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**MMP AND THE NEW ZEALAND
CONSTITUTION:
HOW THE ADVENT OF A PROPORTIONAL
REPRESENTATION ELECTORAL SYSTEM HAS
ALTERED THE RELATIONSHIP BETWEEN THE
LEGISLATIVE AND EXECUTIVE AND
EXECUTIVE BRANCH OF GOVERNMENT.**

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I INTRODUCTION

The 1993 general election in New Zealand was a landmark occasion. Not only was it a tightly contested electoral race that saw the National Party returned to power with a majority of just one vote, it also saw New Zealanders vote to introduce an entirely new voting system for future elections – the old ‘First-Past-the-Post’ (FPP) system would be replaced by a Mixed Member Proportional system (MMP).

The reasons for this outcome can be simply stated. A Royal Commission inquiry conducted 7 years earlier had recommended that New Zealand consider a new voting system, with MMP being its preferred option.¹ FPP had long been seen to disadvantage parties other than National and Labour, however the outcome of both the 1978 and 1981 elections, where Labour lost to National despite winning more votes nationwide, had increased sentiments of discontent with the existing system. Change was in the air for the electoral system; it remained to be seen how this would impact on the New Zealand political scene.

Almost twelve years later, as New Zealand approaches its fourth election under MMP, it seems timely to assess the implications that this new system has had on the New Zealand constitution. This paper presupposes that the advent of a new voting system in New Zealand has indeed changed our constitution – and yet the formal constitutional structure appears largely unaltered. There were, for example, no amendments made to the Constitution Act 1986 to recognise the new voting system. The constitution of New Zealand is a political one - in the absence of a single legal document outlining the rules of the constitution, and a judiciary with the power to enforce them, the operation of New Zealand’s constitution is largely determined by political actors. As one political commentator puts it; “A constitution is a political matter in its substance and a

¹ The Royal Commission on the Electoral System “Towards a Better Democracy” [1986] AJHR H3.

legal matter only in its form.”² For this reason, a change in voting system, and hence in the way that our political leaders are chosen, cannot but have an impact on the constitutional framework of New Zealand, in practice if not on paper. Part II of this paper looks briefly at the characteristics of the constitution, and outlines the particular characteristics that dominated prior to the 1993 referendum in which New Zealanders voted for a new electoral system. Part III then describes the Mixed Member Proportional system that was introduced. Part IV goes on to consider the constitutional implications of the new system for the legislative branch of Government, while Part V addresses the impact on the executive branch. Throughout, the changes in the relationship between the two will be explored. As one of the primary criticisms of FPP was that it allowed too much power to be concentrated in the executive branch, the paper focuses on the ways in which MMP has acted as a check on the executive, through an increase in scrutiny by the legislature, and in the changing nature of Cabinet.³ As constitution-making does indeed take place at the interface between politics and law,⁴ a change in the way in which political actors are chosen and legitimised must be acknowledged as affecting the constitution. This is especially true when the change has such an impact on the balance of power between political and Governmental institutions. Finally, Part VI looks at what MMP means for New Zealand as a Parliamentary democracy.

This paper postulates that MMP does have the potential to have a considerable impact on the way in which the New Zealand Constitution operates on a day-to-day level. The extent of the shift in power during each parliamentary term depends on the outcome of each election. In particular, the amount of support enjoyed by the governing party or parties in the House of Representatives will dictate the extent to which the executive can dominate the legislative programme. Where an election results in a minority Government that relies on other parties for support, the need for negotiation and compromise within the House will strengthen the power of the legislative branch. Where a

² Colin James “The Political History and Framework” (Building the Constitution Conference, Wellington, 7-8 April 2000).

³ For further reading in this area see Rt Hon Sir Geoffrey Palmer “To what extent has MMP reduced the powers of the executive in New Zealand” (Paper Presentation to the 5th Public Law Forum, Wellington 24-25 March 2003).

⁴ B V Harris “The Constitutional Future of New Zealand” (2004) NZLR 269, 273.

coalition results, intra-executive politics will play a larger role in determining the manner in which Government policies are decided upon, pursued and implemented. Where this coalition is also a minority, the need for power sharing and negotiation will be still greater. The rhetoric of MMP claims that it places more power in the hands of New Zealand voters. In reality, it gives more power to an increased number of political actors, but political pressures will oblige these actors to have an increased regard to the wishes of the voting public.

II THE NEW ZEALAND CONSTITUTION

A The Legal Framework

New Zealand is often considered unusual in that it has no one written constitutional document that can be called ‘The Constitution’.⁵ This is not to say that New Zealand does not have a constitution, or that no parts of it are written down. Rather the New Zealand constitution is a peculiar amalgam of written and unwritten principles, emanating from a wide array of sources.

The formal Constitutional framework is set out in the Constitution Act 1986. This allows for three branches of Government: Parliament (consisting of the Sovereign and the House of Representatives), an Executive Council, and a judiciary. However the Constitution Act makes no mention of some fundamental institutions of Government, such as Cabinet, and overstates the actual real powers of other actors, such as the Governor-General. It does not definitively cover all aspects of the New Zealand constitution. Further, the Constitution Act is merely descriptive of some of New Zealand’s constitutional structures and principles, rather than being their source.⁶

Constitutional principles are also found in the common law, in other important statutes (for example the Ombudsman Act 1975, the Public Finance

⁵ Only the United Kingdom and Israel are in a similar position.

⁶ Philip Joseph “The Legal History and Framework of the Constitution” in Colin James *Building the Constitution* (Victoria University of Wellington, Institute of Policy Studies, Wellington, 2000) 168, 170.

Act 1989, and the Bill of Rights Act 1990), in court decisions and, importantly, in non-justiciable constitutional conventions.⁷

B Constitutional Conventions

Constitutional conventions play a crucial role in the operation of the constitution. Conventions are non-legal rules of a political or constitutional nature,⁸ accepted norms which regulate constitutional behaviour. They are non-justiciable, and are binding on political actors to the extent to which they (collectively) feel themselves to be bound. Conventions flesh out the legal skeleton created by legislation and fundamental constitutional principles, to fill the gaps, as it were, and to ensure that the principles may be applied in practice. The Supreme Court of Canada has recognised the importance of conventions in coining the equation: “constitutional conventions plus constitutional law equal the total constitution of the country.”⁹

There is however no definitive way to define what is or is not a constitutional convention, as they are constantly evolving to adapt to changing circumstances. Breach of a constitutional convention will be met with political, rather than legal, consequences. If there are no ramifications for what should be a breach of a convention, perhaps that convention will come to be regarded as unnecessary and will wither away, while new conventions will rise up to take its place in meeting the new demands of the political scene. While the flexible nature of our Constitution means that most changes may be made by an ordinary statute of Parliament, still more changes may evolve gradually at the level of constitutional conventions. The advent of MMP has necessitated the evolution of several key constitutional conventions, several of which will be considered below.

⁷ For further reading see Philip Joseph *Constitutional and Administrative Law in New Zealand* (2ed, Brookers, Wellington, 2001) Chap 5 “The ‘Unwritten Constitution’”; Palmer and Palmer *Bridled Power: New Zealand’s Constitution and Government* (4ed, Oxford University Press, Melbourne, 2004) 4-6.

⁸ Morag McDowell and Duncan Webb *The New Zealand Legal System: Structures, Processes and Legal theory* (3ed, Butterworths, Wellington, 2002) 140.

⁹ *Reference re Questions Concerning Amendment of Constitution of Canada* [1981] 1 SCR 753, para 263.

The electoral system, in determining many of the actors who inhabit our constitutional scene, also plays a fundamental constitutional role. The significance of the voting system may be evidenced by the fact that the provisions of the Electoral Act 1993 which relate to the method of voting are among the few provisions on the New Zealand statute books to be in any way entrenched, requiring a majority of 75 per cent in the House of Representatives, or the support of a majority of votes cast in a general referendum.¹⁰ Prior to the passing of this Act, New Zealand's electoral system was governed by the Electoral Act 1956, and consisted of a first-past-the-post system, whereby the voters in each constituency elected a candidate, and the party with the most candidates nationwide formed a Government. The three major characteristics of an FPP system of voting are:

- 1) two-party dominance;
- 2) disproportionate representation in Parliament;
- 3) single-party, majority Government.

I *Two-party dominance*

FPP systems of voting promulgate two-party political environments.¹¹ Candidates are elected at a constituency level, but it is the party with the most elected candidates which will be able to form a Government. In New Zealand, the National and Labour parties were the dominant players. Minor parties did not offer a realistic choice for voters, as they were never going to win enough seats to govern. If voters were unhappy with the status quo come election time, they may have seen their best option as being to vote for the candidate from the major Opposition party, as the only party likely to be able to win enough electoral seats nationwide to oust the current Government. A pragmatic

¹⁰ Electoral Act 1993, s 268, entrenching s 168.

¹¹ A Lijphart *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999) 165, cited in Peter Aimer "The Changing Party System" in Raymond Miller (Ed) *New Zealand Government and Politics* (2ed, Oxford, Auckland, 2001) 271, 271.

approach was necessary, even if voters might have preferred another candidate to be their representative in Parliament.

2 *Disproportionate representation*

Because the make-up of Parliament was determined by the outcome of regional constituency votes, the number of seats that a party was allocated in the House was seldom proportionate to the percentage of the popular vote that party (or rather, their candidates) actually received. This was exacerbated by the tendency for constituency seats to be won by candidates from one of the two main parties. National and Labour were invariably over-represented in Parliament, while smaller parties were under-represented. The results of the 1981 election provide a clear example – the National and Labour parties between them received only 77.8 per cent of the popular vote but won 97 out of the 99 constituency seats; while the Social Credit Party received 20.7 per cent of the votes, yet won only 2 seats in the House (2.2 per cent of the House). Under FPP, candidates from smaller parties rarely had a real chance of winning a constituency seat. A vote cast for one of these minor candidates was often seen to be ‘wasted’, perpetuating the entrenched dominance of two major political parties on the country’s political scene. However, the system could also act to the detriment of the dominant parties – in both the 1987 and the 1981 elections, more votes were cast nationwide for candidates from the Labour party, yet the National party won more seats, and the right to govern.

3 *Single party, majority Government*

Under FPP, it was almost guaranteed that one party would win a majority of seats in Parliament, and thus be able to form a strong majority Government. The senior members of the largest party represented in the legislative branch would form a committee of Ministers to carry out the executive functions of Government – the Cabinet. When Bagehot described the secret of efficiency under the Westminster system as being its “fusion” of

legislative and executive,¹² he was referring to a Cabinet arising out of a plurality system of voting such as FPP.¹³ As Cabinet dominated the governing party's Caucus, and Caucus dominated the House, Cabinet was virtually assured of being able to pass legislation implementing any policy it liked.¹⁴ However, as the governing party rarely represented a majority of voters, and as the plurality system was seen to disregard the interests of minorities and to disadvantage smaller political parties, voices began to call for a change in electoral system, finally resulting in the adoption of MMP in 1993, to come into effect at the 1996 election.

III MMP: THE NEW WAY

A The MMP Process

On 6 November 1993, New Zealand voters at the general election were given the opportunity to vote in a referendum to decide electoral system to be used in future elections. The results were clearly in favour of a new Mixed Member Proportional system of voting, or MMP.¹⁵ Thus, the 1993 election was the last election to be held under the pluralist, 'first-past-the-post', system. The new MMP electoral system became the only constitutional foundation of the New Zealand system of Government to have ever been formally mandated by the people.¹⁶

Under MMP, each voter receives two votes – one is for a candidate from their electorate, while the other is for the party of their choice. In each electorate, the candidate who receives the most votes is elected to the House of Representatives, as under the former FPP system. However it is the party, or list,

¹² Walter Bagehot *The English Constitution* (Fontana, London, 1963) 65.

¹³ Matthew Palmer *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* (JSD Dissertation, Yale Law School, 1993) 79.

¹⁴ Palmer and Palmer, above n 7, 10.

¹⁵ MMP received 53.9 per cent of votes cast, with a voter turn-out of 82.6 per cent of registered electors: Jack Vowles and others *Towards Consensus?* (Auckland University Press, Auckland, 1995) 175.

¹⁶ B V Harris, above n 4, 278.

vote which decides the composition of the House. Each party receives a number of seats proportionate to the number of list votes it gains – the number of electorate seats won by each party is first taken into account, and is then topped up by candidates from the party list to make up the correct number of seats. A party must, however, win at least 5 per cent of the vote to be awarded its proportion of seats, to avoid a proliferation of small parties in the House, which might lead to instability. This threshold is waived if a party wins at least one electorate seat, in which case it is awarded its percentage of the party vote, even if this is below 5 per cent of the total.

B Has There Been Any Constitutional Change?

The advent of MMP has undoubtedly wrought many a change on the political landscape of New Zealand, but to what extent are these changes constitutional? [A change of electoral system does not change, for example, the fact that New Zealand is a parliamentary democracy, based on the rule of law, nor that the power of Government is divided between three distinct branches, each with its own duties and responsibilities. It does not, in short, affect the skeletal framework of Government.]

One *might* argue, that the new electoral system has changed our political system, but has not in any way altered the constitution. Such a view would interpret a constitution as comprising a purely legal framework of principle and rules. The only real legislative impact of MMP has been the redrafting of the Electoral Act 1993, only a few provisions of which actually refer to the method of voting itself. This might seem insufficient to deserve being labelled a constitutional change. But the idea of ‘constitution’ encompasses more than just the institutions and regulations around which a State is centred. It includes the processes behind the rules, and the relationships that dominate the operation of Government in a practical sense.¹⁷ As New Zealand has no constitutional court to act as the final arbitrator over constitutional questions, it is often political actors who, through their actions, determine what our constitution is. The

¹⁷ See Palmer and Palmer, above n 7, 4.

choice of political actors is therefore instrumental in determining how the constitution will develop to meet the changing demands of the political arena.

The advent of MMP has been described by commentators as the “most substantial change to the constitution since the enactment of the New Zealand Bill of Rights Act 1990.”¹⁸ It introduces the possibility of voting directly for one political party and its policies, as well as for an individual constituency candidate. The purpose of the party vote is to ensure that the composition of the House accurately reflects the level of support that a political party enjoys. For the first time, it is possible for parties to gain representation in the House without having a single candidate win a constituency seat. This opens up the political playing field to include a much broader spectrum of players, and removes the duopoly on representation previously enjoyed by the Labour and National parties. More importantly, however, MMP has changed the dynamics of Parliament, and, by implication, of Government. Parliament now exercises more power in the governmental system, and has the potential to greatly check the power of the executive Government.

MMP poses such constitutional questions as: Is New Zealand truly a democratic nation? How are the primary actors selected? What power do they now wield, or choose not to wield? The answer to the latter question in particular depends largely on the degree of support enjoyed by those in power, and on how secure they feel their position is. A nominal power to act means little if the exercise of that power is constrained in practice. This paper focuses on three main ways in which the constitution has been changed. Firstly, and most obviously, the method of selection of the House of Representatives will lead to a more representative and multifaceted legislative branch. The composition of the House also has a direct impact upon the composition of other legislative functions, such as select committees, which now play a more important role in the legislative process. Secondly, the more equitable distribution of seats among political parties acts as a restraint upon the

¹⁸ B V Harris, above n 4, 282; see also Rt Hon Sir Geoffrey Palmer “The New Zealand Constitution in 2005” (2005) in Jack Hodder (Ed) *New Zealand's Constitutional Arrangements: Where Are We Heading?* (New Zealand Law Society, Wellington, 2005) 1, para5.

governing party or parties, who may now be held more accountable to the legislative. The dynamics within the executive, particularly in cases of coalition Government, have also altered. The changes in the operation of the legislative and executive branches of Government, and in the relationship between them, form the focus of this paper. Lastly, the adoption of MMP has implications for the democratic nature of New Zealand Government.

IV MMP AND THE LEGISLATIVE BRANCH

A *The House of Representatives*

The most direct impact of MMP has been on the composition of the House of Representatives (“the House”), the primary organ of the legislative branch. The Royal Commission of Inquiry cited the likelihood that MMP would result in a more representative House among its primary reasons for recommending the introduction of MMP.¹⁹ It was predicted that MMP would allow more for better representation across society, in particular representation of women, of ethnic minorities, and of diverse political viewpoints. This expectation seems to have been justified. The current Parliament sees 35 women holding seats – a total of 29%, which, while not reflecting the number of women in the population, is at least an improvement on their representation under FPP. There are 19 Maori MPs (including the 7 Maori seats), three Pacific Islanders, and two Asian MPs, including one of the Muslim faith. While Parliament used to be dominated by MPs with a farming background, the most common previous occupation of MPs in the current Parliament is in business, followed by former teachers, lawyers, then farmers, trade unionists and managers or administrators.²⁰ The youngest MP, Darren Hughes, is just 24 years old, while the oldest, Jim Peters, is 68. Such diversity is a great improvement on the composition of the House under FPP, when parties tended to stand middle-of-the-road candidates who would appeal to a broad class of mainstream New Zealand.

¹⁹ The Royal Commission on the Electoral System, above n 1, 50-51.

²⁰ “Composition of Parliament” <www.decisionmaker.co.nz> (last accessed 25 July 2005).

It is, however, questionable whether the mere presence of so-called “minorities” in Parliament really has an impact on their ability to represent other members of those minority groups. Take the example of a ethnically Chinese Member of Parliament – if elected as a constituency MP, he or she is under an obligation to represent all members of that constituency; if as a list member then arguably the obligation is towards voters who voted for the party from whose list he or she was elected. In neither case is there evidence for the proposition that members of the Chinese community in New Zealand, or their particular interests, will be better represented.

Ashraf Choudhary, New Zealand's first South Asian and Muslim MP, is a Labour list MP. Dr Choudhary has faced some difficulties in reconciling the expectations of his party (to whom he owes his seat in Parliament) with the expectations of Muslim New Zealanders. In 2003, for example, Dr Choudhary abstained from voting on the Prostitution Reform Bill, allowing the legislation to decriminalise prostitution to go through with a majority of one vote. In 2004, he again caused controversy amongst the Muslim community by voting in favour of the Civil Union Bill, allowing homosexual as well as heterosexual couples to enter into a legally recognised relationship. Dr Choudhary has since been subjected to criticism for comments he has made regarding Islamic practices of stoning homosexuals on a New Zealand current affairs television show,²¹ comments which Prime Minister Helen Clark was quick to disassociate the party from, and which Choudhary subsequently modified. The power of the political power has not diminished under MMP, and remains paramount in Parliament – although members of a minority group may feel some affiliation to a member who appears to identify with them, in reality MPs are obliged to follow party line in most matters, and even under a conscience vote may be forced to consider the expectations of a wider voting public. The very fact that Parliament seems more representative of a range of New Zealand identities, however, increases its appearance of legitimacy.

²¹ See for example “Some stoning okay says Choudhary” *New Zealand Herald* (5 July 2005).

MMP has increased representation in another more crucial manner – through the representation of different political viewpoints manifested by the various political parties. Whereas under FPP there were generally two, or sometimes three, parties represented, the current Parliament contains members of eight parties.²² As it is the party vote which determines the number of seats each party holds in the House, for the first time small parties have the opportunity to gain seats according to their nationwide support level, without necessarily being obliged to win an electorate seat. Essentially, in choosing to whom to give their party vote, voters are choosing between sets of political policies on a range of issues.²³ Under FPP, there were only two viable options, both of which tended to gravitate towards the middle ground in order to win swinging voters. New Zealand has traditionally had a unidimensional political scene,²⁴ but under MMP, there may be a wide range of ideologies represented. Instead of fitting into the traditional Left-Right spectrum, parties may focus on a particular issue or range of issues, one example being the Green Party with its ecological focus. It is to be hoped the more representative nature of Parliament under MMP will increase public confidence in the democratic process. The impact of MMP on the legitimacy of Parliament in a democratic nation is discussed below in Part VI.²⁵

B More Representative Legislation?

The principle function of Parliament is to enact legislation. While a more representative House may allow for livelier and more diverse political debate, some commentators have submitted that this comes at the cost of efficiency and expediency. The New Zealand Parliament has been described as a “hands-on” one.²⁶ By this is meant that the Government no longer completely controls the legislative programme, and that MPs may have a substantial input

²² Labour, Progressive Coalition, United Future, Greens, National, ACT, NZ First and the Maori Party.

²³ M Laver and K Shepsle *Making and Breaking Governments: Cabinets and Legislatures in Parliamentary Democracies* (Cambridge University Press, Cambridge, 1996).

²⁴ Aimer, above n 11, 273.

²⁵ See Part VI Democracy and MMP.

²⁶ George Tanner, Report of the Parliamentary Counsel Office for the year ending 30 June 2004, 10.

into the design and content of legislation during its passage through Parliament. In particular, the Select Committee stage of the legislative process may lead to extensive revision of a Bill, which, when reported back to the House, may bear little resemblance to the Bill as introduced. The Committee stage in the House may see still further amendments proposed (either by Government or by Opposition members), debated, and accepted. In the year ending 30 June 2005, 127 Supplementary Order Papers suggesting amendments to Bills before the Committee of the Whole House were introduced, all of which had to be then considered and voted upon. Deputy Chief Parliamentary Counsel Geoff Lawn has questioned the impact of MMP on the efficiency of the legislative process, claiming that it is now harder for Parliamentary Counsel to draft legislation that conveys a clear and consistent policy design, owing to the increased amount of political negotiation that is necessary, in some cases right up to and including the Committee of the Whole House stage.²⁷ In general, the legislative process under MMP is subject to much more intense scrutiny than under FPP, however, in some cases the political negotiations may simply result in an Act which fails to implement the desired policy because of the need to compromise in order to gain support for its passage through Parliament.

The new tendency for amendments to Bills to be made after introduction has other implications for the quality of legislation passed. It affects, for example, the ability of the Attorney General to vet Bills for compliance with the Bill of Rights Act 1990, as required by section 7 of that Act. As Bill of Rights vets are completed before a Government Bill is introduced to the House, any suggested amendments by the Select Committee, or amendments introduced through a Supplementary Order Paper at the Committee of the whole House stage, risk being in conflict with the Bill of Rights without attention being drawn to this fact. At a lower, but still very real, level of concern, the number of changes to legislation being made under intense time restraints may lead to mistakes, which cannot then be changed after the third reading. Only mistakes of a typographic or formatting nature may be rectified before the assent copy of a Bill is signed. Any other mistakes, even if noticed at the time, may only be

²⁷ Geoff Lawn "Improving Public Access to Legislation" (Public Law Conference 2001, Wellington, 4 April 2001).

corrected through subsequent legislation. A possible cure to these MMP maladies might be to allow a Minister to call for a Bill which has been subject to changes in the Committee of the whole House to be resubmitted to Committee without putting this to the vote.²⁸ This would allow the amendment provisions to be rechecked in light of the policy of the Bill as a whole, leading to more coherent legislation, as well as ensuring that the amendment provisions do not cause any issues of compatibility with the Bill of Rights Act. As the legislative process stands, the legislation produced by an MMP Parliament may be more *acceptable* in a democratic sense but may not be any *better* than that produced under FPP. The production of clear and consistent legislation is one of the vital roles of a Parliamentary democracy. While not suggesting that this is under threat in New Zealand, this author submits that changes could be introduced at a procedural level to safeguard the ability of Parliament to ensure that all amendments to legislation have gone through the necessary checks.

Until 2003, the legislative output since the introduction of MMP had dropped by about one-third compared with the rate under FPP, prompting reassurances that “New Zealand [was] no longer the fastest law-maker in the West”.²⁹ This could be interpreted as a sign of the House taking back its role of giving legitimacy to the laws which it believes should be passed, and in the form that it believes will be acceptable to the majority of voters, rather than the Government having unchecked power to determine the content of all legislation. Under an MMP system of elections, there is an increased likelihood of either a coalition or a single party minority Government. In the case of a coalition, political power is shared with the minor partner in the coalition, often disproportionately to the actual amount of representation they have in the House. However the power of Government does remain within the coalition agreement, with little power being devolved upon other parties in the House.³⁰ In the case of a minority Government, however, minor parties in the House become more politically effective, as the governing party will be forced to negotiate support

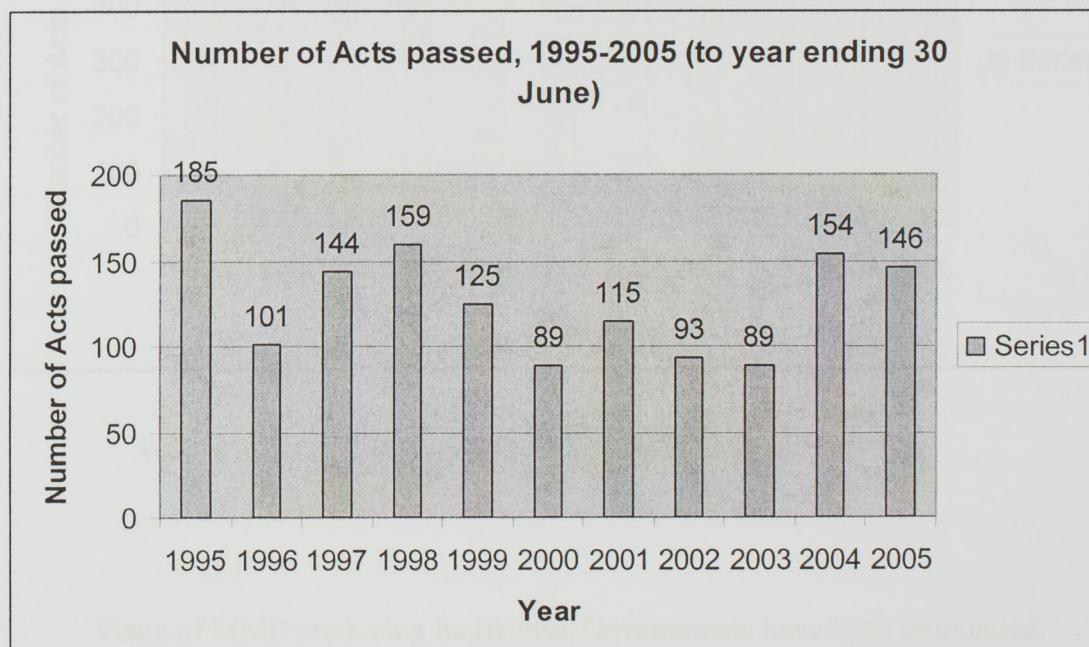
²⁸ See Tanner, above n 26, 40.

²⁹ Palmer and Palmer, above n 14, 371.

³⁰ Steven Condie *Impact of MMP on Select Committee Scrutiny of Legislation* (LLM Research Paper, Victoria University of Wellington, 1996) 2.

for their policies.³¹ The balance of power under MMP will depend, then, on whether the Government of the day enjoys majority support in the House, or whether it relies on another party, or parties for support. The present Government, for example, has received an undertaking of support on confidence in supply from the United Future Party,³² but will still be obliged to negotiate with both United Future and with their alternative supporting party, the Greens, over areas of particular interest to them to gain support for individual legislative policies. Whether or not a Government is able to implement its legislative policies depends on political negotiation

MMP guarantees a decrease in neither the amount of legislation, nor the speed with which it is passed. The following graph shows that, allowing for the three year legislative cycle around election years, the number of Bills passed under MMP steadily decreased for several years, but has begun to rise again the past two years:

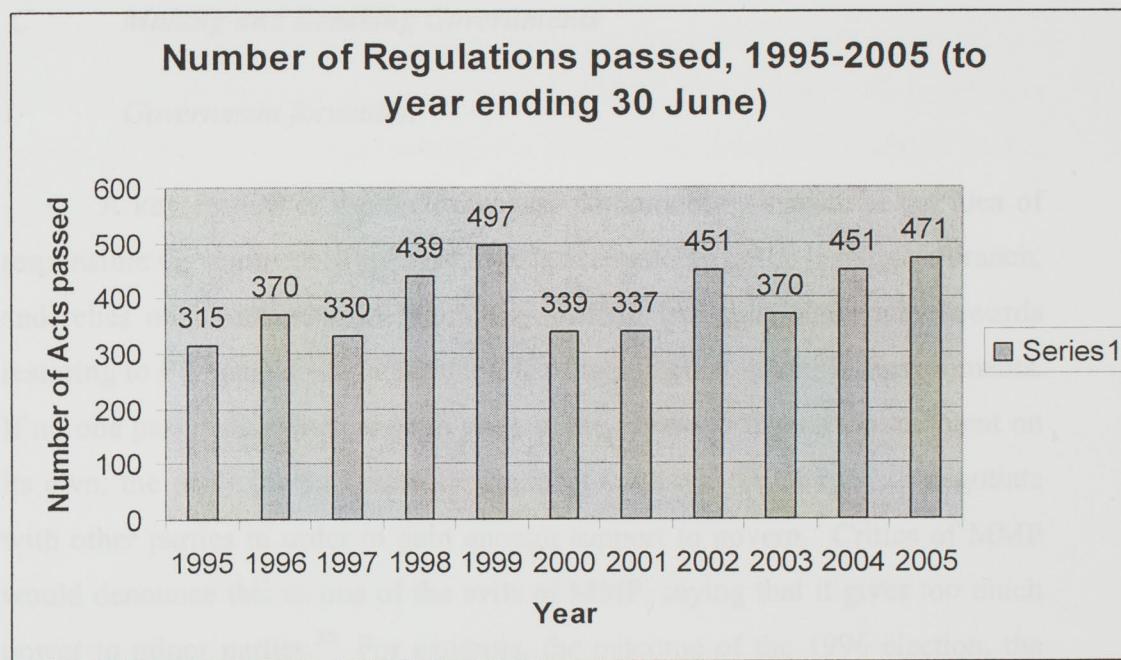


Note: General elections were held on 12/10/96, 27/11/99 and 27/07/02

³¹ Steven Condie, above n 30, 2.

³² Agreement for Confidence and Supply between the Labour/Progressive Government and the United Future Parliamentary Caucus (8 August 2002) ("Agreement for Confidence and Supply").

Still, even with this recent increase, it is clear that MMP has curbed the ability of the Government to pass Government Bills. One concern in this regard is that a Government may compensate for the new difficulty in passing primary legislation, by enacting an increased number of regulations. Contrary to popular assumptions, the number of regulations, although slightly higher, has not skyrocketed in relation to the amount of primary legislation passed. In the years ending in June 2000 and 2001, both the number of Acts and the number of regulations were lower than in the preceding two years. In general, however, there has been a steady increase:



Note: General elections were held on 12/10/96, 27/11/99 and 27/07/02

Fears of MMP producing ineffective Governments have been unfounded: a strong Government still has the ability to pass the measures it wants to. But, in cases of a minority government, there may still be a temptation to provide for more delegated legislation, to circumvent the lengthening process of passing through primary legislation. Parliament now sits on fewer days than it used to, and it takes longer to pass Bills through the processes of the House, particularly matters that do not carry any strong political weight, or attract a lot of media

interest. That said, the process of taking Bills under urgency still allows a Government to push through a particular policy issue rapidly, especially during the last stages of the Bill. This could be seen in the recent passage of the Foreshore and Seabed Act 2004. Changes made by Supplementary Order Paper to this Bill were accepted and passed without being subject to further scrutiny by Select Committee, the public, or even, to any real extent, by other political parties.³³ A greater level of inter-party consultation and negotiation is necessary to ensure that the Government has the numbers for its proposals, but these negotiations are usually carried out before a Bill is ever introduced to the House.³⁴

C *Making and Breaking Governments*

1 *Government formation*

A key feature of the New Zealand parliamentary system is the idea of responsible Government – the executive is accountable to the legislative branch, and relies on its support for legitimacy. MMP has gone some way towards restoring to Parliament its traditional role of making and breaking Governments. If no one party has gained enough seats in the House to form a Government on its own, the party (or parties) with the most seats will be obliged to negotiate with other parties in order to gain enough support to govern. Critics of MMP would denounce this as one of the evils of MMP, saying that it gives too much power to minor parties.³⁵ For example, the outcome of the 1996 election, the first under MMP, gave 44 seats to the National Party, and 37 seats to Labour. The balance of power was held by the New Zealand First Party, with 17 seats. After a lengthy period of negotiation, New Zealand First entered into a coalition with National, despite having indicated prior to the election that it was more likely to enter a coalition with Labour, and indeed having campaigned on the basis that a vote for New Zealand First would see National removed from Government. In this scenario, many of those who voted for New Zealand First

³³ Professor Jim Evans and Richard Ekins, Submission to the Constitutional Arrangements Committee of Parliament (April 2005).

³⁴ See McDowell and Webb, above n 8, 78-80.

³⁵ See for example Graeme Hunt *Why MMP Must Go – the Case for Ditching the Electoral Disaster of the Century* (Waddington Press, Auckland, 1998).

ended up with what they had thought they were voting against – a National-led Government. With such an outcome, there is a danger of voters returning to the FPP, two-party mentality: the only way to oust a Government is to vote for the other large party, as any small party could mislead voters as to their intentions post-election, and thus misuse the power they have been given.

Smaller parties are now tending to structure their election campaigns around how successfully they could enter into a coalition Government with one of the larger parties. The real issue for voters is portrayed as being not which party will gain the most seats in parliament, but rather what minor parties will be there to support them, and what the relationship between these parties will be. United Future, for example, is campaigning for the 2005 election on its proven ability to work together with either National or Labour, providing the best option for voters who want to ensure a secure and stable Government.³⁶ NZ First, meanwhile, has made it clear that if it were in a position to form a coalition, it would not feel bound to give support to the party that won the most votes, but would rather choose to support the party with which it could negotiate the best deal after the election.³⁷ Should parties then be obliged to give some indication prior to an election as to which parties they would be willing to form a Government with? And should they be obliged to carry through with these indications, once voiced? It is submitted that this is an area which is best left to the pressures of the political arena to regulate, rather than any legal rule. Both the formation and maintenance of Government is an essentially political process, which cannot be regulated through an obligation to uphold promises made before the outcome of an election is known. Even if parties were under an obligation to determine their coalition partners pre-election, there is no guarantee that the Government thus formed would survive the full, three-year, parliamentary term. The process of forming a Government immediately after an election must be left to the leaders of the political parties represented in the House – those with the greatest number of seats, and those with the requisite numbers to act as a ‘support’ party. In many European parliamentary democracies, the Head of State will appoint an *informateur* to investigate what

³⁶ “United Future an ally in stability” <www.stuff.co.nz> (last accessed 8 June 2005).

³⁷ “NZ First gets in first with campaign launch” <www.stuff.co.nz> (last accessed 8 June 2005).

Government formation would be most viable, and on the *informateur's* recommendation will then appoint a *formateur* to go about the process of forming a Government. This is often, but not always, the leader of the largest party. Former Governor General Sir Michael Hardie Boys, when faced with question of how Governments would be appointed under MMP, made it very clear that it would continue to be a purely political process, and that no *formateur* as such would be appointed until political negotiation had made it clear which combination of parties would be likely to be able to form a viable Government.³⁸

2 *Maintaining a stable Government*

Once a Government is formed, it will need to ensure it can maintain unity and cooperation within itself, and, in the case of a minority Government, also retain the support of any smaller parties it may be relying on for confidence and supply. Here again, increased negotiation and willingness to compromise will be required – the governing party will not be able to simply rely on being able to implement their policy initiatives without amendment. A Cabinet Government owes its existence to the continued support of a majority of legislators.³⁹ This may not mean that the legislature considers the existing Cabinet to be the ideal Government, but rather the one that is the best out of all viable options. From an inverse perspective then, “a Cabinet remains in office as long as a majority of legislators cannot agree on a preferred alternative Cabinet.”⁴⁰ Although a Government, once in office, exercises considerable power in matters of policy development and legislative direction, it does so at the pleasure of the legislature. Traditional theories of Parliamentary democracy

³⁸ Rt Hon Hardie Boys “The Role of the Governor-General under MMP” (Speech to the Annual Dinner of the Institute of International Affairs, Wellington, 24 May 1996); Rt Hon Hardie Boys “Continuity and Change: The 1996 General Election and the Role of the Governor-General” (1997 Harkness Henry Lecture, University of Waikato, 31 July 1997) (1997) 5 Waikato LR 1. For further reading see also Caroline Morris *The Governor-General, the Reserve Powers, Parliament and MMP: A New Era* (LLB(Hons) Legal Writing Requirement, Victoria University of Wellington, 1994).

³⁹ M Laver and K Shepsle (Eds) *Cabinet Ministers and Parliamentary Government* (Cambridge University Press, Cambridge, 1994) 3 (“Cabinet Ministers and Parliamentary Government”).

⁴⁰ Laver and Shepsle, above n 23, 49.

assume that the executive is controlled by the legislature,⁴¹ but the overlap in membership between the two branches means that the extent to which this is true depends on the mathematics of Government formation. Under a single-party, majority Government, as was the norm under FPP, the governing party also controls numbers in the House, and will hence be unlikely to lose a vote of confidence in its right to govern. If two or more parties constitute a majority Government, the Government can be presumed to control the House and its legislative programme as long as the coalition agreement holds strong. In other words, the majority of legislators are bound to parties which have entered into an agreement to govern with each other. However, a minority Government cannot take for granted the support of the House.

3 Challenges for minority Government

Under a minority Government, the Government's support partner(s) may do more than just make or break the Government – they also have the potential to mould it, at least to a small extent. Not only may the legislature chose the Government which it finds most palatable from the viable options available to it, it may also dictate some of the terms upon which it will give its support to the Government chosen. Thus, a smaller party may say then it will guarantee its support to a minority Government *on the condition that* certain promises are upheld, or certain policies pursued. Under the current support agreement between the Government and United Future, the United Future guarantee is dependant on the Government including several of United Future's primary policies in its legislative programme. Smaller parties are not going to be able to dictate the main thrust of a Government's agenda, but may be able to shift some of the focus in the direction desired by them, or away from a direction they do not condone. United Future, for example, secured an undertaking from the Government that it would not change the legal status of cannabis in this parliamentary term,⁴² which, while not a specific Labour Party policy, might potentially have been used as a bargaining tool when dealing with the alternative support party, the Greens.

⁴¹ See *Cabinet Ministers and Parliamentary Government*, above n 39, 4.

⁴² Agreement for Confidence and Supply, above n 32, 1.

D Select Committee Scrutiny

I Legislative Scrutiny

When compared with other Parliamentary democracies, New Zealand possesses few constitutional safeguards against the abuse of Parliamentary sovereignty. We have no supreme law Constitution, no constitutional Court to review legislative and executive action, and, since 1950, no Upper House to check the passage of legislation through the House. The New Zealand select committee process acts as an internal check on the legislative branch, similar to the function exercised by Upper Houses in other jurisdiction.⁴³ The practice that Bills be referred to a select committee for scrutiny and comment is comparable to the second tier of scrutiny which an upper House would carry out. However, a select committee has no power to veto a proposal, or even to enforce amendments. Select committee approval is likewise not a pre-requisite for the passing of a Bill.

Most Bills are referred to a select committee after their first reading, where they are subject to public submissions and scrutiny. Select committees in New Zealand have the power to make substantial changes to a Bill, although these changes are of course subject to subsequent approval by the House. Usually, the suggestions that are submitted in a select committee report will relate to the detail of a legislative proposal, rather than the policy behind it, as this will already have been the subject of inter-party dialogue and negotiation. Sometimes, however, the careful consideration of a piece of legislation may clarify what the policy behind the proposal is. Recommendations of the Committee can also guide a Government proposal in a direction which takes into consideration the views of the public, to make the final product seem more acceptable. An example of a Bill which underwent severe select committee scrutiny is the Relationships (Statutory References) Bill, the companion to the Civil Union Bill. The purpose of the Bill was to give effect to the Civil Union

⁴³ Palmer and Palmer, above n 14, 371.

Bill across the statute books, and to amend existing legislation which contained unjustifiable discrimination on the grounds of marital status or sexual orientation, by including references to civil unions and de facto relationships alongside references to marriage. The committee was faced with the task of working through approximately 180 pieces of legislation – in each individual case they considered whether the proposed amendments were in keeping with the intention of the statute or regulation being amended.⁴⁴ The committee came to the conclusion that giving civil union and de facto relationship partners the same rights and obligations and married partners in *every* case might be contrary to specific legislative purposes, or simply unnecessary to accomplish the real aim of eliminating discrimination. They also recommended that, even where identical rights and obligations were given, the terminology used in each case should still distinguish between civil union partners and married partners, to reflect the views of members of the public who did not want to see the status of marriage undermined. Although the recommendations of the committee made little difference to the core policy of the initial proposal, they did clarify that the policy was not to equate all types of relationships, but rather to provide protection to all equally, and to align the rights and obligations of each where this was deemed to be appropriate.

The power of the select committee to recommend amendments to legislation is comparable to the powers of an Upper House in other Parliamentary democracies. In the United Kingdom, for example, the House of Lords is able to recommend amendments to all Bills, with the exception of Bills relating to taxation. All amendments must then be referred back to the House of Commons for acceptance. The House of Lords lacks the power to reject a Bill outright – it may delay the passage of a Bill for up to 12 months, but it may then be passed by the House of Commons alone.⁴⁵ Its function is to act as a “revising chamber” for important or complex pieces of legislation.⁴⁶ This is the same function as that carried out by a select committee. In the same way as an Upper House is seen to be complementary to a Lower House, select committees

⁴⁴ Justice and Electoral Committee “Report on the Relationships (Statutory References) Bill”, 2.

⁴⁵ “Role of the House of Lords” <www.parliament.uk> (last accessed 25 July 2005).

⁴⁶ “Role of the House of Lords”, above n 45.

complement the House of Representatives in its legislative role by carrying out the necessary, in-depth and critical scrutiny of legislation that the House lacks the time and expertise to undertake.

2 *Membership*

In an MMP Parliament, the membership of select committees is allocated on the basis of proportionality – the number of select committee positions a party has reflects its representation in the House.⁴⁷ The Government is no longer assured of having a majority in each select committee. Smaller parties will, of course, not be represented in every select committee, but may negotiate to sit on committees that consider their particular areas of concern. As the proportionality requirement extends over select committee membership as a whole, rather than each committee individually, it is possible for some committees to have a Government majority while others do not. Under MMP, select committees function more as Parliamentary committees, rather than as a designation of the Executive.⁴⁸ Cabinet Ministers do not sit on select committees, to further the separation between the legislative and executive branches.⁴⁹ They may, however, be called to appear before committees to explain their policies and actions. This has been an important step in increasing the accountability of Ministers to Parliament, which functions more effectively in an MMP environment.⁵⁰

Although the membership of Select Committees now reflects the membership of the House, party representation does not determine the number of select committee chairs each party receives. In the first MMP parliament, only one of the 12 subject committees was not chaired by a Government MP, with the senior coalition partner, National, chairing 10 committees. This is probably because the committees elect their own chairs, and as the majority Government enjoyed a majority in Select Committees the majority rule

⁴⁷ Standing Orders 185(1).

⁴⁸ The MMP Review Committee “Report on the Inquiry into the Review of MMP” [2001] AJHR I2 3A 37.

⁴⁹ Palmer and Palmer, above n 7, 174.

⁵⁰ Palmer and Palmer, above n 7, 174.

continued to prevail.⁵¹ In the current Parliament, 5 out of the 18 subject Select Committees are chaired by non-Government Members. The Privileges Committee is chaired by Matt Robson, member of the coalition Progressive Party. The Government's support parties have the chair of committees which reflect their special interests – the Green's Jeanette Fitzsimons chairs the Local Government and Environment Committee, for example, while United Future's Peter Dunne chairs the Foreign Affairs and Trade Committee (as well as the special Committee set up to investigate New Zealand's constitutional arrangements). New Zealand First chairs one committee and the National Party two. As the select committee chair no longer enjoys a casting vote, this privilege is not as significant as it once was, and in practice the chair of a select committee has little more than a procedural role in chairing meetings and presenting reports anyway. Yet if select committees are to be seen as clearly an arm of the legislative, rather than the executive, branch, an argument could be made that select committee chairs should also reflect the proportionality of the House. Perhaps consideration could be given to introducing a guideline in the Standing Orders to this effect, although it might be difficult to implement under the current practice of each committee electing its own chair.

3 *Select Committee Inquiries*

Select Committees do not only consider potential pieces of legislation – a further function is to conduct inquiries into matters of Government policy, administration and expenditure. Such inquiries have become more common in the MMP environment.⁵² While Select Committees in 1997 conducted only four inquiries, by 2001 this had increased to fourteen, and so far in 2004 select committees have reported back to the House on twenty two areas of inquiry. The increase in select committee inquiries may reflect the fact that list MPs do not have the responsibility of looking after a constituency and can therefore put more energy into particular issues of concern.⁵³ A further factor is that if committees are not dominated by Government MPs, there is potentially more

⁵¹ Philip Joseph "The New Parliament" (1997) NZLR 233.

⁵² Palmer and Palmer, above n 7, 170-171.

⁵³ Steven Condie, above n 30, 23.

scope for them to carry out a thorough investigation into Government policies or actions and come to conclusions which may differ from the official Government position. This would scarcely have been possible under FPP.⁵⁴ In this respect also, select committees mirror the role of an Upper House in other jurisdictions, which also have the ability to question the Government, thus acting as a further restraint on executive power. The development of this function of select committees is a significant shift in the constitutional power balance, especially as this is one check which should prevail regardless of the power dynamics in the House itself. Even were there a majority Government, it could be expected that select committees would continue to conduct meaningful inquiries into Government activity.

E The Business Committee

The Business Committee was established to coincide with the first MMP Parliament, although there may have been other factors which contributed to its existence.⁵⁵ This committee now recommends a programme of sittings for each calendar year,⁵⁶ a role which used to rest solely in the hands of the Government. Under the Standing Orders, the membership of the committee comprises one member of every party with at least 6 seats, one member to represent small coalition partners, and one member to represent all other smaller parties.⁵⁷ However in practice, each party represented in the House is also represented in the Business Committee. The Committee also decides:⁵⁸

- the order of business to be transacted in the House
- the time to be spent on an item of business
- how time on an item is to be allocated among the parties represented in the House
- the speaking times for individuals on an item of business.

⁵⁴ Palmer and Palmer, above n 7, 172.

⁵⁵ Mary Harris “How is Parliament Performing Under MMP?” (July 2002) NZLR, 233.

⁵⁶ Standing Order 78.

⁵⁷ Standing Order 74.

⁵⁸ Standing Order 76.

The creation of the Business Committee aids in distinguishing the House of Representatives from the executive branch of Government – it is the House itself which determines its agenda and procedure, rather than this being dictated by the Government.

V **IMPLICATIONS FOR EXECUTIVE GOVERNMENT**

MMP overturned two of the main features of FPP which allowed the executive branch to monopolise the exercise of power in New Zealand: the dominance of two main political parties to the detriment of smaller parties, and the outcome of a single-party, majority Government. Under FPP, New Zealand was ruled by a strong executive Government. The leader of the party which won the most seats in Parliament would form a Government by advising the Governor-General to appoint his⁵⁹ most senior colleagues to positions on the Executive Council. These Ministers would almost certainly also be appointed to Cabinet, and awarded Ministerial portfolios. The convention of collective responsibility in Cabinet meant that Cabinet spoke with one voice, and was able to exert considerable influence on the members of the governing party's caucus.⁶⁰ With a majority in the House, the governing party could thus pass any legislation, and implement any policy, it desired with very little resistance.

With the proportional nature of MMP granting seats to parties on the basis of their level of support across the country, it is now much less likely that one party will gain enough seats to govern completely on its own.⁶¹ Coalition government is not unique to MMP – the Government formed after the last FPP election in 1993 was a coalition between the National and United Parties. However, under MMP, there is an increased chance of a coalition Government, either majority or minority, or of a single-party minority Government. A coalition is the most likely outcome. The first MMP election in 1996 resulted in a coalition between the National and New Zealand First Parties, which collapsed

⁵⁹ There were no female Prime Ministers under FPP.

⁶⁰ Palmer and Palmer, above n 7, 10.

⁶¹ Palmer and Palmer, above n 7, 14.

part-way through the Parliamentary term and was succeeded by a minority National Government. The 1999 election saw the formation of a Labour-Alliance minority Government, which relied on the support of the Greens to govern. When the Alliance party split in two mid-way through 2002, an early election was called, which again resulted in the formation of a minority coalition Government, this time between Labour and the Progressive Coalition.

Cabinet is a prime example of how constitutional and political realities depart from the legal framework of Government. Although not possessing any statutory mandate, Cabinet is “the central decision making body of executive Government”.⁶² Political scientist Elizabeth McLeay emphasised the power of Cabinet prior to MMP, describing it as:⁶³

A political executive untroubled by challenges to its hegemony by an interfering and retarding upper house, by federal components to the political system with their own sources of power and authority, by judicial review of its decisions or...by troublesome, multi-party parliaments.

All important Governmental decisions are made in Cabinet. In an FPP-elected Parliament, the convention of collective Cabinet responsibility, together with strict party discipline and the influence of senior Ministers within Caucus, meant that a decision of Cabinet was almost guaranteed to have the support of the governing party, and therefore a majority in the House. The likelihood of a coalition Cabinet being appointed following an MMP election raises issues as to the relationship between the coalition partners, and the processes by which they will come to agreements and make decisions in order to govern effectively. The traditional conventions governing Cabinet decision-making and Ministerial behaviour have taken on new meanings under MMP.

⁶² Cabinet Office *Cabinet Office Manual* (Cabinet Office, Wellington, 2001).

⁶³ Elizabeth McLeay *The Cabinet and Political Power in New Zealand* (Oxford University Press, Auckland, 1995) 6.

A ***Collective Responsibility***

I ***Party disagreement***

The effective operation of Cabinet hinges on the doctrine of collective Cabinet responsibility, which requires all Ministers to publicly give their support to every decision made by Cabinet, whether or not they agree with them personally. This convention ensures that Government is seen to be speaking with one voice, and acting with one agenda. The Cabinet Office Manual has this to say about the convention:⁶⁴

The principle of collective responsibility underpins the system of Cabinet Government. It reflects democratic principle: the House expresses its confidence in the collective whole of Government, rather than in individual Ministers. Similarly, the Governor-General, in acting on ministerial advice, needs to be confident that individual Ministers represent official Government policy. In all areas of their work, therefore, Ministers represent and implement Government policy.

This was one of the challenges faced by the first MMP Government, which was comprised of two parties whose succession to the House had hinged on quite different election campaigns. The National-NZ First Government formed in 1996 did not attempt to circumvent the doctrine at all, however. The Cabinet Office Manual of 1996 continued to state that “once a decision has been made [at a Cabinet or Cabinet Committee meeting] it is to be supported collectively by all Ministers, regardless of their personal views and whether or not they were at the meeting concerned”.⁶⁵ The expectation remained that all members of Cabinet would adhere to the duty of collectivity, despite the sometimes very different political philosophies of the two parties represented. Indeed, the Coalition Agreement went even further than the traditional understanding of collective responsibility (which applies only to ministers), and went so far as to expressly forbid either party from voting for or supporting

⁶⁴ Cabinet Office, above n 62, 3.2.

⁶⁵ Cabinet Office, above n 62, 3.4.

legislation without the written consent of the other party.⁶⁶ This commitment to a strict application of intra-Governmental discipline eventually led to a dissolution of the Coalition Agreement, when ongoing differences between the two parties prevented further cooperation.

The lessons of 1996 seemed well-learned in 1999, when the Labour and Alliance parties were negotiating their coalition agreement. For the first time, the doctrine of collective responsibility was expressly amended to allow members of the two parties to agree to classify particular issues as being matters of "party distinction", in cases where a distinctive policy matter raises an issue of importance to the party's political identity.⁶⁷ This would allow the minor coalition partner to publicly state that they did not agree with a particular decision that had been made in Cabinet. However the proviso to the rule neither allowed individual MPs to dissent from Cabinet decisions, nor relieved coalition partners of the obligation to fully implement policies which had been collectively agreed on. The ability to agree to disagree merely gave minor coalition partners a chance to indicate that they had not backed down in theory from their election promises, but that in practice they did not have the numbers to implement them. This is important in allowing smaller parties to maintain the confidence of the voters who have given them the mandate to enter Government in the first place. The changes in understanding of the doctrine of collective responsibility in a coalition Government were reflected in the amended Cabinet Manual of 2001. The relevant provisions now read:⁶⁸

- 3.22 In a coalition Government, Ministers are expected to show careful judgement when referring to party policy that differs from Government policy. Subject to paragraph 3.23, a Minister's support and responsibility for the collective Government position must always be clear.
- 3.23 Coalition Governments may decide to establish "agree to disagree" processes, which may allow Ministers to maintain, in public, different party positions on particular issues or policies. Once the final outcome of any "agree to disagree" issue or policy has been determined (either at the Cabinet level or

⁶⁶ National-New Zealand First Coalition Agreement 1996, Rule 4.2a.

⁶⁷ The Coalition Agreement between the Labour and Alliance Parties (6 December 1999).

⁶⁸ Cabinet Office, above n 62, 3.22-3.24.

through some other agreed process), Ministers must implement the resulting decision or legislation, regardless of their position throughout the decision making process.

- 3.24 "Agree to disagree" processes may only be used in relation to different party positions. Any public dissociation from Cabinet decisions by individual Ministers outside the agreed processes is unacceptable.

The current coalition partners have also entered into a coalition agreement which allows them to agree to disagree as set out in the Cabinet Manual. In addition, the Labour-Progressive Government has entered into agreements of support with both the Green and United Future Parties. These agreements outline the level of consultation and cooperation to be expected between Government and its supporting parties, and seem to imply that, although not strictly bound by collective responsibility, the supporting parties will be expected to comply with the doctrine in certain defined situations.⁶⁹

2 *Individual disagreement*

As stated above, the now accepted exception to the doctrine of collective responsibility does not apply to individual ministers who choose to speak out against a decision of Cabinet. However, there seem to be an increasing number of such breaches under MMP.

a) John Tamihere

In February 2003, the then Associate Minister of Māori Affairs, the Hon John Tamihere, made a speech to the Knowledge Wave Conference condemning current Government policies in relation to Māori underachievement.⁷⁰ Tamihere highlighted the failings of the Ministry of Social Development in addressing Maori concerns, and advocated the decentralisation of the Ministry as the only

⁶⁹ Co-operation Agreement between the Labour/Progressive Government and the Green Parliamentary Caucus (26 August 2002) ("Co-operation Agreement"); Agreement for Confidence and Supply, above n 32. See Part IV C 2 Agreements of supply and support.

⁷⁰ John Tamihere, Associate Minister for Maori Affairs "The Reform of Welfare and the Rebuilding of the Community" (Knowledge Wave 2003 – the Leadership Forum, Auckland, 21 February 2003).

way forward. In the week following the speech, Tamihere also directly criticised the then Minister for Social Development, Steve Maharey.⁷¹ Tamihere stepped out of line in five respects:⁷²

1. He attacked a Cabinet colleague.
2. He made a statement on a portfolio area outside his area of Ministerial responsibility.
3. He attacked Government policy.
4. He was in breach of the principle of collective responsibility.
5. Some of the statements he made were factually wrong in any event.

However, despite the clear breach of collective responsibility, he escaped the usual political sanction of dismissal from Cabinet. Tamihere was forced to apologise for his criticism of Government policy, but did not actually retract any of his remarks. Prime Minister Helen Clark, meanwhile, reiterated that it was inappropriate for Ministers to “bag” their colleagues or to comment on another Minister’s portfolio, but also stated that the speech was capable of either a benign or a malign interpretation.⁷³ In choosing to treat Tamihere’s misdemeanours so lightly, Clark was obviously taking the former option, and was encouraging others to do likewise.

At some levels, there seemed to be an acceptance that, while Tamihere may have acted inappropriately, he did at least know what he was talking about. He was seen as having more first-hand knowledge of how Maori were affected by social policy than the rest of his Cabinet colleagues.⁷⁴ He was also seen to be voicing beliefs that enjoyed a high level of popular support, both from the general public and from interest groups – beliefs that were simply being ignored

⁷¹ See (25 February 2003) 606 NZPD 3694

⁷² Chen Palmer & Partners *Wellington Watch: A Weekly Bulletin of Parliamentary and Political Information* Issue 2003/6 (28 February 2003).

⁷³ (25 February 2003) 606 NZPD 3686.

⁷⁴ Colin James “Navigating the transition to a new generation’s country” (25 February 2003) *NZ Herald* Auckland. See also Interview with Mai Chen, (Mike Hoskings, Breakfast, TV One, 5 March 2003) ChenPalmer Archive - Transcripts 2003 at <www.chenpalmer.co.nz> (last accessed 18 July 2005).

by the Government cronies in power.⁷⁵ These factors contributed to the decision to allow Tamihere to continue in Cabinet, albeit with slightly lower levels of confidence in his commitment to Government.

b) Tariana Turia

Another example which received much critical media attention was the position of Labour Minister Tariana Turia on the Foreshore and Seabed Bill 2004. During the weeks leading up to the final vote, Turia maintained that she would vote the way her constituents wanted her to, not the way her party required.⁷⁶ She indicated that she would refuse to support the Bill on the grounds that it was detrimental to the interests of many of her constituents in the Maori electorate of Tai Hauauru. At this time, Turia was a Minister outside of Cabinet but was nevertheless bound by the constraints of collective responsibility.

The response of Prime Minister Helen Clark to Turia's blatant disregard of the convention was that, as Prime Minister, it was her role to "determine what the bounds of manoeuvre for Ministers are".⁷⁷ Initially, when Turia stated her intention of voting against the Government it appeared that her dismissal from Cabinet would be imminent. However, at a subsequent meeting with Helen Clark a week before the Bill was debated, Clark reputedly set out four options for Turia to consider: abstain and keep her ministerial post; absent herself from Parliament and keep her ministerial post; vote against and resign from her post, and be rehabilitated once the legislation is passed; and vote against and be sacked.⁷⁸

As it eventuated, Turia did resign both her Ministerial portfolios and her seat in the House before further sanctions were imposed. But in the circumstances in question, it was clear that it was really other political

⁷⁵ Denis Dutton "Tamihere walking in footsteps of Roosevelt" (4 April 2003) *NZ Herald* Auckland.

⁷⁶ Tariana Turia (27 April 2004, Media Statement).

⁷⁷ (11 December 2003) 614 NZPD 10658.

⁷⁸ Chen Palmer & Partners *Wellington Watch: A Weekly Bulletin of Parliamentary and Political Information* Issue 2004/15 (30 April 2004).

considerations which were determining the Prime Minister's response. The Government would have preferred not to face a by-election in the Tai Hauauru electorate in the event of Turia resigning her seat in Parliament, and was also anxious not to appear to be alienating members of the Maori caucus. The decision on what sanction, if any, is appropriate in cases of breach of collective responsibility has always essentially been a political one. The sanctions available range from a private reprimand up to dismissal from Cabinet, with the choice of procedure lying in the hands of the Prime Minister and her Cabinet colleagues. Intra- and inter-party politics will always be a factor in determining what is acceptable behaviour for politicians, but this appears to have been exacerbated under MMP, particularly in minority Governments. It may be more politically expedient for a Government to allow minor breaches of the convention to escape unsanctioned, if it is clear that the Minister perpetrating the breach has the support of other tactically significant factions – either within Government, within the House or in the public arena. As “[c]ollective responsibility is one of the factors in producing strong Executive control over Parliament”⁷⁹, the apparent loosening of the strict application of collective responsibility shows yet again the reduction in executive power under MMP.

B *Individual Ministerial Responsibility*

Matthew Palmer suggests that the convention of individual ministerial responsibility has three distinct elements:⁸⁰

- The Explanatory element;
- The Amendatory element; and
- The Culpability element.

The first two elements stem from the accountability that each Minister owes to Parliament – they are under an obligation to explain all matters relating to their

⁷⁹ Palmer and Palmer, above n 7, 87.

⁸⁰ Matthew Palmer “Ministerial Responsibility versus Chief Executive Accountability: Conflict or Complement?” (Institute for International Research Conference on “Analysing and Understanding Crucial Developments in Public Law”, Wellington, 4 April 2001).

portfolio areas, and to ensure that problems are rectified and failing processes amended.⁸¹ According to the Cabinet Manual, Ministers are accountable to Parliament for ensuring that the departments for which they are responsible carry out their functions properly and efficiently.⁸² The culpability aspect addresses the sanctions that may be imposed in cases of breach of responsibility, and has usually been described as requiring Ministers to resign for impropriety in relation to their Ministerial portfolios.⁸³ This is an uncertain test, and one which is undoubtedly more political than constitutional in nature.

There has been an increase in the number of public sanctions for breach of individual ministerial responsibility under MMP. No longer can a Government, secure in its position of power, sweep a miscreant Minister's actions under the carpet, or simply shuffle him or her into another portfolio. In 1999, then National Prime Minister Jenny Shipley dismissed Tuariki Delamere from the immigration portfolio for inappropriate exercise of his individual Ministerial discretion. Delamere had approved permanent residency for a group of Chinese businessmen on the basis that they would invest in various Maori development schemes. However he remained a Minister within Cabinet with other responsibilities.

Current Prime Minister Helen Clark is known to be tough on individual ministers,⁸⁴ with seven either resigning or being dismissed under her leadership. Dover Samuels was dismissed in June 2000 after facing allegations of sexual misconduct before he became a minister. He had previously refused to resign, but was finally forced to go because, as Clark said at the time, he could not be effective while surrounded by such controversial allegations. Ruth Dyson resigned from Cabinet in October 2000 after being stopped for drink-driving. Marian Hobbs and Phillida Bunkle both resigned from ministerial positions in February 2001 following investigations into their right to enrol on the Wellington Central electoral roll and to claim out-of-town living allowances

⁸¹ Palmer, above n 80.

⁸² Cabinet Office, above n 62, para 2.162.

⁸³ Richard Mulgan *Politics in New Zealand* (Auckland University Press, Auckland, 1995) 140.

⁸⁴ Colin James "A Farm Girl, Discipline and Her Helicopter" (*Management Magazine* August 2003).

while living in Wellington. Ms Hobbs was reinstated once the investigation cleared her of wrongdoing. In February 2004, Lianne Dalziel resigned her portfolios amid allegations that she had misled the public over her involvement in the leaking of a legally privileged letter. John Tamihere stepped down in November 2004 following allegations of fraud. The latest resignation was that of David Benson-Pope, who stepped down in May 2005 after media reports that he was accused of bullying students during his time as a teacher before entering Parliament. Mr Benson-Pope denied the allegations.

Simon Power has claimed that “in an MMP environment individual ministerial responsibility is a far more important convention...because it is the only mechanism by which multi-parties have the opportunity to pin Ministers down to the departments they are responsible for.”⁸⁵ However, the real use of individual responsibility under MMP has not been to sanction Ministers for transgressions or oversights in relation to their Ministerial portfolios. It has rather been to regulate behaviour of Ministers which might allow their integrity to be called into question, in either their public or private life. As Joseph has pointed out, “[a] Prime Minister will sacrifice a Minister whose personal failings cannot be publicly defended or are an ongoing liability to the Government.”⁸⁶ Although Clark had known of the allegations against Samuels for several months, and the matter had been handed over to the Police, no action was taken against him until the matter became public knowledge. Ostensibly, Ruth Dyson’s resignation was necessary because her transgression was related to her Ministerial duties for accident compensation and injury prevention. Although perhaps true in this case, it seems unlikely that the matter would have incurred no punishment had Dyson been responsible for another portfolio. The public reaction was such that a resignation would have been expected in any case, particularly as Dyson had, only the week previously, made very public statements about the need for public figures to act as good role models.⁸⁷ Almost as soon as accepting Dyson’s resignation, however, Helen Clark indicated that it was likely that Dyson would eventually be reinstated as a

⁸⁵ (21 May 2003) 608 NZPD 5952.

⁸⁶ Joseph, above n 7, 289.

⁸⁷ Ruth Dyson (26 October 2000) Press Release.

Cabinet Minister,⁸⁸ as indeed happened in June of the following year. In all seven cases the resignations or, in the case of Samuels, dismissal, came at a time when while the allegations of impropriety were just that – allegations.

Do these examples show that the nature of individual ministerial responsibility is changing under MMP? Are Ministers being held accountable for transgressions which previously did not fall under the convention? Palmer suggests that the proper formulation of the culpable element of the doctrine of individual ministerial responsibility is that a Minister must resign when he or she loses the confidence of the Cabinet as expressed by the Prime Minister.⁸⁹ Some Prime Ministers will take a stricter line with their Cabinets, as Clark seems to be doing.⁹⁰ Clark's willingness to reinstate Ministers once the public furore over their behaviour dies down supports the contention that the decision on whether to sanction individual ministers over misdemeanours unrelated to their ministerial portfolios is an essentially political one, which reflects the Government's need to retain an appearance of integrity in the public eye. Under MMP, there will be more political incentive on a Cabinet to cut its losses and dismiss an offending minister who has lost public confidence.⁹¹ This is not necessarily a change in the convention, but a political approach to how the convention will apply.

C *Agreements of Supply and Support*

After the 2002 election, the Labour party had won 52 seats in the 120 seat Parliament. It entered into a coalition agreement with the two-member Progressive Party, forming a minority coalition Government. This meant that the coalition required the support of at least one other party on confidence and supply matters to allow it to govern. As it turned out, the Government entered into agreements with both the United Future and Green Parties.

⁸⁸ "Dyson pays heavy price" OneNews <www.onenews.nzoom.com> (last accessed 18 July 2005).

⁸⁹ Palmer, above n 80.

⁹⁰ Palmer, above n 80.

⁹¹ Palmer and Palmer, above n 7, 89.

The United Future Parliamentary Caucus, by written agreement, undertook to provide confidence and supply to the Labour/Progressive Government for the current term of Parliament.⁹² This agreement is intended to guarantee the durability of a stable Government, and operates on the basis of “good faith and no surprises” between the parties. In return for support in matters of confidence and supply, the coalition Government agreed to take United Future policy priorities into account in determining their policy agenda, and specifically undertook to not introduce certain legislative measures relating to the legal status of cannabis – interestingly, a policy of the other party most likely to provide support to the Government in individual legislative matters, the Greens.⁹³ In addition, the Government will consult with United Future about the legislative programme, major policy issues and broad budget parameters. All exchanges of information in the course of consultation and negotiation will be kept confidential.⁹⁴

One of the most interesting features of the Confidence and Supply agreement is its position on collective responsibility. The relevant provision reads:⁹⁵

Although United Future will not be bound by collective responsibility on Government decisions, where there has been full participation in the development of a policy initiative, and that participation has led to an agreed position, it is expected that all parties to this agreement will publicly support the process and the outcome.

The Co-operation Agreement between the Labour/Progressive Government and the Green Parliamentary Caucus commits the two parties to having a constructive relationship based on good faith, for the term of the current Parliament. The agreement sets out expectations of co-operation on agreed areas of policy development. A requirement of consultation is given paramount importance. Policy areas are allocated a category from A to C, with

⁹² Agreement for Confidence and Supply, above n 32.

⁹³ See for example Misuse of Drugs (Cannabis Infringement) Amendment Bill, introduced by Green MP Nandor Tanczos.

⁹⁴ Agreement for Confidence and Supply above n 32, 2.

⁹⁵ Agreement for Confidence and Supply, above n 32, 2.

Category A indicating areas in which full co-operation in working towards joint policy positions is envisaged; Category B matters requiring consultation with a view to achieving support for legislative proposals; and Category C matters involving sharing of information with no particular expectation of developing shared positions.⁹⁶ As with United Future, there is an emphasis on confidentiality during any consultation or negotiation period. Both parties to the agreement are expected to publicly support any policies developed collectively about Category A matters.⁹⁷

These provisions suggest that at least the unanimity principle of collective responsibility is being extended to apply to the Government's support partners, in agreed upon situations. This fits with the rationale behind the principle, of promoting coherency of Government policy and confidence in the Government's ability to command the support of the House. It is of course important to remember that a support or co-operation agreement is a purely political agreement, and cannot be said to override existing constitutional principles. However, if the practice of entering into such agreements of supply and support with smaller parties who are not part of a coalition Government becomes the norm, it may have interesting implications for the development of expectations of behaviour within that relationship.

VI DEMOCRACY AND MMP

A voting system in a liberal democracy determines how elected legislators are chosen. Where Parliament is sovereign these elected legislators have the final say on contentious social policy issues as well as providing the pool from which members of the executive such as the Prime Minister and Minister of Finance are chosen. So the voting system matters; how elected legislators are chosen is a basic feature of any democracy, including New Zealand's.⁹⁸

⁹⁶ Co-operation Agreement, above n 69, 1.

⁹⁷ Co-operation Agreement, above n 69, 2.

⁹⁸ James Allen "Changing the Voting System or Creating a Brand New Highest Court — Is One More Constitutionally Fundamental than the Other in a Liberal Democracy?" (2005) 11 Otago LR 17, 23.

The changing demographics of New Zealand's population have demanded recognition that New Zealand is a multicultural society. If democracy is to be one our nation's underlying principles, and New Zealanders pride themselves that it is,⁹⁹ there is a need to reflect this change in the electoral system. This in itself may be seen as a constitutional change – if New Zealand really is a democratic nation then the way in which this is put into practice must be also be a constitutional principle. A state cannot truly claim to be democratic if its electoral system does not function in a democratic manner.¹⁰⁰ As the above quote indicates, a Parliamentary election determines not only the membership of the legislative, but also who may form an executive Government. One of the primary concerns under FPP was that the number of seats in the House was usually distributed among the two largest political parties, to the detriment of smaller parties. Voters who chose to support a smaller party felt that their votes were wasted, as their candidate rarely had a chance of winning an electoral seat when competing against the larger parties, and there was no other way of gaining a place in the House. The need to ensure that the House of Representatives would truly reflect the choices of the voting public was one of the prime concerns of the Royal Commission in 1986. In summarising the characteristics of the FPP voting system, the Commission came to the following conclusions:¹⁰¹

2.56 The foregoing survey of plurality against our criteria shows that New Zealand's voting system has serious deficiencies. Even in those areas where plurality has recognised strengths, there are real qualifications to be made. Thus, plurality rates well in terms of *effective representation of constituents*, but does not cater for many of those who wish to approach an MP of their own party. *Voter participation* is enhanced by the ease with which valid votes may be cast, but the votes of many electors are ineffective in influencing the overall result. Plurality is generally conducive to *effective Government* and enables implementation of policies in a decisive way, but this may not necessarily result in stable and effective Government in the long term. Plurality does produce an *effective*

⁹⁹ As does the Rt Hon Sir Kenneth Keith: "On the Constitution of New Zealand: An Introduction To The Foundations Of The Current Form Of Government" (2001) in Cabinet Office, above 62, 1.

¹⁰⁰ See Alan McRobie "Elections and the Electoral System" in Raymond Miller (Ed) *New Zealand Government and Politics* (2ed, Oxford University Press, Auckland, 2001) 185, 185.

¹⁰¹ The Royal Commission on the Electoral System, above n 1, 28.

Parliament, but provides little to check a powerful executive. It assists the development of *effective parties*, but the broad-based appeal required of candidates limits the ability of parties to select candidates who are representative of a range of groups and interests. The *legitimacy* of the system is well accepted, though this may in significant measure be due to the impartiality with which it is administered and a lack of knowledge about alternative systems.

2.57 In those areas where plurality is acknowledged to have weaknesses, these are severe indeed. Not only is plurality unfair to supporters of *major parties*, but it is also grossly unfair to supporters of *minor parties*. Plurality also fails to ensure reasonable recognition and *representation* for significant *minority and other special interest groups*. In particular, and despite the 4 Māori seats, plurality denies *effective Māori representation*.

MMP was not the only system considered as an option – others were also canvassed, but the characteristics of MMP were seen as offering the most advantages (or least disadvantages) when lined up against the principles that the Commission thought should underpin the voting system.¹⁰² (MMP allows the composition of the House to more closely reflect the wishes of the voting public, by allowing voters to choose both an individual candidate to represent their local concerns, and a party whose policies they would like to see play a role in the future policy direction of Government.)

A further impact of the democratic nature of MMP is that it makes Governments more directly answerable to public opinion on policy issues. Sir Geoffrey Palmer has pointed out that a single-party Government with a secure majority, as was the norm under FPP, could sustain unpopular policies for longer than is now the case when there is a minority Government under MMP. Any smaller parties supporting the Government will be acutely aware of the impact on their own popularity and standing in the polls, should they appear to be supporting Government policies which do not enjoy a public mandate. “[If the Government] gets too unpopular in too many areas it will not be able to

¹⁰² The Royal Commission on the Electoral System, above n 1, 63-64.

secure the numbers for passing its budget or passing its legislation and so it has to pay attention to the public preferences.”¹⁰³

VII CONCLUSIONS

“[W]e don’t really know in New Zealand what our Constitution is with any great degree of precision...it’s a human construct, an idea about governance. I suppose the thing you want most from it is good Government. You want the rules of Government to be effective so that the governance of the country is optimal.”¹⁰⁴

MMP has not in fact changed the constitutional structures, or functions of Government. What has changed is the potential for how the constitutional structures will operate in the political reality. The real impact of MMP depends primarily on the outcome of each election – how much support is enjoyed by the governing party? If one party were to garner more than 50 per cent of the popular vote, the operation of Government would be hardly distinguishable from that under FPP. The effectiveness of MMP in acting as a check on the power of the executive arm depends on its representative nature, and the probability that a multi-cultural and multi-valued society will return a diversity of political parties to power.

Under a minority Government, the potential for MMP to rein back the power of the executive is more pronounced. In such a situation more power is given to other parties in Parliament to determine, firstly, who will be given the authority to govern, and secondly, what policies will be enacted and in what form. The power that is devolved upon smaller parties should not however be overstated: as politicians become more familiar with the workings of MMP it is unlikely that a party which enjoys a large amount of public support will allow their policies to be directed to too great an extent by small parties. If small parties do appear to the public to be over-exercising the power that was granted

¹⁰³ Interview with Rt Hon Sir Geoffrey Palmer (Linda Clark, Nine-to-Noon, National Radio, Dec 22, 2004) ChenPalmer Archive - Transcripts 2004 <www.chenpalmer.co.nz> (last accessed 20 July 2005).

¹⁰⁴ Interview with Rt Hon Sir Geoffrey Palmer (Maggie Barry, Nine-to-Noon, National Radio, 25 May 2005) ChenPalmer Archive - Transcripts 2005 <www.chenpalmer.co.nz> (last accessed 26 July 2005).

to them at the ballot box, no doubt they will feel the political consequences at the next election (as did happen with New Zealand First in 1999, when they won only 4.26 per cent of the vote¹⁰⁵). Under the present Government, it appears that support parties are willing to guarantee support to the Government in return for an integration of one or two of their key electoral platforms into the Governmental agenda – for example, United Future's commitment to the establishment of a Commission on the Family, and the Green's commitment to facilitating a review of the Environmental Risk Management Authority.

The effect of MMP on the legislative process has been to make it easier for the legislative branch to determine the content of particular policy proposals, and to delay or veto others. Palmer and Palmer suggest that New Zealand is now close to approaching a situation analogous to that in the United States – when it comes to matters of unpopular legislation, the Government proposes and the Legislature disposes.¹⁰⁶ Which may perhaps not be an entirely bad thing – it enhances the separation of powers, and ensures that the power to legislate remains in the right hands. However, it may be detrimental to efficient government – indeed, the choice for MMP over FPP was a compromise between the ideals of representation and efficiency. It is important to ensure that the many advantages of MMP are not overshadowed by the perception that necessary measures are being delayed because they do not attract sufficient attention to withstand the rigours of the political testing now common in an MMP environment.

The method of Government formation allows the legislative to exercise control over the composition of the executive, effectively determining its legitimacy. The strength of a Government is now determined by the degree of support it can muster in the House of Representatives. The legislature now has a greatly increased ability to determine the composition of Government. The potential for a legislative to withdraw its support of Government also acts as an important check on executive action.

¹⁰⁵ As leader Winston Peters won an electorate seat, the 5 per cent threshold was waived and New Zealand First was allocated five seats in the House.

¹⁰⁶ Palmer and Palmer, above n 14, 371.

Norman St John Stevens once said that “procedure is the best constitution that we have.”¹⁰⁷ Conventions such as collective Cabinet responsibility and individual Ministerial responsibility are essential to ensure the continuation of a democratic and accountable Government. These procedural safeguards do more than illustrate the principles of the constitution, they shape the way in which the constitution translates principle into practice. Under MMP, these conventions have been forced to adapt to meet the new needs of working under a coalition or a minority Government. The convention of collective responsibility now recognises that coalition partners may have different interests – the core of the convention remains, to maintain the principle of efficient, united Government, but in an altered manner, to allow for the principle of party autonomy (and in recognition of political reality). The convention of individual Ministerial responsibility has also adapted to reflect the increased pressures on Ministers to be accountable for their actions to the House.

Under FPP, the balance of power between the executive and legislative branches of Government was tipped disproportionately towards the former. The main overriding effect of MMP on the New Zealand Constitution, therefore, has been to curtail the power of executive, by providing more scope for the legislature to act as a check on its decisions and behaviour.

¹⁰⁷ Norman St John Stevens, former English MP, cited in Diane Morcom, Secretary of Cabinet “Quills, Qubits and the Quest for Quality” (IPANZ Seminar, Wellington, 25 April 2005).

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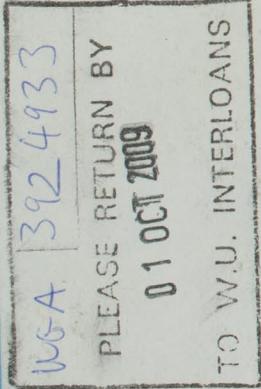
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