

CLARE HEFFERNAN

**THE ELECTORAL (INTEGRITY) AMENDMENT  
BILL 1999:  
An Ineffective, Unnecessary and Undesirable Bill**

LLM RESEARCH PAPER

LAWS 505

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CONTENTS

I INTRODUCTION ..... 1

A Legislative Paper by **CLARE HEFFERNAN** ..... 1

B Paper Outline ..... 2

C Party Hopping ..... 3

II IS THE ELECTORAL (INTEGRITY) AMENDMENT BILL EFFECTIVE? ..... 8

A Current Law ..... 8

B Proposed Amendments to the Electoral Act 1993 ..... 11

C Will The Bill be Effective in Achieving its Purposes? ..... 14

1 Will the Bill enhance public confidence in the integrity of the electoral process? ..... 14

2 Will the Bill meet its purpose? ..... 16

**THE ELECTORAL (INTEGRITY) AMENDMENT BILL 1999:**

**An Ineffective, Unnecessary and Undesirable Bill**

A The "Transition Phase" Argument ..... 19

B Triennial Elections ..... 22

III AN UNDESIRABLE BILL ..... 25

A An Unnecessary Bill ..... 25

B The Independence of Members of Parliament as a Constraint on Executive Power ..... 27

**LLM RESEARCH PAPER**

**LAWS 505**

1. Origin of the Proposed Independence of Members of Parliament ..... 27

2. How does the doctrine of independence of Members of Parliament operate as a restraint on Executive power? ..... 33

3. Effect of the proposed independence of Members of Parliament on the operation of the doctrine of independence of Members of Parliament ..... 35

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C Power ..... 38

V CONCLUSION ..... 42

VI BIBLIOGRAPHY ..... 45

2001

1

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## CONTENTS

<b>I</b>	<b>INTRODCUTION</b> .....	1
<b>A</b>	<b>Legislative History</b> .....	1
<b>B</b>	<b>Paper Outline</b> .....	2
<b>C</b>	<b>Party Hopping</b> .....	3
<b>II</b>	<b>IS THE ELECTORAL (INTEGRITY) AMENDMENT BILL EFFECTIVE?</b> .....	8
<b>A</b>	<b>Current Law</b> .....	8
<b>B</b>	<b>Proposed Amendments to the Electoral Act 1993</b> .....	11
<b>C</b>	<b>Will The Bill be Effective in Achieving its Purposes?</b> .....	14
	1. <i>Will the Bill enhance public confidence in the integrity of the electoral system?</i> .....	14
	2. <i>Will the Bill maintain proportionality?</i> .....	16
<b>III</b>	<b>IS THIS BILL NECESSARY?</b> .....	19
<b>A</b>	<b>The "Transition Phase" Argument</b> .....	19
<b>B</b>	<b>Triennial Elections</b> .....	22
<b>IV</b>	<b>AN UNDESIRABLE BILL</b> .....	25
<b>A</b>	<b>An Unpredictable Political System</b> .....	25
<b>B</b>	<b>The Independence of Members of Parliament as a Constraint on Executive Power</b> .....	27
	1. <i>Origins of the Principle of the Independence of Members of Parliament</i> .....	27
	2. <i>How does the doctrine of Independence of Members of Parliament operate as a restraint on Executive power?</i> .....	33
	3. <i>Effect of the Electoral (Integrity) Amendment Bill on the operation of the principle of Independence of Members of Parliament</i> .....	35
<b>C</b>	<b>The Confidence Vote as a Constraint on Excessive Executive Power</b> .....	38
<b>V</b>	<b>CONCLUSION</b> .....	42
<b>VI</b>	<b>BIBLIOGRAPHY</b> .....	45

**ABSTRACT**

By Clare Mellor

This paper analyses the Electoral Integrity Amendment Bill 1999 No. 3-1 as likely to be amended by the Supplementary Order Paper number 177. The paper argues that this Bill should not be made law for three reasons; it is an *ineffective, unnecessary and undesirable* Bill.

The change from First Past the Post (FPP) to Mixed Member Proportional (MMP) Government has meant that the operation of Government and the relationship between Parliament and the Executive has become more unpredictable. It is argued that the primary purpose of the Bill is to make Government more predictable. This paper suggests that a certain level of unpredictability is desirable, as it ensures better government and stable policy.

The Bill has two *stated* purposes, to increase the integrity of Parliament and maintain the proportional distribution of seats within Parliament. This paper argues that the Bill will not be effective in achieving these two goals. The nature of MMP Government is complex; this paper demonstrates that a wide range of factors influence the public's perception of the electoral system, and the proportional distribution of seats within Parliament. This Bill is ineffective in accounting for all these factors.

My second argument that in any event, the Bill is now unnecessary, party hopping is a self-correcting problem. The current mechanism of the triennial election is the most appropriate means of sanctioning MP's behaviour. And there has been no party hopping during the second MMP Parliament.

My third argument is that this particular legislation is undesirable. The effect of the Bill is to reduce the ability of MPs to act independently within the House, and therefore removes an important constraint on Parliament. Where the proportional distribution of seats is controlled, it affects the ability of Parliament to effectively use a confidence motion to oust a Government; this ability should not be limited by legislation. This paper also argues that limiting an MP's ability to speak in dissent of their party operates as a breach of the New Zealand Bill of Rights Act section 13 and 14. And the sanction of party hopping amounts to a breach of section 17 of the Bill of Rights Act.

**Word Count:** 13 864

<sup>1</sup> New Zealand Government "Party Hopping to End", (18 September 2001) Press Release  
www.govt.nz

## THE ELECTORAL (INTEGRITY) AMENDMENT BILL 1999:

### An Ineffective, Unnecessary and Undesirable Bill

By Clare Heffernan

#### I INTRODUCTION

##### A *Legislative History*

In December 1999, the new Labour/Alliance Government introduced the Electoral (Integrity) Amendment Bill or as it is colloquially known – “the Party Hopping Legislation”, (hereinafter cited as “the Bill”). The Bill has two stated purposes, the first, is to maintain the proportional distribution of seats within Parliament, as established on Election Day. The second is to enhance the integrity of Parliament. It is meant to achieve these purposes by requiring a Member of Parliament (MP) who defects from his or her party, to also vacate their seat in Parliament.

The Bill had its first reading and was referred to the Justice and Electoral Committee on 22 December 1999. The Select Committee was divided equally in its recommendation - Labour and Alliance approved of the Bill, whereas Greens, National and Act fundamentally opposed the Bill - and the Bill returned to the House unamended. The Bill received a second reading on 9 November 2000 but debate was interrupted and no motion was passed. It was apparent to the Government that they did not have the numbers in the House to pass this Bill. By April 2001, the Government was in negotiations with New Zealand First with a view to gaining its support for the Bill. Supplementary Order Paper number 177 (SOP) was drafted and introduced to Parliament by the Associate Justice Minister, Hon M Wilson, AG on 18 September 2001. In a press release the Government stated that, “The proposals have the support of the Government and New Zealand First”.<sup>1</sup> Therefore, unless a Government or New Zealand First member votes against party lines, it is expected that this Bill will be passed into law.

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<sup>1</sup> New Zealand Government “Party Hopping to End” (18 September 2001) Press Release [www.scoop.co.nz](http://www.scoop.co.nz).

## **B Paper Outline**

This paper will critically analyse the Electoral (Integrity) Amendment Bill as amended by the SOP, under the assumption that the amendments will be passed in the House.

In this paper I make three arguments. The first is that even with the SOP amendments, the Bill is not *effective* in meeting its twin purposes, the enhancement of public confidence in the integrity of the electoral system and the maintenance of the proportional distribution of seats within Parliament.

My second argument is that even if such legislation were effective, it is simply *unnecessary*. This is so for two reasons, the first is that in the current environment there is no need for the legislation. Party hopping is symptomatic of the transition period from MMP to FFP, the second MMP Parliament is noticeably more stable than the first and there has been no party hopping since the last Parliament. The second argument is that the electoral system already has sufficient safeguards in place to limit unjustified party hopping, this is found primarily in the triennial election process.

My third argument is that even if such legislation is effective, and is considered to be necessary, it is *undesirable* that such legislation be passed. The combined effect of the Bill and the SOP amendments is that party leaders who have the support of a two-third majority of their Caucus, have the power to expel a member from Caucus and therefore from Parliament. This raises a number of constitutional issues; the primary concern of this paper is the Bill's effect on the ability of Parliament to act as a constraint on executive power. The Bill substantially limits the principle of independence of MPs and therefore an MP's ability to vote according to their conscience. It also substantially weakens the threat posed by the ability of Parliament to remove a Government through a confidence motion.

Before these arguments are made however, it is useful, first to consider the history of party hopping, which led the Government to introduce the Bill.



### *C Party Hopping*

Party Hopping is a term coined to describe the action of MPs who, during a parliamentary term, resign from their party and remain in Parliament. These MPs either switch to a new party, remain as an independent, or create a new party.

Party hopping is not new and there have been instances of MPs leaving their parties in the past. However, party hopping to the extent seen, particularly since 1993, is a new phenomenon and can be directly linked to the introduction of MMP. It is argued by political scientists that the party hopping, to the extent witnessed over the past few years is merely a symptom of a changing electoral system. It is argued that a certain amount of party hopping was necessary and to be expected, in order to create more parties. Once everything settles down, party hopping will be far less frequent. This was the reason for the "Sunset Clause" – clause 3 in the Bill.<sup>2</sup> This clause states that the Bill will expire with the close of polling day for the second general election held after the date on which this Act comes into force.

The "recent" trend started in 1989, and those early party hoppers demonstrated this theory of transitional behaviour. Each of the early defections involved MPs with dynamic personalities, who actively spoke out against their parties. These MPs claimed to be disillusioned with their party's policy direction. Upon resignation from their party, each formed their own political party. Jim Anderton left Labour in 1989 and established New Labour. The following year Gilbert Myles (MP for Roskill) and Hamish MacIntyre (MP for Manawatu) left National forming the Liberal Party. In October 1991 Winston Peters was dismissed from Cabinet, after which the National Party executive refused to re-select him as candidate for Tauranga. Peters left National and resigned from Parliament. He successfully contested his seat in the April 1993 By-election, and by July had announced the creation of a new party "New Zealand First".

After the 1993 referendum was decided in favour of introducing MMP, the number of electorates was reduced. The next spate of party hopping is perhaps a result of this. It is likely that there was also a certain amount of "strategic placement" in preparation for MMP. Those who previously had a "safe-seat" in a

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<sup>2</sup> See part II B *Proposed Amendments to the Electoral Act 1993*.

particular electorate could no longer be so certain of their prospects of re-election. In September 1994, the Hobson electorate disappeared, and as a result Ross Meurant left National to form the Right-of-Centre Party. Not only did he not vacate his parliamentary seat, but he also remained in Cabinet.<sup>3</sup> Likewise after Trevor Rogers' electorate, Howick was incorporated into the redrawn Pakuranga, Rogers left National and also joined the Right-of-Centre party.<sup>4</sup>

Graeme Lee left his party after National refused to reappoint him as Minister of Internal Affairs after the 1993 election. "Disappointed at his treatment, Lee was another obvious source of discontent among members of National's Caucus, and observers of the political scene correctly judged that it was only a matter of time before he too struck out on his own...he established the Christian Democrats Party in May 1995."<sup>5</sup>

In Dunedin there were problems for Labour. "With three active, high-profile MPs ...representing the city, the down-sizing of Dunedin to two seats...was always going to be painful for Labour. This was proved in late June 1995 when Dr Clive Matthewson, a former Labour Cabinet Minister, broke from the party he had represented in Parliament for 11 years to become leader of the United New Zealand group. He was accompanied by six other MPs – two from Labour (Margaret Austin and Peter Dunne, the latter having come via Future New Zealand), and four from National (Cabinet minister Bruce Cliffe, and backbenchers Pauline Gardiner, Peter Hilt and John Robertson)."<sup>6</sup>

In March 1996 Michael Laws resigned from National and joined New Zealand First. A month later Peter McCardle abandoned National and also moved to New Zealand First, as did Labour MP, Jack Elder who was unhappy with his low placement on the Party list.<sup>7</sup>

This timeline provides useful information. The earlier party hoppers, Jim Anderton, Gilbert Myles, Hamish McIntyre and Winston Peters, were able to justify their actions by claiming that their party had moved away from its election mandate,

<sup>3</sup> Jonathan Boston, Stephen Levine, Elizabeth McLeay, and Nigel S Roberts, (ed) *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 50.

<sup>4</sup> Boston et al above n 3, 51.

<sup>5</sup> Boston et al above n 3, 51.

<sup>6</sup> Boston et al above n 3, 52.

and the public were able to judge for themselves whether their actions were justified. But as we moved closer towards the introduction of MMP, the reasons for resignation appear to be connected more to career advancement, and positioning oneself strategically for MMP.

The first MMP election was in November 1996. Over half the country had voted for MMP, yet when the first election took place many were not prepared for the practical realities of the new system. For example, when Winston Peters sided with National forming the National/New Zealand First Coalition, many New Zealanders were disillusioned; they had not expected Winston Peters to back National. The public felt cheated, and powerless. The power of the vote had been removed from their hands, and placed in the hands of the parties. "There [was] a feeling...that Parliament [had] become a House of political parties rather than a House of Representatives."<sup>8</sup> It was perceived that National became the Government as a matter of "luck" and "party antics" as opposed to a legitimate mandate from the voting public.

The first MP to defect under MMP Government was Alamein Kopu, who left the Alliance and remained in Parliament as an Independent. When the National/New Zealand First Coalition broke up, National was left to govern as a minority Government. Following Alamein Kopu, Neil Kirton resigned from New Zealand First citing protest over what he called Winston Peters' "Litany of deceits and betrayals".<sup>9</sup> Next to resign from New Zealand First were five MPs who formed Mauri Pacific. National's ability to remain a minority Government was due primarily to the support of those defecting MPs. Of significance is Alamein Kopu's vote, which allowed National to pass legislation, cutting National Superannuation.<sup>10</sup> Had these MPs remained with their parties, National may not have been able to govern as a minority Government.

These were not the type of antics, which the public had expected. While they had anticipated inter-party negotiation and consultation, they had not expected

<sup>7</sup> Boston et al above n 3, 55.

<sup>8</sup> John Howard in Jonathan Hill "Election 1999: Voting in The Dark" (24 November 1999) *Scoop Headlines* [www.scoop.co.nz/stories/HL9911/S00169.htm](http://www.scoop.co.nz/stories/HL9911/S00169.htm).

<sup>9</sup> Michael Cullen "Defecting MPs" (17 December 1998) Press

Release [www.labour.org.nz/mediacentre1/speeches/981217.html](http://www.labour.org.nz/mediacentre1/speeches/981217.html).

<sup>10</sup> Anthony Hubbard "Kopu's 15 minutes over" (28 November 1999) *Sunday Star Times* Auckland A7.

the loyalties of MPs to have such a significant impact on the Government of the day. Jenny Shipley (Prime Minister at the time) said, "People were told that MMP would give them better representation and more choice. I think it's given them clutter and confusion and to some extent disappointment".<sup>11</sup>

The response of the public was reflected in the press of the day. Anthony Hubbard wrote:<sup>12</sup>

Voters hate party hoppers. We sent them into Parliament coloured red, or white and black, and once they got there they turned a treacherous blue. We detest [them] ultimately, these turncoat chameleons, and know them all by their first names; Alamein, Tuku, Tau, Rana, Tuariki.... the first chance we got, we turned them all out at a general election.

The *Sunday Star Times* expressed the view that "...the frantic party hopping by defecting MPs of all kinds has naturally brought disillusionment with MMP as well. The system which was supposed to save us has let us down".<sup>13</sup> Kevin Taylor commented that public discontent with party hoppers and MMP as a system was at an all time high and cynicism about politics was more wide spread than ever.<sup>14</sup>

The *Sunday Star-Times* wrote:<sup>15</sup>

Voters have been misled by the Left, the Right, and the Centre. Their faith in politicians is badly frayed. There are even signs, fortunately still faint, of a growing disillusionment with democracy itself. The task of the new parliament is to restore political confidence. It is an enormous job and the politicians, on their past record are likely to bungle it. But nothing in politics in the new millennium matters more.

Labour and Alliance recognising the public's disillusionment immediately pledged to prevent such practice in future Parliaments. Both parties promised to implement anti-party hopping legislation if they were elected in 1999.

<sup>11</sup> Kevin Taylor "NZ in the mood to prune; Party policies on: MMP and political accountability" (27 October 1999) *The Press* Christchurch (available on-line at [www.scoop.co.nz](http://www.scoop.co.nz)).

<sup>12</sup> Anthony Hubbard "Party Poopers" (5 December 1999) *Sunday Star Times* Auckland, C5.

<sup>13</sup> The Editor, "Important to restore confidence" (28 November 1999) *Sunday Star Times* Auckland, A 10.

<sup>14</sup> Kevin Taylor above n 11.

<sup>15</sup> The Editor above n 13.

By 1999 the tide had turned against National and Labour and Alliance established a minority Coalition Government. The first Government Bill introduced, not surprisingly, was *The Electoral (Integrity) Amendment Bill 1999*.

This section of the paper serves three purposes. The first is to provide the reader with the reasons for the introduction of the Bill are couched in language of concern over the public's dissatisfied view of Parliament and the MMP system. However, I argue that the Bill also serves a third purpose, that of ensuring stability of Government, by giving party discipline the force of law through legislation and the threat of a confidence vote. When introducing the Bill at its first reading, Hon Wilson, AG said, "This Government has a responsibility to promote political stability and that is the primary purpose of this Bill".<sup>16</sup>

#### A Current Law

Section 55 of the *Electoral Act 1993* currently stipulates the situations which will give rise to a vacancy within Parliament. The situations are all examples of where a member is rendered incapable of performing his or her function. Such as, where an MP fails to attend the House; or makes a declaration of allegiance to a foreign power; or is convicted of a crime punishable by imprisonment for a term of two years; or becomes a public servant; or resigns his or her seat; or dies or becomes mentally disordered. The focus of the section is the member's "personal" ability to perform his or her function as a representative. This section is designed to address personal incapacity, not the operation of Parliament or the maintenance of proportionality. The section does not include ceasing to be a member, or resignation from a political party, among the situations which will cause a vacant seat. Therefore MPs who cease to be members of their political party, whether through resignation or expulsion from that party, are free to remain in Parliament, either as independents, or as members of another party.

<sup>16</sup> Ministry of Justice "Legislative Advisory Committee Guidelines on Process and Content of Bills" (22 December 1999) 581 NZPD 64. [http://www.justice.govt.nz/leg/pubs/2001/legislative\\_guidelines](http://www.justice.govt.nz/leg/pubs/2001/legislative_guidelines) (22 September 2001).

## II IS THE ELECTORAL (INTEGRITY) AMENDMENT BILL EFFECTIVE?

This section of the paper serves three purposes. The first is to provide the reader with a summary of how defecting MPs are currently affected by the law. The second is to provide a summary of the proposed amendments to the Electoral Act and the third is to analyse the practical effects of the Bill, and determine whether the legislation is effective in meeting its policy objectives, according to the requirements of the Legislative Advisory Guidelines.<sup>17</sup> I conclude this section with the view that the Bill is ineffective in achieving its two purposes.

### A Current Law

Section 55 of the *Electoral Act 1993* currently stipulates the situations which will give rise to a vacancy within Parliament. The situations are all examples of where a member is rendered incapable of performing his or her function. Such as, where an MP fails to attend the House; or makes a declaration of allegiance to a foreign power; or is convicted of a crime punishable by imprisonment for a term of two years; or becomes a public servant; or resigns his or her seat; or dies or becomes mentally disordered. The focus of the section is the member's "personal" ability to perform his or her function as a representative. This section is designed to address personal incapacity, not the operation of Parliament or the maintenance of proportionality. The section does not include ceasing to be a member, or resignation from a political party, among the situations which will cause a vacant seat. Therefore MPs who cease to be members of their political party, whether through resignation or expulsion from that party, are free to remain in Parliament, either as Independents, or as members of another party.

<sup>17</sup> Ministry of Justice "Legislative Advisory Committee Guidelines on Process and Content of Legislation" (Wellington, 2000) <[http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/introduction.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/introduction.html)> (last accessed 22 September 2001).

In anticipation of an MMP Parliament, and the likely changes to procedure, the Standing Orders were revised. Standing Order 34 expressly anticipates that MPs will change parties, and remain in Parliament. Standing Order 34 (2) states:

Members who cease to be members of the party for which they were originally elected may be recognised as a party for parliamentary purposes if –

- (a) They apply to the Speaker, and
- (b) Their new party is registered as a party by the Electoral Commission.

Standing Order 34 (3) states:

Any member who is not a member of a recognised party is treated as an Independent member for parliamentary purposes.

The status of a member who remains in Parliament after leaving their party is determined by a number of factors. As an Independent, an MP's influence will depend on the current proportional distribution of parties within Parliament. If the Government of the day is a minority one and requires the Independent's support, the Independent may have a significant influence over policy. If however, there is a majority Government, or majority Coalition Government, then their influence will be less.

Participation in debate is determined by Standing Order 103. Participation in debate is approximately proportional to party membership in the House. Priority is given to party spokespersons in order of the size of the party membership of the House.<sup>18</sup>

An Independent may not be represented on the Business Committee. Standing Order 74(2) states that "Every party with six or more members is entitled to be represented at each meeting of the Committee by one member nominated by its leader" and Standing Order 74(3) states that parties with fewer than six members which are in a Government coalition are entitled to choose one member between them to represent them on the Committee. Other parties with fewer than six

<sup>18</sup> Standing Order 103; New Zealand Parliament, *Standing Orders of the House of Representatives: brought into force 20 February 1996, amended 22 August 1996, amended 8 September 1999* (GP Print, Wellington, 1999).

members and Independent members are entitled to choose one member between them to represent them on the Committee.

At the conclusion of the Parliamentary term, an MP's continued existence will be tested at the ballot box. Experience has shown that most party defectors do not survive re-election.

The current law acknowledges that MPs are able to act independently of their party, and will not be required to resign from their party if they disagree with its policy direction on a particular issue. Where a Bill adversely affects an MP's electorate, he or she may vote contrary to party lines, or Caucus may determine a particular vote to be a "free vote" where all MPs are permitted to vote according to their conscience, independently of party lines. However, MPs as a general rule are expected to toe the party line. It would not be a wise career move, to constantly undermine the party position by voting independently. Consequences can include not being nominated for candidacy at the next election, the party may "isolate" or "freeze-out" the member or a party may expel a member from the party.

For example the Labour Party Constitution includes the following disciplinary procedures:<sup>19</sup>

- Censure
- Prohibition from seeking or holding any office
- Prohibition from seeking or holding candidacy
- Suspension of membership and expulsion from the Party.

Such disciplinary action shall be applied for and ruled upon on the grounds of:

- (a) Contravention of the principles, rules and policies of the Party... and/or
- (b) Bringing the Party into disrepute.<sup>20</sup>

Such action is currently decided by the entire political party, which includes both the parliamentary political party and the extra-parliamentary party.<sup>21</sup>

<sup>19</sup> Labour Party Constitution, cl 288 <http://www.labour.org.nz/InfoCentre1/Organisation/constitutionnovember1997>.

<sup>20</sup> Labour Party Constitution, cl 292 above n 19.

<sup>21</sup> The SOP amendments to the Bill indicate that this decision may now rest in the hands of the parliamentary political party.



## **B Proposed Amendments to the Electoral Act 1993**

Amendments to the Electoral Act have proceeded in two stages. The first was the Electoral (Integrity) Amendment Bill as originally submitted to Select Committee on 22 December 1999. Supplementary Order Paper number 177 has made further amendments to the Bill. For the purposes of this paper, discussion will usually refer to the combined effect of the amendments. Where a distinction is made between the two stages, it will be identified by reference to the "original Bill" or the SOP.

The original Bill inserted a new section 55A into the Electoral Act. It provided that where a member voluntarily resigned from their party and provided notice of that resignation, in the prescribed form to the Speaker or in certain circumstances the Governor-General, they would be required to vacate their seat in Parliament. The Solicitor General's vet stated that so long as the Bill only related to voluntary resignations, it would not be found to breach the Bill of Rights Act 1990.<sup>22</sup>

The original provision was strongly criticised as being ineffective and easily avoidable. The ACT, National and Green members of the committee concluded that:<sup>23</sup>

This Bill contains essentially symbolic statements, without substantive enforceability. It applies to vacate the seat of an MP only if the member, in effect, volunteers to go, by choosing to deliver a written notice of resignation from his or her party, to the Speaker or the Governor General.

The Opposition also argued that the Bill could be avoided where an MP defects in substance but not in form:<sup>24</sup>

For example, a member who consistently votes against the positions of his or her party, or who does not attend Caucus, or who disrupts Caucus deliberations, or attends Caucus meetings of another party or is otherwise disloyal, could be unaffected.

<sup>22</sup> Solicitor-General "Electoral (Integrity) Amendment Bill 1999 – PCO 3426cl/2: compliance with New Zealand Bill of Rights Act 1990" EIA/J/2.

<sup>23</sup> House of Representatives Justice and Electoral Committee Report on the Electoral (Integrity) Amendment Bill No 3-1, 18.

The SOP seeks to resolve this procedural ineffectiveness by substituting section 55A with a new provision, and adding sections 55B, 55C, and 55D.

The new section 55A omits the words "resigning from" and substitutes the words "*ceases to be a parliamentary member* of the political party for which the Member of Parliament was elected".<sup>25</sup> The effect of section 55A is that it is no longer restricted to voluntary resignation, but now includes any other event, which terminates an MP's party membership. This arguably could include voting according to conscience.

Under the new section 55A a member will cease to be a parliamentary member of their party when they deliver to the appropriate person, written notice, which complies with section 55B, this is similar to the original section 55A. The ability of an MP to easily avoid the section is addressed by section 55A(b), which makes a substantial change. Section 55A(b) states that a member also ceases to be a parliamentary member of their political party if the parliamentary leader of the political party delivers to the appropriate person, a written notice that complies with section 55C.

Section 55C requires a notice signed by the parliamentary leader concerned, and addressed to the appropriate person. Section 55C(c) requires that the written notice be accompanied by a statement which complies with section 55D. Section 55D states:

Section 55D(c) is problematic because it gives party leaders and the Caucus much more power than they currently hold. Currently, Caucus is able to expel a member from Caucus and ultimately Parliament. Traditionally it is the entire political party which determines membership, and the voter who determines who is a member of the House of Representatives.

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<sup>24</sup> House of Representatives Justice and Electoral Committee above n 23, 18.

<sup>25</sup> Supplementary Order Paper 177, proposed section 55A, emphasis added.

**55D Form of statement to be made by parliamentary leader**

The statement referred to in **section 55C(c)** must be in writing and signed by the parliamentary leader concerned, and must –

- (a) state that the parliamentary leader reasonably believes that the member of Parliament concerned has *acted in a way that has distorted, and is likely to continue to distort, the proportionality of political party representation in Parliament* as determined at the last general election; and
- (b) state that the parliamentary leader has delivered to the member of Parliament concerned written notice –
  - (i) informing the member that the parliamentary leader considers that **paragraph (a)** applies to the member and the reasons for that opinion; and
  - (ii) advising the member that he or she has 21 working days from the date of receiving the notice to respond to the matters raised in the notice by notice in writing addressed to the parliamentary leader; and
- (c) state that, after consideration of the conduct of the member and his or her response (if any) by the parliamentary members of the political party for which the member was elected, the parliamentary leader of that party confirms that at least two-thirds of the parliamentary members of the party agree that written notice should be given by the parliamentary leader under **section 55A(3)(b)**.

The two main issues raised by this provision are found in 55D(a) and 55D(c). Under 55D(a) the italicised passage above is particularly problematic, the wording is vague and it is unclear what conduct will be considered to distort the proportional distribution of seats within Parliament. The provision has the potential to cover any manner of conduct. It is my view that the wording is broad enough to include MPs choosing to vote according to conscience rather than party lines.<sup>26</sup>

Section 55D(c) is problematic because it gives party leaders and the Caucus much more power than they currently hold. Currently, Caucus is able to expel a member from Caucus and ultimately Parliament. Traditionally it is the entire political party which determines membership, and the voter who determines who is a member of the House of Representatives.

<sup>26</sup> See part IV B 3 *Effect of the Electoral (Integrity) Amendment Bill on the operation of the Principle of Independence of Members of Parliament*.

*C Will the Bill be Effective in Achieving its Purposes?*

1. *Will the Bill enhance public confidence in the integrity of the electoral system?*

Following the 1996-1999 Parliament, there was a definite perception of public dissatisfaction with MMP.<sup>27</sup> If it is established that there is a link between the public's view of politicians and their view of MMP; then it is likely that this Bill, if effective, would enhance public confidence in the integrity of the electoral system. It is useful to consider the 2001 survey submitted to the MMP Review Select Committee, which outlines a comprehensive study of the perceptions of, and attitudes towards MMP amongst New Zealanders.<sup>28</sup> This report confirms that there is a connection between the conduct of MPs and the public's satisfaction with the MMP system as a whole. The report found that public's judgements of MMP are:<sup>29</sup>

...Intertwined with the level of general satisfaction with politics and politicians. Debate does not proceed on a rational academic basis... Perceptions hinge much more on general judgments of politics and politicians, with the electoral system being blamed accordingly".

The report stated, "It is clear that the hopes and expectations of many MMP supporters took a big hit during the political turmoil of the 1996 to 1999 period".<sup>30</sup> The report found that 52 per cent of those surveyed believed that MMP has proved to be a disappointment.<sup>31</sup> The report further stated that "MMP is now clearly in the position where it is taking some of the blame for perceived poor performance of politicians and political parties".<sup>32</sup>

When participants were asked what changes they would make to MMP a prominent, although not the most frequent response was "... changing the method of election of list MPs and ending party hopping".<sup>33</sup>

<sup>27</sup> See Part I B *Party Hopping*.

<sup>28</sup> UMR Insight Limited "MMP: A Study of Public Attitudes [Executive Summary]" (submission to MMP Review Select Committee, UMR Insights Limited, Wellington, February 2001) <http://www.clerk.parliament.govt.nz/publications/index.html>

<sup>29</sup> UMR Insight Limited above n 28, 5.

<sup>30</sup> UMR Insight Limited above n 28, 13.

<sup>31</sup> UMR Insight Limited above n 28, 6.

<sup>32</sup> UMR Insight Limited above n 28, 13.

<sup>33</sup> UMR Insight Limited above n 28, 15.

In summary therefore:<sup>34</sup>

There was overall strong support in the qualitative research for banning party hopping, declaring Coalition partners prior to election and setting a limited timeframe for Coalition negotiations. There was little serious dissent against any of these propositions. Some saw them as almost too obvious to merit discussion. Support for the banning of party hopping remained solid despite prompted counter arguments of MPs being placed in a difficult position if parties change philosophies or policies. There was also only very slight support for applying any ban on party hopping to list MPs alone.

Thus as of February 2001, there was clearly a public dissatisfaction with party hopping and this could be linked to the public's view of MMP. However, for this Bill to be effective in increasing the integrity of Parliament, the conduct of MPs must be the sole reason for the public's dissatisfaction in the electoral system. Where it is but one factor, this Bill will not achieve this purpose, unless it addresses all concerns.

The report identified a number of other factors, which contributed to public dissatisfaction. There was disappointment that MMP had not been more effective at tempering the perceived adversarial nature of New Zealand politics. "Some supporters of MMP in 1993 clearly had somewhat utopian expectations that under MMP New Zealand would be governed by some form of all party Coalition."<sup>35</sup>

There was also "general disquiet" about list MPs. There was considerable general suspicion apparent about the accountability and workload of list MPs. Respondents during the qualitative research often described list MPs as "unelected". One key criticism was that it was possible for MPs to be defeated in electorate contests but return to the House through their position on the list, "...61% agreed and 15% disagreed that list MPs are not as accountable to voters as electorate MPs".<sup>36</sup>

Others criticised MMP because of its "perceived impact on Government decision-making. Some see the need to consult and the involvement of more parties

<sup>34</sup> UMR Insight Limited above n 28, 15.

<sup>35</sup> UMR Insight Limited above n 28, 6.

<sup>36</sup> UMR Insight Limited above n 28, 13.

in decision-making as ruling out any possibility of a Government making hard decisions. There was similar concern that MMP meant that making decisions takes too long.<sup>37</sup>

Thus, it appears that public dissatisfaction in the electoral system can be linked to a wide range of factors. While the Bill may stem public disquiet regarding party hopping, it is inconclusive whether this piece of legislation alone would "enhance public confidence in the integrity of the electoral system".

## 2. *Will the Bill maintain proportionality?*

In situations where either section 55 or 55A of the Electoral Act are invoked, whether or not proportionality is maintained depends on whether it is a list MP or electorate MP who must vacate his or her seat.

The starting assumption is that if a list MP vacates his or her seat, the next candidate on the list will replace them and proportionality will normally be maintained. If an electorate MP vacates his or her seat, then it will depend on the outcome of the By-election whether or not proportionality as established by the previous election is maintained.

The MMP system does not guarantee that proportionality will be maintained for the entire term. If this was desired, a provision such as found in the German system that all vacancies be filled by a list MP would have been included. The current Electoral Act makes no such provision.

A number of occurrences will affect the proportionality of Parliament following an election; party hopping is only one of those occurrences. A parliamentary party may cease to exist as a totally separate party following a complete merger with another party or by becoming a component party. A political party may dissolve altogether, leaving all its MPs free to become Independents, to join other parliamentary parties,<sup>38</sup> or to form new parties. A parliamentary party may split into two or more new parties, MPs belonging to an umbrella party may

<sup>37</sup> UMR Insight Limited above n 28, 13.

<sup>38</sup> The SOP amendments may cover this situation if the original party continues to exist and chooses to invoke sanctions.

decide to become MPs representing their respective component parties, or an MP may be expelled from a party.<sup>39</sup>

Circumstances may necessitate that additional provisions of the *Electoral Act* are invoked; Sections 131, 136 and 137 are particularly relevant. Section 131 and 136 of the *Electoral Act* 1993 provide that a majority of seventy-five percent of all MPs may resolve not to fill a vacancy in an *electorate seat*<sup>40</sup> or a *list seat*<sup>41</sup> if the vacancy occurs within six months of the expiry of Parliament or if the Prime Minister advises the House that a General Election will be held within six months. The seat then remains vacant until the General Election and in general the proportional distribution of seats would be disturbed during that period. The House passed resolutions under section 131 in May 1996 and 1999.<sup>42</sup>

Section 137 of the *Electoral Act* 1993 provides that a vacancy in a list seat is not to be filled if there is no candidate on the party's list who is lower in order of preference than the former list MP and who remains a member of the party and is willing to replace the former list MP. In those circumstances, the list seat remains unfilled until the next general election, thus changing the proportionality of the seats in Parliament during that period.<sup>43</sup>

A vacant list seat may also have to remain unfilled if the political party to which a former list MP belonged no longer exists as a separate organisation. There would then be no person who is the Secretary of the party to respond to the Chief Electoral Officer's enquiry under section 137(3) of the Act about a list candidate's continuing membership of the party.<sup>44</sup>

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<sup>39</sup> The Electoral Commission "Submission to the Justice and Electoral Select Committee on the Electoral (Integrity) Amendment Bill" para 2.4.

<sup>40</sup> Electoral Act 1993 s 131.

<sup>41</sup> Electoral Act 1993 s 136.

<sup>42</sup> The Electoral Commission "Submission to the Justice and Electoral Select Committee on the Electoral (Integrity) Amendment Bill" paras 2.1 and 2.3.

<sup>43</sup> The Electoral Commission above n 42, para 2.1 (b).

<sup>44</sup> The Electoral Commission above n 42, para 2.1 (c).

III I have demonstrated that the proposed amendments to the Electoral Act do not cover or anticipate all the circumstances where changes to the proportional distribution of seats may occur. Furthermore, proportionality is only guaranteed when it is a list MP who resigns their seat. Therefore, the amendments proposed in the Electoral Integrity Bill will not maintain proportionality in every situation where proportionality is affected.

her words, is legislation necessary? In considering this question, officials are expected to consider a range of alternatives to legislation which may also achieve the policy goals. Among the list of alternative considerations is "the status quo" which includes the potential for a problem to self correct, and "existing law" which would in this case, include existing restraints on party hopping behaviour.

If it is my argument that party hopping legislation is not necessary, this is supported by two key arguments. The first is the "transition phase argument", that is, that the problem is due merely to the transition from FPP to MMP, and as the system settles down, so too will party hopping. The second argument is that triennial elections provide a sufficient control over party hopping. Therefore the problem of party hopping has the potential to self-correct and existing law operates as a reasonable restraint on party hopping.

#### A The "Transition Phase" Argument

The introduction of a new electoral system inevitably involves a temporary reduction in stability. Parties, candidates, and voters have to learn new strategies while passing through a period of enhanced volatility, disappointment, and frustration.<sup>40</sup>

But, this is only temporary. Already under the second MMP Parliament, things have visibly settled down. Politicians and the public alike seem to be coming to terms with the new system. It is also significant that so far, there has been no party hopping under the second MMP Government.<sup>41</sup>

<sup>40</sup> Ministry of Justice "Legislative Advice: Guidelines on Process and Content of Legislation" (Wellington, 2000).

<sup>41</sup> [http://www.justice.govt.nz/legislation/legislation\\_guidelines\\_guidelines\\_2000/introduction.html](http://www.justice.govt.nz/legislation/legislation_guidelines_guidelines_2000/introduction.html) (last accessed 12 September 2001) emphasis added.

<sup>42</sup> Alan Taitupou and Matthew S. Stanger in Jonathan Boston, Stephen Leveson, Elizabeth McLay, and Nigel S. Rubens (ed) *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 2000) 10.

<sup>43</sup> As of 1 October 2001.



### III IS THIS BILL NECESSARY?

According to the Legislative Advisory Committee (LAC) Guidelines, one of the first questions to ask when considering creating new legislation is, whether legislation is *needed* to give effect to the policy which the Government is planning to implement".<sup>45</sup> Or in other words, is legislation necessary? In considering this question, officials are expected to consider a range of alternatives to legislation which may also achieve the policy goals. Among the list of alternative considerations is "the status quo" which includes the potential for a problem to self correct, and "existing law" which would in this case, include existing restraints on party hopping behaviour.

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<sup>45</sup> Ministry of Justice "Legislative Advisory Committee Guidelines on Process and Content of Legislation" (Wellington, 2000)  
<[http://www.justice.govt.nz/lac/pubs/2001/legislative\\_guide\\_2000/introduction.html](http://www.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/introduction.html) (last accessed 22 September 2001) emphasis added.

<sup>46</sup> Rein Taagepera and Matthew S Shugart in Jonathan Boston, Stephen Levine, Elizabeth McLeay, and Nigel S Roberts (ed) *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996) 15.

<sup>47</sup> As of 1 October 2001.

Alan McRobbie and Professor Keith Jackson presented a detailed and informative submission to the Justice and Law Reform Select Committee. Their submission made a comparison with the German experience under AMS (which is most analogous to MMP). Party hopping was common during the initial phases of transition to AMS and lessened in later years.

In the first post-war Bundestag (1949-53) 53 of the 4020 MPs (13.2 per cent) left their parties. This is recognised as a transitional period from the old (Weimar republic) regime to the new, democratic parliamentary system resulting from the introduction of the additional member electoral system. The second Bundestag (1953-57) saw 40 defection (8.2 per cent of MPs), and the third (1957-61), 21 (4.2 per cent). Since then, with the sole exception of the 1967-72 Bundestag, defections from German parties have been consistently below 1 per cent of the Bundestag's total membership.<sup>48</sup>



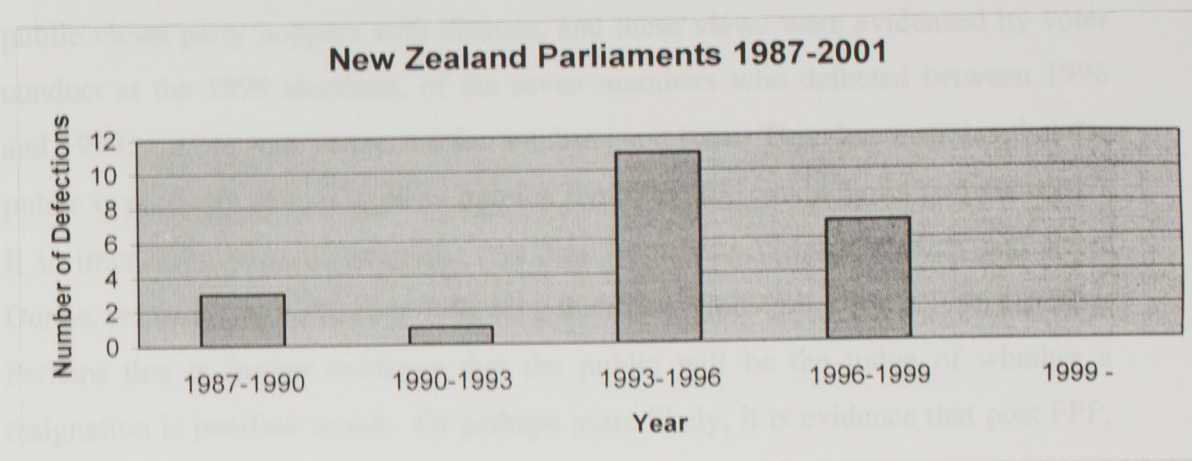
It is also of interest that in Germany, Article 38(1) of Germany's Basic Law states that members of the Bundestag '...shall be representatives of the whole people; they shall not be bound by any instructions, only by their conscience'.<sup>49</sup> In other words, German MPs have an express right to act independently of their parties, and still, party hopping has remained low for three decades.

<sup>48</sup> Alan McRobbie and Keith Jackson "Submission to the Justice and Electoral Select Committee on the electoral (Integrity) Amendment Bill", number 8, para 7.

<sup>49</sup> Alan McRobbie and Keith Jackson above n 48, para 7.

I make the argument in the third part of this paper that the effect of the Bill is to restrict the operation of the principle of independence of Members of Parliament. In light of the German experience, it can also be argued that it is unnecessary to limit this principle through legislation. The German experience has shown that party discipline can be maintained, even where the Constitution expressly recognises the independence of Members of Parliament.

New Zealand statistics in comparison:



New Zealand Statistics show a similar trend to that of Germany. Except, the New Zealand system seems to have settled down faster than Germany, and so far, it seems that party hopping has ceased altogether.

The Ministry of Justice responded to Alan McRobie and Professor Keith Jackson's submission on behalf of the Government. It acknowledged that there is evidence that the number of defections is likely to reduce as the system "beds in". However:<sup>50</sup>

The likelihood of high defections at the beginning of MMP underlines the desirability of legislation of this nature. The defections from the first MMP Parliament were seen to undermine the mandate of Parliament, and the integrity of MMP, irrespective of the fact that defections could be seen as having been an inevitable consequence of the transition to the new system. The fact that provision is included for the legislation to expire after two elections takes into account the likelihood of defections dropping off.

While this is a valid argument, the fact that the high number of defections only occurred in the first election and have not occurred at all in the second points to the common-sense conclusion that the situation has resolved itself, therefore legislation to the same effect is superfluous and unnecessary.

### **B Triennial Elections**

Party hopping is self-correcting on a second level. It is apparent that the public views party hoppers with distaste, and these views were evidenced by voter conduct at the 1999 elections, of the seven members who defected between 1996 and 1999, not one was re-elected for a subsequent term. This demonstrates that the public is perfectly able to form an opinion regarding the conduct of a particular MP. It is interesting to note however, that Jim Anderton, Winston Peters, and Peter Dunne, remained in Parliament following their defections prior to the 1996 election. Perhaps this is further evidence that the public will be the judge of whether a resignation is justified or not. Or perhaps more likely, it is evidence that post FPP, the public is less likely to tolerate party hopping.

The public's vote will act as a significant control over party hopping in the future. MPs have seen the public response to party hoppers and are fully aware of the likely consequences to their parliamentary careers if they choose to defect from their parties. This view was expressed in the *Sunday-Star Times*:<sup>51</sup>

It should now be obvious to opportunist party hoppers that the public dislikes them and will punish them, after all, is just another face of the same issue, of democratic trust. Those who are elected into parliament carrying one banner and then switch to another can expect no more. We have all had enough of political turncoats and political treachery. The MPs in parliament must know that they lie and mislead at their peril, and that lying [impedes] more than just their own petty ambitions.

An MP contemplating resignation from their party would therefore have to have some strong reasons to justify their actions in the eyes of the voting public. This will prevent the type of party hopping seen prior to the first MMP election,

<sup>50</sup>Ministry of Justice "Electoral (Integrity) Amendment Bill Report of the Ministry of Justice" EIA J/3, 5.

<sup>51</sup>The Editor "Important to restore confidence" (28 November 1999) *The Sunday Star-Times* Auckland, A 10.

where MPS strategically placed themselves for the next election, influenced by changing electorate boundaries and party lists.

The Ministry of Justice, in making comment on the Bill on behalf of the Government stated:<sup>52</sup>

...defections are motivated by a number of factors. The legislation does not distinguish between different types of defections. However, it would be very difficult to legally make a distinction between different types of defections.

While it is difficult to make a distinction between different types of defections through legislation, the voting public is perfectly capable of making that distinction. The Ministry of Justice went on to discuss the role of voters, and acknowledged that they would be able to support or reject the MP's motivations.<sup>53</sup> It is my argument that if it is recognised that the public is capable of sanctioning the actions of MPs, then it is unnecessary to provide sanctions through legislation. The triennial elections have long been the prime mechanism by which an MP's actions are judged. It is the voters who place MPs in Parliament, and is ultimately the voters who should remove them from Parliament. The effect of the Bill is that now the decision to remove members from Parliament is in the hands of party leaders and the Caucus. The triennial election has proved an adequate safeguard in the past; there is no reason to suppose that it would not still be adequate to prevent party hopping.

The opposing argument to this theory is that "it is important to restore public confidence and party proportionality at the time of the defection, rather than waiting up to three years until the next election".<sup>54</sup> The flaw in this argument is that it will create a disparity between list MPs and electorate MPs, this was acknowledged to be undesirable, both by the Ministry of Justice and the Electoral Law Reform Commission.<sup>55</sup> If the decision to punish an MP is left until the next election, then neither list MPs or electorate MPs are treated any differently, both campaign for re-election on an equal footing. But, if the decision is made during the parliamentary term, there will be a difference in treatment between a list MP and an electorate MP.

<sup>52</sup> Ministry of Justice above n 50, 5.

<sup>53</sup> See Ministry of Justice above n 50, 5.

<sup>54</sup> Ministry of Justice above n 50, 6.

<sup>55</sup> Ministry of Justice above n 50, 6 and Report of the Royal Commission on the Electoral system, *Towards a Better Democracy*, (GP Print, Wellington, 1986).

Where a list seat is vacated, the next candidate on the list will fill the seat. The defecting MP will have to wait up to three years before they can test voter confidence in their decision. An electorate MP however, will have the opportunity to test voter confidence immediately, because an electorate seat is usually subject to a by-election. The one exception is section 131 of the Electoral Act 1993.<sup>56</sup> Where the vacancy arises within six months of the expiry of Parliament, a 75 per cent majority of the House may elect that a seat remain vacant. Therefore, in most instances, where the decision is made at the time of defection, as opposed to at the next election, an electorate MP has a distinct advantage over a list MP. There is no way to prevent this disparity of treatment in the legislation, wherever a member is required to vacate their seat, a list MP will always be disadvantaged. It is not only the list MP who is disadvantaged, but also the public. The public does not have the ability to express their approval or condemnation of that MP's action. The survey submitted to the MP Review Committee indicated that lack of accountability of MPs was a reason for disenchantment with the system, a Bill that denies the voter the right to judge an MP's action, is likely to aggravate discontentment with the system rather than resolve it.

It is therefore apparent that the fairest, and most constitutional means of limiting party hopping is through orthodox means. The triennial election is a perfectly adequate means of limiting party hopping; it is also the only means by which equal treatment of both list MPs and electorate MPs can be maintained.

It is also true that there has been no party hopping since 1999. One would think that the presence of party hopping legislation on the Government agenda since 1999 would encourage rather than deter party hopping. Anyone contemplating leaving their party would be aware that it is better to do so now, before the Bill is passed, rather than later, when their actions would be subject to legislation. The fact that there have been no defections during the current Government indicates that while such legislation may have been perceived as necessary in 1999 it is no longer necessary in 2001. The common-sense conclusion is that there is simply no longer any need for party hopping legislation. The problem has self-corrected.

#### IV AN UNDESIRABLE BILL

My third argument is that this Bill substantially limits the ability of Parliament to act as a check on the power of the executive, and is therefore constitutionally undesirable. The Bill has the potential to sanction MPs who speak out against, or vote contrary to their party. This will increase party discipline, giving it the force of law, at the expense of the principle of independence of MPs. The penalty for independent action is the requirement that the MP vacate his or her Parliamentary seat, this will operate as a chilling effect because MPs are unlikely to vote according to their conscience when the penalty is so grave. This Bill will also prevent party hopping. But, in doing so it will reduce the threat of the Government losing a confidence vote. It is my argument that the threat of the confidence vote is vital to ensuring consultative and accountable Government.

##### A An Unpredictable Political System

The move from FPP to MMP has introduced a system, which was intended to restrict the dominance of the Executive over Parliament. Under MMP, Government is unlikely, although it is still possible, to be a single-party majority. Four types of Government are possible, the single-party majority, the single-party minority, the coalition majority and the coalition minority. All but the single-party majority require some form of consensus between parties in order to pass legislation. Where Government is a minority or coalition the Executive will have to consult and negotiate with other parties to ensure their support. This was intended to limit excessive executive power but it has also introduced some unpredictability into our electoral system.

It is a mistake to assume that "unpredictability" is a negative concept. Under FPP, Government was predictable in the sense that a single party established policy, and the opposition party could do very little to influence a change in that policy. Under MMP the passage of legislation according to the policy direction of one party is not guaranteed, because, where Governments rely on the support of other parties, it must negotiate policy that is acceptable to those parties.

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<sup>56</sup> See part II D *Will the Bill maintain proportionality?*

It is also a mistake to assume that predictability leads to stability. While FPP Governments were usually stable during their tenure in office, often a change of Government would lead to instability. Under FPP, where an election brought a change from Labour to National, or vice-versa, the effect on policy was usually an abrupt about-turn. Labour and National often represented two polar views, and policy represented a left or right viewpoint. Abrupt policy changes also cause instability. The advantage of MMP and consultative government is that policy is more likely to take a middle ground approach, incorporating a wider range of interests. While the negotiating process may be unpredictable, it is likely that the policy formed will be more stable and enduring.

Party hopping has also created a degree of unpredictability, both for the voter and the parliamentary parties themselves. Under FPP, the Government elected on election night, was unlikely to change mid-parliamentary term. However, with MMP, as we have seen, party hopping and changes in the proportional distribution of seats can lead to unforeseen results. For example, after the collapse of the National/New Zealand First Coalition during the first MMP Parliament, National went from a majority coalition to a minority Government, propped up only by MPs who had defected from other parties. Quite the opposite could have occurred, for without the support of defecting MPs, National would have lost the confidence of the House, and therefore would not have been able to govern.

Under FPP constraints on the executive were very rarely invoked. "The last time a confidence vote was lost in New Zealand was 1928".<sup>57</sup> Under MMP, it appears that the likelihood of changes in proportionality, causing a government to lose the confidence of the House is a very real threat. It is this threat, which will create better government, increasing the power of Parliament over the Executive, and insuring greater intra- and inter-party consultation.

Thus, this Bill seeks to limit the ability of Parliament to act as a constraint on Executive power and is therefore constitutionally and democratically undesirable. The remainder of this paper will discuss the two primary ways in which Parliament is able to act as a constraint on Executive power. That is, through the principle of

<sup>57</sup> Professor Matthew S.R Palmer "Ministerial Responsibility versus Chief Executive Accountability" conflict or complement?" (Institute for International Research conference on "analysing and Understanding Crucial Developments in PUBLIC LAW" (Wellington, 4 April 2001) 3.



independence of MPs and the exercise of the confidence vote. It is interesting to note the comments made by the authors of *Bridled Power*:<sup>58</sup>

MMP does not mean the government will be impossible or will not take place...the basic structures and processes of Westminster government originally evolved in an era, before the dominance of the two-party system, which was more similar to relationships under MMP than FPP. Traditional mechanisms such as the vote of confidence...and the power of Parliament make more sense in a multi-party than in a two-party system.

It will be seen that the current system revitalises these concepts, under FPP, they were unlikely to have any substantial effect, and the main constraint of the executive was the triennial election. Under MMP these traditional constraints are likely to operate as a check on executive power. It will be seen that the current system has internal mechanisms by which it limits the application of both of these principles in a justified manner. It is my argument that the Bill would operate as an unjustified limit on the operation of these principles.

## ***B The Independence of Members of Parliament as a Constraint on Executive Power***

### *1. Origins of the principle of the Independence of Members of Parliament*

New Zealand adopted the Westminster system of Government, and in so doing, retained the principle of Independence of Members of Parliament. In the early days of the Westminster system, MPs were elected as independent representatives of their local constituency, and political parties did not exist in an overt extra-parliamentary form. Therefore, as independent representatives, parliamentarians were justified in expressing independent views, and this was seen as a means of restricting the power of the State.<sup>59</sup> According to what became known as the "liberal constitutional model", the main function of Parliament was to act as a deliberative assembly. It was a meeting place; where elected representatives could

<sup>58</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Auckland University Press, Auckland, 1997) 16.

<sup>59</sup> See generally Richard Mulgan *Politics in New Zealand* (2 ed, Auckland University Press, Auckland, 1997).

critically debate the issues of the day, each contributing his<sup>60</sup> own individual opinions and judgments to the process. And the government of the day had no right to expect that its proposals would as a matter of course receive the endorsement of the assembly.<sup>61</sup>

With the advent of the political party, the principle of independence became somewhat more strained. Under the FPP system, candidates still ran as candidates for a particular constituency, but were almost always a member of either the National or Labour Political Party. The party that won the most seats become the next government. Accordingly, the political reality was that when casting a vote for an electorate candidate, voters were deciding between two parties.

Thus, an MP's loyalties became divided, between duties owed to their party, and to their local constituency. As a representative of the party under which they were elected, MPs owed an obligation to support the party in implementing its electoral mandate; this duty was even greater if their party was the governing party. This duty extended to the voting public who had a legitimate expectation that its elected representative would act in support of the party. As a representative of a local constituency, the MP owed duties to that constituency, which could potentially be different from, and/or conflict with the duties owed to his or her political party. The constituency had a legitimate expectation that the Member would operate in a manner, which promoted the needs of that constituency. An MP also retained the right to act according to his or her conscience, which again may conflict with duties owed to his or her party.

In recognition of these often-divided loyalties, a set of non-binding internal party rules developed within, and outside of Parliament to accommodate an MP's different obligations. These still remain today. The status quo is that once Caucus<sup>62</sup> had made a decision, its members were bound to stand by it. The principle of independence of MPs was recognised in two exceptions to the rule. The first is the "free vote", that is, the right to vote according to conscience, free from the obligation to keep to a party line. The decision to allow a free vote is a collective decision made by the caucus as a whole to relax the rules of collective solidarity in

<sup>60</sup> There were no female members of Parliament until late in the twentieth century.

<sup>61</sup> Mulgan above n 59, 106-107.

<sup>62</sup> The Parliamentary members of a Political Party.

particular cases. The second exception is that the Caucus may allow an individual member to go against party policy where the member feels a need to support the local interests of his or her constituents.<sup>63</sup>

It was recognised that the ability of MPs to vote according to conscience could be counter-intuitive to operational Government. It is therefore counter balanced by party discipline. Party discipline ensures that MPs vote according to party policy and party lines. Where party discipline is strong, party leaders can be assured that members will support party policy and vote accordingly.

Traditionally under a plurality system, party discipline has been strong. It was primarily maintained because of "the comparatively small size of the New Zealand Parliament in international terms and because the Cabinet dominated Caucus through seniority, experience, and numbers."<sup>64</sup> With the advent of MMP, the increase in the number of MPs may make the governing caucus less easily dominated by the executive, "[t]his may encourage a loosening of party discipline and hence make the executive less assured of voting support in the House".<sup>65</sup> An MP may find it easier to depart from party lines, with the knowledge that they can join another party or remain in Parliament as an Independent Member.

Party discipline is maintained through informal mechanisms, such as peer pressure and coercion of argument from the parliamentary political party. It is also maintained through the influence of the extra-parliamentary party. A party can refuse to re-select an MP for candidacy for the next election, or place them on a lower ranking on the party list. However, we have seen that such threats may actually motivate MPs to resign from their party. There, is therefore, a potential danger that party hopping may unduly influence parliamentary parties in the process of candidate selection. This may be contrary to section 71 of the Electoral Act 1993.<sup>66</sup> The political reality may very well be that where an MP holds the balance

<sup>63</sup> Richard Mulgan above n 59, 113.

<sup>64</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand government under MMP* (3<sup>rd</sup> ed, Oxford University Press, Auckland, 1997) 7.

<sup>65</sup> Harris, Paul "The Electoral System" in Holland, Martin(ed) *Electoral Behaviour in New Zealand* (Oxford University Press, Auckland, 1992) 1, 9.

<sup>66</sup> **Section 71 Requirement for registered parties to follow democratic procedures in candidate selection**

Every political party that is for the time being registered under this Part of the Act shall ensure that provision is made for participation in the selection of candidates representing the party for election as members of Parliament ...

of power, in his or her vote, that MP may be able to use that position to influence his or her ranking on a party list, or to ensure re-selection as a candidate.

I have used the term "counter balance" to describe the role of party discipline. This is because both independence of MPs and internal party discipline are important. Richard Mulgan stated:<sup>67</sup>

If the voters in electing a Parliament have been helping to choose a party government, they can expect Parliament to sustain the party government and to let it govern effectively. At the same time, the government must be subject to constant public scrutiny to prevent it from abusing its power and to keep it accountable and responsive to the public...Parliament thus has two broad purposes, which may sometimes be in conflict, to facilitate the people's government and to scrutinise it.

The principle of independence of MPs acts as a check on executive power and party discipline acts as "...a guarantee of the voter's choice. The party label gives the voter a say in the choice of government and policies. Party discipline is necessary to see that the party delivers its commitments".<sup>68</sup>

With the advent of MMP, there has been debate as to whether the principle of independence has been retained, especially with regard to the List MP, who doesn't have a local constituency and arguably "has no other being...than as a creature of his or her party".<sup>69</sup> I acknowledge that, "The change to MMP underlines the centrality of political parties to Parliament by giving voters a specific party vote which determines the party composition of Parliament".<sup>70</sup> However, the acknowledgement of political parties, does not, in itself abolish the ability of MPs to act independently, the principle has survived alongside the operation of party politics, for most of New Zealand's political history.

It is my view that the principle of independence still operates under MMP as it did under FPP, but its effect may be more significant. With the move from FPP to MMP, "many of the elements of the previous constitution remain intact, for instance, the executive power of Cabinet, the legal supremacy of Parliament and the

<sup>67</sup> Richard Mulgan *Politics in New Zealand* (2<sup>nd</sup> ed), Auckland University Press, Auckland, 1997, 110.

<sup>68</sup> Richard Mulgan above n 67, 68.

<sup>69</sup> (9 November 2000) 588 NZPD 6493.

<sup>70</sup> Richard Mulgan above n 67, 109.

absence of an upper house".<sup>71</sup> There is nothing to suggest that the principle of Independence of MPs has not also been retained, especially when one considers that the purpose of MMP was to increase Parliamentary control over the executive. If Parliament is still to be supreme, then limits on the ability of Parliament to function as a constraint on the executive are *prima facie* undesirable.

The primary evidence that suggests that the principle has been retained is the retention of the "electorate vote".<sup>72</sup> Under FPP, the vote for a local representative was essentially a fiction, the reality for most voters was that they were voting for the party they wished to see in Government, as opposed to the person best able to represent the constituency's interests. It is arguable that the retention of the electorate vote, in light of the express party vote, further enhances the notion of independence. The first MMP election was evidence, of the value placed on individual representation.<sup>73</sup>

The overall extent of split-ticket voting in New Zealand's first MP election was very high by international standards...New Zealanders clearly relished the opportunity given by the mixed member proportional electoral system to distinguish between two very different propositions formerly concealed when voting under first-past-the-post (FPP). For the first time in New Zealand's history, it was possible for electors to vote for a local MP without in any way compromising their views about the party best fitted to govern the country.

It was also made clear by the Ministry of Justice when reporting on behalf of the National Government on Cullen's 1997 Party Hopping Bill that the principle of independence of MPs still exists under MMP. The Department stated:<sup>74</sup>

MPs were not mere mouthpieces of their parties, rather they are independent agents who answer to their own consciences and to the people, not just their party...It has always been the case [that] the Members of the Parliament are legally entitled to act independently in the House.

<sup>71</sup> Mulgan above n 67, 65.

<sup>72</sup> Ministry of Justice "Submission to the Justice and Law Reform Committee on the Electoral (Party Registration) Bill 1997 no 65-1".

<sup>73</sup> Stephen Levine and Nigel S Roberts "Surveying the Snark: Voting Behaviour in the 1996 New Zealand General Election" in Boston et al *From Campaign to Coalition* (The Dunmore Press, Palmerston North, 1997) 183, 186.

<sup>74</sup> Hubbard, Anthony "Party poopers" (5 December 1999) *The Sunday Star-Times* Auckland, C5.

This statement, applies equally to the list MP. The list MP is said to have a national constituency. On behalf of the Government, in response to submissions on the Bill the Ministry of Justice said, "it can be argued...that list MPs have a national constituency in the same way that constituency MPs have a local constituency, and that they have an (albeit less direct) popular mandate from voters nation-wide".<sup>75</sup> This is because all voters, when casting votes for a party have the opportunity to see the content of the party list. A list MP, like an electorate MP can also be said to have divided loyalties. Parties attempt to ensure that their lists are diverse, and often the reason for an MP's placement comes down to a particular class of persons that they represent. For example, Pansy Wong, who was New Zealand's first Asian MP.

The List allows minority voices and persons who may not normally receive the support of the electorate, to have a voice in Parliament. They were placed on the Party List as a means of attracting party votes, as indicative of the representative nature of the particular party. Thus, the mandate for their position is also as a representative of the "class" of persons they were intended to attract.

The threat of losing one's seat in Parliament due to expulsion from a political party may act as a further restraint on a list MP's ability to speak up for the minority group they represent. It should also be noted that many members who enter Parliament on a list, are less politically 'savvy',<sup>76</sup> they do not necessarily know the 'rules of the game', and are usually a minority within Parliament. This in itself will often act as a restraint on their ability to speak freely. MMP was introduced with the intention that a greater proportion of New Zealanders would be represented within Parliament. It is vital that no unjustifiable restraints are placed on those persons who will have diverse viewpoints and knowledge to offer.

Thus it can be seen that both types of MPs owe loyalties to more than just their parties. They are both equally representative of the people, regardless of how they came to be in Parliament. Therefore, a list MP should be able to express independent views within the House, to the same extent of as electorate MP. As mentioned above, the ability to express independent views is limited by non-binding party rules. An MP may differ with his or her Caucus where there is agreement that

<sup>75</sup> Ministry of Justice "Electoral (Integrity) Amendment Bill Report of the Ministry of Justice" EIA J/3, 7.

the vote will be a free-vote, or where the MP must vote according to the interests of his or her electorate. It is apparent, that these rules will need to be modified in an MMP environment, as reference to constituency interests will have to be interpreted broadly if it is to accommodate the interests of list MPs. It will be easier for an electorate MP to rely on the second exception. Take for example Hon D Conner, MP who consistently votes contrary to his party when his West Coast Electorate is adversely affected by government actions. There is a clear link between his vote and the interests of his electorate.

2. *How does the doctrine of Independence of Members of Parliament operate as a restraint on Executive Power?*

In the past, the likelihood of a backbencher revolt was rare, "Under the domination of a two-party system, where party discipline was exceedingly strict, as it has been in New Zealand from 1935 until 1993, this possibility was remote and theoretical".<sup>77</sup> However, under MMP, it is likely to be more common. Where the Government, is a coalition or minority government, all governing parties will expect to be consulted on politically significant items of government business. This will mean that Caucus may need to sacrifice some policies in order to accommodate other parties. "The authority of one caucus...will be limited by the need to secure the agreement of coalition partners and their caucuses".<sup>78</sup>

In an MMP environment, a unified Caucus is important. Once a party has taken a stance, the Party Leader must be assured that the position is supported so that he or she can effectively negotiate with other parties on the basis of that position. This will mean that the role of the Party Leader must change. Effective Government will be determined by a leader's ability to manage his or her Caucus. A divided Caucus threatens the stability of Government itself, potentially vetoing an agreement between coalition partners in Cabinet.

The role of the Party Leader must change accordingly. To ensure adequate support, consultation must take place with all concerned. This means, that it is no

<sup>76</sup> For example Alamein Kopu.

<sup>77</sup> Palmer, Geoffrey and Palmer Matthew *Bridled Power: New Zealand Government Under MMP* (3 ed, Auckland University Press, Auckland, 1997) 7.

<sup>78</sup> Richard Mulgan *Politics in New Zealand* (2 ed, Auckland University Press, Auckland, 1997), 113.

longer possible for Cabinet to make independent decisions, and then dictate them to its respective Caucus or Caucuses.

Ironically, the introduction of the Electoral (Integrity) Amendment Bill brought about a situation where this occurred. When the Bill was originally submitted to the Select Committee, Labour had the full support of its backbenchers. However, in April this year, when negotiations were taking place regarding the possible content of a SOP, at least ten Labour MPs expressed their disapproval of the Bill.<sup>79</sup> Mr Tamihere said at the time, "...they might have to vote with the Opposition to defeat the Bill".<sup>80</sup> In their eyes the proposed changes made the Bill "constitutionally unacceptable".<sup>81</sup> Without the support of these MPs, the legislation would not be passed, however, according to a recent press release, it now appears that this situation has been resolved.<sup>82</sup>

Thus the Bill itself is clear evidence that under MMP the dissenting voice of a few MPs can have a powerful effect on Cabinet's ability to see Government legislation passed. This is evidence of the new "unpredictable" nature of MMP, the implication is that FPP-style party leadership and party discipline may not be appropriate under MMP. It is my view that this Bill has been introduced in an attempt to increase party discipline, and thereby make the job of the Party Leader easier. Hon M Wilson, AG, when introducing the Bill to the house said:<sup>83</sup>

While individual rights of members of this House must be respected, so must the principle of proportionality, because that now lies at the heart of our electoral law. This Govt has a responsibility to promote political stability, and that is the *primary purpose* of this Bill.

The Bill represents a desire to enforce party discipline through law, thereby increasing stability. This will be at the expense of the principle of independence of MPs, and therefore Parliament's ability to constrain the executive.

<sup>79</sup> Brent Edwards, Ruth Berry "Rebel MPs told to toe line" (1 March 2001) *Evening Post*, Wellington, 1.

<sup>80</sup> Johnathan Milne "Backbench Challenge to Deal" (1 March 2001) *The Dominion* Wellington 2.

<sup>81</sup> Johnathan Milne above n 80.

<sup>82</sup> New Zealand Government "Party Hopping To End" (18 September 2001, 10.50am 2001) Press Release.

<sup>83</sup> (22 December 1999) 518 NZPD, 64 per Hon M Wilson, AG emphasis added.



3. *Effect of the Electoral (Integrity) Amendment Bill on the operation of the principle of Independence of Members of Parliament*

The effect of this Bill is that it will alter the current balance between the doctrine of independence and party discipline, so as to place the doctrine of proportionality above that of the ability of Parliament to act as a restraint on the power of the Executive. This was expressly acknowledged by the Government upon the introduction of the original Bill. Hon M Wilson, AG said:<sup>84</sup>

The Government recognises that this Bill raises a number of important constitution issues relating to the appropriate balance to be struck between the principle of proportionality of party representation, and the principle of independence of individual members of parliament.

Section 55D of the Bill alters the balance so as to give party discipline the force of law, which will effectively operate as a chilling effect on an MP's ability to express dissenting views within Parliament. The Bill prevents an MP from acting in a way that "distorts and is likely to continue to distort, the proportionality of political party representation in Parliament".<sup>85</sup> This language is broad enough to potentially include the operation of the conscience vote. While it remains to be seen how this section will operate in practice, the mere fact that it could potentially operate as a fetter on the ability of an MP to speak out against his or her party makes this an undesirable Bill.

The Bill does provide an opportunity for an MP to defend his or her actions under the proposed section 55D(b), where the MP concerned is given 21 days to respond to allegations made by the Party Leader. For the reasons noted above,<sup>86</sup> it will be particularly problematic for a list MP to justify his or her conscience vote. A list MP cannot point to the interests of a particular constituency as justifying their action, only to a national constituency or class of persons, or their own conscience. However, the dangers posed by this Bill apply equally to both list MPs and electorate MPs. There is no clear indication in the legislation as to exactly what kind of conduct will be deemed to have "distorted" the proportionality of Parliament, nor is there any indication as to what justifications can be raised to

<sup>84</sup> (22 December 1999) 518 NZPD, 64.

<sup>85</sup> Supplementary Order Paper number 177, 6 September 2001, proposed clause 55D.

<sup>86</sup> Part III A 2 *How does the doctrine of Independence of MPs operate as a restraint on Executive Power?*

defend an allegation of such conduct. Germany for instance has enshrined the principle of Independence of MPs in its constitution; A38 provides that legislators must be bound only by their consciences.<sup>87</sup> In New Zealand, it is unclear whether this principle is constitutionally recognised. In my view, this principle is of constitutional standing, because of its role as a constraint on executive power. Accordingly this legislation is un-constitutional. Even if the principle does not have constitutional standing, the fettering of freedom of speech alone renders this Bill undemocratic and undesirable.

This Bill breaches sections 13, 14 and 17 of the New Zealand Bill of Rights Act 1990 (NZBORA) - freedom of thought, conscience and religion; freedom of expression; and freedom of association respectively. Proposed section 55D unduly limits the ability of an MP to express a dissenting view, and is therefore contrary to sections 13 and 14. The fact that the Bill gives Caucus and party leaders the ability to expel members from Parliament because they cease to be a member of their party is contrary to section 17. A member has the right to choose whether or not to remain a member of a particular party and they also have the right to resign on a matter of principle.

The Solicitor-General vetted the original Bill for compliance with the NZBORA and concluded that no provision in the Bill appeared to be inconsistent with any of the rights and freedoms contained in the Bill of Rights.<sup>88</sup> This conclusion was based on the premise that the Bill only applied to voluntary resignations and therefore "the section was drafted in such a way as to minimise its impact on manifestations of dissent generally within the Parliamentary process".<sup>89</sup> The Solicitor-General made it clear that:<sup>90</sup>

One of the chief concerns in respect of the constitutionality of anti-defection laws generally has been the extent to which such law has a chilling effect on expression of dissenting views within the political process. The notion that the open manifestation of expressions of dissent is vital to healthy democratic processes is one of the core propositions underlying the rights which are grouped in the Bill of Rights under the heading of "Democratic and Civil Rights".

<sup>87</sup> Solicitor-General "Electoral (Integrity) Amendment Bill 1999 – PCO 3426cl/2: compliance with New Zealand Bill of Rights Act 1990" EIA/J/2, para 2.

<sup>88</sup> Solicitor-General above n 87, para 1.

<sup>89</sup> Solicitor-General above n 87, para 14.

<sup>90</sup> Solicitor-General above n 87, para 12.

The Solicitor-General went on to say, "Importantly, the legislation does not in my opinion create a sanction of a legal kind against Members who speak out against their parties, or who vote against them in the House. Control of such matters is left to the political forces rather than the legal process".<sup>91</sup>

However, since that statement was made, the SOP, as noted, has made substantial changes to the effect of the Bill. It now potentially requires MPs who are expelled from their parties to vacate their parliamentary seat, and potentially fetters freedom of expression. The implication from the Solicitor-General's original vet is that where the Bill is not restricted to voluntary resignation, but acts as a "legal sanction" against members who speak out or vote against their parties in the House, it would amount to a breach of sections 13, 14 and 17.

Section 5 of the NZBORA provides that rights and freedoms contained in the NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. Currently, the principle of independence of MPs as a manifestation of the rights contained in the NZBORA is restrained by the non-binding rules of party discipline. This is a justified limit. The Solicitor-General stated that control of such matters as speaking out against one's party or voting against them in the House is left to the political forces rather than the legal process. By implementing this legislation, the Government is giving party discipline, the force of law. This is an unjustified limitation on the operation of freedom of thought, conscience and religion, freedom of expression and freedom of association. The Rt Hon Geoffrey Palmer said, "MPs should make honourable undertakings, not legal undertakings. They may be coerced by argument, by public opinion, but not stand-over tactics in closed rooms by party leaders".<sup>92</sup> The current balance provides reasonable limits on the principle of independence, it is undesirable that this balance be altered and given the force of law through the Electoral (Integrity) Amendment Bill.

<sup>91</sup> Solicitor-General above n 87, para 14.

<sup>92</sup> (22 December 1999) 518 NZPD 71 per Hon Rod Donald, MP.

C *The confidence Vote as a Constraint on Excessive Executive Power*

The convention of Collective Responsibility is essential to a Cabinet system of Government.<sup>93</sup> The convention of Collective Responsibility is made up of three elements, confidence, unanimity, and confidentiality.<sup>94</sup> Of significance to this paper is how the element of confidence operates under MMP Government.

The Confidence element of Collective Responsibility is important because, "Cabinet must collectively enjoy the confidence of the House of Representatives in order to continue in office... It gives Parliament the power to make and unmake government administrations in addition to its power to make and unmake law".<sup>95</sup>

Confidence of the House is expressed through a vote of confidence. If a Government loses a vote of confidence, "it becomes a caretaker administration awaiting either the formation of another Government or a dissolution of Parliament and new elections".<sup>96</sup> Under FPP, the system was biased towards majority Governments, with a majority in the house, "retaining the confidence of the House was thereby rendered a foregone conclusion".<sup>97</sup> Under MMP however, retaining the confidence of the House is far less certain. Under MMP, a majority party is unlikely, and therefore, the ability of a Government to retain the confidence of the House is not a foregone conclusion, this is yet another instance of the unpredictable nature of MMP Government. Accordingly, the "doctrine of responsibility has found new vigour in the giving, and potential taking away, of life to a New Zealand Government".<sup>98</sup>

Party hopping is a significant factor in that uncertainty. Where the proportional distribution of seats is uncertain and subject to change, the Government cannot guarantee that they will retain the confidence of the House for the entire term. It will be recalled that Hon M Wilson, AG said, "This Government has a

<sup>93</sup> Cabinet Office Manual 1996, para 3.6.

<sup>94</sup> See further Geoffrey Marshal, "Introduction" in Ministerial Responsibility, ed. Geoffrey Marshall (Oxford: Oxford University Press, 1989).

<sup>95</sup> Professor Matthew S.R Palmer "Ministerial Responsibility versus Chief Executive Accountability" conflict or complement?" (Institute for International Research conference on "analysing and Understanding Crucial Developments in PUBLIC LAW, Wellington, 4 April 2001).

<sup>96</sup> Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Auckland University Press, Auckland, 1997), 3.

<sup>97</sup> Geoffrey Palmer and Matthew Palmer above n 94, 3.

responsibility to promote political stability, and that is the primary purpose of this Bill".<sup>99</sup> I propose that this Bill is an attempt to ensure stability through limiting the threat to the Government of losing a vote of confidence. As mentioned earlier, instability, or unpredictability, is not a negative concept, but in fact, operates as both a check on executive power, and as a means of creating better government, and stable policy. Jonathan Boston wrote:<sup>100</sup>

The possibility that coalitions may shift from one group of parties to another, possibly without intervening elections being held, means that 'policy stability' and the keeping of 'international commitments' cannot be entirely guaranteed. When control of the Treasury benches changed from National to Labour (or vice versa) under FPP, however there was also an inevitable loss of policy continuity – which is not always a bad thing, and in some instances precisely what electors voted for.

Party hopping and alterations to the proportional distribution of seats is not the only way in which a party can lose the confidence of the House. Other such causes include, the inability to gather enough support from other parties, or where a coalition party, or supporting party withdraws its support, or where there is a party split, or divided Cabinet.

It is also important to note that a minority Government will not lose a vote of confidence as a matter of course. The new Standing Orders<sup>101</sup> allow parties to abstain in a confidence vote. Therefore "a government does not require an *absolute* parliamentary majority in order to win a vote of confidence. All that is required is a simple (or relative) majority."<sup>102</sup>

Retaining the majority of the House also has the advantage of giving the governing party or parties the ability to call an early election. "A government with a firm majority can – at least in principle – determine the date of the next election. It thus has the potential to seize the opportunity afforded by favourable opinion-poll

<sup>98</sup> Professor Matthew S.R Palmer "Ministerial Responsibility versus Chief Executive Accountability" conflict or complement?" (Institute for International Research conference on "analysing and Understanding Crucial Developments in PUBLIC LAW, Wellington, 4 April 2001), 4.

<sup>99</sup> (22 December 2001) 518 NZPD 64.

<sup>100</sup> Jonathan Boston, Stephen, Levine, Elizabeth, McLeay, and Nigel S Roberts, (ed) *New Zealand Under MMP: A New Politics?* (Auckland University Press, Auckland, 1996). 189.

<sup>101</sup> Standing Order 141(2); New Zealand Parliament, *Standing Orders of the House of Representatives: brought into force 20 February 1996, amended 22 August 1996, amended 8 September 1999* (GP Print, Wellington, 1999).

<sup>102</sup> Boston et al above n 100, 100.

ratings to secure an electoral advantage over its major political rivals".<sup>103</sup> Under MMP, the opposite is also true, the Opposition parties, where they can form a majority, may also seize the opportunity to call an early election, through a motion of confidence, again adding to the uncertainty under MMP.

Changes to the proportionality of Parliament have the potential to pose a real threat of losing the confidence of the House. It is interesting to note that the opposite can also be true, changes in proportionality may operate to ensure a government retains the confidence of the House, even after losing significant support. For example, under the first MMP Government, when the National/New Zealand First Coalition collapsed, National was able to remain in Government as a minority Government due to the support of defecting members from other parties.

I have discussed the confidence vote in terms of a "threat". This is because, in my view, the "likelihood" of a confidence vote under MMP is perhaps no more real than under MMP, but the "threat" that it *could* now be used to remove a government is greater. Theoretically, the possibility of the Opposition removing a government through a confidence motion is greater. However, there are a number of constraints, which mean that the political reality is that, a motion will only be used in rare circumstances. The first constraint is that Opposition parties would have to agree to topple the Government. While all are united in opposition of the current government, they may not be united in toppling the Government, which can have far-reaching effects. For instance, the potential effect on New Zealand's economic position will be a relevant consideration, as will party rankings in the polls, which will indicate whether an early election may or may not be in a party's favour. Public opinion will also be a factor, it may well be that the public may look unfavourably on those parties, which were perceived as creating instability.

However, the fact remains, that in theory so long as the proportional distribution of seats is subject to change during a parliamentary term, a government can never be certain that they will be able to retain the confidence of the House for the entire term. The confidence vote therefore poses a significant threat; it is this threat, which will create better consultative Government and reduce the power of the executive over Parliament. The threat of the confidence vote will ensure better government. This threat ensures that Party Leaders will keep Caucus informed, and

<sup>103</sup> Boston et al above n 100, 98.

include Caucus in all aspects of policy formulation and negotiation. This will also mean that traditional party discipline will have to be altered accordingly. "This may make life more difficult for rulers, and it may make life in Parliament more messy. But our rulers should not have an easy run: look where it got us before".<sup>104</sup>

The renewed "vigour" of the confidence vote was not an unexpected result of the introduction of MMP. Authors of *Bridled Power* stated that, "Parliament and Opposition parties will determine the continued existence of a minority government. If they have a majority, the Opposition parties will be able to topple a minority governing party from office through a vote of no confidence in Parliament".<sup>105</sup>

One of the objectives of MMP was to lessen the power of the executive, by increasing the power of Parliament. The threat of a confidence vote is Parliament's primary means of exerting power over the executive. Any legislation, which would affect the ability of Parliament to use or threaten a no-confidence motion, would therefore defeat one of the objectives of MMP.

Thus, this Bill is undesirable. It seeks to prevent party hopping under the premise that instability and uncertainty are detrimental to the operation of government. American scholars have suggested that "effectiveness...is not the sole purpose of government"<sup>106</sup> Martin Lipset argues that "effectiveness was not the exclusive or perhaps even central objective of the Framers of the American Constitution, the American way of life entails a commitment to five core values: liberty, egalitarianism, populism and laissez-faire – effective government is not one of them".<sup>107</sup> It is my argument that a certain degree of unpredictability is necessary to ensure that the government remains accountable to the public. It is Parliament's role, and the role of the individual MP to act as a check on that power. The increased vigour of the confidence vote has ensured that Parliament can act as a real constraint on the power of the Executive. In order to retain the support of the House, the Executive must actively consult with its backbench MPs. Thus, the unpredictable nature of MMP Government will ensure better consultative Government, which, was one of the primary objectives of the introduction of MMP.

<sup>104</sup> The Editor, "Important to restore confidence" (28 November 1999) *The Sunday Star-Times* Auckland, A 10.

<sup>105</sup> Geoffrey Palmer, and Matthew Palmer *Bridled Power: New Zealand Government Under MMP* (3 ed, Auckland University Press, Auckland, 1997) 14-15.

<sup>106</sup> Weaver and Rockman, "Assessing the Effects of Institutions", 7 in Boston above n 100, 189-190.

#### IV CONCLUSION

In conclusion therefore, this paper has made three arguments in favour of abandoning the Electoral Integrity (Amendment) Bill 1999. The first was that even with the SOP amendments, the Bill would not be *effective* in meeting its twin purposes. The second is that even if such legislation were effective, it is simply *unnecessary*. And third, this Bill is constitutionally and democratically *undesirable*.

This paper has demonstrated that the primary purpose of this Bill was to increase stability within Parliament. This was supported by Hon M Wilson's speech at the Bill's first reading. Yet this purpose is not stated in the Bill itself, the Bill stated only two purposes; to increase the integrity of Parliament and to maintain the proportional distribution of seats within Parliament. This paper has demonstrated that the Bill is ineffective in achieving those purposes, and it is undesirable that it should achieve the third. The Bill will not be successful in achieving its stated purposes because it cannot accommodate for the complexity of an MMP Parliament, while party hopping has been shown to detrimentally affect the public's confidence in MMP, and the proportional distribution of seats within Parliament, it has also been shown to be only one factor causing dissatisfaction with MMP. The Bill cannot account for all the factors that have lead to public dissatisfaction with MMP and therefore is ineffective.

This paper also demonstrated that while the Bill may have been thought to be necessary in 1999, this is no longer the case. The system has settled down and so far there has been no party hopping during the second MMP Government. Statistics show a similar experience in Germany, it is therefore likely that party hopping will not be common practice now that the system has "bedded-in". Further, this paper has shown that the traditional mechanism of the triennial election is both an effective and appropriate method by which to control party hopping. The electorate has made it clear that it will not condone party hopping. An MP is aware that the public is unlikely to accept their behaviour if they choose to leave their party during a parliamentary term. This will ensure that MPs only defect where they are able to justify their position to the voting public.

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<sup>107</sup> Martin Lipset in Boston above n 100, 190.



Finally, this paper has demonstrated that this Bill is undesirable. This paper has acknowledged that MMP has brought about substantial change in the day-to-day operation of Parliament. But, I have also argued that a certain degree of unpredictability is desirable. It ensures that the goals of representative, democratic, and accountable government are achieved. Where government is unpredictable, it ensures that the executive actively consults Parliament, and ideally this will ensure enduring, well thought out policy and therefore greater stability between changes of Governments.

This paper also argues that the principle of Independence of MPs has not only survived the change from FPP to MMP, but ensures that Parliament is able to constrain the Executive. I have also demonstrated that the principle applies equally to list MPs and electorate MPs. The ability of MPs to party hop and act independently has ensured that the use of the confidence vote poses a very real threat to the government of the day. While the political reality may be that it will not necessarily be invoked, the threat is that it could be, and therefore Government Party Leaders will have to ensure that they maintain party discipline to secure their position as Government. I have also suggested that party discipline is still an appropriate and justified limit on the principle of independence of MPs, but that it may have to be reconsidered and operate in a different manner under an MMP system. The old ways of strict FPP discipline may no longer be appropriate.

The true purpose underlying this Bill is a desire to make Parliament more predictable by increasing party discipline through law so as to limit the ability of a few MPs to prevent a government passing laws through independent action. I have argued that such legislation is contrary to the NZBORA, and is therefore undemocratic and unconstitutional. Legislation which unduly fetters the ability of Members of Parliament to dissent from the views of their parties should not become law.

At present, there is every indication that the Bill will become law. This would be unfortunate for all of New Zealand. While this paper has focused on the effect of the Bill on Parliamentarians, the consequences of such legislation affect all members of a free and democratic society. MMP was designed to ensure greater democracy and representation with Parliament. This Bill will defeat the purposes

behind the change from FPP to MMP and is therefore undesirable for all of New Zealand. In opposing this Bill, Hon R Pebble, MP said:<sup>108</sup>

The only restraint we have upon the executive from having, in the words of Geoffrey Palmer, "Unbridled Power", is the power of the backbench – the fact that the Government has to persuade MPs to vote for it on every single measure. That is a very powerful restraint.

Where a Bill is ineffective, unnecessary and substantially limits the ability of Parliament to act as a constraint on the executive, it is undesirable and should not be made law.

<sup>108</sup> (22 December 1999) 581 NZPD 68.

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