
**CPA Australian and Pacific Regional
Conference**

Stable Government and the role of Parliament

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Debating Chamber, Parliament,

Tuesday, 15 August, 2pm

- 1 Westminster systems have many common elements. Perhaps the most important is the fact that Cabinet must come from Parliament. The efficient secret of the Westminster style of Government was described by Walter Bagehot in 1867 as:¹

[T]he close union, the nearly complete fusion, of the executive and legislative powers...

A Cabinet is a combining Committee – a *hyphen* which jams, a *buckle* which fastens, the legislative part of the State to the executive part of the State. In its origin it belongs to the one, in its functions it belongs to the other.

- 2 While Cabinet Government might be regarded as common to almost all Westminster systems in the Commonwealth, at this point in history the governance arrangements in the Commonwealth are diverse. The political culture of every country is different and often the institutional arrangements reflect those differences.
- 3 New Zealand has seen many important changes to its system of Government in recent years. The Official Information Act 1982 opened up Government decisions and information to scrutiny of a type that had never been present before. It made Government much more transparent – it was a very important change. The Official Information Act 1982 remains in New Zealand a highly effective model. Its presumption of openness has led to more information being made available on a progressive basis.
- 4 The New Zealand Bill of Rights Act 1990 is a Parliamentary Bill of Rights. It does not give the Courts power to strike down legislation that is inconsistent with it. But the Government is bound to report its legal analysis as to when measures introduced may be in breach. These opinions are posted on a Government website.² The New Zealand Bill of Rights Act had been given much more weight than most people might initially have expected because the Courts have taken up its interpretation with some rigour. In 2001 Professor Phillip Joseph wrote that

¹ Walter Bagehot *The English Constitution* [1867] (Fontana, London, 1963) 65-68.

² Ministry of Justice <<http://www.justice.govt.nz/bill-of-rights/index.html>> (last accessed 14 August 2006).

“today, the Bill of Rights is an integral part of our jurisprudence and represents one of the major legal developments of the modern era”.³

5 Then came the Mixed Member Proportional representation election system known in New Zealand as MMP. Now, under the Electoral Act 1993, every New Zealander has two votes. One vote is a party vote. The other is for a constituency MP. It is the party vote that determines the composition of the Parliament. This is very similar to the electoral system of Germany. The New Zealand system was established and set up as a result of a Royal Commission that reported in 1986, recommending the system.⁴

6 The election of 2005 in New Zealand was the fourth held under the new electoral system. The results were as follows:⁵

Labour Party	50 seats
National Party	48 seats
New Zealand First Party	7 seats
Green Party	6 seats
Maori Party	4 seats
United Future New Zealand	3 seats
ACT New Zealand	2 seats
Jim Anderton’s Progressive	1 seat

7 All of you can see from those results that the situation is an interesting one. Seven parties are represented in the Parliament.

³ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 1018.

⁴ Royal Commission on the Electoral System *Towards a Better Democracy* [1986] AJHR H3.

⁵ 2005 General Election – Official Result <<http://www.electionresults.govt.nz>> (last accessed 14 August 2006).

- 8 After intricate negotiations lasting about two weeks this led to the formation of a minority Government led by Rt Hon Helen Clark and consisting of a coalition arrangement with Progressive's only MP the Hon Jim Anderton, coupled with what were called by the Prime Minister "enhanced" confidence and supply agreements with New Zealand First and United Future. The enhanced factor was that the leaders of these two parties were allocated ministerial posts, outside Cabinet. The Rt Hon Winston Peters, leader of New Zealand First, became Minister of Foreign Affairs, Minister for Racing, and Associate Minister for Senior Citizens. The Hon Peter Dunne became Minister for Revenue and Associate Minister of Health. In each instance the detailed policy undertakings backing the Confidence and Supply Agreements were publicly released. It seems clear that both United Future and New Zealand First gave their assent to the arrangements on the basis that the Green Party would not secure any ministerial positions. Thus, the Green party was left in the position that while it had some policy agreements with the Government it was not offering such positive assurances but rather the co-operation agreement it signed required the Greens "not to oppose confidence or supply for this term of Parliament, and agrees to work with the government on agreed policy and budget initiatives."⁶
- 9 These arrangements amount to negotiated political bargains, the terms of which are transparent. The agreement with New Zealand First deserves some detailed analysis. It begins with a Preamble reciting the fact that there was potentially an equal split of 57 on each side for a National led or Labour led Government. This required New Zealand First to change its position to some extent by offering a positive vote on confidence and supply, not merely abstention. So the party said it was offering such support, but not becoming part of a coalition. In order to honour that position some unorthodox and unprecedented arrangements were made that impinge upon the principle of collective responsibility.
- 10 Remember, it would have been possible with a combination of Labour, Progressive, New Zealand First and United Future to form a majority Coalition

⁶ Rt Hon Helen Clark "Government Arrangements Announced" (17 October 2005) Media statement.

Government. That would have involved the smaller parties in a closer relationship with the Government than their political health may have suggested was wise. So far in the New Zealand experience, MMP has been tough in exacting electoral retribution from small parties. The 2005 election itself demonstrated this when National secured many votes at small parties' expense. Thus the device used in the agreement relaxed the principles of collective responsibility that apply as far as the two "Ministers outside Cabinet from other parties with Confidence and Supply Agreements" are concerned.

- 11 The Prime Minister's media statement stated that "Collective Responsibility will apply to the areas for which they have portfolio responsibility."⁷ The agreements themselves refer to collective responsibility:⁸

New Zealand First agrees to fully represent the government position and be bound by Cabinet Manual provisions in respect of any areas within the portfolio responsibility of the Leader of New Zealand First and to support all areas which are matters of confidence and supply.

In other areas "agree to disagree" provisions will be applied as necessary.

- 12 MMP has had some profound effects on the operation of the New Zealand system of Government. Those effects can probably be summarised as follows:

- Parliament and opposition parties determine the continued existence of a minority government.
- The Governor-General has more potential power under MMP but will exercise it only cautiously – occupants of the office have repeatedly stressed that it is for elected political leaders to take substantive decisions.⁹
- There is less pressure on Cabinet ministers to agree publicly with coalition Cabinet decisions.

⁷ Rt Hon Helen Clark, above n 6.

⁸ New Zealand Labour, New Zealand First, "Confidence and Supply Agreement with New Zealand First," 17 October 2005 2.

⁹ Sir Michael Hardie Boys, Governor-General (Public Law Class at College House, Christchurch, 10 September 1997).
<<http://www.gg.govt.nz/gg/speeches.asp?type=current&ID=255>> (last accessed 14 August 2006).

- The role of the Prime Minister and senior officials in coordinating ministers and officials is more difficult in a coalition Cabinet.
- Public servants face more direct pressure from opposition politicians.
- Ministers may tend to make decisions within their portfolios without reference to a coalition Cabinet.
- Regulations tend to be used to avoid the need for legislation under minority government.¹⁰
- Parliament and opposition parties determine whether particular minority government policies will be implemented through legislation and possibly whether individual ministers will resign.
- Legislation that is supported by a minority government and sometimes a coalition majority government may not be passed (depending on the coalition government).¹¹
- There is pressure to increase the resources available to Parliament, Select Committees, and political parties.
- Select Committees of Parliament are more important to the passage of legislation and the scrutiny of government through Select Committee investigations.
- The Judiciary may take up an increased policymaking role. Increased use of regulations may lead to more challenges to regulatory powers in the courts (or at the Regulations Review Select Committee of Parliament).

13 Putting together a Cabinet that enjoyed the confidence of the House was, in the situation that exists in New Zealand, a task not without challenge. The principle of

¹⁰ Geoffrey Palmer “Deficiencies in New Zealand Delegated Legislation” (1999) 20 VUWLR 1; Michael Taggart “From ‘Parliamentary Powers’ to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century” (2005) 55 U Toronto LJ 575.

¹¹ Geoffrey Palmer “The Cabinet, The Prime Minister and the Constitution” (2006) NZJPIL 1, 16.

selective, collective responsibility certainly has elements of novelty to it. But by and large so far it seems to have worked tolerably well and the Government has been stable.

- 14 Indeed, what the New Zealand experience demonstrates is the need for politicians to act together in a way that produces a Government. After all, the first duty of the Parliament is to produce a stable Government. In New Zealand, when MMP was introduced, the Governor-General has made it clear that the first duty is on the politicians to ensure that the election result is translated into practical action that works. He said: ¹²

The formation of a Government is a political decision and must be arrived at by politicians.

My task as Governor-General is to ascertain where the support of the House lies. In an unclear situation, that may require me to communicate with the Leaders of all the parties represented in the new Parliament.

Once political parties have reached an adequate accommodation, and a Government is able to be formed or confirmed, I expect that the parties will make that clear by appropriate public announcements of their intentions. At that point it may be necessary for me to talk again with some party leaders. I would then expect to have sufficient information to be able to appoint a new Prime Minister, if that were required.

Throughout this period of negotiation, the incumbent Prime Minister will remain in office, governing in accordance with the Caretaker Convention.

- 15 It is sometimes easy to forget that it is not the role of every MP to be a member of the Government. The attraction of Cabinet Office seems very considerable, particularly in the Pacific, but in a mature democracy we have to remember that Cabinet is accountable to the Parliament. This means opposition members, as well as Government back-benchers. There is an emerging trend in the New Zealand Parliament, which now has 121 members, for MP's to seek satisfying careers as back-benchers or as Chairs of Select Committees. These can be significant careers that influence events, but do so from the Parliament, rather than the halls of the Executives.

¹² Sir Rt Hon Michael Hardie Boyes, Speech to the Annual Dinner of the Institute of International Affairs, Wellington, 24 May 1996, page 10.

- 16 Listen to what Tim Barnett, the Labour MP for Christchurch Central said about this in an article in 2005:¹³

However, since both these issues [preservation of heritage buildings and dealing with the chaotic power market] are fundamentally part of ministerial portfolios, once Labour became the Government in 1999 my ability as a backbencher to influence such matters was limited. Certainly, backbench pressure can have an effect on a variety of issues, but in my experience as both an observer and a member of governments, such pressure, to be effective, depends on a widespread popular perception that there is a problem which the Government has a duty to solve, whether such a perception is already present or fostered as part of the lobbying campaign. In its absence, backbenchers can find themselves whistling in the wind, often for the best of political reasons – whether because of the existing party programme, other pressures on Ministers, or the poor presentational quality of which backbenchers can sometimes be guilty.

From 1999 onwards, by which time Labour had achieved power and I felt more appreciative of and less overawed by the institution, I faced a riddle which many MPs never succeed in solving. How was I to make my job challenging and memorable, and leave my mark as a politician, while not deliberately or unwittingly undermining the Government of which, as a backbencher, I was part? I wanted to pursue issues relevant to my electorate. I wanted issues related to my background and my interests. And I wanted issues requiring legislation; in the Parliamentary forum, a backbencher can sidestep all or most of the political and confidentiality constraints involved in working on policy matters which will ultimately be resolved by bodies, such as Cabinet and its Committees, to which they are denied access.

Between 1996 and the time of writing (early 2005) I identified and helped deal with two such issues. One was reform of New Zealand's long-outdated and discredited prostitution laws. The other was designing and implementing a New Zealand response to the issue being tackled worldwide of appropriate relationship law for same-sex couples.

- 17 Chairing a Select Committee can be a most satisfying parliamentary assignment. So can steering through Members Bills that increasingly have a tendency to become law in our MMP Parliament. Mr Barnett's article demonstrates that Parliament is more than a forum in which to strive for political advantage. It is about the public interest. Despite the competitive quest for power that the Westminster system encourages, it needs to be remembered that the public interest comes first. Parliament is an instrument for public accountability, not for a vehicle for the accretion of personal power. Power is, of course, notoriously dangerous.

¹³ Tim Barnett "Comment: Moral Leadership from the Back Benches" (2004) 56 Political Science 19, 20.

In any democracy it has to be divided up. That is the essence of constitutional Government.

- 18 In the New Zealand parliamentary system, MPs serve on Select Committees. For the most part, Ministers do not. This is to observe the separation of powers between the Executive and Parliament. The work of MPs scrutinising Government Bills in Select Committee can be a very satisfying and important one.
- 19 Virtually every Bill introduced to the New Zealand Parliament is referred to a Select Committee. This involves scrutinising Bills that have been introduced, reading or hearing submissions from the public on them, considering departmental reports on those Government Bills and making amendments to the Bills and reporting them back to the House for further consideration.
- 20 New Zealand probably goes further than other Commonwealth Parliaments in providing such an extensive consideration of legislation with systematic public input. Governments have come to rely on the Select Committee system to provide for the public discussion and refinement of legislative proposals before they become law.
- 21 This is probably the result of New Zealand not having an upper House. It was abolished here in 1950 and it was an appointed one then. Lacking democratic legitimacy, it didn't do anything of any use for years. Its passing has not been mourned.
- 22 So in many ways the Select Committee system in the New Zealand Parliament functions as a revising chamber for Government legislation. This is an entirely benign and most important feature of the legislative process.