

Superdiversity, Democracy & New Zealand's Electoral & Referenda Laws

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By Mai Chen



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& New Zealand's Electoral
& Referenda Laws

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for Law, Policy and Business

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Foreword

This study explores the constitutional law and public policy implications of New Zealand's increasingly ethnically diverse population – and the impact on electoral laws provides a perfect example. This angle of narration makes tangible what would otherwise be difficult to grasp – that is, why the demographic transformation that New Zealand is undergoing, especially in Auckland, has democratic and civic engagement implications.

This paper makes concrete recommendations which will only become more important as superdiversity grows – Statistics New Zealand projections tell us that by 2038, 51 per cent of New Zealand's population will identify as Asian, Māori and Pacific. Even the flag referenda that we are about to have raises the question of whether New Zealanders who have little or no English will really be able to participate. The issue arises again for the Local Government elections in 2016 and the Central Government election in 2017.

I hope the recommendations in this paper will be given serious consideration. I also hope that through understanding how superdiversity can impact on one area of the law – that concerning elections and referenda – thinking will be sparked on how else superdiversity may affect law and policy issues. That is why I set up the Superdiversity Centre for Law, Policy and Business.

Acknowledgments

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Executive Summary

1. The legitimacy of the New Zealand government rests on its election in periodic democratic elections, in which everybody who is entitled to vote is treated equally and in which everybody's vote is worth the same. Alongside this is an arguably evolving convention that constitutional change is authorised by referenda, as are other matters such as the upcoming flag referenda.
2. New Zealand's electoral laws achieve this aim by regulating how elections and referenda are to be carried out. The transition to ethnic superdiversity – and the accompanying growth in linguistic diversity – means that the old assumption that elections could essentially be carried out in English and that this would not exclude anybody who was lawfully entitled to vote is no longer necessarily true. For example, unlike many countries, New Zealand permits permanent residents to vote as well as citizens. Almost all those with permanent resident status will be new migrants for some of whom English will not be a mother tongue.
3. This paper conducts a detailed analysis of New Zealand's electoral law and practice regarding eligible voters who have little or no English and how they have changed to reflect shifts in New Zealand's ethnic and linguistic makeup, together with analysis of electoral law and practice of other superdiverse jurisdictions regarding eligible voters who have English or other language limitations, and makes recommendations for improvement.

4. New Zealand is already, as the Electoral Commission warns, suffering a “steep and consistent” decline in electoral participation. Māori, Pacific peoples and new migrants are all disproportionately represented in the growing number of New Zealanders who could vote but who simply choose not to, with new migrants voting the least of these three groups. The young also disproportionately do not vote and demographic projections show that New Zealand will be younger and browner in future, especially north of Taupo.
5. Over time, if new migrants continue not to vote, there is a risk that the existing under-representation of New Zealand’s ethnic minority and immigrant populations in central and local government will increase, despite their numerical increase as a proportion of the population. This will have adverse impacts on social cohesion and ultimately on the New Zealand state’s democratic legitimacy. Historically, the voting rates of long-term migrants eventually adjust to mirror those of New Zealand-born voters. However, the proportion of non-voters who were long-term migrants increased between the 2008 and 2011 elections.¹ In addition, New Zealand continues to attract new migrants – for example, as at the 2013 Census, approximately 80 per cent of people identifying as Asian living in New Zealand were born overseas.²
6. There may be many reasons why the superdiverse do not vote,³ including:
 - a. Limited or no understanding of the democratic process, or about how New Zealand central and local government work, and why voting matters;
 - b. A lack of confidence, based on their experiences in their countries of origin, that the vote will be fair or secret, or that the democratic process in New Zealand is genuine;
 - c. No access to information about how they can vote, including what their options are if they are not able to reach a polling booth; and/or
 - d. Limited or no English.
7. As the Electoral Commission found in its *Report into the 2014 General Elections*, Asian, Pacific and young voters (aged 18-29) were more likely than other voters to report having a poor or very poor understanding about the electoral process and Asian and young voters were more likely to report poorer understanding of how and where to vote and what to do if they could not get to a voting place.⁴
8. New Zealand currently has three official languages – English, Māori and New Zealand Sign Language. Most government business is only transacted in English. This potential obstacle to voting can be removed through law reform to make it easier for ethnic and linguistic minorities who speak little or no English to participate in elections and referenda by, for example, consistently making election and referenda material available in the most common languages spoken in New Zealand, making interpreters available at polling places, and making provision to help those requiring assistance to answer questions about their identity to election officials and to cast their votes or special votes.
9. New Zealand should also consider the adoption of compulsory voting in parliamentary elections. While this duty would fall on non-migrant New Zealanders as well, voter participation is falling for all New Zealanders. Voting in elections is a fundamental part of participation in civic society, and it is arguable that taking up the rights and privileges of citizenship or permanent residence in New Zealand should bring with it an obligation to participate in civic life, and the national conversation around elections, by voting.
10. Such an approach would be consistent with the public policy discourse around the role of new migrants, as Simon-Kumar identifies:⁵

Civic engagement – a second dimension of political citizenship highlighted in policy – reflects a broad duty for ethnic people to articulate their needs to the government. It was the government’s intent to improve the conditions and ‘settlement’ outcomes for migrants from ethnically different backgrounds and, to some extent, ethnic people were expected to contribute to the policies and programmes that would augment this improvement. Thus, ethnic citizenship was also to be enacted through participation in the activities of government policy making, as co-producers of policy making or in the delivery of social services.

11. Compulsory voting may also require the better delivery of measures under the New Zealand Bill of Rights Act 1990 (“NZBORA”) to help those who speak little or no English in terms of electoral law, policy and practice, as they present themselves at polling places and require assistance to vote.
12. However, it is important that the penalties associated with failing to vote do not themselves lead to disenfranchisement. The Singaporean approach where non-voters are removed from the roll until they pay a penalty is potentially problematic in this regard and should not be adopted in New Zealand. The Australian approach, of imposing a very modest fine for failing to vote without an acceptable excuse, effectively serves as a reminder to vote.
13. There are already a significant number of accommodations in New Zealand’s electoral laws to assist voters with little or no English. However, many of these accommodations are difficult to use and appear to be seldom used in practice.
14. There is also a lack of consistency of accommodations for voters with little or no English across electoral and referenda legislation and even at different stages of the voting process. The critical path for a voter with little or no English to cast their vote is essentially ad-hoc.
15. There has been no systematic development of an end-to-end statutory process to help those with little or no English to vote in central and local government elections, or in referenda. This may explain why the rate of voting among new migrants is so poor despite the large number of accommodations in law to help them.
16. A balance must be struck between facilitating voting in languages other than English and retaining the essential characteristics of free and fair secret ballot elections affirmed by s 12 of the NZBORA. Otherwise, indirect discrimination against different racial and ethnic groups may be alleged under s 19 of the NZBORA if they are not able to vote under s 12 due to limited or no English.
17. There are practical limitations – such as cost, and the availability of suitably qualified interpreters in multiple languages – on the arrangements that can be made to assist those with little or no English to vote, and thus limitations even on the fundamental right to vote may be reasonable and demonstrably justified in a free and democratic society.
18. New Zealand has never required voters to meet a particular standard of English ability to be eligible to vote in general or local elections, or to participate in referenda. And since 1956, New Zealand’s electoral laws have made various allowances for the fact that some eligible voters speak little or no English and require assistance to vote.
19. These measures are included in the Electoral Act 1993, the Local Electoral Act 2001, the Citizens Initiated Referenda Act 1993, and the various laws empowering government-initiated referenda, which are analysed below.
20. While voting in elections for central and local government is important, voting in referenda is equally so, particularly given the arguable constitutional convention that significant constitutional change is authorised by referendum. Even citizen-initiated referenda require support from 10 per cent of eligible voters before they are held.
21. There appear to be five key areas in which language issues can pose a barrier to voting:
 - a. The languages information about the election is made available in, including in particular how to enrol and cast a vote;
 - b. How prospective voters satisfy electoral officials that they are legally entitled to cast a vote and be issued a ballot paper;
 - c. Whether translators or interpreters are available at polling places for voters with little or no English;
 - d. Whether ballot papers are only provided in English; and
 - e. Whether assistance for voters with little or no English is provided to answer questions about identity to get the ballot paper and to help cast the vote in the booth.

22. The particular accommodations made in New Zealand to address these issues vary across the relevant legislation, but all share the general approach that a person who requires assistance to vote because of English language difficulties may be assisted in voting by a third party, contrary to the general rule that voting should be done alone and in secret. While on the one hand, this helps to ensure that eligible voters are not prevented from voting purely because of language limitations, it also creates a risk of electoral fraud or undue influence on such voters from the “assisting” individual. Such cases would likely breach prohibitions on undue influence in our electoral laws, but more may be needed given New Zealand’s increasingly superdiverse population, and the pressure that hard fought contests place on current laws, to ensure that elections are free and fair.
23. Many other provisions could be used to help those with limited or no English to vote, but they depend on the discretion of the relevant electoral authority or officer. The discretion is usually exercised by relatively low-level electoral officials, which may provide opportunities for discrimination or abuse. There are also few mandatory relevant considerations that need to be taken into account before exercising the discretion. For example:
 - a. The voter verification procedures in the Electoral Act create the possibility that a person lawfully entitled to vote could be denied that right because of their inability to give answers to basic questions about themselves in written English to an official at a polling place;
 - b. The Electoral Act permits the appointment of interpreters at polling places, but does **not** require that they are in fact appointed, and before a voter can make use of an available interpreter, they must go through a complex process including being directed to a poster containing voting instructions in languages other than English;
 - c. The Local Electoral Act allows the relevant electoral officer to include voting information in other languages, but once again this is not mandatory. A poster may also be erected inside polling booths giving instructions on how to vote in languages other than English, but it is not required;
 - d. The Local Electoral Act also permits the submission of candidate statements for distribution in languages other than English, provided that a translation into English is provided;
 - e. The Referenda (Postal Voting) Act permits, but does not require, the inclusion of voting information, together with ballot papers, on how to vote and how to return the ballot paper in any language or languages.
24. In contrast, the Local Electoral Regulations 2001 provide that the electoral officer “must” provide translations of the “Directions to voter” sections of the voting document if he or she “considers it desirable in order to ensure that every elector has a reasonable and equal opportunity to vote.”
25. Finally, there are aspects of New Zealand’s electoral laws that effectively require certain aspects of New Zealand’s electoral administration to be conducted exclusively in English. In some cases this has the potential to undermine the accommodations made for voters with poor English. For example, while a voter may be provided with detailed information on how to vote in a language that they understand, they may still be unable to effectively exercise their right to vote if the ballot paper is exclusively in English.
26. The prescribed form for enrolment as a ratepayer elector (as opposed to a residential elector, for which there is a different, simpler process) in the Local Electoral Regulations is exclusively in English, as is the prescribed ballot paper under the Citizens Initiated Referenda Regulations. The various Acts to empower government referenda have all required that the referenda question be put to the voter in English.

Summary of Findings

27. New Zealand already does more than most comparable countries to allow new migrants to vote because it allows migrants who are not yet citizens but who hold permanent

residency to vote. Most countries restrict the franchise to their own citizens or to citizens of countries with whom they have a strong relationship (such as Commonwealth citizens or citizens of the European Union in the United Kingdom).

28. New Zealand can improve its accommodations in its electoral law to help those with little or no English language to vote. Although s 12 of the NZBORA, which affirms the right to vote, applies only to elections to Parliament, and not to elections held under the Local Electoral Act or the various referenda legislation, the accommodations it may require in respect of language represent best practice and should be applied in the context of the Local Electoral Act or the various referenda legislation, even if there is no legal obligation to do so.
29. New Zealand's electoral legislation should be revised to adopt consistent standardised approaches to linguistic diversity whether it is local or central government elections, or referenda. Voters with little or no English should receive consistent levels of information, and support to vote, regardless of where in New Zealand they live, or what language they speak.
30. In dealing with those with little or no English, New Zealand's electoral laws need to find a balance between giving electoral officials the discretion to respond to unique situations, while making sure that the overall application of measures to help those with little or no English to vote is consistent and fair. The worst case scenario is that officials exercising discretion do so in a discriminatory fashion.⁶ New migrants with little or no English are unlikely to know how to complain or to whom.
31. This paper also considers electoral laws in comparable superdiverse jurisdictions, such as London, Singapore, Johannesburg, Toronto and Australia.
32. The comparative analysis shows that despite its ad-hoc nature, New Zealand has a relatively sophisticated suite of measures to assist those with little or no English to vote, compared to comparable superdiverse jurisdictions. There are some aspects of particular measures which both New Zealand and some comparable superdiverse jurisdictions have adopted which are done better overseas, and which New Zealand should consider adopting, such as:
 - a. Requiring the person providing assistance to a voter with limited or no English to cast their ballot to swear to follow instructions and maintain vote secrecy (Canada – federal);
 - b. Requiring election information to be made available in every language spoken in 2 per cent or more of the homes in a city (Canada – Toronto). If New Zealand were to adopt Toronto's approach, election information for general elections would be required in English, Te Reo Māori and Samoan. In Auckland elections, information would be required in English, Te Reo Māori, Samoan, Hindi, Northern Chinese, Yue, and other Sinitic languages;
 - c. Requiring election information to be made available in multiple specified languages, instead of leaving it to the discretion of electoral officials (Singapore);
 - d. Allowing voters to answer questions put to them to ascertain whether they are permitted to vote "satisfactorily", which will allow a person to answer other than in English (United Kingdom).
 - e. Compulsory voting in elections (Australia and Singapore), provided that the penalties for non-voting are not unduly harsh.
33. Finally, New Zealand needs to keep its electoral laws, and the accommodations made for those eligible voters with little or no English, under regular review to ensure that they continue to minimise the language-related obstacles to voting. Changes in New Zealand's linguistic makeup, or in the technology used to administer elections, may change what accommodations for those with little or no English are considered reasonable.

Summary of Recommendations

34. This paper makes the following recommendations about how New Zealand's electoral laws should change to help those voters with little or no English vote:

Parliamentary Elections

- a. Consideration should be given to whether forms for voter registration (which is compulsory) should be provided in languages apart from English, especially as New Zealand's superdiversity grows.
- b. The Electoral Commission should emphasise in training electoral staff that New Zealand is a superdiverse society with eligible voters who come from a range of different countries and cultural backgrounds, and who speak different languages but who all have the same right to cast a vote. The Electoral Commission should also emphasise the challenges faced by voters with little or no English, the accommodations in the legislation to assist them to vote, and how polling place officials and issuing officers can avoid unconscious bias and ensure that such voters can use the accommodations afforded to them.
- c. The recommendation of the *Report of the Electoral Commission into the 2014 General Election* that promoting voter participation be made a whole-of-Government priority with multi-party support and that a long-term national strategy to nurture and celebrate our democratic culture and encourage participation be developed to reverse the "particularly steep and persistent" decline should be adopted.
- d. Election staff pay rates should be reviewed, as the Commission also recommended, since there has been no increase since 2008 despite more self-study and training time being required of each staff member. Election staff have important responsibilities, including helping voters with little or no English to cast their ballot. Proper pay is needed to attract candidates of the right calibre.⁷
- e. The Commission also recommended looking to expand Kids Voting and to continue to provide and develop curriculum linked resources.⁸ Kids Voting is a programme for young New Zealanders that encourages them to experience and understand an authentic electoral event. Given that Māori, Pacific and Asian voters are younger than European New Zealand voters, this should help engage and inform them of the importance of voting and help to establish a habit of doing so.
- f. Consideration should be given to amending electoral legislation to require the Returning Officer or other relevant official to take account of the need to make available information in a language other than English to ensure that all electors qualified to vote have a reasonable and equal opportunity to do so, using s 75(3)(a) of the Local Electoral Act as a precedent.
- g. The provisions in the Electoral Regulations 1996 governing the availability of interpreters should be made less complex, with fewer preconditions that must be satisfied before an interpreter can be used, and the Electoral Commission should also seek to employ more interpreters. However, it needs to be acknowledged that the Commission's preference, in line with its policy, is to ensure that issuing officers are employed who reflect the community and have the relevant language skills.⁹
- h. A person should be permitted to obtain assistance (from an interpreter or otherwise) to answer questions about their identity or whether they have already voted, or be permitted to answer questions to demonstrate their eligibility to vote through other means such as producing a passport or drivers' licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in a language other than English.
- i. Ballot papers should be available in English and Māori, which are New Zealand's written official languages. As linguistic diversity grows, it may be appropriate to consider making ballot papers available in other languages used by a significant percentage of the population;
- j. Persons assisting those with little or no English should have to sign a declaration that they will follow the voter's instructions, and maintain the secrecy of the vote. Breaching this declaration should be an offence. This is a further preventative measure given that the Electoral Act already enables the voter to request that another person inspect the ballot

- paper before it is put in the ballot box to ensure their instructions are complied with, and it is an offence to say how someone voted if you were the person assisting;
- k. There should also, for the avoidance of doubt, be a specific offence created in s 170 of the Electoral Act for voting contrary to the instructions of the voter you are assisting, just as there is for divulging how they voted, in subsection (5).
- l. Provisions in New Zealand's electoral law should be reviewed to ensure they do not, directly or indirectly, discriminate on the basis of race or ethnicity against specific voters in elections or referenda in terms of ss 19 and/or 12, and cannot be justified in terms of s 5 of the NZBORA.

Local Government Elections

- m. The recommendation from the Justice and Electoral Committee's report on the 2013 Local Authority Elections be implemented that the Government review the available teaching material in civics education and investigate commissioning of research into the impact of civics education in New Zealand on voter turnout and voter behaviour.
- n. The Local Electoral Act 2001 should be amended so that the notice given about enrolment as a ratepayer elector, and about the election or poll, can be made available in languages other than English.
- o. The Local Electoral Act should be amended to make provision for the use of interpreters.
- p. Regulation 34 of the Local Electoral Regulations, which specifically deals with how a voting document or special voting document may be marked by voters with specified difficulties in voting, including "is not sufficiently familiar with any language or languages used on the document to vote without assistance", appears too narrow to extend to assistance in providing any necessary identifying details before the voter is issued with voting documents. Thus, such a provision needs to be added by law reform.
- q. Regulation 34 of the Local Electoral Regulations also appears too narrow to extend to assisting a special voter with little or no English to make a special voting declaration. Thus, such a provision needs to be added by law reform.

Referenda

- r. The Citizens Initiated Referenda Act should be amended to prohibit promoters of petitions from deceiving voters into signing petitions that they do not understand if they have limited or no English. Using s 218 of the Electoral Act as a precedent, it should be a specific offence to, by abduction, duress, or any fraudulent device or means, compel, induce, or prevail upon any elector to sign or not sign a petition, similar to provisions prohibiting undue influence in other electoral legislation.
- s. As with parliamentary elections held under the Electoral Act, the provisions governing access to interpreters should be streamlined so that voters in referenda with little or no English are able to access an interpreter if necessary.
- t. The Referenda Regulations should be amended to at least make it legally possible to provide a ballot paper in Te Reo Māori, and consideration should be given to whether ballot papers should be available in other languages as New Zealand's demographic makeup shifts.
- u. The Referenda (Postal Voting) Act should be amended to require the Returning Officer to exercise his or her discretion under s 36(2)(b) taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote, using s 75(3)(a) of the Local Electoral Act as a precedent.
- v. A person should be permitted in a referendum to obtain assistance to answer questions from scrutineers confirming their name (from an interpreter or otherwise), or be permitted to answer the question through other means such as producing a passport or drivers'

licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in other than English.

- w. The Schedules to the New Zealand Flag Referendums Act 2015 should be amended to make it legally possible to provide a ballot paper in Te Reo Māori and other languages. Section 25(2)(b) of the 2015 Act should also be amended to require the Returning Officer to exercise his or her discretion taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote, using s 75(3)(a) of the Local Electoral Act as a precedent.

Comparable Superdiverse Jurisdictions

- x. New Zealand should consider the adoption of compulsory voting to improve voter participation rates, as in Australia and Singapore;
- y. New Zealand's Electoral Commission should be required to adopt a formal multicultural plan like Australia's Electoral Commission, which focusses on improving voter participation rates among new migrants, and be properly funded to implement such a plan. New Zealand's increasing superdiversity makes communicating with all voters more complicated and expensive;
- z. Where possible, decisions about how and in what languages information is to be provided should be made by the Electoral Commission, and be rules-based rather than discretion-based, provided that the rules are kept under review so that they can change to reflect New Zealand's changing demographic makeup;
- aa. There should be a requirement during elections and referenda to provide information in particular languages based on a statistical analysis of the most commonly spoken languages in New Zealand. If the decision depends on a regulator's assessment of what is needed, then the main languages spoken in New Zealand should be a mandatory relevant consideration; and
- bb. People assisting others to vote should be required to swear a declaration that they will follow the voter's instructions and preserve secrecy. Breaching this declaration should be an offence.

Table: Summary of measures to assist voters with limited or no English

	Interpreters	Ballot papers	Assistance to voters	Voter information
Electoral Act 1993	May be appointed for a particular polling place.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
Local Electoral Act 2001 Booth voting	No.	All approved formats are in English.	Voter may be assisted by a third party.	May be provided in other languages.
Local Electoral Act 2001 Postal voting	Not applicable.	All approved formats are in English.	Voter may be assisted by a third party.	May be provided in other languages.
Citizens Initiated Referenda Act 1993	May be appointed for a particular polling place, if booth voting is used.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
Referenda (Postal Voting) Act 2000	Not applicable.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
Electoral Referendum Act 1993 (repealed)	Yes.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
Compulsory Retirement Savings Scheme Referendum Act 1997 (repealed)	Not applicable.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
Electoral Referendum Act 2010 (repealed)	May be appointed for a particular polling place.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.
New Zealand Flag Referendums Act 2015	Not applicable.	Prescribed in English only.	Voter may be assisted by a third party.	May be provided in other languages.

The Under-Representation of the Ethnically Diverse

35. Voting in democratic elections is a fundamental part of civic life. Despite this, New Zealand's electoral participation rate is, as the Electoral Commission warns, suffering a "steep and consistent" decline. Migrants and ethnic minorities are disproportionately represented in the growing number of New Zealanders who could vote but who simply choose not to. Māori and Pacific peoples have low rates of voting, but new migrants are the lowest.

36. Māori, Pacific peoples and Asians are also under-represented in local government and have low voter turnout in local government elections. For example, the General Social Survey, which analysed voter turnout in the Auckland local government elections, found that only 53 per cent of Asian respondents voted in the 2010 local body elections.¹⁰ This puts those of Asian ethnicity in the company of single parents with dependent children (55 per cent); those living on their own (53 per cent); those not in paid employment (50 per cent); those with personal incomes under \$20,000 (55 per cent); those with only high school certificate and equivalent (54 per cent); and those living in the most deprived areas (54 per cent). The reasons for not voting included "I didn't know enough about the people standing for election" and "I didn't know about the election".¹¹

37. There is also low representation in Parliament. Following the 2014 general election, Parliament is comprised of only 22 per cent Māori MPs, 6 per cent Pacific MPs and 4 per cent Asian MPs. Only two political parties have Asian MPs, and 84 per cent of ministers (inside and outside Cabinet) are European. Of 20 councillors in Auckland, none are Asian or Māori and only two are of Pacific descent.

Growing Linguistic Diversity

38. New Zealand's growing ethnic diversity has resulted in a corresponding increase in linguistic diversity.
39. The 2013 Census results show that English is still the most common language in which people hold conversations about everyday things, with 3,819,972 speakers (96.1 per cent of the population).¹² After English, the next most common languages spoken are Te Reo Māori, Samoan and Hindi. Between 2001 and 2013, the number of people who could speak Hindi in New Zealand nearly tripled (from 22,749 people in 2001 to 66,309 in 2013).
40. The number of people who could speak Northern Chinese (including Mandarin) almost doubled between 2001 and 2013 (from 26,514 people in 2001 to 52,263 in 2013).
41. In 2013, however, more than 87,000 (about 3%) people did not speak English. Of those who did not include English as one of their spoken languages, 65.3 per cent lived in the Auckland region, and most identified with at least one Asian ethnicity (63.8 per cent or 55,320 people). The most common languages spoken by non-English speakers were:
 - a. Sinitic not further defined (including Chinese) (13.7 per cent of all non-English speakers or 11,961 people);
 - b. Yue (including Cantonese) (12.1 per cent or 10,551 people);
 - c. Northern Chinese (including Mandarin) (11.7 per cent or 10,218 people);
 - d. Samoan (11.2 per cent or 9,825 people);
 - e. Te Reo Māori (10.2 per cent or 8,916 people).
42. Around 62 per cent of Asians, however, speak a second language (compared with 19 per cent of all New Zealand residents), and four times as many Asians speak a third language compared to the total population.¹³
43. According to the 2013 Census, Samoan was the most commonly spoken Pacific language among the Pacific population, with 60 per cent of New Zealand's Samoan population reporting that they could speak Samoan. This was followed by Tuvalu (66 per cent of the Tuvaluan population in New Zealand), Tongan (53 per cent), Fijian (43 per cent), Tokelauan (34 per cent), Niuean (19 per cent) and Cook Island Māori (13 per cent). Samoan was the third most commonly spoken language in New Zealand (2.2 per cent of the total New Zealand population), behind English (96.1 per cent) and Te Reo Māori (3.7 per cent).

Why Does Ethnically Diverse Representation Matter?

44. Given the importance of civic participation to social cohesion, improving migrant and ethnic voter turnout is an important consideration for policy makers. There have been increased attempts to educate these groups in civics to encourage participation and voting in recent years. The Electoral Commission's *Statement of Intent for 2014/15–2020/21* considered that lower participation rates for new migrants and the Māori and Pacific communities would require "particular attention" from multiple agencies.¹⁴
45. The Electoral Commission's Report on the 2014 General Election found that, while overall there is a high understanding of the voting process Asian, Pacific and young voters¹⁵
...were more likely than other voters to report having a poor or very poor understanding about the electoral process, and Asian and young voters were more likely to report poorer understanding of how and where to vote and what to do if they could not get to a voting place on election day.
46. The Justice and Electoral Committee's report on the 2013 Local Authority Elections said that the Committee was aware that the participation rate of Asian voters is low, and of the need for local authorities such as Auckland Council to encourage participation by Asian voters. Auckland Council has a close partnership with the Electoral Commission on enrolment. The report also said that voting appears to be habit-forming, meaning that an elector who did not vote in 2013 is more likely not to vote in future. Thus, immigrants who arrive with no habit of voting may need more encouragement to vote than the general population.¹⁶ The Commit-

tee also recommended that the government review the available teaching material in civics education and investigate commissioning research into the impact of civics education in New Zealand on voter turnout and voter behaviour.¹⁷ However, these recommendations have not been adopted.

47. There is a strong correlation between a sense of belonging and an individual's likelihood to vote: the stronger the sense of belonging, the more likely a person is to vote.¹⁸ Therefore, as superdiversity grows, an increasing portion of New Zealanders risk being disengaged from political processes because they do not understand our system of government – for example, they may not come from a democracy, or may come from a country where voting is not free or fair – or because they do not read or speak English well, or at all.

48. The potential problem is illustrated by the fact that approximately 49 per cent of residence approvals for 2013/14 were granted to people whose source country was assessed by Freedom House as being either “not free” or “partly free”. The Philippines (with 3,990 people) surpassed the United Kingdom as the largest source country for Essential Skills workers in 2013/14. In addition, the Philippines had the largest absolute increase (920 people or 30 per cent) from 3,070 in 2012/13. The Philippines was ranked “partly free” by Freedom House in 2015. It received a score of 3 for both political rights and civil liberties (with 1 being the most free and 7 the least free). The United Kingdom (3,919 people), India (3,512 people) and Fiji (1,661 people) were the next largest source countries of Essential Skills workers. The UK and India were both ranked “free” in 2015. Fiji was ranked “partly free” (receiving a score of 3 for political rights and 4 for civil liberties). Over the last four years, the number of Essential Skills workers from India has been increasing year on year, with the number approved in 2013/14 double what it was in 2009/10.

The Growing Problem of Under-Representation

49. Lower than average participation by migrants and minorities in civic life would be concerning in any society. However, it is particularly serious in societies which are undergoing a transition to ethnic and cultural superdiversity where the numbers of migrants and ethnic minorities are increasing relative to the European population. Even though migrant voting rates eventually trend towards the average the longer migrants stay in New Zealand, there will continue to be a steady stream of new migrants who may not speak English as a first language. The downstream effect of this is that the proportion of the public who do not vote may increase. For example, the percentage of non-voters who were Asian increased between the 2008 and 2011 general elections.¹⁹ Approximately 80 per cent of Asians living in New Zealand were born overseas as at the 2013 Census.²⁰

50. Such disenfranchisement has impacts at all levels of society. If most new migrants choose not to vote in parliamentary elections, then the resulting Parliament is less likely to reflect their political aspirations; and Parliament is also less likely to be “representative” insofar as it is supposed to be a House of Representatives. The relevance of, and “buy-in” to, a parliamentary democracy whose inhabitants neither represent nor resemble them may decrease for minorities and new migrants.

51. Low voting rates have similar ramifications at a local level. From community and local boards to district health boards to local authorities, voting representation at a local level is an equally important part of participating in civic life which may be closed off to those who do not vote. Local government at all levels is intended to reflect the diversity of New Zealand's communities and to acknowledge that different communities may have different needs, values and aspirations. Section 10 of the Local Government Act 2002 provides that the purpose of local government is to enable democratic local decision making and action by, and on behalf of, communities and to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses. How can it achieve this goal if large numbers of new New Zealanders feel no connection to it?

52. Finally, low participation rates by ethnic minorities and new migrants will have long-term constitutional ramifications. There is arguably an evolving constitutional convention that major constitutional change should be authorised by the public through a majority

at a plebescite, even where such referenda would not legally be required.²¹ For example, New Zealand held referenda on our electoral system – the move to MMP and its retention – and two referenda will be held over the next two years on the New Zealand flag. There may be further significant constitutional referenda in the near future, on questions such as republicanism, the entrenchment of the Treaty of Waitangi, the adoption of a supreme law constitution, or adding economic, social, or property rights to the NZBORA.

53. But the rationale for such a convention – that sovereignty arises from the people and therefore major changes to our constitution should be made with the majority's approval – is undermined if significant portions of New Zealanders do not actually vote in such referenda. Genuine mass participation is vital if referenda are to have genuine legitimacy, and this will not be achievable unless we can be confident that New Zealanders from all backgrounds are able to participate.

The Causes of Under-Representation

54. There are many possible reasons why the superdiverse may decide not to vote even though they are able to, including:

- a. Limited or no understanding of the democratic process, or about how New Zealand central and local government works, and who and what exactly they are voting for and why it matters; and/or
- b. No access to information about how they can vote, or what their options are, especially if they cannot get to the voting booth on polling day;²² and/or
- c. Limited or no English;²³ and/or
- d. Lack of confidence that the vote will be fair or secret, or that the democratic process in New Zealand is genuine, based on their experiences in their countries of origin.²⁴

55. This paper considers in particular whether the way in which New Zealand's electoral law deals with people who speak no or limited English, Māori or New Zealand Sign Language can be improved. New Zealand has chosen not to have a language qualification to vote or to stand for office. New Zealand's electoral legislation includes various provisions to facilitate voting by people who speak no or limited English, Māori or New Zealand Sign Language. The question this paper seeks to answer is whether those provisions need to be improved, while striking a balance between ensuring that everyone who is lawfully entitled to vote is able to vote and protecting the principles of a free and fair secret ballot affirmed by s 12 of the NZBORA.

Parliamentary Elections

57. There is no explicit language qualification on the right to vote in New Zealand. Section 12 of the NZBORA provides that every New Zealand citizen who is of or over the age of 18 years 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.

58. This right is given effect in respect of elections for the House of Representatives by the Electoral Act 1993. In summary, every registered elector is qualified to vote. Every citizen and permanent resident aged over 18 is qualified to be registered as an elector, and indeed must register as an elector. There is no statutory requirement that for a person to be qualified to vote they must speak or understand English, Māori or New Zealand Sign Language.

59. Nor does it follow that a migrant who is a New Zealand citizen or permanent resident will necessarily be able to speak English to any particular standard, as the statistics set out above show. There are pathways to permanent residence and citizenship which do not require that a particular standard of English be met before a person can reside in New Zealand.

60. For example, under the Citizenship Act 1977 a person can be a New Zealand citizen by birth, descent, or a grant made under special circumstances without necessarily meeting an English language requirement.²⁵ Similarly, the Investor Plus visa category provides a pathway to permanent residence without having to meet English language requirements.

Entitlement to Vote in New Zealand

61. Section 60 of the Electoral Act 1993 sets out who is qualified to vote in an election:

60 *Who may vote*

Subject to the provisions of this Act, the following persons, and no others, shall be qualified to vote at any election in any district, namely,—

- (a) *any person whose name lawfully appears on the main roll or any supplementary roll for the district and who is qualified to be registered as an elector of the district:*
- (b) *any person—*
 - (i) *who is qualified to be registered as an elector of the district; and*
 - (ii) *who is registered as an elector of the district as a result of having applied for registration as an elector of the district before polling day:*
- (c) *any person who is qualified to be registered as an elector of the district, and was at the time of the last preceding election duly registered as an elector of the district or, where a change of boundaries has intervened, of some other district in which his or her then place of residence within the first-mentioned district was then situated:*
- (d) *any person—*
 - (i) *who is qualified to be registered as an elector of the district; and*
 - (ii) *who is registered as an elector of the district as a result of having applied, since the last preceding election and before polling day, for registration as an elector of the district or, where a change of boundaries has intervened, of some other district in which that person's then place of residence within the first-mentioned district was then situated:*
- (e) *any person who is qualified to be registered as an elector of the district pursuant to section 74 and who resides on Campbell Island or Raoul Island or has resided on either of those Islands at any time in the 1 month before polling day:*
- (f) *any member of the Defence Force who is outside New Zealand, if he or she is or will be of or over the age of 18 years on polling day, and his or her place of residence immediately before he or she last left New Zealand is within the district.*

62. In essence, the test as to whether a person may vote in a particular electoral district is whether they are registered as an elector in that district and are qualified to be so registered, with the exception of members of the Defence Force. There are administrative exceptions where, for example, a district boundary has shifted or where their registration has not yet been processed, and provision in s 61 for qualified voters to cast special votes outside of their electoral district. But the general rule is that a person is qualified to vote if they are a registered elector. There is no rule that they must speak or understand a particular language to be qualified to vote.

63. Accordingly, s 74 of the Electoral Act sets out who is qualified to be registered as an elector:

74 *Qualification of electors*

- (1) *Subject to the provisions of this Act, every adult person is qualified to be registered as an elector of an electoral district if—*
 - (a) *that person is—*
 - (i) *a New Zealand citizen; or*
 - (ii) *a permanent resident of New Zealand; and*
 - (b) *that person has at some time resided continuously in New Zealand for a period of not less than 1 year; and*
 - (c) *that electoral district—*

- (i) *is the last in which that person has continuously resided for a period equalling or exceeding 1 month; or*
 - (ii) *where that person has never resided continuously in any one electoral district for a period equalling or exceeding 1 month, is the electoral district in which that person resides or has last resided.*
- (2) *Where a writ has been issued for an election, every person—*
 - (a) *who resides in an electoral district on the Monday before polling day; and*
 - (b) *who would, if he or she continued to reside in that electoral district until the close of polling day, have continuously resided in that electoral district for a period equalling or exceeding 1 month,—*

shall (whether or not he or she does so continue to reside in that electoral district) be deemed, for the purposes of subsection (1)(c), to have completed on that Monday a period of 1 month's continuous residence in that electoral district.
- 64. In other words, New Zealand citizens and permanent residents are entitled to be registered as electors if they have resided in New Zealand continuously for at least one year at some point in their lives. Precisely which district they will be registered to vote in depends on where they live.
- 65. Registration as an elector is technically compulsory under s 82 of the Electoral Act and failure to do so can attract a modest fine of \$100 for a first offence and \$200 for second and subsequent offences. It does not appear that any charges have ever been laid under this section.
- 66. Section 80 of the Electoral Act sets out those who are disqualified from registration as electors (and consequently unable to vote):
- 80 *Disqualifications for registration*
- (1) *The following persons are disqualified for registration as electors:*
 - (a) *a New Zealand citizen who (subject to subsection (3)) is outside New Zealand and has not been in New Zealand within the last 3 years:*
 - (b) *a permanent resident of New Zealand (not being a New Zealand citizen) who (subject to subsection (3)) is outside New Zealand and has not been in New Zealand within the last 12 months:*
 - (c) *a person who is detained in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or in a secure facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and to whom one of the following applies:*

...
 - (d) *a person who is detained in a prison pursuant to a sentence of imprisonment imposed after the commencement of the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010:*
 - (e) *a person whose name is on the Corrupt Practices List made out for any district.*

...
- 67. Importantly, a person is not disqualified from registration as an elector, and consequently from being able to vote, merely because they do not speak or understand English.
- 68. Section 83 of the Electoral Act sets out how a person goes about becoming registered:
- 83 *Application for registration*
- (1) *An application for registration as an elector may be made to a Registrar of Electors—*
 - (a) *in writing, by completing and signing the prescribed form and returning it to the Registrar of Electors; or*

- (b) *in an approved electronic medium, by providing the information necessary to complete the prescribed form.*
- (2) *An application for registration as an elector must state, in respect of the person making the application,—*
 - (a) *the person's full name; and*
 - (b) *the person's date of birth; and*
 - (c) *the place of residence in respect of which registration is claimed, specified in a manner that enables it to be clearly identified; and*
 - (d) *the person's postal address, if different from the address given under paragraph (c); and*
 - (e) *the person's occupation, if any; and*
 - (f) *the honorific (if any) by which the person wishes to be addressed; and*
 - (g) *whether or not the person is a Maori; and*
 - (h) *any other particulars that are prescribed in regulations.*
- (3) *A Registrar of Electors may reject an application for registration as an elector if—*
 - (a) *the application is made under subsection (1)(a) and the prescribed form is not—*
 - (i) *signed; or*
 - (ii) *completed with the details specified in subsection (2)(a), (b), (c), and (h); or*
 - (b) *the application is made under subsection (1)(b) and the information provided does not include the details specified in subsection (2)(a), (b), (c), and (h).*
- (4) *If a person does not specify in his or her application whether he or she is a Maori, this Act applies as if the person had specified in his or her application that he or she is not a Maori.*
- (5) *An application for registration as an elector that is rejected by the Registrar of Electors is treated as not having been made.*
- (6) *Where it appears to a Registrar of Electors that a person who has applied for registration as an elector in an electoral district is qualified to be registered as an elector in another electoral district, the Registrar must immediately send that person's application to the Registrar of Electors of that other district.*

69. Once again there is no requirement that an application for registration must be completed in a particular language, other than the prospect that the “prescribed form” referred to may not be intelligible to somebody with little or no English. But there is no particular requirement that the prescribed form itself be exclusively in English, other than the general presumption that English, Māori and New Zealand Sign Language are New Zealand’s “official” languages. This raises the question of whether registration forms should be provided in languages apart from English, especially as New Zealand’s superdiversity grows.

70. There is also no requirement that an elector fill out an application for registration without assistance provided that the elector signs the form themselves, and in practice given that as many as 90,000 electors do not speak English, many electors are likely to receive help filling out their registration forms.

71. Finally, s 89 of the Electoral Act provides that where a Registrar of Electors is satisfied that an applicant for registration is entitled to be registered, they must enter that applicant’s name on the roll for that district.

History of Entitlement to Vote

72. The franchise in New Zealand has never been qualified by reference to language. The New Zealand Constitution Act 1852 limited the franchise to male British subjects over the age of 21 who met property thresholds. While these provisions were in principle colour-blind, in practice they restricted the franchise to European males, as Chinese and other Asians generally were not able to become British subjects, and the communal nature of Māori

land ownership did not meet the property thresholds (although Māori who held land under individual title could register and vote). Māori parliamentary representation was first established by the Māori Representation Act 1867.

73. While the technical details of registration and voting evolved as New Zealand moved towards the abolition of the property requirement in 1879 and women's suffrage in 1893, New Zealand never formally required voters to demonstrate that they were literate in the English language before they could vote.

74. In 1975, New Zealand extended the franchise to permanent residents, although they are still not eligible for election as members of Parliament and their right to vote is not affirmed by s 12 of the NZBORA, which only applies to citizens.

The Role of the Electoral Commission

75. The Electoral Commission, established by s 4B of the Electoral Act, is an independent Crown entity and is specifically required to act independently.²⁶ The Commission's objective is to administer the electoral system impartially, efficiently, effectively, and in a way that facilitates participation in parliamentary democracy, promotes understanding of the electoral system and associated matters, and maintains confidence in the administration of the electoral system.

76. The Commission's functions include (among others) carrying the provisions of the Electoral Act into effect, and promoting public awareness of electoral matters by means of the conduct of education and information programmes or by other means. To this end the Commission's powers include initiating, sponsoring, and carrying out any studies or research, making any inquiries, consulting with any persons or classes of persons, and publicising its work, as well as its general powers as a Crown entity.

77. The 2014 General Election was the first where all elements of electoral participation – enrolment, voter education and voting – were within the statutory responsibility of the Commission. The Commission's Report on the 2014 General Election stressed that promoting voter participation be made a whole-of-Government priority with multi-party support and for a long-term national strategy to nurture and celebrate our democratic culture and encourage participation to be developed to reverse the "particularly steep and persistent" decline.²⁷

78. In terms of communications and outreach, the Commission noted²⁸

There are some segments of New Zealand society who are harder to reach and engage in electoral processes. Research shows that enrolling and voting has less relevance in the lives of these groups, motivation to enrol and vote is low, and other things in their lives take priority. Specific approaches, work programmes and activities needed to be created to reach these groups.

79. Before the 2014 election, the Commission piloted a new community engagement programme, focussing on "geographical areas/communities with high concentration of those who are 'hardest to reach' with electoral information – Māori, Pasifika and ethnic communities". The results were:

- a. 385 influencer relationships established;
- b. 378 influencer agreements established to promote the 2014 election;
- c. Influencers reached 377,000 members of the target population;
- d. 63 media engagements to promote the 2014 election; and
- e. Media engagements reached 506,000 members of the target population.

80. As part of the community engagement pilot programme, the Commission reported that contracts were established with the Chinese New Settlers Services Trust, NZ Federation of Multi-Cultural Councils Inc, Auckland Regional Migrant Services Trust, and Christchurch Migrant Centre to deliver enrolment, voting and motivational messages direct to their communities.

81. Enrolment and voting brochures were redesigned and available in 21 languages (as well as New Zealand's three official languages) through Commission staff, community organisations and other outreach contacts. The languages were chosen with the advice of Statistics New Zealand. The information for voters are developed and produced centrally without any discretion being exercised by registering officers who are temporary staff.²⁹

82. The Commission said it will be looking for ways to improve outreach and information for Asian, Pacific and young voters.³⁰ However, the Commission needs to be properly funded to communicate with all New Zealanders, especially as superdiversity makes this more complicated and expensive. Yet the Commission said in its Report on the 2014 General Election that its overall budget for the public information campaign was broadly the same as for the last three elections, meaning a significant decrease in real terms.³¹ There has been a significant increase in the last 10 years of the number of New Zealand voters not born here and speaking a different language.

Voting on Polling Day and Election Staff

83. This section considers how the Electoral Act currently deals with a voter who is lawfully entitled to vote, but who speaks little or no English, Māori or New Zealand Sign Language, when they come to vote on polling day. There appears to be scope to improve the availability of interpreters, the issue of ballot papers, and assistance to voters to actually vote. The Electoral Commission advises that in 2014, around 2690 voting place staff out of a total of 14,854 staff employed on polling day cited the ability to speak a second language in their job application – approximately 18 per cent. The Commission appoints electoral officers which best reflect the community they are working in. This includes hiring issuing officers who can speak the languages of the voters they are likely to be serving in a particular electorate or community.³² Many of the accommodations discussed below depend on the discretion of Returning Officers, polling place managers, issuing officers and other electoral officials. Because general elections only happen once every three years, most of the staff involved in the administration of an election work on relatively short-term contracts.

84. All of the staff employed or engaged by the Electoral Commission are “electoral officials”. Section 20A of the Electoral Act provides that the Electoral Commission may give oral or written directions to all or any electoral officials, who must “exercise or perform his or her powers, duties, and functions in accordance with any directions given by the Electoral Commission”. This means that the Commission can give guidance and directions to electoral officials about how they exercise their functions and powers in terms of the accommodations made for those with little or no English. Section 158A gives the Commission and Returning Officers similar power in respect of polling place officials.

85. The Commission already produces an extensive and detailed confidential operational manual to Returning Officers which constitutes directions from the Commission as to how Returning Officers are to deliver elections. This should therefore include directions to electoral and polling place officials about how they should exercise their powers, duties and functions in relation to voters with little or no English so that there is a fair and consistent approach across all of New Zealand.

86. Section 20B of the Electoral Act requires the Commission to designate an electoral official as the Returning Officer for each district. Section 20C provides that the Returning Officer may delegate any of their functions, duties, or powers, except for the power of delegation, to another electoral official.

87. Section 158 further provides that for each polling place, a Returning Officer must appoint in writing as many polling place officials as the Returning Officer thinks are required for the conduct of the poll, and the preliminary count of votes, at that place. Polling place officials may be authorised as issuing officers, designated as interpreters, or to act as the manager of that polling place.

88. There are no statutory criteria as to the personal characteristics of appointees (although they cannot be candidates for election). On appointment, Returning Officers, electoral officials and polling place officials must make a declaration that they will “well and

truly serve" in the relevant office, and will not do anything forbidden by s 203 of the Act, including disclosing information obtained in their official capacity, interfering with a voter, or disclosing voter information (such as who a voter voted for or what their ballot paper number is).

89. The Electoral Commission's *Report on the 2014 General Election* stated that Returning Officers received three days of induction training in April 2014 followed by four further days of training in June/July 2014. The training was developed and delivered with assistance from more than 20 experienced field staff. Film footage obtained during the 2011 election and through simulations was a key element in delivering training to staff performing many different roles. Follow-up regional training took place during August and September 2014. The Commission intends to expand regional training with an emphasis on targeting services to the local community (for example through recruitment and voting place selection).

90. Over 16,000 staff were trained in the two and a half weeks before Election Day. Because many Election Day staff work during the week, training is generally delivered in the evenings or weekends. In 2014, polling place staff were required to watch a DVD, read an instruction manual and complete a study guide prior to attending a face-to-face training session. Ordinary Issuing Officers received 2 hours, Special Issuing Officers 3.25 hours and Voting Place Managers almost 5 hours of training.

91. The primary aims were for staff to:

- a. Understand the responsibilities, expectations and importance of their role;
- b. Understand how their role fits into wider voting services being delivered;
- c. Practise the key tasks they would undertake in accordance with legislative and operational requirements; and
- d. Have an awareness of safety, privacy and security issues – for both people and voting materials.

Recommendations

92. The Commission should emphasise when training staff that New Zealand is a superdiverse society with eligible voters from about 220 ethnicities speaking about 160 different languages, but that all have the same right to vote. New Zealand's demographic transition can provide the context for further training on the challenges faced by voters with little or no English, the accommodations the legislation makes to assist them to vote, and how polling place officials and issuing officers can avoid unconscious bias and make sure that voters with little or no English are able to use the accommodations afforded to them.

93. I support the recommendation of the Electoral Commission in its *Report on the 2014 General Election* that election staff pay rates should be reviewed since there has been no increase since 2008 despite more self-study and training time being required of each staff member. Election staff have important responsibilities, including helping all New Zealanders vote. Proper pay is needed to attract candidates of the right calibre.³³

94. I also support the Commission looking to expand Kids Voting and to continue to provide and develop curriculum linked resources.³⁴ Kids Voting is a programme for young New Zealanders that encourages them to experience and understand an authentic electoral event. Given that Māori, Pacific and Asian voters are younger than European New Zealand voters, this should help engage and inform them of the importance of voting and help to establish a habit of doing so.

Interpreters

95. The Electoral Act makes detailed provision for the discretionary appointment of interpreters at polling places to assist voters who do not speak English. While in principle, the appointment of interpreters would seem to be a straightforward way to help people who

cannot speak English to vote, there are a number of difficulties, both in a practical sense and with the provisions of the Act, which make it doubtful that the provisions work as intended. Indeed, these provisions are not widely publicised or well understood.

96. In 2014, the Electoral Commission employed five interpreters for the 2014 general election and they were utilised in the Nelson, New Lynn, Mt Roskill and Maungakiekie electorates. The Commission does not hold records of how often these interpreters were used.³⁵
97. The main practical difficulty with appointing interpreters at polling places is the near-impossibility of ensuring that every polling place is staffed by sufficient interpreters, speaking sufficient languages, such that every person with little or no English who is entitled to vote and who wishes to do so can receive language support.
98. Without comprehensive coverage, the ability of voters without English to obtain support from an interpreter depends on whether:
- a. The district's Returning Officer considers that an interpreter should be appointed to a particular polling place at all; and
 - b. The Returning Officer considers that an interpreter who speaks the relevant language other than English should be available at a particular polling place; and
 - c. There is in fact a suitable interpreter available for appointment; and
 - d. Voters who speak the languages which the interpreter speaks know which polling place or places the interpreter is at.
99. While the Electoral Act permits the appointment of interpreters to assist voters who do not speak English on polling day, it does not require that qualified interpreters be appointed for each polling place, or indeed that interpreters are appointed at all.
100. Section 158(3)(b) of the Electoral Act provides that the Returning Officer for each district may, in relation to a polling place, designate in writing one or more of the polling place officials as interpreters. Section 159A(1) of the Act provides that whenever the Returning Officer designates polling place officials as interpreters, the Returning Officer must, at the request of a candidate, give the candidate the names of the interpreters, and that regulations may be made under s 267 of the Act to prescribe procedures governing the use of interpreters. Finally, s 165(1) of the Electoral Act contains an exception to the general rule that voters are not to be communicated with in a polling place, allowing an interpreter to assist the person issuing a voter with a ballot paper if necessary.
101. The Electoral Regulations 1996 also impose prior requirements before a person can use an interpreter, as follows. Regulation 66 of the Electoral Regulations 1996 prescribes procedures for the use of an interpreter. Regulation 66(2) provides that, when it appears to a Returning Officer that an elector is unfamiliar with English, the Returning Officer must first draw the elector's attention to a prominently displayed poster containing information on how to vote, both in English and in other languages before an interpreter can be called on (assuming one is available).
102. Regulation 66(3) provides that the Returning Officer may only call on an interpreter to assist if the required poster is not in fact available or if the elector has seen the poster but still requires assistance.
103. Finally, reg 66(4) reflects s 159A by providing that the Returning Officer must provide the names of any interpreters appointed by the Returning Officer and the polling places in respect of which they have been appointed to a candidate on request. This may be helpful for candidates in terms of voter mobilisation, but it is not necessarily useful for voters.

Recommendations

104. The regulations governing the availability of interpreters should be made less complex so that there are fewer preconditions imposed before a voter can access an interpreter. The requirement that voters can only make use of an interpreter if they can show that they do not understand a poster should be deleted. Voters should be

able to make use of an interpreter if a suitably trained interpreter is available.

105. The Commission should also seek to employ more interpreters for Auckland ethnoburb booths, for example, which are likely to have more foreign language speakers. However, it needs to be acknowledged that the Commission's preference, in line with its policy, is to ensure that issuing officers are employed who reflect the community and have the relevant language skills.³⁶

Issuing Ballot Papers

106. One of the ways in which we ensure that an election is fair is to prohibit voters from voting twice or from impersonating other people. It is reasonable that issuing officers should be able to make some inquiries of voters before issuing ballot papers to them, but this practice should not be able to be used as a de facto literacy test, either intentionally or by mistake. Issuing officers need training to ensure that they do not exercise unconscious bias or discriminate when asking the questions.

107. Before an elector can be issued with ballot papers they must confirm who they are. The Electoral Act makes provision for an elector to confirm their identity with the assistance of another person or by gesture where they do not speak English. However, the issuing officer may ask further questions, either on their own initiative or at the request of a scrutineer. The Electoral Act is silent on whether a person who does not speak English can receive assistance to answer these questions, which raises the prospect of a qualified voter being denied the right to vote.

108. Section 167(1) of the Electoral Act requires an issuing officer to issue ballot papers to every elector who applies to vote. Under s 167(2) of the Electoral Act, an elector applying to vote must verbally give or confirm their name, and any other particulars necessary to find the elector's name on the roll. Section 167(2A) of the Electoral Act provides that if an elector cannot verbally give or confirm their name because of an inability to understand English or because of a physical disability, the elector may comply with that requirement by gesture or any other means with the assistance of a person nominated by the elector.

109. However, s 166 of the Electoral Act enables the issuing officer to make further queries of an elector before permitting that person to vote. The officer must make those queries if required to do so by a scrutineer. The questions are:

Are you the person whose name appears as AB in the electoral roll now in force for the [name of district] Electoral District?

Have you already voted at this election in this or any other electoral district?

110. Section 166(2) requires issuing officers to obtain signed answers in writing. A person who fails to answer the questions or fails to give the "correct" answers (that is, yes followed by no) is liable to a fine of \$1,000 and is prohibited from voting then or afterwards at that election. Deliberately false answers also attract a penalty of \$1,000.

111. There is no provision for the use of interpreters or other assistance to answer these questions, which raises the prospect of an otherwise qualified voter being denied the right to vote simply because they did not understand the questions being put to them, or were not able to answer the questions in written English.

Recommendation

112. A person should be permitted to obtain assistance (from an interpreter or otherwise) to answer all questions about their identity or whether they have already voted, or be permitted to answer questions to demonstrate their eligibility to vote through other means such as producing a passport or drivers' licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in a language other than English, rather than in written English.

Content of Ballot Papers

113. Section 150(1) of the Electoral Act prescribes the form of ballot papers used in general elections as follows:

114. Section 150 further prescribes requirements about how the names of candidates and parties should be ordered and presented, including permitting the Electoral Commission to abbreviate a candidate's name if it is too long: s 150(19). No provision is made for making the ballot paper available in languages other than English, although Māori is an official language. Similar provisions apply to the format of a special ballot paper issued to a special voter under the Electoral Regulations 1996.

Recommendation

115. Ballot papers should be available in English and Māori, which are New Zealand's written official languages. As linguistic diversity grows, it may be appropriate to consider making ballot papers available in other languages used by a significant percentage of the population.

Casting the Vote

116. The general rule in New Zealand is that voting is to be conducted by secret ballot; that is, the only person who should know how a person has voted is the voter. This is achieved by requiring voters to vote alone. However, this requirement can potentially act as an obstacle to a person voting if they do not understand English well enough to be able to vote without assistance. Accordingly, the Electoral Act permits such electors to vote with assistance, which creates the risk of voter fraud.

117. Voting Place Managers and Returning Officers do not hold records of how many voters with little or no English asked for assistance from an electoral official or were provided assistance by a friend or family member because of language needs. There is no separate application process that needs to be completed in order to be assisted to vote. It happens seamlessly – but this also means no records are available.

118. Section 168 of the Electoral Act incorporates the general rule that an elector should vote “alone and secretly”, reflecting the right affirmed in s 12 of the NZBORA to participate in elections by means of secret ballot.
119. Section 170 provides an exception to this rule for an elector who is blind, disabled, illiterate or insufficiently familiar with the English language to vote without assistance. Section 170(2) provides that such an elector may request that a nominated third person, or the issuing officer, accompany the elector into the voting booth and either assist the voter to vote or mark the ballot paper on the voter’s instructions. Section 170(3) enables the voter to request that another person inspect the paper before it is put in the ballot box, to ensure that their instructions have been complied with.
120. In other words, contrary to the general rule that elections should be conducted by secret ballot, a person who speaks little or no English may bring somebody else into the voting booth with them, who may well end up voting on their behalf. While the Act implicitly requires that the person assisting act on the voter’s instructions, there is no specific penalty for a person who does not do so. Section 170(5) makes it an offence to say how the person you are assisting to vote cast their ballot.
121. Section 218 of the Electoral Act, which creates an offence of undue influence, likely will be engaged where an elector exercising their rights under s 170 has been mistreated. Section 218 renders it a corrupt practice where a person, among other conduct:
- ... by abduction, duress, or any fraudulent device or contrivance, impedes or prevents the free exercise of the franchise of an elector, or thereby compels, induces, or prevails upon an elector either to vote or to refrain from voting.*
122. This provision has not been tested in the context of s 170, but it is possible that in some circumstances (such as where a voter has been misled as to the effect of their vote or as to whom their vote has been cast for) an offence would be committed. Such misconduct could also be investigated in the context of an electoral petition heard before the High Court if it has impacted the outcome of an election.

History of this Provision

123. The Act’s predecessor – the Electoral Act 1956 – was the first Act in New Zealand’s electoral law to make provision for non-English speaking voters:
- 108 *Blind, disabled or illiterate voters—*
- (1) *Any elector who is wholly or partially blind, or is unable to read or write (whether because of physical handicap or otherwise), or is not sufficiently familiar with the English language to vote without assistance, may vote in accordance with the provisions of this section.*
 - (2) *At the request of any voter who has received a ballot paper the Deputy Returning Officer shall accompany him into one of the inner compartments provided for the marking of ballot papers, and the ballot paper may there be marked by the voter with the assistance of the Deputy Returning Officer or may be marked by the Deputy Returning Officer in accordance with the instructions of the voter.*
 - (3) *The person assisting the voter shall sign his name on the back of the ballot paper and shall add the words “Witness for blind or partially blind person” or “Witness for person not familiar with the English language”, as the case may be, and shall fold the ballot paper so that its face cannot be seen before depositing it in the ballot box.*
 - (4) *A poll clerk or some other person nominated by the voter shall also accompany him into the inner compartment and may, if so desired by the voter, inspect the ballot paper before it is deposited in the ballot box...*
124. The current Act allows non-English speaking voters to have a person of their choosing mark (or assist with marking) their ballot paper, while the 1956 Act required the Deputy Returning Officer to mark (or assist with marking) their ballot paper.

125. During the 1956 Act's second reading, a number of members of Parliament observed that the 1956 Act was intended to ensure that everybody could vote. However, the effect of s 108 in terms of electors who simply did not speak English was not specifically addressed during the debates on the Electoral Bill (as it then was).

126. Then Attorney-General Hon Jack Marshall observed that:³⁷

The principles which we have tried to apply in the drafting of this Bill are worthy of mention. The first is that no qualified person should be deprived of the opportunity to register or to vote. In other words everyone who is entitled to vote should be able to vote...

127. Rt Hon Walter Nash, speaking for the Opposition, agreed:³⁸

The objective on both sides was the same. We wanted to find a way by which everyone qualified to vote would have the right to vote.

128. Sir Eruera Tirikatene described the purpose of s 108 of the 1956 Act in particular:³⁹

The Bill may not be absolutely perfect but I do believe an endeavour has been made to make things easier for electors. There is provision for those who are not capable of voting. It is left for the returning officer or poll clerk, or other agreed persons, to assist blind, disabled, or illiterate voters. That is in clause 108. A lot of elderly people will have to depend on that provision. It is a new provision that such people can take a friend with them to see that the voting is done properly. That is a step in the right direction.

129. Previous New Zealand electoral legislation was silent on the question of non-English speaking voters.⁴⁰ In essence, such legislation presumed that anybody who was qualified to vote would also be able to speak English, such was the very different demographic context in 1950s New Zealand.

Recommendation

130. Persons assisting those with little or no English should have to sign a declaration that they will follow the voter's instructions, and maintain the secrecy of the vote. Breaching this declaration should be an offence. This is a further preventative measure given that the Electoral Act already enables the voter to request that another person inspect the ballot paper before it is put in the ballot box to ensure their instructions are complied with, and it is an offence to say how someone voted if you were the person assisting.

131. There should also, for the avoidance of doubt, be a specific offence created in s 170 of the Electoral Act for voting contrary to the instructions of the voter you are assisting, just as there is for divulging how they voted, in subsection (5). I note that s 58(2) of the New Zealand Flag Referendums Act 2015 creates just such an offence, stating:

Every person commits an offence and is liable on conviction to a fine not exceeding \$5,000—

(a) *who—*

(i) *is authorised by a voter to mark the voting paper under section 27(4)(b); or*

(ii) *is the Returning Officer or a person acting under a delegation*

under section 17(1) and marks a voting paper under section 27(5);

and

(b) *who does not mark the voting paper in accordance with the voter's instructions.*

Special Votes

132. The Electoral Act also makes provision for special votes, reflecting the reality that not everybody will be able to attend a polling place on polling day to vote.⁴¹ Special voting can pose particular challenges to those with limited English because the administrative requirements in ensuring that special voting is not a vehicle for electoral fraud can make it more difficult for such voters to vote.

133. Special voting ballot papers are prescribed by reg 17 of the Electoral Regulations 1996 and are broadly similar to standard ballot papers. There is no provision for such papers to be made available other than in English.
134. Regulation 20 of the Electoral Regulations provides that the application for a special vote may be made in person by the elector, by a written application signed by the elector, by a written application signed on behalf of the elector pursuant to an authority signed by the elector, or in any other manner, if the person issuing the ballot paper is satisfied that the application is made in good faith and that it is not practicable to make it in one of the prescribed ways. This provision should assist a person with little or no English to be able to apply for a special vote.

Advance and Hospital Voting

135. Since 2011, it has been possible to cast special votes in person and in advance of polling day without having to give a reason. Such votes are governed by reg 24 of the Electoral Regulations 1996 and are treated similarly to votes cast in person on polling day – for example, reg 24(6) provides that s 170 of the Electoral Act applies where an advance voter “is not sufficiently familiar with the English language to vote without assistance”.
136. The same observations made above about the risks associated with this accommodation also apply. The application of s 170 overrides the general rule regarding advance votes set out in reg 24(6) that every person present when a special vote under this regulation is exercised by a voter:
- a. Shall refrain from looking at or becoming acquainted with the vote given by the voter; and
 - b. Shall not in any way attempt to influence or interfere with the voter in the exercise of his or her vote; and
 - c. Shall not allow any person:
 - i. To see or become acquainted with the voter’s vote; or
 - ii. To assist the voter to vote; or
 - iii. To interfere in any way with the voter in relation to his or her vote.
137. Similar arrangements apply in respect of hospital votes, which are special votes exercised in accordance with reg 23 of the Electoral Regulations at a “hospital, maternity home, or institution for the reception or relief of persons requiring medical or surgical or other treatment or suffering from any illness, disease, or disability, or for convalescent, aged, infirm, incurable, destitute, or poor people”.

Special Voting with Declarations

138. However, most special votes must be accompanied by a declaration. The form of the required declaration varies depending on whether the special voter was present at the issuing office or polling place when the vote was cast. The declaration must include a reason why a special vote is necessary. Both declarations are prescribed by the Electoral Regulations as being in English only.
139. Voters with little or no English may struggle to understand the requirements of the declaration. Section 172(8) of the Electoral Act provides that:

Subject to the provisions of this section and section 61, and to the provisions of any regulations made for the purposes of this section, all the provisions of this Act shall, as far as applicable and with the necessary modifications, apply with respect to voting by special voters and to their votes (emphasis added).

140. This provision should allow a person making a special vote declaration to be assisted by an interpreter or other nominated person, if they do not understand what they must do to cast a special vote.

Casting a Special Vote

141. The casting of a special vote is governed by reg 27 of the Electoral Regulations. As with hospital and advance votes, s 170 of the Electoral Act applies where the special vote is cast at the polling place or issuing office, with the same potential issues around voter fraud.
142. However, where the special vote is cast away from a polling place or issuing office (that is, by post), then reg 27(10) simply provides that the person who witnesses the declaration (unless they are a witness authorised for that purpose by a candidate) may assist the voter to mark the ballot paper, or mark the ballot paper on the voter's instructions. Section 170(5) of the Electoral Act makes it an offence to divulge how the person you assisted voted under any regulations to the Act.

Summary of Recommendations on Electoral Act and Electoral Regulations

143. The Electoral Commission should emphasise in training electoral staff the challenges faced by voters with little or no English, the accommodations that the legislation makes to assist them to vote, and how polling place officials and issuing officers can avoid unconscious bias and make sure that voters with little or no English are able to use the accommodations afforded to them.
144. The regulations governing the availability of interpreters should be streamlined, and the Electoral Commission should also seek to employ more interpreters, or more issuing officers who have language skills relevant for the voting place they are hired to staff.
145. A person should be permitted to obtain assistance to answer questions (from an interpreter or otherwise), or be permitted to answer questions about eligibility through other means such as producing a passport or drivers' licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in a language other than English, as opposed to in written English.
146. Ballot papers should be available in all of New Zealand's official languages. As linguistic diversity grows, it may be appropriate to consider making ballot papers available in other languages.
147. Persons assisting those with little or no English should have to sign a declaration that they will follow the voter's instructions, and maintain the secrecy of the vote. Breaching this declaration should be an offence. This is a further preventative measure given that the Electoral Act already enables the voter to request that another person inspect the ballot paper before it is put in the ballot box to ensure their instructions are complied with, and it is an offence to say how someone voted if you were the person assisting.
148. There should also, for the avoidance of doubt, be a specific offence created in s 170 of the Electoral Act for voting contrary to the instructions of the voter you are assisting, just as there is for divulging how they voted, in subsection (5).

Local Government Elections

149. The right to vote in parliamentary elections affirmed by s 12 of the NZBORA does not appear to extend to local body elections or polls, although this proposition has not been tested in court.
150. As with parliamentary elections, there is no statutory requirement that for a person to be qualified to vote they must speak or understand English, Māori or New Zealand Sign Language. Qualification to vote in local elections flows from being qualified to vote in a parliamentary election and being resident in the relevant area.
151. Local elections can be conducted either by booth or postal voting, unlike Parliamentary elections which can only be conducted by booth voting. All local authorities have used postal voting since 1986 with the exception of Hutt City Council which used booth voting once in 1992.

152. A small number of local authorities will participate in a trial of online voting for the 2016 local elections. Although regulations enabling such a trial to be held have not yet been made, there is the potential for instructions, forms, voting documents and candidate profile statements to be made available in languages other than English, so that an online voter can receive information in a language of their choice.

Right to Vote in Local Elections

153. A person is entitled to vote if they are on the electoral roll as a residential or ratepayer elector for the relevant local authority, or have applied to be on the roll before the last day of the voting period.
154. A person who is registered as a parliamentary elector will automatically be registered as a residential elector. However, registration as a ratepayer elector is more complex and may be difficult for a person with limited or no English.
155. Sections 20, 23 and 24 of the Local Electoral Act 2001 set out the general rules as to who may vote in a local election or poll.

20 *Right to vote in election or poll*

- (1) *Every person whose name appears on the electoral roll in force in any district of a territorial authority or in the local government area of any other local authority as a residential elector or a ratepayer elector is, unless the person has ceased to possess a qualification as a residential elector or ratepayer elector, an elector and is entitled to exercise 1 vote—*
- (a) *at every election for which that roll indicates the elector is qualified to exercise a vote; and*
- (b) *at every poll for which that roll indicates the elector is qualified to exercise a vote.*
- (2) *Every person who has qualified as a residential elector before the close of voting, and who applied to enrol as an elector not later than the day before the close of voting but whose name does not appear on the electoral roll or whose voting entitlements are incorrectly recorded on that roll, is an elector and is entitled to exercise 1 vote—*
- (a) *at every election for which that elector is qualified to exercise a vote; and*
- (b) *at every poll for which that elector is qualified to exercise a vote.*
- (3) *Every person who has qualified as a ratepayer elector before the close of voting and who applied to enrol as a ratepayer elector not later than the day before the close of voting but whose name does not appear on the electoral roll or whose voting entitlements are incorrectly recorded on that roll, is an elector and is entitled to exercise 1 vote—*
- (a) *at every election for which that elector is qualified to exercise a vote; and*
- (b) *at every poll for which that elector is qualified to exercise a vote.*
- (4) *No person is entitled more than once at the same election or poll.*

156. Sections 23 and 24 set out who qualifies as a residential elector and ratepayer elector.

23 *Residential electors*

Every parliamentary elector is qualified as a residential elector of a local government area if the address in respect of which the person is registered as a parliamentary elector is within the local government area.

24 *Ratepayer electors*

- (1) *Every parliamentary elector is qualified as a ratepayer elector of a region, a district, a local board area, or a community if the address for which the person is registered as a parliamentary elector is outside the region, district, local board area, or community, and—*
- (a) *that person is identified in the appropriate valuation roll as the sole ratepayer in respect of a rating unit within the region, district, local board area, or community; or*

- (b) *that person is nominated to be enrolled as a ratepayer elector in respect of a rating unit within the region, district, local board area, or community, owned by 1 or more ratepayers, none of whom is qualified as a residential elector within the region, district, local board area, or community.*
- (2) *Subsection (1) does not authorise the nomination of different persons by the same ratepayer or ratepayers in respect of different properties within the same region, district, local board area, or community.*

157. In essence, every “parliamentary elector” is entitled to vote in local elections. This means that the qualifications to vote as a local elector effectively mirror those governing voting as a parliamentary elector. Persons who are disqualified from registration as parliamentary electors under s 80 of the Electoral Act 1993 are accordingly unable to be registered to vote in local body elections.

158. Sections 38 and 45 of the Local Electoral Act 2001 require the electoral officer for each territorial authority to compile a roll of electors for that district. Residential electors are determined by use of a computer-derived list provided by the Electoral Commission, since all parliamentary electors in a district are, by virtue of s 23 of the Local Electoral Act, qualified as residential electors in that district. This paper addresses elsewhere the challenges which can be faced by a non-English speaker in becoming a parliamentary elector.

159. However, because a ratepayer elector may not necessarily be resident in the district or districts in which they pay rates, there is a different and more complicated process for registration as a ratepayer elector. Section 39 of the Local Electoral Act requires that public notice of the procedures for enrolment as a ratepayer be given in various forms before an election is held. Regulation 15 of the Local Electoral Regulations prescribes what such a notice must state:

15 *Public notice of procedures for enrolment as ratepayer on electoral roll*

For the purpose of section 39(1)(a) of the Act, the public notice of the qualifications and procedures for enrolment or nomination as a ratepayer elector must state the following:

- (a) *that a person may be a ratepayer elector for a local government area if he or she is listed on the district valuation roll as a ratepayer of a rating unit in that area and the address in respect of which he or she is registered as a parliamentary elector is outside that area; and*
- (b) *that any organisation, body, society, or association (whether corporate or unincorporate), or any joint owners, that are ratepayers in respect of a rating unit may nominate as a ratepayer elector any member or officer of the organisation, body, society, or association, or one of the joint owners, as long as the person nominated is registered as a parliamentary elector for an address that is outside the local government area in which the rating unit is situated; and*
- (c) *that eligibility to enrol or be nominated depends on criteria in the Act and in the regulations; and*
- (d) *that only 1 enrolment or nomination may be made for any local government area, even if more than 1 rating unit is owned in that area; and*
- (e) *that no person may be enrolled or nominated more than once for any local government area; and*
- (f) *that existing ratepayer electors should have already received an enrolment confirmation form; and*
- (g) *that if a person believes that he or she may be eligible to enrol as a ratepayer elector, that person must obtain an enrolment form from the local authority.*

160. The Act and Regulations are silent as to the language the information about enrolment as a ratepayer elector must be made available, and it appears that in most cases the information is only made available in English. In addition, the prescribed enrolment form for ratepayer electors in sch 1 to the Regulations is in English only.

161. There appear to be similar problems for public notice of the election or poll under s 52 of the Local Electoral Act, and relevant regulations only being in English.
162. Whether this is adequate to properly enable those with little or no English to vote depends on whether adequate assistance is provided.

Recommendation

163. The Local Electoral Act 2001 should be amended so that the notice given about enrolment as a ratepayer elector, and about the election or poll can be made available in languages other than English.

Content of Voting Documents

164. The Local Electoral Act 2001 permits local authorities to conduct elections and polls either through booth voting (similar to parliamentary elections) or through postal voting. Different issues around English language limitations arise depending on which option is chosen.

Issuing Voting Documents – Booth Voting

165. If the local authority is conducting an election by means of booth voting, reg 75 of the Local Electoral Regulations provides that voters must state their name to the electoral officer and provide any necessary identifying details before they are issued with voting documents:

75 Issue of voting documents

- (1) *Subject to this regulation, every electoral official in charge of a polling booth must issue voting documents to all voters who apply to vote at that polling booth.*
- (2) *Every voter applying to vote must state his or her name to the electoral official, and must give any details that are necessary to identify the entry on the electoral roll for that voter.*
- (3) *If the name of the voter appears on the roll and it appears from the roll that he or she is qualified to vote,—*
- (a) *the electoral official must issue to the voter a voting document for any election or poll for which the voter is eligible to vote; and*
- (b) *the roll must be marked to record the issue of voting documents to that voter.*

166. This requirement could act as a barrier to voting for those who are not confident in the English language, as they may not understand or be able to fulfil the requirement to identify themselves to the satisfaction of the electoral official without assistance.
167. This issue does not arise in the context of elections conducted by postal voting, where voting documents are simply posted to residential addresses, with no requirement that voters positively identify themselves prior to casting a vote.

Recommendation

168. Regulation 34 of the Local Electoral Regulations which specifically deals with how a voting document or special voting document may be marked by voters with specified difficulties in voting, including “is not sufficiently familiar with any language or languages used on the document to vote without assistance,” appears too narrow to extend to assistance in providing any necessary identifying details before the voter is issued with voting documents. Thus, such a provision needs to be added by law reform.

Content of Voting Documents

169. There is a general requirement in the Act and Regulations for both postal and booth voting that the electoral officer (if he or she considers it necessary) provide information in other languages as part of the voting documents to ensure electors are able to vote in local elections. However, this remains at the discretion of the electoral officer. For booth voting the Regulations require the electoral officer to provide translations of the “Directions to voter” section if he or she considers it necessary.

170. Section 78 of the Local Electoral Act provides that “an elector may cast a vote using a voting document during the voting period in accordance with regulations made under this Act”.

171. Section 75 of the Act sets out what voting documents for local government elections must contain. These requirements are effectively mirrored in s 76 for polls conducted by local authorities, and in reg 36 of the Local Electoral Regulations 2001 which deals with the information that special voting documents must contain.

75 *What voting documents for election must contain*

(1) *Every voting document for an election must contain the following directions to the voter:*

- (a) *the voter should read the directions carefully before voting; and*
- (b) *if the First Past the Post electoral system is being used at the election, —*
 - (i) *how and where on the voting document a voter exercises his or her vote (for example, a tick against a box); and*
 - (ii) *the minimum and maximum number of candidates for which a voter may exercise his or her vote; and*
- (c) *if the Single Transferable Voting electoral system is being used at the election, —*
 - (i) *how and where on the voting document a voter indicates his or her preferences; and*
 - (ii) *the minimum and maximum number of candidates for which a voter may indicate his or her preferences; and*
- (d) *what the voter should do if he or she spoils the voting document; and*
- (e) *what the voter must do with the voting document after voting; and*
- (f) *any other relevant requirements that are particular to the voting method or the electoral system that is being used.*

(2) *In addition to the directions to the voter, every voting document for an election must contain the following:*

- (a) *information necessary to identify the elector on the electoral roll and the voting documents issued to that elector; and*
- (b) *the name of the local government area to which the election relates; and*
- (c) *the position or positions to be filled at the election; and*
- (d) *the name under which each candidate is seeking election, and the name of any organisation or group with which the candidate claims to be affiliated or, if applicable, the status of the candidate as an independent candidate; and*
- (e) *information that is necessary to distinguish any candidates that have the same or very similar names; and*
- (f) *an illustration of how and where the voter indicates his or her choice or preferences, as the case may be; and*
- (g) *a warning describing the offences that a person may commit under sections 122(1)(a), 123(1)(c), and 124(b).*

(3) *Voting documents for an election may contain any other information that the electoral officer considers appropriate to ensure that—*

- (a) *all electors who are qualified to vote have a reasonable and equal opportunity to vote (including, without limitation, information in a language other than English)*
- (b) *the secrecy of the vote is maintained.* [Emphasis added.]

172. Section 75(3)(a) specifically envisages that information in a language other than English can be included as part of a voting document to ensure that “all electors who are

qualified to vote have a reasonable and equal opportunity to vote”. This is helpful and should be replicated in other electoral referenda legislation.

173. Regulation 71 of the Local Electoral Regulations sets out what the electoral officer must provide for an election or poll using booth voting in an election using the First Past the Post electoral system. Regulation 116 sets out the same for an election using the Single Transferable Voting electoral system.

71 *Booths, ballot boxes, and voting documents, etc*

The electoral officer must provide the following things for holding an election or poll using booth voting:

- (a) 1 or more polling booths at each official place at which voting documents are to be issued and, in each booth, 1 or more inner compartments that provide adequate facilities for each elector to vote in secret; and*
- (b) in each polling booth, 1 or more suitable containers that are able to be secured and that have a slit in the upper side by which the voting documents may be put into the container, to be used as ballot boxes; and*
- (c) if the electoral officer considers it desirable in order to ensure that every elector has a reasonable and equal opportunity to vote, translations in whatever languages the electoral officer considers necessary of the “Directions to voter” section of the voting document; and*
- (d) at each polling booth, 1 or more copies of the electoral roll; and*
- (e) a sufficient number of voting documents.*

174. Regulation 71(c) provides that the electoral officer, if they “[consider] it desirable in order to ensure that every elector has a reasonable and equal opportunity to vote”, must include translations in whatever languages the electoral officer considers necessary of the “Directions to voter” section of the voting document. Once again, there is no requirement that the officer do so, and no guidance as to how she or he exercises this discretion.

Recommendation

175. Section 75(3)(a) of the Local Electoral Act should be replicated in other electoral and referenda legislation. It specifically envisages that information in a language other than English can be included as part of a voting document to ensure that “all electors who are qualified to vote have a reasonable and equal opportunity to vote”.

Candidate Profile Statements

176. Section 61 of the Local Electoral Act allows a candidate to provide a candidate profile statement to the electoral officer to be included with voting documents. These statements contain the candidate’s name and principal place of residence, and information about the candidate’s policies.

177. The Act envisages that these statements can be provided in languages other than English or Te Reo Māori, but the candidate must also provide a translation of that candidate profile statement into English.

178. Section 61(2) of the Act provides:

- (2) A candidate profile statement, —*
 - (a) if —*
 - (i) in English or Māori or both, must not exceed 150 words in each of the languages used in the statement:*
 - (ii) in a language other than English or Māori, must not exceed 150 words, or the equivalent, if the language uses symbols rather than words (including any translation of those words into another language provided by the candidate) [Emphasis added.]*

179. Candidate profile statements can be in English, Māori, or another language. If the candidate profile statement is in English and Māori, s 61(3) of the Act requires the information to be substantially consistent in each language.

180. If the candidate profile statement is in a language (wholly or in part) other than English or Māori, reg 27 of the Regulations requires the candidate to provide a translation of the material into English or Māori to the electoral officer.

Polling Day

181. As in general elections, voters with little or no English are able to nominate someone else to mark, or assist them with marking, their voting documents in local elections.⁴²

Regulation 34 of the Local Electoral Regulations provides:

34 *Specified difficulties in voting*

(1) *A voting document or special voting document may be marked in the manner described in subclause (2) if the voter—*

(a) *is physically impaired; or*

(b) *is unable to read or write; or*

(c) *is not sufficiently familiar with any language or languages used on the document to vote without assistance.*

(2) *The manner is—*

(a) *by the voter, with the assistance of a person authorised by the voter; or*

(b) *by a person authorised by the voter, in accordance with the voter's instructions*
[Emphasis added.]

182. Regulation 34(1)(c) envisages that the voting document could include languages other than English, but a voter may still be assisted by another person where they are not familiar with any of the languages on the ballot document.

183. Regulation 34(2) provides that the person may either receive assistance or have somebody else vote for them on their instructions. Regulation 74 provides that no person may speak to, or communicate in any way with, any voter in a polling booth, either before or after the voter has voted, but is subject to reg 34. Accordingly, in practical terms these provisions are similar to those in the Electoral Act which also allow for a person to be assisted to vote if they have little or no English, and similar issues around the potential for voter fraud arise. Section 127(b) of the Local Electoral Act provides that it is an offence for a person “by abduction, duress, or any fraudulent device or means” to impede or prevent the free exercise of the vote of any elector, or to compel, induce, or prevail upon any elector either to vote or to refrain from voting. Section 129 provides it is an offence “to interfere with or attempt to interfere with a voter when marking or recording his or her vote,” or to “attempt to obtain” information about how the voter has voted or communicate this information to another person.

184. Unlike in general elections, there is no provision for interpreters in the Local Electoral Act or Regulations.

Recommendation

185. The Local Electoral Act should be amended to make provision for the use of interpreters.

Special Voting

186. The Local Electoral Regulations also address the requirements for special voting.

Regulation 38 requires that every voter must make a special voting declaration before voting. Special votes accompanied by declarations that do not meet the requirements of reg 38 must be disallowed. Regulation 38(4) requires that a declaration must state:

a. The local government area of which the special voter is an elector or qualified to be an

elector; and

- b. Whether or not the special voter is enrolled as a parliamentary elector; and
- c. The full name, occupation, residential address, and postal address of the special voter; and
- d. That the special voter has not already voted at the election or poll; and
- e. Why the special voter is qualified to vote as a special voter under s 21 of the Act.

187. The Regulations do not prescribe a form for the declaration, although most local authorities provide a form which can be filled out. The issue is whether a person with limited or no English would understand the requirements of the declaration such that they could cast a valid vote.

188. Section 22(2) of the Local Electoral Act provides that

(2) Subject to this Act and to any regulations made under this Act, the provisions of this Act and any regulations made under this Act, as far as applicable and with the necessary modifications, apply with respect to voting by special voters and to their votes.

Recommendation

189. Regulation 34 of the Local Electoral Regulations which specifically deals with how a voting document or special voting document may be marked by voters with specified difficulties in voting, including “is not sufficiently familiar with any language or languages used on the document to vote without assistance,” appears too narrow to extend to assisting a special voter with little or no English to make a special voting declaration. Thus, such a provision needs to be added by law reform.

Summary of Recommendations on Local Electoral Act and Regulations

190. The Local Electoral Act 2001 should be amended so that the notice given about enrolment as a ratepayer elector, and about the election or poll can be made available in languages other than English. The Local Electoral Act should also be amended to make provision for the use of interpreters.

191. Regulation 34 of the Local Electoral Regulations, which specifically deals with how a voting document or special voting document may be marked by voters with specified difficulties in voting, including “is not sufficiently familiar with any language or languages used on the document to vote without assistance,” appears too narrow to extend to assistance in providing any necessary identifying details before the voter is issued with voting documents. It also appears too narrow to extend to assisting a special voter with little or no English to make a special voting declaration. Thus, such provisions needs to be added by law reform.

Voting in Referenda

192. In New Zealand referenda can be held by the government pursuant to empowering legislation, following a successful petition for a citizen-initiated referendum under the Citizens Initiated Referenda Act 1993, or under a government-initiated indicative referendum under the Referenda (Postal Voting) Act 2000.

193. The Citizens Initiated Referenda Act 1993 sets out the requirements for citizen-initiated referenda. The provisions in the Referenda (Postal Voting) Act 2000 also apply to citizen-initiated referenda held by post. The provisions in the Electoral Act 1993 apply to citizen-initiated referenda held at a general election or poll. Referenda held pursuant to empowering legislation are administered according to that legislation.

194. A range of different approaches are taken in the above Acts, and they are not consistent with each other, or with the Electoral or Local Electoral Acts. When referenda are authorised by Parliament, those referenda should have at least the same accommodations and

safeguards for those with little or no English as are provided for by the Electoral Act and Local Electoral Act. There is no clear justification for varying accommodations and standards across different forms of democratic engagement.

195. Voting in referenda is equally as important as voting in elections for central and local government, particularly given the arguable constitutional convention that significant constitutional change is authorised by referendum. In New Zealand matters are not likely to go to referenda unless they are important. Even a citizen-initiated referendum requires 10 per cent of eligible voters to want it before it is held.

Government-Initiated Indicative Referenda

196. The government may initiate an indicative postal referendum under the Referenda (Postal Voting) Act 2000. If so, s 6(1) of the Referenda (Postal Voting) Act provides that the wording of each proposal to be put to electors, and the responses for which they may vote, must be specified by the Governor-General by Order in Council.

197. No such Order has ever been made, but the Act is silent on whether the wording would or could be made available in languages other than English.

Citizen-Initiated Indicative Referenda

198. The Citizens Initiated Referenda Act 1993 enables citizens to trigger an indicative referendum if they are able to secure the signatures of 10 per cent of eligible electors within a 12-month time period. Section 24 of the Act provides that other than specified provisions, the provisions of the Electoral Act and its regulations apply to any referenda not held by postal voting, whether or not it takes place on polling day.

Form of Petition

199. The process for presenting an indicative referendum petition to Parliament is as follows. First, s 6 of the Act requires that a draft of the proposed indicative referendum petition be submitted to the Clerk of the House of Representatives. Assuming that the proposal satisfies the form requirements of s 6, s 7 then requires the Clerk to publish notice of the receipt of that proposal in the *Gazette*, and in such newspapers as he or she considers necessary. The notice must invite comments on the wording of the proposed referendum question.

200. Section 11 requires the Clerk to determine the precise wording of the referendum question. Section 10 provides that the wording of the question:

- a. Must convey clearly the purpose and effect of the indicative referendum; and
- b. Must ensure that only one of two answers may be given to the question; and
- c. Must take into account the original proposal, any comments on the wording received, and any other consultation carried out by the Clerk.

201. The Clerk must then approve a petition form, and give notice that he or she has done so. The approval of the petition form is important because s 16(1) of the Act requires that signatures that are not on the approved form must be discarded.

202. The Act is silent as to whether a petition form can be approved in a language other than English or Māori. However, Standing Order 363 of the House of Representatives requires that all petitions to Parliament be in English or Māori, so it is unlikely that a petition in a language other than English or Māori would be approved by the Clerk.

203. The Act is also silent as to whether the Clerk may approve a form which is partially in English or Māori but which includes translations into other languages. In practice, approved petition forms have been in English, which may present a limit on the ability of those with little or no English to understand and participate in this process.

Participating in the Petition Process

204. Once the form of a petition has been approved, the promoter of the petition has 12 months to collect signatures from 10 per cent of eligible voters, which can be extended by a further two months.

205. Section 15 of the Citizens Initiated Referenda Act sets out the requirements for each signature:
- 15 *Requirements in relation to indicative referendum petition*
- (1) *Every signatory to an indicative referendum petition—*
- (a) *shall, against his or her signature, state—*
- (i) *his or her full name; and*
- (ii) *his or her residential address; and*
- (b) *may, against his or her signature, state his or her date of birth.*
2. *Failure by a signatory to comply with any of the requirements of subsection (1) shall not of itself prevent the signature of that signatory from being used for the purposes of determining the number of signatures that must be checked in accordance with section 19.*
206. A number of concerns arise from this process. The first is that electors with little or no English are likely to be wary of signing a petition that they do not understand. Balanced against that, there are no protections in the Act to prevent people with English language limitations being tricked or coerced into signing a petition they do not understand.
207. Although it is an offence to bribe the promoter of a petition, or to attempt to compel a promoter to withdraw an indicative referendum petition, the same conduct in respect of a voter choosing whether or not to sign appears not to be illegal.⁴³ Nor is there any apparent requirement that a person signing a petition actually understand what they are doing.

Recommendation

208. The Citizens Initiated Referenda Act should be amended to prohibit promoters of petitions from deceiving voters into signing petitions that they do not understand if they have limited or no English. Using s 218 of the Electoral Act as a precedent, it should be a specific offence, by abduction, duress, or any fraudulent device or means, to compel, induce, or prevail upon any elector to sign or not sign a petition, similar to provisions prohibiting undue influence in other electoral legislation.

Voting Qualifications

209. As with parliamentary elections and local government elections, there is no statutory requirement that a person must speak or understand English, Māori or New Zealand Sign Language to vote in a referendum. The right to vote in referenda is tied to the right to vote in general elections.
210. In terms of referenda which are held by post, s 29 of the Referenda (Postal Voting) Act 2000 provides:
- Every elector is qualified to vote at the referendum.*
211. Similarly, s 60 of the Electoral Act (which sets out who may vote) applies to citizen-initiated referenda not held by post.

Voting Papers

212. The Returning Officer dispatches voting documents by post (or by fax or dictation in certain circumstances) in referenda governed by the Referenda (Postal Voting) Act 2000.
213. The form of the voting paper is prescribed by s 7(1) of the Referenda (Postal Voting) Act for government-initiated indicative postal referenda:
- 7 *Form of voting paper*
- (1) *The voting paper used in a government initiated referendum—*
- (a) *must have a heading that—*
- (i) *begins with the words “REFERENDUM ON”; and*

- (ii) *states the subject of the referendum; and*
- (b) *must have an explanatory note that—*
 - (i) *has the heading “Explanation”; and*
 - (ii) *explains—*
 - (A) *the purpose of the voting paper; and*
 - (B) *the effect of the referendum; and*
 - (iii) *specifies—*
 - (A) *the referendum material, if any, accompanying the voting paper that summarises the subject of the referendum; and*
 - (B) *the title and date of government publications, if any, intended to provide electors with a full description of the subject of the referendum; and*
- (c) *must also—*
 - (i) *set out the proposal and responses worded as specified in an Order in Council made under section 6(1); and*
 - (ii) *set out instructions on how to vote and how to return the voting paper; and*
 - (iii) *provide a space for electors to indicate the response for which they wish to vote; and*
 - (iv) *set out the following numbers:*
 - (A) *the elector’s roll identifier number, which must be unique to that elector;*
 - (B) *the elector’s electorate code;*
 - (C) *the voting paper’s number, which must be a number in a consecutive sequence that starts at 1; and*
 - (v) *be in the prescribed form.*

214. Section 7(2) of the Referenda (Postal Voting) Act provides that the voting paper used in a citizen-initiated referendum must be in the form prescribed in s 28 of the Citizens Initiated Referenda Act 1993:

28 Voting paper

The voting paper shall—

- (a) *contain the precise question to be put to voters in the indicative referendum; and*
- (b) *provide, opposite the precise question to be put to voters, a space for the answers:*
- (c) *provide a circle to the right of each answer:*
- (d) *have a counterfoil in form 13 of Schedule 2 of the Electoral Act 1993:*
- (e) *have printed on the top right-hand corner and in the space provided in the counterfoil a number (called a consecutive number) beginning with the number 1 in the case of the first voting paper printed and being consecutive on all succeeding voting papers printed, so that no 2 voting papers for the district bear the same number.*

215. The Act is silent as to what languages the voting papers must or may be produced in.

216. However, the form for voting papers issued under the Citizens Initiated Referenda Act appears to have been prescribed by the Citizens Initiated Referenda Regulations 1995 as follows:

[Consecutive number]

[Name of electoral district]

Directions

(Read carefully before voting)

- 1 *Vote by putting a tick in the circle immediately after the answer you choose.*
- 2 *After voting, fold the voting paper so that its contents cannot be seen and place it in the ballot box.*
- 3 *If you spoil this voting paper, return it to the officer who issued it and apply for another.*
- 4 *You must not take this voting paper out of the polling booth.*

217. Accordingly, it does not appear possible for an electoral officer to issue voting papers in a language other than English in the context of a referendum under the Citizens Initiated Referenda Act.

Recommendation

218. The Referenda Regulations should be amended to at least make it legally possible to provide a ballot paper in Te Reo Māori, and consideration should be given to whether ballot papers should be available in other languages as New Zealand's demographic makeup shifts.

Voting Information

219. Section 36(2)(b) of the Referenda (Postal Voting) Act permits, but does not require, the Returning Officer to include "information, in any language or languages, on how to vote and how to return the voting paper".

Recommendation

220. The Referenda (Postal Voting) Act should be amended to require the Returning Officer to exercise his or her discretion under s 36(2)(b) taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote, using s 75(3)(a) of the Local Electoral Act as a precedent.

Voting in a Referendum not held by Post

Interpreters

221. The provisions on interpreters set out in the Electoral Act 1993 and the Electoral Regulations 1996 apply in a referendum not held by post. The same potential limitations apply, with the additional complication that what must be translated is not simply how to vote for a particular person or party, but the referendum question as a whole.

Recommendation

222. As with parliamentary elections held under the Electoral Act, the provisions governing access to interpreters should be streamlined so that voters in referenda who consider that they require interpretation services to vote are able to access an

interpreter if they consider it necessary and that one is available.

Issuing Ballot Papers

223. If the referendum is not held by post, ss 166 and 167 of the Electoral Act require an elector, at the request of a scrutineer, to verbally confirm their name before they are issued with ballot papers.
224. As in general elections, this could present difficulties for voters with limited or no English.

Recommendation

225. A person should be permitted in a referendum, to obtain assistance to answer questions from scrutineers confirming their name (from an interpreter or otherwise), or be permitted to answer the question through other means such as producing a passport or drivers' licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in a language other than English.

Assistance with Voting

226. As in general and local elections, voters who have difficulty with English can nominate a person to mark, or assist them with marking, their voting paper in referenda.
227. Section 38 of the Referenda (Postal Voting) Act provides:
- 38 *Method of Voting*
- (1) *The elector votes by marking the voting paper with a tick within the space provided for the response for which the elector wishes to vote.*
- (2) *The voting paper may be marked in the manner described in subsection (3) if an elector—*
- (a) *is visually impaired; or*
- (b) *is unable to read or write for any reason; or*
- (c) *is not sufficiently familiar with any language or languages used on the voting paper to vote without assistance.*
- (3) *The manner is—*
- (a) *by the elector, with the assistance of a person authorised by the elector; or*
- (b) *by a person authorised by the elector, in accordance with the elector's instructions.*
228. Section 38 does not assume the language used on the voting paper will be English, instead referring to "language or languages".
229. If the referendum is not held by post, s 170 of the Electoral Act, discussed above, applies instead, as do the same potential issues in terms of electoral fraud.

Recommendation

230. As discussed above, although there are provisions in s 170 of the Electoral Act enabling the voter to request that another person inspect the ballot paper before it is put in the ballot box to ensure their instructions are complied with, and it is an offence to say how someone voted if you were the person assisting, there would still be value in requiring those assisting to make a declaration that they will follow the voter's instructions, and maintain the secrecy of the vote.

Referenda held pursuant to Empowering Act

231. Since the advent of MMP, there have been three referenda held pursuant to their own empowering legislation, and two further scheduled to be held pursuant to the New Zealand Flag Referendum Act 2015.

232. While legislation empowering a referendum is usually repealed shortly after the referendum has been held (and any binding consequences have been resolved), the evolving constitutional convention that major constitutional change should be authorised by a referendum means that the provisions of such legislation should also be scrutinised to determine if there are opportunities to make better provision for the participation of the ethnic minorities and migrants in future referenda.

233. The purpose of including these provisions in the paper is to show that there has been little change in the accommodations made for those with little or no English since 1993. Previous legislation empowering referenda has drawn very heavily on the Electoral Act 1993, which emphasises the importance of making sure that the Electoral Act is fit for purpose. New Zealand in 2015 is now demographically very different. New laws need to include appropriate provisions for the growing number of voters who may have difficulties with written and/or spoken English.

New Zealand Flag Referendums Act 2015

234. The New Zealand Flag Referendums Act 2015 requires that referenda be held about the New Zealand flag. The first referendum will require voters to choose from one of four alternatives to the current New Zealand flag, and the second referendum will require voters to choose between the winner of the first referendum and the current flag. The referenda will be held by post.

235. The provisions of the 2015 Act are very similar to those used for postal voting in other referenda. This means that the accommodations that have been made for those voters with little or no English are limited, and depend essentially on the discretion of the Returning Officer and a panel appointed to produce referendum material. It also means that the observations and recommendations that are made earlier in this paper as to improvements in respect of postal voting apply equally to the 2015 Act, specifically:

- a. The Schedules to the Act should be amended to make it legally possible to provide a ballot paper in Te Reo Māori and other languages;
- b. Section 25(2)(b) of the 2015 Act should be amended to require the Returning Officer to exercise his or her discretion taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote, using s 75(3)(a) of the Local Electoral Act as a precedent.

236. Section 27 of the 2015 Act already provides for those with little or no English to be assisted in marking their ballot paper or to have it marked by another person they authorise, and s 58 makes it an offence for any person assisting to divulge how the person they were assisting voted to others, or not to mark it as the voter wanted them to.

237. Section 25(2) of the 2015 Act provides that where the Returning Officer faxes or mails a referendum voting paper, the Officer must include with it “a copy of the referendum material, if any”⁴⁴ and “information, in any language or languages, on how to vote and how to return the voting paper”. The 2015 Act imposes no requirements and provides no guidance as to what languages the “referendum material” or voting information should be provided in.

238. However, from the beginning of its process, the Flag Consideration Panel has wanted its activities to be open and accessible to all New Zealanders. It sought advice from a number of sources on how this should best be done, and subsequently took all reasonable and practical steps to act on that advice, including, for example, mirroring the Electoral Commission’s practice of providing key information in 25 languages other than English. The Panel’s work has been complimented by work from other agencies, including the Electoral Commission.⁴⁵

239. During the consideration of the New Zealand Flag Referendum Bill by Parliament’s Justice and Electoral Committee, the Ministry of Justice’s Departmental Report set out some aspects of the information campaign that is to be held.

240. The enrolment campaign will involve the distribution of an English language brochure reminding electors to enrol and providing information on how to vote to homes. Community, advocacy, public sector, education and sector interest organisations will receive the brochure in English and Māori, and versions in multiple languages will be available online.
241. Enrolled voters will receive brochures detailing the voting process in English, Māori and “multiple languages”, with additional information explaining the flag options in languages other than English and Māori available online.
242. The Electoral Commission will provide information on voting and enrolment in multiple languages online. The information brochure to be included in the voting pack will be available online in 25 languages. Official descriptions of the flag designs are also available online in 25 languages.⁴⁶
243. The websites associated with the flag project have been designed so that they can be read by translation software, and the information brochures and community resources are made available in Te Reo Maori, Samoan and Mandarin, as well as English. Resources for schools are available online in English and Te Reo Maori.
244. Section 27 of the 2015 Act prescribes the method of voting and essentially reflects s 38 of the Referenda (Postal Voting) Act described above.
245. Finally, schs 1 and 2 to the 2015 Act prescribe voting papers for the flag referendum. As with other New Zealand electoral legislation, they prescribe papers in English:

Voting Paper for the 1st Referendum on the New Zealand Flag

QUESTION:
If the New Zealand flag changes, which flag would you prefer?
Rank flags using the instructions above.

INSERT QR CODE and NO.

WRITE NUMBER(S) HERE

Option A	Option B	Option C	Option D
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Voting Paper for the 2nd Referendum on the New Zealand Flag

INSERT QR CODE and NO.

QUESTION:
What is your choice for the New Zealand flag?

Option A	<input checked="" type="radio"/>
Option B	<input type="radio"/>

TICK ONLY ONE BOX

Electoral Referendum Act 1993

246. The Electoral Referendum Act 1993 (now repealed) empowered a binding referendum on proposals for electoral reform. Section 3 of the 1993 Act provided that the 1956 Act applied “subject to the provisions of this Act and of any regulations made under this Act”.

As noted above, the 1956 Act was the first to make allowance for assisted voting for those who did not speak English.

247. However, s 2(2) of the 1993 Act required that the proposals about the electoral system that were the subject of the binding referendum be submitted in the voting paper in form 1 of the Schedule. Schedule 1 set out a voting paper exclusively in English:

OFFICIAL MARK

OFFICIAL MARK

[Consecutive Number]

Electoral District

Directions
(Read carefully before voting)

1. You may vote for only one proposal.
2. If you wish to vote, vote by putting a tick in the circle immediately after the proposal you choose.
3. After voting, fold this voting paper so that its contents cannot be seen and place it in the ballot box.
4. If you spoil this voting paper, return it to the officer who issued it and apply for another.
5. You must not take this voting paper out of the polling booth.

VOTING SYSTEM PROPOSALS

If 50 percent or more of votes in this referendum are for the retention of the present First-Past-The-Post System, there will be no change to the method of electing members of the House of Representatives.

If a majority of votes in this referendum are for the proposed Mixed Member Proportional System as provided in the Electoral Act 1993, that Act will come into force and the next general election of members of the House of Representatives will be conducted using that system.

Vote Here

I vote for the present **FIRST-PAST-THE-POST SYSTEM** as provided in the Electoral Act 1956

I vote for the proposed **MIXED MEMBER PROPORTIONAL SYSTEM** as provided in the Electoral Act 1993

TICK ONE PROPOSAL

NOTE*

This form shall have a counterfoil in form 9 in the First Schedule to the Electoral Act 1956.

*Not to be printed as part of the form.

248. There was no special provision made for voters with limited English other than those provisions made in the Electoral Act 1956.

Electoral Referendum Act 2010

249. The Electoral Referendum Act 2010 (now repealed) made provision for an indicative referendum to be held in conjunction with the next general election on the preferred

system of voting for election to the House of Representatives in New Zealand. Because the referendum was held at the same time as the 2011 General Election, s 9 of the 2010 Act provided the Electoral Act applied to the conduct of the referendum, subject to the provisions of the 2010 Act.

250. The form of the ballot paper was prescribed as being exclusively in English by sch 1 to the Act:

[INSERT ELECTORATE NAME AND NUMBER] [Consecutive Number]

Referendum on New Zealand's Voting System

[INSERT ELECTORATE NAME AND NUMBER] [Official Mark]

Explanation

1. You may vote in **both Part A and Part B** or you may vote in **only Part A** or **only Part B**.
2. Vote by putting a tick in the circle next to the option you choose.

Part A

Should New Zealand keep the Mixed Member Proportional (MMP) voting system?

Vote for only one option

I vote to **keep** the MMP voting system

I vote to **change** to another voting system

Vote Here

Part B

If New Zealand were to change to another voting system, which voting system would you choose?

Vote for only one option

I would choose the **First Past the Post** system (FPP)

I would choose the **Preferential Voting** system (PV)

I would choose the **Single Transferable Vote** system (STV)

I would choose the **Supplementary Member** system (SM)

Vote Here

Final Directions

- If you spoil this voting paper, return it to the officer who issued it and apply for a new paper.
- After voting, fold this voting paper so that its contents cannot be seen and **place it in the referendum ballot box**.
- You must not take this voting paper out of the polling place.

251. There were no other specific provisions in the 2010 Act dealing with language issues, and so the various provisions discussed above in the Electoral Act 1993 applied.

Compulsory Retirement Savings Scheme Referendum Act 1997

252. The Compulsory Retirement Savings Scheme Referendum Act 1997 (now repealed) provided for the holding of a referendum of electors on a proposal for a compulsory retirement savings scheme. The referendum was held by post, and all eligible electors in terms of the Electoral Act were entitled to vote.

253. Section 5 of the 1997 Act prescribed the question to be put to electors as:

“Do you support the proposed compulsory retirement savings scheme?”

254. There was no indication that the question could be put to electors in any language other than English. Similarly, s 6, which prescribed the content of the voting paper, gave no indication that the paper could be presented in any language other than English:

6 Form of voting paper

- (1) The voting paper must have the following heading:

“Referendum on the Compulsory Retirement Savings Scheme”.

- (2) *The voting paper must have the following explanatory note:*

“Explanation

“Use this voting paper to have your say on the proposed compulsory retirement savings scheme. A summary of the scheme is with this voting paper. A full description is in the [title of Government publication describing the proposed compulsory retirement savings scheme] dated [date]. The Government will introduce legislation to set up the scheme if more people voting at the referendum vote ‘yes’ than vote ‘no’.”.

- (3) *The voting paper must—*

(a) *Set out the question; and*

(b) *Set out the following answers:*

“YES I support the proposed compulsory retirement savings scheme

“NO I do not support the proposed compulsory retirement savings scheme”; and

(c) *Set out instructions on how to vote and how to return the voting paper; and*

(d) *Provide a space for the voter to indicate the answer for which he or she wishes to vote; and*

(e) *Set out the following numbers:*

(i) *The elector’s roll identifier number and the elector’s electorate code; and*

(ii) *The voting paper’s number—*

in accordance with the following rules:

(ii). *An elector’s roll identifier number must be unique to that elector; and*

(iv) *A voting paper’s number must be unique to that voting paper; and*

(v) *Voting paper numbers must be in a consecutive sequence that starts at 1; and*

(f) *Be in the prescribed form.*

4. *When printed, the voting paper must set out, in place of the italicised words and square brackets in subsection (2), the title and date of the Government publication describing the proposed compulsory retirement savings scheme.*

255. The form of the paper was prescribed by reg 2(2) of the Compulsory Retirement Savings Scheme Referendum Regulations 1997 as follows:

REFERENDUM ON THE COMPULSORY RETIREMENT SAVINGS SCHEME

(Director's name and address)

Explanation

Use this voting paper to have your say on the proposed compulsory retirement savings scheme. A summary of the scheme is with this voting paper. A full description is in the Government publication entitled "You and your retirement savings: The proposed compulsory Retirement Savings Scheme" dated 7 July 1997.

The Government will introduce legislation to set up the scheme if more people voting at the referendum vote "yes" than vote "no".

Directions to Voter

1. You may vote only once.
2. To vote ~~for~~ the compulsory retirement savings scheme, ☒ in the circle at the end of the line "YES I ~~support~~ the proposed compulsory retirement savings scheme".
3. To vote ~~again~~st the compulsory retirement savings scheme, ☒ in the circle at the end of the line "NO ~~and~~ not support the proposed compulsory retirement savings scheme".
4. After you have voted, carefully tear off the bottom part of the voting paper. The bottom part of the voting paper is your vote. Do not fold it.
5. You may post your vote or you may deliver it by hand.
6. To post your vote—
Put it in the envelope addressed to the Returning Officer and seal the envelope.
If you are voting from overseas, put a stamp on the envelope.
Post it early—
A vote posted in New Zealand must be postmarked on or before 28 September 1997.
If you post your vote on 28 September, choose a postbox which is cleared in time for your vote to be postmarked on that day. The clearance times are on the boxes.
A vote posted overseas must be postmarked on or before 25 September 1997.
Votes postmarked after these dates will be invalid.
7. To deliver your vote, take it during business hours to the Chief Electoral Office, Level 1, 110 Featherston Street, Wellington.
8. If you spoil your vote, ring 0800 800 810 for advice on how to get a replacement voting paper.

Tear here

REFERENDUM ON THE COMPULSORY RETIREMENT SAVINGS SCHEME

Do you support the proposed compulsory retirement savings scheme?

YES	I support the proposed compulsory retirement savings scheme
NO	I do not support the proposed compulsory retirement savings scheme

Tick only ONE answer above.

Vote Here

256. Section 34(2) of the 1997 Act permitted, but did not require, the Returning Officer to include "information, in any language or languages, on how to vote and how to return the voting paper".
257. Similarly, s 36(2) of the Act permitted a voter with English language issues to vote with assistance, notwithstanding that the ballot was a postal one:
- 36 *Method of voting*
- (1) *The voter votes by marking the voting paper with a tick within the space provided for the answer for which the voter wishes to vote.*
- (2) *If any voter—*
- (a) *Is visually impaired; or*
 - (b) *Is, for any reason, unable to read or write; or*
 - (c) *Is not sufficiently familiar with any language or languages used on the voting paper to vote without assistance,—*
- the voting paper may be marked in the manner described in subsection (3).*
- (3) *The manner is—*
- (a) *By the voter, with the assistance of a person authorised by the voter; or*
 - (b) *By a person authorised by the voter, in accordance with the voter's instructions.*
- (4) *A voter to whom the Returning Officer has dictated the relevant parts of the voting paper under section 33(4)(b) may, in accordance with any regulations made under this Act, dictate his or her vote to the Returning Officer. The Returning Officer must mark the voting paper in accordance with the voter's instructions.*

Summary of Recommendations

258. The Citizens Initiated Referenda Act should be amended to prohibit promoters of petitions from deceiving voters into signing petitions that they do not understand if they have limited or no English. Using s 218 of the Electoral Act as a precedent, it should be a specific offence to, by abduction, duress, or any fraudulent device or means, compel, induce, or prevail upon any elector to sign or not sign a petition, similar to provisions prohibiting undue influence in other electoral legislation.
259. As with parliamentary elections held under the Electoral Act, the provisions governing access to interpreters should be streamlined so that voters in referenda who consider that they require interpretation services to vote are able to access an interpreter if they consider it necessary and one is available.
260. The Referenda Regulations should be amended to at least make it legally possible to provide a ballot paper in Te Reo Māori, and consideration should be given to whether ballot papers should be available in other languages as New Zealand's demographic makeup shifts.
261. The Referenda (Postal Voting) Act should be amended to require the Returning Officer to exercise his or her discretion under s 36(2)(b) taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote using, s 75(3)(a) of the Local Electoral Act as a precedent.
262. A person should be permitted in a referendum, to obtain assistance to answer questions from scrutineers confirming their name (from an interpreter or otherwise), or be permitted to answer the question through other means such as producing a passport or drivers' licence. The requirement should also be to give a satisfactory answer, which may allow a voter to answer the question in a language other than English.
263. The Schedules to the New Zealand Flag Referendums Act 2015 should be amended to make it legally possible to provide a ballot paper in Te Reo Māori and other languages.
264. Section 25(2)(b) of the 2015 Act should also be amended to require the Returning Officer to exercise his or her discretion taking account of whether information in other languages is needed to ensure that all electors who are qualified to vote have a reasonable and equal opportunity to vote, using s 75(3)(a) of the Local Electoral Act as a precedent.

Elections and the New Zealand Bill of Rights Act 1990

265. The accommodations made for eligible voters with little or no English need to be considered in the context of the rights and freedoms affirmed under the NZBORA. The right to vote affirmed by s 12 of the NZBORA is of central importance because it affirms the right for citizens to vote. However, in the context of minority languages and elections, the right to freedom from discrimination affirmed by s 19, and the rights of minorities in respect of their language, religion, and culture affirmed by s 20 are also relevant, subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society under s 5 of the NZBORA.
266. The question is whether the combined effect of the rights affirmed by s 12, which is a fundamental right, together with ss 19 and 20 read together, subject to reasonable limits in terms of s 5 of the NZBORA, requires the government to do more to facilitate voting by eligible voters who speak little or no English, notwithstanding that the rights affirmed by ss 19 and 20 are negative rights – “freedoms from” rather than “rights to”.⁴⁷

Section 12: The Right to Vote in Elections

267. Section 12 of the NZBORA affirms that 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, and is qualified for membership of the House of Representatives; and*
- (b) *Is qualified for election to Parliament.*

268. New Zealand already extends the franchise further than s 12 requires, because permanent residents are able to vote. Section 12 applies only to citizens, and not to permanent residents or any other class of person who may be able to vote at some point in the future. Almost all new migrants will spend some time as permanent residents before becoming citizens, so this accommodation has particular significance for those with limited or no English.

269. The right to vote in free and fair elections is a fundamental part of the democratic process. In *Taylor v Attorney-General*,⁴⁸ the High Court declared that s 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) was inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the NZBORA, and cannot be justified under s 5 of that Act.

270. As part of that case, the High Court made a number of observations about the importance of the right affirmed under s 12, noting:⁴⁹

A democracy is built around the idea that a state is governed by elected members of a legislative body. For that reason, the right to vote is arguably the most important civic right in a free and democratic society. Affirmation of the importance of that right is apparent from the terms in which both s 12(a) of the Bill of Rights and art 25(b) of the International Covenant on Civil and Political Rights (the International Covenant) are expressed.

271. The Court went on to say, in explaining why a declaration ought to be granted in the particular circumstances of *Taylor*:⁵⁰

The question whether a citizen's right to vote has been removed in a manner inconsistent with the Bill of Rights is a point of such constitutional importance that it justifies the Court exercising a discretion to grant relief in the form of a declaration.

272. The Court further stated:⁵¹

The inconsistency arises in the context of the most fundamental aspect of a democracy; namely, the right of all citizens to elect those who will govern on their behalf.

273. The fundamental right affirmed by s 12 is potentially engaged in a languages context where New Zealand's electoral law may prevent citizens who are otherwise entitled to vote from exercising their right to vote because they have limited or no English. Examples of how provisions in electoral laws might do this include:

- a. Requiring particular electoral documents to be prepared or presented in English, such as prescribed forms;
- b. Making information about how to vote available only in English; or
- c. Imposing administrative requirements that voters with little or no English cannot meet, such as requiring voters to answer questions in English to confirm that they are eligible to vote.

274. Whether a particular aspect of New Zealand's electoral law in fact prevents or may prevent a person from voting because they have limited or no English may depend on what other accommodations are made in the law to help such a person cast a vote. The absence of such accommodations may bring an otherwise innocuous provision of the law into conflict with the right to vote, if its effect is to prevent citizens from exercising their right to vote because they have limited or no English. The question, then, is whether such a limitation is reasonable, prescribed by law, and demonstrably justified in a free and democratic society under s 5 of the NZBORA.

275. In *R v Hansen*,⁵² a majority of the Supreme Court set out the approach to determining whether a limitation on a right affirmed under the NZBORA can be justified under s 5:

[104] *This approach can be said to raise the following issues:*

- (a) *does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?*
 - (i) *is the limiting measure rationally connected with its purpose?*
 - (ii) *does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?*
 - (iii) *is the limit in due proportion to the importance of the objective?*

276. In an electoral law context, the purpose of “limiting measures” will essentially be to ensure that elections are held fairly, efficiently and consistently across New Zealand by, for example, prescribing a ballot paper which all voters must use. Whether the particular measure has a rational connection with that objective and imposes a reasonable and proportionate limit on the right to vote will depend on the application of the measure to the particular facts at the time of an election.

277. Where the cost or difficulty of making an accommodation for voters who do not speak English is small, and the number of voters affected is large, it may be harder to justify not making such an accommodation in terms of s 5. This is because it will be more difficult to show that the infringement on the very important right to vote impairs the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose. On the other hand, where the number of voters affected is very small, and the cost or difficulty of the accommodation is very large, the limitation may be demonstrably justified.

278. The reasonableness or otherwise of the failure to make accommodations may also shift over time as New Zealand’s demographic makeup changes. For example, as the number of citizens who do not speak English but speak other languages increases, the reasonableness of failing to make accommodations for minority linguistic groups is likely to diminish, particularly given ss 19 and 20 of the NZBORA.

279. Canadian courts have considered similar issues in the context of the right to vote guaranteed by the Canadian Charter of Rights and Freedoms. For example, in *Hoogbruin v Attorney-General of British Columbia*,⁵³ the British Columbian Court of Appeal noted in the context of British Columbia’s failure to make provision for absentee voting:

[14] *Mr. Welsh, for the appellants, at first asked that we “direct” the legislature to enact provisions for absentee voting. Under questioning by the court, he amended his submission asking only for a declaration. In our view it would be “appropriate and just in the circumstances” to declare (see Que. Assn. of Protestant Sch. Bd. c. P.G. Que., [1982] C.S. 673, 140 D.L.R. (3d) 33 (sub nom. Que. Assn. of Protestant Sch. Bd. v. A.G. Que.), affirmed [1983] C.A. 77, 1 D.L.R. (4th) 573 (Que.), as well as Maltby, supra) that in the court’s view the right to vote as guaranteed by s. 3 of the Charter is denied to British Columbia registered voters where the sole reason they are unable to exercise their right to vote is that no procedural mechanism exists which would reasonably enable them to do so. [Emphasis added.]*

280. In *Hoogbruin*, the Court concluded that the British Columbian government’s lack of provision to enable absentee voting was itself an interference with the right to vote.

281. However, Canadian courts have not imposed a standard which requires sufficient accommodations so that every voter may vote. The Court of Appeal for British Columbia in *Henry v Canada (Attorney-General)*, in the context of whether voter identification laws unjustifiably infringed the right to vote, upheld⁵⁴ the Supreme Court of British Columbia’s finding that:

The [appellants] submit that precluding even one voter from casting a ballot would be a significant deleterious effect. Indeed, that would be a deleterious effect, as would be the creation of inconvenience that discourages voters from coming to the polls. In an ideal world, no elector would ever be inconvenienced or precluded from voting by any aspect of the electoral system.

However, that is not the constitutional requirement. Just as it cannot be constitutionally required for an individual polling station to be set up for each individual voter, a system of voter identification need not be such that not one person is ever inconvenienced or precluded from voting by its requirements. The state has a positive obligation to create an electoral system that is sensitive to the needs of all electors and that maximizes access in every way possible, but a standard of absolutely perfect access cannot be imposed. [Emphasis added.]

282. Some limitations on the right to vote are inevitable – for example, in *Taylor*, the High Court noted in obiter that disqualifying prisoners convicted of serious offences might well be a justified limitation on the right to vote.⁵⁵ However, any accommodations that are made to enable citizens to cast votes must themselves be consistent with 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”.

283. More significantly, s 12 applies only to elections to Parliament, and not to elections held under the Local Electoral Act or the various referenda legislation. However, s 12 and the accommodations it may require in respect of language represent best practice and should be applied in the context of the Local Electoral Act or the various referenda legislation, even if there is no legal obligation to do so.

Section 19: Freedom from Discrimination

284. The right to freedom from discrimination affirmed by s 19 of the NZBORA is also engaged by New Zealand’s electoral law. Section 19 provides:

19 *Freedom from discrimination*

- (1) *Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.*
- (2) *Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.*

285. Importantly, unlike s 12, s 19 applies to “everyone”, and its application is not limited to parliamentary elections. Accordingly, s 19 also applies in respect of permanent residents, and in respect of elections held under the Local Electoral Act and referenda held under the various referenda legislation.

286. Language is not specified as one of the prohibited grounds of discrimination in the Human Rights Act 1993, but there are a range of other grounds of discrimination which are engaged by discrimination on the basis of language, such as colour, race, and ethnic or national origins, and the concept of indirect discrimination contained in the Human Rights Act.⁵⁶ For example, if an electoral official discriminated against Asian and Pacific voters by deliberately asking them complex questions to establish their identity in a way they could not comprehend that would be a breach of the freedom affirmed by s 19.

287. Indirect discrimination may also arise in an electoral law context where eligible voters suffer a disadvantage in terms of their ability to vote because of provisions in electoral legislation that have a disproportionate impact on those with little or no English, such as requirements that ballot papers or other voter information documents be provided exclusively in English.

288. Whether a particular measure in fact disadvantages voters with little or no English such that s 19 is engaged should be considered in light of any accommodations made for such voters as part of that measure. A measure will be less likely to be discriminatory if there is no actual resulting disadvantage to voters with little or no English. So, for example, it is likely to be permissible for the voting system to be administered primarily in English as long as there is reasonable assistance for those voters of different race and ethnicity with little or no English to vote.

289. It is also relevant that s 19(2) provides that measures taken in good faith for the purpose of “assisting or advancing persons or groups of persons disadvantaged because

of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993” does not constitute discrimination. This provision may therefore permit, in principle, “affirmative action” for voters with little or no English, provided it can be demonstrated that such measures have been adopted in good faith and are to assist persons who have been disadvantaged by unlawful discrimination.

290. As with s 12, the right to freedom from discrimination affirmed by s 19 is not absolute and may be subject to reasonable limits in terms of s 5 of the NZBORA. This means that measures in electoral laws that disadvantage eligible voters because they speak little or no English may nevertheless be justified if it can be shown that the discriminatory provision serves an important purpose (such as ensuring that elections can be held efficiently and fairly) and that the measures are rationally connected with that purpose, infringe on the right to freedom from discrimination no more than is reasonably necessary, and are proportionate.

291. Provisions in New Zealand’s electoral law should be reviewed to ensure they do not, directly or indirectly, discriminate on the basis of race or ethnicity against specific voters in elections or referenda in terms of ss 19 and/or 12 in a way that cannot be justified in terms of s 5 of the NZBORA. The areas where there may be breaches of the NZBORA are reflected in the recommendations for change made in this paper

Section 20: Rights of Minorities

292. Section 20 of the NZBORA provides that a person belonging to an “ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority”.

293. Like s 19, s 20’s application is not limited to New Zealand citizens, or parliamentary elections. Accordingly, s 20 also applies in respect of permanent residents, and in respect of elections held under the Local Electoral Act and referenda held under the various referenda legislation.

294. Section 20 is expressed in negative terms, which suggests that the only obligation on the state is to refrain from interfering in particular minority activities: the state has no positive duty to foster a minority’s enjoyment of its culture, religion or language. This was the conclusion of the Court of Appeal in *Mendelssohn v Attorney-General* in rejecting the plaintiff’s contention that the government was obliged to protect his religious beliefs from criticism.⁵⁷ The Court considered that, in contrast to other rights in the NZBORA (such as the rights of persons charged with criminal offences), s 20 affirmed a negative freedom and therefore did not impose a positive duty on the state to act.⁵⁸

295. The purpose of s 20 is to prevent “oppressive government action which would pursue a policy of cultural conformity by removing the rights of minorities to enjoy those things which go to the heart of their very identity – their language, culture and their religion”.⁵⁹ The UNHRC has further observed that art 27 of the International Covenant on Civil and Political Rights (ICCPR), on which s 20 is based, is “directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole”.⁶⁰

296. The word “minority” is not defined in the NZBORA or in the ICCPR. However, the UNHRC has observed that “minority” tends to relate to a group “numerically inferior” to the rest of the national population.⁶¹

297. In terms of identifying an “ethnic minority” for the purposes of s 20, the test adopted by the Court of Appeal in *King-Ansell v Police* is likely to be useful.⁶² First, members of the group must hold a subjective belief that they are alike and share historical bonds. Second, other people must recognise the group as sufficiently distinct in the community. The use of this mixed objective/subjective test has been approved by the House of Lords.⁶³

298. Although the meanings of “religious minority” and “linguistic minority” have not been subject to such consideration by the courts, the Ministry of Justice’s 2004 *Guidelines on the New Zealand Bill of Rights Act 1990* suggest that these terms will be given a broad and

liberal construction. The Guidelines suggest groups that use a language other than English are likely to qualify as linguistic minorities for the purposes of s 20.

299. The right affirmed in s 20 is not absolute and nor can it be used to circumvent other rights affirmed in the NZBORA.⁶⁴ Accordingly, interference with the right is capable of being justified in accordance with s 5 of the NZBORA. Section 20 is unlikely to be directly engaged by electoral legislation because the right only applies to the enjoyment of culture, practice of religion or use of language by a minority in community with other members of that minority. However, s 20 may be engaged if it can be demonstrated that the overall effect of failing to make accommodations for voters with little or no English is to discourage the use of a minority language both in public and at home as part of a de facto assimilation policy.

300. Many of the observations above in the discussion about ss 12 and 19 in respect of accommodations for eligible voters with limited or no English also apply in respect of s 20. Where the overall effect of electoral law creates no tension between members of a minority continuing to use its language in community with other members of that minority, and voting, s 20 is even less likely to be engaged.

301. As with ss 12 and 19, the right of minorities “in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority” can also be subject to reasonable limits under s 5 of the NZBORA.

Conclusion

302. The significant number of accommodations already made in New Zealand’s electoral laws to assist voters with little or no English makes it difficult to argue that the law requires more. However, many of these accommodations are difficult to use and appear to be seldom used in practice.

303. Although New Zealand has implemented a range of accommodations across its electoral law, there is a lack of consistency across electoral legislation and even at different stages of the voting process. The critical path for a voter with little or no English to cast their vote is essentially ad-hoc. There has been no systematic development of an end-to-end statutory process to help those with little or no English to vote. This may explain why the rate of voting among new migrants is so poor despite the large number of accommodations which have been made. This may also open New Zealand’s electoral laws to challenge for breach of the NZBORA

304. Certainly better implementation of the measures already in place is needed to ensure that the assistance to those with little or no English is real, and is not dependent on discretions which are not exercised or which can be easily abused. Statutory amendments to make processes to help the superdiverse vote consistent and practically usable need to be considered. This will become more urgent as the superdiversity of New Zealand’s population grows.

Recommendation

305. Provisions in New Zealand’s electoral law should be reviewed to ensure they do not, directly or indirectly, discriminate on the basis of race or ethnicity against specific voters in elections or referenda in terms of ss 19 and/or 12 in a way that cannot be justified in terms of s 5 of the NZBORA.

Comparable Superdiverse Jurisdictions

306. This part of the paper considers comparable overseas superdiverse jurisdictions, and what steps, if any, they have taken to enable those who do not speak the majority language or languages to vote.

307. The jurisdictions considered in this paper are:

a. The United Kingdom – London;

- b. The Republic of Singapore;
- c. The Republic of South Africa;
- d. Canada – Toronto; and
- e. Australia.

308. These jurisdictions have been chosen because they either are superdiverse (such as Singapore) or contain superdiverse cities (such as London, Johannesburg and Toronto). In particular, this paper considers how those jurisdictions address the issues of:

- a. Compulsory voting or enrolment;
- b. Provision of election information, such as instructions on how to vote;
- c. Voting documents and what languages they are prepared in; and
- d. What assistance is given to voters to vote.

309. The comparative analysis shows that New Zealand is the only country of those considered that allows permanent residents as well as citizens to vote. New Zealand also has a relatively sophisticated suite of measures to assist those with little or no English to vote, compared to comparable superdiverse jurisdictions. There are some aspects of particular measures which both New Zealand and some comparable superdiverse jurisdictions have adopted which are done better overseas, and which New Zealand should consider adopting.

310. The main measure which is in place overseas which has not been adopted in New Zealand is compulsory voting. The experience in both Australia and Singapore suggests that this may significantly improve the participation rate in elections. However, the consequence of failing to vote must not itself effectively serve to entrench a pattern of non-voting, which is a potential risk in Singapore. The modest fines associated with the Australian model are more likely to encourage voting without the risk of long-term disenfranchisement. We should also be studying countries where voter participation remains high despite being voluntary. For example, the Danish participation rate was 85.89 per cent in the 2015 parliamentary elections, however, the population is very homogenous.⁶⁵

311. A number of jurisdictions also apply more “rules-based” approaches to measures to assist those with little or no English, although as with New Zealand the majority of measures still depend on the discretion of relatively low-level electoral staff. At one extreme, the most rules-based approaches are those of Singapore and South Africa, where voting information and materials are in certain languages and there is little or no statutory assistance for those who do not speak prescribed languages.

312. Such measures should not be adopted in New Zealand. On the other hand, the approach taken in Toronto to the provision of electoral information, where there is a bylaw which creates a process for determining the languages in which electoral information should be made available, is a model which should be considered for adoption in New Zealand.

United Kingdom – London

313. Elections to the Greater London Authority are governed by the Greater London Authority Elections Rules 2007, made under the Representation of the People Act 1983. London is highly superdiverse. As early as 2005 there were over 300 languages spoken in London, and more than 50 non-indigenous communities with populations over 10,000. The 2011 UK Census found that 37 per cent of Londoners were born outside of the United Kingdom.

314. London's electoral system is very similar to that of New Zealand, although a person with limited or no English cannot get assistance to vote in the same way that they could in New Zealand. London also requires voters to answer questions about their identity if they are asked, but does not require voters to respond in English which reduces the risk of disenfranchisement.

Is Voting Compulsory?

315. There is no obligation to vote in elections to the Greater London Authority. Turnout in the 2012 Authority elections was 40.9 per cent, a drop of 4.38 per cent since the 2008 election.

Is Election Information Available in Languages other than the Majority Languages?

316. Provision is made for the distribution of election information in languages other than English, but, like New Zealand, there is no obligation on the constituency Returning Officers to in fact issue information in languages other than English.

317. The programme team at the Greater London Authority responsible for the 2016 London elections has made key voting information available in 16 languages other than English: Arabic, Bengali, Chinese – simple, Chinese – traditional, French, Gujarati, Hindi, Lithuanian, Polish, Portuguese, Punjabi, Somali, Spanish, Tamil, Urdu and Yoruba. These languages have been identified as the 16 key languages spoken in the capital.

318. Similarly, the handbook for staff at polling stations for elections held under the Rules published by the UK Electoral Commission advises that the Returning Officer may provide “instructions and guidance in alternative languages or formats depending on requirements within the community”. Whether the Returning Officer in fact does so is at his or her discretion.

319. The Rules provide, in respect of elections to the London Assembly and for the Mayorality of London, that constituency Returning Officers must “issue to those entitled to vote by post such information as he thinks appropriate about how to obtain...translations into languages other than English of any directions to or guidance for voters sent with the ballot paper”.⁶⁶ So, what information about obtaining translations is made available depends on what constituency Returning Officers consider to be appropriate.

320. The Rules also require that notices for the guidance of voters must be exhibited outside the polling station, inside the polling station and in the communal areas. The content of these notices is prescribed by the Schedule 9 to the Rules, but in accordance with s 199B(2)(b) of the Representation of the People Act 1983, translations of these documents into languages other than English may also be made available by the constituency Returning Officer.⁶⁷ What, if any, translations are made available appears to be at the discretion of the Returning Officer.

321. The Rules provide for questions to be put to voters to ascertain whether they are permitted to vote. However, unlike the New Zealand Electoral Act, answers are not required in writing, and a ballot paper may only be withheld from somebody if he has not “answered each question satisfactorily”, which suggests that a person could answer this question other than in English.

What Languages are Voting Documents Made Available in?

322. The content of ballot papers and nomination documents is prescribed by sch 10 to the Rules. All ballot papers and nomination documents appear to be prescribed as being in English.

What Assistance is given to Voters with Language Difficulties?

323. The Rules do not make any specific provision for persons with little or no English to receive assistance in casting their vote. The Rules provide for the presiding officer to mark a person’s ballot paper in accordance with their directions where that voter is illiterate or incapacitated by blindness or other disability from voting. But, unlike New Zealand, there is no specific provision made for a person who speaks little or no English.

Recommendation

324. The London electoral model and how it deals with those with little or no English is very similar to New Zealand’s electoral model, although New Zealand’s approach appears to be more sophisticated in most respects.

Singapore

325. Singapore is a superdiverse city. In 2014, Singapore was 74 per cent Chinese, 13 per cent Malay and 9.1 per cent Indian. Languages spoken in Singapore include English, Mandarin, Hokkien, Teochew, Cantonese, Malay, Tamil, and a range of other Chinese and Indian languages or dialects. Singapore is one of the cities being studied by the Max Planck Institute for the Study of Religious and Ethnic Diversity's GlobaldiverCities project.⁶⁸

326. Singapore makes limited provision for non-majority language speakers in its Parliamentary Elections Act and Presidential Elections Act. The approach taken is to make arrangements for English, Chinese, Tamil and Malay speakers on the basis that most if not all Singaporeans who are entitled to vote will speak at least one of these languages.

327. The Constitution of Singapore also requires that a person be able to speak, read and write at least one of English, Tamil, Chinese or Malay to be eligible for election as a Member of Parliament, although this is not a specific requirement for eligibility to be elected President.

Is Voting Compulsory?

328. Section 43(1) of the Parliamentary Elections Act provides that every elector must vote in Parliamentary elections, and s 26(1) of the Presidential Elections Act imposes the same requirement in respect of Presidential elections. The 2011 Presidential elections had a turnout rate of 94.8 per cent and the 2011 parliamentary elections had a turnout rate of 93.18 per cent.

329. In the case of both Parliamentary and Presidential elections, a person who fails to vote has their name expunged from the register of electors, so that they cannot vote or stand for office. A person can have their name restored to the register of voters on payment of a SG\$50 fine, or on providing a "good and sufficient reason for not having recorded his vote". Examples of acceptable reasons, according to the Singapore Elections Department, include working, studying or holidaying overseas, illness, and childbirth.

330. There is a risk that if striking people off the roll for failing to vote without a "good and sufficient reason" was adopted in New Zealand, it would create an underclass of people who never voted, having been struck off the roll once, lacking a "good and sufficient reason for not having recorded his vote", and being unwilling or unable to pay the fine to be reinstated.

Is Election Information Available in Languages other than the Majority Languages?

331. Voting information in Singapore published by the Singapore Elections Department is published in English, Malay, Chinese and Tamil.

332. Section 37 of the Parliamentary Elections Act and s 20(1) of the Presidential Elections Act require that outside each polling station, a list of candidates must be posted showing the name of each candidate in English, Malay, Chinese and Tamil. The candidates' names must be arranged alphabetically according to their English names (or in groups if the election is for a group representation constituency).

333. Section 42(7) of the Parliamentary Elections Act and s 20(1) of the Presidential Elections Act further require that, when the poll is open, the presiding officer must exhibit outside his polling station a notice in English, Malay, Chinese and Tamil, giving directions for the guidance of voters in voting, "substantially" in the form set out below:

1. *The voter may vote for one candidate or, if the electoral division is a group representation constituency, one group of candidates.*
2. *The voter has one vote.*
3. *The voter will go into the place reserved for the marking of ballot papers and mark a cross in the space provided for the purpose on the right hand side of the ballot paper opposite the name of the candidate or, if the electoral division is a group representation constituency, the names of the group of candidates, for which he votes, thus, X.*
4. *The voter will then fold up the ballot paper so as to show the official mark on the back, and without showing the front of the paper to any person, show the official mark on the back to the*

presiding officer, put the paper into the ballot box and immediately leave the polling station.

5. *If the voter inadvertently spoils a ballot paper, he can return it to the presiding officer who will, if satisfied of such inadvertence, give him another paper.*
6. *If the voter votes for more than one candidate or, if the electoral division is a group representation constituency, more than one group of candidates, on any ballot paper, his ballot paper will be void and will not be counted.*
7. *If the voter places any mark on the ballot paper by which he may afterwards be identified, his ballot paper will be void and will not be counted.*

What Languages are Voting Documents Made Available in?

334. Section 40(2) and (3) of the Parliamentary Elections Act and s 23(2) of the Presidential Elections Act require that ballot papers list candidates in English – not in Malay, Chinese or Tamil. There do not appear to be any provisions relating to the translation of ballot papers.

What Assistance is given to Voters with Language Difficulties?

335. There is no statutory provision made for the assistance of a voter who does not speak English, Malay, Chinese or Tamil, although the Registration Officer and the Returning Officer can appoint interpreters as necessary:

Appointment of clerks and interpreters

- (1) *The Registration Officer and the Returning Officer may, from time to time, appoint such numbers of clerks and interpreters as may be necessary for the purposes of this Act.*
- (2) *The appointments made under subsection (1) may be revoked at any time*

336. The provisions governing the election of the President of Singapore are, as regards language, in substance the same as those governing parliamentary elections.

Recommendations

337. The Singaporean approach would exclude eligible voters who do not speak English, Malay, Chinese or Tamil to a high enough standard to vote. There is virtually no provision made for voters who do not speak one of the above languages. On the other hand, by requiring that information be made available in the country's four official languages, Singapore removes the element of discretion when deciding what languages information should be published in, ensuring a consistent approach across all electorates.

338. The Senior Director of the Prime Minister's Office in Singapore said that there is compulsory education at primary school by law, and a bilingual policy so all children would learn English as well as their mother tongue – be it Malay, Chinese or Tamil. It is therefore very unlikely that there are eligible voters who do not understand any of the languages and are thus unable to vote. There has been no feedback or indication of any chilling effect on the rights of linguistic minorities to cast a vote. Voting cards are also deliberately made very simple with diagrams to help the voting process.⁶⁹

South Africa

339. The 2011 Census in South Africa found that 79.2 per cent of South Africans identified as "Black", 8.9 per cent as "White", and 8.9 per cent as "Coloured". However, South Africans who identify as Black are culturally and linguistically diverse. Johannesburg is one of the cities being studied by the Max Planck Institute for the Study of Religious and Ethnic Diversity's GlobalDiverCities project.

340. The Constitution of the Republic of South Africa provides that the "official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu". General elections in South Africa are governed by the Electoral Act 1998.

341. The Constitution further provides that:

- (a) *The national government and provincial governments may use any particular official languages for the purposes of government, taking into account usage, practicality, expense, regional circumstances and the balance of the needs and preferences of the population as a whole or in the province concerned; but the national government and each provincial government must use at least two official languages.*
- (b) *Municipalities must take into account the language usage and preferences of their residents.*

Is Voting Compulsory?

342. Voting is not compulsory in the Republic of South Africa. Voter turnout in the 2014 Parliamentary election was 73.48 per cent.

Is Election Information Available in Languages other than the Majority Languages?

343. The South African Electoral Commission's functions under the Electoral Commission Act 1996 include to:
- Ensure that any election is free and fair;
 - Promote knowledge of sound and democratic electoral processes; and
 - Promote voter education.
344. In 2014, the Commission produced fact sheets, educational posters, a voter education booklet, a training manual and school education material. All fact sheets, posters and the booklet were produced in 12 languages (11 official languages plus Nama), as well as in Braille and audio versions.
345. The Commission also published a Multilingual Election Terminology List in February 2014, aimed at educating the public about election terminology, providing election practitioners and language experts with a tool to standardise and improve the quality of translation, as well as broadening the public's knowledge about elections.

What Languages are Voting Documents Made Available in?

346. The Electoral Act 1998 section 68 provides that the Commission determines which language should be used on a ballot paper, taking into account the election in which that paper is to be used, which allows it to determine which language is most likely to be spoken in a particular region and arrange publication of voting documents in that language. This is an improvement on systems where these decisions are made on a case-by-case basis by relatively low-level staff:

68 *Ballot papers*

The Commission must determine—

[...]

- (b) *The language to be used on a ballot paper, taking into account the election in which that ballot paper is to be used.*

[...]

What Assistance is Given to Voters with Language Difficulties?

347. The Electoral Act does not seek to make arrangements for a voter who does not speak one of the 11 official languages, or who does not understand the languages in which voting documents have been made available.

Recommendation

348. As with Singapore, the South African approach is to provide all voting materials in one of the 12 languages, as well as in and virtually no other provision made for voters who do not speak one of the above languages. There is a chilling effect on the

rights of linguistic minorities who cannot speak one of these languages to cast a vote but that should be a limited group.

Canada – Toronto

349. Canada faces particular diversity issues because of its colonial history and indigenous population. As well as French and English, there are over 60 aboriginal languages spoken in Canada as at the 2011 Census. Other languages spoken by more than 100,000 Canadians in 2011 included Punjabi, Spanish, Italian, German, Mandarin, Cantonese, other Chinese dialects, Arabic and Portuguese. The approach which Canada has taken to helping those with poor English or French language skills vote must be viewed in the context of the Canadian Charter of Rights and Freedoms, and the electoral and linguistic freedoms which it guarantees.

Canadian Charter of Rights and Freedoms

350. The right to vote in Canadian elections is one of the rights guaranteed by the Canadian Charter of Rights and Freedoms. The Charter provides at s 3:

Every citizen of Canada has the right to vote in an election of the members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

351. In *Figueroa v Canada (Attorney General)*,⁷⁰ the Canadian Supreme Court noted that:

...the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the Charter.

352. The Charter also protects language rights. Section 16 of the Charter provides that English and French are the official languages of Canada, and “have the equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada”.

353. However, s 22 of the Charter preserves rights in respect of other languages, and states that:

Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

354. In practice, however, it appears that English and French continue to be explicitly privileged over other languages in Canadian legislation.

355. Section 133 of the Constitution Act 1867 continues in force, and states:

Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

356. In 2005, the Standing Committee on Rules, Procedures and the Rights of Parliament considered whether this provision might make it illegal to use a language other than French or English in Parliament, and in particular whether a Canadian aboriginal language could be used, and concluded that it did not, French-Canadian Senator Serge Joyal OC OQ noting that:⁷¹

How do we solve this problem? To me it is not a problem; it is an asset. If the Parliament of Canada, and singularly the Senate, makes way to allow Aboriginal people to use their language, they allow those people to be themselves, to demonstrate their true identity as a component part of Canada and as a respected part of Canada.

Official Languages Act 1988

357. The Official Languages Act 1988 confirms and restates the principles of Canadian bilingualism. Section 24(3) specifically provides that the duty to “ensure that any member of the public can communicate with and obtain available services from all of its offices or facilities in Canada or elsewhere in either official language” applies to the Office of the Chief Electoral Commissioner.

Canada Elections Act 2000 and Referendum Act 1992

358. The Canada Elections Act governs the election of members of Parliament to the Canadian House of Commons.
359. There is no language qualification for voting – s 3 of the Act provides that every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector.
360. The Referendum Act governs referenda in Canada. Section 3 of the Act provides that the Governor in Council may by proclamation “direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose”.

361. Section 3(5) provides:

The Chief Electoral Officer shall ensure that the text of a referendum question is available in such aboriginal languages and in such places in those languages, as the Chief Electoral Officer, after consultation with representatives of aboriginal groups, may determine.

362. Section 7 provides that the Canada Elections Act applies to the conduct of a referendum, subject to any necessary amendments made by the Chief Electoral Officer. The same observations made below accordingly apply.

Is Voting Compulsory?

363. Voting is not compulsory in Canadian elections at a federal, provincial or local level. Voter turnout to the 2011 federal election was 61.4 per cent.

Is Election Information Available in Languages other than the Majority Languages?

364. Section 48 of the Canada Elections Act provides that before a new elector can be registered, they must be sent the Chief Electoral Officer’s information relating to him or her, and asked if he or she wishes to be included in the Register of Electors. A new elector who wishes to be included in the register must confirm, correct or complete the information, in writing, and give it to the Chief Electoral Officer along with a signed certification that he or she is qualified as an elector.
365. There does not appear to be any requirement that the Chief Electoral Officer provide the information in a language the person can understand.
366. Once a writ has been issued, s 95 requires Returning Officers to send a notice of confirmation of registration to every elector (other than soldiers, prisoners, or overseas electors). Section 95(3) invites the elector to contact the Returning Officer if he or she requires a language or sign language interpreter. In practice, the notice itself appears to be in English and French.
367. Elections Canada provides extensive information to minority language speakers on how to vote. Voting information is made available in 43 languages, including the major Canadian aboriginal languages.

What Languages are Voting Documents Made Available in?

368. Ballot papers are printed in English and French, Canada’s official languages, consistent with the Canadian government’s obligations in respect of bilingualism discussed above. The form of the ballot paper is prescribed by sch 1 to the Act.

What Assistance is Given to Voters with Language Difficulties?

339. Section 155 enables any elector who requires assistance to vote to have the assistance of a friend, spouse, or relative:

155 Assistance by friend or related person

- (1) *If an elector requires assistance to vote, a friend, the spouse, the common-law partner or a relative of the elector or a relative of the elector's spouse or common-law partner may accompany the elector into the voting compartment and assist the elector to mark his or her ballot.*
- (2) *No person shall as a friend assist more than one elector for the purpose of marking a ballot.*
- (3) *A person described in subsection (1) who wishes to assist an elector in marking a ballot shall first take an oath, in the prescribed form, that he or she*
 - (a) *will mark the ballot paper in the manner directed by the elector;*
 - (b) *will not disclose the name of the candidate for whom the elector voted;*
 - (c) *will not try to influence the elector in choosing a candidate; and*
 - (d) *has not, during the current election, assisted another person, as a friend, to mark a ballot.*
- (4) *No person who assists an elector under this section shall, directly or indirectly, disclose the candidate for whom the elector voted.*

370. This provision is similar to other provisions relating to assisting others to vote, albeit with stronger prohibitions to attempt to avoid misconduct.

371. Section 156 permits a deputy Returning Officer to appoint and swear in "a language or sign language interpreter to assist the officer in communicating to an elector any information that is necessary to enable him or her to vote".

Recommendations

372. Canada has a complex relationship with language because of its bilingual origin, as well as its settler origins (like New Zealand). This means that there are some key parts of the voting process and the documents and information made available which are restricted to English and French. Despite this, there is a large volume of information made available in many other languages, particularly aboriginal languages.

373. The provision dealing with assisted voting is also the most sophisticated in this case study, in as far as it actually attempts to discourage misconduct by the person assisting. This is a sensible approach which should be considered for adoption in New Zealand.

Municipal Elections Act 1996

374. This is an Ontarian statute regarding the conduct of municipal elections, including in Canada.

375. Section 9 of the Act addresses the language in which notices and forms may be given:

9 Language of notices and forms

- (1) *Notices, forms and other information provided under this Act shall be made available in English only, unless the council of the municipality has passed a by-law under subsection (2).*
- (2) *A municipal council may pass a by-law allowing the use of,*
 - (a) *French, in addition to English, in prescribed forms;*
 - (b) *French, other languages other than English, or both, in notices, forms (other than prescribed forms) and other information provided under this Act. 1996, c. 32, Sched., s. 9 (2).*

376. The City of Toronto passed bylaw number 1176-2009 on 2 December 2009, which provides that:

Election information provided to electors under the Municipal Elections Act, 1996 for a regular municipal election or a City-wide by-election may be prepared in any language which the most recent and available Statistics Canada data shows was spoken and understood in the home by at least two percent of a ward's population at the time of the census.

377. In the 2014 municipal election in Toronto, information was accordingly made available in 24 languages.

378. Section 52(4) of the Act simply states that:

The deputy returning officer may permit an elector who needs assistance in voting to have such assistance as the deputy returning officer considers necessary.

Recommendations

379. Toronto's approach to the provision of electoral information appears to strike a balance between ensuring voters can access voting information while recognising that every single language cannot reasonably be accommodated. Effectively setting a mechanism to determine which languages will be recognised ensures that particular languages are not marginalised, although the effectiveness of this mechanism depends primarily on the accuracy of data from Statistics Canada.

380. However, in terms of actually assisting voters, the Act depends essentially on the discretion of the deputy Returning Officer at a particular polling place. There is no standard procedure for assisting a person with language limitations to vote.

Australia

381. Australia is also superdiverse. In June 2014, 28 per cent of Australian residents were born outside Australia. New Zealanders and people from the United Kingdom and Chinese people are the three largest groups. Federal elections in Australia are governed by the Commonwealth Electoral Act 1918. Constitutional referenda are governed by the Referendum (Machinery Provisions) Act 1984.

Is Voting Compulsory?

382. Section 245 of the Commonwealth Electoral Act makes it "the duty of every elector to vote at each election". Failure to vote incurs an initial penalty notice of \$20 unless a "valid and sufficient" reason is given for the failure to vote. A person who fails to pay after the subsequent issue of a reminder notice can be convicted of an offence and fined \$50. There is no other consequence for failing to vote.

383. Section 45 of the Referendum (Machinery Provisions) Act 1984 establishes a similar regime, including penalties, for electors who fail to vote in constitutional referenda.

384. In the 2013 elections for the federal Parliament, Australia had a 93.23 per cent voter turnout. The advantage of imposing a small penalty for failing to vote is that it serves as a gentle reminder rather than a severe penalty. A severe penalty may paradoxically lead to migrants feeling less engaged with their new country rather than improving civic engagement.

Is Election Information Available in Languages other than the Majority Languages?

385. Section 7 of the Commonwealth Electoral Act provides that it is a function of the Electoral Commission to "promote public awareness of electoral and parliamentary matters by means of the conduct of education and information programs and by other means".

386. The Australian Electoral Commission has a Multicultural Plan 2013–2015 which aims to promote knowledge of and participation in Australia's electoral system equitably across the Australian community. Examples of the steps undertaken by the Australian Electoral Commission include:

- a. Community education workshop programmes using bilingual educators;
- b. Supporting new citizens to enrol by providing relevant information for inclusion in citizen application packs, providing partially completed enrolment forms to new citizens at their citizenship ceremonies and, wherever possible, having Commission staff available at ceremonies to assist with completing and collecting enrolment forms;
- c. Publishing translated material on its website;
- d. Providing access to a telephone translator service for phone enquiries;
- e. Using a specialist consultant (and ABS data) to determine the priority languages into which to translate material, and regularly updating this advice;
- f. Providing translated materials in polling places and aiming to employ as many as possible bilingual or multilingual staff in those polling places; and
- g. Creating a new category of bilingual/multilingual polling staff for polling places with high levels of informal voting. Staff will explain voting procedures to voters.

What Languages are Voting Documents Made Available in?

387. Nomination and ballot papers are prescribed as being in English by sch 1 to the Electoral Act 1918. There does not appear to be any provision made for their translation into other languages.
388. It is also relevant that s 93A(2)(c) of the Act provides that the Commissioner may decide not to include a person's name on the electoral roll (rendering them ineligible to vote) if the name "is not written in the alphabet used for the English language".

What Assistance is given to Voters with Language Difficulties?

389. The Electoral Act 1918 makes no specific provision for voters with limited or no English.
390. Section 234 of the Act provides that if a voter satisfies the presiding officer that "his or her sight is so impaired or that the voter is so physically incapacitated or illiterate that he or she is unable to vote without assistance", the voter may appoint a person to enter the polling booth and "mark, fold, and deposit the voter's ballot paper". But, unlike New Zealand, there is no specific provision made for a person speaks little or no English.

Recommendations

391. While the Australian Electoral Commission has a comprehensive strategy to improve voting by migrants, New Zealand's electoral legislation is more sophisticated in terms of the measures and accommodations to enable those migrants to actually vote. New Zealand's Electoral Commission already adopts some of the strategies of the Australian Electoral Commission, and should consider whether more can be done.
392. However, compulsory voting in Australia does appear to have delivered consistently high participation rates. The advantage of imposing a small penalty for failing to vote is that it serves as a gentle reminder rather than a severe penalty. A severe penalty may paradoxically lead to migrants feeling less engaged with their new country rather than improving civic engagement.

Summary of Recommendations from Comparable Superdiverse Jurisdictions

394. The following accommodations made overseas appear to have merit and should be adopted in New Zealand:
 - a. New Zealand should consider the adoption of compulsory voting to improve voter participation rates;
 - b. New Zealand's Electoral Commission should adopt a formal multicultural plan which focusses on improving voter participation rates among new migrants, and be properly funded to implement such a plan;
 - c. If voters are to be asked questions to verify their identity and eligibility to vote, then

they should only be required to provide “satisfactory” answers instead of specified written answers in English;

- d. Where possible, decisions about how and in what languages information is to be provided should be rules-based rather than discretion-based, provided that the rules are kept under review so that they can change to reflect New Zealand’s changing demographic makeup ;
- e. There should be a requirement during elections and referenda to provide information in particular languages based on a statistical analysis of the most commonly spoken languages in New Zealand, rather than on a regulator’s assessment of what is needed, and if the decision depends on a regulator’s assessment of what is needed then the main languages spoken in New Zealand should be a mandatory relevant consideration; and
- f. People assisting others to vote should be required to swear a declaration that they will follow the voter’s instructions and preserve secrecy. Breaching this declaration should be an offence.

Table: Comparison between New Zealand and superdiverse jurisdictions

	New Zealand Parliamentary Elections	New Zealand Local Elections	New Zealand Referenda	United Kingdom - London	Singapore	South Africa	Canada - Toronto	Australia
Permanent residents vote	Yes	Yes	Yes	No*	No	No	No	No
Compulsory voting	No	No	No	No	Yes	No	No	Yes
Language qualification to vote or stand	No	No	No	No	Yes	No	No	No
Formal provision for interpreters	Yes	No	No	No	Yes	No	No	No
Multilingual voting information	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Multilingual ballot papers	No	No	No	No	Yes	Yes	Yes	No
Assistance to voters	Yes	Yes	Yes	No	No	No	Yes	No

* Some exceptions for Commonwealth and European Union citizens.

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Endnotes

- 1 Statistics New Zealand *Non-voters in 2008 and 2011 General Elections: Findings from New Zealand General Social Survey* (2014).
- 2 Statistics New Zealand "2013 Census ethnic group profiles" <www.stats.govt.nz>.
- 3 Superdiverse cities have been defined as cities where more than 25 per cent of the resident population is comprised of ethnic migrants. Paul Spoonley "Auckland's Future: Super-Diverse City" (Conversations in Integration, 28 November 2013). Other academics have alternatively defined superdiverse cities as those where more than 100 nationalities are represented.
- 4 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [181].
- 5 R Simon-Kumar "Difference and Diversity in Aotearoa/New Zealand: Post-neoliberal constructions of the ideal ethnic citizen" (2014) 14(1) *Ethnicities* 136–159 at 146.
- 6 See the recent movie called *Selma* about Martin Luther King and the white officials who used the need to answer questions showing knowledge of the US constitution as a way of keeping black citizens from being able to vote.
- 7 Report of the Electoral Commission on the 2014 General Election, at [56] - [57].
- 8 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [118].
- 9 Communications with the Chief Electoral Officer, Electoral Commission, September 2015.
- 10 Democracy Services *Comparison of Voters and Non-voters: Results from the General Social Survey 2013* (Auckland Council, January 2015) at 3.
- 11 Democracy Services *Comparison of Voters and Non-voters: Results from the General Social Survey 2013* (Auckland Council, January 2015) at 3 and 4.
- 12 Statistics New Zealand "QuickStats about culture and identity: Languages spoken" (2013) <www.stats.govt.nz>.
- 13 W Friesen *Asian Auckland: The Multiple Meanings of Diversity* (Asia New Zealand Foundation, February 2015) at 43.
- 14 Electoral Commission *Statement of Intent for 2014/15–2020/21* at 7.
- 15 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at 22.
- 16 Justice and Electoral Committee *Inquiry into the 2013 Local Authority Elections* (25 July 2014) at 4.
- 17 Justice and Electoral Committee *Inquiry into the 2013 Local Authority Elections* (25 July 2014) at 5.
- 18 Anne Henderson *Immigrants and Electoral Enrolment: Do the Numbers Add Up?* (Statistics New Zealand Working Paper No 13-01, January 2013) at 8.
- 19 Statistics New Zealand *Non-voters in 2008 and 2011 General Elections: Findings from New Zealand General Social Survey* (2014).
- 20 Statistics New Zealand "2013 Census ethnic group profiles" <www.stats.govt.nz>.
- 21 See, for example, M Chen *Public Law Toolbox* (2nd ed, LexisNexis, 2014), ch 28.
- 22 See, for example, Democracy Services *Comparison of Voters and Non-voters: Results from the General Social Survey 2013* (Auckland Council, January 2015) at 3 and 4.
- 23 For example, the 2013 Census noted that 87,534 people did not speak English at all.
- 24 Of New Zealanders who did not vote in the 2011 General Election, 7.1 per cent gave as their reason for not voting: "I didn't think it was worth voting because my vote wouldn't have made a difference," and 7.0 per cent, "I didn't think it was worth voting because it makes no difference which party is in government".
- 25 Sections 6, 7 and 9 of the Citizenship Act 1977 respectively.
- 26 The role of the Electoral Commission is covered in more detail in Mai Chen *Public Law Toolbox* (2nd ed, LexisNexis, 2014), ch 5, from which this section is adapted.
- 27 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at ii and 51.
- 28 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [96].
- 29 Communications with the Chief Electoral Officer, Electoral Commission, September 2015.
- 30 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [182].
- 31 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [122].
- 32 Communications with the Chief Electoral Officer, Electoral Commission, September 2015, and with Electoral Commission staff in July 2015.

- 33 Report of the Electoral Commission on the 2014 General Election at [56] – [57].
- 34 *Report of the Electoral Commission on the 2014 General Election* (March 2015) at [118].
- 35 Email from the Electoral Commission (29 July 2015).
- 36 Communications with the Chief Electoral Officer, Electoral Commission, September 2015, and with Electoral Commission staff in July 2015.
- 37 *Hansard*, vol 310, p 2840.
- 38 *Hansard*, vol 310, p 2843.
- 39 *Hansard*, vol 310, p 2850.
- 40 Electoral Act 1927; Legislature Act 1908; Electoral Act 1905; Electoral Act 1902; Electoral Act 1893; Regulation of Elections Act 1881; Regulation of Elections Act 1870; Regulation of Elections Act 1858.
- 41 Or, in the case of a tangata whenua vote cast under reg 22 of the Electoral Regulations 1996, a polling place for a general electoral district has not also been appointed a polling place for a Māori electoral district.
- 42 The now-repealed Local Elections and Polls Act 1976 made similar provision:
- 36 *Blind, disabled, or illiterate voter*—
- Where any elector—
- (1) [...]
- (c) is not sufficiently familiar with the English language to vote without assistance, and the “Directions to Voter” section of the voting paper is not translated into any other language with which he is sufficiently familiar to enable him to vote without assistance, –
- the elector may vote in accordance with this system.
- (2) At the request of any voter who has received a voting paper and is wholly or partially blind, any person nominated by the voter, or if no person is nominated, the Deputy Returning Officer, shall assist the voter to mark the voting paper in accordance with the instructions of the voter...
- 43 Sections 53A and 53B of the Citizens Initiated Referenda Act 1993.
- 44 “Referendum material” is defined in s 5 of the New Zealand Flag Referendum Act 2015 as “material that is prepared by a panel and presented to electors for the purpose of informing them about each of the options”.
- 45 Email from the Flag Consideration Project (8 October 2015).
- 46 Email from the Flag Consideration Project (8 October 2015).
- 47 See, for example, *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) in respect of s 20 and the decision of the High Court in *Child Poverty Action Group Inc v Attorney-General* HC Wellington CIV-2009-404-273, 25 October 2011, Dobson J sitting with Ms J Grant and Ms S Ineson.
- 48 *Taylor v Attorney-General* [2015] NZHC 1706.
- 49 *Taylor v Attorney-General* [2015] NZHC 1706 at [2].
- 50 *Taylor v Attorney-General* [2015] NZHC 1706 at [76].
- 51 *Taylor v Attorney-General* [2015] NZHC 1706 at [77(a)].
- 52 *R v Hansen* [2007] NZSC 7.
- 53 *Hoogbruin v Attorney-General of British Columbia* (1985) 24 DLR (4th) 718, [1986] 2 WWR 700, 70 BCLR 1, 20 CRR 1 (BC CA).
- 54 *Henry v Canada (Attorney-General)* 2014 BCCA 30 at [104].
- 55 *Taylor v Attorney-General* [2015] NZHC 1706 at [78].
- 56 The High Court held in *NRHA v Human Rights Commission* [1998] 2 NZLR 218 (HC) that s 19 prohibits both direct and indirect discrimination.
- 57 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA).
- 58 *Mendelssohn v Attorney-General* [1999] 2 NZLR 268 (CA) at [14].
- 59 *A Bill of Rights for New Zealand: A White Paper* (1985) AJHR A.6 at [384].
- 60 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [9].
- 61 UNHRC *General Comment 23 – Article 27* UN Doc HRI/GEN/1/Rev 1 (1994) at [5.1]–[5.2].
- 62 *King-Ansell v Police* [1979] 2 NZLR 531 (CA) at 538.
- 63 *Mandla v Dowell Lee* [1983] 2 AC 548 (HL).
- 64 See the comments of Judge Moore in *Police v Taurua* [2002] DCR 306 (DC) at [50].
- 65 International IDEA: Institute for Democracy and Electoral Assistance “Voter turnout data for Denmark” available: <http://www.idea.int/vt/countryview.cfm?id=63> (last accessed 25/09/2015).
- 66 Greater London Authority Elections Rules 2007, rr

- 24(4)(a), schd 1, 24(4)(a), schd 2, 23(4)(a), schd 3, 24(4)(a), schd 6, and 23(4)(a), schd 7.
- 67 Greater London Authority Elections Rules 2007, rr 29(2), schd 1, 30(2), schd 2, 29(2), schd 3, r 30(2), schd 6, and 29(2), schd 7.
- 68 Max Planck-Gesellschaft "New social diversity in global cities" (2 April 2015).
- 69 Frank Goh, Senior Director of the Prime Minister's Office in Singapore, email of 30 September 2015.
- 70 *Figueroa v Canada (Attorney General)* [2003] 1 SCR 912 (SC).
- 71 Proceedings of the Standing Committee on Rules, Procedures and the Rights of Parliament, Issue 3, Evidence (1 June 2005).



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