, disadvantaged or not, is an important goal? Yet we do not require separate seats for Pacific Islanders, or women, despite the undeniable importance of their concerns. This is seen as the responsibility of political parties themselves and not a suitable subject for special measures.²⁶⁴

As discussed earlier, the importance of guaranteed representation comes from the Treaty,²⁶⁵ and also perhaps from the status of Māori as the indigenous people of New

²⁶³ *R v Oakes* (1986) 26 DLR (4th) 200, 225 per Dickson CJC (Chouinard, Lamer, Wilson and Le Dain JJ concurring).

²⁶⁴ MMP Review Committee "Inquiry into the Review of MMP"[2001] AJHR I 23 A, 43 and 45. The Royal Commission noted that providing separate representation for ethnic minorities, in particular Pacific Island communities, there would be great difficulties as they come from such diverse societies and form small percentages of the population.

²⁶⁵ This was seen as an important reason for clause 12.4 of the Local Government Bill 2001, which enabled Māori wards or constituencies to be created under the Local Electoral Act 2001. See Ministry of Justice *Preliminary Legal Advice: Compliance with the New Zealand Bill of Rights Act 1990: The Local Government Bill 2001* (5 December 2001) para 62, confirmed in Ministry of Justice *Legal Advice: Compliance with the New Zealand Bill of Rights Act 1990: The Local Government Bill 2001* (17 December 2001) para 3.

Zealand. It is important in any society for promises made to be honoured, and not just when it suits the majority. Part of the justification for New Zealand colonisation, and thus for our society being here today, comes from the Treaty. If Māori and Pākehā are really to be meaningful partners and build one nation together, there must be an even playing field. It is important that Māori have a place in Parliament where they can exercise some rangatiratanga, protect their taonga, and truly enjoy the rights of "British citizens".

(b) A rational and proportionate measure?

The seats are rational because they have the desired effect of guaranteeing a of Māori presence in the House, and more importantly, of ensuring effective representation. As discussed above, now that MMP has been implemented, many of the disadvantages of the seats under FPP have been minimised, while the advantages have remained. The list seats mean that non-Māori MPs can no longer afford to ignore Māori concerns. The seats allow Māori to choose appropriate representatives for themselves. Other options for representing Māori views in Parliament do not give the same benefits, but would suffer the same disadvantages.

Furthermore, the seats are achieving these goals with the least interference with the rights of non-Māori. While relying on MMP alone, for example, would interfere less, it would not offer Māori suitable representation. At the other end, a separate Parliament would offer Māori a high level of representation, but would interfere more with the rights of others, as rather than only a few seats, there would be a whole federal government or national Māori Parliament in which they could not participate. The existing seats sit comfortably in the middle and are a proportionate measure.

Even if the seats did breach the right of non-Māori to freedom from discrimination, or infringe on their right to equal suffrage, guaranteed representation for Māori is a justified limitation on those rights in a free and democratic nation, such as New Zealand.

VII CONCLUSION

The Māori seats in Parliament have a long history. They were instituted in 1867 as a temporary measure to lessen the effect on Māori of the proprietary requirements for suffrage. They were also considered something of a pacifier, and were ideologically linked to the demands of the miners who also received special representation. While these justifications are no longer applicable, the seats still exist, and should remain.

The contention surrounding the seats is not aimed at Māori representation per se, but that it takes the form of guaranteed seats in Parliament, unavailable to any other group. Two reasons justify the special treatment.

First, Māori status as the indigenous people of New Zealand differentiates them from other groups, as is being increasingly recognised at international law. While the Draft Declaration does not give enforceable rights as yet, its demand for full participation in decision-making at all levels is part of the wider context to be considered.

Secondly, and more importantly, Māori have a unique relationship with the Crown as a Treaty partner. This requires active protection of Māori rights, including the right to political representation. Any just partnership should allow both partners to have a stake in the decision making.

The Treaty also made certain promises to Māori, which must be honoured. While sovereignty resides in Parliament, Māori retained a lesser form of rangatiratanga. By guaranteeing Māori representation in Parliament, Māori have direct input into legislation and policy, and retain some control over their destiny. This also enables Māori to protect their taonga, and to enjoy the rights of British citizens promised to them. The Crown has vigorously enforced the concessions of sovereignty and pre-emption; Māori should at least be able to enjoy their part of the bargain too.

Māori are different from other groups and deserve special political representation measures that others do not, but this must be more than empty symbolism. In order to embody rangatiratanga, or enable Māori to protect their taonga, the seats must provide

effective representation. Although the Royal Commission did not favour the seats, the change to MMP allayed much of their concerns and ensured quality representation. With the creation of list seats no party can afford to ignore Māori, who make up 12% of the voting population. The seats offer Māori a means of promoting and protecting Māori views that is not possible with either the list or general electorate seats, where prominence must be given to the views of the non-Māori majority.

Nor would alternative methods of Māori representation in Parliament give Māori direct representation. Instead, these rely too greatly on the goodwill of political parties to put forward appropriate spokespeople for Māori. While some alternatives better express rangatiratanga and partnership, there are many issues to work through before they can be implemented, and this will not happen in the near future. In the meantime we should focus on what we already have available, and what is already working – the Māori seats.

Although the seats obviously treat Māori differently from other groups in society, this does not have a detrimental impact on the rights of other New Zealanders, and the seats are justified under the New Zealand Bill of Rights Act 1990. Arguably the seats do not constitute even a prima facie breach. They lack the necessary unfairness to non-Māori to warrant the label discrimination. In any case they could be classified as a positive discrimination measure, although this does not give proper recognition to the special status of Māori as tangata whenua and Treaty partner, or the ongoing nature of that relationship. Nor do the Māori seats undermine our democracy. Just because Māori can choose which roll to vote on does not limit the voting rights of anyone else. It is still "one person one vote"; Māori votes do not carry more weight than anyone else's.

Even if the seats constituted discrimination or infringement of electoral rights, this would be justified under section 5. Fulfilling Treaty obligations is an important objective, and effective representation via the seats is a rational and proportionate way of realising this.

While the justifications for their existence may have changed since 1867, there are still good reasons why the seats should remain today. They are an important and effective realisation of Māori Treaty rights, and a justified part of a free and democratic society.

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