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ELECTORAL REFORM: MMP, POLITICAL
PARTIES AND PROPORTIONALITY

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ABSTRACT

This paper focuses on electoral reform, particularly in regard to the electoral actors, political parties, and the desired outcome, a proportionate and accountable government, of our MMP electoral system; it attempts to find a balance between principled results and effective government. The constitutional role of political parties is discussed, highlighting why it is undesirable to leave political parties in the legal wilderness. Particular regard is given to the legal status and identity of political parties, the candidate selection processes within parties that serve as an electoral bottleneck, and the oversight of parties. A three pronged approach is recommended in the reform of parties. First, parties must be brought within the public law checks and balances (that exist for other constitutional actors) and must have a distinct and accessible legal identity. Secondly, the candidate selection processes must be developed to ensure the appropriate level of democratic involvement and minimise potential for abuse. Thirdly, oversight of parties must be strengthened (by allowing direct sanction of parties for non-compliance with electoral rules). The underlying principle of proportionality and the way in which electoral rules affect the proportionality of outcomes is discussed. Two specific areas where rules are less than ideal are examined, electoral thresholds and electoral district / list-seat-determination. It is recommended that these rules be modified to ensure that proportionality is not needlessly harmed. Although New Zealand has a robust and principled electoral system this paper concludes that complacency should be avoided and that we should strive to keep improving electoral principle and practice.

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MMP - Political Parties - Proportionality

I INTRODUCTION

The electoral system is of central interest to anyone concerned with the operation of a democratic system of government. Elections are the defining moment in a democracy: they perform two fundamental tasks. They confer authorisation upon those chosen to represent the electors, and they hold representatives to account for their actions while in office.¹ All electoral systems seek these goals but prioritise different factors, and provide different methods for arriving at a resultant democratic government.

In New Zealand the Mixed Member Proportional system ("MMP") is used to convert votes into seats in Parliament.² While the fact of MMP broadly describes the exercise of voting, what a vote does, and the look of government, a myriad of rules exist to actually implement MMP. Two underlying principles can be identified in MMP and must be realised in the rules for an effective MMP electoral system; these are the accountability and connection of plurality rule in single member electorates with the corrective proportional qualities of a national list.³

The most fundamental underlying principle of MMP is that of proportionality. MMP seeks a Parliament that accurately reflects the proportionality of votes cast; it seeks to do this by taking a plurality election and applying a corrective proportional system to this result.⁴ Proportionality is the required output of the electoral system under MMP. Proportionality tends to create a more truly representative body, and encourages voter participation.⁵

The other underlying principle of MMP is that of accountability and the electorate-MP connection. MMP seeks to realise these principles by retaining a number of single-member electorates allocated by a plurality vote.⁶

¹ Hanna Fenichel Pitkin *The Concept of Representation* (University of California Press, 1967) 38-59.

² Note that while MMP is referred to as the Additional Member System (AMS) overseas, the term MMP will be used throughout this paper.

³ P Dunleavy and H. Margetts "Understanding the Dynamics of Electoral Reform" (1995) 16 *International Political Science Review* 9, 27.

⁴ Louis Massicotte and Andre Blais "Mixed Electoral Systems: A Conceptual and Empirical Survey" (1999) 18 *Electoral Studies* 341, 353.

⁵ Robert Richie "Full Representation: The Future of Proportional Election Systems" (1998) 87 *National Civic Review* 85, 85-87.

⁶ Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (Government Printer, Wellington, 1986) 37 and 53-55.

Both principles of MMP, proportionality and accountability, tie back into the concept of the political party. Parties are recognised as the fundamental actor in government and in the electoral system, as it is in reference to parties that proportionality is determined. Parties determine who is to be elected through endorsing electorate candidates and composing party lists. Parties provide the necessary political identity to MPs, and allow the ordinary voter to participate in the electoral process.⁷ The rules relating to parties must therefore ensure that parties are recognised as the constitutional actors they are, and that the principles of proportionality, accountability, and connection are not undermined.

The current rules relating to parties will be examined. These rules must ensure effective parties without undermining the democratic principles of MMP outlined above. Of particular interest are the rules relating to the regulation of parties. Who oversees parties, party decision making processes, transparency of parties, and accountability of parties will be examined. At present these rules are inadequate, therefore recommendations for reform of the regulation of parties will be presented; from changing parties' legal status to recognise their public and constitutional role, adding public law checks such as judicial review and the Official Information Act 1982, empowering the overseers to effectively monitor and sanction parties, and tightening the democratic procedures within parties.

Rules that relate to the actual allocation of seats will be examined. These must produce an outcome that remains true to the principle of proportionality, but must not do so to the exclusion of good government. Of particular interest are the rules relating to electoral thresholds, which directly influence both parties and proportionality, and the rules relating to determining the makeup of seats in Parliament, electorate or list. While thresholds do adversely influence proportionality, it is recommended that a middle ground be adopted, to maintain effective government. In addition it is recommended that the determination of electorate and list seats be modified to allow growth of Parliament as the number of electoral districts increases.

⁷ Geoffrey Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 131.

Finally the 'party-hopping' phenomenon will be briefly examined, as it may be felt by some that the 2005 election will exasperate the effect of party-hopping on government continuity. The problems in principle and form with such legislation will be set out as well as the impact of such legislation on the operation of government. It is recommended that party-hopping legislation be relegated into the annals of history never to rear its head again.

The focus of this paper is electoral reform, particularly in regards to the underlying actors, parties, and the desired outcome, proportional representation. It seeks to examine the often neglected law on parties and recommends the establishment of a regulatory regime not only robust and principled but also practical. Two specific areas in the operation of MMP, thresholds and electoral determination, where proportionality can be distorted are examined. While no major changes are recommended here, it is possible to modify the rules in order to ensure that the results of elections better represent the underlying principles of MMP.

Throughout, this paper has attempted to balance principle and practical reality. It endeavours to strike a balance between rules for the passing hour, which may require regular review, and principles for an expanding future, which must be of a more enduring nature.⁸

II MMP, POLITICAL PARTIES AND PROPORTIONALITY

A MMP in New Zealand

New Zealand uses the Mixed Member Proportional electoral system. This is a proportional representation system that combines electorate seats allocated by a plurality type vote, with a corrective list seat allocation to parties according to the proportion of party votes received.⁹ It is in the allocation of list seats that

⁸ Royal Commission on the Electoral System, above n 6, 293.

⁹ For an in-depth description of MMP see Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4 ed, Oxford University Press, Melbourne, 2004) 24-28; for a conceptual analysis of mixed proportional / majoritarian systems and MMP's place within such an analysis see Massicotte and Blais, above n 4, 353.

disproportionalities arising at the electorate level can be ironed out.¹⁰ Each party receives a total number of seats equal to electorate seats plus list seats which equal the proportion of party votes received.¹¹

It is noted that if an independent candidate or a candidate from a party that did not contest the party vote wins any electorate seats, the number of list seats to be allocated is decreased by the number of independent seats.¹² The final number of MPs will remain the same.

1 *Overhang seats and election thresholds*

Overhang seats may occur when a party receives more electorate seats than the total seats they are entitled to based upon their party vote. For example in the 2005 election the Maori Party won four electorate seats, but only 2.12 per cent of the party vote. This created an overhang seat as the Maori Party was entitled to a total of only three seats based upon their party vote.¹³ Overhang seats are retained by the party that won them, the party gains no list seats, and the total number of MPs in Parliament is increased by the number of overhang seats until the next election.¹⁴

Underhang seats may also occur when a party is entitled to more list seats, as a result of the party vote, than they have candidates on their party list. Underhang seats will decrease the total number of MPs in Parliament until the next election. This will rarely occur; although perhaps the 99 MP Party who in 2005 had only two list candidates was hoping to win approximately 20 per cent of the party vote in order to create 21 underhang seats, thereby resulting in 99 MPs.

A party will not receive any seats unless they meet the election thresholds. The thresholds either are five per cent of the party vote or one constituency

¹⁰ Michael Gallagher, Michael Laver and Peter Mair *Representative Government in Modern Europe* (2 ed, McGraw-Hill, New York, 1995) 279.

¹¹ For example, a party receiving 50 per cent of the party vote and winning 40 constituencies would receive 20 list seats, 60 seats being 50 per cent of total seats in New Zealand's 120 seat parliament.

¹² Electoral Act 1993, s 191(8).

¹³ See below VI Appendix One: The Sainte-Laguë Method.

¹⁴ Electoral Act 1993, s 192(5).

seat.¹⁵ For example a party that receives four per cent of the party vote and no constituency seats will receive no seats in Parliament; a party that receives four per cent of the party vote and one constituency seat will receive the constituency seat won, and in addition any list seats they would be entitled to given their proportion of the party vote.¹⁶

B Proportionality

Electoral systems based on proportionality seek to ensure a proportionally representative result from democratic elections; x percent of votes should be represented by x percent in Parliament. In practice this involves ensuring that parties in Parliament receive the number of seats that is (approximately) proportionate to the percentage of the total vote they received. With proportionality, the principle of majority rule is still in effect but the minority wins its fair share of representation.¹⁷

Proportionality is a desirable attribute for an electoral system. Proportionality enhances representation;¹⁸ a voter will usually vote for a person representing their interests, and these people will often share similar social, cultural, ethnic and economic traits. Under a proportional system, these 'representative representatives' are more likely to be elected in their own right, and parties are more likely to place significant groups in favourable positions within the party in order to capture the vote of a specific group.¹⁹ Proportionality also enhances voter participation; a proportional system ensures that each vote equally determines the result.²⁰

Electoral systems have a continuous effect on government behaviour;²¹ therefore the underlying principles of the electoral system should be reflected in

¹⁵ Electoral Act 1993, s 191(4).

¹⁶ In 1999 New Zealand First won 4.26 per cent of the party vote and one constituency seat and therefore received four list seats for a total of five seats; Ministry of Justice *The General Election 1999* (May 2000) <www.elections.org.nz> (Last visited 26 September 2005).

¹⁷ Richie, above n 5, 85-87.

¹⁸ Richie, above n 5, 85-87.

¹⁹ Royal Commission on the Electoral System, above n 6, 52.

²⁰ Royal Commission on the Electoral System, above n 6, 55; Richie, above n 5, 85-87.

²¹ Palmer, above n 7, 197-198; Palmer and Palmer, above n 9.

the continuing operation of government. Proportionality needs to be recognised as a principle that underpins our governmental institutions.

Proportionality operates in two distinct spheres. The first is on Election Day when votes are turned into seats. This may be undermined by poorly crafted electoral rules and inadequate regulation of the electoral actors, parties. Secondly, proportionality operates within the everyday operation of government. This may be threatened by changing the relative proportions within Parliament.

C *The Constitutional Role of Parties*

Political parties play a vital constitutional role in legislative and executive government and in elections.²² The current constitutional role of parties will be examined.

1 Parties and elections

Parties are the cornerstone of MMP. It is parties that contest the party vote, and it is with reference to parties that the proportionality of Parliament is determined; without parties we could not have MMP. Parties are the most visible actor in elections: in addition to disseminating party policy platforms, and forming party lists, individual electorate candidates are identified with parties. Often it is the party, rather than the personality, of electorate candidates, that determines to whom a voter will give their electorate vote.²³ Effective parties are therefore essential for maintaining an effective electoral system.

Parties are the sole gateway into Parliament for all list MPs; they provide financial backing, policy platforms and an identity to electorate candidates. Election without party support is unlikely; 1943 was the last time an independent

²² Royal Commission on the Electoral System, above n 6, 6.

²³ *Lange v Atkinson* [1998] 3 NZLR 424, 463 (CA) Blanchard J.

candidate was elected.²⁴ The party candidate selection processes is a bottleneck in the process of becoming an electorate or list MP. Candidate selection processes therefore need to be fair and accountable to minimise the risk of abuse in this crucial electoral step.

Parties are also important in regard to the rules governing election campaigning; rules exist restricting party spending and party broadcasting.²⁵ These rules seek to ensure that well-funded parties do not receive an advantage over less prosperous parties.²⁶ The limits on spending are rather high, evidenced by the large variations in spending in each election campaign.²⁷

2 *Parties in Parliament and government*

Benjamin Disraeli, in 1872, stated:²⁸

Gentlemen, I am a party man. I believe that, without party, parliamentary government is impossible. I look upon parliamentary government as the noblest government in the world, and certainly the one most suited to England. But without the discipline of political connection, animated by the principle of private [honour], I feel certain that a popular assembly would sink before the power or the corruption of a minister. Yet, gentlemen, I am not blind to the faults of party government. It has one great defect. Party has a tendency to warp the intelligence, and there is no minister, however resolved he may be in treating a great public question, who does not find some difficulty in emancipating himself from the traditionary prejudice on which he has long acted.

This statement showed the importance of parties at all levels of government in the Westminster system. Parliament was made up of parties, Parliament determined executive government according to parties, and parties influenced the

²⁴ Electoral Commission *General Elections 1890-1993 - Seats Won by Party* <www.elections.org.nz> (last accessed 11 September 2005).

²⁵ See III A 2 Regulating parties.

²⁶ Royal Commission on the Electoral System, above n 6, 190-198.

²⁷ Richard Mulgan *Politics in New Zealand* (3 ed, Auckland University Press, Auckland, 2004) 254-255.

²⁸ Benjamin Disraeli "On the Principles of His Party" (Manchester, April 1872).

practice of ministers.²⁹ This was an informal role, based on political necessity, but one that was crucial to the operation of government.

MMP has formally institutionalised the role of parties. The electoral system now determines the makeup of Parliament based primarily on parties, parties in Parliament now negotiate to form executive government comprised of a coalition of parties,³⁰ and party policy still does determine executive government policy. The Standing Orders also give formal recognition to parliamentary parties.³¹ Select committee membership and MP speaking rights are allocated to reflect the party composition of Parliament.³²

Parliamentary party discipline under MMP still incorporates the rules that applied under First Past the Post ("FPP"). Most votes still occur along parties lines and are whipped votes.³³ Crossing the floor, where an MP votes against their party, remains unlikely, although this does seem to have been on the rise since the introduction of MMP. Party discipline remains strong and plays a large role in the everyday operation of Parliament.

It is the relationship between parties that determines whether a bill will become law or not. This has become more apparent under MMP as there are more parties involved in the legislative process and it is unlikely that one party, and less likely that the government as a whole, will be able to ensure passage of a bill.

It is the relationships between parties which determine the formation and death of governments, given the much lower likelihood that a single party will gain a majority of the seats in Parliament. The chance of a coalition or minority government has increased as a party that desires to form a government will either

²⁹ Royal Commission on the Electoral System, above n 6, 6-7.

³⁰ As evidenced by MMP's bias away from any one party receiving a majority of parliamentary seats and the fact that proportional systems give rise to multi-partism; Carsten Anckar "Determinants of Disproportionality and Wasted Votes" (1997) 16 *Electoral Studies* 501, 501-502; see also Labour Party and Progressive Coalition "Coalition Agreement between the Labour and Progressive Coalition Parties in Parliament" (8 August 2002) Coalition Agreement <www.beehive.govt.nz> (last accessed 28 September 2005); Labour Party and Alliance "The Coalition Agreement between the Labour and Alliance Parties" (6 December 1999) Coalition Agreement <www.executive.govt.nz> (last accessed 28 September 2005); National Party and New Zealand First "The Coalition Agreement" (10 December 1996) Coalition Agreement <www.executive.govt.nz> (last accessed 28 September 2005).

³¹ House of Representatives *Standing Orders of the House of Representatives* (2004) <www.clerk.parliament.govt.nz> (last accessed 8 July 2005) order 34.

³² House of Representatives, above n 31, orders 103 and 187.

³³ Palmer, above n 7, 141-143.

need to bring other parties in as coalition partners, secure other parties' support on matters of confidence and supply, or a combination of both, in order to ensure the confidence of the House.³⁴

The process of forming a government has been commented on by Governor-General Sir Michael Hardie Boys (as he then was), who stated that:³⁵

1. The formation of government is a political decision and must be arrived at by politicians.
2. My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation, that might require me to communicate with the leaders of all the parties represented in Parliament.
3. Once political parties have reached an adequate accommodation, and a government is able to be formed or confirmed, the parties could be expected to make that clear by appropriate public announcements of their intentions. At that point it might be necessary for me to talk with some party leaders. I would then expect to have sufficient information to be able to appoint a new Prime Minister, if that were required.

This emphasises that the formation of government is up to negotiation between parties in Parliament. The death of governments is also determined by the relationship between parties.

Parties are the fundamental actors in executive government. With MMP, and the proportionality it brings, the formation of government is usually going to follow the majority of the vote. Because the nature of government formation, even under MMP, involves excluding some parties from government, just because all voters are represented fairly in Parliament does not mean that all voters are represented fairly in the exercise of executive power. This is a necessary result of a parliamentary system, and is not something that can, or should, be changed; such change would come at the cost of effective

³⁴ See Labour Party and Progressive Coalition, above n 30; Labour Party and Alliance, above n 30; National Party and New Zealand First, above n 30.

³⁵ Sir Michael Hardie Boys "Continuity and Change: the 1996 General Election and the Role of the Governor-General" (1997) 5 *Waikato Law Review* 1, 9; these rules are set out in the Cabinet Manual; see Cabinet Office *Cabinet Manual 2001* (Wellington, 2001) paras 4.35 – 4.43.

government.³⁶ This does highlight the limits of proportional representation; it only applies to Parliament and legislative government, not executive government.

III REGULATION OF POLITICAL PARTIES

Party importance has increased under MMP. Most obviously parties are now a formal actor in our government, and play the major role in elections. While this was true under FPP, that system rested upon the fiction that parties did not really exist and the only actors in elections, Parliament, and government were individual MPs.³⁷

Most importantly proportionality is based on the proportion of the total party vote that each party receives at an election. List seats are only available to members of parties. Party lists, and therefore the potential candidates for list seats, are determined following 'democratic procedures' by each party.³⁸ Given that party lists are 'closed lists' which the voting public cannot influence or change if they disagree with the makeup or ordering of the list, the party has huge control over who may be elected as an MP.

A Existing Party Law

Parties have an ephemeral status within our legal system. Before MMP, parties existed solely within the sphere of private law, and the public role of parties was ignored.³⁹ However, in reality parliamentary government was party government, and had been for some time.⁴⁰

MMP, based as it is on the proportionality of parties in Parliament, somewhat ameliorates this fiction. Our electoral law does now mention parties and provides some rules regarding them.⁴¹ However, even though parties have

³⁶ Royal Commission on the Electoral System, above n 6, 24 and 57.

³⁷ Royal Commission on the Electoral System, above n 6, 13 and 265.

³⁸ Electoral Act 1993, s 71.

³⁹ Royal Commission on the Electoral System, above n 6, 265.

⁴⁰ Disraeli, above n 28.

⁴¹ See particularly Part 4 of the Electoral Act 1993; Electoral Act 1993, s 62-71B.

become the key actor in elections and government, they still sit largely outside the public law.

1 *Legal status of parties*

Parties are voluntary, essentially private organisations.⁴² They may or may not be incorporated,⁴³ although most are not.⁴⁴ This private nature was stated in the decision of *Peters v Collinge*,⁴⁵ and has been tacitly confirmed in *Awatere Huata v Prebble*.⁴⁶ The private nature of parties has important consequences for the accountability and transparency of parties.

As an unincorporated society, a party has no separate legal identity from its members; it is comprised of a network of personal relationships, governed by contract, between members, and therefore only exists while there are members.⁴⁷ Parties cannot own property, enter into a contract, or be sued. The majority of the public, and most members of parties, would consider that parties are separate entities and therefore deal with parties in such a way.⁴⁸ However, if things go wrong, nothing exists with which to attach liability; the party does not exist as a legal entity. Members of the party executive cannot bind general party members in contract, so general party members are not accountable. The members of the party executive may be liable in contract, if they personally entered into the

⁴² The fact that this does not square with the actual position of parties is discussed by the Royal Commission; Royal Commission on the Electoral System, above n 6, 267.

⁴³ Note that many parties have various branches or associated organisations incorporated, while the party itself remains unincorporated. Associated organisations are usually set up to deal with the party's property; this makes sense as it creates a distinct legal entity to deal with property without having to rely on the (potentially) transient party membership. Branches are incorporated because, unlike the core party, branch membership is a lot more transient and incorporating a branch will grant some stability.

⁴⁴ The only parliamentary party that is incorporated is the Green Party; see Green Party "Constitution and Rules of the Greens, the Green Party of Aotearoa/New Zealand Incorporated" (5 June 2004).

⁴⁵ *Peters v Collinge* [1993] 2 NZLR 554, 566 and 575 (HC) Fisher J.

⁴⁶ *Awatere Huata v Prebble* [2005] 1 NZLR 289, 309 (SC) Elias CJ.

⁴⁷ Teresa Somes "The Legal Status of Political Parties" in Marian Simms (ed) *The Paradox of Parties* (Allen and Unwin, Sydney, 1997) 175; *Peters v Collinge*, above n 45, 566.

⁴⁸ This phenomenon exists with all voluntary organisations, including political parties.

contract, or liable in tort, if they have committed some wrong, but are not liable by virtue of their status as party executive members.⁴⁹

Peters v Collinge was a case brought by the Rt Hon Winston Peters challenging a decision of the National Party in expelling Peters, attempting to restrict him standing for Parliament if not selected as a National candidate, and not approving Peters as the Tauranga National candidate.⁵⁰ The major issue became whether National's decision to disapprove Peters for the Tauranga electorate was subject to judicial review, and whether wider party political processes were reviewable.

Fisher J found that the jurisdiction to review steps taken by unincorporated societies was through contract, the terms of the contract being the rules of the society that members agreed to follow when becoming members. There may be, in special situations, non-contractual judicial review where the society is exercising 'quasi-public functions', or when there was a 'significant direct impact upon the public', but this was not one of those cases. Therefore, it was the express and implied terms of National's rules that were relevant to the case; the validity of the rules themselves could not be examined.

Parties' decisions are therefore only reviewable on whether the party rules were followed, unless the decision is a matter of significant and direct impact upon the public.⁵¹ If the selection of a candidate to have party backing to stand for election is without impact on the public, it is hard to identify any party action that would be.

The fiction of government being comprised of individual MPs is also evident in *Peters v Collinge*, where it is stated that parties are legally private bodies, and as such have no public duties.⁵² A party merely assists individuals into becoming MPs and offers support and 'suggestions' to MPs from the wings.

⁴⁹ For the legal status of unincorporated societies generally, including liability issues, see *Campbell v Scott* [1995] 2 NZLR 345, 355-356 (HC) Tipping J.

⁵⁰ *Peters v Collinge*, above n 45.

⁵¹ *Peters v Collinge*, above n 45, 566-571.

⁵² Contrast with the decisions in *Dunne and Anderton v Canwest TVWorks Limited* (11 August 2005) CIV 2005 495 1596, paras 31-36 Ronald Young J where the changing law relating to review is summarised as being a move toward 'bodies who perform public functions', rather than the nature of the body; see also *Ransfield v Radio Network Ltd* [2004] BCL which states that in the context of New Zealand Bill of Rights Act 1990, private bodies can be required to adhere to the rights contained in the Act if they are performing a public function. It is at least arguable that candidate selection would be considered a public function under the test in *Ransfield*.

Individual MPs may have public or statutory duties by virtue of their status as an MP.⁵³ While MMP has, since this case was decided, put parties on the 'public stage', the public and statutory duties of a party would not extend to situations beyond what the individual MPs' duties were, and as such would not cover the internal workings and decision making processes of the party.

The way that the arguments were structured and the relief that was sought effectively would have forced the National Party into approving Peters as the candidate for Tauranga. The observation that parties are private entities, and that private law relating to private unincorporated societies and public law relating to elections must be kept separate, was an efficient and (relatively) non-contentious way to deny this remedy to Peters. If the Court had decided parties were public bodies, their decisions were able to be reviewed, and that the particular decision in the case was illegal, Fisher J would have had little choice but to effectively force National into giving Peters the Tauranga nomination. The Court would appear to be deciding who could have a realistic chance of entering Parliament by being a major party candidate. This perception likely would have occurred despite the result being based upon the validity of the party's internal decision making processes independent from whomever or whatever the decision is being made about; this perception could have influenced the Court into observing parties' private nature.

In *Awatere Huata v Prebble* the principle that parties were not subject to public duties was restated. It was observed that a court would enforce a party's rules, but that a party had wide freedom to determine their internal arrangements, objectives and membership.⁵⁴ The fiction that parties do not have a role in public politics has continued even after the change to MMP.

Incorporated societies must comply with the Incorporated Societies Act 1908. They are distinct legal entities in the form of bodies corporate, with the powers and functions of bodies corporate, such as ownership of property, the ability to contract and to be sued.⁵⁵ This creates an entity easily accessible in a dispute; rather than having to sue a member of the party executive who

⁵³ *Peters v Collinge*, above n 45, 575.

⁵⁴ *Awatere Huata v Prebble*, above n 46, 309.

⁵⁵ Incorporated Societies Act 1908, s 10.

participated in the decision making process, the party itself can be sued. Wider party members are not personally liable for the society.⁵⁶

Incorporated societies have financial reporting obligations, which include reporting income, expenditure, assets, liabilities, and securities.⁵⁷ These are more detailed than the annual disclosure of donations and the election expense returns parties must make.⁵⁸ Parties that are incorporated are therefore slightly more transparent in regards to finances, and are directly accessible and accountable in disputes.

However, it is likely that the observations from *Peters v Collinge* and *Awatere Huata v Prebble* would apply to incorporated parties. Internal arrangements are still governed by society rules; there are no additional requirements that would affect the internal workings of the party. Judicial review of incorporated societies occurs in the same way as review of companies according to their constitutions, meaning that parties can be held to comply with their rules, but the validity of those rules cannot be examined.⁵⁹ Parties have no public duties in ordering their internal arrangements just because they are incorporated.

2 *Regulating parties*

The Electoral Act 1993 contains a party registration regime. Parties that register may submit party lists and contest the party vote.⁶⁰ The Act contains no definition of a party. Therefore any organisation meeting the registration requirements may register as a political party. The registration criteria are that the organisation must have at least 500 financial members, and the party's name and logo must not mislead or cause confusion.⁶¹

Beyond these requirements, which provide a minimum size and sufficiently serious political intent before an organisation may register as a

⁵⁶ Incorporated Societies Act 1908, s 13.

⁵⁷ Incorporated Societies Act 1908, s 23.

⁵⁸ Electoral Act 1993, ss 214C and 214G.

⁵⁹ See *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 12.

⁶⁰ See Electoral Act 1993, ss 62-71B, especially s 62: parties do not have to register to contest electorate seats.

⁶¹ Electoral Act 1993, s 63.

party,⁶² there exists little regulation. Financial restrictions on campaign spending exist; exceeding the limits may attract a fine or imprisonment to the person responsible, but there is no sanction for the party itself.⁶³ Additionally registered parties must declare all donations over \$10,000 that they receive,⁶⁴ although such declarations may be from anonymous third parties, and are recorded as such,⁶⁵ or may be funnelled through a trust to stop disclosure of the donor. In 1999 only four donations above \$50,000 were not made either anonymously or through a trust.⁶⁶

The candidate selection processes within parties must be democratic.⁶⁷ This requirement does not affect the registration of a party, so a party with undemocratic procedures for candidate selection may still register and remain registered as a party. Democratic processes must involve participation by all financial members of the party, or participation by delegates selected by those members.⁶⁸ This in practice differs markedly between parties, with varying degrees of participation and influence afforded to party members.

The candidate selection process is arguably the most important function undertaken by parties; it essentially determines the makeup of Parliament. Party lists are closed lists, so that the general voting public has no influence on the makeup, or ranking, of the list. It is essential that these processes be regulated to ensure suitability for such a vital step in elections, and transparent to minimise potential abuse.

Regulation of the actual selection process is rather scarce. First, section 71 does not specify what participation means, so while party members may participate they may have no actual influence. Secondly, there is no sanction for registered parties that have undemocratic selection processes. They remain registered, and there appears to be no power for the Electoral Commission to

⁶² Andrew Geddis and Caroline Morris "All is Changed, Changed Utterly? – The Causes and Consequences of New Zealand's Adoption of MMP" (2004) 32 *Federal Law Review* 451, 461.

⁶³ A party may spend \$1,000,000 plus \$20,000 for each candidate; Electoral Act 1993, ss 214B(2)(a) and 224.

⁶⁴ Electoral Act 1993, s 214G.

⁶⁵ Electoral Act 1993, s 214G(1)(a)(ii).

⁶⁶ Justice and Electoral Committee "Inquiry into the 1999 General Election" [1999-2002] *AJHR* I7c 100.

⁶⁷ Electoral Act 1993, s 71.

⁶⁸ Electoral Act 1993, s 71.

sanction or censure an infringing party, or even review the selection processes.⁶⁹ The procedures are likely to be reviewable in court; although this has not happened in New Zealand it has occurred in Australia.⁷⁰

It is parties who are allocated advertising time and money under the Broadcasting Act 1989.⁷¹ It is illegal for parties to purchase additional broadcasting time.⁷² Breach of this is punishable by up to a \$100,000 fine for the person who commits the offence.⁷³

Broadcasting time and money is only available to registered parties.⁷⁴ When deciding on the allocation to be made to each party the Electoral Commission, with a representative from the government and opposition parliamentary parties, must have regard to:⁷⁵

- The vote received at the previous election by a party;
- The number of MPs a party has;
- Relationships that may exist between parties, which would cover statements of intent as to post election coalitions or supply;
- Public support, including opinion polls and party membership; and
- The need to provide a fair opportunity to registered parties to convey their policies to the public.

The Electoral Commission's role and the effect of these considerations in the allocation of broadcasting time and money will be discussed below.⁷⁶

⁶⁹ See Electoral Act 1993, ss 5 and 6.

⁷⁰ *Clarke v Australian Labour Party* (1999) 74 SASR 109; Geddis and Morris, above n 62, 462; Andrew Geddis "The Unsettled Legal Status of Political Parties in New Zealand" (2005) 3 NZJPIL 105, 117.

⁷¹ Broadcasting Act 1989, ss 71, 73, 74, 74A and 74B.

⁷² Broadcasting Act 1989, s 70.

⁷³ Broadcasting Act 1989, s 280.

⁷⁴ Broadcasting Act 1989, s 75(1).

⁷⁵ Broadcasting Act 1989, s 75(2).

⁷⁶ See III B 1 Broadcasting Allocation.

The Electoral Act has established a regulation regime for parties. This revolves around registration of parties; essentially any organisation that meets the minimal size and seriousness requirements may become a political party. From this base of registration the regulation of campaign spending and broadcasting, financial disclosure of donations, and candidate selection requirements flow. These are essentially the steps that were recommended by the Royal Commission, although the registration thresholds have been increased slightly.

B The Electoral Commission

The Electoral Commission is an independent body established under the Electoral Act.⁷⁷ It was created in 1994 to deal with the registration of parties, and has responsibility for the allocation of broadcasting time and money.⁷⁸ It is one of four agencies that administer the electoral system.⁷⁹ The functions of the commission are to:⁸⁰

- Register parties and their logos;
- Supervise the disclosure of donations to parties by parties;
- Allocate broadcasting time and money to parties for election campaigns in conjunction with representatives from parliamentary parties;
- Supervise a party's filing of party campaign expenses;
- Promote public awareness of electoral matters; and
- Consider and report on electoral matters referred to it by Parliament or the Minister of Justice.

These functions mean that the effective role of the Electoral Commission is in public education, electoral research, registering parties, and ensuring party compliance with the Electoral Act 1993 and Broadcasting Act 1989.

⁷⁷ Electoral Act 1993, ss 4-15.

⁷⁸ Ministry of Justice "Report of the Election Framework Taskforce" (Wellington, June 2001) 3.

⁷⁹ The others being the Chief Electoral Officer, the Electoral Enrolment Office, and the Representation Commission.

⁸⁰ Electoral Act 1993, s 5.

However, there are gaps in the Commission's coverage of the electoral rules relating to parties. For example the requirement that candidate selection be democratic is not covered, although the Royal Commission did recommend that the Electoral Commission be able to review selection rules and determine whether they are appropriate.⁸¹ Also, the Commission has limited powers to impose sanctions on wayward parties; it must report to the police any conduct believed to be an infringement of the election expense and financial reporting requirements,⁸² but this relates only to the person who breached the rules, not the party as a whole.

The Royal Commission recommended that the Electoral Commission be able to audit any party to ensure compliance with the financial reporting requirements.⁸³ While parties must currently appoint auditors to oversee the validity of election expense reports, and auditors must advise the Electoral Commission when it seems that the requirements have been breached or the party has interfered with the audit,⁸⁴ the Commission itself does not have the ability to carry out its own investigation.

1 Broadcasting allocation

A major role of the Electoral Commission is the allocation of broadcasting time and money.⁸⁵ It undertakes this role with two representatives: one representing the government, and one representing the opposition parliamentary parties.⁸⁶ There are clear criteria the expanded Commission must consider when making allocations.⁸⁷

This is an important function as much of the public gain the majority of their knowledge of parties through television and radio. Allowing a party to present its view without the gloss of editorial influence is important. This reason

⁸¹ Royal Commission on the Electoral System, above n 6, 240-241; the Electoral Commission's decision could be appealed to the High Court.

⁸² Electoral Act 1993, ss 214C(6) and 214I.

⁸³ Royal Commission on the Electoral System, above n 6, 200.

⁸⁴ Electoral Act 1993, ss 214D and 214E.

⁸⁵ Electoral Act 1993, s 5(ba).

⁸⁶ Broadcasting Act 1989, s 75(1).

⁸⁷ Broadcasting Act 1989, s 75(2).

speaks as to why party broadcasting must be made available to all parties and why it must be restricted so as to not give certain parties unfair advantages.

The current process of broadcasting allocation is not ideal. Firstly, representatives of Parliamentary parties participate in the allocation of broadcasting. Secondly, the allocation criteria include the votes a party received at the last election and the number of MPs a party has in the current Parliament. Both of these factors favour parties who are established and in Parliament already, with the bigger parties receiving more than the smaller parliamentary parties, who receive more than the parties outside Parliament. For the 2005 general election, money for broadcasting was allocated as follows:⁸⁸

Table 1: 2005 party broadcasting allocations

Group	Party	Allocation per Party	Allocation per Group
1	Labour Party	1,100,000	1,100,000
2	National Party	900,000	900,000
3	ACT, Greens, NZ First, United Future	206,607	826,428
4	Maori Party	129,129	129,129
5	Progressive	77,478	77,478
6	Alliance, Christian Heritage, Destiny NZ, Libertarianz	20,661	82,644
7	99 MP Party, Democrats, NZ FRPP, Republic Party of NZ	10,330	41,320

As can be seen the two major parties, Labour and National, received considerably more allocation than all the other parties, a total of \$2 million. This was due to the votes in the 2002 general election, the number of MPs, opinion polls and membership of the party. These factors were all also used to justify \$200,000 more to Labour than National. The remaining parliamentary parties received almost \$1.1 million, distributed between seven parties. The parties outside Parliament received slightly over \$120,000, distributed over eight parties. The differentiation between the Parliamentary parties (groups three, four, and five) was based on the results of the 2002 election and the number of MPs. The

⁸⁸ Electoral Commission "Election Advertising Funds Re-Jigged as New Parties Fail to Stand Lists" (26 August 2005) Press Release <www.elections.org.nz>.

differentiation between non-Parliamentary parties was based solely on opinion poll results, the group six parties having received over 0.5 percent in a poll during the preceding year.⁸⁹ The allocation considerations therefore help to entrench dominant large parties who already have a popular support base.

The Electoral Commission is the primary body responsible for overseeing parties. It does, however, seem to be crippled by inadequate powers to ensure party compliance. The Electoral Commission also plays an important role in electoral administration in general. Since the Royal Commission report there have been several inquiries advocating the consolidation of electoral administration into a single entity, the Electoral Commission.⁹⁰ However, the government line, for the most part has been, 'if it ain't broke, don't fix it,' or the issue has been put off until a full inquiry into the electoral system can be undertaken in the future.⁹¹ While it is beyond the scope of this paper to undertake a review of electoral administration in general, such a consolidation would be beneficial to the administration of parties as the Electoral Commission would gain critical mass in order to effectively carry out its functions.⁹²

C Party Reform

There are plenty of options for party reform. Tightening up the rules relating to parties would ensure that as the primary actor in elections, parties were both transparent and accountable for their constitutionally important role. Three areas exist where reform would be most effective. First, the status of parties needs to be changed to recognise the fact that they are public actors; this would increase both transparency and accountability. Secondly, the rules relating to democratic procedures for candidate selection can be improved; this would help to remove a potential bottleneck in political representation and ensure that no oligarchy within parties controls access to Parliament. Thirdly, oversight of

⁸⁹ Electoral Commission "Decision of the Electoral Commission on Allocation of Time and Money to Political Parties for Broadcasting of Election Programmes for the 2005 General Election" (15 April 2005) Press Release <www.elections.org.nz>.

⁹⁰ Justice and Electoral Committee, above n 66, 124-126; Ministry of Justice, above n 78, 17-22.

⁹¹ Palmer and Palmer, above n 9, 32-34.

⁹² Ministry of Justice, above n 78, 21-22.

parties can be improved by extending the scope of functions of the Electoral Commission and allowing the Electoral Commission to enforce electoral rules directly against parties.

1 *Regulating legal status*

Currently, parties are treated as essentially private organisations; they have no public duties, and are not accountable under public law. Parties are usually unincorporated and therefore do not have a legal identity separate from party membership.⁹³ Reform, to ensure accountability and transparency of parties, should therefore be made by changing the status of parties to public and creating a distinct legal identity. This would enable public law checks and balances, and ensure accessibility and accountability when things go wrong.

The status of parties was determined in *Peters v Collinge*.⁹⁴ This was decided before the transition to MMP. Parties' private status has been tacitly confirmed in *Awatere Huata v Prebble*, a decision delivered during the third MMP term.⁹⁵ These decisions do not describe the actual reality of parties. As has been shown parties perform constitutionally important roles at all levels of government,⁹⁶ from determining whom may be elected and disseminating political information, to forming and dissolving governments, to determining the passage of legislation and government policy.

To ensure effective, transparent, and democratic elections and government, we need to ensure that parties operate effectively, transparently, and democratically.⁹⁷ Parties presently operate effectively; most have very streamlined decision making processes with a clear group in control. Transparency has been improved with the donation reporting requirements and campaign spending restrictions that accompanied the introduction of MMP. Beyond this, transparency and democracy in party decision making is often

⁹³ See III A 1 Legal status of parties.

⁹⁴ *Peters v Collinge*, above n 45.

⁹⁵ *Awatere Huata v Prebble*, above n 46, 309.

⁹⁶ See II C The Constitutional Role of Parties.

⁹⁷ Geddis, above n 70, 110.

obfuscated behind committees and party executives with wide undefined powers, and pseudo-inclusive party direction and policy making processes that are subject to veto by a small party elite. In reforming the law relating to parties we need to ensure that transparent and democratic operation is maximised without derogating from effective party operation.

It is simple to recognise the public status of parties. The insertion of a provision in the Electoral Act 1993 would likely suffice.⁹⁸ This could be modelled on an equivalent German provision, which provides:⁹⁹

(1) Political parties form a constitutionally integral part of a free and democratic system of government. Their free and continuous participation in the formation of the political will of the people enables them to discharge the public tasks which are incumbent upon them pursuant to the [constitution] and which they undertake to fulfil to the best of their ability.

(2) The parties shall participate in the formation of the political will of the people in all fields of public life, in particular by:

- bringing their influence to bear on the shaping of public opinion; inspiring and furthering political education;
- promoting an active participation by individual citizens in political life; training talented people to assume public responsibilities;
- participating in Federal, Land and Local Government elections by nominating candidates;
- exercising an influence on political trends in parliament and the government;
- initiating their defined political aims in the national decision-making processes; and
- ensuring continuous, vital links between the people and the public authorities.

This provision simply states that parties do have a vital constitutional role in democratic government, and sets out the broad public duties that parties have. Such a provision would bring the entire ambit of party activity into the public sphere.

⁹⁸ *Clarke v Australian Labour Party*, above n 70.

⁹⁹ Political Parties Act (Gesetz über die politischen Parteien), article 1 (Germany).

By giving parties a public status, public law checks and balances would apply,¹⁰⁰ successfully boosting transparency and accountability in decision making processes without harming the effectiveness of the party system. These checks include public law judicial review of party decision making, the New Zealand Bill of Rights Act 1990,¹⁰¹ and the Official Information Act 1982.

Judicial review is a judicial invention to ensure that decisions by the executive or a public body are made according to law, even if a decision does not otherwise involve an actionable wrong.¹⁰² Judicial review applies to all public bodies. Parties are arguably acting as public bodies in their constitutional functions;¹⁰³ however, this argument has been hampered by decisions stating that parties are not public.¹⁰⁴ It would be simple to clearly allow judicial review of parties by affirming their public status in statute.

The ground of judicial review most appropriate to reviewing parties decision making process would be courts' innominate ground of review, where intervention takes place when something has gone wrong of a nature and degree that requires court intervention.¹⁰⁵ This ground gives more flexibility to review of non-governmental organisations where the decision to be reviewed does not fit cleanly within one of the traditional review grounds.¹⁰⁶

Judicial review of party decision making processes would ensure that decisions complied with the Electoral Act 1993. This is particularly relevant in relation to the requirement for democratic candidate selection in section 71. Review would also ensure natural justice was followed in decision making: this enhances transparency and would ensure that party interests triumphed over any personal biases.¹⁰⁷ Judicial review does not harm effective parties because the remedies do not impose substantive obligations on parties. Rather, judicial

¹⁰⁰ *Clarke v Australian Labour Party*, above n 70, 129-130 and 137-139.

¹⁰¹ New Zealand Bill of Rights Act 1990, s 3(b).

¹⁰² *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385, 388.

¹⁰³ *Royal Australasian College of Surgeons v Phipps*, above n 59, 11.

¹⁰⁴ *Peters v Collinge*, above n 45; *Awatere Huata v Prebble*, above n 46, 309.

¹⁰⁵ *Electoral Commission v Cameron* [1997] 2 NZLR 421, 430 (CA).

¹⁰⁶ The traditional grounds are illegality (exceeding power granted by statute), irresponsibility (a breach of natural justice or procedural fairness), and irrationality (a decision that no reasonable decision maker would ever have made); see *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374, 410-411.

¹⁰⁷ Contrast with the modest standard of fairness required by the court in *Peters v Collinge*, above n 45, 568-569.

review advises only on proper decision making procedures, and the final substantive decision always rests with the party. Judicial review would ensure legal, fair and rational decisions by parties without compromising their role in the political process.

Recognising parties' public status would bring them under the New Zealand Bill of Rights Act 1990. The public activities undertaken by parties would be covered by section 3(b) according to the test in *Ransfield v Radio Network Ltd*, if their public status was recognised.¹⁰⁸

The most pertinent right relating to parties is the right to natural justice.¹⁰⁹ This right guarantees judicial review of decisions, and will ensure procedural fairness in decision making. Freedom from discrimination is important, particularly for the candidate selection process, and may help to ensure truly representative candidates.¹¹⁰ However, the prohibited grounds of discrimination include political opinion.¹¹¹ Political opinion, and discrimination based on that opinion, is essential to the operation of effective parties, who require unique political stances to be effective. There are no exceptions for parties within section 19 to avoid this requirement, and section five is inapplicable unless the limit was proscribed by law.¹¹² Discrimination on political opinion by parties should be authorised by statute.

Section 12 provides for electoral rights and that everyone over the age of 18 is qualified for membership in the House of Representatives. This would be unlikely to affect parties.¹¹³ It is relevant to party conduct as it reinforces the idea that parties cannot prevent anyone, including members and putative candidates, from standing as a candidate against the party.¹¹⁴ However, the fact that someone is qualified does not mean that a party must, for instance, select them as a candidate. Qualified only means that everyone has the opportunity to become a

¹⁰⁸ *Ransfield v Radio Network Ltd*, above n 52.

¹⁰⁹ New Zealand Bill of Rights Act 1990, s 27.

¹¹⁰ New Zealand Bill of Rights Act 1990, s 19.

¹¹¹ Human Rights Act 1993, s 21(1)(j).

¹¹² New Zealand Bill of Rights Act 1990, ss 19 and 5.

¹¹³ New Zealand Bill of Rights Act 1990, s 12.

¹¹⁴ The idea that such restriction was not possible was tentatively mentioned in *Peters v Collinge*, above n 45, 565.

member of the House. Any other interpretation, for instance one that was used to attempt to force a party nomination, would make this provision unworkable.¹¹⁵

As famously stated by the United States' Justice Brandeis, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."¹¹⁶ To that end the Official Information Act 1982 should be extended to cover parties. This could be achieved by amending schedule one of the Official Information Act, to state that the organisations subject to the Act include registered parties. All registered parties would then be subject to the information disclosure requirements of the Act.

Parties would, rather than being able to operate in effective secrecy as they presently do, be subject to public scrutiny when information was requested unless good reason existed to withhold the information.¹¹⁷ Much information contained by parties that is currently secret, like party finances, would therefore be available on request. However, things that should be kept secret, such as names and address of members, and party policy, can remain secret.¹¹⁸ Such a change would not damage party effectiveness because sensitive information will be able to be kept secret, but other information that sheds light on the workings and influences of parties would be available; this would dramatically increase party transparency.

As well as recognition of the public nature of parties, it would be beneficial to create distinct party legal identities. This may be achieved through mandatory incorporation under the Incorporated Societies Act 1908,¹¹⁹ which would be simple to implement. Mandatory incorporation would involve making

¹¹⁵ *Peters v Collinge*, above n 45, 565.

¹¹⁶ Louis D Brandeis *Other People's Money and How the Banker's Use It* (R Adams, AM Kelly, New York, 1971) cited in Royal Commission on the Electoral System, above n 6, 187.

¹¹⁷ Official Information Act 1982, s 5.

¹¹⁸ For names and addresses of party members, this would come under s 9(2)(a) privacy of persons. Party policy would come under s 9(2)(k) preventing the disclosure or use of official information for improper gain or improper advantage; Official Information Act 1982, ss 6, 7 & 9.

¹¹⁹ Another option, adopted in Germany, would be to create a distinct party identity that automatically applies to any organisation who meets certain requirements: see Political Parties Act, above n 99, arts 2 and 3. Such a system seems superfluous when a legal framework that achieves the same goals already exists under the Incorporated Societies Act 1908, and would involve uncertainty as to when an organisation became a political party and thereby complicate dealings with such organisations.

it a requirement that a party that wishes to register be an incorporated society. Such a goal could be achieved by requiring that applications for registration include evidence of incorporation.¹²⁰ Registration should be cancelled if a party becomes unincorporated,¹²¹ and parties should be required to state in their annual declarations that they remain incorporated.¹²²

The benefits of requiring incorporation as a condition of registration includes parties with distinct and stable legal identities, the ability for parties to enter contracts and own property, the ability to sue and enforce judgment against parties, as well as more detailed and full financial reporting requirements than those currently required. There are few other consequences due to incorporation for parties; the greatest cost is in the additional financial reporting requirements and these are hardly onerous. Mandatory incorporation would therefore make all registered parties significantly more accountable and would increase transparency without impacting on the effectiveness of parties.

2 *Improved democratic procedures for candidate selection*

An essential way to maintain effective and democratic parties is through regulating the way that candidates are selected and party lists are created; parties must be democratic and also seen to be democratic.¹²³ While presently the Electoral Act requires democratic candidate selection processes, the actual processes vary wildly between parties. There are therefore two goals for reform in this area. First, standardising the rules for candidate selection; secondly, improving the democratic input into selection.

The common theme running through all parties' selection procedures is that the final decision making process rests with a small group, usually the party executive. There are different levels of input that ordinary party members have into the selection process. Input ranges from direct election and ranking of

¹²⁰ See Electoral Act 1993, s 63(2).

¹²¹ For instance, a phrase to the effect that "the Electoral Commission shall cancel the registration of any political party on being satisfied that the party is no longer incorporated" could be included in s 70 of the Electoral Act 1993.

¹²² See Electoral Act 1993, s 71A.

¹²³ Hon Peter Dunne MP (19 December 1992) 532 NZPD 13173.

candidates, to nomination of candidates, to selection of delegates who make the decision.¹²⁴

Standardising selection processes would be beneficial. This would put every party and all party members on the same footing. Standardisation would allow a consideration of what is appropriate in democratic candidate selection to occur and ensure that those standards are met. Presently, what is considered important is different for each party; merely specifying that provision be made for member participation does not adequately regulate the process.

(a) Democratic selection process

What therefore should candidate selection processes involve? Democratic involvement by party members has already been identified as the core consideration.¹²⁵ The level of involvement, however, must be determined. The Royal Commission recognised the tension between party executive and ordinary member selection of candidates. It was recognised that party executives had a beneficial effect on the overall quality and representation of candidates, but that under an MMP system parties would be solely responsible for choosing 50 per cent of Parliament, given 50 per cent of list seats filled from party lists, and it would be wrong to concentrate such a great influence on the makeup of Parliament in the hands of a relative few.¹²⁶

So while democratic involvement in candidate selection is very important, it should be set at such a level as to ensure high quality candidates and high representation; too much democratic input may compromise quality candidates to populist candidates and undermine adequate diversity of representation, too little input would create a democratic deficit in deciding who is to be considered for election. Parties have approached this tension in two main ways; either by indicative votes from party members, or selection by directly elected delegates.

Both methods have problems. An indicative vote does not restrain the party executive from just making up their mind and selecting their favoured

¹²⁴ See VIII Appendix Three: Selected Party Constitutions.

¹²⁵ Electoral Act 1993, s 71; Royal Commission on the Electoral System, above n 6, 240.

¹²⁶ Royal Commission on the Electoral System, above n 6, 240-241.

candidates without reference to the indicative vote. The delegate method does not actually allow the wider party to even express their support for potential candidates, but does at least make the ultimate selectors accountable to the party.

While the particular method of candidate selection should be left up to parties, as each party will have different considerations it desires to emphasise in the selection process, a number of requirements can be imposed to stress the ideally 'democratic' nature of selection. First, an indicative vote by the wider party should occur; this allows the wider party to express their views as to who should be elected. Secondly, criteria for departure from an indicative vote should be promulgated before such a vote occurs; these criteria should be decided by the party and designed to represent the values of the party. Thirdly, when the indicative vote is departed from reasons should be given by the party executive and these reasons should conform to the already promulgated departure criteria. These requirements will ensure that candidate selection is not controlled by a small group within a party. They will ensure transparent and rational selection processes, while still allowing the party to select effective and representative candidates.

German law requires that candidate selection occur by secret ballot by party members.¹²⁷ However, this is less desirable than the open and transparent indicative vote method suggested; a binding secret ballot prioritises democratic procedures to the exclusion of quality control.

(b) Party lists

Party lists are essential for MMP; it is from these lists that the extra MPs that the party vote entitles parties to are drawn. List selection needs to ensure that these seats, that can only be filled by party candidates, do not undermine the proportionality or accountability of Parliament. The list selection procedures may be improved by either retaining closed lists and improving the 'democratic procedures', or switching to open lists.

¹²⁷ Political Parties Act, above n 99, art 17.

Closed lists mean that the party itself determines the list membership and order.¹²⁸ The current methods of determining lists range from the Green Party, who allows all financial members to directly vote for the membership and order of the list,¹²⁹ to parties that seem to 'democratically determine' the composition of the list based solely upon the votes of the dominant party personalities.¹³⁰

List selection suffers from the same problems as candidate selection, in that currently too much power rests with a small group within the party. Even the Greens' method allows modification based on ensuring the list is representative of the New Zealand population; this may be representative but not democratic. The minor 'cult of personality' parties make barely a show of democratic selection. All parties to some degree retain the power to influence lists with a small elite within the party.

The indicative method described above would remedy the problems in the list selection and ranking procedures; party members would be required to rank candidates in order of preference, and this would result in an indicative list vote.

Open lists are where the voter while selecting a list at the election can indicate their preference for the order, or alternatively the make-up of the list. This has the benefit of eliminating the democratic deficit that occurs with closed lists as every person, not just those who belong to a party, have an equal say both in who is elected and who can be chosen to be elected.

Open lists are nevertheless less desirable than closed 'democratic' lists. Open lists bring with them much added complexity; a voter must do more than choose a party and electoral candidate they like, they must also consider the order they would like candidates to be elected, and possibly whether there is anyone else they would like.

Complexity is undesirable and would be increased even if the voter only had the option of re-ranking candidates. The act of voting would become similar

¹²⁸ Electoral Act 1993, s 127(2).

¹²⁹ However this may be modified slightly in a committee phase; see Green Party, above n 44.

¹³⁰ See United Future "Constitution of United Future New Zealand" (September 2004); ACT New Zealand "Constitution and Rules of ACT New Zealand" (16 March 2002); these parties require 'weight' to be given to indicative votes and comments by the wider party, but do not in any other way restrict the Party Executive.

to single transferable voting, although the allocation of seats would remain different. Increased complexity leads to increased informal voting.¹³¹

Write-in candidates, where the voter may nominate a person not on the ballot for election, would increase the complexity of voting again. If write-in candidates had to register before the election, this method of voting is superfluous. However, if anyone can be nominated, the likelihood of a write-in candidate having any significant effect on the election is minimal.

While support for open lists does exist, it is by no means unanimous.¹³² Also practical considerations exist that favour the retention of closed lists. These are that:¹³³

- National closed lists enable parties to ensure balanced representation among its candidates;
- Open lists may mean competition within a party as candidates seek to be placed higher on the list than other members of their party;¹³⁴
- To be effective open lists would require that every voter have a large degree of knowledge about all the candidates; and
- Open lists bring added complexity in voting.

Candidate selection processes within parties are an important bottleneck in the electoral process. Therefore these processes must be democratic, but not compromise the electoral process, effective parties or effective government. Candidate selection in general should proceed upon open and fair lines, with wider party members having an indicative input into the selection process.

¹³¹ Canadian Parliamentary Research Branch *Electoral Systems: Background Paper* (May 1993) 20: informal votes are those that are unable to be counted by not clearly expressing the voters intent. However, it is not agreed that complexity necessarily increases informal voting: see Enid Lakeman *How Democracies Vote: A Study of Electoral Systems* (Faber and Faber, London, 1974).

¹³² Nine (compared to 11 who supported the status quo) of 21 submissions to the MMP Review Committee desired open lists, as did the United Party; MMP Review Committee "Inquiry into the Review of MMP" [2001] AJHR I23A 52.

¹³³ MMP Review Committee, above n 132, 51-52; Royal Commission on the Electoral System, above n 6, 68.

¹³⁴ It was on the basis that such competition in public was undesirable that it was stated that such competition should occur within party forums; Royal Commission on the Electoral System, above n 6, 68.

Closed lists should be retained to maintain effective parties, government, and elections.

3 *A new and improved Electoral Commission*

The Electoral Commission is the appropriate overseer of parties. It maintains the register of parties, and already supervises the registration and financial reporting requirements for parties. However, the Commission's powers should be expanded.

The allocation of broadcasting time and money should continue to be based on the current criteria. However, other considerations should also be allowed; presently the Commission is unable to consider wider issues. Such other issues could include:¹³⁵

- The number of electorate and list candidates a party intends nominating;
- The time made available by broadcasters and the amount of money appropriated by Parliament;
- Any relevant matters raised in consultation with parties and broadcasters;
- The length of a party's existence;
- The scope of its policies and activity, so a single-issue party should receive a smaller allocation than parties with a full range of policies;
- The geographical spread of a party; and
- The exclusion of parties with little chance of success or without serious political intent.

Such considerations could be given a lower priority than the current 'primary' considerations of past electoral performance.¹³⁶ Allowing wider considerations would move the focus from the past electoral success of parties, to

¹³⁵ Electoral Commission "Submission to the Electoral Law Committee on the Inquiry into the 1999 General Election".

¹³⁶ Broadcasting Act 1989, s 75(2); see also Electoral Law Committee "Broadcasting (Election Broadcasting) Amendment Bill" [1996-99] LXVI AJHR I24.

the future benefits parties would receive from allocation. This would help mitigate the entrenchment that large well-established parties have.

The representatives of Parliamentary parties on the Commission for broadcasting allocation should be removed. This would ensure that the allocation decisions remain independent, and appear to be independent, from any party and parliamentary bias.¹³⁷

The Commission should be given a role in ensuring compliance with the democratic candidate selection procedures within parties.¹³⁸ This was advocated for by the Royal Commission, with the possibility of High Court review of Commission decisions.¹³⁹ The Commission's role was removed at the select committee stage as it was thought more appropriate that oversight of this process rests with the courts.¹⁴⁰ The Commission should, however, have a role in reviewing selection rules. First, a review by the Commission would be less expensive, onerous and time consuming than taking a review case to court; this could be important in the time pressures that are involved in elections. Secondly, as parties are required to lodge copies of their rules with the Commission in order to register, the Commission has easy access to the rules and is well positioned to examine them. Thirdly, if the democratic selection criteria are changed as recommended,¹⁴¹ it is a relatively simple task to check for compliance. Fourthly, if the Commission's powers are extended to allow direct sanctioning or censure of parties for breach of electoral rules, the Commission is the logical place to impose all sanctions and give censure.

Responsibility for oversight of party adherence to the requirements in the Incorporated Societies Act should also rest with the Commission. The Commission should be allowed the powers of inspection in the Incorporated

¹³⁷ Palmer and Palmer, above n 9, 31. The Electoral Commission itself has submitted that these representatives be removed; see Justice and Electoral Committee, above n 66, 116; Justice and Electoral Committee "Inquiry into the 2002 General Election" [2002-2005] AJHR I7A 17; MMP Review Committee, above n 132, 56-57.

¹³⁸ These procedures are located in section 71 of the Electoral Act 1993. For the recommended changes to s 71, see III C 2 Improved democratic procedures for candidate selection.

¹³⁹ Royal Commission on the Electoral System, above n 6, 240-241.

¹⁴⁰ Electoral Law Committee "Report on the Electoral Reform Bill" [1991-93] XXIV AJHR I17C 7.

¹⁴¹ See III C 2 Improved democratic procedures for candidate selection.

Societies Act,¹⁴² and required to seek liquidation of an incorporated party when it no longer meets the act's requirements.¹⁴³

The donation reporting regime should be tightened up. Presently, given the possibility of anonymous donations, the regime does not meet the purposes for which the donation disclosure regime was established, namely to reduce improper influence, and promote transparency, accountability, and public confidence.¹⁴⁴ This could be improved by changing the definition of 'anonymous donation' to a donation received by someone who is actually unknown to the party, and by requiring that 'associated entities' (any organisation that is controlled by, or operates to the benefit of, a registered party) make disclosure of donations on the same basis as parties.¹⁴⁵ The Commission should have the ability to sanction non-compliant organisations.

The Commission should have the ability to sanction wayward parties. Presently, the Commission can recommend to the police that individuals who breach the financial reporting and election expense provisions be charged with corrupt or illegal practice. Sanctions should be available against parties directly, which would be possible if mandatory incorporation was instituted.¹⁴⁶ If a party, for example, exceeds the election expense restrictions, that party should be liable for illegal practice.

Sanctions against parties should include deregistration. Although the Royal Commission considered that party deregistration was too draconian and impractical,¹⁴⁷ given the constitutional importance of parties and the need to ensure compliance with electoral rules to ensure an effective electoral system and democracy, such sanction should be available.¹⁴⁸ Deregistration should not be made lightly, and should only be made when a party wilfully refuses to comply with electoral rules, particularly when a party loses incorporated society status or fails to remedy undemocratic selection procedures. The first action taken by the

¹⁴² Incorporated Societies Act 1908, s 34A.

¹⁴³ Incorporated Societies Act 1908, ss 25 and 26.

¹⁴⁴ Justice and Electoral Committee, above n 137, 22-23.

¹⁴⁵ Justice and Electoral Committee, above n 66, 101-102.

¹⁴⁶ See III C 1 Regulating legal status.

¹⁴⁷ Royal Commission on the Electoral System, above n 6, 267.

¹⁴⁸ Note that the Commission already can cancel registration if it becomes satisfied that party membership has fallen below 500; Electoral Act 1993, s 70(2).

Commission when a party has breached electoral rules should be censure of the party. This allows the party to remedy the deficiency themselves. Parties must be given notice of potential deregistration, and may object to deregistration.¹⁴⁹

4 Recommendations

In order to maintain effective parties and boost their transparency and accountability, improve the democratic processes within parties, and improve oversight of parties and sanctions for nefarious party behaviour, a number of changes should be made to our electoral law. These may be difficult to implement, given that parties will inevitably see some of these recommendations as adverse to their interests, and because parties have an effective stranglehold on the legislative process.

Changes that will enhance transparency and accountability of parties generally are:¹⁵⁰

- Electoral Act 1993: adding a provision that recognises the constitutional and public status of parties;
- Electoral Act 1993: requiring applications for registration to include evidence of incorporation and that registered parties remain incorporated;¹⁵¹ and
- Official Information Act 1982: amending the first schedule to make registered parties subject to the Act.¹⁵²

Closed lists should be retained, but the 'democratic selection procedures' for electorate and list candidates should be improved. Recommended changes to section 71 of the Electoral Act 1993 are to require:¹⁵³

¹⁴⁹ Compare with the Commonwealth Electoral Act 1918 (Cth), ss 137 and 141; Australian Electoral Commission *Party Registration Overview* <www.aec.gov.au> (last accessed 19 September 2005).

¹⁵⁰ See III C 1 Regulating legal status.

¹⁵¹ These could be included in ss 63 and 70 of the Electoral Act 1993.

¹⁵² Official Information Act 1982, sch 1.

¹⁵³ See III C 2 Improved democratic procedures for candidate selection.

- An indicative vote by all party members;
- A clear set of criteria for when the party executive / delegates may depart from an indicative vote that is promulgated before such voting; and
- That reasons be given for departure from an indicative vote.

Changes to the Electoral Commission that should be implemented through the Electoral Act 1993 are:¹⁵⁴

- Removing the two parliamentary party representatives from the Commission for purposes of allocating broadcasting time and money;
- Allowing oversight of the section 71 democratic candidate selection procedures, with an appeal to the High Court;
- Giving the Commission responsibility for oversight of party compliance with all facets of the Electoral Act 1993 and the Incorporated Societies Act 1908 (assuming mandatory incorporation is adopted);
- Allowing the imposition of sanctions directly against parties (assuming mandatory incorporation is adopted); and
- Allowing deregistration of parties for continued and cynical breaches of electoral rules after notice and an opportunity to object is given to the party.

IV MAINTAINING PROPORTIONALITY

New Zealand under MMP has an extraordinary record of proportionality. Proportionality has been improving with every election since the introduction of MMP.¹⁵⁵ There are, however, a number of challenges which may have an adverse effect on proportionality. As the underlying principle of MMP is proportionality, and proportional representation is the desired outcome of an

¹⁵⁴ See III C 3 A new and improved Electoral Commission.

¹⁵⁵ See VII Appendix Two: The Gallagher Index of Disproportionality.

MMP election, these challenges should be resolved. Proportionality must be balanced against ensuring a functioning and effective system of government.

There are two types of challenges that face proportionality. First, challenges caused by the operation of the rules of MMP which distort proportionality as seats are allocated; these are caused by electoral thresholds, determination of electorate seats, and overhang seats. Secondly, challenges within the operation of Parliament, most obviously party-hopping; this distorts proportionality during the term of Parliament.

A Disproportionality in Seat Allocation

The rules relating to when a party is entitled to 'top-up' list seats on the basis of their party vote ("electoral thresholds"), and the rules for determining electoral districts, can have a significant impact on the proportionality of Parliament. These rules relate to how seats are allocated: electoral thresholds determine when a party may receive list seats, and the determination of electoral districts affects the ratio of electorate to list seats and therefore what seats are available.

Electoral thresholds have an immediate effect on proportionality and parties in that if a party fails to meet a threshold, they do not receive any seats and the votes they did receive are effectively wasted. Determining electoral districts is a long term threat to proportionality. It does not affect parties directly, but as time passes, will eventually benefit the major parties more, as they win more electorate seats than minor parties.¹⁵⁶

While other rules of MMP may be exploited to allow manipulation of proportionality, for instance the use of decoy lists,¹⁵⁷ these have not had a significant impact in New Zealand, and are best addressed through political sanction, rather than changing the rules relating to MMP. Such exploitation of

¹⁵⁶ Royal Commission on the Electoral System, above n 6, 66.

¹⁵⁷ This is somewhat ameliorated in New Zealand given the rules relating to component parties, however determined parties may still get around these rules if they are willing to accept the risk of a public backlash given the cynical exploitation of rules; Electoral Act 1993, ss 63(2)(d), 127(3A), 128A, and 191. The use of decoy lists has been successful overseas, particularly in Italy in 2001; see VII Appendix Two: The Gallagher Index of Disproportionality.

rules, rather than issues with the rules themselves, have therefore not been examined.

1 Electoral thresholds

Electoral thresholds limit the parties that receive seats in Parliament to those that gain over five percent of the total party vote (“the vote threshold”), or an electorate seat (“the electorate threshold”).¹⁵⁸ Thresholds are designed to discourage the proliferation of minor or extremist parties in Parliament; too many disparate and whimsical minor parties can disrupt the passage of legislation and make confidence and supply uncertain.¹⁵⁹ With no threshold parties would gain a seat at around 14,000 votes; with the five percent vote threshold, a party needs approximately 100,000 votes.¹⁶⁰

Thresholds affect both the proportionality of Parliament, and the Parliamentary existence of otherwise viable parties.¹⁶¹ For instance a party that received 90,000 party votes (under five per cent) and no electorate seat would receive no seats;¹⁶² these 90,000 votes have no effect in the makeup of Parliament; those voters have effectively been disenfranchised.¹⁶³ In 1996 7.5 per cent of party votes was given to parties that did not meet the thresholds, in 1999 six per cent, in 2002 4.9 per cent, and in 2005 1.3 per cent.¹⁶⁴ In each MMP election a significant number of votes have been wasted. Thresholds also influence voting behaviour; voters may be discouraged from voting for a party who is on a threshold borderline.¹⁶⁵

A balance must be struck between effective government and proportionality. The potential for disruption to government is actually quite

¹⁵⁸ Electoral Act 1993, s 191(4).

¹⁵⁹ Royal Commission on the Electoral System, above n 6, 66-67.

¹⁶⁰ In 2005 the Destiny Party would have gained a seat at 0.62 per cent (14,210 votes) of the party vote with no threshold; see VIII Appendix Three: Election Results and Thresholds; statistics taken from Electoral Commission *Election Results* <www.electionresults.govt.nz> and <www.elections.org.nz> (last accessed 21 September 2005).

¹⁶¹ Anckar, above n 30, 510.

¹⁶² The Christian Coalition in 1996 received 4.3 percent of the party vote, which was approximately 90,000 and did not receive any seats; MMP Review Committee, above n 132, 48.

¹⁶³ Rein Taagepera “Nationwide Threshold of Representation” (2002) 21 *Electoral Studies* 383.

¹⁶⁴ Electoral Commission, above n 160.

¹⁶⁵ Anckar, above n 30, 504, and 505-506; Kieran Williams “Judicial Review of Electoral Thresholds in Germany, Russia, and the Czech Republic” (2005) 4 *Election Law Journal* 191, 191-192.

considerable.¹⁶⁶ In 2002 having no election thresholds would have significantly shifted the balance of power post election; the minority Labour-Progressive government would have had to secure at least one more party on confidence and supply in order to be sure of retaining the ability to govern.

It is therefore a case of weighing the importance of effective government against a proportional result with minimal wasted votes. No thresholds create too much risk of a 'hung house', and are not appropriate.¹⁶⁷ Two questions remain. First, what level should the vote threshold be? Secondly, should the electorate threshold remain as another path to Parliament?

New Zealand has a high vote threshold at five per cent.¹⁶⁸ The Royal Commission recommended a threshold of four per cent; this was seen as an appropriate level to maintain effective government without being the obstacle to emerging parties that a five per cent threshold would be.¹⁶⁹ In the 2001 MMP review, several arguments were raised for reducing the threshold to four per cent. These were less discouragement of emerging parties, reduction in wasted votes (this is significant, for in three of the four MMP elections the number of wasted votes has been above 100,000), and mitigation of the 'jackpot effect'. The jackpot effect is where 4.9 per cent = no seats, but 5.1 per cent = six or seven seats. Voting behaviour as a result may be distorted, both in key electorates (such as Wellington Central in 1996 and 1999) and even for the party vote, as has happened in New Zealand and Germany. A lower vote threshold would ameliorate the jackpot effect and distortions to voting patterns.¹⁷⁰

While a four per cent threshold, combined with the electorate threshold, would not have changed anything in the last three elections, this is not a valid reason for keeping the status quo.¹⁷¹ The threshold should be set as low as possible without undermining effective government; a four per cent threshold

¹⁶⁶ See VIII Appendix Three: Election Results and Thresholds.

¹⁶⁷ Royal Commission on the Electoral System, above n 6, 66; MMP Review Committee, above n 132, 48.

¹⁶⁸ Compare to two per cent in Denmark, 1.5 per cent in Israel, four per cent in Norway and Sweden, and five per cent in Germany; MMP Review Committee, above n 132, 49.

¹⁶⁹ Royal Commission on the Electoral System, above n 6, 66-67; the ACT, Green, and United parties (admittedly all parties that have a vested interest in a lower vote threshold) agreed with this, see MMP Review Committee, above n 132, 48.

¹⁷⁰ MMP Review Committee, above 162, 48-49.

¹⁷¹ This essentially was the argument from those parties who desired retaining the status quo. A four per cent threshold would have affected the 1996 election, since the Christian Coalition received 4.3 per cent and therefore would have gained five seats: MMP Review Committee, above n 132, 48-49.

would not undermine effective government but may be important to minor parties, and would mitigate the adverse effects of a high threshold, while still erring on the side of caution.

The electorate threshold represents another path to representation for small parties that may not be able to garner the support to cross the vote threshold. However, it has attracted opposition from all but parliamentary parties with electorate seats. Arguments against the electorate threshold are that it is unfair and anomalous in allowing list MPs to enter Parliament on the 'coat-tails' of another MP rather than on the basis of party support, and that success in an electorate is not necessary evidence of support elsewhere.¹⁷² However, taking the view that as most electorate MPs are elected based upon their party affiliation anyway,¹⁷³ winning in an electorate seat is justified in allowing the allocation of list seats, as by winning an electorate seat there exists significant local party support that may otherwise be ignored.¹⁷⁴ Additionally the electorate threshold does avoid vote wastage.¹⁷⁵

The effect of the electorate threshold on the allocation of seats is much more significant than changing the vote threshold.¹⁷⁶ Several minor parties have relatively safe electorate seats and depended on the electorate threshold to gain list seats, in 2005 four parties were in this position. More importantly, as a consequence of eliminating the electorate threshold, electorate seats gained when a party does not reach the vote threshold would become overhang seats;¹⁷⁷ this further distorts proportionality.¹⁷⁸ Therefore while the electorate threshold may be seen to be anomalous in principle, by allowing MPs from a national party list to enter Parliament based on the merits of an individual MP, the effect of removing this threshold would exasperate vote wastage, the jackpot effect, disproportionality, and discourage regional representation; the electorate threshold also has a significant positive effect on proportionality.¹⁷⁹ The electorate threshold should remain given the serious adverse effects on

¹⁷² Palmer and Palmer, above n 9, 25-27.

¹⁷³ *Lange v Atkinson*, above n 23, 463.

¹⁷⁴ MMP Review Committee, above n 132, 50.

¹⁷⁵ MMP Review Committee, above n 132, 50.

¹⁷⁶ See VIII Appendix Three: Election Results and Thresholds.

¹⁷⁷ See Electoral Act 1993, s 191.

¹⁷⁸ See VIII Appendix Three: Election Results and Thresholds.

¹⁷⁹ See VIII Appendix Three: Election Results and Thresholds.

proportionality and possible proliferation of overhang seats that would occur if removed.

2 *Declining proportionality and overhang seats*

The operation of electoral rules creates a situation of declining proportionality over time. This is due to the method of determining electoral districts in relation to the population of the South Island, and the fixed number of total MPs.¹⁸⁰

Electoral districts are determined by taking the population of the South Island and dividing by 16. This gives the size of each electoral district ("the quota"). North Island and Maori electoral districts are determined by taking the population on the general roll in the North Island and on the Maori roll and dividing by the quota.¹⁸¹

As the North Island and Maori population increases faster than the South Island population the number of electoral districts will increase. In 1996 there were a total of 66 electoral districts;¹⁸² in 2001 a total of 69.¹⁸³ Population estimates from June 2004 show that there would be at least one more North Island or Maori district if districts were recalculated at that time.¹⁸⁴

As electoral districts and therefore electorate MPs increase, the amount of list MPs decreases, as the total number of MPs is limited to 120.¹⁸⁵ There is no proportionality in the allocation of electorate seats: they are awarded by plurality

¹⁸⁰ Electoral Act 1993, ss 35, 36 and 191.

¹⁸¹ For example in 2001, when the electoral districts were last redrawn, the populations were 868,923 (South Island), 2,497,596 (North Island), and 371,690 (Maori). This gave an electoral district size of 54,308 ($868,923 \div 16$), 46 North Island districts ($2,497,596 \div 54,308$), and 7 Maori districts ($371,690 \div 54,308$), for a total of 69 electoral districts; see Electoral Act 1993, ss 35 & 36.

¹⁸² 45 North Island, 5 Maori, and 16 South Island.

¹⁸³ 46 North Island, 7 Maori, and 16 South Island.

¹⁸⁴ Total North Island adult population (including population on the Maori roll) had increased by 143,000 compared to total South Island adult population (including population on the Maori roll) by 37,000, therefore if electoral districts were redrawn in June 2004, given district size of under 60,000 and an increase of 106,000 more in the North Island than South Island, at least one, possibly two or three, more North Island / Maori electoral districts would be required depending on the exact numbers on the Maori roll; Statistics New Zealand *National Population Estimates (June 2004 Quarter)* <www.stats.govt.nz> (last accessed 23 September 2005).

¹⁸⁵ Electoral Act 1993, s 191; MMP Review Committee, above n 132, 17-18 and 38.

votes. It is list seat allocation that establishes proportionality.¹⁸⁶ As the ratio of electorate to list seats increase, the likelihood of overhang seats increases.¹⁸⁷

This problem can be remedied by either cementing the number of electorates or increasing the total number of MPs. Of the two options increasing the number of MPs is the more preferable, even with public opposition to increasing MPs;¹⁸⁸ as section 35 is entrenched it will be difficult in practice to alter the method of creating electoral districts,¹⁸⁹ and cementing the number of electorates will result in larger and larger electorates as time passes, diminishing the electorate-MP link. The Royal Commission thought the least amount of MPs needed for effective government was 120, and preferred 140;¹⁹⁰ the report also stated that under MMP, as the number of electorates increased, the size of the House should increase. The ideal ratio of electorate seats to list seats was determined to be 1:1; other ratios were able to maintain proportionality to an extent, however, these were rejected on the basis of causing different classes, and a lower diversity, of MPs.¹⁹¹

The current method of determining electoral districts should be retained, but section 191 should be modified to allocate an equal number of list seats to the number of electorate seats.

B Disproportionality During Parliament

Party-hopping refers to the phenomenon where an MP elected as a list or electorate candidate of one party, during the term of Parliament, switches to another party. This distorts proportionality as the original party now has one less seat than it was entitled to on Election Day.

¹⁸⁶ Gallagher, Laver and Mair, above n 10, 279.

¹⁸⁷ Electoral Act 1993, s 192(5); MMP Review Committee, above n 132, 17-18 and 38.

¹⁸⁸ A number of popular campaigns have sought a reduction of MPs, usually to 99. However while these have attracted popular support, considered opinion, and submissions made on the issue, general favour retaining the status quo or increasing the number of MPs; MMP Review Committee, above n 132, 34-40; Phillip Joseph "Constitutional Law" [2001] 4 NZLR 449, 469-470.

¹⁸⁹ Electoral Act 1993, s 268. The total number of MPs is not so entrenched; see Electoral Act 1993, s 191.

¹⁹⁰ Royal Commission on the Electoral System, above n 6, 126-129; see also Ministry of Justice, above n 78, 34-38.

¹⁹¹ Royal Commission on the Electoral System, above n 6, 65-66.

Party-hopping has occurred a number of times in New Zealand, both pre- (notably the Rt Hon Winston Peters and the Rt Hon Jim Anderton) and post-MMP. The party-hops of Alamein Kopu in 1997 and part of the New Zealand First caucus in 1998 caused concern about the effect of party-hops on Parliament and government.¹⁹² This prompted a legislative response, the Electoral (Integrity) Amendment Act 2001 ("The Integrity Act").

After the Integrity Act had passed, the Alliance party fractured. Anderton was the 'parliamentary leader' of Alliance, but formed a new party to contest the upcoming election. The Integrity Act proved ineffective.

In 2002 Donna Awatere Huata was suspended from ACT and became an independent. ACT attempted to invoke the Integrity Act, by stating that Huata was distorting the proportionality of Parliament.¹⁹³ ACT contended that because Huata was no longer an ACT member, the party had less parliamentary strength than entitled to, thereby distorting proportionality. Huata claimed she still voted according to ACT policies. The Integrity Act was eventually successfully invoked to remove Huata from Parliament.

1 The Electoral (Integrity) Amendment Act 2001

Concern has been that party-hoppers deny voters their desired result. Particular concern has been on list MPs, considered to be elected solely by reason of the party since shunned. The Integrity Act was passed to address this perceived problem. The intent was to stop MPs leaving their parties or 'distorting the proportionality of Parliament' and remaining in Parliament.¹⁹⁴ The Act was only triggered when the MP themselves, or the parliamentary leader, notified the Speaker.¹⁹⁵ When triggered a list MP was replaced by the next person down on the list, and an electorate MP forced a by-election in that constituency.¹⁹⁶ The Act has now expired.¹⁹⁷

¹⁹² Palmer and Palmer, above n 9, 140 – 141.

¹⁹³ Electoral Act 1993, s 55D (expired).

¹⁹⁴ Electoral Act 1993, ss 55A, 55B, 55C, and 55D (expired).

¹⁹⁵ Electoral Act 1993, s 55A (expired).

¹⁹⁶ Electoral Act 1993, ss 134 and 129.

¹⁹⁷ Electoral (Integrity) Amendment Act 2001, s 3.

The Act was designed with the idea that because we have a proportional electoral system our Parliament should be proportionate to the election result. Proportionality is undermined whenever an MP switches parties. This reduces the effectiveness that party should have based on the party vote. MPs should therefore not be able to switch parties and remain in Parliament.

New Zealand is unique in toying with fixing election-night proportionality by preventing party-hopping. Germany, as well as other non-MMP proportional systems, have never implemented such restrictions.¹⁹⁸ Party-hopping in New Zealand does, because of the smaller size of Parliament, influence proportionality more than in overseas jurisdictions.

Party-hopping legislation may become relevant again in the current Parliament; parties are finely balanced, some appear unstable, and defections by one or two MPs may cause the government to collapse. Party-hopping legislation may be the only prevention of such a dilemma; although whether prevention is desirable must be questioned.

Effective party-hopping legislation must be able to maintain proportionality; the Integrity Act was less than successful in this regard, due to problems in form. Any such legislation also has problems in principle, and undesirable consequences.

(a) Problems in form

Party-hopping legislation simply does not work when it is intended to work. Legislation may not cover many of the situations of actual party-hopping; the Integrity Act was restricted to two narrow circumstances, the resignation of an MP and when an MP (who is not the parliamentary leader) acts in such a way as to distort the proportionality of Parliament.¹⁹⁹

Even when activated the Integrity Act entrusted the formal power to determine whether a seat has become vacant to the Speaker. The Speaker is not

¹⁹⁸ For example both Poland and Israel (pure proportional representation) have had some trouble with party-hopping but have not implemented any such measure.

¹⁹⁹ Electoral Act 1993, ss 55A, 55C, and 55B (expired): see particularly the discussion regarding Anderton's 2002 party-hop. As Anderton was both the parliamentary leader and the resigning MP the Integrity Act could not be invoked against him.

the appropriate person to exercise this power. Because of the role of the Speaker this formally entrenches the power to determine the disqualification of MPs with Parliament; given that Parliament is a partisan environment this is not appropriate.²⁰⁰

The Integrity Act is also inconsistent in regards to electorate and list MPs. If after an electorate MP party-hops, a candidate not from the party that originally held the seat wins the by-election, proportionality will be affected. The number of list MPs the original party would have received if they had won the same party vote but not the constituency will be one greater than what they actually received, and if the MP has jumped to a rival party that party will have one too many MPs.²⁰¹

(b) Problems in principle

The principles behind the Act are also of concern. Such legislation derogates from the principle that MPs are elected to exercise their own judgement, and are not 'obedient messengers to the electorate or any other man', including parties.²⁰² Additionally the problems that the Act was meant to address are political concerns and should not be dealt with by the blunt instrument of legislation. Before the Integrity Act was passed, party-hopping often resolved itself with the next election.²⁰³ Also, party-hopping may be appropriate in some circumstances; for example, party-hopping was endorsed at the following election by the electorate in Anderton's case. Legislation automatically bans party-hopping even when the defecting MP may be the one who is adhering to party-principles and it is the party that has strayed.²⁰⁴

²⁰⁰ See generally Claudia Geiringer "Judging the Politicians: A case for Judicial Determination of Disputes over the Membership of the House of Representatives" (2005) 3 NZJPIL 131.

²⁰¹ Phillip Joseph "Constitutional Law" [2000] NZLR 301, 311.

²⁰² Edmond Burke "Speech to the Electors of Bristol" (Bristol, 3 November 1774).

²⁰³ As Alamein Kopu MP, and the New Zealand First party-hoppers failing to get re-elected.

²⁰⁴ Palmer and Palmer, above n 9, 141; Phillip Joseph "Mrs Kopu's Challenge to MMP" [1997] NZLJ 413, 414; Joseph, above n 201, 310-311.

(c) The effects of fixing proportionality

Fixing proportionality has an effect on legislative and executive government. Strong party discipline combined with party-hopping legislation means that Parliament effectively loses the role of individual MPs. Fixing proportionality creates a formalistic Parliament: a Bill goes in one end, and depending on the numbers and parties will come out (or not) at the other; party numbers are determined on election night, and will remain unchanged for the intervening three years.

The benefits of fixing proportionality are that voters can be sure of what is going to happen in Parliament. The individual idiosyncrasies of MPs will not affect the legislative process. The maintenance of proportionality also assumes greater importance with the acknowledgement that parties have become the fundamental actors in our political process.

Fixing proportionality has a significant effect on executive government. New Zealand has a parliamentary democracy. The major advantage of parliamentary democracy is the flexibility of executive government; the government is responsible to Parliament and may be removed by it. The major disadvantage is the lack of clear separation of powers between legislative and executive government.²⁰⁵

Fixing proportionality destroys the flexibility of government without increasing the separation of powers. In a majority government if proportionality is fixed the government will rarely fall. It would be equivalent to government under FPP, without the ability of individual MPs to defect. Therefore with majority governments fixing proportionality leaves less flexibility than we had under FPP. Even majority coalition governments will seldom fall given that the minor party as a whole must leave the government.

²⁰⁵ This can be contrasted with the presidential system which is inflexible - the president is unable to be removed for the entire length of a defined term - yet has fantastic separation of powers: Alan Siaroff "Varieties of Parliamentarianism in the Advanced Industrial Democracies" (2003) 24 *International Political Science Review* 445, 446-447.

In minority governments flexibility will also be reduced. It will not matter what MPs think, only what the relationship between parties are. Relationships between parties change only under severe circumstances, whereas enough individual MPs may atrophy and cause the downfall of a minority government. Minor parties are particularly sensitive to causing trouble and would be unwilling to jeopardise their popularity with the electorate by causing a government to fall, however, many MPs as individuals thrive on such controversy and this does not tarnish the party as a whole.

While fixing proportionality gives certainty to the legislative process, it is clearly undesirable in relation to the executive. The reduction in flexibility caused by fixing proportionality is a serious threat to the most important check on executive government. MMP has given us, a parliamentary democracy that is truly flexible and able to potentially bring down rogue governments. By fixing proportionality at a relatively arbitrary date once every three years,²⁰⁶ we lose perhaps the most important benefit of MMP.

C Maintaining Proportionality

New Zealand under MMP has had a consistently minimal level of disproportionality.²⁰⁷ This is due to a relatively robust system of turning votes into seats. We have an optimal-size constituency for the return of list seats, a constituency that covers the entire country.²⁰⁸ Presently, the ratio of electorate to list seats is able to maintain the proportionality of Parliament and minimise the risk of overhang seats. While the ability for the system to maintain proportionality will decline as the population changes, it is still (just) within the recommended margins of the Royal Commission.²⁰⁹ Also while electoral

²⁰⁶ Voter opinion would certainly not support the election night proportionality throughout the entire term.

²⁰⁷ See VII Appendix Two: The Gallagher Index of Disproportionality, particularly Table 3: *Disproportionality in New Zealand elections (1990 – 2005)*, and Table 4: *Disproportionality in recent elections worldwide*.

²⁰⁸ See for example the effect that multiple multi-member constituencies have had on proportionality in Scotland; VII Appendix Two: The Gallagher Index of Disproportionality.

²⁰⁹ Royal Commission on the Electoral System, above n 6, 65-66.

thresholds have pushed disproportionality up, given that New Zealanders still vote largely for established parties,²¹⁰ few votes have been wasted due to the thresholds. Parties too have contributed to this good result, and the Kiwi philosophy of 'fair-play' has come across in the conduct of elections. Although parties may snipe and attempt to discredit each other, no party has manipulated the rules to their advantage.

It would be a shame to allow this outstanding level of proportionality to fall prey to neglect. Therefore the two areas where the rules have been identified as less than ideal should be changed before they begin to present a problem. The first of these is in relation to electoral thresholds. Electoral thresholds do play an important role in preventing the proliferation of minor or extremist parties and the subsequent degradation in the stability and continuity of government. However, setting these thresholds too high results in disproportionality and discouragement of emerging parties. The vote threshold should be lowered to the Royal Commission's recommended four per cent. Although this would not have changed the results of last three elections at all, it is important to allow minor parties the added chance of representation that four per cent, which is still a conservative threshold, gives. In addition proper consideration should be given to even lower thresholds, as four per cent is still rather high. A two per cent vote threshold would seem to be effective: it does not allow the myriad of additional minor parties that no threshold at all would allow, but does allow parties that are sufficiently large to win seats, and is a popular threshold overseas.²¹¹

An alternative to basing the vote threshold on a percentage of the total vote would be to require parties to receive a number of votes equal to the electoral district quota, approximately the size of an electorate.²¹² This would have the advantage of not changing the actual number of votes required

²¹⁰ In 2005 approximately 80 per cent of the vote was received by Labour or National (86 per cent if the top three parties, Labour, National, and New Zealand First, are considered); in 2002 this was over 60 per cent (73 per cent if the top three parties, Labour, National, and New Zealand First, are considered); in 1999 this was 69 per cent (77 per cent if the top three parties, Labour, National, and Alliance, are considered).

²¹¹ See IX Appendix Four: Election Results and Thresholds, in particular Table 7: *Thresholds and the 1999 election*. In 1999 this would have allowed the Christian Heritage party who received almost 50,000 votes (2.4 per cent of the party vote) to receive 3 seats, but would have prevented the Future and Aotearoa Legalise Cannabis parties, who would have received seats if no thresholds existed, from receiving seats.

²¹² Electoral Act 1993, s 35(3)(b); presently this is 54,308, and is equivalent to approximately 2.38 per cent (in 2005) to 3 per cent (in 2002) of the total party vote.

depending on election day voter turnout, and is a logical number: if a party can gain seats in Parliament based on a plurality of votes within an electorate, a party who receives votes equivalent to an entire electorate should be entitled to receive seats.

The electorate threshold should be retained. While some feel that it is unprincipled, it has a positive effect on the maintenance of proportionality, reduces the otherwise large chance of overhang seats, minimises vote wastage, and recognises significant local support.

The second set of rules that should be modified are those relating to the setting of electoral districts and list seats. The rationale of the current method of setting electorate districts is to ensure a practical electorate-MP link, electorates of relative size, and a certain minimum representation for the South Island,²¹³ setting electorates in stone, or limiting the number of electorate seats would see the electorate-MP link and the equivalence of electorates decline over time. However, due to these rules, which see a gradual increase in the number of electorates, and the fact that the total number of list and electorate MPs are limited to 120, the ratio of electorate to list seats increases. As this ratio increases, it is more likely that an election will be disproportionate and that overhang seats will occur.

There are a number of practical difficulties with remedying this solution. First, the sections relating to calculating the number of electoral districts are entrenched, and will therefore be difficult to change;²¹⁴ however, it is not recommended that these sections change, given that this would mean that electorates would become larger. Secondly, any increase in the number of MPs, the more desirable solution, is likely to cause public outcry.²¹⁵ An increase in the total number of MPs as electorate seats increase, by allocating an equivalent number of list MPs as electorate MPs, is desirable as not only would this maintain effective proportionality and electorate-MP links, but as the population of New Zealand increases there will be more MPs available to cover all the

²¹³ Royal Commission on the Electoral System, above n 6, 151-152.

²¹⁴ Electoral Act 1993, ss 268(1)(c) and (d).

²¹⁵ Although considered opinion and submissions on this issue generally support the status quo rather than a reduction; MMP Review Committee, above n 132, 34-40; Joseph, above n 188, 469-470.

duties MPs must. The Royal Commission, in 1986, preferred 140 MPs for this reason, but recommended 120 to avoid a negative public reaction.²¹⁶ Although a negative public reaction is a problem to be overcome, a greater threat is that caused by a collapse in public support and confidence in the electoral system and government due to declining proportionality and MPs who cannot carry out their jobs.²¹⁷

The Royal Commission saw this declining proportionality as a problem. It suggested that the numbers of MPs would need to be increased if the method of determining electoral districts, which was essentially the same, and the total number of MPs were fixed.²¹⁸ The Royal Commission predicted this would need to happen around the turn of the century, now five years ago. However, rather than increasing the fixed total of MPs, changing the method for determining the number of list seats to one where an equivalent number of list to the number of electorate seats is allocated, is more desirable.²¹⁹ This is the better option as it allows for the gradual increase of MPs as population increases; this was done pre-MMP, and did not seem to inflame the public the way that an extraordinary increase does. This option also means that the ratio of electorate to list seats remains the same and does not increase as the population changes, only to fall again when proportionality gets too tight and the total number of MPs is increased.

Party-hopping has continually inflamed the ire of parties and public since MMP was introduced. With the 2005 election resulting in a fine balance between parties, a single defection from a party supporting the government may cause the government to collapse. This may put party-hopping legislation back on the agenda. Legislation is not effective for dealing with this political situation; as was made apparent by New Zealand's experience with the Electoral (Integrity)

²¹⁶ Royal Commission on the Electoral System, above n 6, 126-129 (particularly 127); see also Ministry of Justice, above n 78, 34-38.

²¹⁷ Palmer, above n 7, 128.

²¹⁸ Compare Electoral Act 1993, ss 35 and 36, to Royal Commission on the Electoral System, above n 6, 126-129 and 151-152. The Royal Commission did provide for less South Island districts (15 instead of 16) and a greater allowance in the variance between districts (10 per cent instead of 5 per cent).

²¹⁹ See Electoral Act 1993, s 191(7).

Amendment Act. Not only was it undesirable in principle and form, it was ineffective in achieving its stated aims.

Legislation is not the appropriate method for resolving this political process; complex political decisions such as whether to 'hop' cannot be boiled down to a few simple (or even many complex) rules. How can a proscriptive rule decide whether an MP has moved on from the party, or whether the party has moved on from both its principles and the MP? Such situations should be resolved by the only group who can fairly and without bias answer that question, the electorate at a general election. The only realistic solution to party-hopping is a constitutional convention that requires that MPs who have unjustly 'hopped' to resign from Parliament; this will require development and acceptance by individual MPs. The development of a convention could be aided through accurate reporting of situations so that the public mood can be evaluated, and that when the electorate as a whole decides that the 'hop' was unjustified, the MP will not be re-elected. A repeat of the Integrity Act is to be avoided.

1 Recommendations

To summarise, the rules relating to electoral thresholds and determination of electoral and list seats should be modified to enhance proportionality. Party-hopping should remain non-regulated by rules, but better education of MPs and the public would help to ensure that abuse of party-hopping does not occur, and would facilitate the formation of a convention. The recommendations in relation to the electoral thresholds are:²²⁰

- To retain the electorate threshold as in section 191(4)(b);²²¹ and
- To change section 191(4)(a) to ensure that the Chief Electoral Officer disregards any party that "has not achieved a total

²²⁰ See IV A 1 Electoral thresholds.

²²¹ Electoral Act 1993, s 191(4)(b).

number of party votes that is at least equal to the quota as determined by section 35(3)(b)”,²²² or

- If this recommendation is not accepted, the vote threshold in section 191(4)(a) should be lowered to the Royal Commission’s recommended four per cent, and consideration should be given to a lower threshold, such as two per cent.

The recommendations in relation to the determination of electoral and list seats are:²²³

- Retaining the current method for determining electoral districts;
- Allowing the total number of MPs to increase beyond 120; and
- Maintaining a 1:1 ratio between electorate and list seats.

These recommendations could all be achieved by changing section 191(7) to require the Chief Electoral Officer to ascertain “the highest number of quotients equal to twice the number of general and Maori constituency seats”, thereby resulting in an equal allocation of lists seats as there are electorate seats.

V CONCLUSION

In order to realise an effective, principled and democratic MMP electoral system, the system as a whole must be based on clear and appropriate principles and be well structured. This extends beyond just the process of turning votes into seats, to include the actors and outcomes of elections. Our electoral system is based upon the principles of democracy, proportionality and accountability, and these must be reflected in the actors and outcomes of elections.

In assessing electoral systems, focus is usually placed upon the processes within the system of turning votes into seats and the outcomes that result from such processes. Such analysis is useful and will show whether the system

²²² Electoral Act 1993, ss 191(4)(a) and 35(3)(b).

²²³ See IV A 2 Declining proportionality and overhang seats.

respects its underlying principles. Actors, however, are often left out of the analysis. As it is actors to whom the electoral rules are applied, any degradation of the underlying principles inherent in the actors will carry through to the final outcome; such degradation may be overt, and the result will not reflect the principle, or more covert, where while seeming to conform to the principles, they are undermined.

To ensure a robust electoral system we must ensure robust rules that produce principled outcomes, and ensure that those outcomes are not compromised by wayward actors. Under MMP the principled outcome is a democratically proportional one; the actors are political parties. Principles must not be prioritised to the exclusion of effective government, therefore an appropriate balance between principles and effective government must be found.

This paper has examined the law relating to parties, and has found the law to be deficient. Presently little accountability of parties exists, and democracy and proportionality may be undermined by inappropriate party structures and decision making. Reform of parties can be undertaken to improve accountability and ensure adherence to electoral principles. A three pronged attack changing party legal status, improving party decision making, and improving oversight of parties is recommended.

A public legal status would bring public law checks over parties, including public law judicial review of the validity of party decision making, the New Zealand Bill of Rights Act, and increased access to information through the Official Information Act; if this was combined with mandatory incorporation of parties this would create effective regulation of parties ensuring sound results and sufficient accountability without undermining the effectiveness of parties.

Party decision making processes, particularly in regards to candidate selection, may be improved by setting out certain requirements to ensure the desired level of democratic input and maintain high quality and effective parties. This may be achieved by mandating an indicative method of candidate selection that may only be departed from under clear circumstances. Leaving the departure criteria up to parties allows party goals to prevail but will ensure that no breach of process occurs.

Oversight may be improved by increasing the powers of the Electoral Commission in regards to parties. The Electoral Commission should have the ability to review party selection processes and parties compliance with electoral rules, and be able to impose sanctions on wayward parties. By combining an improved Electoral Commission with a public status, mandatory incorporation and mandated selection processes an efficient system of party oversight and control can be exercised. This would not derogate from efficient parties.

This three pronged approach essentially uses existing and effective law to create a robust regulation and oversight regime of parties. Parties have a vital constitutional role that presently is unregulated. The recommendations in this paper allow proper protection of the constitutional role of parties to ensure that abuse cannot occur but do not derogate from effective and unique parties.

The rules relating to converting votes into seats have been examined. Two areas are less than ideal and may in the future undermine the principles MMP is based on. In particular the rules relating to electoral thresholds, which determine when an otherwise viable party will gain list seats, and the rules relating to setting electoral districts and the maximum number of MPs are unsatisfactory. While these areas do not in themselves abrogate the principles of MMP they have the potential to undermine the realisation of said principles.

Electoral thresholds are currently set too high. This paper recommends that thresholds are lowered to a level which while avoiding a proliferation of minor or extremist parties that may undermine effective government, do allow emerging parties a chance in elections. Ideally a vote threshold set to the size of the electorate quota would achieve this, and is independently a justifiable level for election. However, if a percentage of the total vote cast is desired, the vote threshold should be lowered to at least the level recommended by the Royal Commission, four per cent, and consideration should be given to lowering to an even smaller threshold, two per cent, which would seem to be appropriate given the electoral history of MMP in New Zealand.

The electorate threshold should be retained. While it is seen by some as unprincipled and anomalous, the effect of removing this threshold on effective government and proportionality is severe. Without the electorate threshold overhang seats are more likely to occur, which would further undermine

proportionality. If the vote threshold is changed to the electorate quota size as recommended, the electorate threshold is also far less anomalous; both thresholds would therefore require a party to show a sufficient level of national or local support in order to gain list seats.

The rules relating to the determination of electoral districts and the maximum number of MPs will create a situation of declining proportionality. This can be remedied by allowing the gradual increase of the number of total MPs as the New Zealand population changes in size and distribution. Ideally the calculation of electoral districts, and therefore electorate seats, should remain the same, and an equivalent number of list seats should be allocated. This would solve the problem of declining proportionality and maintain a 1:1 electorate to list seat ratio.

Party-hopping has also been discussed as an example of the inappropriate use of legal rules to regulate political conduct. The use of legal rules in such a situation has serious impact on effective government. This shows the danger of prioritising the principles of MMP over the practical reality of government.

New Zealand already has a robust MMP electoral system. Proportionality is better in New Zealand than almost anywhere else in the world; government has been stable and effective. There do remain a few areas that may present a problem in the future; if the rules of MMP are tightened up such a threat will be mitigated. The area where MMP is most threatened exists in the status and regulation of parties. Parties are the fundamental actor in government and elections. They have their fingers in every piece of the constitutional pie, but remain outside any checks and balances that other constitutional actors are subject to. Parties need to be brought within the scope of public law and be subject to its checks and balances. This is arguably the most difficult task facing constitutional reform in New Zealand; parties retain a stranglehold on the processes that would need to be used to rein them in. While the task of convincing parties to delegate some of their powers to the rule of law is an arduous one, the process must begin somewhere; this paper has hopefully provided a picture of an effective and principled electoral system that will resonate with electoral actors and set New Zealand on the road to reform.

VI APPENDIX ONE: THE SAINTE-LAGUË METHOD

The actual allocation of seats is based on the Sainte-Laguë method.²²⁴ This involves taking the total party votes each party receives and dividing successively by odd numbers (i.e. 1, 3, 5, 7, 9, 11...) in order to produce a table. Seats are then allocated to each party; the party with the highest number gets the first seat, the second highest gets the second, and so on, until the total amount of seats, presently 120, has been allocated. This gives the total seats each party will receive, electorate and list. For example, the 2002 election (showing the first four divisions):²²⁵

Table 2: The Sainte-Laguë method in the 2002 New Zealand election (first four divisions)

	Votes / 1	Votes / 3	Votes / 5	Votes / 7
Labour	838219 (1)	279406 (3)	167644 (5)	119746 (10)
National	425310 (2)	141770 (8)	85062 (12)	60759 (16)
New Zealand First	210912 (4)	70304 (14)	42182 (24)	30130 (32)
ACT	145078 (6)	48359 (19)	29016 (33)	20725 (46)
Green Party	142250 (7)	47417 (20)	28450 (35)	20321 (48)
United Future	135918 (9)	45306 (22)	27184 (37)	19417 (51)
Progressive Coalition	34542 (28)	11514 (83)	6908 (-)	4935 (-)

The Progressive Coalition was entitled to two seats, numbers 28 and 83 of 120; as they had won one electorate seat, they received one list seat.

There are various other methods for allocating seats in proportional electoral systems. The other major method, used in Germany, is the d'Hondt method which instead of dividing by successive odd numbers, divides by successive numbers (i.e. 1, 2, 3, 4, 5, 6...). Still another uses a modified Sainte-

²²⁴ Electoral Act 1993, s 191.

²²⁵ Electoral Commission, above n 160.

Laguë method that replaces the initial divisor of one; 1.4 is used in Norway, Sweden and Denmark, three was proposed for New Zealand by the Royal Commission, although was not accepted.²²⁶

The method used has a significant impact of the resultant allocation of seats and the proportionality of Parliament. For example the d'Hondt method, and to a lesser extent the modified Sainte-Laguë method, is biased towards allocating seats to larger parties than the pure Sainte-Laguë method is; the pure Sainte-Laguë method recognises that vote to seats differences have a greater impact on smaller parties than larger parties and is therefore effective in creating a significantly proportional result for all parties in an election.²²⁷

²²⁶ Royal Commission on the Electoral System, above n 6, 71-74.

²²⁷ Michael Gallagher "Proportionality, Disproportionality and Electoral Systems" (1991) 10 Electoral Studies 33; Royal Commission on the Electoral System, above n 6, 71-74.

VII APPENDIX TWO: THE GALLAGHER INDEX OF DISPROPORTIONALITY

The disproportionality of an election, i.e. how far apart the percentage of seats a party receives is from the percentage of votes that party received, may be measured by reference to the Gallagher Index. The index gives a numerical value of disproportionality, the higher the value the higher the disproportionality caused by an election. The calculation involves taking the square root of half the sum of the squares of the differences between percent of vote received and percent of seats received for each party, graphically:²²⁸

Figure 1: The Gallagher Index

$$LSq = \sqrt{\frac{1}{2} \sum (V - S)^2}$$

Where LSq (the least square) is the measure of disproportionality, V is the percentage of votes received, and S is the percentage of seats received. This will produce a number between 0 and 100, 0 indicates perfect proportionality and 100 indicates that a party, or candidate, with no votes received a seat.²²⁹ The index is useful for comparing the proportionality of different electoral systems, as well as the proportionality of results of individual elections.

Applying the index to the results of recent elections in New Zealand gives the following table:²³⁰

Table 3: Disproportionality in New Zealand elections (1990 – 2005)

Election (electoral system)	Disproportionality
1990 (FPP):	16.65%

²²⁸ Anckar, above n 30, 503.

²²⁹ Kenneth Benoit "Which Electoral Formula is the Most Proportional" (2000) 8 Political Analysis 381, 383.

²³⁰ Electoral Commission, above n 160.

1993 (FPP):	18.29%
1996 (MMP):	4.50%
1999 (MMP):	3.15%
2002 (MMP):	2.56%
2005 (MMP):	1.13%

As can be seen disproportionality was reduced dramatically with the introduction of MMP; in 1996 disproportionality was a less than a quarter of the 1993 level, and has been continuing to reduce in the following MMP elections. Comparing the index of recent elections around the world gives:

Table 4: Disproportionality in recent elections worldwide

Election (electoral system)	Disproportionality
United Kingdom 2005 (FPP):	16.9%
Russia 2003 (SM): ²³¹	13.0%
South Korea 2004 (SM):	12.2%
Wales 2003 (MMP):	12.03%
Canada 2004 (FPP):	10.0%
Scotland 2003 (MMP):	9.10%
Italy 2001 (MMP):	8.08%
India 2004 (FPP):	5.4%
European Parliament 2004 (PR-M): ²³²	5.0%
Germany 2002 (MMP):	4.3%

²³¹ Supplementary member (for example 50 percent of seats are elected by closed list proportional allocation, 50 percent of seats by first-past-the-post, the FPP election does not affect and is not affected by the PR election (contrast with MMP); Seat Allocation: Russia, 225 (FPP), 225 (PR), South Korea, 243 (FPP), 46 (PR)).

²³² Proportional representation within multiple multi-member constituencies using closed lists.

New Zealand 2002 (MMP):	2.56%
Netherlands 2002 (PR-S): ²³³	1.0%

This shows that the proportional representation systems (MMP, PR) are less disproportionate than the systems that have a large component of majoritarian or plurality election (FPP, SM (these are at least 50 percent plurality / majoritarian), India being an exception. The New Zealand and German MMP systems perform reasonably well, and are only beaten by the absolutely proportional system of the Netherlands with no potentially distorting electoral thresholds.

The high disproportionality of the MMP election in Wales is likely due to the poor implementation of the electoral system. In Wales 40 seats are electorate seats and only 20 are allocated to parties based on the party vote; a high ratio of electorate seats to list seats makes it less likely that disproportionate results in the plurality type electorate vote will be mitigated by the proportional allocation of seats according to the party vote. This increases the likelihood of overhang seats which further decreases proportionality.

Scotland had a relatively high level of disproportionality, although it was still below the plurality and majoritarian systems. Scotland has 73 electorate seats and 56 list seats; this is actually a slightly better ratio of electorate to list seats than in New Zealand. The higher level of disproportionality in Scotland is due to the implementation of MMP. Scotland is divided into seven regions, each region has eight list seats and these are allocated to parties based on their proportion of the party vote within that region; this in effect means that there are seven multi-member constituencies in addition to the plurality constituencies (electorate seats). This system increases disproportionality as the more seats a constituency returns the greater the proportionality; any division in list constituencies will therefore increase disproportionality. A single national multi-member list constituency, such as is used for list seat allocation in New Zealand, is therefore the least disproportionate way of structuring MMP.²³⁴

Italy also has high disproportionality, caused by the use of decoy lists. These allow parties to gain seats beyond their proportion of the party vote by

²³³ Proportional representation, single constituency, no threshold for election.

²³⁴ Benoit, above n 229, 385-386.

exploiting the rule that list seats plus electorate seats must equal the proportion of the party vote. By splitting candidates into a list party and an electorate party, and with voters splitting their votes between the two parties, the combined number of seats between the two parties can be much greater than the proportion of the party vote would entitle them to as the number of electorate seats won will not be subtracted from the list seat allocation.²³⁵

²³⁵ Note that this issue is partially covered in New Zealand by the rules relating to component parties, however, it would still be possible to exploit this rule if the party was willing to take on the risk of losing electorate MPs; Electoral Act 1993, ss 63(2)(d), 127(3A), 128A, & 191.

VIII APPENDIX THREE: SELECTED PARTY CONSTITUTIONS

All registered parties must lodge copies of their current candidate selection rules with the Electoral Commission.²³⁶ These rules must be democratic procedures for candidate selection.²³⁷ The actual rules relating to candidate selection differ markedly between parties. The constitutions of selected parties have been examined and the candidate selection processes are set out here.

A *The Green Party*²³⁸

The Green Party currently has the most pure democratic input into candidate selection by the wider party membership than any other party. The constitution allows for the selection processes to be determined by the party executive,²³⁹ this allows for relative ease of change of the selection processes.

The rules set out the actual selection process.²⁴⁰ Firstly, all the putative candidates are ranked by the Party Executive, to give all members an indicative ranking order based upon the views of those who have interacted with the putative candidates. This vote does not contribute to the final selection. Secondly, all current financial members of the Green Party rank the putative candidates that produces a final list allocated by single-transferable vote. Finally, the Candidate Selection and List Ranking Committee check the final list to ensure that it conforms to certain criteria and may recommended a change to the list order or candidate selection based upon those criteria.

The criteria require that the list in particular must throughout contain:²⁴¹

- a minimum of 10 percent Maori representation;
- a maximum of 60 percent male or 60 percent female;
- a minimum of 40 percent from the North Island, and a minimum of 20 percent from the South Island; and
- a minimum of 10 percent aged under 40.

²³⁶ Electoral Act 1993, s 71B.

²³⁷ Electoral Act 1993, s 71.

²³⁸ Green Party, above n 44.

²³⁹ Green Party, above n 44, rule 10.1.

²⁴⁰ Green Party "Candidate Information" (February 2005).

²⁴¹ Green Party, above n 240, 2.

Candidates may only be moved a maximum of three places in the list order according to these criteria.

These rules allow for relatively robust direct democratic involvement from the wider party membership. As the criteria for departure from the indicative final vote are promulgated before the vote this minimises the influence that the party elite may have on the final candidate selection.

B The Labour Party²⁴²

The Labour Party candidate selection process is based on selection by delegates of the wider party membership. There is therefore no direct democratic involvement by the wider party. The rules are contained in the constitution and therefore may only be changed at the annual party conference involving all party members.²⁴³

The selection process begins in the Regional Conferences who select putative candidates from previously nominated members. Each region selects a different number of candidates based on population distribution.²⁴⁴ Regional Conferences must observe gender and ethnic balance in their selections or lose voting entitlement.²⁴⁵ The Regional Conferences are made up of delegates from the region, and includes delegates from the Regional Council, electorate organisations, affiliates (trade union members), representatives from the New Zealand Council, and representatives from the Labour caucus.²⁴⁶ The delegates at each Regional Conference rank candidates using an STV vote, and must consider in so voting that the candidates are fairly balanced with respect to representation of Maori, women, men, and other ethnic groups, and are appropriate for the geographic spread of the population.²⁴⁷

After the Regional Conferences have determined the electorate candidates, these candidates go to the Moderation Committee for consideration for the party

²⁴² Labour Party "New Zealand Labour Party Constitution and Rules".

²⁴³ Labour Party, above n 242, rule 155.

²⁴⁴ Labour Party, above n 242, rule 266.

²⁴⁵ Labour Party, above n 242, rule 260.

²⁴⁶ Labour Party, above n 242, rule 263.

²⁴⁷ Labour Party, above n 242, rules 266-267.

list.²⁴⁸ The Moderation Committee is comprised of members of the Party Executive, caucus, members of the Labour Maori Council, members of sector councils (which include women, pacific island, Young Labour, and union affiliates), and members from Regional Councils.²⁴⁹ The Moderation Committee must have regard to representation from Maori, women, men, ethnic groups, people with disabilities, and regard to geographic spread, and skill of putative candidates when composing the final list.²⁵⁰ The Moderation Committee can add candidates not selected through regional conferences to ensure due regard is given to these factors.²⁵¹ The Moderation Committee's decision is final.²⁵²

Candidate selection is highly regimented by the constitution; the criteria to be considered at each stage are strictly defined. It does not involve direct input by the wider party, but rather input is given by delegates elected by the wider party membership and delegates appointed by certain groups within the Labour Party. The Regional Conferences have final selection for the electorate candidates, while the Moderation Committee retains the final selection of list candidates. The Party Executive retains significant control over candidate selection, but is restrained by the criteria in the constitution.

C *The National Party*²⁵³

The National Party candidate selection process is set out in the constitution and may therefore only be changed at the annual conference with input by the wider party membership.²⁵⁴

Electorate candidates can be selected by two alternative methods. Firstly, candidates are selected within the electorates by Electorate Committees, who are either appointed from committees within the National Party or elected by financial members within the electorate,²⁵⁵ acting under direction from the Party Executive and according to an STV vote by the Electorate Committee.²⁵⁶

²⁴⁸ Labour Party, above n 242, rules 271-287.

²⁴⁹ Labour Party, above n 242, rule 273.

²⁵⁰ Labour Party, above n 242, rules 277 & 280.

²⁵¹ Labour Party, above n 242, rule 281.

²⁵² Labour Party, above n 242, rule 282.

²⁵³ National Party "Constitution and Rules of the New Zealand National Party" (May 2003).

²⁵⁴ National Party, above n 253, rule 25(b).

²⁵⁵ National Party, above n 253, rule 64.

²⁵⁶ National Party, above n 253, rules 89 & 115.

Alternatively, an electorate may undertake candidate selection by way of vote of all party members within the electorate.²⁵⁷ Selected candidates are subject to approval by the Party Executive.²⁵⁸

All list candidates, apart from a maximum of five selected by the Party Executive, must be electorate candidates.²⁵⁹ The Party Executive determines the size of the list. Candidates are ranked by preferential voting by Regional Forums.²⁶⁰ These indicative lists are given to a List Ranking Committee, which comprises of the Party Executive and members of the National caucus, who then rank the nominees having regard to the Regional Forum lists; this list is final.²⁶¹

This process is relatively undefined. The electorate candidate selection process is undertaken usually by the Electorate Committee who do not have to have regard to any specified criteria. The list selection process is decided solely by the Party Executive only with reference to the indicative vote by the Regional Forums. There is little direct involvement by the wider party unless the 'universal suffrage' option is exercised at the electorate level.

D Other Parties

United Future's candidate selection process is set out in the rules of the party,²⁶² and is therefore able to be changed by the Party Executive. Candidate selection occurs by the Candidate Selection Committee, comprised of members appointed from Regional Councils and representatives of the Party Executive, first vetoing putative nominees from their electorate.²⁶³ All party members may then comment on the putative candidates, these comments are weighed up by the Candidate Selection Committee who then endorses a candidate to the Party Executive, who can accept or send an endorsement back to the Candidate Selection Committee for further consideration.²⁶⁴

List selection occurs by indicative vote of all party members. This indicative vote is then used by the List Selection Committee, which is comprised

²⁵⁷ National Party, above n 253, rule 116.

²⁵⁸ National Party, above n 253, rules 93 & 96.

²⁵⁹ National Party, above n 253, rules 121(b) & 127.

²⁶⁰ National Party, above n 253, rules 130-132.

²⁶¹ National Party, above n 253, rule 133.

²⁶² United Future, above n 130, rules 16.1 & 19.1.3.

²⁶³ United Future "United Future New Zealand Party Rules" (December 2004) rule 1.9.

²⁶⁴ United Future, above n 263, rules 1.12-1.16.

of the Party Executive and the caucus leader and deputy leader, to compile the final list.²⁶⁵

The Maori Party electorate candidate selection process occurs by hui of all financial members in the relevant electorate. If no consensus is achieved the Electorate Council, essential elected delegates, selects a candidate. List selection occurs by Electorate Councils ranking five candidates in an indicative vote, with the final list determined by the Party Executive.²⁶⁶

The ACT Party determines electorate candidates by secret ballot of all party members within each electorate.²⁶⁷ There is an indicative vote method for list candidate selection. All party members may participate in an indicative vote, as does the Party Executive. The final list is determined by the Party Executive with regard to the two indicative votes.²⁶⁸

²⁶⁵ United Future, above n 263, rules 2.19-2.21.

²⁶⁶ Maori Party "Rules of the Maori Party" (December 2004) First Schedule.

²⁶⁷ ACT Party, above n 130, rule 22.

²⁶⁸ ACT Party, above n 130, rule 23.

IX APPENDIX FOUR: ELECTION RESULTS AND THRESHOLDS

Electoral thresholds can cause quite a significant difference in the resultant allocation of seats. These tables examine the differences four different thresholds would have made on the 2005, 2002, and 1999 elections.

The actual result was arrived at with a five percent of the party vote, or one electorate seat, threshold. The four percent or one electorate is similar, but with a lower party vote threshold; this threshold was examined as it was the threshold recommended by the Royal Commission.²⁶⁹ The four percent threshold by itself means a party will only be allocated list seats if they reach four percent of the party vote, winning an electorate would not entitle the party to any additional list seats. They would, however, retain the electorate seats won; this threshold was examined as it had significant support in the 2001 MMP review and shows the effect that no electorate threshold would have.²⁷⁰ No threshold means a party would gain list seats in proportion to the party vote gained; there is still an effective threshold created by the application of the Sainte-Laguë method, but no legal threshold exists. The two percent or one electorate threshold was chosen as this appears to be a popular vote threshold overseas.

Table 5: Thresholds and the 2005 election²⁷¹

	Actual Result	4% or 1 electorate	4% threshold	2% or 1 electorate	No Threshold
Labour (41.1%)	50	50	54	50	50
National (39.1%)	48	48	51	48	47
New Zealand First (5.7%)	7	7	8	7	7
Green Party (5.3%)	6	6	7	6	6
Maori Party (2.12%)	3 (+ 1 overhang)*	3 (+ 1 overhang)*	4 overhang	3 (+ 1 overhang)*	3 (+ 1 overhang)
United Future (2.7%)	3*	3*	1 overhang	3	3
ACT (1.5%)	2*	2*	1 overhang	2*	2
Progressive (1.2%)	1*	1*	1 overhang	1*	1

²⁶⁹ Royal Commission on the Electoral System, above n 6, 66-67.

²⁷⁰ MMP Review Committee, above n 132, 47-50.

²⁷¹ (*) indicates that the party met the electorate threshold but not the vote threshold.

Destiny (.6%)	0	0	0	0	1
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Table 6: Thresholds and the 2002 election

	Actual Result	4% or 1 electorate	4% threshold	2% or 1 electorate	No Threshold
Labour (41.3%)	52	52	53	52	49
National (20.9%)	27	27	27	27	25
New Zealand First (10.4%)	13	13	13	13	12
ACT (7.1%)	9	9	9	9	9
Green Party (7.0%)	9	9	9	9	8
United Future (6.7%)	8	8	9	8	8
Progressive (1.7%)	2*	2*	1 overhang	2*	2
Christian Heritage (1.4%)	0	0	0	0	2
Outdoor Rec (1.3%)	0	0	0	0	2
Alliance (1.3%)	0	0	0	0	2
Aotearoa Legalise Cannabis (.6%)	0	0	0	0	1

Table 7: Thresholds and the 1999 election

	Actual Result	4% or 1 electorate	4% threshold	2% or 1 electorate	No Threshold
Labour (38.7%)	49	49	50	48	48
National (30.5%)	39	39	39	38	37
Alliance (7.7%)	10	10	10	10	9
ACT (7.0%)	9	9	9	9	9
Green Party (5.2%)	7	7	7	6	6
New Zealand First (4.3%)	5*	5	5	5	5
Christian Heritage (2.4%)	0	0	0	3	3
Future (1.1%)	0	0	0	0	1
Aotearoa Legalise Cannabis (1.1%)	0	0	0	0	1
United NZ (.5%)	1*	1*	1 overhang	1*	1

The effect of electoral thresholds on disproportionality can also be seen. No electoral threshold consistently produces the most proportional result, while abolishing the electorate threshold consistently produces the most disproportionate result. A two percent vote threshold or one electorate seat is an

improvement on disproportionality for the 1999 election. This is because no thresholds means that only votes received by parties that fall below the effective threshold of applying the Sainte-Laguë method are not counted; no electorate threshold means that votes given to parties that received an electorate seat, but not enough of the party vote to qualify for list seat allocation, are not counted; there has also consistently been overhang seats with no electorate threshold.

Table 8: Thresholds and disproportionality

	Actual Result	4% or 1 electorate	4% threshold	2% or 1 electorate	No Threshold
2005 Election	1.13%	1.13%	2.15%	1.13%	0.99%
2002 Election	2.56%	2.56%	2.82%	2.56%	0.78%
1999 Election	3.15%	3.15%	3.24%	2.03%	1.48%

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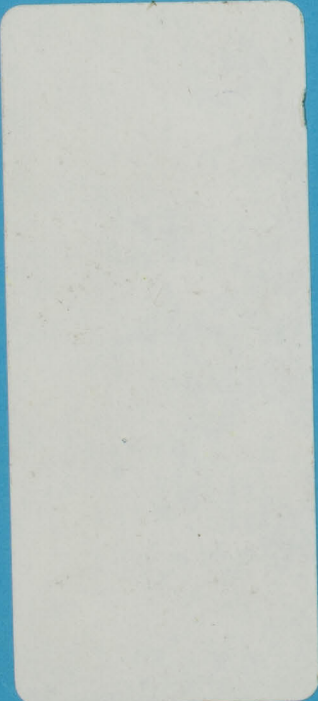
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