

From People's Revolution to Partisan Reform: Recent Electoral Change in New Zealand

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ABSTRACT

For a comparatively small and geographically peripheral nation, New Zealand enjoyed a moment of psephological prominence some 20 years ago when it abandoned its long-used single member plurality (SMP) voting system for a new mixed-member proportional (MMP) electoral process. This national decision to swap the blunt simplicity of single party majority government in favor of the vagaries of proportional representation and coalition rule was particularly notable in light of New Zealand's status as a long-established, comparatively peaceful democracy that still adheres staunchly to a traditional Westminster form of government. The various reasons for taking this fundamental step, as well as the process used to do so, have been well picked over, and I do not propose adding substantially to the already existing literature on the subject. Rather, I take up the story since New Zealand's "big bang" move to MMP and outline a number of electoral law developments (and, just as importantly, refusals to change) that have taken place in that time. It is thus something of an updating of New Zealand's experience with electoral law reform over the last two decades, paying particular attention to the process that has been used to effect that reform.

Keywords: New Zealand, mixed-member proportional, MMP

FOR A COMPARATIVELY SMALL and geographically peripheral nation, New Zealand enjoyed a moment of psephological prominence some 20 years ago when it abandoned its long-used single member plurality (SMP) voting system for a new mixed-member proportional (MMP) electoral process. This national decision to swap the blunt simplicity of single party majority government in favor of the vagaries of proportional representation and coalition rule was particularly notable in light of New Zealand's status as a long-established, comparatively peaceful democracy that still adheres staunchly to a traditional Westminster form of government.¹ The various reasons for taking this fundamental step, as well as the process used to do so, have been well picked over, and I do not propose adding substantially to the already existing literature on the subject.

Rather, I take up the story since New Zealand's "big bang" move to MMP to outline a number of electoral law developments (and, just as importantly, refusals to change) that have taken place in that time.

More fundamentally, this article considers the range of different ways in which decisions about New Zealand's electoral laws are made. This "how change occurs" question is important because of the central role that voting plays in the country's overall constitutional arrangements. New Zealand retains a now-unique commitment to a strong Diceyan concept of parliamentary sovereignty.² That is to say, enactments of the New Zealand

¹See generally Andrew Geddis, *Parliamentary Government in New Zealand: Lines of Continuity and Moments of Change*, 14 INT'L J. CONST. L. 99 (2016).

²MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 41 (2014) (describing New Zealand as "the only [constitutional] system that remains committed in theory to parliamentary sovereignty").

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Parliament remain the nation's highest form of law, and no individual or other institution (including the nation's courts) may invalidate or refuse to apply such legislation. Consequently, not only does Parliament retain the last word on all matters of law (including electoral law), but also the process of voting for elected representatives provides the fundamental legitimacy of lawmaking and governing power. Therefore, while the perceived fairness of the electoral process is important in all democratic societies, it *particularly* matters in New Zealand as no written constitutional framework constrains the actions of representatives once elected. This fact means that if the basic soundness of the electoral process (and the laws that govern this) is regarded with public suspicion, then the justificatory basis for the country's entire constitutional arrangements is threatened. This fact then has important normative ramifications for how electoral law change should take place in the New Zealand context.

The first and most fundamental method of deciding electoral law matters in New Zealand is through direct involvement by the country's voters in choosing amongst a range of possible electoral systems available for use in their country. The first part of this article briefly recaps New Zealand's adoption of MMP by means of referendum vote, before recounting the electorate's revisiting of that decision in 2011. Following a majority decision to retain MMP, the country's Electoral Commission was tasked with formulating recommendations for reforming the voting system. The second part examines these recommendations and their fate once passed over to elected members of Parliament (MPs), noting the regrettable partisan considerations that led to their swift dismissal. The third part moves to discuss three other electoral law developments ushered through Parliament that have been marked by differing levels of partisan political disagreement: a ban on sentenced prisoners voting; changes to the regulation of electoral financing; and the merger of the country's electoral agencies. The fourth part outlines why the nation's judiciary has not participated directly in these developments, at least until very recently. It then notes the High Court's decision to formally declare a ban on prisoner voting to be inconsistent with the legislatively guaranteed right to vote and explains how this judicial move fits with how electoral law reform in New Zealand generally is carried out.

MMP'S POPULAR ADOPTION (AND RETENTION) IN NEW ZEALAND

New Zealand's decision to change electoral systems in 1992–93 has been analyzed in depth elsewhere.³ To summarize and simplify, New Zealand's longstanding use of SMP voting in parliamentary elections combined with strong forms of inter-party discipline to create an effective two-party duopoly competing to win governmental power. Furthermore, New Zealand's Westminster-style constitution, unicameral legislature, and lack of any written constitution meant that whichever party captured government office faced very few checks on its lawmaking and administrative powers. A period of extensive economic and social reforms carried out between 1984–92 then convinced a wide section of the public that these existing political processes failed to give voters adequate control over either Parliament or government:

The impetus for electoral reform in the 1990s reflected a profound sense of voter disillusionment with the radical policies of successive ... governments. ... Rather than curbing the powers of the big two parties by way of constitutional reform, with a written constitution and upper house as potential options, MMP provided the less radical alternative of a multi-party legislature and executive.⁴

Pressed by this public disenchantment with the performance of their elected representatives and caught by an earlier election promise to hold a referendum on electoral reform, the government reluctantly asked the voters directly which voting system they would prefer to use. Swayed by an earlier report from a Royal Commission on the Electoral System, which unexpectedly had recommended replacing the existing electoral system with the MMP model used in

³The most complete account of both the factors causing and the process leading to the introduction of the mixed-member proportional (MMP) electoral process into New Zealand remains KEITH JACKSON AND ALLAN McROBIE, *NEW ZEALAND ADOPTS PROPORTIONAL REPRESENTATION: ACCIDENT? DESIGN? EVOLUTION?* (1998). My own discussion of the change can be found at ANDREW GEDDIS, *ELECTORAL LAW IN NEW ZEALAND: PRACTICE AND POLICY 20–25* (2nd ed. 2014).

⁴Raymond Miller and Pierce Lane, *Future of the MMP Electoral System*, in *NEW ZEALAND GOVERNMENT AND POLITICS* 181 (5th ed., Raymond Miller ed., 2010).

(as it was then) West Germany,⁵ in 1993 the electorate ultimately endorsed this new proportional representation voting system by a 53.9% to 46.1% majority.

MMP has since been used in seven parliamentary elections. While many politicians⁶ and academics⁷ view the change as positive for New Zealand's political processes due to its more proportional outcomes, greater representativeness, and ending of all-powerful single-party majority government, a significant proportion of the population remained unconvinced of its virtues. Common criticisms are that the system gives smaller parties "too much" power and hampers the effectiveness of government, while coalition building leads to undemocratic post-election deals being struck between parties. Furthermore, there was a widely held (albeit incorrect) belief that when MMP first was adopted voters were explicitly promised a future opportunity to review its performance. Seeking to capitalize on this mood, the major opposition party promised to hold another referendum on the electoral system. It felt bound by that commitment upon winning office in 2008, so voters were once again asked at the 2011 general election whether they wished to change their voting system. This time change was rejected, with an increased majority of 58% favoring the existing MMP system and 42% rejecting it.⁸ That outcome was entirely predictable as there was nothing like the general public dissatisfaction with the performance of political actors that had spurred the earlier decision to alter voting systems.⁹ The real question thus was not whether MMP should still be used for New Zealand's elections but rather what precise rules ought to apply to that voting system.

THE STILLBORN REFORMS TO MMP

When the voters' 2011 verdict cemented MMP's future, the Electoral Commission was statutorily required to review certain of its aspects and advise on any reforms.¹⁰ It commenced a process of public engagement that produced first an issues paper with proposed changes and then, following further public engagement, a final report to the government.¹¹ Although non-binding, this report contained recommendations that reflected the general views of the numerous individuals and groups who had participated in the review process. In particular, the Commission proposed two reforms to the existing MMP system to counter specific public concerns.

First, the Commission recommended removing the so-called "electorate lifeboat" rule whereby parties that win an individual electorate seat are exempted from the primary threshold requirement of winning five percent of the party vote before receiving party list seats in Parliament.¹² The Commission's view was that this rule served no useful purpose and only incentivized gaming behavior, with parties making accommodations in individual electorates to help potential coalition partners obtain parliamentary representation. This behavior then was a primary source of reported dissatisfaction with MMP's operation, with public opinion strongly favoring its abolition.¹³ However, the Commission also recognized that removing the electorate lifeboat rule would make it harder for smaller parties to gain parliamentary representation and thus could lead to a less representative institution. To counteract this risk, the Commission recommended reducing the remaining representation threshold from five to four percent of the party vote.¹⁴ While this still represents a significant hurdle for new political parties in particular to surmount, the Commission believed that any lower threshold risked the fragmentation of parliamentary representation in ways that the public disapproved of.¹⁵

Overall, the Commission's review was markedly conservative. The bulk of its final report favored either retaining the status quo or making only

⁵ROYAL COMMISSION ON THE ELECTORAL SYSTEM, REPORT OF THE ROYAL COMMISSION ON THE ELECTORAL SYSTEM: TOWARDS A BETTER DEMOCRACY 63–64 (1986).

⁶See, e.g., Charles Chauvel, *A Better Democracy, Thanks to MMP*, in RECONSTITUTING THE CONSTITUTION 199 (Caroline Morris, Jonathan Boston, and Petra Butler eds., 2011).

⁷See, e.g., GEOFFREY PALMER AND MATTHEW PALMER, BRIDLED POWER: NEW ZEALAND'S CONSTITUTION AND GOVERNMENT 376–378 (4th ed. 2004); Jack Nagel, *Evaluating Democracy in New Zealand Under MMP*, 8 POL'Y Q. 3 (2012).

⁸Andrew Geddis, *New Zealand Votes to Keep Proportional Representation*, 23 PUB. L. REV. 3, 4–6 (2012).

⁹Miller and Lane, *supra* note 4, at 181–182.

¹⁰Electoral Referendum Act, 2010, No. 139, § 78. For a discussion of the Electoral Commission and its role *see infra*, notes 32–36 and accompanying text.

¹¹N.Z. Electoral Commission, *Report of the Electoral Commission on the Review of the MMP Voting System* (Oct. 29, 2012) available at <http://www.elections.org.nz/sites/default/files/bulk-upload/documents/Final_Report_2012_Review_of_MMP.pdf>.

¹²*Id.* at 16–20.

¹³*Id.* at 20.

¹⁴*Id.* at 12–16.

¹⁵*Id.* at 15–16.

minor adjustments to the existing rules. However, its recommendations to change the dual representation thresholds proved overly challenging for the political parties whose MPs were required to enact them into law. In particular, parties in the governing coalition rejected the Commission's recommendations in their entirety, while opposition parties supported those aspects of reform that they thought most advantageous to their interests. Claiming this disagreement demonstrated there was "no consensus for any change" amongst political actors, the minister of justice quickly announced that no further action would be taken on the matter; while the prime minister stated that as far as the government was concerned, the review process it itself had initiated was at an end. The fate of the Commission's report thus illustrates the underlying danger of leaving the final decision on electoral law to those elected representatives. The outcome all-too-often will be what those representatives see as being in their best interests, rather than what the voting public believe their electoral process ought to look like.

CHANGES TO PRISONER VOTING, POLITICAL FINANCING, AND ELECTORAL ADMINISTRATION

The failure to implement any of the Commission's recommended changes to MMP was driven by nakedly partisan considerations. The governing party quite openly stated that it opposed the reforms precisely because it believed these would complicate its winning office again in the future.¹⁶ Its support partners in government, whose parliamentary existence depended on the electorate lifeboat rule the Electoral Commission recommended scrapping, unsurprisingly agreed that no changes should be made. And while the voting public largely favored the proposals, this was a soft support that did not generate the necessary political pressure to overcome the incumbent self-interest involved. This sort of partisan calculation on the part of elected MPs also has featured to varying degrees in respect of three other recent changes to New Zealand's electoral laws: the imposition of a voting ban on sentenced prisoners; new restrictions on political financing; and the merger of the country's electoral administration agencies into one organization.

Banning prisoners from voting

Prisoners' voting rights have varied markedly over the 160 years New Zealand has held elections.¹⁷ However, in 1993, general agreement appeared to have been reached on the issue when Parliament unanimously agreed that prisoners serving sentences of three or more years (the equivalent of the length of the parliamentary term) could not register to vote, but prisoners serving lesser sentences could. That compromise position remained in place largely unremarked until 2010, when a governing party MP proposed that voting rights be once again removed from *all* serving prisoners. The rationale for doing so was unclear, with the MP responsible merely stating that prisoners had "committed crimes against the community sufficient to forfeit their right to have a say in its governance."¹⁸

While this proposal did not represent official government policy, the governing party nevertheless chose to bloc vote in support of its MP's proposal. It was joined by one of its support partners in government, providing a 63–58 majority in New Zealand's single-chamber Parliament. On this party-line basis the measure passed through the various stages of parliamentary debate and voting, before finally being enacted into law in late 2010.¹⁹ I have strongly criticized the procedure used to make this law change elsewhere.²⁰ To summarize, MPs were formally notified when the bill first was introduced that stopping all prisoners from voting unjustifiably limited the legislatively guaranteed right to vote contained in the New Zealand Bill of Rights Act 1990 (NZBORA).²¹ While this fact could not in

¹⁶New Zealand National Party, *Submission on the MMP Proposal Paper* (Sept. 13, 2013), available at <http://www.elections.org.nz/sites/default/files/bulk-upload/documents/Proposals_Paper_National_Labour_Green_NZ%20First%20submissions.pdf>.

¹⁷See Greg Robins, *The Rights of Prisoners to Vote: A Review of Prisoner Disenfranchisement in New Zealand*, 4 N.Z. J. PUB. AND INT'L L. 165, 166–171 (2006).

¹⁸Electoral (Disqualification of Convicted Prisoners) Amendment Bill, No. 117-1.

¹⁹Electoral (Disqualification of Sentenced Prisoners) Amendment Act, 2010, No. 128.

²⁰Andrew Geddis, *Prisoner Voting and Rights Deliberation: How New Zealand's Parliament Failed*, [2011] N.Z. L. REV. 443.

²¹Christopher Finlayson, *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill*, J4 (2010).

itself prevent Parliament from enacting the measure, nor (as will be seen below) does any such unjustified limitation render the law invalid,²² it ought to have given pause to those MPs minded to support it. However, far from prompting careful deliberation on the rights and wrongs of taking the proposed step, the warning was completely ignored. Instead, when supporters of change even bothered justifying their vote during the parliamentary debates, they did so on the simple basis that prisoners are bad people who have done bad things and so should not be allowed to vote.²³

This rather perfunctory legislative process suggests that the law change was motivated less by considered reflection of the proposal's intrinsic merits and more by the opportunity to send a policy message to the electorate generally. Removing the voting rights of prisoners permitted the government to burnish its "tough on criminals" image while at the same time painting those opposing the change as "soft on crime."²⁴ In this sense, the voting rights of some 3,000 New Zealanders were used purely as an instrumental weapon in the partisan battle for political power. That was and is quite deplorable. As is discussed below, the New Zealand courts take a similar view of the matter.²⁵

Restrictions on political financing

A rather patchy set of rules governed the financing of individual candidates and political parties up until New Zealand's 2005 general election.²⁶ Candidates and parties faced overall spending caps on advertising in the three months prior to an election, but there was no limit on donations to such actors. Requirements to publicly disclose donor identity could be lawfully evaded and so were effectively voluntary in nature. Third-party groups or individuals faced no restrictions on conducting parallel advertising campaigns, nor did they have to publicly disclose who funded such messages. At the 2005 election, however, an unprecedented amount of third-party spending took place on advertising in opposition to the governing parties. Furthermore, allegations were levelled that the main opposition party had received undisclosed campaign funding from overseas sources.²⁷ These events prompted the narrowly reelected governing coalition to propose a set of new restrictions on political financing, purportedly to prevent the electoral system being corrupted by "big money." Third-party spending on

electoral advertising would be radically restricted for the entirety of an election year and such participants would be required to disclose the identity of their donors. Political parties also would face tougher donation disclosure requirements, along with a ban on receiving anonymous or foreign donations above a small amount. Such changes, the government claimed, were necessary to ensure the overall integrity of New Zealand's electoral processes.

As with the prisoner voting example discussed above, the reform legislation can be criticized on both substantive and procedural grounds.²⁸ In particular, the bill's original proposed restrictions on third-party electoral participation were excessively draconian. Third parties would be required to register with the Electoral Commission and thereafter were to be restricted to spending no more than NZ\$60,000 (US\$41,000) on "electoral advertisements" for the entire election year. Furthermore, the proposed definition of electoral advertisements was very wide, capturing any message that advocated a policy position with which a political party or candidate was associated. In terms of the process used, the draft legislation had no input from opposition political parties or wider civil society. Consequently, it was no surprise that opposition parties decried the measures as an attempt to muzzle criticism in order to help the incumbent regime retain office. Public opposition to the legislation also was widespread and vocal. Although this criticism of the original proposal's severity resulted in some softening amendments, the Electoral Financing Act 2007 (EFA) still was enacted on a straight party-line parliamentary vote. The leader of the main opposition party—which not only was ideologically opposed to government regulation but traditionally had enjoyed an advantage in electoral

²²See *infra* notes 38–40 and accompanying text.

²³See, e.g., Simon Bridges, N.Z.P.D., Vol. 668, p. 15184 (Nov. 10, 2010) ("There is no reason why serving prisoners should have the right to vote. Those people have landed in the clink because they have done something serious.").

²⁴See, e.g., *id.* ("[Opposition] members are soft on crime. They want criminals to vote.").

²⁵See *infra* notes 41–45 and accompanying text.

²⁶For a history of political finance regulation in New Zealand see GEDDIS, *supra* note 3, at 136–140.

²⁷*Id.* at 138–139.

²⁸See Andrew Geddis, *New Zealand's Electoral Finance Act 2007 and Its Discontents*, 19 PUB. L. REV. 215, 216–219 (2008).

spending—then promised that if elected, “the first thing [we] will do is repeal this legislation.”²⁹

This promise duly was delivered upon when, despite the new political financing law's alleged incumbent-protecting purpose, the 2008 election produced a change in government. However, the election of a new administration also resulted in a different approach to the issue. First, the new government did not repeal the EFA in its entirety, instead preserving the new rules requiring greater public disclosure of donors to parties and candidates (but not third-party organizations). Second, all but one of the parliamentary parties supported repealing the legislative restrictions on third-party participation. This virtually unanimous recognition that the controls imposed on third parties had been overly zealous carried over to the creation of an all-party parliamentary Electoral Legislation Committee, which sought public submissions on what replacement political financing rules ought to be adopted. When public opinion and the now opposition parties argued in favor of retaining *some* controls on third-party election spending, the government agreed to a compromise set of rules.³⁰ Under these rules, third parties are still required to register with the Electoral Commission before engaging in substantial advertising campaigns and face overall constraints on their electoral advertising spends, but that cap was lifted significantly, and no requirement to disclose donors was included.³¹ Furthermore, these regulations only apply to (in effect) a three-month window prior to a general election. This replacement legislation was then enacted on a parliamentary vote of 112–9.

This turn away from partisan contestation toward cross-party compromise may be explained by a number of factors. There was little perceived political advantage in the nation's various political parties and their MPs continuing to battle over the issue of political financing. The newly elected government, having strongly criticized its predecessor for acting in a unilateral manner when setting political financing rules, faced potential charges of hypocrisy should it do likewise. The now opposition parties recognized the EFA had been unpopular with the public and so wished to move on from the issue quickly and quietly. Finally, the new minister of justice genuinely was committed to trying to reach as consensual an outcome as possible on this issue because of the threat posed to overall public trust in the electoral process by MPs' partisan bick-

ering. In so doing he accepted that the governing party had to compromise on its ideological opposition to limits on electoral speech and recognize that, within New Zealand's political culture, these were widely considered desirable. As such, the final outcome reflected a general political compromise, and the new law's governing principle was “what sort of electoral rules do the New Zealand voters think best in their democracy?”

Reorganization of electoral agencies

Up until 2010, three different agencies managed various aspects of New Zealand's electoral processes.³² Although the division of labor between these entities was reasonably clear, their relationship was confusing for electoral participants and the general public. In addition, their interaction heavily relied on goodwill and informal understandings rather than formal lines of communication. Different agencies also took different approaches to their roles, while the potential for government interference (even if never actualized) in the work of each differed. Consequently, there were numerous calls over many years to simplify the administrative structure through amalgamation.

The Electoral (Administration) Amendment Act 2010 did just that. By way of a two-stage process, the chief electoral officer and the Electoral Commission were merged into a new Electoral Commission for the 2011 election, with the Electoral Enrolment Centre's responsibilities then incorporated before the 2014 election.³³ This timetable was adopted to minimize disruption to the administrative agencies' operations, especially with respect to the nation's electoral rolls. Two points about this reform process are notable. First, it was entirely free of the sort of partisan wrangling that marked the issues of MMP reform, prisoner voting, or political financing, with the legislation unanimously supported in Parliament. Second, there was no disagreement

²⁹Audrey Young, *Key: This Will Be the First Thing to Go*, N.Z. HERALD (Dec. 5, 2007), available at <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10480387>.

³⁰See generally GEDDIS, *supra* note 3, at 140–155.

³¹Third parties (or “promoters”) may spend up to NZ\$315,000 on “electoral advertisements.”

³²Additionally, a separate Representation Commission is constituted following the national census every five years to redraw the boundaries between constituencies.

³³The Electoral Commission's current role is described in GEDDIS, *supra* note 3, at ch. 13.

over the new Electoral Commission's essential form and function.³⁴ MPs from all parties agreed that it ought to consist of non-partisan members appointed by Parliament (not the current government)³⁵ and operate under a statutory mandate of independence.³⁶ This consensus reflects an underlying belief in New Zealand's political culture about what is desirable and practicable in electoral administration. Once embodied in law, the nation's electoral rules and processes ought to be applied in ways that are not susceptible to partisan manipulation or favoritism. And it is thought possible for an agency to operate without being captured by the interests of any political party or ideology. That is not to say that politicians or their parties do not accuse electoral administrators of making mistakes or acting incorrectly.³⁷ But it is notable that no recent electoral contest has produced an allegation that an electoral agency or individual polling place official has acted in a *biased* or *partial* manner.

JUDICIAL (NON)INVOLVEMENT IN ELECTORAL REFORM

The above account of recent electoral reforms makes virtually no mention of New Zealand's courts. Under the nation's unwritten constitution in which Parliament retains complete legislative supremacy, the judiciary has only a comparatively minor role to play in this area. It is charged with interpreting and applying electoral legislation where the meaning of some provision is disputed in a particular factual situation.³⁸ Equally, it may review the actions of the Electoral Commission to ensure that these comply with the law (including judicially imposed standards of administrative propriety).³⁹ However, the courts have no constitutional power to invalidate electoral legislation enacted by Parliament, nor may they refuse to apply clearly worded legislative provisions that are thought to improperly infringe on electoral rights. So, for example, when opponents of the EFA asked the courts to intervene in the passage of that legislation on the basis that the proposed measures unjustifiably limited third-party free speech rights, the courts refused to do so.⁴⁰ The ultimate desirability or appropriateness of any given electoral rule has been, in the courts' view, a matter for Parliament to decide.

However, a recent court decision suggests a new judicial preparedness to take action in situations

where Parliament is judged to have failed in its law-making role. The case involved a challenge brought by a group of serving prisoners to the blanket ban on prisoner voting.⁴¹ They claimed that the legislation represented an unjustified limit on the right to vote guaranteed under section 12(a) of the NZBORA. Although the existence of such an unjustified limit cannot invalidate the ban or otherwise permit prisoners to vote,⁴² the plaintiffs nevertheless asked the High Court to formally declare its existence. In response, the Crown positively admitted that the ban represented an unjustified limit on the right—the attorney general already had conveyed this conclusion to Parliament⁴³—but denied that the Court could issue the sort of formal declaration sought. Ultimately, the High Court sided with the plaintiffs and issued a novel remedy of a formal “declaration of inconsistency” with the NZBORA. The remedy's express purpose is to send a message to the New Zealand public regarding the nature of the law,⁴⁴ whereupon “[a]ny political consequences of [the] decision can be debated in the court of public opinion, or in Parliament.”⁴⁵ The assumption is that this expression of judicial disapproval towards the legislation's fundamental nature will lead to a parliamentary reassessment of its merits, prompted if necessary by public concern.

³⁴Justice and Electoral Committee, *Report on the Electoral (Administration) Amendment Bill 93-2* (Apr. 26, 2010).

³⁵Electoral Act 1993, No. 87, § 4D(1).

³⁶*Id.* § 7.

³⁷*See, e.g.*, *Peters v. Electoral Commission*, [2016] N.Z.H.C. 394.

³⁸*See, e.g.*, *Payne v. New Zealand National Party*, [2008] N.Z.H.C. 608, [2008] 3 N.Z.L.R. 233; *Electoral Commission v Watson*, [2016] N.Z.C.A. 512.

³⁹*See, e.g.*, *Kirk v. Electoral Commission*, [2008] N.Z.H.C. 862; *Peters*, [2016] N.Z.H.C. 394.

⁴⁰*Boscawen v. Attorney-General*, [2009] N.Z.C.A. 12, [2009] 2 N.Z.L.R. 229.

⁴¹*Taylor v. Attorney General*, [2015] N.Z.H.C. 1706.

⁴²Although the New Zealand Bill of Rights Act 1990 (NZBORA) purports to “guarantee” the right to vote, § 4 of the legislation prohibits a court from invalidating or refusing to apply legislation it believes infringes on this right. In this sense, Parliament retains final authority over what the rights guarantee means in practice. *See generally* STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* 129–156 (2013).

⁴³*See supra* note 21. Because the Crown admitted the existence of an unjustified rights limit, the Court did not need to consider this substantive issue. Rather, argument centered on the Court's remedial powers.

⁴⁴*Taylor*, [2015] N.Z.H.C. 1706, ¶¶ 30, 77(d).

⁴⁵*Taylor*, [2015] N.Z.H.C. 1706, ¶ 70.

I have three brief concluding comments about this development. First, the fact *this* particular case produced the first NZBORA declaration reflects both the foundational importance that the right to vote holds in New Zealand's constitutional arrangements and a degree of judicial concern that MPs did not fully appreciate that importance when legislating. Second, and relatedly, declarations of inconsistency are in keeping with New Zealand's primarily political approach to rights issues, including electoral rights. Where the courts consider that those political processes have failed, as is the case in relation to prisoner voting, the response is to try and prompt elected representatives to revisit the matter in a deliberative manner rather than compel them to adopt some solution. And finally, questions surround the remedy's effectiveness.⁴⁶ It will only work if MPs take the declaration seriously or if the New Zealand public demands that they do so. Absent such a response, there is no further means of judicial enforcement. Which means that while the case represents a tentative step towards a more judicial involvement in the process of electoral reform in New Zealand, it does not displace the primary presumption that elected representatives (and sometimes the electors themselves) ought to have the last say in what happens—be that for good or ill.

CONCLUSION

New Zealand's electoral law is not a static phenomenon. Since the introduction of MMP in 1993, there have been major changes in who may vote, how campaigns can be financed, and who oversees the election process. In addition, the very use of the MMP voting system has been subject to popular review by way of a referendum. Not only do the substantive decisions in each of these areas matter, but the way in which they are made also is important. For given the role that elections play as the key—perhaps even the *only*—legitimizing feature in New Zealand's constitutional arrangements, how changes to its election laws occur matters a great deal. This article has sought to illustrate that fact.

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⁴⁶Andrew Geddis, *New Zealand—Prisoner Voting and Consistency with the New Zealand Bill of Rights Act 1990*, [2016] PUB. L. 325, 332–333.