

**The Maori Seats in Parliament  
Te Papa Address, 5 February 2009**

**By**

**Philip A Joseph  
Professor of Law  
University of Canterbury**

**Introduction**

Some little while ago, I was invited to contribute to a study on the social and economic progress of Maori. It was suggested that I might examine the Maori seats in Parliament. A moment's hesitation and I said "yes". Before me was, as it were, a blank canvass. I had not had occasion to consider the Maori seats and I had no views on whether they should be retained or done away with. So I set about examining the issue and came to a considered view: that the separate seats compromised the Mixed-Member Proportional (MMP) system and should be abolished.

That study was published in May of last year. In it, I relied substantially on the Royal Commission on the Electoral System, which reported in 1986. The royal commission recommended MMP as the preferred proportional system to replace FPP elections. The rest is history. My interest was with the royal commission's supplementary recommendation – to abolish the Maori seats should New Zealand adopt MMP. I examined closely the reasons advanced and could not find fault. Here are the reasons why I believe the Maori seats lack justification and should be abolished: (1) the seats are unnecessary to secure effective representation of Maori; (2) the seats invite "overhang" that skews the proportionality of the House of Representatives; (3) the seats entrench a form of historical paternalism that removes Maori issues from the mainstream political agenda; (4) the seats are a form of reverse discrimination fundamentally at odds with Western human rights values; and (5) justifications derived from the Treaty of Waitangi are flawed.

**Origin of the seats**

Separate Maori representation has routinely been trumpeted as a defining feature of our electoral system. So one would expect its introduction to have been on a considered and principled basis. But not so: four separate Maori electorates were introduced in 1867. Those seats were a temporary expedient, not a principled reform. This is how it happened.

Attempts to enfranchise Maori hit a stumbling block. This was the property qualification that conferred the right to vote under English law. Maori land-holding was communal which effectively disenfranchised most Maori. The colonial authorities refused to waive the property qualification, even at the request of the settler government. Consequently, in 1867 the government resolved to convert communal Maori land-holding into individualised, crown-derived estates. Maori would then have the right to vote. The Native Land Court, established in 1862, was given the task of transforming Maori land tenure into individualised Crown grants. The four Maori seats were introduced as interim measures while the court set about its task. The statute establishing the seats was to remain in force for five years, until 1872. However, the sunset clause grossly under-estimated the task of individualising Maori land holding. So Parliament extended the life of the statute for a further five years, until 1877. Throughout this further period, the Native Land Court continued to struggle with its task, and in 1876 Parliament extended the life of the statute indefinitely. Again, the rest is history: the Maori seats were retained under each successive electoral statute. No one had expected the seats to become a permanent feature of the electoral landscape. For one historian, separate Maori representation “stumbled into being”.

### **Token representation**

That identifies the inauspicious beginnings of the Maori seats. However, revisionists might still seek to acclaim the seats, as fulfilling some laudable historical purpose. But the record does not speak in support. The four seats were token representation. As at 1867, Maori would have been entitled to 14 seats, based on the electoral quota and the national Maori population. In 1867 Parliament comprised 76 electorates: 72 general electorates and four Maori electorates. The four Maori electorates represented approximately 50,000 Maori. Contrast the 72 general electorates, which represented approximately 250,000 European New Zealanders. To place this in context: the settler population numbered five times that of Maori but held 18 times the number of seats in Parliament. Consequently, one cannot reconstruct the historical past as one of enlightenment. If anything, the four seats discriminated against Maori.

The systemic under-representation of Maori continued throughout last century. Under FPP, Maori representation was virtually non-existent outside of the Maori seats.

## **Maori representation under MMP**

Has MMP remedied that? Has it delivered what the royal commission predicted; that Maori would achieve fair representation through the list system? The commission believed that Maori would achieve equitable representation without need of the separate seats. MMP would encourage all parties to compete for Maori votes by placing Maori candidates high on the party list. When the MMP statute was introduced in the House, it did not carry over the separate Maori seats. There were to be equal numbers of electorate and list members (60 electorate and 60 list members). However, Maori rallied against that proposal and the Bolger Government reinstated the seats, and tagged their number to the number of voters on the Maori roll. The Maori seats were increased to five in 1996, to six in 1999 and to seven in 2002.

In my study published last year, I predicted two things: that retaining the seats will inflate the political representation of Maori beyond their relative national population, and that it will lead to permanent “overhang” and distortion of MMP proportionality. Let us examine those predictions. First, has the party-list system remedied Maori under-representation? Maori representation in Parliament has trended upwards with each election. The one exception was in 2008. At the first MMP elections in 1996, Maori representation doubled from 6 to 12.5 percent of Parliament’s membership (15 members identified as being of Maori descent). The 1999 elections produced a marginal increase (16 members identified as being Maori, representing 13.3 percent of Parliament’s membership). There occurred a marked increase in Maori representation at the 2002 elections. Nineteen elected members identified as being of Maori descent. The 19 seats represented 15.8 percent of Parliament’s membership. This was slightly over 1 percent higher than the relative national population of Maori, which stood at 14.7 percent of the national population. If the seven Maori seats were subtracted, the remaining 12 general seats would have represented 10 percent of Parliament’s membership (4.7 percent below the national population of Maori).

The 2005 elections capitalised on the 2002 polling. These produced a rapid narrowing of the representational deficit. Twenty-two elected members were of Maori descent. That figure represented 19.0 percent of Parliament’s membership – a figure over 4 percent higher than the nation Maori population. If the seven Maori seats were subtracted, the remaining 15 general seats would represent 12.5 percent of Parliament’s membership (just 2.2 percent below the national Maori population).

Based on the 2005 figures, I predicted last year that the 2008 elections would eliminate any remaining representational deficit: that is, without taking account of the seven Maori seats. Retaining the separate seats would then produce a distortion in electoral representation that would compound with each election. A progressive increase in the number of Maori seats, coupled with more Maori gaining election through the list system, would inflate Maori representation beyond their national population base. Did last year's elections bear out my prediction? "No", they did not.

Here is the breakdown. There are currently 18 members of Maori descent (down from 22 members in the previous Parliament). These members represent 14.8 percent of Parliament's membership. The 2006 census recorded that 17.7 percent of the national population identified as being Maori (up three percent from the 2001 census). Twenty-two members produce a representational deficit of a little under 3 percent. If the seven Maori seats were subtracted, Maori would hold 11 general seats, representing just 9 percent of Parliament's membership. These figures throw into doubt whether MMP will fully eliminate the under-representation of Maori.

Might there be an explanation for the 2008 results? Might these be aberrant, given that elections from 1996 have trended in the opposite direction? The next two elections should tell the tale. But before we move on, there are two subtexts worth exploring. First, might the Maori seats, indeed, impede Maori representation? Abolition of the seats might accelerate the number of Maori winning general seats. Political parties would be encouraged to promote able Maori candidates in both list and electorate seats, as a strategy to entice voters previously on the Maori roll.

The second subtext is this: Would abolition of the Maori seats discourage strategic voting by those on the Maori roll? Many voters give their electorate vote to the Maori party but place their party vote elsewhere (principally with the Labour party). Removing the seats would place in issue the Maori party's survival in the MMP Parliament. If the seats were removed, one surmises that many Maori would give their party rather than electorate vote to the Maori party. How much its party vote would increase is a matter of conjecture. But I would not be surprised if the party's elected number exceeded the present number of seven Maori seats.

## Overhang

My earlier study predicted that the Maori seats would produce overhang at the last elections that might skew the equity of proportional representation. In the event, that did not happen. But the potential is there. Overhang inflates the membership of the House beyond its standard 120 members. The current Parliament, for example, has 122 members. Overhang occurs where a party wins more electorate seats than it is entitled to under its party vote. The Maori party won five of the Maori seats on a party vote of 2.2 percent (an entitlement of three seats), producing an overhang of two members. Unless the Maori party can increase its party vote, it is destined to produce overhang at each election.

Last year, commentators posed a challenging scenario. They believed that the 2008 elections would produce an overhang of up to six members of Parliament. They speculated that the Maori party might win all seven Maori seats on a party-vote entitlement of three seats (producing an overhang of four seats). They added to that figure the electorate seats of Progressives leader, Jim Anderton, and United Future leader, Peter Dunne. Both were expected to retain their electorate seats (Ōhuria and Wigram respectively) but on party votes that were scarcely registering in the polls. The Progressives were polling at 0.1 per cent of the party vote and United Future at 0.4 percent. On these polls, the election of Anderton and Dunne would have produced a further overhang of two seats, taking the membership of the House to 126.

On this scenario, commentators expressed some concern because the National party had been polling over 50 percent of the party vote. They thought National might have been able to govern alone, as a single-party majority government. But overhang, they thought, threatened this outcome. An overhang of six members (four Maori party members plus Anderton and Dunne) would have swelled the confidence votes needed from 61 to 64. A party that won over 50 percent of the party vote, but fell short of winning 64 seats, would have cause for complaint. In my earlier study, I concluded:

“A party that garnered over 50 percent of the popular vote but could not govern would represent an undemocratic outcome and would indubitably arouse deep resentment.”

In that scenario, overhang would trump proportionality. As hindsight has it, though, that scenario did not eventuate. The gap between the major parties invariably narrows as the elections approach, and the overhang of six members did not materialise.

However, overhang does produce distortions in other ways. Some pundits believed that overhang would give the Maori party inflated leverage in coalition talks – this owing to the party’s disproportionate representation. The influence that the minor parties exert over the make-up of government has been a recurring criticism of the MMP system. A minor party may poll at around five percent (or less if it wins an electorate seat) and hold the balance of power: which of the two centrist parties – Labour or National – will head the government. “The tail wagging the dog”. This criticism strengthens where a minor party wields disproportionate influence through overhang.

### **Marginalisation of Maori representation**

As time is against us, I will advance my final three arguments as *ex cathedra* propositions. The first argument adopts the finding of the royal commission; that the separate seats historically have undermined effective Maori representation. The commission found that the system had isolated Maori members and marginalised them within the numerically dominant culture. Under electoral separatism, Maori and non-Maori members of Parliament are responsible to the communities that elect them. The result: Maori issues historically have been removed from the mainstream political agenda. These issues have been treated as quintessentially *Maori* – not national – issues, and have not received the sober consideration they deserve. The royal commission also found that Labour’s monopoly over the Maori seats had further eroded their utility. The commission:

“The Labour party’s domination of the Maori seats since 1943 has meant that neither it nor any other party has any real *electoral* incentive to commit resources to the development of policies for the Maori people, or to campaign vigorously for their votes.”

However, abolish the Maori seats and there would be a very *real* electoral incentive: that is, to win the votes of those who had been on the Maori roll.

## **Discriminatory privilege**

This brings me to my second argument, which is *fundamental*: the seats represent a discriminatory privilege. The seats contravene the principle of electoral equality – “one person, one vote, one value”. Representative democracies must avoid barriers for the representation of minorities. Maori confront no such barriers. In 1867, they did; they failed the property qualification and could not vote. But in 1893 New Zealand moved to a universal adult franchise under which all citizens had the right to vote. Maori are free to compete for parliamentary representation. There are no impediments. The retention of the Maori seats amounts to reverse or indirect discrimination. There is no justification for the difference in treatment. For the courts, a discriminatory *benefit* on racial or ethnic grounds is as unlawful as a discriminatory *disadvantage*. One court described discrimination thus:

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

Preferential treatment on grounds of race or ethnicity is discriminatory and ethically wrong. To discriminate on those grounds deeply offends the right to equality of treatment under New Zealand’s human rights legislation.

## **No Treaty argument**

My third argument: separate Maori representation is not a Treaty of Waitangi right. The royal commission reflected that Maori regard the separate seats as “an important concession to ... their constitutional position under the Treaty.” This belief is flawed. For Sir Tipene O’Regan, it is even repugnant. No one – Maori or non-Maori – may claim preferential electoral rights under the Treaty. Liberal democracies espouse the elemental principle of “one person, one vote, one value”. Understandably, they rail against electoral privilege based on racial or ethnic distinction.

The Crown is under a duty of active protection to Maori. That duty was affirmed by the Court of Appeal in the landmark *Maori Council* case in 1987 (commonly known as the *Lands* case). The duty of active protection arises under Article II of the Treaty, which guarantees Maori customary

property rights, not electoral rights. Article II guarantees Maori “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties”. Electoral rights are Article III rights. Article III extends to all New Zealanders – Maori and non-Maori – the Crown’s protection. It imparts “all the rights and privileges of British subjects” (“British subjects” meaning today New Zealand citizens). Sir Tipene O’Regan termed this guarantee the Treaty’s “equity package”. It gave Maori, he said, “no greater and no lesser rights in social and legal terms than [were] available to the general populace”. Maori have the right to participate fully in the electoral process (“no lesser rights”) but on no more favourable terms (“no greater rights”). Sir Tipene deplored attempts under Article III at contrived justifications for preferential treatment. Such attempts, he said, were “fundamentally repugnant”.

### **Conventional wisdom**

I end by questioning conventional wisdom. This holds that abolition of the Maori seats would end the Maori party’s parliamentary representation. Presently, the party holds five of the Maori seats but on a party vote of only 2.2 percent (less than half of the electoral threshold ordinarily needed to gain representation). But I question the assumption, that without the seats the Maori party would lose its place in Parliament. Voters on the Maori roll know they can have their cake and eat it too. They know that, by giving their electorate vote to the Maori party, the party will be returned to Parliament. But they can also appease their historical affiliation to the Labour party by giving it their party vote. Maori links to the Labour party date from the alliance Labour struck with the Ratana Movement in the mid-1930s.

Suppose that the Maori seats were no longer there. Would many Maori, currently on the Maori roll, continue to place their party vote elsewhere? I believe not; the strategic voting would end. This raises a poignant question: Are the separate seats the leg-iron of the Maori party? At the last elections, the party won five of the seven seats (a commendable feat). But how many more seats might the party win on a ticket that aggressively targeted the *party* vote? We can but speculate. But one thing is palpably clear: under the status quo, the party can never win more than seven seats in Parliament.

## **Conclusion**

I will state briefly my conclusion. Calls to retain the Maori seats should have been resisted. The royal commission advanced principled argument for their abolition. The historical under-representation of Maori will continue to trend down with each election, until representational parity is achieved. The seats have negative impact: they confer an electoral privilege based on race or ethnicity, and they entrench overhang as a permanent feature of the MMP Parliament. Finally, there are no institutional barriers to Maori representation. The separate seats are fundamentally at odds with the principle of electoral equality, the linchpin of representative democracy – one person, one vote, one value.