

6. Democratic Rights

Tikanga Manapori

“Everyone has the right to choose to take part in the government of their country.”



Everyone has the right to choose to take part in the government of their country.

Universal Declaration of Human Rights, Article 21 (plain text)

Introduction

Timatatanga

Democratic rights include the right to take part in electing the Government and the right to access and participate in the public service. There is also a corresponding duty of responsible citizenship, which involves a willingness to play a part in public affairs and to respect the rights and freedoms of others.

There have been some significant changes since the Commission's review of human rights in 2004. Domestically, these include acknowledgement of the need for a review of New Zealand's constitutional arrangements, better understanding of the role that civil society can play in informing the development of policy, and amendments to the Local Government Act 2002 to increase the transparency and accountability of local government. The Electoral Finance Act 2007 was introduced (and repealed), legislation to make Auckland into a 'super city' was passed, and the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 and Canterbury Earthquake Recovery Response Act 2010 were enacted amid criticism that they undermined democratic participation and the rule of law.

Internationally, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) – which includes the right to self-determination for Indigenous peoples – was adopted by the UN General Assembly in 2007.¹ The Convention on the Rights of Persons with Disabilities, which sets out a state's responsibility to ensure persons with disabilities can effectively and fully participate in political and public life on an equal basis with others (Article 29(a)), was also opened for ratification in 2007. Overall, there is greater recognition that democracy and the rule of law

are not only interdependent but necessary to create an environment in which human rights can be realised.²

International context

Kaupapa ā taiao

INTERNATIONAL HUMAN RIGHTS STANDARDS

Under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), all citizens have the right and opportunity to take part in the conduct of public affairs in their country, directly or through freely chosen representatives, and the right "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".³ They also have access, on equal terms, to public service.

Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) state that all peoples⁴ have the right to self-determination, including the right to freely determine their political status. The right to self-determination is also found in the UNDRIP.

Democratic rights include a range of other rights, such as to justice, freedom of expression, peaceful assembly and freedom of association. They also include freedoms and social and economic rights, such as to health, social security and education. The importance of ensuring that these rights are available on a non-discriminatory basis is emphasised in the ICCPR and the ICESCR, the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of Racial Discrimination (CERD) and, most recently, the Convention on the Rights of Persons with Disabilities (CRPD). CEDAW and CERD also require states to ensure equal representation and participation of women and all ethnic and racial groups in political processes and institutions.⁵

1 New Zealand indicated its support for the declaration in 2010.

2 Economic and Social Council, Civil and Political Rights (2005), Interdependence between Democracy and Human Rights, Report of the Second Expert Seminar on Democracy and the Rule of Law, Geneva, E/CN.4/2005/58

3 Unlike the other rights in the ICCPR, Article 25 applies only to citizens, not to all people.

4 Traditionally a term referring to nation states

5 CEDAW, Article 7; CERD, Article 5(c)

INTERDEPENDENCE OF DEMOCRACY AND HUMAN RIGHTS

Democracy and the rule of law are interdependent and both are necessary to create an environment in which human rights can be realised. The Economic and Social Council has reported in relation to Article 25 that “the fundamental principles of equality, participation and accountability derive from, underpin and protect human rights, democracy and the rule of law”.⁶

General comment 25 develops the concept of the right of everyone to vote and play a role in public affairs. It describes the conduct of public affairs as:

... a broad concept which relates to the exercise of political power ... It covers all aspects of public administration, and the formulation and implementation of policy at international, national and regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs should be established by the constitution and local laws.⁷

The rights to influence public decision-making and decision-makers (popular control), and to be treated with equal respect and as of equal worth (political equality) in decision-making are fundamental to a democracy.

The conditions necessary for realising popular control and political equality are:

- a guaranteed framework of citizens’ rights (including civil, political, economic, social and cultural rights)
- a system of representative and accountable political institutions
- an active civil society (people working together who

can channel popular opinion and engage with the Government).⁸

New Zealand context Kaupapa o Aotearoa

THE CONSTITUTIONAL FRAMEWORK

New Zealand does not have a single, stand-alone constitution. Rather, a number of laws, including the Constitution Act 1986, the Electoral Act 1993 and the New Zealand Bill of Rights Act 1990 (BoRA), together with the Treaty of Waitangi, judicial decisions and constitutional conventions, make up the constitutional framework.⁹

The business of government is distributed among the executive (cabinet ministers and the public service), the legislature and the judiciary. This separation of powers ensures that there are checks and balances within the system and accountability and impartiality are maintained. The public service consists of 35 government departments and ministries, is politically neutral (that is, appointments are not made on a partisan political basis) and serves the elected Government.¹⁰

Treaty of Waitangi¹¹

Article 1 of the Treaty of Waitangi provides for the Crown’s right to govern in New Zealand. In terms of contemporary democratic rights, Article 1 is arguably the basis for current government structures in New Zealand, including the predominantly Westminster style of governance.

Article 2 of the Treaty guarantees Māori “full, exclusive and undisturbed possession” (English version) or “te tino rangatiratanga” (Māori version) of their lands, estates, forests, fisheries and ‘taonga’ (treasured possessions). This

6 Economic and Social Council, *Civil and Political Rights* (2005), para 41

7 United Nations Human Rights Committee (1996), general comment 25: The right to participate in public affairs, voting rights and the right of access to public service (UN Doc.CCPR/C/21/Rev.1 add 7).

8 Beetham D (1999), *Democracy and Human Rights* (Stafford, Australia: Wiley-Blackwell)

9 Many constitutional conventions (such as the collective responsibility of cabinet ministers) have no formal legislative base, but are reflected in documents such as the Cabinet Manual. Similarly, parliamentary practices are contained in Parliamentary Standing Orders.

10 Under the State Sector Act 1981, the State Services Commissioner has three roles relating to the performance of the public service: appointing chief executives, reviewing the performance of chief executives and investigating the performance of the public sector.

11 For a more detailed explanation of the Treaty and its relationship to New Zealand law, see the chapter on ‘Human Rights and the Treaty of Waitangi’.

can be measured by the extent to which Māori are able to govern relevant aspects of Māori life and participate in Māori structures and organisations, including whānau, marae, hapū and iwi.

Article 3 affirms the equal citizenship rights of all New Zealanders, including Māori. This may be measured by the extent to which New Zealanders are proportionately represented in the institutions of the State and can participate in political processes, such as voting. Article 3 also promises the Queen's "royal protection" to Māori. A measure of this protection would be the well-being of Māori.

New Zealand Bill of Rights Act 1990 (BoRA)

The BoRA affirms New Zealand's commitment to the ICCPR.¹² Section 12 states:

Every New Zealand citizen who is of or over the age of 18 years:

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

(b) is qualified for membership of the House of Representatives.

Equal suffrage has been interpreted as meaning every vote carries equal weight and has equal influence. It requires that elections be 'genuine' and accurately reflect the will of the people and be free from intimidation or fraud.¹³

Although section 12 is limited to national elections and does not refer to the right to take part in public affairs, the BoRA provides for a range of other rights and freedoms that are central to democracy and which relate to the ability to participate in public affairs, such as freedom of thought, conscience and religion (section 13), freedom of expression (14), association (17) and peaceful assembly (16), and freedom from discrimination (19) on the grounds provided for in section 21 of the Human Rights Act 1993 (HRA).

CONSTITUTION ACT AND ELECTORAL ACT

The Constitution Act 1986 vests power in Parliament and entrenches the three-year parliamentary term. The Electoral Act 1993 sets out the structures and processes for holding national general elections (including the creation of electoral districts and the method of voting), defines who can vote, and describes the qualifications for members of the House. Certain provisions in the Electoral Act are also entrenched.

Certain groups are disqualified from voting under section 80 of the Electoral Act. They include New Zealand citizens who are not (and have not been for the three years prior) in New Zealand at the time of the election; some detainees under the Mental Health (Compulsory Treatment and Assessment) Act 1992; certain categories of prisoners; and people on the Corrupt Practices List. At the time of writing this chapter, legislation – the Electoral (Disqualification of Convicted Prisoners) Amendment Bill – that would amend the Electoral Act to disqualify all convicted prisoners from voting had passed its second reading in Parliament.

In 2007, the Electoral Finance Act introduced more rigorous requirements for election campaigning by third parties or parallel campaigners. It also included a stricter regime for disclosure of political donations and increased the criminal penalties and time limits for prosecution for electoral finance offences. The act was repealed in 2009 in the face of wide-ranging criticism about the restrictions on freedom of expression, and concerns about the parallel campaigning regime generally. The former provisions of the 1993 act relating to campaign expenditure and advertising were reinstated, and the provisions of the 2007 act relating to donations and criminal sanctions were inserted into the Electoral Act 1993.

Following an extensive consultation process, legislation was introduced in 2010 to further amend the Electoral Act 1993. The Electoral (Finance Reform and Advance Voting) Amendment Bill is designed to ensure greater certainty and transparency in the conduct of the electoral process and increase public confidence in the outcome of elections.

¹² In New Zealand, the right to vote extends to all permanent residents.

¹³ Butler P and Butler A (2005), *The New Zealand Bill of Rights: A Commentary* (Wellington: LexisNexis), para 12.8. See also discussion below on "free and fair elections".

National general electoral system

The first general election using the mixed member proportional system (MMP) was held in 1996. Under MMP every person has two votes – one for a party and one for an electorate candidate. The party vote determines the overall distribution of parliamentary seats in the House of Representatives. To be entitled to a seat in Parliament, a registered party must gain more than 5 per cent of all the party votes or win at least one electorate seat. A referendum will be held in conjunction with the 2011 general election to indicate whether voters want to retain the current MMP voting system.

The Māori electoral option

After each census, the process of redrawing electorate boundaries begins with a four-month Māori electoral option. During this period, Māori can choose to be on either the Māori electoral roll or the general roll. The results form the basis for calculating the Māori electoral population and the general electoral population, and determine the number of Māori seats for the following two general elections.

Currently, the 122 seats in Parliament consist of 63 from general electorates, seven from Māori electorates and 52 from party lists. The 2008 election created an overhang of two seats.

Citizens-initiated referenda

The Citizens Initiated Referendum Act 1993 (CIR Act) provides a process for individuals and corporate bodies to initiate national referenda on any subject if 10 per cent of registered voters sign a petition in support. The results of such referenda are indicative only and not binding on the Government.

Election oversight and review

As part of the electoral reform package, the Electoral Act 1993 was amended to establish a new Electoral Commission as an independent Crown entity. The new Commission will merge the functions of the Chief Electoral Officer and the Electoral Commission from 1 October 2010.¹⁴ The Chief Registrar of Electors' responsibility for the electoral role will transfer to the new Electoral Commission in October 2010.

The new commission will have all the functions of the original agencies relating to electoral administration – information on electoral issues and reviews of the electoral system – as well as providing an advisory opinion on whether a draft advertisement is an election advertisement for the purposes of the Electoral Act.

LOCAL GOVERNMENT ELECTORAL SYSTEM

There are three types of local government in New Zealand: regional, territorial (cities and districts) and unitary (combining the functions of a regional and territorial council).

Local government does not have a formally recognised constitutional status, although Parliament's Standing Orders give local authorities the right to promote legislation affecting their own districts independently of central government. Local authorities enjoy considerable independence from the Government, but must act within the legal framework established by Parliament.

Local government elections occur every three years under the Local Electoral Act 2002, which establishes principles to ensure fair and effective representation for individuals and communities in local government. It also allows regional councils to provide Māori seats and a triennial representation review for choice of the electoral system. To date, only one council (Environment Bay of Plenty) has allocated specific seats for Māori. The electoral systems available for local-body elections are 'first past the post' (FPP) and 'single transferable vote' (STV).

Local Government Act 2002

The Local Government Act 2002 (LGA) requires local authorities to promote the social, economic, environmental and cultural well-being of their communities, in a way that is sustainable now and in the future. It promotes the accountability of local authorities to their communities¹⁵ and respect for the Crown's responsibilities under the Treaty of Waitangi, and provides opportunities for Māori to contribute to local government decision-making.¹⁶ Part 6 requires local authorities to involve citizens in decisions that affect their lives, by setting out principles for consultation with communities,

¹⁴ This was an action point in the previous Action Plan.

¹⁵ LGA 2002, section 3(c)

¹⁶ LGA 2002, section 4

including obligations to ensure the contribution of Māori to decision-making¹⁷ and to consult with all interested and affected persons.¹⁸ The LGA also sets out a process for identifying and reporting on community outcomes.

In 2010, the Local Government Act 2002 Amendment Bill was introduced. The bill aims to change the way local authorities set their direction and how this can be influenced and assessed by their communities. The bill will achieve this by reinforcing the need for local authorities to focus on the contribution which specified 'core services' make to its communities. It requires local authorities to satisfy themselves that the expected returns from commercial activities are likely to outweigh the inherent risks. It also reduces "unnecessary" consultation by limiting the opportunity for different communities to consult and act in partnership with local councils. This could undermine the consultation requirements in the principal act and the ability of different communities to influence the activities of local government. Although designed to improve transparency, the bill is also seen as easing the way for increased private-sector involvement in local government operations.¹⁹

The 'super city' legislation

In October 2009, Cabinet agreed to a package of reforms to improve the transparency, accountability and financial management of local government. As part of this, a suite of bills was introduced to change the local government structure in Auckland. The legislative change was preceded by a Royal Commission on Auckland Governance, which had reported to the Government in March 2009 following extensive public consultation. The Commission found that regional governance was weak and fragmented and there was poor community engagement. It recommended a single council as the first tier of governance, supported by six local councils that would focus on local engagement and the delivery of quality local services. The commission also recommended that there be a number of safeguarded seats on the council for Māori, in recognition of the Treaty of Waitangi and the requirements of the Local Government Act.

17 LGA 2002, section 8.

18 LGA 2002, section 82

19 Russell McVeagh (2010), Local Government Update, 3 May. Accessible online at http://www.russellmcveagh.com/_docs/LocalGovernmentUpdate_298.pdf

20 Local Government (Auckland Council) Bill, explanatory note at 9

The Local Government (Tāmaki Makaurau Reorganisation) Act 2009 and the Local Government (Auckland Council) Act 2009 create a single unified governance structure. They have the primary objective of ensuring democratic and effective local government to maximise "...the current and future wellbeing of Auckland and its communities".²⁰ In other words, the legislation departs significantly from the format envisaged by the royal commission:

- It creates a new mechanism for the devolution of non-regulatory activities through Council Controlled Organisations. This has been the subject of significant criticism because of the lack of transparency in the appointment process.
- There is no specific provision for Māori representation in the decision-making process. Māori representation is provided through an independent statutory board which is to "promote issues of significance for mana whenua and Māori of Tāmaki Makaurau" and is designed to ensure that the council acts in accordance with existing Treaty of Waitangi provisions. The board has no real power and is purely advisory.
- Provision is made for a Pacific Peoples Advisory Panel and an Ethnic Peoples Advisory Panel with similarly limited roles.
- The legislation does not reflect the Royal Commission's view of local boards. Rather than six local councils, there are a large number of small local boards with poorly defined roles, which are intended to respond to local needs and requirements.

OTHER REPRESENTATIVE BODIES

Other bodies that require election or representative participation include school boards of trustees, district health boards, statutory boards and committees (of which there are over 400), registered societies and associations, and electoral colleges. Iwi and runanga trust boards are also examples of representative bodies to which members may be elected. Although no accurate figures exist, many thousands of New Zealanders are involved in such bodies.

New Zealand today Aotearoa i tēnei rā

A human rights approach to good governance – which includes the realisation of democratic rights – empowers citizens and voters, requires governments to act consistently and in a non-discriminatory way, affirms that governments have a legal obligation to observe human rights commitments, and recognises that rights are linked. For example, economic and social rights cannot be achieved when rights to information or free speech are obstructed.²¹

HUMAN RIGHTS EDUCATION

Although New Zealand's recognition of democratic rights meets international standards, there is no formal process for educating people about their human rights and the importance of participation. The core principles of the national education curriculum recognise the importance of the Treaty of Waitangi, cultural diversity and inclusion (as being non-sexist, non-racist and non-discriminatory), and in its values statement encourages students to “respect themselves, others and human rights”. The New Zealand Qualification Authority offers a number of standard units linked to human rights through a variety of tertiary institutions. A number of university courses also include human rights components.

The Human Rights Commission provides information on and education about human rights. The Commission provides a comprehensive website and has a dedicated advisor team that provides education on human rights, delivers workshops on topics such as the human rights dimensions of the Treaty of Waitangi, works with communities to build their capability to address human rights issues locally, and facilitates the New Zealand Diversity Action Programme. The Commission also works with a range of government agencies to integrate a human rights approach into policy and practice. Over the past

five years, this has included the New Zealand Police, the Ministry of Foreign Affairs and Trade, and the Department of Corrections.

There is no co-ordinated programme specifically for local authorities. Rather, each local authority is responsible for ensuring that its employees understand and apply relevant human rights standards.

Civil society also plays a role in promoting human rights. Human Rights in Education (Mana Tika Tangata) is an initiative by Amnesty International, the Children's Commissioner, the Development Resource Centre, the Peace Foundation and the Human Rights Commission to assist schools and early-childhood centres in understanding and promoting human rights. Other NGOs offer specific programmes for schools, including the Culture of Peace Outreach Programme and the Cool Schools Peer Mediation Programme offered by UNESCO.

LEVEL OF DEMOCRACY

The democracy of a society can be identified in a number of ways, including whether there is a legislative framework guaranteeing citizens' rights, and the levels of participation, authorisation, representativeness, accountability, transparency and responsiveness.

Guaranteed rights

Over the past 20 years there has been debate about whether New Zealand should have a written constitution to guarantee the rights of its citizens and what place the Treaty of Waitangi should have in such arrangements.²²

The BoRA itself is not entrenched legislation. It follows that in theory it could be repealed by Parliament.²³

There is also no formal power for the courts to strike down legislation that breaches New Zealand's constitutional arrangements, although declarations of inconsistency are possible in some (limited) areas.²⁴

21 International Council on Human Rights (2005), *Local Government and Human Rights: Doing Good Service* (Geneva: ICHR), p 4. Accessible online at http://www.ichrp.org/files/reports/11/124_report.pdf

22 See, for example, Roughan N (2005), Te Tiriti and the Constitution: Rethinking Citizenship, Justice, Equality and Democracy, *New Zealand Journal of Public and International Law* 3(2), November, pp 285–303.

23 This is highly unlikely, given the NZ BoRA's almost quasi-constitutional status. See discussion in Rishworth P, Huscroft G, Mahoney R and Optican S (2003), *The New Zealand Bill of Rights Act 1990* (Auckland: OUP), pp 3ff

24 Under the HRA (s.92)), a declaration of inconsistency can be obtained in relation to the right to freedom from discrimination. It is also considered that, as section 6 of the NZ BoRA requires a court to prefer statutory meanings that are consistent with the Bill of Rights over those that are not, for all practical purposes the outcome is a declaration of inconsistency. See, for example, *R v Hansen* [2007] 3 NZLR 1.

Despite the fact that there is no single document that protects all the recognised democratic rights, New Zealand's protection of human rights rates highly in terms of international standards. New Zealanders enjoy freedom of movement, expression, association and assembly, with minimal restrictions. They are free to practise their own religion, speak their own language and observe their own culture. The public sector, including the executive and the judiciary, are subject to the BoRA, and the criminal justice and penal system are independent and impartial.

While successive New Zealand governments have taken the view that economic, social and cultural rights are not justiciable²⁵ – and therefore not legislatively guaranteed in the same way as civil and political rights – these rights are addressed through policy and practice.

Participation and empowerment

Participation is integral to stable and responsive governance. The United Nations, for example, recently issued a guidance note suggesting that the way a government provides for people to have a say in the policy process and the development of legislation has a direct impact on the way they view the legitimacy of the democratic system.²⁶

Consultation is fundamental to participation. Genuine consultation involves listening to what others have to say and considering the responses, even if not necessarily agreeing on the outcome. The party with the onus to consult must keep an open mind and be ready to change and even start afresh if necessary.²⁷ The person consulted must be provided with enough information and sufficient time to allow them to respond in a useful way.

It can be particularly concerning, therefore, when the opportunity to provide input to the development of legislation is unduly restricted – for example, the limited timeframe for the public to make submissions

on the Local Government (Auckland Council) Bill 2009; or legislation such as the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010, which was introduced under urgency and forced through all three readings in a single sitting;²⁸ or the precedent set when a law such as the Canterbury Earthquake Response and Recovery Act 2010 is enacted under urgency, abrogating established constitutional protections.

In the absence of a written constitution, a robust and independent civil society is fundamental to democratic participation and the rule of law. New Zealand has an active and well regarded civil society that covers a wide spectrum of interests and issues. However, to realistically influence decision-making, there needs to be greater engagement between civil society and government agencies.

Over the years, some government ministries and departments have made efforts to involve community organisations in their policy and planning, but the results have often been unsatisfactory. Community organisations tend to feel that the sector's views and expertise are ignored, that lipservice is paid to the partnership between Māori and the Crown, and that consultation and decision-making processes are ineffective.

In 2009, Cabinet approved a package designed to build stronger community relationships and send a clear message to communities that the Government takes their concerns seriously.²⁹ The initiative will involve the development of a set of principles and a quick reference guide on how to implement the principles for effective engagement with citizens and communities. It is modelled on overseas examples, such as the OECD Guiding Principles for Open and Inclusive Policy Making.³⁰ The principles will balance the value of inclusive and collaborative

25 The position on justiciability is slowly changing as international changes increasingly impact as a result of the UN's adoption of an optional protocol to the ICESCR.

26 Guidance note of the Secretary-General on Democracy (2009), para 7.

27 *Wellington International Airport v Air New Zealand Limited* [1993] 1 NZLR 671, 675

28 Joseph P (2010), Environment Canterbury legislation, *New Zealand Law Journal*, June, p 193

29 Office of the Minister for the Community and Voluntary Sector (2009), Cabinet Social Policy Committee: Government Commitment to Building Strong Community Relationships

30 Accessible online at <http://www.oecd.org/dataoecd/20/3/42658029.pdf>

practices with the need for efficiency where issues have already been well canvassed. Guidance in the Cabinet Guide for the public service about consulting community organisations will also be developed, along with a tool for assessing how existing work to improve and measure government performance can include agencies' community relationships.

There will be seminars on good practice in community engagement in a range of locations, the development of a Code of Funding Practice to assist implementation of good funding practice, and information for community organisations on the Ombudsmen's role in dispute resolution.³¹

Authorisation

Elections in New Zealand are considered to be free and fair – 'free' because there is no restriction on access to the process, and 'fair' because they are impartially run in accordance with international standards.³² The criteria for deciding whether elections are free and fair will vary from country to country. They take into account issues such as rules about campaigning, balancing the rights of those not contesting the election to put their arguments to the people with the right to free speech without restriction. It was perhaps a reflection of the commitment to democracy in New Zealand that led to the level of public concern when these values appeared to be under threat with the introduction of the electoral finance legislation.

Voter turnout rates are an indicator of the extent to which citizens participate in the political process, the confidence the population has in it and the importance they attach to political institutions. While it is mandatory for all New Zealand citizens and permanent residents to be on the electoral roll once they are 18 years old, it is not compulsory to vote.

Even though New Zealand ranked 10th out of 30 OECD countries surveyed in 2008 on voter turnout, which was

higher than the OECD median of 74 per cent, there has been a decline in civic engagement in its most 'politically salient' forms (such as voter turnout³³) over the last 20 years. In 2008, voter turnout in New Zealand in the general election was 76 per cent, a slight decline from 77 per cent in 2005, but significantly less than the 89 per cent recorded in 1984.³⁴

Although there is no detailed information available on who votes, results from New Zealand election surveys over a number of years show that non-voters are more likely to be people on lower incomes, younger people, and members of Māori, Pacific or ethnic groups. This is of concern, because where there is a decline in voter turnout among low-income groups, governments can react by spending less on welfare, with the result that over the long term, social problems associated with poverty and income inequality are more likely.³⁵

There has also been a drop in those voting in local-body elections, down from 46 per cent in 2004 to 44 per cent

TABLE 1: PERCENTAGE OF REGISTERED POPULATION WHO VOTED IN PARLIAMENTARY ELECTIONS IN NEW ZEALAND AND SELECTED OECD COUNTRIES, 2005–2008

Country	Date of recent election	Voter turnout at election
New Zealand	2008	79.5
Australia*	2007	95
Canada	2008	59
United States	2008	62
Sweden	2006	81.9
United Kingdom	2005	62

* Voting is compulsory in Australia

31 Office of the Minister for the Community and Voluntary Sector (2009), para 4

32 Elections New Zealand, Free and Fair Elections. Accessible online at <http://www.elections.org.nz/elections/concepts/free-fair-elections/>

33 Vowles J (2004), Civic engagement in New Zealand: Decline or Demise? Inaugural professorial address delivered at the Conference Centre, University of Auckland, October 13, 2004. Accessible online at http://www.nzes.org/docs/papers/Inaugural_2004.pdf

34 Ministry of Social Development (2009), Social Report 2009 (Wellington: MSD). Accessible online at <http://www.socialreport.msd.govt.nz/>

35 Brady D (2003), The Politics of Poverty: Left Political Institutions, the Welfare State and Poverty, Social Forces 82 (2), pp 557–588, cited in MSD (2009)

in 2007 – the lowest turnout since the restructuring of local government in 1989. The drop was relatively constant across all regions,³⁶ but there were considerable variations between rural and urban areas. For example, smaller communities and those in the South Island tended to have a higher turnout for all types of election.

Representation and non-discrimination

Participation is heavily influenced by who speaks for communities and who is represented on decision-making bodies. Only when those directly affected by policy and legislation have a genuine voice in deciding its formation can a governance structure be said to truly reflect the society it represents.

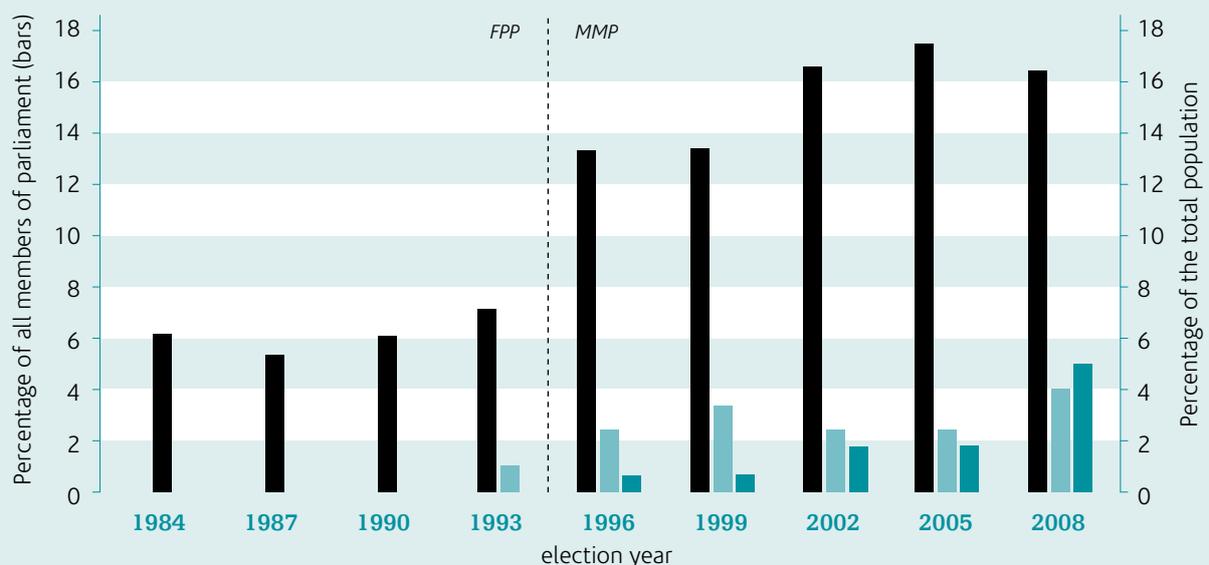
Representation at the national level

Māori seats have contributed to a more representative Parliament. The MMP system has also resulted in a Parliament that better reflects the social and political composition of the electorate, with more Māori, Pacific and Asian MPs, a greater number of women, and openly gay MPs.

The diversity of ethnic groups represented in Parliament rose sharply with the introduction of MMP in 1996 and has increased steadily in subsequent general elections. In 2008, 31 per cent of MPs identified as Māori, Pacific or Asian, and the proportion of MPs identifying as Pacific or Asian were the highest recorded.³⁷ A similar proportion of Māori were elected to Parliament in 2008 as the percentage of Māori in the population overall (16 per cent of MPs identified as Māori, compared with 15 per cent of the total population in 2006). The proportion of Pacific peoples in Parliament (4 per cent) was smaller than their share of the population (7 per cent), while the Asian ethnic group had the lowest representation (5 per cent of all MPs, compared with 10 per cent of the population).³⁸

Under the FPP electoral system, women’s representation in Parliament increased from 13 per cent in 1984 to 21 per cent in 1993, but as with Māori, it rose significantly in the first MMP election in 1996. Following the 2008 general election, 41 (33.6 per cent) of the 122 seats were held by women, compared with 32 per cent after

TABLE 2: MEMBERS OF PARLIAMENT IDENTIFYING AS MĀORI, PACIFIC OR ASIAN 1984–2008, AND MĀORI, PACIFIC OR ASIAN SHARE OF THE TOTAL POPULATION



Source: Wilson and Anderson (2008), Statistics New Zealand, *Estimated National Ethnic Population 1996, 2001, 2006*; MSD (2009), *The Social Report 2009*.

36 Brady (2003), cited in MSD (2009)

37 Brady (2003), cited in MSD (2009), p 74

38 ibid

the 2005 election. Since then, three women MPs have resigned.

In 2008, women made up a higher proportion of list MPs (42 per cent) than of electorate MPs (27 per cent). The majority of women elected to Parliament in 2008 were list MPs. Although the current 38 women MPs are the largest number in New Zealand's parliamentary history, this is unlikely to continue to increase unless women are high on party lists or in winnable constituency seats.³⁹

Public service representation

In the year to 30 June 2009, the number of full-time employees in the public service increased to 44,672. Employees in the public sector are still overwhelmingly European (71.4 per cent), but there has been an increase in the number of people identifying as Asian. If the Asian ethnic group continues to increase at its present rate, it will overtake Pacific peoples as the third largest ethnic group in the public service within the next two years. The number of Māori and Pacific peoples employed in the public sector has remained relatively constant, although a small decline is evident. Their numbers are not reflected at senior management level, however. Clearly there is still some way to go for the senior management group of the public service to fully reflect the diversity of the workforce.⁴⁰

A high proportion of women (59 per cent) are employed in the public sector compared with the labour force generally. Again, this is not reflected at senior level, where only 37.8 per cent of senior managers are women. The number of women in leadership positions is disproportionately low compared with their numbers in the workforce generally, and has even dropped slightly since 2008.

In 2007, the CEDAW committee raised concerns about the absence of women in leadership positions, recommending

that New Zealand "enact and implement comprehensive laws guaranteeing the substantive equality of women with men in both the public and private sectors..."⁴¹

Local government representation

In the 1990s and early 2000s, women were more highly represented in local government than national government, but this trend has been reversed since the 2005 election.⁴² In 2007, there were marginal increases in the number of women elected to local government. Women's representation was highest on district health boards (46 per cent), followed by city councils (37 per cent) and community boards (33 per cent). Women's representation was lowest on district councils (28 per cent) and regional councils (27 per cent). Census data shows that the number of women in management positions in local government has more than doubled in the past 10 years, but a closer look at the organisational structures within local authorities shows that women hold only 5 per cent of CEO positions and 24 per cent of second-tier management jobs.⁴³

In 2007, the proportion of representatives on local boards identifying as Māori was 4.8 per cent. Apart from the Environment Bay of Plenty, the Māori seat option has not been used.

Representation on District Health Boards is much better for Māori – 19.2 per cent of those represented identified as Māori – mainly as a result of the minister exercising a power of appointment to address any perceived imbalance. Representation of Pacific and Asian people remains very low.⁴⁴

Overall, women, Māori, Pacific peoples and other minority groups tend to be under-represented, in proportion to their numbers in the population, in leadership roles on bodies such as school and district health boards and

39 Human Rights Commission (2008), *New Zealand Census of Women's Participation 2008* (Auckland: HRC), p 66. Accessible online at http://www.neon.org.nz/documents/HR%20Women_screen.pdf

40 State Services Commission (2009), *Human Resource Capability Survey of Public Service Departments as at 30 June 2009* (Wellington: SSC).

41 Committee on the Elimination of Discrimination Against Women 39th Session 23 July–10 August 2007 CEDAW/C/NZ/CO/6. Accessible online at http://www.un.org/womenwatch/daw/cedaw/cdrom_cedaw/EN/files/cedaw25years/content/english/CONCLUDING_COMMENTS_ENGLISH/New%20Zealand/New%20Zealand%20-%20C-6.pdf

42 State Services Commission (2009), p 73

43 Human Rights Commission (2008), pp 59–61

44 Human Rights Commission (2007), *Tui Tui Tuituia: Race Relations in New Zealand* (Auckland: HRC), p 74

councils. Concern about such inequalities has led to initiatives to improve participation of young people, ⁴⁵ disabled people ⁴⁶ and older people ⁴⁷ in a range of focussed projects. Nominations and appointments services are also operated by a number of agencies, such as Te Puni Kōkiri, the Ministry of Pacific Island Affairs, the Office of Ethnic Affairs, the Ministry of Women's Affairs, the Office for Disability Issues and the Crown Company Monitoring Unit as a way of increasing diversity.

Accountability

Parliament plays the central role in holding the Executive and the Government of the day to account. It does this in various ways, including ensuring expenditure is allocated for specified purposes, reviewing how the money is spent, providing debating opportunities when the Government must defend its position, and upholding the traditional right to petition the House on issues such as seeking change to public policy or the law. ⁴⁸ These structures compare favourably with other parliamentary systems. Governments are also obliged to account for how they use the input received through feedback, consultation or other forms of public participation. It follows that measures to ensure that policy-making is open, transparent and amenable to external scrutiny and review are crucial to accountability.

The select-committee process (which has existed in its current form for 25 years) strengthens the accountability of the executive to Parliament by systematic, comprehensive scrutiny of government activity. ⁴⁹ It also provides opportunities for the public to become involved in the

work of the House through the submission process. This interchange between MPs and the public is the most distinctive feature of New Zealand's parliamentary system. ⁵⁰ However, the submission process can prove difficult for groups likely to be affected by proposed legislative change who do not normally engage with or understand the process (for example, as occurred with some groups in relation to the 'super city' legislation).

The select committee process itself can be subverted by unreasonably restricting the time for making submissions or limiting the number of submissions that will be heard (as occurred with the Electoral Finance Bill). This has led the Commission to advocate for at least 12 weeks as the minimum period for consultation on proposed legislation. ⁵¹ The Executive's ability to dictate which committee it sends a particular piece of legislation to can also influence the outcome. For example, the Foreshore and Seabed legislation was sent to the Fisheries Select Committee (rather than the Māori Affairs Select Committee) because the Government anticipated resistance from the latter. The frequent use of supplementary order papers (SOPs) to introduce amendments that are not subject to public submission or examination for consistency with the BoRA can affect the quality of participation. ⁵² Poor legislation can result when the established legislative process is effectively bypassed by the use of urgency.

Twenty years ago, commentators warned about hasty legislation and the frequency with which urgency was invoked. ⁵³ The use of urgency has now evolved to such a point in New Zealand that it has been described as

45 Ministry of Youth Affairs (2002), *Youth Development Strategy Aotearoa* (Wellington: Ministry of Youth Affairs)

46 Minister for Disability Issues (2001), *New Zealand Disability Strategy* (Wellington: Ministry of Health)

47 Ministry of Social Development (2001), *New Zealand Positive Ageing Strategy* (Wellington: MSD)

48 Office of the Clerk of the House of Representatives (2010), *Government Accountability to the House*. Accessible online at http://www.parliament.nz/NR/rdonlyres/439D688B-629B-4A2A-9197-C15C888F80A3/148361/governmentaccountability2010_3.pdf

49 Standing Orders Committee, *Report of the Review of Standing Orders 1995*, AJHR 1.18A, p 31

50 New Zealand Parliament, *25th Anniversary of the Select Committee System*, media release, 23 July 2010. Accessed 4 November 2010 from <http://www.parliament.nz/en-NZ/Features/5/2/9/00NZPHomeNews230720101-25th-anniversary-of-the-select-committee-system.htm>

51 The Commission's position is outlined on its website at www.hrc.co.nz/hrc_new/hrc/cms/files/documents/16-Jul-2009_10-43-25_SubmissionAkldCouncilBill.doc

52 Waldron J (2008), *Parliamentary Recklessness: Why We Need to Legislate More Carefully*, Inaugural John Graham Lecture, Maxim Institute, Auckland.

53 Joseph P (2010), p 196

“disgraceful by world standards”.⁵⁴ While urgency may be acceptable in relation to changing revenue laws in the wake of a budget,⁵⁵ it is less justifiable where it is used for purely political purposes. For example, the Electoral Finance Bill was deliberately rushed through its second reading and committee stages, in the face of public concern and opposition by other parties. The Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 was introduced under urgency and forced through all three readings in one sitting.

Transparency

Transparency and accountability are closely linked.⁵⁶ Transparency can be defined as access by the public to timely and reliable information on decisions and performance in the public sector.

In New Zealand, transparency is made possible through the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987, which ensure that citizens can access information about government and local government activities and are primary tools for public scrutiny of the Executive and local bodies.

In relation to the development of legislation, the BoRA applies to legislation in a number of ways. All government policy proposals and bills introduced into Parliament are assessed for their consistency with the BoRA. The process of vetting proposed legislation for consistency also contributes to transparency. Where legislation appears to be inconsistent with any of the rights and freedoms in the BoRA, a report must be tabled in Parliament by the Attorney-General. Although Parliament can enact the legislation even if it is incompatible, the process does ensure that the public and the legislature are aware that it breaches the BoRA.

The reporting requirement has been described as “deficient” in certain respects. It applies only on the

introduction of legislation (and, as noted earlier, not to SOPs). A report will be tabled only if the Attorney-General considers the bill is inconsistent (not if it is consistent) with the BoRA. The fact that the legal information provided to the Attorney-General on which the advice is based can be withheld under the Official Information Act has been criticised as having implications for the transparency of the process.⁵⁷ Although advice received by the Attorney-General relating to BoRA consistency has been posted on the Ministry of Justice’s website since 2003, the process could be improved by tabling Bill of Rights reports on every bill introduced.

To further help ensure the regulatory process is open and transparent, regulatory impact statements are prepared to support the consideration of regulatory proposals. They are published when the relevant bill is introduced to Parliament or the regulation is gazetted, or at the time of ministerial release.

The media also plays a significant role in ensuring transparency by championing the right to free speech, which is a necessary prerequisite for the effective functioning of a democratic government.⁵⁸ In New Zealand, state-owned television and radio channels are run at arm’s length from the Government through state-owned enterprises.

Responsiveness

Government responsiveness is held in high regard in New Zealand. Members of parliament, including cabinet ministers, make themselves available to the public and their constituents, and local authorities have a wide range of mechanisms through which they can consult the general public.

Tensions can arise, however, when the Government has to balance conflicting views. The Government is responsible for making principled decisions and respecting and protecting internationally agreed-on human rights, even when public opinion on a particular issue is inconsistent with those standards.

54 Waldron J (2008), p 21

55 *ibid* p 21

56 Armstrong E (2005), Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues UN Economic and Social Affairs. Accessible online at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>

57 Butler and Butler (2005), p 212

58 Butler and Butler (2005), p 308

This is well illustrated when people participate in democratic processes such as citizen-initiated referenda and the Government does not act on the results. In 2009, there was a national referendum on section 59 of the Crimes Act, which relates to the use of force in disciplining children. The referendum, which asked “Should a smack as part of good parental correction be a criminal offence in New Zealand?”, highlighted a number of difficulties. Not only was the question ambiguous, but the process for querying the wording was not generally well understood, effectively pre-empting the opportunity of challenging it. For many, however, it was more concerning that although 87 per cent of those who voted opted for “no”, the Government elected not to change the law (which it considered was working well).

The section 59 debate illustrates the dilemma sometimes faced by governments being responsive to general public opinion and implementing human rights standards. Governments must maintain this balance in order to both stay in power and retain their moral authority to act.⁵⁹

Conclusion

Whakamutunga

New Zealand is a parliamentary democracy with universal suffrage and free and fair elections. Its structures and processes are seen as largely democratic and there is general consensus on the ideal of a common citizenship without discrimination. Government accountability is recognised as important and public participation in decision-making is well understood and appreciated. The declining rate of voter turnout in both parliamentary elections and local body elections seems to reflect a loss of confidence in the benefits of participation.

Mechanisms to ensure participation and accountability are not always effective, and have at times been undermined by unduly limiting opportunities for making submissions to select committees or passing legislation under urgency. There is also a strong sense of dissatisfaction by many Māori about accountability by the Crown in relation to the Treaty of Waitangi.

While many institutions reflect increasing diversity, women, Māori, Pacific peoples, young people, disabled people and people of ethnic, cultural, religious and linguistic minorities are under-represented in elected office.

The Commission consulted with interested stakeholders and members of the public on a draft of this chapter. The Commission has identified the following areas for action to progress democratic rights in New Zealand.

Constitutional framework

Reviewing the laws that make up our constitutional framework to ensure the Treaty, indigenous rights and human rights are fully protected.

Legislative process

Enhancing the transparency and accountability of the legislative process by tabling reports on the consistency of legislation with the BoRA on introduction and the third reading.

Representation

Increasing the representation of Māori, Pacific and other ethnic groups in local government.

Disenfranchisement of prisoners

Ensuring there is no further disenfranchisement of prisoners.

⁵⁹ In order for a government even to consider acting on the results of a referendum, petitioners need to achieve a credible turnout. Turnout is one objection that opponents raise against making such referendums binding. Others are public policy importance and comprehensibility (which the section 59 referendum arguably failed).